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2012 Survey of Rhode Island Law: Cases and 2012 Public Laws of Note

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Arbitration. *In re Town of Little Compton*, 37 A.3d 85 (R.I. 2012). The Town of Little Compton contended that a local firefighter union, through its non-lawyer representative, had engaged in the unauthorized practice of law during an arbitration hearing against the Town. The Supreme Court declined to limit the practice of non-lawyers in labor arbitrations, but left the door open to further address the issue in the future.

FACTS AND TRAVEL

In June of 2008, the Town of Little Compton (“Town”) and the Little Compton Firefighters Local 3957 (“Union”) entered into a collective bargaining agreement that governed the employment of the local firefighters.\(^1\) The agreement contained a provision stating that grievances were to be resolved through arbitration.\(^2\) In February 2009, the union filed a claim against the Town for violating the agreement, and appointed a non-lawyer to represent the union in the arbitration proceedings.

The Union’s claims were ultimately denied during the hearings, and the Town filed a petition with the Superior Court to enter a final judgment on behalf of the Town.\(^3\) After the arbitration hearing, but prior to the arbitration panel’s ruling in favor of the Town, the Town had also filed a formal complaint with the Unauthorized Practice of Law Committee (“UPLC”),\(^4\) stating that the Union had violated state law when represented by a non-lawyer during the arbitration proceedings.\(^5\)

The UPLC formally notified the Union about the complaint and scheduled an investigative hearing, during which the Union was represented by an attorney authorized to practice law in

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2. *Id.*
3. *Id.* at 87.
4. The Unauthorized Practice of Law Committee is a committee appointed by the Supreme Court, and charged with enforcing provisions regulating the permitted practice of law in the State. R.I. GEN. LAWS §11-27-19 (1956).
Rhode Island. After the investigative hearing, a majority of the members of the UPLC found that the Union had technically violated the provisions prohibiting the unauthorized practice of law in the state. Nonetheless, because representation of labor unions by non-lawyers is common practice in Rhode Island, the committee deferred the matter to the Supreme Court.

**ANALYSIS AND HOLDING**

Prior to addressing the issue, the Rhode Island Supreme Court delved into a historical background of labor arbitration, describing how opinions about arbitration evolved from its generally unfavorable view by courts at the turn of the twentieth-century, to a common activity in modern disputes involving collective bargaining. The change came largely with the need to avoid disrupting production during wartime, and later became a “distinctive feature of our collective-bargaining system,” after a series of decisions on labor arbitration by the U.S. Supreme Court in the 1960’s.

As part of its analysis, the Court also examined how other jurisdictions had approached the issue. In Ohio, the Board of the Unauthorized Practice of Law of the Supreme Court determined, in an advisory opinion, that non-lawyer representation did not constitute the unauthorized practice of law despite the adversary nature of arbitration because parties do not “rely on the strict use of formal rules of civil procedure or evidence.” Similarly, the states of Connecticut, Utah, Washington and California, either by Court rule or statute, allowed for non-lawyer representation in arbitration proceedings arising under collective bargaining agreements.
agreements. 12

The Court acknowledged that the minute number of states allowing for non-lawyer practice in labor arbitration did not indicate a trend, but it also asserted that, to the Court’s knowledge, no state had outlawed the practice as it pertained to labor arbitrations. 13

Rhode Island Analysis

The Court began its Rhode Island analysis by reaffirming the sole authority of the Court to decide what the practice of law entails. The Court referred to the legislature’s attempt to codify what constituted the authorized practice of law, but ultimately reaffirmed that those statutory definitions 14 served only to guide the Court in the regulation of the practice of law, not to grant the right to practice law irrespective of the Court’s authority. 15 Further, the Court also noted its limited role in the arbitration process, reviewing arbitration awards only under an “exceptionally deferential standard,” which helps legitimize the practice. 16

The Court later examined the extent of non-lawyer representation in labor arbitration in Rhode Island, finding it to be common practice. In fact, prior labor arbitrations to which the Town was a party had also included other parties represented by non-lawyers. 17 Common practice, noted the Court, should not alone validate non-lawyer representation in arbitration cases. 18

The Court then cited two instances where non-lawyer representation had been allowed in the state: employee-assistants aiding employees in informal hearings before the Department of Workers Compensation, 19 and non-lawyers representing “unions

12. Id. at 90-91.
13. Id. at 91.
14. The statute, in pertinent part, defines the practice of law as “the doing of any act for another person usually done by attorneys at law in the course of their profession,” including acting as the “representative of another person before any … commission, board, or body authorized or constituted by law to determine any question of law or fact.” R.I. GEN. LAWS §11-27-2 (1956).
15. Town of Little Compton, 37 A.3d at 91-92.
16. Id. at 92.
17. Id.
18. Id.
19. Id. at 93 (citing Unauthorized Practice of Law Comm. v. State, Dept.
and employers in unfair labor practice proceedings.”

In support of its decision, the Court also weighed the advantages of arbitration, which provides parties with an inexpensive and informal means of solving grievances, as well as the advantages that a non-lawyer working with the union would have, due to familiarity with the specific collective bargaining agreement and the operating practices at the organization. Forcing the union to obtain a lawyer would formalize the process, encumber the proceedings and raise its costs, all of which would be detrimental to the nature of arbitration itself.

On the other hand, the Court analyzed the findings of the UPLC, which showed that the non-lawyer had engaged in presenting arguments and examining witnesses during the arbitration hearing, behaviors generally attributed to the practice of law. Further, the Court remarked that the Practice of Law statute did not permit the practice by listing non-lawyer representation in labor arbitrations as an exception.

In the end, since the arbitration award was in favor of the Town and an adverse decision would greatly impact the way labor arbitrations were conducted in Rhode Island, the Court decided not to “disturb the status quo,” but left open the possibility that, under the supervisory powers of the Court, and with the participation of a full panel of justices, the Court could address the issue of non-lawyer representation in labor arbitrations in the future.

of Workers’ Comp., 543 A.2d 662, 666 (R.I. 1988) (“Acknowledging that, [while] the actions of the nonlawyer employee assistants generally [fell] within the definition of the practice of law,” the conduct was authorized by the Rhode Island Supreme Court because of public need)).

20. Id. at 94. The Court references the Rhode Island State Labor Relation Board’s General Rules and Regulations which allows “[b]usiness managers, field agents, union stewards, or any other member(s) of a labor organization” to represent a union. Id. (citing 16-020-001 R.I. Code R. § 5.01.2(b)).

21. Id.

22. Id.


24. Town of Little Compton, 37 A.3d at 94.

25. Id. at 95.

26. Id.
In its opinion, the Court did not want to constrain the practice of arbitration, seeing it as a beneficial tool to the legal system. However, it seemed to waiver on the decision to allow non-lawyer representation in arbitration hearings, for reasons which are not fully expounded in the

For those expecting a definitive answer, this decision might point to a distasteful excess opinion, but apparent in its suggestion that it might re-examine the issue of carefulness on the part of the Court. However, the Court here is certainly prudent in delaying the issue for further consideration with the benefit of a full panel, perhaps even giving an opening to the legislature, which has the time and resources to fully analyze the consequences that such a ruling would have in labor dispute resolutions.

CONCLUSION

For now, at least, non-lawyers are allowed to represent parties in labor arbitrations proceedings which stem from a collective bargaining agreement. However, it would not be a surprise if the rule changed in the near future.

Antonio Massa Viana

27. See id.
Civil Procedure. *Watson v. Fox*, 44 A.3d 130 (R.I. 2012). The Rhode Island Supreme Court held that plaintiffs lacked standing because plaintiffs urged that the process used by the General Assembly to allocate state funds to legislative grants for local and community nonprofit organizations violated the Rhode Island Constitution, yet the plaintiff’s complaint alleged no particularized or concrete injury not suffered by the public at large. The Court reasoned that to grant an exception based on “taxpayer standing” in this case would work to undermine the standing requirement of an injury-in-fact, specific and distinguishable from one suffered by the public at large, in order to meet the standing requirement for justiciability.

**FACTS AND TRAVEL**

The plaintiff, Robert Watson (“Watson”), along with nine colleagues of the Rhode Island House of Representatives, filed a complaint as taxpayers challenging the constitutionality of the General Assembly’s “legislative grant program.” 1 Administered under the General Assembly’s Joint Committee on Legislative Services (“JCLS”), which adopted the application process for state grants, the legislative grant program provides for state funds to be awarded to nonprofit entities and community organizations.  2 Specifically, to begin the process, the legislative sponsor of the nonprofit or organization submits an application to the fiscal office of either the Rhode Island House or Senate.  3 Thereafter, the final decision to award the grant rests with the Speaker of the House and the President of the Senate.  4 As a condition of receiving state funds, an organization that is awarded a grant is responsible for preparing and submitting a “legislative grant expenditure report,” which details the planned expenditures to be made flowing from the award received.  5

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2.  *Id.* at 132-33.
3.  *Id.* at 133.
4.  *Id.*
5.  *Id.*

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In 2006, the JCLS proposed an appropriation of $2.3 million for “other grants” as a line item of the Fiscal Year 2008 budget. The appropriation divided the grant expenses among the executive, legislative, and judicial branches, but did not include line items for each individual award or amount to be distributed to local and community recipients of state funds. The budget, and the appropriations therein, were passed by the General Assembly and vetoed shortly thereafter by the Governor. The General Assembly successfully overrode the Governor’s veto in June of 2007, as the budget act received more than the constitutionally-required two-thirds majority vote in the Rhode Island House and Senate.

The plaintiffs’ central argument in challenging the process of allocating $2.3 million in “other grants” is that the process failed to include grants of state funds as specific line items in the budget, a failure which “deprived legislators of information. . .that they were voting to allot $2.3 million of public funds for local and/or private purposes.” The plaintiffs requested declaratory relief in their complaint, specifically for a court to rule that the legislative grant allocation process is unconstitutional. In response, defendants filed a motion to dismiss that raised a two-fold argument: first, that the plaintiffs’ complaint should be dismissed for failure to state a claim upon which relief can be granted, as the plaintiffs failed to allege an “injury-in-fact distinguishable from that suffered by” the general public; and second, that a court could not honor plaintiffs’ request for declaratory relief, as granting a declaration would force a court to rule on a political question contra to justiciability principles.

At a hearing before the Superior Court in 2008, the motion justice credited defendants’ arguments and granted their motion to dismiss, ruling that the plaintiffs’ complaint failed to meet the injury-in-fact requirement of standing and moreover that the

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6. Id.
7. Id.
8. Id.
9. Id. at 133-34.
10. Id. at 134. Plaintiffs also contended that the administration of the legislative grant program solely by the speaker of the House and president of the Senate “usurped” the role of the executive, but this argument was not reached by the Court in its final decision. Id.
11. Id.
plaintiffs’ claim requested “a political solution to an in-house legislative branch quarrel” and therefore constituted a nonjusticiable political question. Only one plaintiff, Watson, completed a timely appeal, and the Rhode Island Supreme Court granted review.

ANALYSIS AND HOLDING

The Court reviewed the Superior Court decision to determine whether the plaintiff was “entitled to relief under any conceivable set of facts,” and more specifically, to determine whether the plaintiff had standing to challenge the budget appropriation of legislative grants. The plaintiff argued that even if the Court determined that his claim did not allege an “injury-in-fact” sufficient to meet the requirement of standing, the Court should find: (1) that the plaintiff’s claim should be viewed in light of Flast v. Cohen, a U.S. Supreme Court case holding that plaintiff taxpayers had a “sufficiently strong interest” in ensuring appropriate spending of public funds; and (2) that the “substantial public interest” exception, used on rare occasion by the Court, permitted the Court to determine the merits of the case at bar.

Initially, the Court reviewed whether the plaintiff had standing as a taxpayer to challenge the constitutionality of the legislative grant appropriations. The Court examined specifically the injury requirement of standing, explaining: “[t]o satisfy the standing requirement, a plaintiff must allege ‘that the challenged action has caused him injury in fact, economic or otherwise.’” Further, the injury must be “particularized” and must derive from the plaintiff’s “stake in the outcome that distinguishes his claims from the claims of the public at large.”

12. Id.
13. Id. at 132.
14. Id. at 135.
15. Id.
17. Id. at 137.
18. Id. at 138.
19. Id. at 135-38.
20. Id. at 135 (citing Rhode Island Ophthalmological Society v. Cannon, 317 A.2d 124, 128 (R.I. 1974)).
21. Id. at 136 (quoting Bowen v. Mollis, 945 A.2d 314, 317 (R.I. 2008)).
“Mere interest” in a problem is insufficient itself to bring about the harm required to sustain a claim of injury in fact, as are “generalized claims alleging purely public harm.” While the plaintiff here urged the Court to adhere to Flast precedent, the Court declined the chance to grant such “taxpayer standing” and to make such a “radical departure” from the Court’s long-established standing principles.

Finally, the Court addressed plaintiff’s argument that the “substantial public interest exception” should apply. However, since the plaintiff failed to take actions to include all potentially interested parties in the litigation, the Court was not persuaded that this case was an appropriate one in which the “substantial public interest” exception should apply. Moreover, the Court was unwilling to allow the plaintiff to seek relief more akin to an advisory opinion under the guise of a request for a declaratory judgment.

The Court affirmed the decision of the Superior Court and granted defendants’ motion to dismiss. Placing a strong emphasis on Rhode Island standing doctrine and jurisprudence, the Court concluded: “if we were to dispense with the requirement of standing here, in the words of Chief Justice Warren, it would tend to ‘distort the role of the Judiciary in its relationship to the Executive and the Legislature’ and would verge on ‘government by injunction.’”

22. Id. at 136 (quoting Blackstone Valley Chamber of Commerce v. Public Utilities Commission, 452 A.2d 931, 933 (R.I. 1982)).
23. Id. at 136 (citing In re Review of Proposed Town of New Shoreham Project, 193 A.3d 1226, 1227-29 (R.I. 2011)).
24. Flast, 392 U.S. at 88 (holding that certain taxpayer plaintiffs had a “sufficiently strong interest” in the government expenditures of public funds, such that they met the standing requirement).
25. Id. at 137-38. In addition, the Court reasoned that plaintiff’s supporting cases were either inaccurate or ill-fit for analogy to the case at hand, and that the relief plaintiff seeks (declaratory relief) is inconsistent with the relief typically sought under the “taxpayer standing” exception. Id.
26. Id. at 138.
27. Id.
28. Id. at 138.
29. Id. at 139.
30. Id. at 139 (citing Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 222 (R.I. 1964)).
COMMENTARY

In this case, the Rhode Island Supreme Court took the opportunity, first and foremost, to emphasize the well-respected and long-standing approach in Rhode Island to matters of justiciability. This case illustrated the Court’s unwillingness to override or overlook the standing requirement to any agree, stressing that doing so would be “imprudent” and would weaken the “concrete adverseness” that a court must identify before “address[ing] thorny constitutional questions.” Constitutional considerations, such as separation of powers and safeguarding the system of checks and balances, were surely in mind as the Court resolved the issues here, particularly concerns of ensuring that the judiciary is refrain from improperly exercising its authority and is limited to resolving justiciable disputes.

The Court alludes to these concerns in its discussion of advisory opinions, making it clear that the Court will not grant a request for declaratory relief if such relief would amount virtually to an advisory opinion from the Court. While such advisory opinions are permissible under Rhode Island law (in contrast to federal courts), they must be properly sought through written request of the Governor or either House of the General Assembly “only when the questions propounded concern the constitutionality of pending legislation...[or] existing statutes.” Specifically in reference to Watson’s claim as a taxpayer, the Rhode Island Supreme Court cautious rejected the chance to alter existing standing and justiciability jurisprudence to allow a “taxpayer exception” in such a way that would loosen and relax the standing requirement.

However, the Court does little to clarify in its analysis what exactly the “substantial public interest exception” entails. Merely indicating that the exception might apply “[o]n rare

31. Id. at 138-39 (citing Flast, 392 U.S. at 99; Baker v. Carr, 369 U.S. 186, 204 (1962)).
32. Id. at 137-38.
33. Id. at 136 (citing In re Advisory Opinion (Chief Justice), 507 A.2d 1316, 1319 (R.I. 1986)).
34. Id. at 138.
35. Id.
occasions” at the Court’s discretion, the Court fails to describe what elements plaintiffs may need to allege, or factors the Court might consider, in assessing whether the exception applies. The fact that plaintiffs failed to take any steps to join all interested parties in the litigation clearly influenced the Court’s analysis and ultimate decision, but the extent to which it did is unclear. The decision leaves unresolved some substantial questions about the public interest exception, as to both its substance and application; further, it begs questions peculiar to the case at hand: would the issues be decided differently if Watson had just attempted to “join all the interested parties” potentially affected by the appropriations process, and if not, what else might Watson have needed to allege here that would have met the exception’s standard? Watson reinforces the Rhode Island constitutional injury-in-fact requirement of standing, but discusses a critical applicable exception in passing only, leaving litigants in the dark as to the exception’s elements, reasoning, or application.

CONCLUSION

The Rhode Island Supreme Court affirmed the Superior Court’s decision that the plaintiffs in the present case failed to allege an injury sufficient to meet the standing requirement, therefore their claim was nonjusticiable. In order for a plaintiff to have standing, he must be able to allege in the complaint the experience of some concrete and particularized injury other than one suffered by the public at large. The Court also refused to apply the public interest exception and declined to adopt the “taxpayer standing” theory, reemphasizing the importance of the injury-in-fact requirement of standing in Rhode Island jurisprudence.

36. Id.
37. Id. The Court explains: “if a court were to reach the merits of this case, and if plaintiff prevailed, the rights of these absent parties unquestionably would be affected.” Id. It is clear that the Court is concerned about issuing a binding judgment where all parties or interests are not represented or voiced, but again, the Court still fails to elaborate on or explain this factor (and others) that are critical to the analysis centering around the substantial public interest exception. See id.
38. Id.
Maura J. Clancy
**Contract Law.** *Mut. Dev. Corp. v. Ward Fisher & Co., LLP, 47 A.3d 319* (R.I. 2012). The Rhode Island Supreme Court held that a finder’s fee in a real estate contract needs to be in a signed writing in order to be enforceable. The applicability of the Statute of Frauds to a contract is determined by the nature of the transaction, not who the parties are. In addition, the word “commission” in subsection 6 of the Statute of Frauds is broad enough to encompass any type of payments, including a finder’s fee.

**FACTS AND TRAVEL**

In September 2001, the defendants, Ward Fisher & Co., LLP (“Ward Fisher”) and WF Realty & Investment, LLC (“WF Realty”) were searching the market to purchase a commercial building for their new accounting offices. The defendants met with Stephen Soscia, the president of Mutual Development Corporation, who first introduced two properties to the defendants for lease. The defendants were not interested in the first two properties. Ultimately, the defendants were interested in purchasing properties rather than leasing them.

In September 2002, Mr. Soscia found a property located at 250 Centerville Road, Warwick, RI which met the defendants’ requirements. The defendants admit that they had no knowledge of the property prior to its introduction by Mr. Soscia. The defendant, Ward Fisher, decided to make an offer on the Centerville property and during the discussion Mr. Soscia alleges the topic of a finding fee came up. Later, Ward Fisher submitted an offer for the property and later counter-offered with a higher

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2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 321-22.
bid to purchase the property. Mr. Soscia helped defendants create an initial bid, but the seller rejected it for another offer. Later, the defendants, without the aid of Mr. Soscia, pursued the property until an agreement was struck with the seller.

On February 20, 2007, the plaintiff sued the defendants in the Superior Court for Kent County for breach of contract, fraud, and unjust enrichment. The defendants answered asserting the affirmative defense of the Statute of Frauds and argued the plaintiff failed to state a claim upon which relief could be granted. After discovery the defendants moved for summary judgment on all counts upon which plaintiffs objected.

At the November 10, 2008 summary judgment hearing, plaintiff argued that the finder’s fee is not subject to the Statute of Frauds. The defendants alleged that the plaintiff sought to recover a fee based upon defendants’ purchase of the property which requires section 6 of the Statute of Frauds to apply.

At the hearing the justice held that the Statute of Frauds was so broad that it prohibited even a finder’s fee. In order for a broker or finder to receive the commission they need to have a written agreement; therefore, any oral agreement is unenforceable. The justice granted summary judgment in favor of the defendants.

After the defendants moved for an entry of final judgment, the plaintiff filed an objection, alleging the justice failed to make a decision in regard to plaintiff’s fraud claim. The hearing justice’s later ruling granted summary judgment for defendants on

8. Id. at 322.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id. at 322; See R.I. GEN. LAWS ANN. § 9-1-4 (1956) (“no action shall be brought whereby to charge any person upon any agreement or promise to pay any commission for or upon the sale of any interest in real estate”).
17. Id. The Court went on to discuss that a sophisticated party such as Mutual Development should have known the importance of obtaining a written document. Id. at 322.
18. Id.
19. Id.
all claims and a final judgment was issued.\textsuperscript{20} The plaintiffs later appealed.\textsuperscript{21}

**ANALYSIS AND HOLDING**

The Supreme Court of Rhode Island heard the case on appeal under a *de novo* review and sought to reconcile plaintiff's alleged distinction between finders and brokers for purposes of applicability to the Statute of Fraud and how the word "commission" in the Statute of Frauds should be interpreted.\textsuperscript{22}

Plaintiff argued that subsection 6 of the Statute of Frauds is applicable only to brokers and agents and not to finders because there is a "well-recognized distinction" between brokers and finders.\textsuperscript{23} In response defendants argue that the distinction between a broker and a finder is inapplicable under the Statute of Frauds and the ultimate determination of applicability is not who the parties are but what the nature of the underlying deal is.\textsuperscript{24} In its review the Court agreed with the defendant's interpretation of the Statute of Frauds determining that the Statute of Frauds draws no distinction between a broker and finder, and any individual or entity seeking a finder's fee must have evidence of a written agreement signed by the party to be charged.\textsuperscript{25}

In support of their opinion, the Court examined previous decisions which declined to focus on a distinction between a finder and broker because the determination of applicability to the

\textsuperscript{20} Id. at 322-23.
\textsuperscript{21} Id. at 323.
\textsuperscript{22} See id. at 323-24.
\textsuperscript{23} Id. at 324 (citing Brochu v. Santis, 939 A.2d 449 (R.I. 2008)(holding "we need not dwell on the distinction between a finder's fee and a commission since at most, the transaction at issue reflected an agreement to pay a commission and therefore the oral agreement was unenforceable due to its failure to comply with the Statute of Frauds); Bottomley v. Coffin, 399 A.2d 485 (R.I. 1979)(holding "the Statute of Frauds did not bar the suit since the nature of the transaction was the sale of business and not about the distinction between a finder and broker); Fishbein v. Zexter, 270 A.2d 510, 512 (R.I. 1970)(holding "the applicability of subsection 6 of the Statute of Frauds, it is the nature of the underlying transaction that is determinative and not whether the person attempting to enforce the agreement is a finder or a broker").
\textsuperscript{24} Id. at 324.
\textsuperscript{25} Id. at 324-28; see R.I. GEN LAW § 9-1-4.
Statute of Frauds rested upon the nature of the transaction. In addition, the Court determined that the Statute of Frauds was inherently broad enough to require a finder’s agreement to be in writing. From a public policy perspective, the Court feared individuals would be able to undermine the intent and effectiveness of the Statute of Frauds simply by labeling themselves as finders and not brokers to avoid the writing requirement.

Next, the plaintiff argues that the presence of the word “commission” under subsection 6 is stated in terms of its well-established common meaning of percentage-based compensation and not in terms of other forms of compensation, such as a finder’s fee. The defendants disagreed with plaintiff’s definition of “commission,” contending that the term commission refers to both percentage-based and flat-fee compensation.

The Court disagreed with the plaintiff’s characterization of the term “commission.” The Court determined that when a word is not defined by the statute, it is the Court’s practice to employ the common meaning of the word provided by recognized dictionaries. None of the dictionaries examined by the Court described “commission” only relating to percentage-based compensation. The Court concluded that that word “commission” under the Statute of Frauds encompasses any type of payment, including a finder’s fees.

Finally, the Court wanted to uphold the “public-protection” purpose of the Statute of Frauds. The purpose of the Statute of Frauds rested upon the nature of the transaction. In addition, the Court determined that the Statute of Frauds was inherently broad enough to require a finder’s agreement to be in writing. From a public policy perspective, the Court feared individuals would be able to undermine the intent and effectiveness of the Statute of Frauds simply by labeling themselves as finders and not brokers to avoid the writing requirement.

27. Id. at 327 (quoting 12 Am. Jur. 2d Brokers § 70 (2012)).
28. Id. at 327(citing Buckingham v. Stille, 379 N.W.2d 30, 33 (Iowa Ct. App. 1985)).
29. Id. at 324
30. Id.
31. Id. at 329.
32. Id. at 328-29.
34. Id. at 329. The court also wanted to make sure to keep in accord with the intent of the General Assembly. Id. at 328.
35. Id. at 330.
Frauds was to protect the public against “unfounded claims” and foster certainty in contract formation and not based upon “loose statements.” The court was concerned that to allow plaintiff’s to separate themselves from the Statute of Frauds would defeat its purpose to protect the public from “unfounded claims” and potentially open up the “floodgates of litigation” which have been “closed” by the Statute’s clarity and unambiguity.

COMMENTARY

Before the Rhode Island Supreme Court even began their analysis on the issues the Court had already made it quite clear they intended to remain constantly aware of the underlying principles of the Statute of Frauds. The Court was mindful that in order to fulfill the public policy behind the Statute of Frauds it required strict enforcement. “To do so otherwise would defeat the basic purpose of the statute.” Before the analysis was even conducted one could get the general sense the court was leaning to the defendant’s side. It appears the Court wanted to remain in strict compliance with the Statute of Frauds and was not prepared to grant any exceptions to the long-standing statute and its principles.

In addition, the Court emphasized the Statute’s clear and unambiguous language. When a statute’s language is not subject to multiple interpretations and the words are unambiguous, the Court must give the words their plain and ordinary meanings as a means to honor and give effect to the General Assembly’s general intent. It is reinforced by the Court that if the legislative body wanted to create exceptions to the Statute they would have specifically made it clear and evident.

Another matter that the Court correctly reinforces is the need
to have everything down in a written, signed agreement, especially for major business transactions. As the hearing court noted, a sophisticated business party like Mutual Development should have recognized the importance of placing the finder’s fee in the written document.\textsuperscript{43} From a practical perspective this concept cannot be underestimated. So many costs, expenses, and legal suits could have been squarely avoided if the parties had just taken the time to write the fees and clauses within the agreement. This is a simple case that delivers an important lesson.

CONCLUSION

The Rhode Island Supreme Court held that when it comes to the Statute of Frauds it does not open the door for a distinction between a finder and a broker. The Court supports this decision on the long-standing principle that the applicability of the Statute of Frauds is ultimately determined by the nature of the transaction, not who the parties are. In addition, to allow the plaintiff to find its way around the Statute of Frauds based upon their characterization would go against the overall purposes of protecting the public from unfounded claims and placing a stopper on frivolous lawsuits.

Adam Forsblom

\textsuperscript{43} Id. at 322.
**Contract Law.** *Sophie F. Bronowiski Mulligan Irrevocable Trust v. Todd Arthur Bridges*, 44 A.3d 116 (R.I. 2012). In a breach of contract action, the Rhode Island Supreme Court held that the clear and unambiguous language set forth in a residential lease agreement was controlling and the proper measure of damages for repairing the damaged wallpaper in the historic home was the cost of repair rather than diminution of value.

**FACTS AND TRAVEL**

A Brown University graduate student (“Tenant”) was accused of breaching his lease agreement when he painted over expensive wallpaper in the historic home of the plaintiff, the Sophie F. Bronowiski Mulligan Irrevocable Trust (“Landlord”), and failed to make his last month’s rent payment. The Tenant, Todd Arthur Bridges, signed a lease agreement with the Landlord on September 3, 2004. The agreement gave him access to the second, third, and fourth floors of the 1862 home located at 151 Benefit Street in Providence, Rhode Island. The Landlord alleged in its complaint that its damages included “$1,600 in unpaid rent, $25,000 for repairs to the property, punitive damages, costs and attorneys’ fees.”

The lease agreement described the property and its historic nature, the Tenant’s responsibility for any property damage, and the Tenant’s liability if any legal action was necessary to enforce the lease. After the Tenant moved out of the home on September

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2. *Id.* at 118.
3. *Id.*
4. *Id.* at 117.
5. *Id.* at 118. Paragraphs 21 and 15 of the lease agreement provide:

21. **Historic property.** Tenant acknowledges that the rented premises is a unique historically significant house which has been carefully and meticulously restored with the advice of historical experts on Victorian and 18th century design. Should any part of the
5, 2006, the Landlord filed a complaint alleging that the Tenant breached the express terms of the lease by painting several parts of the house without the Landlord's permission. In his answer, the Tenant did not deny painting parts of the home. Instead, he alleged that the home had been damaged by smoke and that painting was necessary to fix the damage.

On July 21, 2010, a bench trial was held at the Providence County Superior Court in which only the Landlord was represented by counsel. Ronald Dwight was called as the first
decorated surfaces of the house, including the woodwork or plaster work, be chipped or any wallpaper be torn or marked for any reason other than aging or settling or a casualty of which the Tenant has not been a proximate cause, Tenant agrees to restore the same to the same condition as when the premises were received. Tenant acknowledges that all colors are custom mixed and must be exactly matched to the present color scheme. If exact matching is not possible, this may involve repainting or wallpapering large areas to obtain visual integrity. Removal of all finger marks and restoration of the woodwork and wallpaper to the condition at the beginning of the lease term will be the Tenant's financial responsibility at the end of the lease term. If Landlord must restore the premises after Tenant's surrender of possession, Tenant will be liable for the expense and acknowledges that special restorers and experts in painting may be required at more than normal expense to perform such work. ... If Tenant wishes to paint any room, tenant will obtain first obtain [sic] permission and then Landlord as to color and finish [sic] and Landlord will supply all materials. Painting must be down [sic] to landlord's specifications.

15. **Legal action to enforce lease.** Should any legal action be required by the Landlord to enforce any of the obligations of this lease or to obtain compensation for any damage to the property under an action separate from the lease, Tenant agrees to pay reasonable attorney's [sic] fees and costs should any court of competent jurisdiction render a judgment in Landlord's favor to collect for unpaid rent, damages to the property of any kind, to obtain possession of the premises, or to obtain an injunction against improper use of the property or behavior thereon, or an order to obtain compliance with any provision of the lease.

*Id.*

6. *Id.* at 119.

7. *Id.*

8. *Id.* The Tenant also suggested in his answer that, “he and plaintiff agreed to apply his security deposit toward the last month’s rent.” *Id.*

9. *Id.* However, the Landlord’s attorney, Ronald A. Dwight, was forced to withdraw his representation because he was scheduled to testify as a
witness to testify on the Landlord’s behalf. He testified that the Tenant painted five areas of the home in violation of the lease’s terms and drops of paint had damaged the recently refinished wood floors. Tiffany Adams was the Landlord’s second witness. She testified very specifically as to the process and costs of replacing the very expensive wallpaper. She also stated that, in her opinion, if the entire space was not re-wallpapered, “the overall appearance of the hallway and stairwell ‘absolutely’ would be affected.” However, when Ms. Adams was cross-examined, she conceded that the stairwell walls that the Tenant painted were separated from the hallway by a wooden border and estimated that merely twelve to fourteen rolls of paper would be needed to wallpaper the hallway. Finally, the Landlord called the Tenant as an adverse witness in which the Tenant “conceded that he painted a portion of the third-floor bathroom, the stair tread, and the hallway adjacent to the stairwell without permission from the plaintiff.”

The trial justice delivered the bench decision holding that the Tenant had to pay the Landlord the last month’s rent of $1,600 plus interest. She found that although the defendant admitted to breaching the lease by painting certain areas of the home and failing to pay his last month’s rent, but that he should not be held responsible for paying to re-wallpaper the entire stairwell.

The Landlord argued that the trial justice erred in forcing the attorney to withdraw but since it did not pursue this argument further, the Court found the issue moot. See id. at 120 n.5.

10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id. at 120.
presentation of the property’ that defendant should be saddled with the cost of re-wallpapering the entire stairwell in addition to the hallway."\textsuperscript{20} The trial justice refused to award more than the unpaid rent in damages because “the evidence is such that [she] would only be speculating if [she] were to arbitrarily pick a different dollar amount of compensation.”\textsuperscript{21} The Landlord filed a timely appeal alleging that the damages amount was wrongly determined and that the trial justice failed to award the attorney’s fees as agreed in the lease.\textsuperscript{22}

\textbf{ANALYSIS AND HOLDING}

Upon review of the Superior Court’s order, the Rhode Island Supreme Court first addressed whether the amount of damages awarded to the Landlord were correct.\textsuperscript{23} The Court focused on Ms. Adams’ expert testimony, which she “testified with great specificity about the cost of re-wallpapering the grand foyer, stairwell, and hallway of 151 Benefit Street.”\textsuperscript{24} She also testified that if the entire stairwell was not re-wallpapered, the “visual integrity’ would be compromised.”\textsuperscript{25} The Court thus found that based on fundamental principles of contract and state law, when a contract is “clear and unambiguous,” that language is controlling.\textsuperscript{26} Furthermore, where there is temporary rather than permanent damage, the proper measure is the cost of repair and not the diminution in value.\textsuperscript{27} The Court pointed to specific language in the lease providing that “Tenant agrees to restore the same to the same condition as when the premises were received...If exact matching is not possible, this may involve repainting or wallpapering large areas to obtain visual

\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 117.
\textsuperscript{23} Id. at 120. “[T]he standard of review of a trial justice findings on damages is quite differential.” Id. (quoting Riley v. St. Germain, 723 A.2d 1120, 1122 (R.I. 1999) (citation omitted)).
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 121.
\textsuperscript{26} Id. (quoting Elias v. Youngken, 493 A.2d 158, 163 (R.I. 1985)).
\textsuperscript{27} Id. (citing Tortolano v. DiFilippo, 349 A.2d 48, 52 (R.I. 1975). Diminution in value is a more appropriate measure when the damage is permanent. Id.
Therefore, the Court held that based on the clear language of the lease agreement and Ms. Adams testimony, “the trial justice erred when she determined damages because she appear[ed] to have applied the ‘diminution of value’ standard rather than the ‘cost of repair’ standard.”

The Court then reviewed the Landlord’s argument that the trial justice erred by not awarding attorney’s fees. The trial justice’s ruling on the attorney’s fees is reviewed for an abuse of discretion. Although the Court follows the “American Rule” when awarding attorney’s fees, the Court again pointed to the clear language of the contract, providing that “the defendant agreed ‘to pay reasonable attorney’s [sic] fees and costs’ if the legal action was required to ‘obtain compensation for any damage to the property.’” Therefore, the Court held that the trial justice abused her discretion in failing to award plaintiff the attorney’s fees. The Court affirmed the unpaid rent award of $1,600, plus interest, but remanded the case to the Superior Court for a hearing on the issue of damages for the repair of the historic property and to award attorneys’ fees.

COMMENTARY

The Rhode Island Supreme Court clearly followed established principles of contract law. The Court’s focus was on the “clear and unambiguous” language of the lease agreement. The Landlord sought to protect his historic property by carefully
drafting the lease agreement. The Tenant agreed to the lease’s terms when he signed the document and began living in the home. As stated by the Court, the lease clearly stated the intent of the parties and their obligations. Thus, it would be unfair to allow the Tenant to pay only the last month’s unpaid rent when the lease clearly stated that he was responsible for any damage done to the property and any attorney’s fees.38

CONCLUSION

In Sophie F. Bronowiski Mulligan Irrevocable Trust v. Todd Arthur Bridges, the Rhode Island Supreme court held that when a lease agreement’s language is clear and unambiguous, the parties are bound to that agreement. Furthermore, when damages can be ascertained with specificity, the cost of repair standard should be applied rather than the diminution in value.

Joceline Rocha

38. See id. at 122.
Criminal Law. *State v. Carpio*, 43 A.3d 1 (R.I. 2012). The Rhode Island Supreme Court concluded that murdering a police officer in the line of duty was an aggravating factor sufficient to uphold the defendant’s sentence of life imprisonment without parole; that jury instructions which adequately cover the relevant law may include statements clarifying the jury’s role in the proceedings; and that a defendant’s failure to raise an issue at trial waives the defendant’s right to appeal on that issue.

FACTS AND TRAVEL

In the span of a single day, Esteban Carpio (“Mr. Carpio”), the defendant, escaped from two of his victims and law enforcement authorities three times, leaving a critically injured elderly woman and a fatally wounded police detective in his wake.¹

The twenty-four hour crime spree began midday, when Mr. Carpio tried to rob Madeline Gatta (“Mrs. Gatta”) in front of her home.² With his face hidden by a scarf and hat, Mr. Carpio stabbed Mrs. Gatta in the back near the strap of her purse, then fled the scene in a red van.³ Though he later changed cars, telling his girlfriend he wanted to get another car, one of Mrs. Gatta’s neighbors took down the red van’s registration, and police used that information to track down Mr. Carpio.⁴ Later in the day, officers apprehended Mr. Carpio at his home, and the defendant offered no resistance.⁵

At the police station, detectives brought Mr. Carpio to a conference room for questioning and removed his handcuffs.⁶ Several detectives made “small talk” with Mr. Carpio, but the questions became more probing with the arrival of Detective Allen

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². *Id.* at 3.
³. *Id.* Mrs. Gatta’s injuries were severe: the stab wound could not be closed for two days and required hospitalization. *Id.* at 3.
⁴. *Id.* at 3, 4.
⁵. *Id.* at 4.
⁶. *Id.*
(“Det. Allen”), who conducted much of the interview with Mr. Carpio. Though initially reticent, Mr. Carpio became “agitated” during the course of the interview, as Det. Allen made clear the seriousness of Mr. Carpio’s situation. At one point, only three people were in the room: Mr. Carpio, Det. Allen, and a third detective, Detective Timothy McGann (“Det. McGann”). Mr. Carpio asked for a glass of water, which Det. McGann left the room to retrieve.

Det. McGann returned and heard shouts and “sounds of a violent struggle” from inside the conference room. He tried to open the door, but found it locked from the inside. Gunshots rang out, and silence fell. Det. McGann called out to Det. Allen but heard nothing. As other officers arrived, Det. McGann “heard several more gunshots,” but nothing from Det. Allen. When officers finally broke down the door, they discovered Det. Allen fatally injured on the floor. Det. Allen passed away a few hours later at Rhode Island Hospital.

The officers discovered Mr. Carpio’s escape during their search of the conference room and the adjoining office. It appeared Mr. Carpio shot out one of the windows in the adjoining office, leapt to the ground below, and left the murder weapon, Det. Allen’s service pistol, on the metal grate below the window.

Mr. Carpio took refuge at a friend’s apartment and requested a taxicab to New York City. His friend placed a phone call to a taxicab company offering $500 cash for the fare, and the

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7. Id.
8. Id.
9. Id.
10. Id. at 5.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id. at 5. This version of events was corroborated by an eyewitness passing by the Providence Public Safety Complex at the time of Mr. Carpio’s escape, who “heard the sound of shattering glass,” saw a man leap from one of the windows several stories up, and, apparently unhurt, stand and walk quickly away from the scene. Id. at 5.
20. Id. at 5.
dispatcher relayed the request to a driver.\textsuperscript{21} The dispatcher also told the driver about the recent shooting of a police officer, and cautioned the driver in picking up the fare.\textsuperscript{22} In a moment of startling prescience, the driver stopped to talk to a police officer and advise the officer that the next passenger could be the wanted shooter.\textsuperscript{23} Officers agreed to follow the driver to the pick-up.\textsuperscript{24} When the taxicab arrived, Mr. Carpio went towards it, took a few seconds to look at the driver, and then dashed off into the night.\textsuperscript{25} This third escape attempt would be the last for Mr. Carpio, as a number of officers apprehended the defendant.\textsuperscript{26} Mr. Carpio did not submit to arrest easily, “kick[ing] and flail[ing]” until he was physically subdued.\textsuperscript{27}

Mr. Carpio, charged with first-degree murder of a police officer, discharging a firearm while committing a crime of violence, and felony assault with a dangerous weapon, mounted an insanity defense.\textsuperscript{28} The expert for the defense, Dr. Steve Heisel, testified that Mr. Carpio “suffered from schizophreniaiform psychosis” such that he was incapable of obeying the law.\textsuperscript{29} The two experts for the prosecution, Drs. David Faust and Martin Kelly, each testified that in their expert opinions, Mr. Carpio was capable of obeying the law, and that mental illness did not “impair[]” Mr. Carpio from doing so.\textsuperscript{30}

The trial judge gave jury instructions on the insanity defense, noting that “the question of whether defendant is criminally

\begin{enumerate}
\item[21.] Id. at 5, 6.
\item[22.] Id. at 6.
\item[23.] Id.
\item[24.] Id.
\item[25.] Id.
\item[26.] Id. These officers included Rhode Island State Police Officers, Providence Police Officers, and F.B.I. officers. Id.
\item[27.] Id. The Court fleshes out the details of this “violent struggle” in a footnote with the testimony of Rhode Island State Police Officer Christopher Zarrella, who described the officers tackling the defendant, and punching him in the face and head. Id.
\item[28.] Id. at 3, 6. After his final apprehension, Mr. Carpio again submitted to a series of interviews during which he claimed not to remember any of incidents leading up to his second arrest, claimed that “a friend of his made him crazy,” claimed that “he heard voices,” and finally, claimed that “the devil” was to blame. Id. at 6.
\item[29.] Id. at 6.
\item[30.] Id. at 6, 7. Dr. Faust went so far as to say he believed “Carpio’s answers exhibited ‘gross malingering.’” Id. at 7.
\end{enumerate}
responsible is a question for the fact finder – the jury – to determine in light of community standards of blameworthiness.”

The jury found the defendant guilty on all charges, and the trial judge, taking account of all the circumstances of the defendant’s crimes and his background, imposed the maximum sentence under the law, essentially life imprisonment without parole, with two additional consecutive sentences on top of the life term.

Defense counsel did not move for a new trial nor a judgment of acquittal.

On appeal, the defendant raised three contentions: first, that the evidence was insufficient to “establish his criminal responsibility;” second, that the trial judge erred in instructing the jury by adding “community standards of blameworthiness” to the instruction; and third, that his sentence of life imprisonment without parole was “excessive and unwarranted.”

ANALYSIS AND HOLDING

Insufficiency of the Evidence

The Court did not entertain Mr. Carpio’s claim that the evidence was insufficient in light of his counsel’s failure to raise the issue at the trial court level. Discussing the Court’s “well-settled raise-or-waive rule,” Justice Goldberg cited the dual rationale of judicial economy and fairness to opposing counsel, and laid out the proper procedural posture for such a challenge: “the trial justice’s denial of the defendant’s motions for judgment of acquittal and new trial.”

Mr. Carpio conceded, and the Court agreed, that the issue of

31. Id. at 7.
32. Id. The sentence was as follows: “life imprisonment without parole for the first-degree murder of a police officer; a consecutive term of life imprisonment for the discharge of a firearm while committing a crime of violence; and a consecutive term of twenty years to serve on the felony assault of Mrs. Gatta with a dangerous weapon.” Id.
33. Id.
34. Id. at 8.
35. Id. at 8, 10.
36. Id. at 8, 13.
37. Id. at 8.
sufficiency of the evidence was not properly preserved for appellate review in the procedure described above. Thus defendant asserted instead that his right to appeal stemmed from a statutory right or, in the alternative, the plain error doctrine. The Court dismissed Mr. Carpio’s other attempts to fashion a right to appellate review, noting first that the defendant brought forth no support for his claimed “statutory right,” and second, that Rhode Island “does not recognize the plain error doctrine.” The Court thus summarily dismissed Mr. Carpio’s claim of insufficiency of the evidence.

**Jury Instructions**

The Court laid out the standard of review for jury instructions, stating that “[a] charge need only adequately cover the law,” and that the Court would “review the challenged portions in the context in which they were rendered.” The defendant drew the Court’s eye to the trial judge’s instruction regarding “community standards of blameworthiness,” viewing it as another hurdle for the defendant to clear in order to reach acquittal through the insanity defense.

The Court disagreed, discussing at length the role of the jury, particularly in the context of determining whether a defendant claiming insanity ought to be held criminally responsible for his acts. The discussion was a reminder of the jury’s role in fact-finding, and that trials on the issue of insanity were not intended to be “usurped” by expert witnesses. Instead, experts provide

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39. *Id.*
40. *Id.* at 9.
41. *Id.* The Court went on to note that there may exist “extraordinary circumstances” in which a defendant “suffers an abridgement of his basic constitutional rights” where the Court would be willing consider adoption of the plain error doctrine. *Id.* However, Justice Goldberg pointed out the difficulty here in finding that defense counsel’s deliberate choice not to pursue a motion for judgment of acquittal or motion for a new trial would allow an appeal based on the plain error doctrine. *Id.*
42. *Id.*
43. *Id.* at 10 (internal quotations omitted) (citing State v. Cardona, 969 A.2d 667, 674 (R.I. 2009)).
44. *Id.* (internal quotations omitted) (citing *Cardona*, 969 A.2d at 674).
45. *Id.* at 9, 10.
46. *Id.* at 11.
47. *Id.* (quoting State v. Johnson, 399 A.2d 469, 476 (R.I. 1979)).
the “raw data”\textsuperscript{48} for juries to determine the extent to which a defendant was impaired by his or her insanity, the latter being a legal question to which the application of a “community sense of justice” was appropriate.\textsuperscript{49} Thus the Court, in emphasizing the instructions explained the jury’s role rather than add to the defendant’s burden of proof, also dismissed the defendant’s claim that the trial court erred in its instructions to the jury.\textsuperscript{50}

**Life Imprisonment Without Parole**

The Court began by acknowledging the severity of the sentence, calling it “the most severe sentence authorized by Rhode Island law,”\textsuperscript{51} and stating that therefore the burden rests upon the Court to “ratify . . . or . . . reduce” the sentence, “in its . . . discretion.”\textsuperscript{52} The Court first outlined the legal standards regarding the sentence, citing a United States Supreme Court decision describing the murder of a police officer as an “aggravating circumstance” to consider in sentencing, in light of the strong public policy towards protecting those “who regularly must risk their lives in order to guard the safety of other persons and property.”\textsuperscript{53} The Court also cited the Rhode Island General Assembly’s own determination that the “murder of a police officer in the performance of his or her duties warrants a sentence of life imprisonment without the possibility of parole.”\textsuperscript{54}

Next, the Court looked to the factual circumstances surrounding the crime and the defendant’s own history.\textsuperscript{55} In neither place did the Court find reason for reducing the sentence. The crime itself was described by the Court as “heinous,” a “brutal murder” of a police detective.\textsuperscript{56} In addition, the defendant had a criminal history of violence and substance abuse.\textsuperscript{57} Both of these

\begin{itemize}
  \item \textsuperscript{48} Id. (quoting United States v. Freeman, 357 F.2d 606, 619-20 (2d Cir. 1966)).
  \item \textsuperscript{49} Id. (quoting Johnson, 399 A.2d at 477).
  \item \textsuperscript{50} Id. at 12.
  \item \textsuperscript{51} Id. at 13 (quoting State v. Tassone, 749 A.2d 1112, 1121 (R.I. 2000)).
  \item \textsuperscript{52} Id. at 13 (quoting Tassone, 749 A.2d at 1119); see also R.I. GEN. LAWS 1956 §11-23-2.
  \item \textsuperscript{53} Id. at 14 (quoting Roberts v. Louisiana, 431 U.S. 633, 636 (1977)).
  \item \textsuperscript{54} Id.; see also R.I. GEN. LAWS 1956 §11-23-2.
  \item \textsuperscript{55} Id.
  \item \textsuperscript{56} Id.
  \item \textsuperscript{57} Id.
\end{itemize}
“aggravating factors,” in the Court’s eyes, overshadowed the minute mitigating effect of the defendant’s alleged insanity and expressions of remorse. The Court spent time debunking the defendant’s insanity defense, recounting Mr. Carpio’s carefully orchestrated series of escapes: his concealment of his identity with a scarf and hat when robbing Mrs. Gatta, his decision to switch cars after fleeing his failed robbery in one vehicle, his lies to the police about his name and background, his manipulation of Det. McGann to get Det. Allen alone, his escape from the police station, and his getaway to a safer landing zone on grass from the window of an adjoining office to the conference room.

The Court also concluded the trial judge performed the same careful review of the “defendant’s criminal record, personal history, and character,” including listening to the words of Mrs. Gatta, the surviving victim; the deceased victim’s family and coworkers; and Mr. Carpio’s family members at the sentencing hearing. In its independent review of the record, the Court found the sentence appropriate. The Court concluded that risk of danger to the community by Mr. Carpio’s was far greater than any hope of his rehabilitation.

COMMENTARY

Under the Court’s careful and thorough analysis of the record and circumstances surrounding the case at bar is thinly veiled disgust with the defendant and his actions. Justice Goldberg employs strong language to condemn Mr. Carpio and his actions, and rightly so – the murder of Det. Allen and assault of Mrs. Gatta were both shocking and violent. Yet despite the obvious emotional basis for upholding the trial court’s decision, the Court thoughtfully delineated the very good reasons for finding no error in any of the grounds raised by Mr. Carpio.

The most interesting of the three arguments raised by the defendant was his second contention, that the jury instructions by the trial judge inserted a “second tier to his burden of proof.”

58. Id. at 14, 15.
59. Id.
60. Id. at 15.
61. Id.
62. Id. at 9.
The defendant’s concern appeared to be that the instructions essentially told the jury, “You may only acquit based on the insanity defense if you find that there is any reasonable doubt that Mr. Carpio is guilty based on his purported insanity, and that the community would not likely find Mr. Carpio blameworthy in light of the evidence presented regarding his sanity.” The Court dismissed the idea that by stating the jury may make determinations using “community standards of blameworthiness” the trial judge inserted an impermissible “value judgment” into their determinations. The instructions were a fairly standard description of the legal question that a jury must answer in cases of an insanity defense, whether or not a person was legally insane. That value judgment, in the Court’s eyes, was an integral part of the legal question posed to the jury. However, in the factual context at bar, where a twenty-seven year veteran of law enforcement was murdered with his own gun in the confines of police headquarters, Mr. Carpio was right to fear that no matter what his expert witness said about his mental capacity, the “community” would find him blameworthy indeed. Perhaps there was something to his argument regarding a “second tier of proof,” but it is not clear the presence or absence of the trial judge’s words ameliorated or aggravated the effect such a crime would have on the minds of the jury.

CONCLUSION

The Rhode Island Supreme Court held that (1) in the absence of an abridgment to a Constitutional right, the defendant’s failure to raise an issue at trial waived any right to appeal on those grounds; (2) jury instructions clarifying the jury’s role by incorporating “community standards of blameworthiness” were appropriate so long as they adequately covered the relevant law; and (3) life imprisonment without parole for first-degree murder was an appropriate sentence in light of the aggravating circumstance of murder of a police officer in his line of duty.

63. See id.
64. Id. at 10 & n.8.
65. Id. at 9.
66. Id. at 10 & n.8.
67. Id. at 5.
Criminal Law. *State v. Robat*, 49 A.3d 58 (R.I. 2012). The Supreme Court of Rhode Island affirmed defendant’s conviction for second degree murder at trial, holding that the evidence presented at trial was sufficient to meet the State’s burden in proving that the defendant, Julie Robat, acted with malice aforethought when her child died shortly after she delivered in a bathroom in her home, during a difficult delivery. The Court found important that Ms. Robat did not seek medical care before, during, or immediately after the delivery, the body of the baby was found wrapped in plastic bags and hidden in the basement of the Robat home, and that Ms. Robat was thirty years of age at the time of the events. More specifically, the Court held that the defendant’s motions for a new trial and for acquittal were properly denied, that the State carried its burden of proof particularly with respect to proving malice aforethought.

FACTS AND TRAVEL

Sometime between the evening of October 29, 2006 and the early morning of October 30, 2006, thirty-year-old Julie Robat gave birth in the house she lived in with her parents and two adult sisters. The baby, despite apparently being near full-term, did not survive. In the aftermath of the delivery Ms. Robat was rushed to the hospital, having lost copious amounts of blood, where her treating physicians, possibly over her objections, examined her and determined that she had recently given birth. Based on this determination and the elephant in the room that was the missing infant, the doctors notified the police who, upon searching the Robat home, discovered the body of a baby wrapped in two plastic bags. Ms. Robat was subsequently indicted for murder.

At trial copious evidence was introduced, with the state presenting fourteen witnesses, the defense presenting five

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2. *Id.* at 64, 86.
3. *Id.* at 64-65.
4. *Id.* at 61.
witnesses of its own, and the defendant taking the stand on her own behalf. Numerous issues were contested at trial, with conflicting testimony presented as to what the cause(s) of the baby’s death was/were, how long the baby lived, if it was born alive at all, how many breaths the baby took, what actions Ms. Robat did or did not take in the aftermath of her delivery, whether an abruption of the placenta had taken place during the delivery, and what physical and mental condition Julie Robat was in during and immediately after the delivery and during her arrival and initial treatment at the hospital. It was uncontested that Ms. Robat never sought medical attention before she went into labor or during the delivery, that the delivery was a difficult one and that Ms. Robat lost copious and life-threatening amounts of blood, and that the body of the baby was found hidden in the laundry room wrapped in plastic bags. Ms. Robat’s sisters testified that it was Julie Robat who secreted the body, while Ms. Robat testified that she remembered very little of the events of the night after going into labor but that she did remember her sisters putting her in the bath tub and slapping and screaming at her, as well as being dressed and waiting on the steps of the house for an ambulance.

ANALYSIS AND HOLDING

On appeal Ms. Robat contended that the trial justice erred in failing to grant defense motions for an acquittal or in the alternative for a new trial, and that the state had failed to present sufficient evidence of malice aforethought to prove her guilty of second degree murder beyond a reasonable doubt. Additionally she argued that the chain of inferences relied upon by the State rested upon an ambiguous fact and thus could not support a conviction. A majority of the Court rejected these contentions and held, despite a spirited dissent by Justice Flaherty, that the prosecution had presented sufficient evidence for a jury to find

5. Id.
6. Id. at 62-70.
7. Id. at 69-70, 76-77, 86.
8. Id. at 62-63, 69-70.
9. Id. at 60.
10. Id. at 72-74.
that Ms. Robat had acted with the requisite malice aforethought necessary for the death of her child to constitute second degree murder.

The Court noted that because a defendant at trial has a heavier burden in prevailing on an acquittal motion than on a motion for a new trial, a failure to prevail on a motion for new trial precludes success on a motion for acquittal at trial.\textsuperscript{11} The Court, extrapolating from this view of the applicable burdens, first determined whether the trial justice erred in failing to grant Ms. Robat’s motion for a new trial, and upon holding that the trial justice did not, declared that it was not required to make any further analysis of her claims as to her motion for acquittal.\textsuperscript{12}

When ruling on a motion for a new trial a “trial justice acts as a thirteenth juror and exercises independent judgment on the credibility of witnesses and on the weight of the evidence.”\textsuperscript{13} If the trial justice in so doing “does not agree with the jury verdict or does not agree that reasonable minds could differ as to the proper disposition of the case” and further determines that “the verdict is against the fair preponderance of the evidence and fails to do substantial justice” a new trial must be granted.\textsuperscript{14} On appeal a trial justice’s ruling on a motion for a new trial is given great deference, so long as “he or she has articulated sufficient reasoning in support of the ruling” and “will not be overturned on appeal ‘unless [the Rhode Island Supreme Court] determine[s] that the trial justice committed clear error or that he or she overlooked or misconceived material and relevant evidence [relating] to a critical issue in the case.’”\textsuperscript{15}

In the instant case, the Court focused on whether the trial justice had committed clear error in ruling on the motion for a new trial with respect to whether the State had proven the requisite malice aforethought to be convicted of second degree murder.\textsuperscript{16} Second degree murder is defined in Rhode Island as “any killing of a human being committed with malice aforethought

\textsuperscript{11} Id. at 72 (citing State v. Pineda, 13 A.3d 624, 640 (R.I. 2011); State v. Navarro, 33 A.3d 147, 156 (R.I. 2011)).
\textsuperscript{12} Id. at 82.
\textsuperscript{13} Id. at 70 (quoting State v. Guerra, 12 A.3d 759, 765 (R.I. 2011)).
\textsuperscript{14} Id. at 71 (quoting State v. DeOliveira, 972 A.2d 653, 665 (R.I. 2009)).
\textsuperscript{15} Id. (quoting Navarro, 33 A.3d at 156; State v. Texieira, 944 A.2d 132, 141 (R.I. 2008)).
\textsuperscript{16} Id. at 72-73.
that is not defined by the statute as first degree murder,” with malice aforethought being defined as “an unjustified disregard for the possibility of death or great bodily harm and an extreme indifference to the sanctity of human life.”

Of the three types of second degree murder recognized by the Court, the one in question in the instant case “involves those killings in which the defendant killed with wanton recklessness or conscious disregard for the possibility of death or of great bodily harm.” While malice is not mere negligence or carelessness, “malice may be inferred from the circumstances surrounding a defendant’s conduct and the events leading up to the death of the victim” and “from heedless indifference to the consequences of an act or recklessness.”

In reviewing the evidence, the Court found that the trial justice was correct in determining that the state had proven sufficiently; (1) “that defendant never sought medical attention for her baby; (2) that she expressly turned her sisters away while she

17. Id. at 73 (quoting Texeira, 944 A.2d at 142 n. 12; State v. Parkhurst, 706 A.2d 412, 421 (R.I. 1998)); See R.I. GEN. LAWS § 11-23-1. This statute states:

The unlawful killing of a human being with malice aforethought is murder. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any arson or any violation of §§ 11-4-2, 11-4-3, or 11-4-4, rape, any degree of sexual assault or child molestation, burglary or breaking and entering, robbery, kidnapping, or committed during the course of the perpetration, or attempted perpetration, of felony manufacture, sale, delivery, or other distribution of a controlled substance otherwise prohibited by the provisions of chapter 28 of title 21, or committed against any law enforcement officer in the performance of his or her duty or committed against an assistant attorney general or special assistant attorney general in the performance of his or her duty, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him or her who is killed, is murder in the first degree. Any other murder is murder in the second degree. R.I. GEN. LAWS § 11-23-1.

18. Id. (quoting State v. Delestre, 35 A.3d 886, 900 & n. 17 (R.I. 2012)). The three types of second-degree murder recognized by the Court are killings in which the defendant formed a momentary intent to kill contemporaneous with the homicide; felony murder for inherently dangerous felonies that are not expressly listed within the statutory definition of first-degree murder; and those killings in which the defendant killed with wanton recklessness or conscious disregard for the possibility of death or of great bodily harm.

19. Id. at 74 (quoting State v. Wilding, 638 A.2d 519, 522 (R.I. 1994)).
was in the bathroom where she gave birth; (3) that she hid the body of her infant; (4) that she protested when her family sought medical attention for her; and (5) that she vehemently and mendaciously rebuffed the suspicions of her treating physicians to the effect that she had given birth or had seen a baby.”

The Court further found meaningful that the “defendant never once attempted to seek medical advice or treatment after she became aware that she was pregnant,” and that Ms. Robat was thirty years old, rather than more youthful, at the time of the incident in question. Further, the Court found evidence of malice in the fact that Ms. Robat “by not seeking medical attention for her child . . . to whom she owed a legal duty to protect,” and “took affirmative steps to prevent the discovery of the birth of her child” as her sisters had testified Ms. Robat was “seen carrying a laundry basket downstairs to the laundry room—the room in which the body was eventually found “secreted in a trash bag.” These facts, the Court held, could support the inferences necessary to establish malice, namely that the defendant was able to act and did so voluntarily and willfully. The Court further found that the defendant failed to identify “any ambiguity in the factual foundation upon which that ultimate inference rests” that would make the pyramid of inferences insufficient to support a conviction. The Court suggests that since there is clear evidence and defendant even seems to admit that “the child was born alive and that it died while in her care” there can be no ambiguous fact between the facts that there was a live birth followed by a death and the inference that Ms. Robat acted with malice.

Finally, the Court noted “that, by testifying, defendant ran the risk that, if her testimony were disbelieved, the finder of fact could conclude that the opposite of her testimony was actually the truth—provided that there existed some other evidence to support a finding of guilt” and that sufficient other evidence existed, in the form of the evidence above, to support a conviction.

20.  Id. at 78.
21.  Id. at 77-78.
22.  Id. at 77, 80.
23.  Id. at 75.
24.  Id.
25.  Id. at 81 (citing State v. Mattatall, 603 A.2d 1098, 1109 (R.I. 1992)). That other evidence beyond uncredited or disbelieved defendant testimony is necessary to support a conviction flows logically and inexorably from the fact
Having determined to its satisfaction that the trial justice was justified in rejecting Ms. Robat’s motion for a new trial the Court further held that Ms. Robat’s arguments as to the trial justice’s refusal to grant a motion of acquittal were consequently invalid. Having rejected all of Ms. Robat’s arguments the Court affirmed her conviction for second degree murder.

Justice Flaherty, in writing a dissenting opinion, took issue with the factual determinations the majority held to be justified, and would have overturned Ms. Robat’s conviction. Justice Flaherty found error not only with the trial justice’s refusal of her motion for a new trial, but her motion for acquittal as well, and would have remanded the case to Superior Court for an entry of conviction for involuntary manslaughter.

The dissent first takes issue with what it calls “a flawed contortion of this Court’s precedent” in “the majority’s interpretation and application of our law on the probative value of ‘pyramiding inferences.’” In contrast to the majority’s holding, the dissent had no trouble finding an ambiguous fact upon which the pyramid of influences relied upon by the state rested, noting that upon “the established fact that defendant’s child was born alive and died while in her care” a number of ambiguous facts had to be inferred for the state to meet its burden in proving malice aforethought. Those facts, the dissent contends, are that “(1) defendant knew that the baby was born alive; (2) defendant knew that the baby needed care; (3) defendant chose not to provide care, or acted in a hostile manner; and (4) she did so knowingly, or with wanton or conscious disregard for the fact that her failure to provide care likely would cause the baby’s death.” Such a chain of inferences, according to the dissent, resting as is does on the ambiguous fact that the defendant knew the baby was born alive (or further down the chain, that the defendant knew the baby needed care), lacks probative value, is impermissively speculative

26. Id. at 82. The Court further ruled that her argument contending that the prosecutor used improper language during closing arguments was not properly preserved. Id. at 83.
27. Id. at 84 (Flaherty, J., dissenting).
28. Id. (Flaherty, J., dissenting).
29. Id. at 85 (Flaherty, J., dissenting).
30. Id. (Flaherty, J., dissenting).
under Rhode Island law, and as such cannot be the basis for a finding of guilt beyond a reasonable doubt.\(^{31}\) Further, the dissent argues that the majority’s failure to find an ambiguous fact was without basis because “[t]he test for determining whether a fact is ‘ambiguous’ is whether it is susceptible to more than one reasonable inference inconsistent with guilt.”\(^{32}\) “This is so,” the dissent points out; because the same fact-finder reasonably could infer from the evidence that defendant was incapacitated to the extent that she (1) did not appreciate the condition of the baby at the time of delivery; (2) that she did not know that the baby needed to be cared for and warmed immediately; or (3) that she knew the baby needed care but was unable to render any aid. Because these reasonable-alternative inferences exist, any inference drawn in favor of the state beyond the primary inference that “the defendant knew the baby was born alive” lacks “a foundation that logically has the probative force of established fact” and necessarily is reduced to mere “conjecture and surmise.”\(^{33}\)

The dissent also takes issue with the “other evidence” of malice on which the state’s case relied in addition to the finding that the testimony of Ms. Robat was not credible.\(^{34}\) First, Justice Flaherty argues that the majority’s reliance on consciousness of guilt evidence improperly imputes malice from “an inference that defendant knew she had done something that was illegal or shamefully immoral[.]”\(^{35}\) While the dissent notes that Rhode Island has not ruled on whether malice may be inferred from conscious of guilt evidence, it also notes that outside the state it is a well settled issue, and that “authorities . . . unanimously conclude that inferences of malice, premeditation, or deliberation cannot be gleaned from evidence of subsequent concealment of

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31. *Id.* (Flaherty, J., dissenting).
32. *Id.* at 86 (Flaherty, J., dissenting) (citing State v. Vargas, 21 A.3d 347, 353 (R.I. 2011)).
33. *Id.* (Flaherty, J., dissenting) (quoting Carnevale v. Smith, 404 A.2d 836, 841 (R.I. 1979)).
34. *Id.* at 87 (Flaherty, J., dissenting).
35. *Id.* (Flaherty, J., dissenting).
evidence, lying, or other guilty conduct.”  

Second, the dissent argues that the majority misapplied *Mattatall* because, while *Mattatall* “stands for the proposition that if a defendant chooses to testify, then ‘he runs the very real risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth,’” it further requires “some other evidence of the defendant’s guilt . . . to sustain a finding of guilt.” The dissent goes on to note inarguably that if neither consciousness of guilt evidence nor the State’s pyramid of inferences are proper evidence of guilt, then the defendant’s testimony cannot be sufficient proof of guilt on its own.

Finally, the dissent points out that the majority’s decision “puts this Court in the precarious position of judging the sufficiency of every expectant mother’s decisions about prenatal care” by imputing malice to a mother’s decisions about prenatal care. Such a relationship between prenatal care choices and malice is not something Justice Flaherty found persuasive, and he further notes that if such a relationship was held to exist, there is little if anything to distinguish the use of prenatal choices as evidence of malice from its use as evidence of premeditation, a use that the trial justice found impermissible as a matter of law.

### COMMENTARY

In the instant case the majority and dissent were hotly divided over whether sufficient evidence of malice was present. Underlying this disagreement were a number of specific issues on which the dissent and majority did not see eye to eye, including both how the law applied to the facts in this situation, and how certain rules of laws should be understood. The primary points of divergence between the majority and dissent are the application of the law of inferences and ambiguous facts to Ms. Robat’s case, the relationship of consciousness of guilt evidence to the element

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36. *Id.* (Flaherty, J., dissenting).
37. *Id.* at 89-90 (Flaherty, J., dissenting) (quoting *Mattatall*, 603 A.2d at 1109).
38. *Id.* (Flaherty, J., dissenting).
39. *Id.* at 88 (Flaherty, J., dissenting).
40. *Id.* at 88 & n. 34 (Flaherty, J., dissenting).
41. See *id.* at 75; but see *id.* at 85 (Flaherty, J., dissenting).
of malice, the proper understanding of the Mattatall doctrine and how a defendant's testimony can negatively impact her case, and finally to what extent a pregnant women's choices about prenatal care saddle her with potential criminal liability.

The position shared by both the majority and the dissent; that "unless a defendant can show that the presented evidence failed to support his or her conviction upon the motion-for-a-new-trial standard, a defendant necessarily will be unable to establish [that] he or she was entitled to a judgment of acquittal[;]" is procedurally incorrect and logically unsound. While it is at least arguable that such a position is sound at the trial level, where the burden of a motion for acquittal is weighed solely against the burden of a motion for a new trial, on appeal, where appellate review standards are also applied, this conclusion does not and cannot logically follow.

On appeal, a defendant challenging the trial justice's denial of a motion for a new trial must contend with the fact that the Court "accords 'great weight to a trial justice's ruling . . . [so long as] he or she has articulated sufficient reasoning in support of that

42. See id. at 80; but see id. at 87 (Flaherty, J., dissenting).
43. See id. at 81; but see id. at 89-90 (Flaherty, J., dissenting).
44. See id. at 78; but see id. at 88-89 (Flaherty, J., dissenting).
45. Id. at 72 (quoting Pineda, 13 A.3d 623, 641 (R.I. 2011)).
46. Id. The Court first articulated this standard in State v. Otero, 788 A.2d 469 (R.I. 2002). Prior to this case the practice was to analyze each motion separately. In fact, the case Otero drew on in articulating this new appellate standard, State v. Salvatore, 763 A.2d 985 (R.I. 2001), had, despite claims about the heavier evidentiary burden of a motion for acquittal at trial, made two separate analyses of the motions. See Otero, 788 A.2d at 475.
47. "[V]iew the evidence in the light most favorable to the prosecution, giving full credibility to its witnesses, and drawing all reasonable inferences consistent with guilt." Id. at 72 (quoting State v. Pitts, 990 A.2d 185, 189 (R.I. 2010)).
48. "It is the trial justice's responsibility to (1) consider the evidence in light of the jury charge, (2) independently assess the credibility of the witnesses and the weight of the evidence, and then (3) determine whether he or she would have reached a result different from that reached by the jury." Id. at 71 (quoting State v. Staffier, 21 A.3d 287, 290 (R.I. 2011) (internal quotations omitted)). "If the trial justice does not agree with the jury verdict or does not agree that reasonable minds could differ as to the proper disposition of the case, the trial justice is required to determine whether the verdict is against the fair preponderance of the evidence and fails to do substantial justice." Id. at 71 (quoting State v. DeOliveira, 972 A.2d 653, 665 (R.I. 2009) (internal quotations omitted).
ruling”\textsuperscript{49} and that the standard that a “trial justice’s ruling on a motion for a new trial will not be overturned on appeal “unless . . . the trial justice committed clear error or that he or she overlooked or misconceived material and relevant evidence [relating] to a critical issue in the case.”\textsuperscript{50} When reviewing a ruling on a motion for acquittal however, the Court “employ[s] the same standards as the trial court” and reviews the matter \textit{de novo}.\textsuperscript{51} In light of these radically different standards or review, the Court’s post-\textit{Otero} analytical framework is not sound. While the results of appeals of motions for new trial and acquittal may often follow one another, they do not march in quite the lockstep that the Court’s position would have it. As such the Court ought to return to its pre-\textit{Otero} practice of addressing each analysis separately.

The question of the proper application of the \textit{Mattatal} proposition\textsuperscript{52} over which the majority and dissent divided raises similar procedural problems. While it is uncontested that “some other evidence of the defendant’s guilt”\textsuperscript{53} is required beyond mere disbelief in the defendant’s testimony to support a conviction, just what other evidence—and how much of it—is an issue of contention.\textsuperscript{54} While the primary disagreement over how to apply \textit{Mattatal} stems from a disagreement over the proper use of other kinds of evidence to show malice,\textsuperscript{55} the relationship of a defendant’s testimony, and the defense’s case in chief, to a motion for acquittal is worthy of some attention as well. When the defense makes a motion for acquittal at the close of the prosecution’s case it should be granted if the prosecution has not proven, beyond a reasonable doubt, one or more elements of their case, and thus failed to carry their burden.\textsuperscript{56} A logical extension of this is that the prosecution cannot make up its deficiencies through the defendant’s presentation of evidence. Such a result is foreclosed

\textsuperscript{49} Id. at 71 (quoting \textit{Navarro}, 33 A.3d at 156 (R.I. 2011)).
\textsuperscript{50} Id. (quoting \textit{Texeira}, 944 A.2d 132, 141 (R.I. 2008)).
\textsuperscript{51} Id. at 72 (quoting \textit{DeOliveira}, 927 A.2d at 663).
\textsuperscript{52} “[T]hat if a defendant chooses to testify, then he runs the very real risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth.” Id. at 89-90 (quoting \textit{Mattatal}, 603 A.2d at 1109) (internal quotations omitted).
\textsuperscript{53} Id. at 76 (quoting \textit{Mattatal}, 603 A.3d at 1109).
\textsuperscript{54} See \textit{id.} at 76-77; \textit{but see id.} at 89-90 (Flaherty, J., dissenting).
\textsuperscript{55} See \textit{id.} at 89-90 (Flaherty, J., dissenting).
\textsuperscript{56} See \textit{id.} at 72.
upon, because the motion for acquittal should have been granted at the close of the prosecution’s case, and the defense should have had no need or opportunity to present any evidence of its own. The only impact evidence presented by the defense can properly have on a motion for acquittal is the potential to undermine elements of the prosecution’s case, and allow for a renewed motion for acquittal to be granted where the initial one was denied. As such, the “other evidence” required by Mattatal, if it is to respect both the Rhode Island Rules of Criminal Procedure and the defendant’s constitutional right to remain silent, must not be merely “some other evidence of guilt.” Rather the evidence of guilt must be sufficient to carry the State’s burden of proof.

When viewed in such a light the question becomes, as it effectively was in the instant case, whether the State carried its burden of proof in establishing the malice necessary to support a conviction for second degree murder. The majority and dissent divided sharply over whether the consciousness of guilt evidence, failure to seek prenatal care, and resulting pyramid of inferences relied upon by the prosecution was sufficient.\(^{57}\) The use of consciousness of guilt evidence\(^{58}\) to establish malice is, as the dissent rightly notes, a radical departure from broader American jurisprudence despite the fact that Rhode Island itself lacks precedent on the matter.\(^{59}\) As Justice Flaherty rightly noted, citing the Supreme Judicial Court of Massachusetts, “evidence of the defendant’s consciousness of guilt while relevant to the issue [of] whether a criminal homicide was committed, is not evidence of malice aforethought.”\(^{60}\) It is hardly surprising that there is such unanimity outside Rhode Island on the issue; the majority’s use of consciousness of guilt evidence to prove malice not only strains credulity, it is at odds with time’s arrow.\(^{61}\)

\(^{57}\) See id. at 72; but see id. at 84-85 (Flaherty, J., dissenting).

\(^{58}\) For example Ms. Robat’s refusal to let her sisters into the bathroom and her supposed secreting of the body. Id. at 77.

\(^{59}\) Id. at 87 (Flaherty, J., dissenting).

\(^{60}\) Id. (Flaherty, J., dissenting) (quoting Commonwealth v. Lowe, 461 N.E.2d 192, 199 n. 6 (Mass. 1984)).

\(^{61}\) Time’s arrow is a term that describes the “one-way direction” or “asymmetry” of time. It is widely believed to have been coined in or around 1927 by the astronomer Arthur Eddington, and is often used as shorthand for the future-follows-past flow of time explained by the Second Law of Thermodynamics and Entropy.
consciousness of guilt is and can only be probative of the state of mind following the event that lead to that sense of guilt. By definition, guilt must follow the event that causes it; one cannot be guilty about something that has not happened. Were behavior indicative of a consciousness of guilt to precede the event it would not be guilt at all, but fear, anxiety, or worry about an event that had yet to come to pass. Malice aforethought, on the other hand, must, by definition, precede or be concurrent with the event in question. Cause must precede effect, or it can hardly be called cause. One can hardly kill someone with “an unjustified disregard for the possibility of death or great bodily harm and an extreme indifference to the sanctity of human life”62 after they have already died. The unjustified disregard and extreme indifference are modifiers of the killing; they must be demonstrated as accompanying it, not events after it, when the possibility of death or great bodily harm has come gone with the tragic result being realized. The majority’s rule extends malice aforethought into new, illogical, and troubling territory, where the actions born of panic and shock following a tragic event can support criminal liability for a crime that has traditionally been reserved for the most shocking and disquieting of killings, murder.

The majority’s ruling on the law of inferences is similarly troubling. The dissent, as outlined above, does an admirable and persuasive job of illuminating the ambiguous facts and towering pyramid of inferences upon which the prosecution sought to carry its burden.63 It is however worth reiterating, drawing from the single established fact that Ms. Robat delivered a baby that drew at least one breath and that the baby later died, the inferences that Ms. Robat, during and immediately after a harrowing delivery and the loss of massive amounts of blood, was aware of much of anything, was thinking clearly enough to act with malice, was physically capable of doing much of anything, and that the actions she was both physically and mentally able to take would have prevented the death, are more than a bit of a stretch.

The net result of the majority’s handling of consciousness of guilt evidence, of the evidence of inferences, of the impact of the

62. Robat, 49 A.3d at 73 (quoting Texeira, 944 A.2d at 142; Parkhurst, 706 A.2d at 421).
63. See id. at 84-86 (Flaherty, J., dissenting).
defendant’s own testimony and the Court’s general laxity about what evidence is sufficient to meet the prosecution’s burden is to do serious violence to the beyond a reasonable doubt standard. Whatever deference is due to the determinations of the trial justice and the jury, the story presented by Ms. Robat’s sisters—that Julie Robat somehow managed to descend and ascend two flights of stairs while carrying a full laundry basket, and do a load of laundry, immediately after delivery and while in the process of losing at least half, if not terrifyingly close to all, of the blood in her body—is more than a little implausible. The limitations of the human body as it enters the more serious stages of hypovolemia alone militate strongly against such a story being afforded much, if any, credibility. One of the purposes of motions for acquittal and new trial is to prevent just such patently unreasonable testimony from being credited. When the trial justice failed to do so, it was up to the Supreme Court to rectify that failing. That the Court instead chose to credit such an implausible story, and to credit it to such an extent that it could not find reasonable doubt is distressing. If the Court cannot find reasonable doubt as to malice when a woman loses a child and three liters of blood during a traumatic delivery one can only

64. “Blood represents about 7% of the body mass or about 4.5 kg (volume ~ 4.4 liters) in a 64 kg (141 lb) person.” JOHN R. CAMERON ET AL., PHYSICS OF THE BODY 182 (2nd ed. 1999).

65. The amount of blood loss suffered by Ms. Robat was beyond serious. A loss of 30-40% of blood volume is generally considered a class III hemorrhage. In a class III hemorrhage “mental confusion and anxiety are normal, respiratory rate is high, peripheral perfusion is very poor, and the patient appears pale and diaphoretic. The pulse rate is invariably well over 100 beats/min and the production of urine is negligible. Under these circumstances, widespread failure of tissue oxygenation is occurring, with diversion of what blood flow there is to essential organs such as brain, kidney and heart.” M. A. GARRIOCH, THE BODY’S RESPONSE TO BLOOD LOSS 75, Vox Sanguinis 87 (Suppl. 1) (2004). Ms. Robat however lost not merely 30-40%, a class III hemorrhage marked by the above symptoms, she lost more than that, blood loss of a massive enough amount to be the more serious class of hemorrhage, class IV. In a class IV hemorrhage the “situation is immediately life-threatening and within 15 min a mortality of 50% is to be expected. Blood pressure has dropped to be, in some cases, unrecordable, and the pulse is barely palpable. Vital organ perfusion is failing.” Id.

66. Blood loss of less than 500 milliliters, or a sixth of what Ms. Robat lost, is considered within the bounds of normal delivery. Anything over 500 milliliters is considered to be a hemorrhage and requires medical attention. See e.g. KARRIE E. FRANCOIS & MICHAEL R. FOLEY, ANTEPARTUM AND
wonder where they might ever manage to find it, or if the phrase
guilt beyond a reasonable doubt has become little more than a
pious fraud in the State of Rhode Island.

This distressing undermining of many of the standards that
protect defendants from unjustified criminal liability is not even
the most troubling result of the majority’s reasoning. That title
must belong to the majority’s seeming extension of a parent’s legal
duty to protect and assist their children to a woman’s choices
about delivery and perhaps even prenatal care. If Ms. Robat’s
choices about prenatal care expose her not only to criminal
liability but to liability for murder no less, the Court has placed
itself in, as the dissent noted, “the precarious position of judging
the sufficiency of every expectant mother’s decisions about
prenatal care.” Not only that, but the Court seems to suggest
that opting for a home birth, an increasingly popular option,
may, if the Court does not find the precautions and methods
sufficient, open the expectant mother to criminal liability if
something were to go wrong. Essentially the Court’s reasoning
leads to the conclusion that Ms. Robat was guilty of murder
because she made prenatal and delivery choices that the Court felt
were inadequate, and then failed to successfully deliver a healthy
child. The only other possible conclusion is that there must have
been something Ms. Robat should have done differently during
delivery itself. The Court, “however, did not explain how a
hypothetical reasonable woman in the throes of childbirth should
have acted in the circumstances to avoid criminal liability”
especially one in the midst of a difficult and life threatening
delivery.

Postpartum Hemorrhage, in OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES
456-85 (Steven G. Gabbe M.D., Ph.D., Jennifer R. Niebyl M.D. & Joe Leigh
Simpson M.D., eds., 5th ed. 2007). The pool of blood that Ms. Robat’s sister
Marie testified to cleaning off the bathroom floor accounts, on its own, for
something like half the blood lost at the upper bounds of a normal delivery.
See Robat, 49 A.3d at 62; Nelson Awori, Primary Surgery: Trauma §52.3

67. See Robat, 49 A.3d at 86 (Flaherty, J., dissenting).
68. See id. at 80-81.
69. Id. at 88 (Flaherty, J., dissenting).
70. See Marian MacDorman, Ph.D., T.J. Mathews & Eugene Declercq,
Hyattsville, MD: National Center for Health Statistics 2012.
71. 969 N.E.2d 672, 686 (Mass. 2012).
Such a standard seems fraught with peril and more than a bit at odds with the bedrock right of people, including pregnant women, to be free of unwanted medical care. 72 Rhode Island has long recognized such a right, “however unwise his [or her] sense of values [in refusing care] may be in the eyes of the medical profession.” 73 For the Court to substitute its own judgment, presumably informed by those of medical experts, for those of Ms. Robat or other pregnant women, is to rob them of this bedrock constitutional right. Further, it raises a myriad of practical concerns. As the Massachusetts Supreme Judicial Court noted in Commonwealth v. Pugh, 74 “[w]hat constitutes reasonable conduct during labor and childbirth defies ready articulation. Women give birth alone or with others in attendance, with or without complications, and they do so in myriad circumstances, each labor and childbirth posing its own challenges. There does not appear to be any ‘one size fits all’ rule.” 75 It seems striking and rather implausible that the majority intended to eviscerate such a fundamental constitutional right and to so deeply impose its own views on the eminently personal choice of how a person should go about delivering a child with as little comment as is present in the instant case. One can only hope that such was not the Court’s intent, that in future cases the Court will reflect a bit harder when issues of such import are at hand, and that such sweeping implications are not left lurking in the margins of decisions, hanging over the heads of Rhode Islanders with whispered threats of long prison sentences. 76

72. See Cruzan v. Director, Mo. Dep’t of Health, 497 U.S. 261 (1990) (“a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment”); Eisenstadt v. Baird, 405 U.S. 438 (1972) (the Constitution protects “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).
74. Pugh was decided almost simultaneously with the instant case in which, on similar facts, the SJC overturned a conviction for involuntary manslaughter and refused to impose such a duty on a woman giving birth at home without medical attention. See Pugh, 696 N.E.2d at 694-95.
75. Pugh, 969 N.E.2d at 686.
76. Ms. Robat, pending a sentencing reduction hearing, is facing forty-five years imprisonment, twenty-five years to serve and twenty years suspended with twenty years of probation. Robat, 49 A.3d at 70.
CONCLUSION

The Rhode Island Supreme Court, with one Justice dissenting, affirmed the Superior Court’s conviction of Ms. Robat, holding that the evidence presented against her – that she did not seek medical care before, during, and immediately after delivery, that the body of the child was secreted in plastic bags in the basement, and that she was thirty years of age – could sustain inferences sufficient to find malice aforethought beyond a reasonable doubt and thus support her conviction second degree murder.

Michael DaCruz
Criminal Law. *State v. Diaz*, 46 A.3d 849 (R.I. 2012). The Rhode Island Supreme Court vacated a conviction of second-degree murder after concluding that the involuntary manslaughter instruction was inadequate because it lacked the concept of criminal negligence. After considering the typical understanding of a lay person with ordinary intelligence, the Court concluded that the facts in the case required an instruction which created a clear distinction between second degree murder and involuntary manslaughter. Additionally, the Court held, based on the evidence, that a jury could find the defendant guilty of second-degree murder beyond a reasonable doubt and affirmed the trial court’s denial of motion of judgment of acquittal.

FACTS AND TRAVEL

At approximately 9:45 p.m., on June 25, 2008, the defendant, Juan Diaz, called the Pawtucket Police Department and stated that he had “shot [his] girlfriend in the face by mistake.”1 When he was asked to clarify, the defendant responded: “It’s an accident; I shot my girlfriend in the face by mistake... she had my gun and when I took it away from her it hit her right in the face.”2 The defendant then told the dispatcher that his girlfriend was not breathing and throwing up blood.3 After further inquiry, the defendant revealed that the gun was “not around,” that the incident occurred “around three in the morning,” and that he “tried to help her” by performing CPR.4 The defendant also stated that he “didn’t know what to do,” became “nervous,” and “didn’t want to report it.”5 The defendant was later found and arrested in Albany, New York.6

At trial, the State presented testimony from eleven

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2. *Id.* at 851-52.
3. *Id.* at 852.
4. *Id.*
5. *Id.*
6. *Id.*
witnesses.\textsuperscript{7} Heather Hill, the defendant’s girlfriend\textsuperscript{8} and the first person whom the defendant contacted after the incident, was among those witnesses.\textsuperscript{9} Hill testified that the defendant called her and disclosed that he killed his ex-girlfriend; she stated:

\begin{quote}
[T]hey went to a bar to have a couple drinks, and then they went back to his house to watch a couple movies, and, while they went back to his house to watch movies, um, he had a gun, and she had the gun in her hand, and he tried to take it away from her, and he said, ‘Give me the F*** gun.’ Um, then he took the gun, and he said something happened to it, and it went off and it shot her, and it shot her, and she started throwing up. . .[h]e told me that she died in his arms.\textsuperscript{10}
\end{quote}

Hill also testified that the defendant tried to retrieve the gun after the victim put it under a pillow, that while doing so “[h]e touched something on [the gun]” and that then “[t]he gun went off.”\textsuperscript{11} The defendant further explained to Hill that the pair were arguing and that the victim was trying to “get the smiles” out of the defendant and loosen tension from the argument by playing with and hiding the gun from the defendant, but that the defendant “was scared that something could happen because [the victim] had the gun,” and thus tried to retrieve it from her.\textsuperscript{12} The defendant told Hill that he tried to give the victim CPR, after she was shot, and stated that he should have called an ambulance, but exclaimed that “when somebody dies in front of [you,] you don’t even think about a[n] . . .ambulance or anything like that. It’s what you can do at that time not to wait for no f*** ambulance and s***.”\textsuperscript{13} The defendant told Hill that he was going to New York to “see his kids before he went to jail,” but planned to tell the police what happened, pronouncing that the incident “was a f*** mistake.”\textsuperscript{14}

\textsuperscript{7} Id.
\textsuperscript{8} The testimony alludes that the defendant had multiple girlfriends, two of which included Ms. Hill and the victim. See id. at 859.
\textsuperscript{9} Id. at 855-56.
\textsuperscript{10} Id.
\textsuperscript{11} Id. at 856.
\textsuperscript{12} Id. at 857.
\textsuperscript{13} Id. at 856.
\textsuperscript{14} Id. at 856, 857. Later in the trial, another acquaintance of the
Nail Egan, an inmate at the Adult Correctional Institutions ("ACI") who came into regular contact with the defendant at the ACI, testified to a slightly different version of events.\textsuperscript{15} Specifically, Egan testified about the story which the defendant gave after being asked why he was in the ACI.\textsuperscript{16} Egan testified that, at the ACI, the defendant explained that, when at his apartment with the victim, upon realizing his gun was not in the dresser drawer, the defendant “flipped out” and began verbally and physically fighting with the victim, “slapping” her, and that “[t]hey were both beating each other up.”\textsuperscript{17} Egan further testified that the victim hid the gun “under the mattress,” but “ultimately gave [the defendant] the gun.”\textsuperscript{18} Egan testified that when the defendant retrieved the gun, “[the victim] started hitting [the defendant]. She was hitting him in the face. He pushed her away, push her away. She hit him in the face again. He shot her in the face. And he said the gun just went off.”\textsuperscript{19} Additionally, after the victim passed, the defendant “packed his bags and went to his sister’s house” and threw the gun in a dumpster on the way.\textsuperscript{20} The only witness for the defendant, Castabile Florio, saw the defendant with the victim at the bar the night of the incident and testified that she was “normal” and that they were “[h]aving a good time” and were “affectionate.”\textsuperscript{21}

David Holden, a police officer, testified that upon arriving at the scene, the victim’s body was completely cold and rigid and that he observed “what appeared to be a gunshot wound under [the victim’s] left eye,” but did not see a gun.\textsuperscript{22} Furthermore, Dr. Alexander Chirkov, the medical examiner, testified that the gun’s positioning at the time of the fatal shot could have been from a
“few inches up to . . . one, two, possibly three feet” and that it was pointed “[s]lightly down.”23 Also, Chirkov testified that effect of the gun shot would include vomiting and she would have remained alive for fifteen to twenty minutes, but had been dead between twelve and twenty-four hours.24 The examiner also noticed some bruising on the victim’s arm and foot, but there was no evidence of defensive wounds and none of her fingernails were damaged.25

At the conclusion of arguments, the defendant moved for a judgment of acquittal26 on the basis that the defendant did not commit the acts with malice aforethought, stating on appeal “[i]t was abundantly clear from all of the evidence adduced at trial that [defendant] did not intend to shoot or kill his girlfriend. . . but that the shooting was a tragic accident.”27 The defendant also objected28 to the jury instruction29 after the justice gave his

23.  Id.
24.  Id. at 853-54.
25.  Id.
26.  “The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses.” R.I. SUP. CT. R. CRIM. P. 29(a)(1).
27.  Diaz, 46 A.3d at 860-61.
28.  “The defendant’s written objection filed with respect to the involuntary manslaughter charge stated as follows: Defendant objects to the court’s charge of manslaughter and relies upon that described in State [v.] Hockenhull, 525 A.2d 926 [(R.I.1987)] … Defendant maintains that the words “criminal negligence” is what is required in a manslaughter charge.” Id. at 863-64 & n.13.
29.  The trial justice’s jury instruction concerning involuntary manslaughter read:

If, after having reviewed all the evidence, you're not satisfied beyond a reasonable doubt as to the existence of any malice on the part of the defendant, you cannot find him guilty of second-degree murder. And, it is at this point of your deliberations that you should consider whether or not the defendant committed the lesser offense of manslaughter...Generally speaking, manslaughter is the unlawful but unintentional killing of a human being without malice or premeditation. A person who recklessly does an act that results in the death of another human being is guilty of manslaughter even though he did not contemplate such a result. Nothing more is required than an intentional doing of an act which, by reason of its wanton or reckless character, exposes another person to injury, and causes injury or death.
proposed instruction and again after he instructed the jury.\textsuperscript{30} The trial justice granted the defendant’s motion of acquittal as to the first-degree murder charge, but allowed the second-degree murder, involuntary manslaughter, and use of a firearm while committing a crime of violence charges to be submitted to the jury.\textsuperscript{31} After trial, the jury found the defendant guilty of second-degree murder and using a firearm while committing a crime of violence. Diaz was sentenced to life imprisonment for each conviction.\textsuperscript{32}

Juan Diaz appealed his convictions of second-degree murder and of using a firearm while committing a crime of violence.\textsuperscript{33} The defendant first contends that the trial justice erred in failing to grant his motion for judgment of acquittal on the second-degree murder charge, asserting that the state failed to provide sufficient evidence that the defendant acted with malice during the incident which lead to the victim’s death.\textsuperscript{34} Secondly, the defendant contends that the trial justice erred in neglecting to include the concept of “criminal negligence”\textsuperscript{35} in his jury instruction concerning involuntary manslaughter; and in instead using “confusing language” that blurred the elements of involuntary manslaughter and second-degree murder.\textsuperscript{36}

\textbf{ANALYSIS AND HOLDING}

\textit{The Motion for a Judgment of Acquittal}

The Rhode Island Supreme Court applied the same standards

\begin{itemize}
\item \textit{Id.} at 863.
\item \textit{Id.}\textsuperscript{30}
\item \textit{Id.} at 860.
\item \textit{Id.}\textsuperscript{32}
\item \textit{Id.} at 851.
\item \textit{Id.}\textsuperscript{34}
\item \textit{Id.}\textsuperscript{35} Here, the Court recognized the definition of involuntary manslaughter as “an unintentional homicide without malice aforethought, committed...in the performance of a lawful act \textit{with criminal negligence}.” \textit{Id.} at 864 (quoting State v. Hockenhull, 525 A.2d 926, 929 (R.I. 1987) (emphasis added)). Moreover, criminal negligence is defined as “conduct which is such a departure from what would be that of an ordinarily prudent or careful man [or woman] in the same circumstances as to be incompatible with a proper regard for human life, or an indifference to consequences.” \textit{Id.} (quoting State v. Ortiz, 824 A.2d 473, 485 (R.I. 2003)).
\item \textit{Diaz}, 46 A.3d at 851.
\end{itemize}
as the trial court and “view[ed] the evidence in the light most favorable to the prosecution, giving full credibility to its witnesses, and drawing all reasonable inferences consistent with guilt,” and ultimately held that there was sufficient evidence to warrant a jury finding of malice aforethought and a verdict of guilt beyond a reasonable doubt.\textsuperscript{37} The defendant contends that the shooting was accidental and therefore cannot amount to legal malice without any attendant circumstances.\textsuperscript{38} In analyzing these claims, the Court defines murder, the degrees of murder, and malice aforethought.\textsuperscript{39} First, it defined murder as the “unlawful killing of a human being with malice aforethought.”\textsuperscript{40} Moreover, the Rhode Island Supreme Court has defined malice aforethought as “an unjustified disregard for the possibility of death or great bodily harm and an extreme indifference to the sanctity of human life,” arising from either an express intent to kill or to inflict great bodily harm or from “a hardness of the heart, cruelty, wickedness of disposition, recklessness of consequence, and a mind dispassionate of social duty.”\textsuperscript{41} Second-degree murder is officially defined as any murder not covered under the statute of first-degree murder.\textsuperscript{42} However the Court has recognized three distinct theories of second degree murder, including: 1) those “killings in which the defendant formed a momentary intent to kill contemporaneous with the homicide;”\textsuperscript{43} 2) killings involving “felony murder for inherently dangerous felonies that are not expressly listed within the statutory definition of first-degree murder;”\textsuperscript{44} and 3) “killings in which the defendant killed with wanton recklessness or conscious disregard for the possibility of death or of great bodily harm.”\textsuperscript{45}

\begin{flushright}
\textsuperscript{37} Id. at 860 (quoting State v. Pitts, 990 A.2d 185, 189 (R.I. 2010)).
\textsuperscript{38} Id. at 861.
\textsuperscript{39} Id. at 861-62.
\textsuperscript{40} Id. at 861. (quoting State v. Parkhurst, 706 A.2d 412, 421 (R.I. 1998)).
\textsuperscript{41} Id. at 862 (quoting State v. Texieira, 944 A.3d 132, 142 (R.I. 2008)).
\textsuperscript{42} Id. First degree murder is defined by the court as “[e]very murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing or any murder committed during the commission of certain enumerated felonies. Id. at 861 (internal quotation marks omitted).
\textsuperscript{43} Id. at 862 (quoting State v. Gillespie, 960 A.2d 969, 976 (R.I. 2008)).
\textsuperscript{44} Id. at 862 (quoting Gillespie, 960 A.2d at 976).
\textsuperscript{45} Id. (quoting State v. Delestre, 35 A.3d at 886, 900 (R.I. 2012)).
\end{flushright}
When viewing the facts in the light most favorable to the prosecution, the Court was left with the theory that the defendant pointed a loaded gun at the victim’s and did “something” which set a fatal bullet out of the gun.\(^{46}\) The Court concluded that the defendant’s conduct could be considered either a conscious disregard for human life or wanton recklessness within the logical framework of \textit{State v. Mattatall}.\(^{47}\) The Court recognized that malice can be inferred from the circumstances surrounding a killing; for example, the evidence that the defendant disposed of the weapon.\(^{48}\) Therefore, the Court concluded that the evidence could be sufficient to establish a verdict of guilty beyond a reasonable doubt and affirmed the trial justice’s decision to deny the motion for acquittal on second-degree murder.\(^{49}\)

\textit{The Jury Instruction}

The Court applied a \textit{de novo} standard in its review of the jury instruction, examining the language of the instruction in its entirety and in the context that it was rendered.\(^{50}\) In such cases, the Supreme Court will uphold the trial justice’s instruction unless it does not “adequately cover the law and neither reduce[s] nor shift[s] the state’s burden of proof.”\(^{51}\) Furthermore, even if the court were to find a jury instruction erroneous, it must only reverse the instruction if it could have “misled to the prejudice of the complaining party.”\(^{52}\) The Court held that while trial justices are “not required to use any specific words or phrases when instructing the jury,” the given instructions must still adequately cover the law.\(^{53}\) Particularly, the Court held, in the instant case, the trial justice committed a reversible error in failing to include an “adequate reference” to criminal negligence when instructing

\(^{46}\) \textit{Id.}

\(^{47}\) \textit{Id.} at 862-63. (citing \textit{State v. Mattatall}, 603 A.2d 1098, 1107 (R.I. 1992)). In \textit{Mattatall} the Court concluded that the defendant’s act of aiming a gun at a person’s face, similar to Diaz’s conduct, constituted the recklessness required for malice aforethought. 603 A.2d at 1107.

\(^{48}\) \textit{Diaz}, 46 A.3d at 863.

\(^{49}\) \textit{Id.}

\(^{50}\) \textit{Id.} at 860-61.

\(^{51}\) \textit{Id.} at 861 (quoting \textit{State v. Payette}, 38 A.3d 1120, 1124 (R.I. 2012) (internal quotation marks omitted)).

\(^{52}\) \textit{Id.}

\(^{53}\) \textit{Id.} at 865 (citation omitted).
on involuntary manslaughter.\textsuperscript{54}

Here, the defendant argued that the trial justice erred by omitting the term “criminal negligence,” and instead using the phrase “wanton or reckless,” in the jury instruction for involuntary manslaughter.\textsuperscript{55} The defendant contended that the misleading language of the instruction made it impossible for the jury to draw a distinction between second-degree murder and involuntary manslaughter.\textsuperscript{56} The State argued that the Court should apply the reasoning in \textit{State v. Hallenbeck}, which affirmed an involuntary manslaughter charge in which the instruction included the phrase “wanton or reckless.”\textsuperscript{57} Pursuant to these arguments, the Court agreed with the defendant.\textsuperscript{58} The Court considered the rule set in \textit{State v. Hockenhull}, along with the fact that the defendant properly objected to the trial justice’s proposed jury instruction\textsuperscript{59} and concluded that the trial justice should have included the concept of criminal negligence in the charge.\textsuperscript{60}

Moreover, the Court concluded that, based on the specific facts of this case, a jury of ordinary intelligence would not have understood the distinction between the terms “rash” and “unjustified” as the trial justice used to describe malice and

\textsuperscript{54} Id.
\textsuperscript{55} Id. at 863.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 863-64 (arguing that holding in \textit{Hallenbeck} serves as an “explicit approv[all]” of the adequacy of “wanton or reckless” in involuntary manslaughter instructions); \textit{See also} \textit{Hallenbeck}, 878 A.2d 992, 1009 (R.I. 2005).
\textsuperscript{58} \textit{Diaz}, 46 A.3d at 865. The Court rejected the State’s argument by distinguishing \textit{Hallenbeck} from the case before them, specifically stating that the \textit{Hallenbeck} ruling controlled only in the circumstances of that case. \textit{Id.} at 864 (stating, “in the instant case, we are presented with an issue that is entirely different from that which was presented in \textit{Hallenbeck}; and, therefore, our holding in that case is not controlling with respect to the case at bar”). The court further distinguished \textit{Hallenback} by observing that at no time during that case did the Court address the inclusion of “criminal negligence” in an involuntary manslaughter instruction. \textit{Id.} at 864-65. Instead, the Court applied, \textit{Hockenhull}, the case mentioned by the defendant in his written objection to the trial justice’s proposed instruction and found that Rhode Island law “has made it very clear that involuntary manslaughter includes the concept of criminal negligence.” \textit{Id.} at 865.
\textsuperscript{59} Diaz’s counsel specifically objected because the involuntary manslaughter instruction lacked the involuntary manslaughter language from \textit{Hockenhull}. \textit{Id.} at 865.
\textsuperscript{60} \textit{Id.}
“wanton or reckless character” which he used to explain involuntary manslaughter.  In doing so, the Court reinforced previous warnings that when giving criminal negligence instructions, trial justices “should avoid the use of such terms as ‘wanton recklessness’ and ‘willful disregard’ of the harmful consequences because such a state of mind goes beyond negligence,” and satisfies the element of which is necessary for a murder conviction. Specifically, the Court noted that even if there is a legal distinction between specific language of an instruction, this distinction must also be understandable for a lay person of ordinary intelligence. Thus, the Court concluded that, in this case, the trial justice should have included the concept of criminal negligence in the involuntary manslaughter instruction in order to create a distinct and separate instruction from the instruction given for second-degree murder.

**COMMENTARY**

It is still unclear to what extent this holding creates a precedent which trial justices must follow when giving involuntary murder instructions. While the Court reaffirmed its own rule in *Hockenhull*, which established that an involuntary manslaughter charge includes in the concept of criminal negligence, it also recognized that trial justices are not required to use specific words or phrases in their instructions (so long as the law is adequately covered). Additionally, the Court avoided application and review of *Hallenbeck*, which affirmed a manslaughter instruction that did not include the concept of criminal negligence, but instead used language such as “wantonly or recklessly.” Furthermore, the language of this case suggests that the Court did not plan to create an overreaching rule for involuntary manslaughter instructions.

61. Id. at 865-66.
62. Id.
63. Id. at 866 (quoting State v. Robbio, 526 A.2d 509, 514 & n.2 (R.I. 1987)).
64. Id.
65. *Hockenhull*, 525 A.2d at 929.
67. *Diaz*, 46 A.3d at 864; *Hallenbeck*, 878 A.2d. at 1005, 1009.
68. See id. (holding, “in light of the facts of the instant case, the trial justice... committed a reversible error in failing to include an adequate
While the impact that this ruling may have on trial justices remains uncertain, it is distinctively clear how defense attorneys should respond to the holding and analysis of this case. First, defense attorneys should ask for involuntary manslaughter instructions which include the concept of “criminal negligence.” Second, it is imperative that defense attorneys object when trial justices give involuntary manslaughter instructions which lack the concept. In this case, the Court made it clear that criminal negligence should have been included in the defendant’s involuntary manslaughter charge not only because of the rule in Hockenhull, but also because the defendant requested the language from Hockenhull (specifically, the concept of criminal negligence) in his objections after the proposed and actual instructions to the jury.69

This theory is reaffirmed when analyzing the recent Rhode Island Supreme Court case, Hallenbeck.70 Here, the State was not misguided in attempting to use Hallenbeck to support its argument in Diaz. Hallenbeck is very similar to Diaz in many aspects,71 yet the court still ruled that Hallenbeck was not controlling in the instant case.72 The Court’s reasoning lay entirely in the divergent questions at issue in the Hallenbeck.73 In fact, Hallenbeck does differ from Diaz in one major aspect: the

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69. Id. at 865.
70. In Hallenbeck, the Court upheld an involuntary manslaughter instruction which included “wanton” and “reckless.” 878 A.2d at 998.
71. Like in Diaz, in Hallenbeck the trial justice also gave a jury instruction on involuntary manslaughter which did not include the concept of criminal negligence but read, “[a] person who wantonly or recklessly does an act which results in the death of another human being is guilty of manslaughter.” See Diaz, 46 A.3d at 864; Hallenbeck, 878 A.2d at 1005. Furthermore, when examining the trial justice’s instruction, in Hallenbeck, the Rhode Island Supreme Court quoted Hockenhull’s definition of involuntary manslaughter, including the concept of criminal negligence, just as it did in Diaz. Diaz, 46 A.3d at 864; Hallenbeck, 878 A.2d at 1005.
72. Diaz, 46 A.3d at 864.
73. Id. Additionally, the Court in Hallenbeck likely would have applied the Hockenhull rule if a criminal negligence objection had been made since, when examining the instruction in Hallenbeck, the Court quoted Hockenhull’s definition of involuntary manslaughter. Hallenbeck, 878 A.2d. at 1008.
defense attorney’s use of objections to the jury instruction. Unlike defense counsel in this case, the defendant in Hallenbeck made two main mistakes. First, he waived his objections to the jury instruction by stating that he had no objection to the trial justice’s supplemental instruction, and thus, the Court could not consider the issues. 74 Second, the defendant never raised the issue of criminal negligence, but merely asked the trial justice to define “wanton” and “reckless.” 75 The defendant in Diaz, on the other hand, requested the concept of criminal negligence and objected before and after the instruction went to the jury. Therefore, even if this case does not serve as a mandatory guideline for involuntary manslaughter charges, it certainly carries procedural importance for defense attorneys. If the concept of criminal negligence is not brought up through a request or an objection, the Court will not address the question of whether it needs to exist in an involuntary manslaughter instruction to be proper. Thus, for the purposes of appellate review, a defense attorney, at trial, should always request that the concept of criminal negligence be included in involuntary manslaughter instructions and object when it is not. 76

CONCLUSION

The Rhode Island Supreme Court affirmed the trial justice’s denial of the defendant’s motion for judgment of acquittal, but vacated the judgment of conviction against the defendant based on the inadequate involuntary manslaughter instruction and remanded for a new trial. 77 The Court reasoned that there was sufficient evidence for a jury to conclude that the defendant acted with malice, but that the jury instruction, which lacked the concept of “criminal negligence,” failed to adequately distinguish a second-degree murder charge from an involuntary murder charge.

74. Hallenbeck, 878 A.2d at 1009.
75. Id.
76. However, even if the Court concludes that an instruction was erroneous, the Court must still undergo analysis as to whether the instruction was prejudicial on a case-by-case basis.
77. Diaz, 46 A.3d at 866.
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Alyse E. Galoski
Criminal Law. State v. Quattrucci, 39 A.3d 1036 (R.I. 2012). The Rhode Island Supreme Court holds that an arrestee is entitled to a confidential phone call when charged with the civil violation of refusing to submit to a chemical test. However, the defendant’s rights in this case were not violated because the purpose of the confidential call must be to call an attorney or to obtain bail and if an arrestee makes a call for any other purpose, as the defendant here did, he or she is not entitled to confidentiality.

FACTS AND TRAVEL

According to the record, defendant, Lewis Quattrucci, was pulled over by Warren police for driving at a high rate of speed and crossing over the yellow line twice. Upon detecting an odor of alcohol and other signs that he was impaired, the officer administered two sobriety tests, both of which Mr. Quattrucci failed. On the scene, Mr. Quattrucci refused to submit to a preliminary breathalyzer test and was placed under arrest for a DUI. Officer Bryant testified that he read Mr. Quattrucci his rights at the scene.

Subsequently, at the police station, Officer Bryant read Mr. Quattrucci his rights again and the officers offered Mr. Quattrucci an opportunity to use the telephone in accordance with R.I. Gen. Laws §12-7-20 which provides any arrested person the opportunity to make a telephone call for the purpose of securing an attorney or arranging bail. In pertinent part, the statute

2. Id.
3. Id.
4. Id.
5. Id. R.I. Gen. Laws §12-7-20 reads:

Any person arrested under the provisions of this chapter shall be afforded, as soon after being detained as practicable, not to exceed one hour from the time of detention, the opportunity to make use of a telephone for the purpose of securing an attorney or arranging for bail; provided, that whenever a person who has been detained for an alleged violation of the law relating to drunk driving must be

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reads, “[t]he telephone calls afforded by this section shall be carried out in such a manner as to provide confidentiality between the arrestee and the recipient of the call.”

According to the testimony of Officer Bryant, Mr. Quattrucci stated that he wanted to make a call but when asked if he wanted the call to be confidential, Mr. Quattrucci “stated that he didn’t care.” Mr. Quattrucci went on to make several calls while both officers remained in the room and well within earshot. According to the testimony of Officer Bryant, Mr. Quattrucci called his friend to pick him up and tried to reach his girlfriend but was unsuccessful. After making these calls, Officer Bryant asked Mr. Quattrucci if he wanted to take a chemical test and Mr. Quattrucci refused and signed the “Rights For Use At Station” form under the line stating: “I acknowledge that the above rights have been read to me. I REFUSE to take a chemical test at the officer’s request.” At this point, Mr. Quattrucci became subject to an additional civil charge for the refusal.

At the close of his Traffic Tribunal hearing, Mr. Quattrucci asked that his case be dismissed on the grounds that he was denied a confidential phone call in violation of §12-7-20. The Magistrate dismissed the refusal charge, concluding that when an arrestee elects to make a phone call, it must be confidential. The appeals panel affirmed dismissal. The state then filed an administrative appeal in district court and the district court affirmed the appeals panel’s decision. On March 12, 2012, the

immediately transported to a medical facility for treatment, he or she shall be afforded the use of a telephone as soon as practicable, which may exceed one hour from the time of detention. The telephone calls afforded by this section shall be carried out in such a manner as to provide confidentiality between the arrestee and the recipient of the call.

R.I. GEN. LAWS §12-7-20

6. Id. at 1041 (quoting R.I. GEN. LAWS §12-7-20).
7. Id. at 1038.
8. Id.
9. Id. at 1038.
10. Id.
11. Id. at 1042.
12. Id. 1039.
13. Id.
14. Id. at 1039.
15. Id. at 1040.
state filed a petition for writ of certiorari which was granted by the Rhode Island Supreme Court.\textsuperscript{16}

\textbf{ANALYSIS AND HOLDING}

The Supreme Court’s review on writ of certiorari is limited “to examining the record to determine if an error of law has been committed.”\textsuperscript{17}

The court first examines whether the right to confidential telephone call under §12-7-20 applies in the context of a civil violation proceeding.\textsuperscript{18} The court concludes that Mr. Quattrucci was entitled to a call under §12-7-20 regardless of whether the statute applies to civil charges because he had also been arrested for a DUI, a criminal charge.\textsuperscript{19} His subsequent civil charge did not take away that right. “The fact that he subsequently refused to submit to a chemical test, thereby becoming subject to an additional civil charge, did not vitiate his right to make a telephone call in the first instance.”\textsuperscript{20}

However, the court goes on to state that if Mr. Quattrucci had been charged only with the civil charge of refusal, he would still have the right to a confidential call.\textsuperscript{21} In doing so, the Court reaffirms its holding in \textit{State v. Carcieri}\textsuperscript{22} and extends the rational to the context of a civil refusal to take a breathalyzer charge.\textsuperscript{23} “It is clear that the Legislature in enacting §12-7-20 intended that a DUI suspect must be afforded an opportunity to exercise the rights contained therein. Accordingly, we find that §12-7-20 mandates that a police officer not only provide notice of a suspect’s right to a confidential telephone call, but also a reasonable opportunity to speak privately with the recipient of the call, if the call was made for the purpose of securing an attorney”.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} \textit{Id.} (citing State v. Santiago, 799 A.2d 285, 287 (R.I. 2002)).
\item \textsuperscript{18} \textit{Id.} at 1040.
\item \textsuperscript{19} \textit{Id.} at 1042
\item \textsuperscript{20} \textit{Id.} at 1042.
\item \textsuperscript{21} \textit{Id.} at 1040-42.
\item \textsuperscript{22} 730 A.2d 11 (R.I. 1999).
\item \textsuperscript{23} \textit{Id.} (“[T]his court previously has addressed §12-7-20 as it relates to an arrestee who subsequently is charged with the criminal offense of a DUI ... Although the case under review arises in the context of a civil violation, we find the reasoning in \textit{Carcieri} to be persuasive.”)
\item \textsuperscript{24} \textit{Id.} at 1043 (quoting \textit{Carcieri}, 730 A.2d at 16).
\end{itemize}
Establishing that Mr. Quattrucci had a right to a confidential call, the court next considers whether the Warren police violated that right. The Court concludes that the right to confidentiality only attaches when the call is to an attorney or for the purposes of securing bail. Since Officer Bryant testified that the defendant called a friend and his girlfriend and Mr. Quattrucci offered no evidence that he called an attorney or made a call for the purposes of securing bail, the Traffic Tribunal committed an error of law in ruling that defendant’s rights were violated under §12-7-20. The Court remanded the case to district court for further proceedings.

COMMENTARY

The Supreme Court ultimately decided this case based on the fact that the arrestee was not entitled to confidentiality because the purpose of his call was not to speak with his attorney or to secure bond. However, this case is important from a public policy standpoint because it established that an arrestee charged with the civil charge of refusal to take a chemical test does have the right to a confidential phone call for the purposes of speaking with his attorney or securing bail. It is notable that the Supreme Court chose to consider that issue when it seems they could have avoided that question and relied on the fact that Mr. Quattrucci was entitled to a call because he was also charged with the criminal charge of DUI. I think the Court’s holding was correct especially in light of the fact that the civil charge of refusal carries a substantial penalty which includes the loss of a citizen’s driver’s license. When the state institutes penalties that have a

25. Id.
26. Id.
27. See id.
28. Id. at 1036.
29. R.I. GEN. LAWS § 31-27-2 (b) provides in part:

If a person having been placed under arrest refuses upon the request of a law enforcement officer to submit to the test, as provided in § 31-27-2, none shall be given, but a judge of the traffic tribunal or district court judge ... shall promptly order that the person’s operator’s license or privilege to operate a motor vehicle in this state be immediately suspended and that the person’s license be surrendered within five (5) days of notice of suspension. A traffic tribunal judge or a district court judge pursuant to the terms of subsection (c) of this section shall order as follows: (1) Impose for the
significant impact on a citizen’s ability to live and work, the state should err towards providing greater legal protections. The court relies on the language of §12-7-20 which makes reference to a “DUI suspect” which suggest that this ruling does not mean all people charged with a civil charge are entitled to a confidential phone calls. Rather, it applies only to those charges related to drunk driving.

**CONCLUSION**

The court finds that the Traffic Tribunal made an error of law by dismissing Mr. Quattrucci’s charge because §12-7-20 provides a confidential phone call for the purpose of contacting an attorney or securing bail and Mr. Quattrucci did not present any evidence that he sought to do either of those things. However, the Rhode Island Supreme Court held that when a citizen is arrested on a civil charge of refusal to submit to a chemical test, he or she is entitled to a confidential phone call for the purposes of contacting an attorney or securing bail.

Katie Nee

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R.I. GEN. LAWS § 31-27-2 (b).

30. *Id.* at 1041.

31. *Id.* at 1043.
Criminal Law. *State v. Lopez*, 45 A.3d 1 (R.I. 2012). The Rhode Island Supreme Court upheld a first-time criminal offender’s conviction of first-degree murder and sentence to life imprisonment with no possibility of parole. The Court held that the admission of the defendant’s prior violent acts against the victim was not improper and that the instructions to the jury on its entitlement to give whatever weight to witness testimony it so chose was adequate. Further, the Court held that although the admission of a DNA allele table was “testimonial” for Confrontation Clause purposes, the defendant’s confrontation rights were not violated because of the opportunity to cross-examine the expert who certified the underlying DNA testing and whose independent analysis produced the allele table.

FACTS AND TRAVEL

On August 29, 2007, the defendant, Hamlet M. Lopez, was indicted by a grand jury for the murder of his former girlfriend Miledis Hilario ("Hilario"), and the state subsequently sought a sentence of life without parole pursuant to section 11-23-2(4) of the Rhode Island General Laws.\(^1\) Prior to trial, the defendant made a motion *in limine* to exclude evidence of the defendant’s prior acts of violence against Hilario and Ruth Estrella, also a former girlfriend of defendant and mother of one of his sons.\(^2\) The state only sought to introduce evidence of three incidents between

1. *State v. Lopez*, 45 A.3d 1, 4 (R.I. 2012). Life without the possibility of parole is the most extreme sentence in Rhode Island and is to be reserved for a “narrow class of the most heinous crimes.” *Id.* at 26 (quoting *State v. Mlyniec*, 15 A.3d 983, 1003 (R.I. 2011)). The statute states in relevant part:

   Every person guilty of murder in the first degree shall be imprisoned for life. Every person guilty of murder in the first degree. . . (4) committed in a manner involving torture or an aggravated battery to the victim. . . . shall be imprisoned for life and if ordered by the court pursuant to chapter 19.2 of title 12 that person shall not be eligible for parole from imprisonment. Every person guilty of murder in the second degree shall be imprisoned for not less than ten (10) years and may be imprisoned for life.

   R.I. GEN. LAWS § 11-23-2(4).

the defendant and Hilario. The Court excluded evidence of a November 11, 2006 event, but found that two incidences in May 2007, the same month as the murder, would be permissible pursuant to Rule 404(b) of the Rhode Island Rules of Evidence.

On September 17, 2008, the defendant’s jury trial in Superior Court commenced, in which evidence of the relationship and prior violent acts between the defendant and Hilario were adduced. The defendant and Hilario began dating in late 2005, and a few months later the defendant began living with Hilario and her youngest daughter, Miledy Urena (“Miledy”), at 42 Courtland Street in Providence. Miledy testified about how the couple’s deteriorating relationship ended after a physical altercation in early May 2007. Miledy testified that on May 18, 2007, her mother said that the defendant had been over Hilario’s house and that he broke Hilario’s bed and harassed her. The police were called to the scene, interviewed Hilario, Keyla Urena (“Keyla”) (Miledy’s older sister), and Miledy, who testified that the “mattress was stabbed up.”

On May 20, 2007, Miledy was dropped off at work by her mother who was also supposed to pick her up after her shift; however, since Hilario never arrived to pick up Miledy, she received a ride from Keyla. Later on, Miledy received an
“anxious” call from her aunt, Cruz Gonzalez, prompting Miledy to hurry to the Courtland house and call the police exclaiming, “[t]hey gonna kill her, please.” When Miledy arrived at the house, she saw her mother lying “[f]ace up’ on the floor, bleeding,” and the rescue crew that was called pronounced Hilario dead at the scene. The first officer on the scene indicated that there “appeared . . . [to] have been a struggle” inside the house. A police detective later seized various items near the crime scene at the Courtland street house, but was not able to retrieve any identifiable fingerprints. The assistant medical examiner who conducted the autopsy of the decedent testified that there were forty stab wounds, including multiple defensive wounds to the hands and arms, on the decedent’s body which had been inflicted with a sharp-bladed instrument. The examiner determined that “the cause of death [was a] stab wound to the . . . torso, and [the] manner of death [was] homicide.”

The defendant was discovered later that evening in his garage in his home at 39 Bellevue Avenue wearing clothes that appeared to have “dried blood” and “other debris” on them. The defendant was arrested and his clothes were seized. In addition to the defendant’s clothes, police sent a blood sample from the decedent, oral swabs from the defendant, and swabs from two knives seized at the crime scene to the Rhode Island Department of Health and Biology Laboratory for DNA testing and analysis. Testimony from various witnesses at trial established that the defendant had placed several phone calls on the night the murder took place.

proceeded to Marisol’s. Id.

11. Id. at 6-7.
12. Id. at 7.
13. Id. The officer noted that a table top had been knocked over, papers were scattered, and there were blood spatters on the carpet. Id.
14. Id. at 8. Some of the evidence seized included: a large blood-stained kitchen knife found near Hilario’s body, a rinsed off serrated steak knife found in the bathroom sink, and a knife found in a strainer in the kitchen pantry. Id.
15. Id. at 8-9. The examiner stated that Hilario would have been consciously aware of the pain from these injuries prior to her death. Id. at 9.
16. Id.
17. Id. at 8.
18. Id.
19. Id.
20. Id. at 7. Marte and Gonzales had been in the same room during
At trial, the state introduced evidence obtained from the testing and analyses of the samples seized from the crime scene, the decedent, and the defendant. A senior forensic scientist at the Rhode Island Department of Health Forensic Biology Laboratory explained the general procedures for receiving and testing DNA evidence, including the contracting of certain testing with Orchid Cellmark (“Cellmark”) of Dallas, Texas. Later, Matthew Quartaro, a supervisor at Cellmark, testified as an expert, over defendant’s objections, on the results of the DNA testing. Although never having personally observed any of the analysts, nor having performed any of the preliminary steps, Quartaro was allowed to testify about Cellmark’s “team format” approach to DNA cutting, extraction, quantification, and polymerase chain reaction (“PCR”) testing in order to generate a DNA profile. Despite never physically touching any of the evidence, Quartaro testified that he had been “involved in the entire process” through other means, explaining that he had analyzed the DNA profiles that had been created and was able to prepare a report based on his findings. From Quartaro’s report, only an allele table, which contained the numerical data matches from the tested samples, was introduced into evidence. Quartaro concluded to a “reasonable degree of scientific certainty,” that several of the DNA samples extracted from defendant’s clothing matched the DNA profile of Hilario.

Id. Marte testified that defendant state three times he had killed Hilario. Id. Gonzales testified that defendant said “he was going to finish with all [her] family.” Id. The defendant’s son, Emmanual Lopez Sanchez stated that the defendant said over the phone that: “I killed my girlfriend. I killed my girlfriend. I’m going to kill myself.” Id. at 7-8.

21. Id. at 10-11.
22. Id. at 9.
23. Id. at 10.
24. Id. at 10-11. Extraction is the separating out of the DNA to be used for testing. Id. at 10. PCR testing produces copies of the extracted DNA regions. Id. Genetic markers, whose size variances are used for identification purposes, found at these regions are amplified and analyzed using computers in order to create a DNA profile. Id.
25. Id. at 10-11.
26. Id. at 11.
27. Id. Although one of the swabs indicated a profile to have “originated from at least one unknown individual,” Quartaro testified that the probability of another individual besides Hilario matching the profiles found on the
After the close of evidence, the trial justice gave the jury an array of instructions, including an instruction on prior inconsistent statements. On October 1, 2008, the jury returned a guilty verdict of murder in the first degree, and later that such murder involved torture and aggravated battery. On January 16, 2009, the trial justice conducted a sentencing hearing at which various individuals advocated for different degrees of punishment, counsel for both parties argued, the defendant made a statement, and letters submitted on behalf of the defendant were read. The trial justice sentenced the defendant to life imprisonment without parole, to which the defendant timely filed a notice of appeal. Defendant’s appeal was delayed pending the outcome of the United States Supreme Court’s decision in Bullcoming v. New Mexico.

ANALYSIS AND HOLDING

The defendant asserted a variety of errors on appeal, each of which was addressed individually by the Rhode Island Supreme Court.

Confrontation Clause

The defendant argued that his rights to confrontation under the Sixth Amendment and section 10 of the Rhode Island Constitution were violated by the admission of Quartaro’s swabs from the knife and the defendant’s clothes to be one in 11.42 quadrillion. The jury instruction concerning the credibility of witnesses read as follows:

You may consider the presence of corroborating or contradictory evidence as well as any consistencies or inconsistencies between what was testified to by a witness during the trial and what that witness may have said at an earlier time. A witness’s prior statements may be accorded whatever evidentiary weight you feel they deserve.

Id.

28. Id. at 22. The jury instruction concerning the credibility of witnesses read as follows:

Id.

29. Id. at 9.
30. Id. at 24.
31. Id. at 9.
32. Id.
33. 131 S.Ct. 2705 (2011).
testimony regarding the results of the DNA analyses.\textsuperscript{34} Specifically, the defendant argued that cross examining Quartaro was an “insufficient substitute for his right to confront all the intervening analysts who performed the preliminary stages of the DNA testing.”\textsuperscript{35} Incorporating recent analyses by the U.S. Supreme Court, specifically \textit{Bullcoming}, the Court explained that the Sixth Amendment permits the admission of “[t]estimonial statements of witnesses absent from trial . . . only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross examine.”\textsuperscript{36} Additionally, the Court stated that a “document created primarily or ‘solely for an ‘evidentiary purpose,’ . . . made in aid of a police investigation, ranks as testimonial.”\textsuperscript{37}

\textbf{Quartaro’s Testimony}

Conducting a \textit{de novo} review of the mixed questions of law and fact involving constitutional rights, the Court distinguished the testimony of Quartaro from the inadequate witness in \textit{Bullcoming} that had “no connection” to the report that the witness testified about.\textsuperscript{38} The Court held that because Quartaro personally reviewed and analyzed the raw data in order to articulate his own conclusions (which are the statements at issue) that Quartaro was the “very witness that the Supreme Court deemed necessary in \textit{Bullcoming}.”\textsuperscript{39} Further, the Court found that because Quartaro could testify about the process employed for DNA testing in this case that he could be “meaningfully cross-examined on the general and specific risks of error in forensic testing.”\textsuperscript{40}

\textsuperscript{34} Lopez, 45 A.3d at 11.
\textsuperscript{35} Id. at 13.
\textsuperscript{36} Id. at 12 (quoting Crawford v. Washington, 541 U.S. 36, 59 (2004)).
\textsuperscript{37} Id. (quoting \textit{Bullcoming}, 131 S.Ct. at 2717).
\textsuperscript{38} Id. at 13.
\textsuperscript{39} Id. at 13-14.
\textsuperscript{40} Id. at 15. The Court explained that cross-examination does not have to be able to address every possible risk of bias or error in order to be sufficient. Id. at 16. Further, citing the U.S. Supreme Court, the Court affirmed that the “Confrontation Clause does not mandate ‘that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case.’” Id. (quoting Melendez-Diaz v.
Admission of Allele Table

Turning to the allele table created by Quartaro, the Court discussed how various courts analyzed similar tables’ testimonial character.\(^{41}\) Once again, the Court reviewed the mixed questions of law and fact involving constitutional rights \textit{de novo}.\(^{42}\) Finding that creating the allele table required the use of Quartaro’s scientific expertise and supplemental independent interpretation of the results produced by his subordinates’ testing, the Court held that the raw data was transformed into testimonial statements subject to the Confrontation Clause.\(^{43}\) However, because the table was “solely” the product of Quartaro’s analysis, the Court held that the defendant’s ability to cross-examine Quartaro satisfied the Confrontation Clause’s requirements.\(^{44}\)

Prior Acts Evidence

The defendant contended that the admission of two prior acts of domestic violence against Hilario both occurring in the same month as the murder was in error because it was either “insufficiently relevant” and unnecessary to prove motive or intent to kill,” unfairly prejudicial under Rhode Island Rule of Evidence 403, or even if evidence of some prior wrongs was admissible, that the state went too far with the evidence in its case.\(^{45}\) Reviewing the admission of evidence under an abuse of discretion standard, the Court found that the defendant’s prior conduct was “integrally related” and “interwoven” with defendant’s motive to murder because the incidences were close in time, involved the same parties, the same place, and the last incident (the stabbing of Hilario’s bed) involved the “same or similar instrumentality” that was used in the murder.\(^{46}\) The Court concluded that the prior

\(^{41}\) Id. at 17-19. Some courts have found that the allele table was “nothing more than raw data produced by a machine.” \textit{Id.} at 18 (quoting United States v. Summers, 666 F.3d 192, 202 (4th Cir. 2011)). Other courts have found that an allele table is not “wholly machine-generated.” \textit{Id.} (citing Derr v. State, 29 A.3d 533, 541 (Md. 2011)).

\(^{42}\) Id. at 13.

\(^{43}\) Id. at 19.

\(^{44}\) Id. at 20.

\(^{45}\) Id.

\(^{46}\) Id. at 21.
events had “culminated in the gruesome murder of Hilario” and therefore, the “high probative value clearly outweighed any potential for unfair prejudice.”

Jury Instructions on Prior Inconsistent Statements

The defendant contended that the failure to use the defendant’s proffered instruction on inconsistent statements had the implication of restricting the jury to decide “which version of the witnesses’ testimony to credit,” rather than entitling the jury to reject the testimony altogether. Reviewing the jury instructions de novo, the Court held that there was no error in the instruction because in its entirety the instruction “explicitly informed the jury that it was entitled to give a witness’s testimony no weight at all, it so chose.” The Court noted that the trial justice followed the challenged written instruction with an adequate verbal directive to the jury regarding its role as the “sole arbiter of the credibility of witnesses.”

Life Sentence Without Parole

Pursuant to R.I. Gen. Laws § 12-19.2-5 the Supreme Court has the authority to review de novo the appropriateness of life sentences without parole. The trial justice questioned the capacity to rehabilitate the defendant finding that he was manipulative and out to “con the system.” The defendant asserted that his standing in the community, past good deeds, and the fact that he was a first time offender militate towards a

47. Id. Additionally, the Court noted that the risk of unfair prejudice was reduced because of efforts by the trial justice to exclude a more remote incident of violence and the use of limiting instruction to the jury. Id. at 21-22.
48. Id. at 22. The defendant had objected to the trial justice’s written jury instruction concerning the credibility of the witness. Id. The objected to instruction is contained in footnote 28.
49. Id. at 22-23.
50. Id. at 23. The trial justice’s verbal directive stated in relevant part: “You are the sole judges of the credibility of witnesses and of the weight which you will give the testimony of each witness. After making your own judgment, give the testimony of each witness such weight, if any, as you think it deserves.” Id.
51. Id. at 23-24.
52. Id. at 25.
Notwithstanding the defendant’s pleas, noting the brutality of the crime and the defendant’s lack of remorse, the trial justice concluded that life without parole was justified. The Court agreed with the trial justice that the defendant’s “essential character is one of violence” and that any mitigating factors were insufficient to reduce the sentence for the defendant’s “monstrous crime.”

Justice Flaherty dissented from the majority solely on the imposition of the life sentence without parole. Justice Flaherty pointed to the lack of any prior criminal convictions, defendant’s position in the community, and the large amount of letters sent on the defendant’s behalf as strong factors against imposing the most severe sentence in the state. Additionally, Justice Flaherty stated that the parole board would be able to adequately assess the defendant’s ability to return to society when the defendant would become parole eligible.

COMMENTARY

This case determined both a critical legal issue (Confrontation Clause) and an issue, though guided by principles of law, which more deeply implicates the human dimension of our criminal justice system (life without parole).

Confrontation Clause

In light of the centrality of the Confrontation Clause issue to defendant’s case, the defendant’s appeal was delayed pending the outcome of the United States Supreme Court’s decision in Bullcoming. In Bullcoming, the Supreme Court held that the lack of testimony by the witness who certified an inculpatory blood-alcohol analysis violated the Confrontation Clause and that

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53. Id. at 23.
54. Id. at 26-27.
55. Id. at 27.
56. Id. at 27. (Flaherty, J., dissenting).
57. Id. at 28 (Flaherty, J., dissenting).
58. Id. The defendant would not become eligible until his mid-seventies, and even then, could only be released on parole by a unanimous vote of the parole board. Id.
59. Id. at 9.
60. 131 S.Ct. 2705.
the report, which was produced after the defendant was in custody, was testimonial in nature.\textsuperscript{61} Incorporating key elements of the \textit{Bullcoming} analysis, the Rhode Island Supreme Court likely adequately distinguished \textit{Lopez} from \textit{Bullcoming}.\textsuperscript{62} Unlike the non-certifying witness in \textit{Bullcoming} that was not involved in any part of the analysis at issue in the case, Quartaro not only had knowledge of how each of the procedures employed were to be performed, but directed specific analysts to perform testing, reviewed their work to ensure proper protocols were followed, and indeed, as supervisor, certified the work.\textsuperscript{63} Further, the U.S. Supreme Court’s decision in \textit{Williams v. Illinois}\textsuperscript{64} indicates that the R.I. Supreme Court likely was correct in finding the testimony of Quartaro and the introduction of the allele table were both proper.

Here, Quartaro’s intimate knowledge of the testing procedures and independent analysis of the data in question bolstered his adequacy as a sufficient witness for Confrontation Clause purposes. The \textit{Williams} plurality suggests that the testimony of the proper certifying witness may be sufficient in itself to satisfy the Confrontation Clause because of the defense’s ability to surmount its own independent attack on the credibility of a particular DNA analysis.\textsuperscript{65} However, lower courts may eschew from adopting a bright-line, certified-uncertified distinction and may begin to produce varying tests to determine the sufficiency of the certifying witness. Emphasis may be placed on multiple factors including the certifying witness’s particular expertise and its relation to the underlying analysis, the complexity of the procedures employed, the number of individuals who took part in the procedures, and the interconnected nature of

\textsuperscript{61} Id. at 2716-17.

\textsuperscript{62} See \textit{Lopez}, 45 A.3d at 14 (quoting \textit{Bullcoming}, 131 S.Ct. at 2710 (“The accused’s right is to be confronted with the analyst who made the certification. . .”)).

\textsuperscript{63} \textit{Lopez}, 45 A.3d at 15; \textit{see Bullcoming}, 131 S.Ct. at 2715.

\textsuperscript{64} See 132 S.Ct. 2221, 2227-28 (2012). This case was decided six months after \textit{Lopez}.

\textsuperscript{65} \textit{ See id.} at 2228 (holding that introduction of DNA analysis would not have Confrontation Clause violation “will not prejudice any defendant who really wishes to probe the reliability of DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial.”)
their work to the overall product.

Additionally, the Williams plurality implies the adoption of a more relaxed attitude towards the introduction of DNA evidence produced by reliable laboratories, indicating that the R.I. Supreme Court was likely proper in allowing the introduction of Quartaro’s allele table.\textsuperscript{66} Thus, the Williams plurality highlights that the R.I. Supreme Court’s holding in Lopez rested comfortably within the newly contoured parameters of the Supreme Court’s Confrontation Clause jurisprudence.\textsuperscript{67} However, subsequent cases will certainly test the bounds of these new contours and what, if any, different safeguards may be necessary both within and outside of the realm of DNA profiling.\textsuperscript{68}

Indeed, Justice Kagan’s dissent in Williams pointed out the danger of a defendant not being able to confront the particular analyst who performed DNA testing.\textsuperscript{69} Justice Kagan discussed a California case in which a DNA analyst had testified on direct that a DNA sample from a rape victim was a direct match to the defendant.\textsuperscript{70} However, only after having been cross-examined, the analyst realized she had made an error by accidentally testing DNA from a piece of evidence against a control sample taken from the victim herself.\textsuperscript{71} Thus, the “match” to the defendant which the analyst had testified to on direct was completely erroneous, a fact which may never have come to light if the defendant had only been able to cross-examine a party who merely certified the analyst’s report.\textsuperscript{72}

\textsuperscript{66} See id. at 2244 (“[T]he use at trial of a DNA report prepared by a modern, accredited laboratory ‘bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.’”) (citation omitted); see Lopez, 45 A.3d at 19.

\textsuperscript{67} See Williams, 131 S.Ct. at 2227-28; see Lopez, 45 A.3d at 16, 18. Although, the Supreme Court’s 4-4 split with Justice Thomas concurring in the result in Williams may have had the practical effect of not adding anything substantive to the Court’s Confrontation Clause jurisprudence. See Williams, 131 S.Ct. at 2221.

\textsuperscript{68} See Williams, 132 S.Ct. at 2259 (“Today’s holding, however, will reach beyond scientific evidence to ordinary out-of-court statements.”) (Thomas J., concurring in the judgment).

\textsuperscript{69} Id. at 2264 (Kagan, J. dissenting).

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Id. The magnitude of harm that can be caused by not having the opportunity to cross-examine the particular lab analyst can be severe, and the difficulty of remedying the harm retroactively can cause even more
Life without Parole

Life without parole is the most severe criminal penalty in Rhode Island and is reserved for the “narrow class of the most heinous crimes.” As of 2012, only thirty-two individuals were currently serving life without parole in Rhode Island, comprising less than one percent of the entire prison population. This case undoubtedly presented a difficult sentencing determination. All five of the justices essentially agreed that the murder was an aggravated battery and that the defendant had not demonstrated a significant amount of remorse. Additionally, evidence adduced at trial demonstrated that the victim would have been consciously aware of the numerous painful wounds inflicted unto her prior to her death. However, while the majority focused primarily on the violent nature of the underlying crime itself to validate the imposition of life without parole, the dissent placed more substantial emphasis on the presence of external mitigating factors.

Striking the appropriate balance between the circumstances of the underlying crime and the existence of external mitigating and aggravating factors is a tremendously difficult analysis for both the trial justice and the justices of the Supreme Court. Lopez suggests that the Supreme Court will tend to place primary emphasis on the underlying circumstances of the particular crime, and that reduction of a sentence of life without parole will require problems with the entire system. See e.g. Elaine Quijano, Massachusetts lab tech arrested for alleged improper handling of drug tests, CBSNEWS (Sept. 28, 2012, 7:40 P.M.), http://www.cbsnews.com/8301-18563_162-57522834/massachusetts-lab-tech-arrested-for-alleged-improper-handling-of-drug-tests/.

73. Lopez, 45 A.3d at 26 (quoting Mlyniec, 898 A.2d at 86; see e.g., State v. Carpio, 43 A.3d 1, 16 (R.I. 2012) (Murder of on-duty police officer after arrest for stabbing elderly woman, defendant had fifteen prior arrests).
75. Lopez, 45 A.3d at 26 (majority opinion); Id. at 28 (“I agree with the majority that the murder of Ms. Hilario was an aggravated battery.” (Flaherty, J., dissenting in part). Justice Indeglia was the trial justice who initially determined that the murder was an aggravated battery. Id. at 1.
76. Id. at 9.
77. Id. at 28 (Flaherty, J., dissenting in part).
extensive mitigating factors.⁷⁸ Although likely considered in the majority’s overall analysis, the Court did not specifically address the dissent’s point on the practical effect of reducing the defendant’s sentence to life with parole, reaffirming the primacy of the underlying offense in sentencing consideration.⁷⁹

CONCLUSION

The Rhode Island Supreme Court concluded that the defendant’s Confrontation Clause rights were not violated because the defendant had the opportunity to cross examine the witness who not only had knowledge of the DNA analysis that was conducted, but reviewed the procedures of those who conducted the analyses and developed his own independent conclusions from the data.⁸⁰ Likewise, since the allele table that was introduced into evidence was primarily created by expertise and independent analysis of the certifying witness, the opportunity to cross the witness satisfied the Confrontation Clause requirements.⁸¹ Further, the Court found the introduction of prior violent acts against the victim was appropriate and that such evidence was not unfairly prejudicial.⁸² Also, the Court held that there was no error in the trial justice’s jury instructions which, in their totality, let the jury know it was entitled to give whatever, if any at all, weight to witness testimony.⁸³ Lastly, over a pointed dissent, the Court found that the existence of external mitigating factors did not outweigh the aggravating factors present in the underlying crime, thus, the imposition of life imprisonment without parole was justified.⁸⁴

Thomas Pagliarini

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⁷⁸. See id. at 27.
⁷⁹. Id. at 28 (Flaherty, J., dissenting in part). Justice Flaherty pointed out that the defendant would not become parole eligible until his mid-seventies, and even then could not be released unless the parole board unanimously found that he should be able to return to society. Id.
⁸⁰. Id. at 16.
⁸¹. Id. at 20.
⁸². Id. at 20-21.
⁸³. Id. at 23.
⁸⁴. Id. at 27.
Criminal Law. *Tassone v. State*, 42 A.3d 1277 (R.I. 2012). A Rhode Island hearing justice erred when she did not hold an evidentiary hearing to independently evaluate defendant’s application for postconviction relief when the trial transcript was unavailable. In all cases involving defendants sentenced to life without the possibility of parole, an evidentiary hearing is required in the first application for postconviction relief.

FACTS AND TRAVEL

On January 28, 1997, Gary Tassone (“Tassone”) was convicted of the murder of Kendra Hutter, whose body was found buried in the sand at the beach at Crescent Park in East Providence, Rhode Island on June 30, 1994.¹ He was sentenced to life imprisonment without the possibility of parole, and his conviction was affirmed in 2000.²

On August 4, 2000, Tassone filed an application for postconviction relief under Rhode Island General Law 1956 § 10-9.1-1 alleging that his constitutional rights had been violated by the ineffective assistance of his trial counsel and by witness perjury.³ An attorney was appointed to represent him throughout the proceedings for postconviction relief; however, on January 10, 2008, counsel found that Tassone’s allegations were without merit and filed a “no-merit” memorandum and moved to withdraw from the case.⁴ This memorandum listed and described four issues that Tassone felt indicated his trial counsel’s ineffective assistance, as well as perjury committed by police officers who had acted as witnesses at trial.⁵ Ultimately, counsel concluded that Tassone’s claims were “wholly frivolous.”⁶

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². *Id.*
³. *Id.* at 1280.
⁴. *Id.* Tassone also had three previous court-appointed postconviction relief attorneys to represent him, however all of them withdrew for various reasons. *Id.*
⁵. *Id.*
⁶. *Id.* at 1281.
On January 15, 2008, a hearing on counsel’s motion to withdraw was held. At this hearing, however, when the hearing justice gave Tassone an opportunity to address the assertions raised in the *Shatney* no-merit memorandum, Tassone stated that he wanted to address nine issues that had not been heard. Since these issues were not addressed in the original memorandum, the hearing justice directed counsel to draft an additional memorandum incorporating the newly raised issues. Furthermore, at this hearing, it was brought to the attention of the hearing justice that the trial transcript had been lost and was unable to be recovered by the Superior Court clerk’s office, but not before counsel had reviewed it and made his motion to withdraw.

On February 12, 2008, counsel submitted the requested supplemental memorandum detailing the additional issues that Tassone had raised at the January 15th hearing. Again, counsel addressed each issue and concluded that none had any merit.

On February 28, 2008, a final hearing was held on Tassone’s application for postconviction relief, at which Tassone confirmed that all the issues he wished to raise were before the court. A judgment was entered dismissing Tassone’s application on January 13, 2010, and an order was entered granting counsel’s motion to withdraw on January 20, 2010. On January 25, 2010, Tassone filed a notice of appeal, *pro se*.

**ANALYSIS AND HOLDING**

The Rhode Island Supreme Court conducted a *de novo* review of the postconviction relief decision, focusing on Tassone’s three

7. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1282.
14. *Id.*
15. *Id.*
16. *Id.*
main arguments regarding the alleged ineffective assistance he received from his trial counsel.\textsuperscript{17} The Supreme Court endorsed the hearing justice’s use of the two-part test used in \textit{Strickland v. Washington}\textsuperscript{18} in order to evaluate Tassone’s claims.\textsuperscript{19} According to this test, the applicant for postconviction relief must show that “counsel’s performance was deficient in that it fell below an objective standard of reasonableness,” and “that such 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.”\textsuperscript{20} In evaluating the hearing justice’s application of this test, however, the Court concluded that the Superior Court’s failure to hold an evidentiary hearing and its excessive reliance on the \textit{Shatney} memoranda was error.\textsuperscript{21}

In first discussing the Superior Court’s lack of an evidentiary hearing, the Court considered its previous holdings that stated the dismissal of an application for postconviction relief does not explicitly require an evidentiary hearing if the applicant has an opportunity to respond to the court’s dismissal.\textsuperscript{22} While Tassone did in fact have an opportunity to respond to the Superior Court’s decision, the Court clarified that an evidentiary hearing is not required only if the court had the “ability to review the trial record in the absence of an evidentiary hearing.”\textsuperscript{23} As was discussed at the initial January 15, 2008 hearing, the trial record was lost before the hearing justice was ever given an opportunity to review it.\textsuperscript{24} The Court emphasized the importance of trial records in determining the performance of counsel, stating, “[N]o evidence is more probative than the trial transcript.”\textsuperscript{25} Without it, the Court reasoned that the hearing justice could not make an accurate

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{466 U.A. 668 (1984)}.
\item \textsuperscript{19} \textit{Id. at 1284}.
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id. at 1286, 1287}.
\item \textsuperscript{22} \textit{Id. at 1285}.
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id. at 1281}.
\item \textsuperscript{25} \textit{Id. at 1286} (quoting \textit{State v. D’Alo}, 477 A.2d 89, 90 (R.I. 1984)) (“In determining whether a trial counsel’s performance was effective, no evidence is more probative than the trial transcript, for through the transcript a trial justice hearing [an application] for postconviction relief can observe, albeit second-hand, what actually happened as far as the trial counsel’s actions are concerned.”)
\end{itemize}
\end{footnotesize}
factual determination as to whether Tassone received adequate assistance from his trial counsel.²⁶ Lastly, the Court addressed the Superior Court’s reliance on counsel’s Shatney memoranda at the exclusion of the trial record.²⁷ The Court cited the post-conviction relief statute as stating that the “court may dismiss an application on the pleadings if, after reviewing the application, the answer or motion, and the record, the court determines that it lacks merit.”²⁸ The Court reasoned that, without the trial record, the hearing justice could not have “independently determine[d] that no genuine issues of material fact existed surrounding applicant’s claims of ineffective assistance of counsel.”²⁹ This was especially troubling to the Court given the severity of Tassone’s sentence, and ultimately resulted in the Court holding that an evidentiary hearing would thereafter be required in the first application for postconviction relief in all cases concerning applicants sentenced to life without parole.³⁰

Justice Indeglia dissented, stating that an evidentiary hearing was not required by § 10-9.1-6 “[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post conviction relief and no purpose would be served by any further proceedings.”³¹ He stated that, in his opinion, the hearing justice gave Tassone ample opportunity to reply to the proposed dismissal of his application and that she was scrupulous in following the Shatney mandates.³² He also dismissed the majority’s concern that the hearing justice did not review the trial record, stating that the hearing justice did in fact review the available trial record, which included more than just the trial transcripts.³³ Furthermore, Indeglia also revealed that Tassone’s appellate attorney notified the Court on February 1, 2012 that Tassone had a complete copy of the trial transcripts in his cell at the ACI that he could have made available to the

²⁶.  Id. at 1285.
²⁷.  Id. at 1286.
²⁸.  Id. (quoting Shatney v. State, 755 A.2d 130, 133 (R.I. 2000); see also R.I. GEN. LAWS § 10-9.1-6(b)).
²⁹.  Id. at 1287.
³⁰.  Id.
³¹.  Id. at 1287-88 (quoting R.I. GEN. LAWS § 10-9.1-6).
³².  Id. at 1289.
³³.  Id.
trial court, despite his previous claim that they had been lost. 34

COMMENTARY

Given the severity of the defendant’s sentence in this case and the peculiar misplacement of the trial record, the Court’s review of the Superior Court’s decision was appropriately prudent. Despite the hearing justice’s considerations of additional materials later brought to her attention by the applicant and that subsequently required applicant’s counsel to draft a supplemental memorandum, it makes little sense for the justice to rely solely on the memorandum in determining whether the trial counsel was of effective assistance to the applicant. 35

As was emphasized by the Court, the importance of the trial record in determining whether counsel was of effective assistance to the applicant cannot be overstated. 36 It is a decision based on facts that can only be gleaned from the record itself. 37 Allowing a decision based almost exclusively on the memoranda effectively empowers counsel to decide the motion themselves based essentially on the quality and persuasiveness of their writing. While Tassone’s appointed counsel is likely capable of forming an opinion on whether the trial counsel was effective based on his own experience and expertise, the decision must ultimately be reached by the hearing justice after she has independently reviewed the evidence pertaining directly to the trial. 38 Making the decision in this manner allows the hearing justice to “reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” 39

Also important is the Court’s decision to require a mandatory evidentiary hearing in the first application for postconviction relief in all cases involving applicants sentenced to life without parole. Given the severity of this sentence, it seems reasonable to have this provision in place in order to avoid the type of pitfall that occurred here, even when the applicant is given the

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34. Id. at 1290.
35. See id. at 1282 & n.8.
36. Id. at 1286.
37. See id.
38. See id.
39. Id. at 1285 (quoting Lynch v. State, 13 A.3d 603, 606 (R.I. 2011)).
opportunity to respond to the court’s proposed dismissal.

CONCLUSION

The Court held that it is error for a hearing justice not to hold an evidentiary hearing to independently evaluate a defendant’s application for postconviction relief when the trial transcript is unavailable. Additionally, the Court found that in the absence of the trial record, the Superior Court could not simply rely exclusively on counsel’s Shatney memoranda to determine the validity of the applicant’s claims. Furthermore, the Court held that in all cases involving defendants sentenced to life without the possibility of parole, an evidentiary hearing is required in the first application for postconviction relief.

Jennifer Read
Criminal Law. State v. Isabel Taveras, 39 A.3d 638 (R.I. 2012). The Rhode Island Supreme Court found that a police officer was not prohibited by the Fourth Amendment from taking reasonable measures to protect himself, nor is an officer required to use the least intrusive method while standing along a street, at night, in a high-crime area. Specifically, the officer did not violate the Fourth Amendment when he asked a woman, suspected of carrying a weapon, to unzip her jacket to ensure the woman was not armed.

FACTS AND TRAVEL

On January 10, 2007, at approximately 10:30 p.m., two Providence police officers were on patrol on Laban Street in Providence and noticed a conversion van without license plates, the engine running, lights on, and no visible driver.1 The officers drove up to the van, illuminated their cruiser’s take-down lights, and saw the defendant, Ms. Isabel Taveras, in the front passenger’s seat.2 They saw her bend down towards the floor, pick something up and stuff it into the left side of her coat jacket.3 The officers then approached Ms. Taveras and questioned her as to why she was in the area, what her name was, who owned the vehicle, and where the driver was.4 Then, Ms. Taveras was asked to exit the van and open her jacket.5 It is disputed as to whether when she opened her jacket, a clear plastic bag containing cocaine fell to the ground or if the officers saw the bag and pulled it from her armpit.6 After seeing the cocaine, Ms. Taveras was placed in handcuffs and arrested.7

On May 8, 2007, Ms. Taveras was charged with one count of

2. Id.
3. Id.
4. Id. at 640-41.
5. Id. at 641.
6. Id. at 641, 643-44.
7. Id. at 641.
possession of between one ounce and one kilogram of cocaine and one count of possession with intent to deliver a controlled substance, cocaine.\(^8\) Ms. Taveras then filed a motion to suppress tangible evidence on the grounds that the search and seizure was “without prior judicial approval, without a warrant, without consent, or authority, and without probable cause or articulable suspicion.”\(^9\)

On November 3, 2008, a Superior Court conducted a suppression hearing.\(^10\) At the suppression hearing, the officers’ version of the night’s events differed slightly from Ms. Taveras’s testimony.\(^11\) The officers testified that after seeing Ms. Taveras stuff something inside the left side of her jacket, when questioned, she told them a story that “didn’t seem to add up.”\(^12\) She had told the officers she was on a first date with a man whose last name she did not know, that the van belonged to him, that she did not know where he was, and that she did not know who the “dirty and disheveled” man in the backseat was.\(^13\) The officers’ testified that “the combination of [Ms. Taveras’s] story, her nervous demeanor, the fact that it was at night, in a high crime area, and the fact that [the officers’ saw Ms. Taveras] stuff something into her jacket, prompted [them] to conduct a Terry-type search for weapons.”\(^14\) Rather than conducting the typical pat-down search, which would have required the officer touch Ms. Taveras’s chest area, one of the officers had asked Ms. Taveras to unzip her jacket, and when she did, cocaine, in a clear plastic bag, fell to the ground.\(^15\)

Ms. Taveras’s testified that instead of putting the bag of cocaine in her jacket pocket she put it in her armpit.\(^16\) Ms. Taveras testified that an officer did not just ask her to unzip her jacket; instead, he first patted her down over her clothing and then asked her to unzip her jacket.\(^17\) She then testified that when

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\(^8\) Id.
\(^9\) Id.; See R.I. Const. art 1, § 6.
\(^10\) Taveras, 39 A.3d at 641.
\(^11\) Id. at 641-44.
\(^12\) Id. at 641-42.
\(^13\) Id. at 642.
\(^14\) Id.
\(^15\) Id.
\(^16\) Id. at 643.
\(^17\) Id. at 643-44.
she unzipped her jacket the officer told her to spread the jacket open and then the officer pulled the jacket open wider, and it was not until he had pulled the jacket wider that he saw the cocaine, asked her what it was, pulled the bag out of her jacket himself, and then handcuffed her.\textsuperscript{18}

At the close of the suppression hearing, the trial judge denied Ms. Taveras’s motion to suppress.\textsuperscript{19} The trial judge found that the officers had a reasonable basis for conducting a \textit{Terry} type search for weapons, because based on the facts known to the officers at the scene, the officers had a right to protect themselves in a manner that went beyond the traditional pat-down search for weapons.\textsuperscript{20}

After the trial judge denied the motion to suppress, a jury-waived trial commenced.\textsuperscript{21} The trial justice found Ms. Taveras guilty of possession of between one ounce and one kilogram of cocaine, and on January 23, 2009, she was sentenced to a suspended term of ten years at the Adult Correctional Institutions, with ten years probation.\textsuperscript{22} Ms. Taveras filed a timely appeal, appealing the decision to deny the motion to suppress and the judgment of conviction.\textsuperscript{23}

\textbf{ANALYSIS AND HOLDING}

When reviewing the trial judge’s denial of a motion to suppress evidence, the Court must give “deference to a trial justice’s findings of historical fact and will overturn such findings only if [they] conclude that the trial justice clearly was wrong”; however, the Court also independently reviewed, \textit{de novo}, if Ms.

\textsuperscript{18} \textit{Id.} at 644.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.} at 644-45.
\textsuperscript{21} \textit{Id.} at 645.
\textsuperscript{22} \textit{Id.} The testimony at the trial was similar to the testimony solicited at the suppression hearing; however, Ms. Taveras did not testify at trial. \textit{Id.}
\textsuperscript{23} \textit{Id.} While in front of the Rhode Island Supreme Court, the state moved to hold the appeal in abeyance and to remand the case for clarification from the trial judge in regards to the scope of the search. The Court granted the motion and remanded the case. On June 1, 2011, the trial justice issued a written decision noting that after hearing the testimony at the suppression hearing he “firmly believed the police officers’ testimony” and that “certain facts [Ms. Taveras] testified to essentially corroborated the police officers’ testimony” thereby increasing the officers’ credibility. \textit{Id.}
Taveras’s rights had been violated. 24

The Court reasoned, “a police officer may conduct an investigatory stop, provided [the officer] has a reasonable suspicion based on specific and articulable facts that the person detained is engaged in criminal activity.” 25 The Court went on to note that “when reviewing the constitutionality of an investigative stop, [it] must consider the ‘totality of the circumstances.’” 26 The Court recognized that numerous factors may attribute to the reasonableness of an officer’s finding reasonable suspicion of criminal conduct, and that these factors must be viewed in their entirety to determine if an officer had a reasonable suspicion of criminal activity to warrant the belief that his safety or other’s safety was in danger. 27 Here, a van without license plates was idling in a high-crime neighborhood at 10:30 p.m.; when the officers approached the van Ms. Taveras reached to the floor and shoved something into her jacket; officers felt her story did not add up and her demeanor appeared nervous. 28 Based on all of this testimony, looking at the totality of the circumstances, the Court found the officers had “sufficient reasonable suspicion for the officers to suspect [Ms. Taveras] of possible criminal conduct and to perform a Terry-type frisk for weapons to ensure officer safety.” 29

Next, the Court analyzed whether the scope of the search exceeded the scope permissible in a Terry-style pat down. Ms. Taveras argued that the officer asking her to unzip her jacket was invasive and required probable cause. 30 The Court noted that general, exploratory rummaging through a person's belongings is prohibited under the Fourth Amendment; however, an officer is allowed to search a suspect as long as the scope of that search is “reasonably designed to discover guns, knives, clubs, or other hidden instruments” that could be used for the assault of an officer. 31 The Court went on to note that the Fourth Amendment

24. Id. at 645-46
25. Id. at 647 (citation omitted).
26. Id. (citation omitted).
27. Id. (citation omitted).
28. Id. at 648.
29. Id.
30. Id.
31. Id. at 649.
does not require an officer use the least intrusive search possible. However, here, the Court reasoned that asking Ms. Taveras to unzip her jacket was less-intrusive than patting down her chest area. Also, the Court found that the officer asked Ms. Taveras to unzip her jacket to determine if she was armed with a weapon or other dangerous instrument. Thus, the Court held that the Fourth Amendment did not forbid an officer from frisking a suspect by asking that suspect to unzip their jacket under the circumstances of this case.

Justice Flaherty disagreed with the majority's decision that the scope of the officer's search did not violate Ms. Taveras's Fourth Amendment rights. Justice Flaherty believed it was debatable whether asking Ms. Taveras to unzip her jacket was less-intrusive than patting her down, and he reasoned that allowing officers to ask suspects to unzip a jacket "lends an elasticity to Terry and to our prior holdings beyond a point that I am willing to travel." He went on to note that the purpose of a Terry-stop is to discover the presence of offensive weapons that pose a risk of harm to the officer, not to discover evidence. Here, Justice Flaherty was concerned that this case would "give rise to a series of flexible and confusing standards for stops and frisks under Terry . . . [and] presents a particular danger with respect to female defendants because the police may maintain, as they did here, that they are reasonably reluctant to frisk women." Therefore, Justice Flaherty dissented and would have suppressed the evidence retrieved.

32. Id. (citation omitted).
33. Id. at 650.
34. Id.
35. Id.
36. Id. at 651-52.
37. Id. at 652-53.
38. Id. at 654.
39. Id. at 654-55. Theoretically, after this case, an officer may be able to request a female suspect unzip her jacket and obtain evidence that ordinarily may not have been discovered under a typical pat down, because the officer could claim he wanted to use a less intrusive frisking method. However, when finding the frisk constitutional, the majority based its decision on a multitude of factors that will not be present every time an officer wants to frisk a female suspect to ensure she is unarmed. See id.
40. Id. at 655.
COMMENTARY

Although Justice Flaherty made some reputable points, the Court was correct. The Court stated that the purpose of a Terry-stop is to discover the presence of suspected offensive weapons that could be used to assault an officer.\(^{41}\) Based on the officers’ testimony and Ms. Taveras’s statement at the suppression hearing about all of the circumstances of the night in question, the majority found that asking Ms. Taveras to unzip her jacket to ensure she was unarmed and not a threat to their safety was within the parameters of a Terry-stop.

Here, the officers were patrolling in a high-crime neighborhood at 10:30 at night, a van was idling without any license plates, a possible suspect put something into her jacket, and the suspect appeared nervous and told them a story that did not “add up.”\(^{42}\) All of these factors and the officers’ intention to conduct a less intrusive frisk, resulted in one of the officers asking Ms. Taveras to unzip her jacket to determine if she was armed.

Police officers have a difficult and dangerous job, one in which on the spot judgment decisions must be made to protect their lives and the lives of the public. Thus, for public policy reasons, police officers should be able to frisk a suspect by asking her to unzip an outer layer of clothing if, based on the circumstances, an officer found that necessary to protect themselves or disarm the suspect.

CONCLUSION

The Rhode Island Supreme Court held, based on the totality of the circumstances, that an officer properly frisked and did not violate a female suspect’s Fourth Amendment rights when he asked Ms. Taveras to unzip her jacket to ensure their safety.\(^{43}\) Thus, the trial justice’s denial of Ms. Taveras’s motion to suppress evidence and the Superior Court’s judgment of conviction was affirmed.\(^{44}\)

\(^{41}\) Id. at 649, 654.
\(^{42}\) Id. at 648. All of these factors contributed to the officers’ conclusion that they needed to frisk Ms. Taveras to ensure their safety. Id.
\(^{43}\) Id. at 650-51.
\(^{44}\) Id. at 651.
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Nicole M. Verdi
Employment Law. *McGarry v. Pielech*, 47 A.3d 271 (R.I. 2012). A plaintiff need not prove a discrimination claim apart from the adverse inference arising from the spoliation doctrine, but the inference alone is not enough absent existence of other extrinsic evidence supporting the claim.

FACTS AND TRAVEL

Roderick A. McGarry (“Plaintiff” or “McGarry”) applied for two open teaching positions in the Cumberland school system (“Defendants” or “School Department”), was turned down, and brought an age discrimination suit against the school department. In July of 1998, Plaintiff applied for and was denied a full time and part time English teaching position, despite that Plaintiff had just received his certificate to teach English earlier that month. In the spring of 1999, Plaintiff applied for a position as an English and social studies teacher, was interviewed, but ultimately not chosen.

On August 8, 2000, Plaintiff received a right to sue letter from the Rhode Island Commission of Human Rights and brought suit under the Rhode Island Civil Rights Act and the Rhode Island Fair Employment Practices Act alleging he was a victim of age discrimination. Plaintiff believed himself to be qualified for the teaching position because he worked for the school department from 1969 to 1970 and was a substitute teacher there in 1997. Plaintiff was interviewed by a three person board, consisting of the school principal and two English teachers, for both positions. When Plaintiff learned he was not selected for either job, he sought his personnel file, but found the interview sheets were

2. *Id.* at 275.
3. *Id.* at 276.
4. *Id.*
5. *Id.*
6. *Id.*
The principal testified at trial in regards to the hiring process for new teachers; in her testimony the principal described the process as beginning with a panel interview, which results in the submission of one to three names of qualified candidates to the superintendent for final selection. She further testified that she sent the interview sheets to the central office, and that the school department has hired teachers who are over forty in the past. The principal testified that at the first round of interviews Plaintiff placed forth, and the top three were sent to the superintendent for final approval. The principal further testified that in the second round of interviews Plaintiff ranked third, but the interviewing panel decided only to send the top choice over to the superintendent for approval. Both times she felt the other applicants had superior qualifications. The superintendent testified that there is no policy requiring the interview sheets to be submitted, but they often are. The superintendent also admitted that a mistake in the schools certification roster caused the school to report to the Rhode Island Commission of Human Rights that Plaintiff was not certified to teach English when Plaintiff became certified shortly before applying for the positions. The trial justice decided that, because the school lost the interview sheets before trial, a spoliation jury instruction was appropriate because the evidence showed (1) the school regularly uses the interview sheets in its hiring process, and (2) the school department could not produce these documents for trial. After

7. Id.
8. Id. at 277.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id. at 278.
14. Id.
15. Id. at 278. The spoliation instruction the trial justice gave to the jury was:

    [Y]ou may consider the issue of spoliation of evidence, that is, destruction of evidence, where a defendant: (1) has failed to produce a document which the evidence tends to show was routinely generated in its business, and; (2) has not been able to provide a satisfactory explanation as to why
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Plaintiff rested his case, Defendants’ moved for judgment as a matter of law alleging that the only evidence existing, which the jury could use to make its decision, is the spoliation inference and that is not sufficient.16 The trial justice denied Defendants’ Rule 50 motion, but granted the renewal of the motion at the end of trial when Defendants renewed their motion for judgment as a matter of law and moved for a new trial.17 The trial justice reasoned that his spoliation jury instruction was incorrect because Plaintiff did not present any extrinsic evidence to support the inference that the interview sheets were advantageous to the Plaintiff and that the jury put too much weight on the missing interview sheet when making their decision.18

ANALYSIS AND HOLDING

The Rhode Island Supreme Court began its analysis of the trial justice’s ruling on Defendants judgment as a matter of law motion by identifying a three part burden shifting test that is applied to employment discrimination.19 The plaintiff must establish four elements for there to be a presumption that the defendant committed unlawful discrimination.20 Once the

the document was not produced with respect to the incident in the case before the Court.

The plaintiff is not required to show that the defendant destroyed or lost the documents in bad faith. Spoliation of evidence may be innocent or intentional or somewhere [12] in between. You may consider the facts and circumstances which were proven at trial relating to the 1998-1999 interview notes. You may consider who had custody or control of the notes, how they were destroyed or lost, the lack of explanation thereof for their destruction, the timing of the destruction, as well as any other facts and circumstances bearing on this issue.

If you find that there is an unexplained, and negligent or deliberate absence of relevant evidence, you may infer that the missing evidence would have been unfavorable to the position of the defendant.

Id. at 279 & n.7.
16.  Id.
17.  Id. at 279.
18.  Id.
19.  Id. at 280.
20.  Id. (citing Casey v. Town of Portsmouth, 861 A.2d 1032, 1037 (R.I. 2004))((1) he is a member of a protected class (2) he applied for an open position (3) he was not selected (4) the employer filled the position with the
presumption is established it is up to the defendant to provide a nondiscriminatory explanation. After such an explanation is provided, the burden shifts back to the plaintiff to demonstrate that defendant’s explanation in only a pretext and the true motive is discrimination. The court found Plaintiff pled a prima facie case establishing a presumption Defendants committed unlawful discrimination, and Defendants provided a nondiscriminatory explanation. Thus, the critical issue at hand is whether Plaintiff was able to demonstrate that Defendants’ explanation was merely a pretext and the true motive is discrimination.

In considering the propriety of the trial justice’s Rule 50 ruling, this Court held that “by requiring additional evidence to support the inference, exclusive of the evidentiary benefit from the adverse inference, the trial justice erroneously increased plaintiff’s burden of proof.” The Court agreed that there must be some other evidence to support the discrimination claim besides the negative inference from spoliation evidence, but just how much must be decided on a case by case basis. In this case, Plaintiff’s showing that Defendants misrepresented Plaintiff’s qualifications for teaching English, deviated from their hiring process, and ranked third in the second interview but was not submitted to the superintendent combined with the spoliation negative inference was enough to survive judgment as a matter of law.

The Court then briefly addressed the trial justice’s decision granting Defendants’ motion for a new trial finding that the trial justice adequately determined that Plaintiff’s claim was not supported by the weight of the evidence. Justice Robinson dissented to the decision concerning the trial justice’s granting of the Rule 50 motion on the grounds that Plaintiff did not meet his burden of persuasion. This is because “there is absolutely no sufficient evidence, other than the missing

21. Id. at 280.
22. Id. at 281.
23. Id. at 282.
24. Id. at 283.
25. Id. at 284.
26. Id. at 282, 284, 285.
27. Id. at 286.
28. Id.
documents, to support a finding of discrimination.” Justice Robinson bases his holding on the facts that Plaintiff obtained his certifications the very same month he applied to the teaching positions and that the teachers chosen for the position had superior credentials and significantly more teaching experience.

**COMMENTARY**

The primary law derived from this case is that to survive summary judgment, a Plaintiff in an employment discrimination case must provide some amount of facts in addition to any negative inference derived from a spoliation jury instruction. This makes sense because if a fact finder were able to rely solely on a missing document without knowing the contents thereof a fact finder could easily be misled into drawing a negative inference that is not warranted by the evidence. How much extrinsic evidence is needed to support the inference must be decided on a case by case basis. Leaving the door open is a smart decision because doing so will preserve trial justices’ discretion to insure justice will be served.

This decision is pretty straight forward and the Supreme Court was meticulous in its reasoning and rule of law. The biggest implications of this decision will be the effect it has on attorneys protecting their business clients from costly employment discrimination lawsuits. The opinion does not specifically mention it, but it appears to me that the Cumberland school system is utilizing a behavior based interview technique. This technique involves a panel to write down the applicant’s answers so they can each give a score and come to an agreement on a single score amongst the panel. So after this decision, what do we tell our clients to do with the notes? The Cumberland school department had no official policy that says turn them in, but the interviewers turned them in as a matter of course.

We really only have two choices, and either choice has to be followed strictly without waiver. We can have a policy of turning the sheets in or destroying them after a selection has been made. The upside of requiring the notes be saved is that our clients can

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29. *Id.* at 287.
30. *Id.* at 289.
have evidence they based their employment decision on legally appropriate criteria. The downside is that people will be negligent, papers go missing in mounds of other documents and it will always look pretty suspicious to a jury that the one that got misplaced happens to be the one that is being challenged in a discrimination case.

Based solely on the decision in the case at hand my recommendation would be to have a policy to destroy all of the notes upon the selection of a candidate. As in any policy this would be followed strictly without waiver. I base this decision on a risk reward analysis between the two options. The reward for saving them is that the defendant will have evidence as to the propriety of their decision. As previously mentioned the risk is certain negligence resulting in some of these papers getting lost. Conversely, the risk of destroying them is the defendant will destroy good evidence in their favor, but the reward is not having a jury’s imagination run wild as to what devious information was on the lost documents and what conspiracy was being covered up at the organization.

The policy of destroying the interview notes will not prove to be an injustice to the victims of employment discrimination because all of the traditional evidence towards such a showing would still be available. For instance, a plaintiff could show that an organization of fifty employees has not hired a single person over the age of forty or a younger inexperienced person got the job where the plaintiff has superior education and practical experience. For example, in the case at hand, Plaintiff would still have evidence that his qualifications were misrepresented and that he ranked third and his name was not provided to the superintendent as is customary.

Further, a strict policy of destroying such documents is not a practice in bad faith. This is because you will be destroying evidence that is both favorable to the company and potentially unfavorable. Also, there are other reasons for destroying these documents besides avoiding a spoliation jury instruction: (1) doing so provides permanence to the organizations hiring and protects its business judgment decisions; (2) such a practice will enable the interviewers to write down accurate judgments on the candidate’s answers to questions without fear that every note will be overanalyzed and misconstrued.
CONCLUSION

The Rhode Island Supreme Court held that to survive summary judgment on employment discrimination the fact finder cannot rely solely on a negative inference from a spoliation jury instruction; there must be some other evidence provided to support the inference. While the sufficiency of this extrinsic evidence must be judged on a case by case basis, disbelief in defendant’s proffered explanation combined with the negative spoliation instruction can be sufficient.

Geoffrey Aptt
Family Law. Esposito v. Esposito, 38 A.3d 1 (R.I. 2012). When a wife learns that her husband’s interest in a company is worth double its appraised value after the terminal date for equitable distribution, agreed to in the property settlement agreement, the Court cannot grant a relief from judgment pursuant to Rule 60(b) of the Family Court Rules of Procedure for Domestic Relations.

FACTS AND TRAVEL

On February 21, 2005, Joseph Esposito (“Husband”) initiated a divorce action against his wife, Sharon Esposito (“Wife”), citing irreconcilable differences that led to an irremediable breakdown of the marriage. During discovery the Family Court selected Piccerelli, Gilstein, and Company, LLP to appraise Husband’s twenty-five percent ownership interest in Prime Time. Piccerelli submitted a final appraisal on June 23, 2006. The court instructed the parties that they each could obtain an independent appraisal of Prime Time, if they wished. In January 2007, after Wife indicated that she wished to do an independent appraisal, the court ordered Piccerelli to give Wife’s attorney all the records it had used in its appraisal. Wife’s accountants’ appraisal was lower than that of the Piccerelli firm so the parties agreed to use the Piccerelli evaluation which indicated the share in Prime Time was worth $2.9 million.

The parties entered into a property settlement agreement (“Agreement”) in order to equitably divide their marital estate on March 22, 2007. The Prime Time minority interest was included.

1. Esposito v. Esposito, 38 A.3d 1, 3 (R.I. 2012). In this survey, I refer to the parties as “Husband” and “Wife” for clarity only, and intend no disrespect by doing so.

2. Id.

3. Id.

4. Id.

5. Id.

6. Id.

7. Id.
in Husband’s share. That same day, the Family Court approved the Agreement, “ordered that [it] be incorporated, but not merged, into the judgment” and entered a decision pending entry of final judgment.

In August 2007, before the final judgment was entered in the divorce, the primary stockholder of Prime Time engaged in negotiations to sell the company and Husband discovered that the value of his share of Prime Time was worth more than the appraised value of $2.9 million. On October 31, 2007, the final judgment of divorce was entered. Then Prime Time was sold on November 13, 2007 and Husband received $2.5 million more than the appraised value. Wife read a press release about the sale of Prime Time and thus discovered the increase in Husband’s share. On June 4, 2008, she filed a motion under Rule 60(b)(1)(2)(3) and (6) of the Family Court Rules of Procedure for Domestic Relations for a relief from judgment. The trial justice held that there was no concrete evidence that would show that “at the time the divorce was granted and the Agreement was approved, the value of Prime Time was more than what had been provided for in the Piccerelli appraisal.” He found that Wife had produced no evidence that Husband knew the company would be sold at or before the time of the execution of the Agreement. Thus, the Family Court denied Wife’s motion to amend or reform the Agreement and Wife appealed to the Supreme Court of Rhode

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8. Id.
9. Id.
10. Id. at 4.
11. Id.
12. Id.
13. Id. at 4 & n.4.
14. Id. at 4. Rule 60(b) allows for a relief from judgment or order based on:
   (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud... misrepresentation, or other misconduct of an adverse party; ... (6) any other reason justifying relief from the operation of judgment.
15. Id.
16. Id.
Island.\textsuperscript{17}

**ANALYSIS AND HOLDING**

Wife claims that the trial justice committed three errors by denying her Rule 60(b) motion.\textsuperscript{18} First, she alleged that she and Husband relied on the appraisal by Piccerelli and that report failed to accurately account for the marketability of his twenty-five percent share and thus the parties committed a mutual mistake.\textsuperscript{19} Second, she argued that the accurate date for valuation of the marital assets was the date the final judgment was entered, not the date of judicial approval of the Agreement.\textsuperscript{20} Finally, she contended that the trial justice “did not recognize the ‘special status of spousal agreements’” when he refused to use the court’s equitable powers to amend or withdraw the court’s approval of the Agreement.\textsuperscript{21}

**Mutual Mistake**

A property settlement agreement that has been incorporated, but not merged, into the final judgment maintains the characteristics of a contract.\textsuperscript{22} The court must find a mutual mistake before a contract is able to be amended.\textsuperscript{23} If a mutual mistake is committed at the time an agreement is made, it fails, in a material manner, to properly reflect the perception of both parties.\textsuperscript{24}

In this case, it is important that, at the time the Agreement was made, Prime Time had not begun negotiations for its sale.\textsuperscript{25}

\begin{footnotes}
17. \textit{Id.}
18. \textit{Id.}
19. \textit{Id.}
20. \textit{Id. at 4-5.}
21. \textit{Id. at 5.}
23. \textit{Esposito}, 38 A.3d at 5 (citing Gorman v. Gorman, 883 A.2d 732, 740 (R.I. 2005)). A mutual mistake is a mistake that is “common to both parties wherein each labors under a misconception respecting the same terms of the written agreement sought to be [reformed].” \textit{Esposito}, 38 A.3d at 5 (quoting Merrimack Mutual Fire Insurance Co. v. Dufault, 958 A.2d 620, 624 (R.I. 2008)).
\end{footnotes}
Therefore, since Wife did not provide evidence of the discussion of the sale, the trial court concluded that the appraisal was not weakened since it did not take into account the later purchase of Prime Time. \(^{26}\) Thus, since both parties accepted the terms, the Agreement does not fail, in a material way, to show the understanding of the parties about the worth of Husband’s interest in Prime Time at the time they executed it. \(^{27}\) Wife did not show a mutual mistake of material fact by clear and convincing evidence. \(^{28}\) The Family Court did not have the power to reform or amend the Agreement because there was no mutual mistake concerning the value of Husband’s interest in Prime Time when the Agreement was entered into, and because Husband “did not consent to reformation of the Agreement.” \(^{29}\)

**The Proper Date for Valuation of Assets**

Parties of a divorce continue to be husband and wife until the final judgment is entered. \(^{30}\) The date of the final judgment is the “terminal date for equitable distribution,” unless the parties have an express agreement stating otherwise. \(^{31}\) “Significantly, ‘[p]arties may make an express agreement to change the terminal date for equitable distribution.’” \(^{32}\) Here, the Agreement contained an “express agreement” that March 22, 2007, the date the Family Court approved it, would serve as the “terminal date for equitable distribution.” \(^{33}\) Paragraph seventeen of the Agreement explicitly grants each party the freedom to move on with his or her separate financial life without any claims from the other spouse. \(^{34}\) And paragraph

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26. *Id.*
27. *Id.* at 6.
28. *Id.*
29. *Id.*
30. *Id.* (citing Janson v. Janson, 773 A.2d 901, 904 (R.I. 2001)).
31. *Esposito*, 38 A.3d at 6 (citing Ruffel v. Ruffel, 900 A.2d 1178, 1185 (R.I. 2006)).
32. *Esposito*, 38 A.3d at 6 (citing *Ruffel*, 900 A.2d at 1185).
33. *Esposito*, 38 A.3d at 6 (citing *Ruffel*, 900 A.2d at 1185).
34. *Esposito*, 38 A.3d at 6-7. The dispositive section of paragraph seventeen states:

Except as otherwise more specifically provided in this Agreement, all of the property of each of the parties hereto, both real and personal, now owned by him or her, or to which he or she may hereafter
nineteen shows that the parties drafted their agreement knowing the principles stated above. It is not the purpose of the Supreme Court or Family Court to ignore a property settlement agreement simply because a party is unhappy with the result or a party does not want to be bound by it anymore. The Court declined to rewrite the Agreement in Wife’s favor because the parties had provided a terminal date for equitable distribution in the Agreement.

Should the Family Court have withdrawn its approval?

Wife contended that since the Agreement resulted in an inequitable distribution of the marital assets when Husband’s interest in Prime Time increased in value, the Family Court should have withdrawn its approval. She also argued that Husband was required to inform her of the increased value of his share prior to entry of the final judgment.

Spouses have a duty to reveal changes in their financial circumstances until the entry of a final judgment. Since Husband learned that his minority interest in Prime Time had increased in value between the time of the granting of the divorce and the entry of the final judgment, he had a duty to inform Wife

Id. at 6.

35. Id. at 7. Paragraph 19 states “[e]ach party waives any interest he or she may have in and to any assets acquired by the other party subsequent hereto and prior to the entry of any Final Judgment of Divorce.” Id.

36. Id.at 7 (citing Vanderheiden v. Marandola, 994 A.2d 74, 78 (R.I. 2010)).

37. Esposito, 38 A.3d at 7.

38. Id.

39. Id.

40. Esposito, 38 A.3d at 7 (citing Giha, 609 A.2d at 949).
of his change in financial circumstances.\footnote{Esposito, 38 A.3d at 7.} “However, even despite [Husband’s] breach of his duty to disclose, any property rights [Wife] had in [Husband’s] share of Prime Time were foreclosed on March 22, 2007, when the Agreement was executed and approved by the Family Court.”\footnote{Esposito, 38 A.3d at 7 (citing Ruffel, 900 A.2d at 1185). “In so holding, we are in no way signaling a retreat from the good-faith rule set out in Gorman. […] In the absence of the specific terms and judicial approval of the Agreement, [Wife] may well have been entitled to share in the increase in the value of [Husband’s] interest in Prime Time.” Esposito, 38 A.3d at 7 (referencing Gorman, 883 A.2d at 737).}

\textit{Dissent}

In her dissent, Justice Goldberg stated that the Court recognizes that spousal contracts are fundamentally different from ordinary business contracts and that “the Family Court must monitor such agreements ‘with special attention and with concern for the equities of the situation.’ . . . The special nature of marital property settlement agreements makes judicial approval of the fairness of those contracts ‘a sine qua non’ of our Family Court jurisprudence.”\footnote{Esposito, 38 A.3d at 8 (quoting Gorman, 883 A.2d at 737).} In this case, Husband deliberately withheld information involving the increase in the value of the Prime Time share and received $5.4 million.\footnote{Esposito, 38 A.3d at 8.} In her view, the Court should “remand this case to the Family Court ‘to review the Property Settlement Agreement and to withdraw its approval of the Agreement [if] it determine[s] that the Agreement [is] inequitable.’”\footnote{Id. (quoting Gorman, 883 A.2d at 741).} Instead, “the majority concluded that an equitable evaluation of the fairness of the contract is unavailable to this spouse based on the contract itself.”\footnote{Esposito, 38 A.3d at 8-9. The Court declared that even a “completed and integrated and signed document is subject to review and approval by the Family Court,” but the majority decided that a review is unnecessary in this case. Esposito, 38 A.3d at 9 (quoting Gorman, 883 A.2d at 738).}
retreat from the good-faith rule set out in Gorman.”\textsuperscript{47} The circumstances in this case and Gorman are completely different. In Gorman, the husband failed to inform his wife about the existence of substantial shares of stock in his employee stock bonus plan before the property settlement agreement was executed.\textsuperscript{48} In contrast, here, both parties were cognizant of the existence and value of all assets owned by each party at the date the Agreement was executed.\textsuperscript{49} Therefore, “[t]he Agreement was fair and equitable \textit{when the parties entered into it}.”\textsuperscript{50}

This decision shows that when a property settlement agreement is not merged with the final divorce decree, the Family Court has far less discretion to modify contracts/agreements and the court must apply traditional contract principles. Had the Agreement been merged with the final judgment of divorce, it would have been deemed an unenforceable contract and the Family Court would have had the discretion to reevaluate the split of marital assets and potentially modify it.\textsuperscript{51} However, the Family Court has no discretion to modify property settlement agreements after they have been made.\textsuperscript{52} This further supports the majority’s decision that the Family Court and Supreme Court did not have the authority to change the Agreement with “concern for the equities of the situation.”\textsuperscript{53}

The majority is correct in its decision, based on the law. However, it would be equitable to have the Family Court restructure the property settlement agreement since Husband received double the amount of the appraised value. As the Family Court is a court with ample discretion, it should be able to restructure property settlement agreements when it sees fit, but that is not the law in Rhode Island when an agreement is not merged with the divorce decree. The policy behind this reasoning would seem to be that if parties wanted the Family Court to have the authority to amend the agreement, they would have merged the agreement with the final divorce decree, giving the court the

\begin{footnotes}
\footnotetext[47]{Esposito, 38 A.3d at 7 (citing Gorman, 883 A.2d at 737).}
\footnotetext[48]{Gorman, 883 A.2d at 736.}
\footnotetext[49]{Esposito, 38 A.3d at 7.}
\footnotetext[50]{Id. at 8 (emphasis added).}
\footnotetext[52]{See id. at 401.}
\footnotetext[53]{Esposito, 38 A.3d at 8 (quoting Gorman, 883 A.2d at 737).}
\end{footnotes}
discretion to make equitable changes. The policy behind this reasoning is the competency of the parties to enter into contracts and party autonomy.

CONCLUSION

The Court held that a mutual mistake of material fact was not shown here by clear and convincing evidence, the terminal date for equitable distribution is not the date the final judgment was entered because the parties included a terminal date for equitable distribution in the Agreement, and if Husband had disclosed to wife the increase in the value of the Prime Time interest, it would have changed nothing. 54 Accordingly, the Court affirmed the Family Court’s order because there was no indication that the trial justice had abused his discretion when he denied Wife’s motion to vacate. 55

Ashley Brinkmann

55. *Id.* at 8.
Insurance Law.  *Henderson v. Nationwide Ins. Co.*, 35 A.3d 902 (R.I. 2012). The Rhode Island Supreme Court addressed whether a “for a fee” policy exception under an uninsured-motorist insurance policy violated Rhode Island policy. The Court held that the provision was clear, unambiguous and did not violate public policy. Additionally, the Court emphasized that an insurance policy is foremost a contract between an insurance company and the insured and that courts should not interfere with these contracts so long as they meet the above criteria.

FACTS AND TRAVEL

Mr. Henderson, the plaintiff in the Superior Court and the Respondent in this matter, was employed by All Occasion Transportation as a professional driver. Mr. Henderson’s customers paid All Occasion a fee for his services, and in turn All Occasion compensated Mr. Henderson by salary. On or about June 5, 2003, Mr. Henderson, was directed by his employer to transport a number of customers from Newport, Rhode Island, to Logan Airport in Boston, Massachusetts. After driving them to the airport, and while he was unloading his customer’s luggage, another vehicle hit Mr. Henderson, severely injuring him. After the accident, Mr. Henderson settled claims against the tortfeasor as well as All Occasion’s insurance carrier, but he contended that his injuries exceeded the amounts he received. Mr. Henderson then filed an “under-insured” motorist claim with Nationwide, his personal automobile insurance carrier. Nationwide denied Mr. Henderson’s claim, naming two exclusions contained in his uninsured motorist coverage policy: the “for a fee exclusion” and

2.  *Id.* at 903.
3.  The exact date is in dispute due to conflicting testimony by the respondent, Mr. Henderson, but it did not impact the decision in this case. See *id.* at 904 & n. 1.
4.  *Id.* at 904.
5.  *Id.*
6.  *Id.*

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After Nationwide denied his claim, Mr. Henderson filed suit in the Superior Court asserting that his insurer had “unlawfully and unjustifiably” denied him coverage. Nationwide moved for summary judgment, which was denied by the motion justice. The motion justice found that the policy exclusions were “convoluted,” “difficult to understand,” and that they were “a plain attempt to vary or qualify the clear and unambiguous statutory definition of uninsured motor vehicle and the requirement that all insurance carriers offer personal protection to their insured.”

One year later, Nationwide renewed its motion for summary judgment arguing that Mr. Henderson’s testimony, from a deposition after the denials of the initial summary judgment, showed that the accident occurred while he was using All Occasion’s limousine to carry passengers “for a fee” and did so regularly. The motion justice, who presided over the first summary judgment hearing, stated that she accepted the facts both as true and weighing in favor of Nationwide, but still denied Nationwide’s motion because she found that the exclusions were overbroad and violated public policy. After the justice’s ruling, the parties acknowledged that Mr. Henderson’s remaining damages exceeded the policy limits, and subsequently Mr. Henderson filed a motion for entry of judgment in his favor. On October 1, 2010, a judgment was entered on behalf of Mr. Henderson for the policy limit of $25,000. Nationwide appealed that judgment to the Supreme Court of Rhode Island.

7. The relevant portions of his policy provide: “coverage does not apply to: 1. Use of any motor vehicle by an insured to carry persons or property for a fee and 4. bodily injury suffered while occupying a motor vehicle: a) owned by; or b) furnished for the regular use of; you or a relative, but not insured for Auto Liability coverage under this policy.” Id.
8. Id.
9. Id. at 904-05.
10. Id. at 904.
11. Id. at 905.
12. Id.
13. Id.
14. Id. Additionally, Mr. Henderson received interest and costs. Id.
15. Id.
ANALYSIS AND HOLDING

The Supreme Court of Rhode Island began its analysis by stating the general rule for the interpretation of insurance policies in Rhode Island. The Court states "it is well settled that when the terms of an insurance policy are found to be clear and unambiguous judicial construction is an end." The Court elaborates that policy terms must be given their plain, ordinary meaning and that the contract terms must be applied as stated. Further, "[c]ontracts for uninsured-motorist coverage must be [considered] in light of the public policy mandated by the Legislature."

In the case at hand, the Court reviewed the policy language and its precedent and held that the “for a fee” exclusion is consistent with the fundamental purpose of Rhode Island's uninsured-motorist statute. It opined that the language of Nationwide's “for a fee” exclusion was clear, unambiguous, and the words in the exclusion provision were "all of common usage and not susceptible to multiple meanings," and because of this, the Court applied the “clear” and “unambiguous” policy language to the facts of the case at hand. The Court focused on the undisputed facts that at the time of the accident Mr. Henderson was employed by All Occasion as a professional driver, that his passengers paid a fee for his services, which All Occasion paid him a salary for, and that Mr. Henderson was injured in the course of his employment.

Further, the Court has held, in previous uninsured motorist

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16. See id. at 906.
17. Id. (quoting Nationwide Mutual Insurance Co. v. Viti, 850 A.2d 104, 106-07 (R.I. 2004) (citation omitted)).
19. Id. (quoting DiTata v. Aetna Causality and Surety Co., 542 A.2d 245, 247 (R.I. 1988) (citation omitted)). The Court states that the public policy behind Rhode Island’s uninsured-motorist statute is to protect the insured against loss resulting from injuries sustained by negligence of uninsured vehicles. See Henderson, 35 A.3d at 906.
20. Id. at 906.
21. Id.
22. Id. at 907. The Court focused on the fact that Mr. Henderson was injured in the course his employment because he was asserting a claim against his personal automobile insurance policy. Id. at 908.
policy exclusions, that although public policy favors indemnification it does not require insurance companies to provide policyholders with coverage that protects them in every circumstance. The Court believes that this case is one of those circumstances where an insurer is not required to indemnify an insured. In the Court’s opinion, Nationwide was not required to indemnify Mr. Henderson because “the purchaser of a personal automobile insurance policy cannot reasonably anticipate coverage of his employment as a professional driver; neither could an insurance company reasonably anticipate insuring that risk in a personal automobile insurance policy.” Elaborating, the Court explains that the “for a fee” exception comes from the fact that insurers base their policy premium rates on the risk that the policyholder will be injured by an uninsured motorist, and not an individual using his vehicle in a commercial context. Concluding that the “for a fee” exception was not ambiguous and did not violate public policy, the Court did not analyze the parties’ arguments with respect to the “regular use” exception. The Supreme Court of Rhode Island vacated the judgment of the Superior Court and remanded the record to the Superior Court for entry of judgment in favor of the Nationwide Insurance Company.

COMMENTARY

It is important to emphasize that this decision is narrowly focused to the present facts. The Court, itself, admits that the “for a fee” exclusion’s language is vast, and that the broad terms can, at times, lend themselves to wrongful interpretation that may be inconsistent with the public policy that the Court articulated. Further, the Court mentions that though the vastness of the exclusion was the primary concern of the motion justice, the Court stated that it had to channel itself to the facts of the case before

23.  Id. at 906-07.
24.  See id. at 907-08.
25.  Id. at 908.
26.  Id.
27.  Id. & n. 12.
28.  Id. at 909.
29.  See id. at 908-09.
30.  Id. at 908.
Additionally, it seems that “for a fee” is not as “unambiguous” and “clear” as the Court seems to make it.\textsuperscript{32} The exclusion provision explicitly states that coverage does not apply when “use of any motor vehicle by an insured to carry persons or property \textit{for a fee},”\textsuperscript{33} yet Mr. Henderson, the insured who was operating the motor vehicle, was not paid a fee, but a salary.\textsuperscript{34} It seems that the “for a fee” exclusion would be clearly more applicable for one who drives a taxi. For example, if Mr. Henderson were a taxi driver, who was directly paid a fee for his services, and was injured, he would be the insured using a motor vehicle for a fee and excluded under the exclusions plain meaning. Here, All Occasion, who was not insured under the policy, was paid a fee and in turn Mr. Henderson was paid a salary from that fee. Based on the difference explained above it is surprising that the language of the exclusion provision was not found to be ambiguous.\textsuperscript{35}

CONCLUSION

After reviewing Nationwide’s policy language and Rhode Island precedent the Court held that the “for a fee” clause was clear, unambiguous, and did not violate Rhode Island public policy or the purpose behind Rhode Island’s uninsured-motorist coverage statute.

Maxine Kutner

\begin{itemize}
\item \textsuperscript{31} \textit{Id.} at 909.
\item \textsuperscript{32} \textit{See id.} at 906.
\item \textsuperscript{33} \textit{Id.} at 904 (emphasis added).
\item \textsuperscript{34} \textit{See id.} at 903.
\item \textsuperscript{35} \textit{See id.} at 906.
\end{itemize}
Insurance Law. *Koziol v. Peerless Ins. Co.*, 41 A.3d 647 (R.I. 2012). The Rhode Island Supreme Court held that the terms of a homeowner’s insurance policy coverage “summary page” will be considered terms of the actual policy. If the court finds ambiguity and/or contradictions between a “summary page” and the policy, it will interpret the policy against the insurer.

FACTS AND TRAVEL

Ronald Koziol et al (“Plaintiffs”), as a general contractor for the construction of new homes, subcontracted framing work to be done to their property. The framing work done by the subcontractor was faulty “to such an extent that the building official of the Town of Cumberland refused to approve the work.” Therefore, Plaintiffs had to incur additional expenses to bring their property into compliance with the building code. Plaintiffs filed a claim with their homeowner’s insurance company, Peerless Insurance Company (“Peerless”). Peerless denied the Plaintiffs’ claim because it deemed their contract unambiguously excluded coverage for both “faulty workmanship” and for enforcement of “any ordinance . . . regulating the construction . . . of a building,” and Plaintiffs filed this declaratory-judgment action.

In addition to the base coverage provided by the homeowner’s policy, Plaintiffs also purchased a “Homeowners Special Ultra Plus Coverage” (“Ultra Plus Coverage”) at an extra premium. In the insurance summary page under the “Ultra Plus Coverage” section, a chart listed coverages and provided that “Ordinance or Law Compliance for Buildings (required after a loss) [is]
Although the term “loss” was never defined, the summary page did include a disclaimer that the chart did not constitute an insurance contract, and that the insured should look at their policy terms for their specific coverage.

The other relevant terms in the policy are exclusions that Peerless referred to in denying the Plaintiffs’ claim. The policy included an exclusion of coverage for “faulty workmanship,” disjointly found from pages thirty-one to thirty-three of the policy, and an “Ordinance or Law” coverage exclusion for work needed for “enforcement of any ordinance...unless specifically provided under this policy.” The Providence County Superior Court found that the terms of the policy created ambiguity. Because the summary page caused ambiguity and the policy could be reasonably construed to provide coverage, the trial court interpreted the policy against the insured. The trial court denied Peerless’ motion for summary judgment, and entered a declaratory judgment in Plaintiffs’ favor upon a request by both parties for a final judgment. Peerless appealed.

**ANALYSIS AND HOLDING**

A policy’s terms are found to be ambiguous if they are “reasonably susceptible of different constructions” and are strictly construed in favor of the insured if ambiguity is found. The Plaintiffs’ arguments of ambiguity were based on content found in the summary page. The Rhode Island Supreme Court

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7. Id. “Ordinance or Law Compliance for Building” is herein referred to as “ordinance compliance coverage.”
8. Id.
9. Id. at 650.
10. Id.
11. Id. at 649.
12. Id.
13. Id. A bench decision in the lower court was proper because whether a contract is ambiguous is a question of law and not of fact. Id. (citing Bliss Mine Road Condominium Association v. Nationwide Property and Casualty Insurance Co., 11 A.3d 1078, 1083 (R.I. 2010)).
14. Id. at 649.
15. Id. at 650 (quoting Bliss Mine Road Condominium Association, 11 A.3d at 1085).
16. Id. at 651 (citing Bliss Mine Road Condominium Association, 11 A.3d at 1085).
17. See id. at 650.
held that the summary page was also part of the homeowner’s insurance policy and that it should be considered with the other policy terms.\textsuperscript{18} Therefore, the issue in this case is whether the policy’s other coverage terms “when read in concert with the information on the summary page, are sufficiently clear so that an ordinary reader would understand the nature of the coverage...”\textsuperscript{19}

The Court held that the policy was ambiguous in two different ways.\textsuperscript{20} First, although the summary page did provide ordinance compliance coverage after a loss, it never limited the term loss to “covered losses” anywhere in the policy.\textsuperscript{21} Peerless contends that when viewing the policy as a whole, the ordinance compliance coverage did not reach to work needed due to “faulty workmanship.”\textsuperscript{22} The court reasoned that even if the insured “could have been expected to weave their way through the policy” to find such “faulty workmanship” exception, the exception was ambiguous.\textsuperscript{23} It provided that the policy would cover “any ensuing loss... not excluded or excepted in this policy as covered.”\textsuperscript{24} The Court found that an ordinary insured could reasonably conclude that the “Ultra Plus Coverage” covers the ensuing loss “resulting from having to comply with the building code, even if the initial loss due to faulty workmanship was not covered.”\textsuperscript{25}

Secondly, the Court held that the policy was ambiguous because it excluded ordinance compliance coverage “unless

\begin{itemize}
\item \textsuperscript{18} Id. at 651; Similar to Sentry Insurance Co. v. Grena, 556 A.2d 998, 1000 (R.I. 1989) (separate and distinct document that explained the parties’ insurance coverage was permitted to consider the policy’s reach); Unlike Amica Mutual Insurance Co. v. Streicker, 583 A.2d 550, 552 (R.I. 1990) (where an “information digest” that had been sent separately to the Plaintiff’s home was not considered part of the policy terms). Id.
\item \textsuperscript{19} Id. at 651-653 (citing Mallane v. Holyoke Mutual Insurance Co. in Salem, 658 A.2d 18, 21 (R.I. 1995)) (Declaration page of the automotive insurance policy designated plaintiff as “named driver” but insurance company claimed the plaintiff was not insured. Declaration page along with entire policy created ambiguity, and therefore the policy was construed against the insurer).
\item \textsuperscript{20} See id. at 652-53.
\item \textsuperscript{21} Id. at 651.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id. at 652.
\item \textsuperscript{24} Id. (emphasis added).
\item \textsuperscript{25} Id. at 653.
\end{itemize}
specifically provided under [the] policy.”26 When reading the summary page which extended ordinance compliance coverage “required after a loss,” an insured could reasonably conclude that the summary page specifically provided ordinance compliance coverage under the policy.27 “Reasonable expectations of coverage raised by the [coverage summary] cannot be contradicted by the policy’s boilerplate unless the [summary] page itself clearly so warns the insured.”28 Because the Court held that the policy was ambiguous, it construed its terms against Peerless and affirmed the declaratory judgment in favor of the Plaintiffs.29

COMMENTARY

The Court was correct when it reemphasized the established doctrine that ambiguous contracts will be interpreted against the drafter.30 The Court’s policy rationale is that “summaries written by an insurance company are necessarily relied upon by consumers as reasonably clear statements about what they have purchased.”31 The Court determined that it must consider the terms of a summary page to be part of the policy’s terms, especially when the summary page is with the insurance policy, because “it is a common knowledge that the detailed provisions of insurance contracts are seldom read by the consumers.”32 Justice Flaherty, writing for the majority, recognized that it would take an “adventurous” reader to look beyond a policy’s summary page, and that even if one were to do so, they would “soon [be] tangled in a bewildering thicket of verbiage False.”33 Although finding certain provisions in the policy would require a “scavenger hunt” and for an insured to “bounc[e] like a pinball from section to section,” ultimately the Court properly concluded that it was the ambiguity of the actual terms that allowed Plaintiffs to prevail.

26. Id.
27. Id.
28. Id. at 653 (citing Mallane, 658 A.2d at 21).
29. Id.
30. Id. at 651 (citing Bliss Mine Road Condominium Association, 11 A.3d at 1085).
31. Id. at 654.
32. Id. at 653-54 (citing Sentry Ins. Co. v. Grenga, 556 A.2d 998, 1000 (R.I. 1989)).
33. Id. at 652.
not the mere disorderly structure of the policy. 34

CONCLUSION

The Court held that because the terms of an insurance policy coverage “summary page” will be considered terms of the actual policy when such summary is embedded within the policy, no ambiguity or contradictions may exist between the summary page and the actual policy terms. If there is any ambiguity or contradictions, the Court will interpret the policy against the insurer.

Leticia Cunha Tavares

34.  Id.
Insurance Law.  *Henderson v. Nationwide Ins. Co.*, 35 A.3d 902 (R.I. 2012). The Rhode Island Supreme Court addressed whether a “for a fee” policy exception under an uninsured-motorist insurance policy violated Rhode Island policy. The Court held that the provision was clear, unambiguous and did not violate public policy. Additionally, the Court emphasized that an insurance policy is foremost a contract between an insurance company and the insured and that courts should not interfere with these contracts so long as they meet the above criteria.

FACTS AND TRAVEL

Mr. Henderson, the plaintiff in the Superior Court and the Respondent in this matter, was employed by All Occasion Transportation as a professional driver.\(^1\) Mr. Henderson’s customers paid All Occasion a fee for his services, and in turn All Occasion compensated Mr. Henderson by salary.\(^2\) On or about June 5, 2003,\(^3\) Mr. Henderson, was directed by his employer to transport a number of customers from Newport, Rhode Island, to Logan Airport in Boston, Massachusetts.\(^4\) After driving them to the airport, and while he was unloading his customer’s luggage, another vehicle hit Mr. Henderson, severely injuring him. After the accident, Mr. Henderson settled claims against the tortfeasor as well as All Occasion’s insurance carrier, but he contended that his injuries exceeded the amounts he received.\(^5\) Mr. Henderson then filed an “under-insured” motorist claim with Nationwide, his personal automobile insurance carrier.\(^6\) Nationwide denied Mr. Henderson’s claim, naming two exclusions contained in his uninsured motorist coverage policy: the “for a fee exclusion” and

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2. *Id.* at 903.
3. The exact date is in dispute due to conflicting testimony by the respondent, Mr. Henderson, but it did not impact the decision in this case. *See id.* at 904 & n. 1.
4. *Id.* at 904.
5. *Id.*
6. *Id.*
the “regular use exclusion.”

After Nationwide denied his claim, Mr. Henderson filed suit in the Superior Court asserting that his insurer had “unlawfully and unjustifiably” denied him coverage. Nationwide moved for summary judgment, which was denied by the motion justice. The motion justice found that the policy exclusions were “convoluted,” “difficult to understand,” and that they were “a plain attempt to vary or qualify the clear and unambiguous statutory definition of uninsured motor vehicle and the requirement that all insurance carriers offer personal protection to their insured.”

One year later, Nationwide renewed its motion for summary judgment arguing that Mr. Henderson’s testimony, from a deposition after the denials of the initial summary judgment, showed that the accident occurred while he was using All Occasion’s limousine to carry passengers “for a fee” and did so regularly. The motion justice, who presided over the first summary judgment hearing, stated that she accepted the facts both as true and weighing in favor of Nationwide, but still denied Nationwide’s motion because she found that the exclusions were overbroad and violated public policy. After the justice’s ruling, the parties acknowledged that Mr. Henderson’s remaining damages exceeded the policy limits, and subsequently Mr. Henderson filed a motion for entry of judgment in his favor. On October 1, 2010, a judgment was entered on behalf of Mr. Henderson for the policy limit of $25,000. Nationwide appealed that judgment to the Supreme Court of Rhode Island.

7. The relevant portions of his policy provide: “coverage does not apply to: 1. Use of any motor vehicle by an insured to carry persons or property for a fee and 4. bodily injury suffered while occupying a motor vehicle: a) owned by; or b) furnished for the regular use of; you or a relative, but not insured for Auto Liability coverage under this policy.”

8. Id.
9. Id. at 904-05.
10. Id. at 904.
11. Id. at 905.
12. Id.
13. Id.
14. Id. Additionally, Mr. Henderson received interest and costs. Id.
15. Id.
ANALYSIS AND HOLDING

The Supreme Court of Rhode Island began its analysis by stating the general rule for the interpretation of insurance policies in Rhode Island.\textsuperscript{16} The Court states “it is well settled that when the terms of an insurance policy are found to be clear and unambiguous judicial construction is an end.”\textsuperscript{17} The Court elaborates that policy terms must be given their plain, ordinary meaning and that the contract terms must be applied as stated.\textsuperscript{18} Further, “[c]ontracts for uninsured-motorist coverage must be [considered] in light of the public policy mandated by the Legislature.”\textsuperscript{19}

In the case at hand, the Court reviewed the policy language and its precedent and held that the “for a fee” exclusion is consistent with the fundamental purpose of Rhode Island’s uninsured-motorist statute.\textsuperscript{20} It opined that the language of Nationwide’s “for a fee” exclusion was clear, unambiguous, and the words in the exclusion provision were “all of common usage and not susceptible to multiple meanings,” and because of this, the Court applied the “clear” and “unambiguous” policy language to the facts of the case at hand.\textsuperscript{21} The Court focused on the undisputed facts that at the time of the accident Mr. Henderson was employed by All Occasion as a professional driver, that his passengers paid a fee for his services, which All Occasion paid him a salary for, and that Mr. Henderson was injured in the course of his employment.\textsuperscript{22}

Further, the Court has held, in previous uninsured motorist

\textsuperscript{16} See id. at 906.
\textsuperscript{17} Id. (quoting Nationwide Mutual Insurance Co. v. Viti, 850 A.2d 104, 106-07 (R.I. 2004) (citation omitted)).
\textsuperscript{18} Henderson, 35 A.3d at 906.
\textsuperscript{19} Id. (quoting DiTata v. Aetna Causality and Surety Co., 542 A.2d 245, 247 (R.I. 1988) (citation omitted)). The Court states that the public policy behind Rhode Island’s uninsured-motorist statute is to protect the insured against loss resulting from injuries sustained by negligence of uninsured vehicles. See Henderson, 35 A.3d at 906.
\textsuperscript{20} Id. at 906.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 907. The Court focused on the fact that Mr. Henderson was injured in the course his employment because he was asserting a claim against his personal automobile insurance policy. Id. at 908.
policy exclusions, that although public policy favors indemnification it does not require insurance companies to provide policyholders with coverage that protects them in every circumstance. The Court believes that this case is one of those circumstances where an insurer is not required to indemnify an insured. In the Court’s opinion, Nationwide was not required to indemnify Mr. Henderson because “the purchaser of a personal automobile insurance policy cannot reasonably anticipate coverage of his employment as a professional driver; neither could an insurance company reasonably anticipate insuring that risk in a personal automobile insurance policy.” Elaborating, the Court explains that the “for a fee” exception comes from the fact that insurers base their policy premium rates on the risk that the policyholder will be injured by an uninsured motorist, and not an individual using his vehicle in a commercial context. Concluding that the “for a fee” exception was not ambiguous and did not violate public policy, the Court did not analyze the parties’ arguments with respect to the “regular use” exception. The Supreme Court of Rhode Island vacated the judgment of the Superior Court and remanded the record to the Superior Court for entry of judgment in favor of the Nationwide Insurance Company.

COMMENTARY

It is important to emphasize that this decision is narrowly focused to the present facts. The Court, itself, admits that the “for a fee” exclusion’s language is vast, and that the broad terms can, at times, lend themselves to wrongful interpretation that may be inconsistent with the public policy that the Court articulated. Further, the Court mentions that though the vastness of the exclusion was the primary concern of the motion justice, the Court stated that it had to channel itself to the facts of the case before

23. Id. at 906-07.
24. See id. at 907-08.
25. Id. at 908.
26. Id.
27. Id. & n. 12.
28. Id. at 909.
29. See id. at 908-09.
30. Id. at 908.
Additionally, it seems that “for a fee” is not as “unambiguous” and “clear” as the Court seems to make it. The exclusion provision explicitly states that coverage does not apply when “use of any motor vehicle by an insured to carry persons or property for a fee,” yet Mr. Henderson, the insured who was operating the motor vehicle, was not paid a fee, but a salary. It seems that the “for a fee” exclusion would be clearly more applicable for one who drives a taxi. For example, if Mr. Henderson were a taxi driver, who was directly paid a fee for his services, and was injured, he would be the insured using a motor vehicle for a fee and excluded under the exclusions plain meaning. Here, All Occasion, who was not insured under the policy, was paid a fee and in turn Mr. Henderson was paid a salary from that fee. Based on the difference explained above it is surprising that the language of the exclusion provision was not found to be ambiguous.

CONCLUSION

After reviewing Nationwide’s policy language and Rhode Island precedent the Court held that the “for a fee” clause was clear, unambiguous, and did not violate Rhode Island public policy or the purpose behind Rhode Island’s uninsured-motorist coverage statute.

Maxine Kutner

31. Id. at 909.
32. See id. at 906.
33. Id. at 904 (emphasis added).
34. See id. at 903.
35. See id. at 906.
**Tort Law.** *Higgins v. Rhode Island Hospital*, 35 A.3d 919 (R.I. 2012). David Higgins, an injured on the job Providence firefighter, sued Rhode Island Hospital for negligence. The Rhode Island Supreme Court affirmed the judgment below that the “firefighter’s rule” barred a negligence action for a firefighter’s injury that occurred within the course of an emergency where the risk created could be reasonably anticipated because Higgins’ injury arose out of the circumstances that brought him to the scene, it was reasonably foreseeable, and defendants were the alleged tortfeasors who caused Higgins to go to the location where he was injured.

**FACTS AND TRAVEL**

Plaintiff David Higgins (“Higgins”), an on duty Providence EMT/firefighter, was injured when he responded to a call to deliver a patient to defendant Rhode Island Hospital.\(^1\) Higgins injury occurred when a nurse asked Higgins to assist with a different patient that was unruly and “shouting and spitting” at her.\(^2\) Because the patient struggled, was only under soft restraints and allegedly not properly medicated, Higgins was injured when the patient “violently moved his head and torso,” breaking Higgins’ jaw and knocking him unconscious.\(^3\)

Higgins sustained major injuries that caused him to retire as a firefighter on a disability pension.\(^4\) He then filed suit against Rhode Island Hospital and their security company alleging negligence for “fail[ing] to restrain the patient and that failure had caused his injuries.”\(^5\) Defendants motion for summary judgment was granted by Superior Court Justice Stern as plaintiff’s claim was barred by the firefighter’s/public-safety officer’s rule in Rhode Island.\(^6\) Plaintiff timely appealed.

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2. *Id.* at 922, 925.
3. *Id.*
4. *Id.* at 922-23.
5. *Id.* at 922.
6. *Id.*
ANALYSIS AND HOLDING

The Rhode Island firefighter’s rule “bar[s] an injured public-safety official from maintaining a negligence action against a tortfeasor whose alleged malfeasance is responsible for bringing the officer to the scene of a fire, crime, or other emergency where the officer is injured.” If a defendant can meet the three-pronged test to trigger the rule’s application, a plaintiff will be barred from recovery. For the firefighter rule to apply, the defendant must prove “(1) that the tortfeasor injured the police officer or firefighter in the course of his or her employment, (2) that the risk the tortfeasor created was the type of risk that one could reasonably anticipate would arise in the dangerous situation which their employment requires them to encounter, and (3) that the tortfeasor is the individual who created the dangerous situation which brought the police officer or firefighter to the crime scene, accident scene, or fire.”

The Court held that the event was in the course of Higgins’ employment and that there was a nexus between the original emergency and the alleged tort by Rhode Island Hospital. Here, Higgins’ argument that helping the nurse restrain the patient was an intervening act was rejected. As such, all three prongs of the firefighter rule have been met. Higgins was responding to an emergency, the risk could be reasonably anticipated, and the alleged tortfeasor was the same individual creating the risk. Thus, Higgins was properly barred from recovery and the

8. Higgins, 35 A.3d at 923.
9. Id. (quoting Rinn v. Razzee, 912 A.2d 939, 940 (R.I. 2006) (citation omitted)).
10. Id. at 923-24. The Court has recognized cases where an intervening cause does break the chain of causation. See Aenta Casualty & Surety Co. v. Vierra, 619 A.2d 436, 439 (R.I. 2012) (finding a break in causation where a car not involved in the original accident scene struck a police officer) and Labrie v. Pace Membership Warehouse, Inc., 678 A.2d 867, 868 (R.I. 1996) (holding a break in the causal chain where during a fire alarm certification a fire superintendent was injured by an unexpected pipe bursting). But see Walker v. Prignano, 850 A.2d 954, 955 (R.I. 2004) (holding that a plaintiff could not recover when injured on stone steps at a call for a security alarm going off because it was incidental to the emergency). The way the injury was sustained in Higgins is comparable to the one in Walker.
judgment of the Superior Court was affirmed.\textsuperscript{12}

\textbf{COMMENTARY}

This case further strengthens the notion that when a public officer’s injury is proximately related and reasonably anticipated from his service as a public safety officer in the scope of an emergency call, that he is barred from recovery against an alleged tortfeasor that caused the emergency. \textit{Higgins} stands for the principle that the firefighter rule is not a “literal requirement” that the tortfeasor called the firefighter to the scene but that there is a “nexus or connection” between the injury and the reason the firefighter was called to the scene of the accident, clarifying what is an intervening event that will break the chain of causation.\textsuperscript{13} This case properly applied the firefighter rule and is consistent with precedent in Rhode Island.

\textbf{CONCLUSION}

The Rhode Island firefighter’s rule bars a negligence action for a plaintiff firefighter’s injury in the course of his employment where the injury could be reasonably anticipated because it rose out of the circumstances that brought him to the scene.\textsuperscript{14}  

Nicholas Denice

\begin{itemize}
\item\textsuperscript{12} \textit{Higgins}, 35 A.3d at 923, 925.
\item\textsuperscript{13} See id. at 924-25.
\item\textsuperscript{14} Id. at 925.
\end{itemize}
Tort Law. Gushlaw v. Milner, 42 A.3d 1245 (R.I. 2012). A defendant who drives his intoxicated friend to his car does not owe a duty of care to other motorists when the intoxicated friend proceeds to get into his vehicle and drive. Creation of such a duty would impose a high liability on public transport operators as well as interfere with policies designed to combat drunk driving, with particular concern for designated drivers. It is not for the Court, but rather, the General Assembly, to determine whether such a duty should be imposed on this class of individual.

FACTS AND TRAVEL

On August 12, 2005, Joseph M. Clukey (“Mr. Clukey”), then nineteen years old, invited Matthew J. Milner (“Mr. Milner”), then age twenty, to a party in Warwick, Rhode Island. Prior to the party, both men met at a local convenience store not far from where they lived in Smithfield, Rhode Island, where it was decided that Mr. Clukey would drive to the party and Mr. Milner would leave his car at the convenience store. En-route to the party, Mr. Clukey and Mr. Milner stopped at a liquor store where they purchased an “eighteen-pack” of beer and proceeded to the party. At the party, it was observed that each man consumed between seven and eight beers, with Mr. Milner becoming “louder and more obnoxious” as the evening proceeded. Following the first party, Mr. Clukey and Mr. Milner returned to Smithfield where they went to a friend’s house for another party. After being asked to leave from the second party for being too loud, Mr. Clukey drove Mr. Milner back to his car at the convenience store and subsequently returned to the house party.

2. Id. at 1247-48.
3. Id. at 1248.
4. Id. A comment was made by the hostess of the party that she hoped Mr. Milner was not driving, to which Mr. Clukey responded that he would be driving when they left the party. Id.
5. Id. No alcohol was consumed at this party at the hostess’ request. Id.
6. Id.
At approximately 1:30 a.m., Mr. Milner, driving at a “high-rate of speed,” crossed the center line along Plainfield Pike in the Town of Scituate, Rhode Island, and collided with Eldrick L. Johnson (“Mr. Johnson”), the decedent in this case. Mr. Milner was pronounced dead at the scene of the collision and an autopsy indicated his blood alcohol concentration was 0.162, which is twice the legal limit for operating a motor vehicle in Rhode Island. Mr. Johnson, although alive at the scene when the police arrived, was pronounced dead when he arrived at the hospital.

On August 26, 2005, the plaintiff filed a wrongful death suit against Mr. Milner’s father, William J. Milner, John Doe, and Allstate Insurance, with amended complaints adding Mr. Clukey and his parents to the suit. While most of the claims with respect to the other defendants were settled, the plaintiff alleged that Mr. Clukey was negligent in the sense that he knew that Mr. Milner was drunk when he got behind the wheel and Mr. Clukey had a duty to other motorists on the road to prevent Mr. Milner from operating his vehicle. On June 3, 2009, Mr. Clukey filed a motion for summary judgment, arguing that the plaintiff failed to allege a recognized duty under Rhode Island law.

Mr. Clukey argued that he owed no duty to other motorists on the road because there is no duty to prevent third party’s from operating their vehicle. The plaintiff argued that while there was no social host liability attached to Mr. Clukey, there was a voluntary assumption of a duty when Mr. Clukey transported Mr. Milner back to his car.

During oral arguments, the hearing justice expressed reservations on the mechanics of the proposed duty, the scope of the duty, and how an individual in the position of Mr. Clukey

7. Id. at 1249.
8. Id. at 1249 & n.7.
9. Id.
10. There are multiple plaintiffs in this case: Rebecca L. Gushlaw, individually and on behalf of her four minor children and Judith Gushlaw, in her capacity as co-administrator of Mr. Johnson’s estate. See n.1.
11. Id.
12. Id.
13. Id. at 1249-50.
14. Id. at 1250.
15. Id.
would perform this duty. Likewise, the hearing justice raised concerns that the Legislature had not yet debated whether the imposition of such a duty on designated drivers, public transport operators, and other individuals was appropriate. After hearing oral arguments, the hearing justice granted the defendant’s motion for summary judgment, noting that the potential policy implications were too great for a court to rule on; rather, the court deferred its judgment to any future discussions on the matter in the General Assembly. Final judgment was granted for Mr. Clukey on September 3, 2009, with the plaintiff filing a timely appeal on September 17, 2009.

ANALYSIS AND HOLDING

On appeal, the plaintiff advanced four theories to support her claim that Mr. Clukey did owe a duty to Mr. Milner. The theories were:

(1) liability resulting from a cognizable duty ascertained from a consideration of the factors set forth in Banks, (2) establishing a “special relationship” between Mr. Clukey and Mr. Milner as set forth in Restatement (Second) Torts § 315 (1965), (3) voluntary assumption of a duty by Mr. Clukey, and (4) the fact that Mr. Clukey “substantially assisted” Mr. Milner in transporting him back to his car at the convenience store while he was intoxicated.

In reviewing orders for summary judgment from the hearing justice, the Rhode Island Supreme Court reviews the order de novo. The Court will affirm the “grant of summary judgment only ‘[i]f we [the Court] conclude, after viewing the evidence in the light most favorable to the nonmoving party, that there is no genuine issue of material fact to be decided and that the moving

16. Id.
17. Id.
18. Id.
19. Id.
20. Id. at 1251.
22. Id. at 1251 (citing Henderson v. Nationwide Insurance Co., 35 A.3d 902, 905 (R.I. 2012)).
party is entitled to judgment as a matter of law." The party opposing the motion for summary judgment bears the burden of proving there is a fact in dispute.

**Special Relationship: Social Host Liability**

Initially, the Court began its analysis by eliminating the social host liability argument by determining that Mr. Clukey was not hosting Mr. Milner in any social capacity and therefore, such a classification is not applicable. In previous cases, the Court has held that social hosts could not be held liable for injuries of third parties as a result of an intoxicated person coming from the social host’s party. Through prior case law, the Court concluded that to determine if a social host liability existed, “an intricate scrutiny” of the facts was required to determine if a special relationship and in the facts at bar, no special relationship existed between Mr. Clukey and Mr. Milner to require Mr. Clukey to exercise a duty of care over Mr. Milner.

**Duty Analysis**

In addition to examining if a special relationship existed between Mr. Clukey and Mr. Milner, the Court also examined whether a general duty existed between the two men. In their analysis, the Court recognized that there is “no clear-cut formula for the creation of a duty that can be mechanically applied to each

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23. *Id.* at 1251 (citing Empire Acquisition Group, LLC v. Atlantic Mortgage Co., 35 A.3d 878, 882 (R.I. 2012) (citation omitted)).
25. *Id.* at 1252.
26. *Id.* at 1252; see Ferreira v. Strack, 652 A.2d 965, 967 (R.I. 1995) (cautioning that to impose such a duty would raise “serious implications” which should be resolved in the General Assembly, not the courts); contra Martin v. Marciano, 871 A.2d 911, 917 (R.I. 2005) (concluding that because parents were serving minors alcohol, a special relationship existed between parents-children and therefore, the social hosts could be held liable for the actions of the intoxicated minors); see also Volpe v. Gallagher, 821 A.2d 699, 705 (R.I. 2003) (holding that a mother owed a duty to prevent her mentally ill son from storing guns and ammunition on the property because a special relationship existed between the parent-child).
27. *Id.* at 1256.
28. *Id.*
and every negligence case.” To determine if a duty was owed by Milner to third party motorists, the Court carried out an ad hoc analysis. Citing previous cases, the Court has previously examined several factors which included:

(1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of connection between the defendant’s conduct, (4) the policy of preventing future harm, and (5) the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for the breach.

For the case at bar, the Court began by examining the nature of the relationship between Mr. Clukey and Mr. Milner and determined that there was not a property based relationship and that the Restatement (Second) Torts § 318 did not apply to Mr. Clukey and Mr. Milner’s friendship. The Court concluded that Mr. Clukey did not have the ability to control Mr. Milner’s drinking habits and that while Mr. Clukey agreed to take Mr. Milner back to his car, such an act was not enough of an affirmative act signaling the level of control necessary for a duty to be owed. Likewise, the Court looked to Restatement (Second) of Torts § 314A to eliminate Mr. Clukey’s relationship to Mr. Milner from the special relationships delineated in the section, concluding that Mr. Clukey owed no special responsibility to Mr.

29. Id. (quoting Santana v. Rainbow Cleaners Inc., 969 A.2d 653, 664 (R.I. 2009) (citation omitted)).
30. Id. (quoting Ouch v. Khea, 963 A.2d 630, 633 (R.I. 2009) (citation omitted)).
31. Id. at 1256-57 (quoting Ferreira, 652 A.2d at 967-68 (quoting Banks, 522 A.2d at 1225)).
32. Restatement (Second) of Torts § 318 (1965) (A special relationship may arise between the possessor of land and those allowed on the land because of the possessor’s power of control over those allowed to enter.)
33. Id. at 1257.
34. Id. at 1258.
35. Restatement (Second) of Torts § 314A (1965) (“[S]pecial relations giving rise to a duty to aid or protect: (1) common carrier/passenger, (2) innkeeper/guests, (3) possessor of land that holds the land open to the public, and (4) legal or voluntary custodian/ward.”) As explained in comment c. of Restatement (Second) of Torts § 315 (1965), “the relationship between the actor and the other which require the actor to control the conduct of third persons are started in §§914A and 320.” Id. at 1258.
Rejecting the plaintiff's argument that a special relationship and a relationship existed between Mr. Clukey and Mr. Milner, the Court continued their *ad hoc* analysis to focus on the argument that because Mr. Clukey negligently undertook to assisting Mr. Milner back to his vehicle, he should be held liable for Mr. Milner's subsequent actions. In its opinion, the Court recognized that other jurisdictions, in addition to the Restatement (Second) Torts has a “relaxed” standard, meaning that an individual who gratuitously undertakes services for another is subject to the liability resulting from the acts of third party. The Court has not accepted the relaxed approach and declined applying such an analysis to the case at bar. While the Court has assigned responsibility to third parties in instances where a contractual obligation was in place, Mr. Clukey and Mr. Milner were not contractually related, rather they were just friends and no such obligation existed at the time of the incident.

The Court also examined other factors including foreseeability of harm to Mr. Johnson as a result of Mr. Clukey's conduct, determining that while it was conceivable that Mr. Clukey would recognize Mr. Milner could harm people if he was to drive while intoxicated, “foreseeability alone does not create a duty.” In addition to the foreseeability aspect, the closeness of connection between Mr. Clukey's alleged conduct and the death of Mr. Johnson was deemed to be too attenuated seeing as much time.

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36. *Id.* at 1258.
37. *Id.* at 1259. The Court concluded that Mr. Clukey completed his duty to Mr. Milner when he returned Mr. Milner to his car after the party and that even though Mr. Clukey could have driven Mr. Milner home rather than his car, Mr. Clukey was under no obligation to do this because this course of action was not agreed to by Mr. Clukey and Mr. Milner. *Id.* at 1260.
38. *Id.* at 1259; compare *McGee ex rel McGee v. Chalfant*, 806 P.2d 981, 983 (Kan. 1991) (holding that a third party may be held liable when the individual gratuitously undertakes his services to assist another, resulting in the injury of a plaintiff); see also Restatement (Seconds) Torts §§323 & 324A (1965).
39. *Id.* at 1259-60 (quoting *Contois v. Town of West Warwick*, 865 A.2d 1019, 1024 n. 7 (R.I. 2004)).
40. *Id.* at 1260; see *Buszta v. Souther*, 232 A.2d 396, 397 (R.I. 1967).
41. *Id.* at 1261 (quoting *Ferreira*, 636 A.2d at 688 n.4 (citation omitted) (concluding that the true question is not whether the "event is foreseeable, but whether a duty exists to take measures to guard against it").
elapsed between Mr. Clukey dropping Mr. Milner off at his car and the time of the accident.\textsuperscript{42} From the factors analyzed so far, the Court could not conclude that Mr. Clukey owed a duty to Mr. Johnson.\textsuperscript{43}

\textit{Public Policy Concerns}

From its analysis, the Court concluded that Mr. Clukey did not owe a duty to third party motorists on the road and could not be held accountable for the actions of Mr. Milner because no relationship existed between Mr. Clukey and Mr. Milner, the foreseeability of injury to Mr. Johnson was too attenuated and Mr. Clukey did not voluntarily assume responsibility for Mr. Milner when he drove Mr. Milner back to his car.\textsuperscript{44} As part of the \textit{ad hoc} analysis, the Court examined the public policy concerns of assigning a duty to individuals to protect other motorists from third party drivers.\textsuperscript{45} The Court was concerned that the General Assembly has tried to be pro-active against drunk driving, through policy initiatives and laws and believed that assigning a duty to “designated drivers” would deter sober individuals from taking drunk drivers from behind the wheel.\textsuperscript{46} The extent of the burden placed on individuals, taxi drivers, or public transport operators would be too great and the scope would be too vast.\textsuperscript{47} The Court concluded that to create such a duty was too great of a responsibility for the Court, but was vested in the Legislature if it wanted to take this step because if the Court created a “designated driver duty,” it would run counter to Legislative action and the desire for sober individuals to be designated drivers and remove intoxicated individuals from the motorway.\textsuperscript{48}

Taking all the factors into account: (1) the lack of control Mr. Clukey had over Mr. Milner, (2) the attenuated foreseeability of harm to Mr. Johnson, (3) the fact that Mr. Clukey drove Mr. Milner back to his car was not a voluntary assumption of responsibility for Mr. Milner’s actions, and (4) the concern by the

\textsuperscript{42} Id. at 1261-62.
\textsuperscript{43} Id. at 1260.
\textsuperscript{44} Id. at 1262.
\textsuperscript{45} Id. at 1263.
\textsuperscript{46} Id. & n. 22.
\textsuperscript{47} Id. at 1262.
\textsuperscript{48} Id. at 1263.
Court that assigning such a duty to individuals to protect the general population against third party motorists would run contrary to policies implemented by the General Assembly, the Court determined that Mr. Clukey did not owe a duty to Mr. Johnson or other motorists on the road, and affirmed the hearing court’s grant of summary judgment for Mr. Clukey, remanding the case to the Superior Court for further action.49

COMMENTARY

Through the opinion in this case, it seems that the Rhode Island Supreme Court is signaling that assignment of a duty, such as the one desired by the plaintiff cannot be done lightly, or in the words of the Court “mechanically,” but rather is applied based on the intricate details and circumstances of the case at bar.50 The Court seemed to take care to parse the different approaches to duty analysis, developing its own approach to the special relationship sections in the Restatement and the concerns it has with accepting the “relaxed” approach taken by other jurisdictions as well as the Restatements with respect to individuals who “undertakes gratuitously.”51 In its view, a “relaxed” approach to duty analysis creates the potential for unintended policy knock-on effects that are in the purview of the General Assembly to debate, not the Court to assign.52

Likewise, the ad hoc analysis the Court adheres to in this case enable the Court to be versatile in analyzing duty, and negligence cases in general, because it enables the Court to take the facts as given and apply the different approaches as they potentially fit.53 The malleability of the ad hoc analysis does not peg the Court down to one standard, but allows the negligence cause of action to adapt to the situation that is presented to the court and not be pigeon-holed to one set standard. Given the versatility of the ad hoc analysis and the ability to interchange factors as necessary for a particular case, the ad hoc analysis

49. Id. at 1264.
50. Id. at 1256.
51. Id. at 1256-57 (quoting Ferreira, 652 A.2d at 967-68 (citation omitted)); see Restatement (Seconds) Torts §§323 & 324A (1965).
52. Id. at 1259-60.
53. Id. at 1256-57 (quoting Ferreira, 652 A.2d at 967-68 (citation omitted))
seems to have worked in this case, taking the facts and determining which factors were needed for the analysis and whether such a duty should be assigned to a particular individual, in this case, whether Mr. Clukey owed a duty to other motorists on the road given Mr. Milner's intoxication.

Although the Court was correct in its analysis that Mr. Clukey did not assume a duty for Mr. Milner when he drove Mr. Milner back to his car, the Court does not explain why it does not accept the Restatement's "relaxed" position with respect to assigning duty to individuals who gratuitously undertake assisting another individual.\footnote{Id. at 1259-60; see Gray v. Derderian, 448 F. Supp. 2d 351, 360 (D.R.I. 2005) (noting that the Federal District Court cannot apply the "relaxed" approach because the Rhode Island Supreme Court has yet to adopt the Restatement's "relaxed" standard).} Along this line, it would seem that the Legislature has voiced its perspective with the passage of the Rhode Island Good Samaritan Law, which states that individuals who assist others cannot in certain instances, be held liable for any negligent actions that may follow.\footnote{See R.I. GEN. LAWS §9-1-27.1 (2012); see Boccasile v. Cajun Music Ltd, 694 A.2d 686, 687 (R.I. 1997) (concluding that health care professionals are covered by the Good Samaritan Statute when they attempt to assist an individual requiring emergency assistance and their conduct was not willful, wonton, or grossly negligent).}

While the majority of the Court's opinion focused on the duty analysis and the \textit{ad hoc} analysis that has been formulated via previous precedent, the Court in this case seemed to be equally concerned with the policy implications of creation of such a duty on drivers and the extent that such a duty can be assigned. In particular, the Court was concerned that by creation of such a duty, it would run counter to the objectives of the Rhode Island General Assembly in trying to remove intoxicated drivers from the road. The Court was equally concerned that creation of such a duty would impact public transport operators; specifically, taxi drivers and other common carriers that might be held liable if such a duty was imposed.\footnote{Id. at 1264.}

Given the policy implications of assignment of this type of duty to individuals like Mr. Clukey, the Court was correct in balancing its legal analysis with the policy considerations discussed in the opinion and its temperance in not creating a duty
that might run counter to the General Assembly’s attempt to deal with the tragic nature of drunk driving shows a respect for the process of debate and policy development and articulation in the legislature.

CONCLUSION

The Rhode Island Supreme Court held that a duty cannot be imposed on an individual who transports an intoxicated individual to his car because to impose such a duty would run counter to the General Assembly’s attempt to combat drunk driving. While the Court determined based on the ad hoc test that no duty existed, they acknowledged that it was for the General Assembly to decide whether such a duty should be assigned to such a class of individuals who transport intoxicated drivers.

Marc R. Fialkoff
Tort Law. *McCain v. Town of N. Providence*, 41 A.3d 239 (R.I. 2012). The Rhode Island Supreme Court was petitioned by the Town of North Providence to decide whether an employee was employed as a “member” of the fire department at the time he was injured for purposes of Rhode Island’s injured-on-duty statute.

**FACTS AND TRAVEL**

On July 20, 2001, the Town of North Providence hired the plaintiff, Everett McCain as a “Firefighter 3rd Class,” to work as a lineman with the Communications Department of the North Providence Fire Department.1 As a lineman, McCain was responsible for “insuring the proper operation of the bucket truck, maintaining the Municipal Fire Alarm system cabling, and installing and maintaining cabling to town buildings to support radio, telephone and networking equipment.”2

He was issued an identification card that certified him as a “TECHNICIAN” and a “member of the North Providence Fire Department” and was a member of Local 2334, International Association of Firefighters, and AFL-CIO (“the union”).3 McCain was not obligated to attend the fire department sponsored training academy, nor was he required to obtain an Emergency Medical Technician certification or issued “protective gear.”4 He did not participate in fighting any fires or making rescue runs.5 He responded to incident scenes after a fire or other emergency was “under control” and when the incident damaged exterior communications.6 McCain was subject to the collective bargaining agreement (“CBA”) in effect between the town and the union.7

2. *Id.* at 241.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*)
McCain was designated by the CBA as holding an “administrative position” and was considered ineligible to “work callback or overtime as a firefighter.” The CBA also dictated that workers in the Communications Division were unable to work as firefighters, and could not be counted as part of the minimum firefighter manpower requirement.

On June 23, 2006, McCain struck his head on the “underside of a bucket apparatus on a bucket truck” while getting into the truck. Because his injury occurred during the performance of his duties, McCain fell within the provisions of Article XI of the CBA, which provides benefits to employees who are injured or contract illness in the line of duty.

The Town of North Providence began making injured-on-duty (“IOD”) payments to McCain pursuant to Rhode Island General Law § 45-19-1 on June 23, 2006, and continued to make payments until July 24, 2009. The town then decided that because McCain was not a “sworn firefighter,” he was ineligible to collect IOD payments under § 45-19-1. The town accordingly removed McCain from its payroll.

McCain filed a petition for a writ of mandamus with the Superior Court on August 25, 2009, requesting that the Court order the town to resume his IOD benefits based on §45-19-1 and the CBA and asking the court to issue a declaratory judgment that he was a firefighter within the meaning of §45-19-1. The town

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8. Id.
9. Id.
10. Id.
11. Id. The relevant parts of the CBA are:
   Section 1: Injuries and Illness: Employees who are injured or who contract illness in the line of duty shall receive such benefits as are provided by the General Laws of the State of Rhode Island.
   Section 3: Injuries and Illness: Any employee who shall become wholly or partially incapacitated by reason of injuries received or sickness contracted in the performance of their duty, shall, during the incapacity receive full salary or wages and medical expenses from the Town.

Id.
13. Id.
15. Id.
16. Id.
filed an objection to his petition, along with an answer on September 23, 2009, challenging his eligibility to collect benefits under the IOD statute and seeking a declaration that McCain was not a firefighter for purposes of collecting benefits under §45-19-1. The town further requested that the Court require McCain to repay the IOD payments he received between 2006 and 2009. The trial justice issued a written decision on March 11, 2010, finding that McCain fell within the “broad” definition of “firefighter” as set forth in the IOD statute, but failed to issue a writ of mandamus as requested by McCain. Judgment was entered on March 25, 2010, granting declaratory relief in favor of McCain, and denying the town declaratory relief as sought in its counterclaim. The town filed a notice of appeal on April 6, 2010.

ANALYSIS AND HOLDING

The Court applied de novo review to interpret the legislative intent of the IOD statute. By enacting the IOD statute, the Legislature intended to “provide greater work related injury benefits to certain public employees whose jobs require them to serve the state or its municipalities, often in dangerous situations.” Here, the Court was required to determine whether McCain, a civilian lineman with the fire company was a “firefighter” at the time of his injury for purposes of collecting benefits under the IOD statute. The court held that, based on the clear and unambiguous language set forth in §45-19-1, McCain met the definition of a “firefighter” at the time of his injury for the purposes of collecting the IOD benefits under the statute.

As defined by §45-19-1, “firefighter means and includes any chief or other member of the fire department or rescue personnel of any city, town, or fire district, and any person employed as a

17. Id.
18. Id.
19. Id.
20. Id. at 243.
21. Id.
22. Id.
24. Id.
25. Id.
member of the fire department in any city or town.” Therefore, if McCain was employed as a member of the fire department, he was a firefighter for purposes of the statute. McCain was hired by the town as a “Firefighter 3rd Class” with the fire department; his identification card certified him as a “member” of the fire department, and although his training, duties and responsibilities did not fall within the definition of a “first responder,” he was employed as a “member” of the fire department for purposes of the IOD statute. As a result, the Court concluded that the meaning expressed in the statute was the meaning intended, and that because McCain’s job title and identification declared him to be a member of the fire department, he was entitled to collect under the IOD statute.

Justice Goldberg wrote in dissent, joined by Chief Justice Suttell, and agreed with the town that McCain was never a firefighter or a first responder, and therefore did not fall within the purview of §45-19-1. The dissent argued that the Legislature never intended to provide IOD benefits for maintenance personnel, nor was the definition of firefighter under §45-19-1 so broad as to encompass employees of the fire department who are not firefighters in the traditional sense. The Court has declared in the past that the IOD statute was “intended to provide greater work-related-injury benefits to certain public employees, whose jobs require them to serve the state or its municipalities, often in dangerous situations.” According to the dissent, that definition has never been expanded to include a class of employees who were not specifically enumerated in the IOD statute. Therefore, the dissent refused to accord a literal application to a statutory definition when such adhesion “would produce an unintended result and [was] contrary to the policy and purpose underlying the act.”

27. McCain, 41 A.3d at 244-245.
28. Id. at 246.
29. Id.
30. Id. at 247.
31. Id. at 247 (quoting Labbadia v. State, 513 A.2d 18, 21 (R.I. 1986)).
32. Id. at 247.
33. Id. at 248.
Here, the Court made a fair decision by protecting the interests of McCain where he fit into the statutory definition of a “fireman” and was injured while working as such. While the dissent raises valid points, and it would be reasonable to interpret the statute to include only first-responders\(^{34}\) had the Legislature intended that narrow an application of the statute, they easily could have included it in the language of the statute. The fact that the statute does not limit recovery to these classes indicates that the Legislature was aware of the possibility that even those not literally fighting fires are at times placed in potentially dangerous positions as a part of their duties, and wanted to provide protection for those employees.

Also, the town paid McCain according to the IOD statute for several years before deciding that he was ineligible to receive payments; his position as a lineman was well known both at the time of the incident, as well as throughout the years the town paid him. It can be inferred from these facts that for two years the town believed that McCain was a firefighter and qualified for recovery under the IOD statute. The Court reached an equitable decision by declaring McCain a firefighter under the IOD statute at the time of injury, and allowing him his deserved recovery.

**CONCLUSION**

The Rhode Island Supreme Court held that the statutory language in §45-19-1 which defined “firefighter” to mean and include “any person employed as a member of the fire department,” to be clear and unambiguous and to include people working in administrative positions, such as members of the Communications Department.

Caitlyn Kelly

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34. McCain was employed as a “Firefighter 3\(^{rd}\) Class” as a part of the Communications Department and as such was not a first responder to emergencies. *Id.* at 241.
Tort Law. Burke v. Gregg, 55 A.3d 212 (R.I. 2012). Even if an allegedly defamatory communication is inaccurate, a plaintiff cannot recover in a defamation cause of action unless the recipient of the communication could have reasonably understood the communication as intending to injuriously affect the plaintiff’s reputation, degrade him in society, or bring him into public hatred and contempt. Further, under the republication rule, opinions can be actionable as defamatory if they are based on non-disclosed, defamatory facts.

FACTS AND TRAVEL

From 2006 to 2008, William Murphy (“Murphy”), then-Speaker of the House of Representatives of the Rhode Island General Assembly, hosted an annual St. Patrick’s Day event at the Federal Reserve Restaurant, operated by plaintiff Robert Burke (“Burke”).

1. Murphy invited Rhode Island politicians, businesspeople, and media representatives to the event, entitled “Murphy’s Law Luncheon,” where fellow politicians would “roast” one another by subjecting each other to jokes and playful ridicule.

2. Unlike in previous years, for the 2009 luncheon Murphy announced to members of the press that “the jokes, gags, [and] punch lines would be ‘off the record.’”

3. The day before the lunch, defendant Katherine Gregg (“Gregg”) called Burke to protest the “off the record” rule. Burke told her that Murphy, and not he, was responsible for the new rule.

4. In a separate conversation with Murphy’s spokesperson, Gregg asked that Murphy reconsider the rule and allow the press

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1. Burke v. Gregg, 55 A.3d 212, 216 (R.I. 2012). Also joined as plaintiffs are BOEA, Inc. (“BOEA”), which operates the Federal Reserve Restaurant, and its parent corporation the Food and Beverage Corporation (“Food and Beverage”).
2. Id.
3. Reporters were prohibited from publishing things said during the roast. Id.
4. Id.
5. Id.
to publish comments made during the roast.\(^6\) Gregg continued to attribute the new policy to Burke, even after he expressed to her that he considered her accusations to be “repugnant and false.”\(^7\)

Three days later, in a co-authored article published in print and online by defendant Providence Journal Company (“Journal”), Gregg compared the Murphy’s Law Lunch to a similar event in Boston.\(^8\) However, she emphasized that Murphy’s event applied a “press ban” that the Boston event did not, again attributing the censorship to Burke.\(^9\) On the day that the Providence Journal published Gregg’s story, defendant Dan Yorke (“Yorke”), a radio talk show host employed by defendant Citadel Broadcasting Company (“Citadel”), discussed the article on-air\(^10\) and started ranting against Burke and the “off the record rule.”\(^11\) After being advised of the article and broadcast, Burke called into Yorke’s program to address his comments.\(^12\)

Burke eventually filed a complaint alleging multiple counts of libel and slander against Gregg, the Journal, Yorke, and Citadel.\(^13\) The two other plaintiffs, Food and Beverage and BOEA, also alleged libel and slander, as well as two contractual claims, against Yorke and Citadel.\(^14\) All the defendants moved to dismiss

\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
\(^9\) Id. at 216-17. A relevant portion of the article read, “One of the hoped-for side effects of the event is to lessen the polarization that has become rife in our politics,” Burke said in a recent exchange of e-mails. He said he imposed the off-the-record rule because he felt a former Journal columnist took a Murphy quip about homosexuals, at an earlier St. Patrick’s Day lunch, out of context...creating an impression of an event that is mean-spirited.” Id.

\(^10\) It is unclear whether Yorke read the article on air or just referenced it.
\(^11\) Id. at 217. His comments were also streamed across the internet and posted on a website maintained by Citadel. Among Yorke’s comments were: “That Bob Burke thinks he can control the First Amendment.” “You can kiss my Irish ass. You manipulative piece of garbage.” “What an absolute disgrace that guy is.” “And stupid Bob Burke. He’s too stupid. He’s a stupid person. He’s too stupid to understand that I don’t have, have a problem with the event. I have a problem with the gag order.” Id.

\(^12\) Id. The exact contents of their on-air exchange were not detailed in the record. Id. at n.5.
\(^13\) Id. at 215.
\(^14\) Id. Plaintiffs alleged that during the time of Yorke’s broadcast, Food and Beverage and BOEA had advertising contracts with Citadel to advertise
all claims pursuant to Superior Court Rules of Civil Procedure Rule 12(b)(6), and a Superior Court justice granted them all. The plaintiffs timely appealed.

**ANALYSIS AND HOLDING**

In reviewing a motion justice’s decision on a 12(b)(6) motion to dismiss, the Court assumes the plaintiff’s allegations to be true. Viewing the allegations in the light most favorable to the plaintiff, the Court will affirm a ruling that grants a 12(b)(6) motion to dismiss “when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff’s claim.”

**Defamation Claims Against Gregg and the Journal**

Because Burke’s claims against Yorke and Citadel rest in part on the claims against Gregg and the Journal, the Court addressed the latter claims first, which “sound in defamation.” To sustain a defamation claim, a plaintiff must prove “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) damages, unless the statement is actionable irrespective of special harm.” In determining whether a communication is defamatory or not, the Court must construe the statement in its “plain and ordinary meaning.”
The crucial inquiry is what the recipient of the communication “reasonably understood as the meaning intended to be expressed” by the communication.\(^{23}\) The Court agreed with the motion justice that even if Gregg’s attribution of the “off the record” rule to Burke was inaccurate, it was not defamatory.\(^{24}\) The Court reasoned that after considering all the circumstances, the article, though critical, communicated that Burke, in cooperation with Murphy, “had a prudent, thoughtful, and logical reason for imposing [the] rule.”\(^{25}\) Thus, even if Gregg’s assertions were slightly inaccurate, they could not reasonably be interpreted to have “injurious affect [ed Burke’s] reputation, degraded him in society, or brought him into public hatred and contempt.”\(^{26}\) The Court was not persuaded that the plaintiffs stated a claim upon which they could recover and thus it affirmed the motion justice’s dismissal of these claims.\(^{27}\)

**Defamation Claims Against Yorke and Citadel**

The Court begins its analysis of this claim with the republication rule, which provides that “one who republishes libelous or slanderous material is subject to liability just as if he had published it originally.”\(^{28}\) Although opinions are afforded greater protection under the law, an opinion can be actionable under the republication rule if it is based on undisclosed, defamatory facts.\(^{29}\) Conversely, if the statement is based on disclosed or assumed facts, it is not actionable because the recipients would understand it is the author’s interpretation of the

\(^{22}\) Id.

\(^{23}\) Id. (quoting Marcil, 936 A.2d at 213).

\(^{24}\) Id. at 218-19.

\(^{25}\) Id. at 219. The article suggested that the rule was imposed due to the concern that “politically-incorrect” jokes made at the lunch could be taken out of context and create the impression that the event is “mean-spirited.” Id. Plaintiffs did not argue that Gregg’s explanation of the rule’s underlying rationale was incorrect. Id.

\(^{26}\) Id. The Court also rejected the plaintiffs’ suggestion that an opinion drawn from a contested statement is proof that the statement itself is defamatory. Id.

\(^{27}\) Id. at 220.

\(^{28}\) Id. (quoting Trainor v. The Standard Times, 924 A.2d 766, 770 (R.I. 2007)).

\(^{29}\) Id. at 220.
Thus, when reviewing Yorke’s opinions, the Court considered (1) whether Yorke disclosed the basis of his opinions and (2) whether the basis for his opinions was itself defamatory. The Court found that Yorke’s ramblings may have been distasteful and insulting but they were based on disclosed, non-defamatory facts. Yorke clearly disclosed the fact that his opinions were based on Gregg’s article by referring to it on-air, and the Court had already determined that Gregg’s article was not defamatory as a matter of law. Thus, the claims against Yorke and Citadel were not actionable and properly dismissed by the motion justice.

Contractual Claims Against Yorke and Citadel

The Court held that the motion justice did not err in dismissing the interference with prospective contractual relations claim because the plaintiffs failed to allege any intentionally disruptive conduct by either defendant that was aimed at interfering with a potential client relationship. In fact, none of the plaintiffs’ allegations suggested the effect of Yorke’s comments was more than incidental.

Because the motion justice did not address the breach of contract claim —after dismissing the defamation counts and the interference with prospective contractual relations claim—the Court remanded the matter to the Superior Court for a hearing on that claim.

30. Id. at 220-21.
31. Id. at 221.
32. Id.
33. Id.
34. Id.
35. Id. at 222. To make a successful claim for interference with prospective contractual relations a plaintiff must prove, among other things, that but for an intentional act of interference “there would have been a relationship or that it is reasonably probable that but for the interference the relationship would have been established.” Id. (quoting L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 207 (R.I. 1997)). The plaintiffs failed to allege any causal connection between Yorke’s rants and interference with any specific prospective business client. Id.
36. Id.
37. Id.
The Court dismissed the defamation claims against Yorke and Citadel because it first found that Gregg’s article was not defamatory as a matter of law. Instead of making this two-step determination, the Court should have taken Yorke’s statements as evidence of the article’s injurious effect on Burke’s reputation when analyzing the claim against Gregg and the Journal. If the decisive question truly is what the reader reasonably understood as the intended meaning of the article, Yorke’s comments show that he understood it to communicate that Burke was a bully, curtailing journalists’ First Amendment rights by censoring them. The Court acknowledges that the article was “inescapably critical” but does not dwell on this fact because the article also suggested a legitimate rationale for the rule. The Court uses this same reasoning to gloss over the fact that Gregg published the article with this inaccurate attribution after Burke told her on two separate occasions that he was not responsible for the rule. Under the totality of the circumstances inquiry, the fact that the article was critical and it fueled an on-air tirade should have weighed heavily against the mere fact that it put forth an explanation for the rule’s implementation.

CONCLUSION

The Rhode Island Supreme Court held that an article attributing a censorship rule to the plaintiff, even if inaccurate, is not defamatory where the article provided logical reasons for the rule’s implementation, and where it did not injuriously affect the plaintiff’s reputation, degrade him in society, or bring him into public hatred and contempt. Thus, a radio talk show host’s opinions that are clearly based on that article are not defamatory. Further, where such opinions only incidentally, rather than intentionally, affect a plaintiff’s prospective business relations, the plaintiff cannot sustain a claim for interference with prospective contractual relations.

Asia-Sierra Millette

38. Id. at 219.
**Tort Law.** *Yi Gu v. R.I. Pub. Transit Auth.*, 38 A.3d 1093 (R.I. 2012). The Rhode Island Supreme Court addressed whether the trial justice should have let the jurors go to the accident site to help them understand the bus accident and whether the trial justice erroneously admitted the viewing of the site as evidence for the defendant’s case. The Court held that the trial justice erred by not giving instructions to exclude the view as evidence before taking the jurors to the site of the accident and by failing to instruct them before the viewing not to discuss the case during the view.

**FACTS AND TRAVEL**

Plaintiff Yi Gu, an international student from China studying at Brown University, was crossing the street at an intersection at the entrance of a bus tunnel in Providence, RI.¹ She testified that she waited until the walk signal came on and then crossed on the crosswalk.² She did not see the bus until it pushed her from behind and knocked her down.³ The bus then rolled over her ankle, causing injuries that forced her to undergo numerous surgeries and physical therapy and delayed her graduation.⁴ The plaintiff sued Rhode Island Public Transit Authority ("RIPTA"), the owner of the bus, and Hathaway, the driver, for injuries arising from Hathaway’s alleged negligence and Hathaway for gross negligence for delaying moving the wheel off her leg.⁵

As witnesses for the defendant, Hathaway and Bannister, a RIPTA employee who was driving a vehicle out of the tunnel behind the bus, both testified that the light was green when they

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¹. Yi Gu v. R.I. Pub. Transit Auth. 38 A.3d 1093, 1095 (R.I. 2012). The incident occurred at the intersection of Waterman Street and North Main Street, at the entrance to what is commonly referred to as the “East Side bus tunnel” in Providence. *Id.*
². *Id.*
³. *Id.*
⁴. *Id.* The delay caused her to lose one year’s salary as a professor at University of Toronto. *Id.* n.3
⁵. *Id.* at 1093.
exited the tunnel.\textsuperscript{6} Hathaway also testified that the walk signal could not have been on when the light for the tunnel was green.\textsuperscript{7} According to Hathaway, the bus would trigger the trip bar when it comes to the opening of the tunnel, which would then trigger the green traffic light and turn on the “don’t walk” signal for the pedestrians.\textsuperscript{8}

During the trial, at least one juror informed the judge that it was very important for him “to see the bus coming out of the tunnel to see the angle at which it turned.”\textsuperscript{9} There was no evidence that the judge spoke to either counsel about this trip from the courthouse.\textsuperscript{10} Additionally, although she told the jurors that the trip to the accident scene, which the courts referred to as “the viewing” was to “give [them] context”, the justice only instructed the jurors that the viewing was not to be considered evidence two days after the viewing, once the trial had resumed.\textsuperscript{11} During the viewing, a RIPTA van was brought to the tunnel to demonstrate the function of the trip bar to trigger the green light, which the trial court characterized as a demonstration.\textsuperscript{12}

After the viewing, the jury returned a verdict for defendants.\textsuperscript{13} The trial judge subsequently denied plaintiff’s motion for a new trial, even though she admitted that plaintiff’s testimony was more credible than Hathaway’s testimony because it was impossible for Hathaway to not have seen the plaintiff while she was crossing.\textsuperscript{14} The trial justice, after seeing the demonstration at the scene of the accident, believed that the light could have changed fast enough when the bus came to the trip bar, to catch the plaintiff off guard while she was in the middle of crossing the road.\textsuperscript{15} The trial justice also admitted that her instructions to the jury two days later, telling them that the viewing was not evidence probably confused the jury and that she should have explained more specifically that only the facts from

\begin{itemize}
  \item\textsuperscript{6} \textit{Id.} at 1096.
  \item\textsuperscript{7} \textit{Id.}
  \item\textsuperscript{8} \textit{Id.}
  \item\textsuperscript{9} \textit{Id.}
  \item\textsuperscript{10} \textit{Id.}
  \item\textsuperscript{11} \textit{Id.} at 1096-97.
  \item\textsuperscript{12} \textit{Id.} at 1097.
  \item\textsuperscript{13} \textit{Id.}
  \item\textsuperscript{14} \textit{Id.}
  \item\textsuperscript{15} \textit{Id.}
\end{itemize}
the demonstration of the trip bars, and not the entire viewing event, could be considered as evidence. However, the justice concluded that giving the jury more specific instruction would not have changed the jury’s decision even though it would have presented evidence of Hathaway’s negligence.

Plaintiff filed motion to reconsider her motion for new trial, alleging that she was unfairly prejudiced because the viewing gave RIPTA an opportunity to interact with the jurors and provided the jurors the opportunity for ex parte communication. The trial justice stated that she denied plaintiff’s motion for new trial for two reasons. First, plaintiff’s counsel failed to object when he should have known about the demonstration. Second, jurors had been instructed not to consider the evidence of the viewing.

Plaintiff appealed to the Rhode Island Supreme Court the trial justice’s denial of her motion for a new trial.

**ANALYSIS AND HOLDING**

Following the motion for a new trial, the trial justice would assume the role of a “superjuror” weighing “the evidence and assessing the credibility of the witnesses.” “If the trial justice determines that the evidence is evenly balanced or is such that reasonable minds in considering the same evidence could come to different conclusions, the trial justice must allow the verdict to stand.” When reviewing a trial justice’s decision to deny a motion for new trial, the decision cannot stand if she “overlooked or misconceived material and relevant evidence or was otherwise clearly wrong.”

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16. *Id.* at 1098.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 1099.
23. *Id.*
24. *Id.* (citing Botelho v. Caster’s Inc., 970 A.2d 541, 545 (R.I. 2009)).
Plaintiff raised several issues regarding the trial justice’s ruling on appeal.\textsuperscript{26} The Court first addressed the timeliness of the plaintiff’s objections.\textsuperscript{27} Although an objection during trial had to be raised “contemporaneously” by the party or it may be deemed to be waived,\textsuperscript{28} if a party had no opportunity to object, the “failure to object will not be held against the party.”\textsuperscript{29} Here, counsel’s failure to object during trial does not waive his objection because plaintiff’s counsel may have been “unaware of the events that took place during the view” and may not have realized that a significant evidentiary event, the demonstration of the trip bar, occurred during the view of the accident scene.\textsuperscript{30}

The Court held that the trial justice erroneously considered the demonstration as evidence.\textsuperscript{31} Despite instructing the jury that the view was not evidence two days after the viewing, she said herself that the view was “very instructive.”\textsuperscript{32} The trial justice’s consideration of the viewing caused concern for the Court because without considering the information gathered at the viewing, the trial justice believed that Hathaway was not credible and that there was evidence of his negligence due to his failure to see plaintiff on crosswalk.\textsuperscript{33} Additionally, the trial justice characterized a part of the view as a demonstration, justifying acceptance as evidence into the trial, which the Court held was another erroneous action on the part of the trial justice.\textsuperscript{34}

The Court explained that questions regarding the “walk” signal should

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{26}Id.
\item \textsuperscript{27}Id.\textsuperscript{at 1100.}
\item \textsuperscript{28}According to Rule 46 of the Superior Court Rules of Civil Procedure, which “encapsulates the contemporaneous objection requirement when it states in pertinent part that: ‘[I]t is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party’s objection to the action of the court and the party’s grounds therefor is requested; and if party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.’” Id. at n.13 (citing R.I. Super. Ct. R. Civ. P. 46).
\item \textsuperscript{29}Id. at 1100 (citing R.I. Super. Ct. R. Civ. P. 46).
\item \textsuperscript{30}Id.
\item \textsuperscript{31}Id.
\item \textsuperscript{32}Id.
\item \textsuperscript{33}Id.\textsuperscript{at 1101.}
\item \textsuperscript{34}Id. at 1100.
\end{itemize}
\end{footnotesize}
have been determined based on evidence admissible in the courtroom. The evidence of the viewing would have been admissible if the trial justice had first consulted the parties before responding to the jury’s request for the viewing, took reasonable measure to assure that both party’s attorneys and all the jurors were present, employed some method of accurately recording the event, and adequately instructed the jury before they “embarked on the view.”

Because the purpose of a view was only to understand the evidence already admitted, not to obtain evidence, the Court held that the admission of the view as new evidence constituted reversible error. The Court came to this conclusion after considering several factors, including (1) this view was an off-record event, (2) there was no assurance as to whether both party’s attorneys were present or if even all the jurors were present, or if the jurors that were present were fully aware of what transpired, and (3) this was an unorganized viewing where the trial justice neglected to instruct jury before the viewing that it could not be considered as evidence and that they could not discuss the case with each other. The Court held that the trial justice’s later instruction that “the view itself is not evidence” was not enough.

The Court ordered the trial court to grant the new trial in order to take proper steps to safeguard the trial and the rights of the plaintiff.

The Court required that at the very minimum, the proper safeguards be put in place to protect the trial process and that counsel for both parties be represented at the view of the accident scene. If a demonstration must happen to better understand a case, the demonstration must be in a more controlled situation

35.  Id. at 1101.
36.  See id.
37.  Id.
38.  Id.
39.  Id. at 1101-02. The trial justice recollected that “the jurors ‘split up and moved about the intersection’ and were ‘wandering around the area of the intersection’…several jurors coordinated their efforts in an attempt to activate the trip bar by jumping on it.” Id.
40.  Id.
41.  See id. 1102.
42.  See id.
than what had occurred. Additionally, the Court required that the trial court provide the limiting instructions before the viewing of the accident scene in regards to the use of the facts obtained at the scene, such as they are only to use the viewing to clarify the evidence that had been admitted in court and not consider the entire viewing as new evidence.

COMMENTARY

This case presents an example of how some applicable laws may deal with the severe injuries of a helpless plaintiff in the most unsympathetic way. The plaintiff brought in three witnesses, an art student at the Rhode Island School of Design (“RISD”), an employee at the same school, and a professor at RISD (“Professor Drew”). All three had seemingly altruistic intentions to help the plaintiff. They testified to the way the bus hit the plaintiff, but none gave definite answers about whether the signal was on “walk” or “don’t walk”.

Thus, whether the plaintiff saw the sign as “walk” was speculative at best. Professor Drew’s testimony provided confusion over whether the plaintiff thought the light was green for the bus when she started walking or whether she was referring to her “walk” signal. He testified that she told him at the scene that the light was green, although other evidence produced at trial indicated that plaintiff was actually referring to the white walk signal. The plaintiff later explained that because of the shock she suffered during the accident, she had confused the walk signal in the U.S. with the walk signals in China, which are green.

The trial justice and the jury apparently gave more weight to the inconsistent information from the plaintiff than the non-

43. See id.
44. Id. at 1101.
45. Id. at 1092-1093. Witness Hamilton, an artist at RISD, saw the bus “clip” the plaintiff when the plaintiff was about a third of the way across the street. Id. at 1096. Witness Silva, an employee, also saw the “front passenger side of the bus strike the left side of plaintiff’s body.” Id. Witness Drew, a professor, banged on the side of the bus and shouted for it to stop, then cradled the plaintiff’s head to comfort her until the ambulance arrived. Id. at 1095-96.
46. Id. at 1095-1096.
47. Id. at 1095.
48. Id. n.4.
credible evidence given by the bus driver. The jury wanted to see the functionality of the traffic lights because they needed to clarify the plaintiff’s explanation. If they had believed Hathaway’s testimony, they would not have needed to go see the functionality of the traffic light and the “walk” signal.

Though there was some discrepancy in the facts about whether the plaintiff was walking on the crosswalk and whether she looked left and right when crossing the street, none of the plaintiff’s actions should matter if the bus driver, Hathaway, upon approaching the intersection had looked in front of him while driving that enormous vehicle. Thus, the material fact was not whether the plaintiff was exercising reasonable precautions while crossing the street nor was it whether the “walk” signal was on and traffic light was green for the traffic exiting the tunnel. Rather, it was whether the bus driver was exercising reasonable precautions normally exercised by someone driving a bus, which even the trial justice admitted that he was not. Thus, no matter how the law was applied, it is still the negligence of the bus driver, which caused the plaintiff’s injuries.

CONCLUSION

The Court here addressed whether the trial justice should let the jurors go to the site of the accident in question to help the jurors understand the accident and if they must go to better understand the case, what safeguards should be put into place to help facilitate a fair trial for the plaintiff. The Court held that proper instructions regarding what can and cannot be considered as evidence should be given before taking the jurors to the accident scene, the decision should be discussed with of both party’s attorneys, and the jurors should be provided with proper warning to avoid discussing the case with each other during the viewing.

49. See id. at 1097.
50. Id. at 1096.
51. Id. at 1101.
52. Id. at 1102.
53. Id.
Zoe Zhang
Workers’ Compensation. *Gallagher v. Nat’l Grid USA*, 44 A.3d 743 (R.I. 2012). A mesothelioma-stricken employee asserted workers’ compensation claims against his three former employers, pursuant to a statute entitling him to compensation from his “last employer.” The Court ultimately affirmed the decision of the Appellate Division of the Workers’ Compensation Court declaring his penultimate employer his “last employer,” because of insufficient evidence of asbestos exposure while he was subsequently employed by his ultimate employer.

**FACTS AND TRAVEL**

From 1965 to 1971, Dennis Gallagher (“Mr. Gallagher”) was employed as a welder at Electric Boat where, he testified he was consistently exposed to asbestos.\(^1\) In 1984 Mr. Gallagher took up employment as welder at a National Grid USA/Narragansett Electric (“National Grid”) plant.\(^2\) Mr. Gallagher testified that he was exposed to asbestos “insulation in the boilers” at the plant when the insulation was annually stripped and replaced.\(^3\) In 1995, the National Grid Plant was “repowered,” and an outside company encapsulated or removed the asbestos from the plant.\(^4\) In 1998, USGEN New England Inc. (“USGEN”) acquired the plant, and Mr. Gallagher continued working there as a welder under USGEN management.\(^5\) As to the possibility of his exposure to asbestos at the USGEN-managed plant, he testified with language like “I bet you still find some [asbestos]” and “I wouldn’t doubt there’s still some [asbestos in some areas].”\(^6\)

Shortly after his last day of work at USGEN, Mr. Gallagher was diagnosed with malignant mesothelioma likely caused by his

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2. *Id.*
3. *Id.* at 745-746.
4. *Id.* at 746.
5. *Id.*
6. *Id.*
asbestos exposure at Electric Boat. Mr. Gallagher filed petitions against Electric Boat, National Grid, and USGEN, for worker’s compensation benefits for this “occupational disease,” pursuant to R.I.G.L. 1956 §28-34-8. The Rhode Island Worker’s Compensation Court found USGEN liable as his “last employer” because “his employment at [USGEN], the final employer, was the same exact job he did while at [National Grid]. The only difference was the name of the employer.” Recovery against Electric Boat and National Grid was denied.

On appeal, the Worker’s Compensation Court Appellate Division (“Appellate Division”) vacated the trial judge’s decree holding USGEN liable. Instead, it assessed liability against National Grid, because the testimony as to asbestos exposure after the USGEN takeover was “mere speculation” and not probative of asbestos exposure at USGEN. Both Gallagher and National Grid appealed, and the Rhode Island Supreme Court issued certiorari, consolidating the cases.

**ANALYSIS AND HOLDING**

The Supreme Court was satisfied that Mr. Gallagher’s malignant mesothelioma was an “occupational disease,” entitling him to recover from his “last employer” under the relevant statute. The real issue for the Court was determining which employer was in fact his “last employer.” Both Gallagher and National Grid contended that exposure to asbestos at USGEN is not “a condition precedent” to finding USGEN to be the last employer.

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7. *Id.* at 747. Mesothelioma is a rare form of cancer, which an expert witness testified has a “very strong association with asbestos dust exposure.” *Id.* Mr. Gallagher eventually succumbed to his disease, and his wife prosecuted his case after he died, pursuant to R.I. GEN. LAWS § 28-35-56 (1956). *Id.* n.8.

8. *Id.* The statute states in the relevant part that an employee suffering from an occupational disease may recover from “the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted.” R.I. GEN. LAWS §28-34-8 (1956).


10. *Id.* at 748.

11. *Id.*

12. *Id.* at 748, 751.

13. *Id.* at 748.

14. *Id.* at 749.

15. *Id.*
employer, if the type of job performed at USGEN was exactly the same as was performed at National Grid. Additionally, National Grid argued that the Appellate Division should not have disregarded Gallagher's testimony regarding the possibility of asbestos exposure at USGEN because no Rule of Evidence "requires the witness to be positive or absolutely certain about his testimony." The Court, employing a "clearly erroneous" standard, affirmed the Appellate Division’s assessing damages against National Grid. The Court explained that it attached liability to the "last employer" for the purposes of §28-34-8 if "the last employment (no matter how brief) was of the same nature and type in which the disease was first contracted, regardless of whether the last employment aggravated the prior condition." Additionally, the Court noted that the employee must show "evidence of the nature and conditions of his employment and that these conditions be of a nature that is likely to cause the disease." The Court affirmed that USGEN was not the "last employer," due to the Appellate Division’s findings that Gallagher’s testimony as to asbestos exposure was "mere speculation." In doing so, the Court pointed out that the relevant analysis is not of "an employee’s job title; rather, it is whether the employee was exposed to conditions that were ‘likely to cause the disease,’" and that the evidence presented here did not demonstrate such conditions.

Regarding National Grid’s objection to the evidentiary argument, the Court explained that the Appellate Division did not deem the testimony inadmissible because Gallagher was not “absolutely certain about his testimony.” Rather, the Appellate Division found that the testimony was speculative and insufficient to prove the similar disease causing conditions required for

16. Id. at 751.
17. Id.
18. Id.
19. Id. at 749. (quoting Tavares v. A.C. & S. Inc., 462 A.2d 977, 979 (R.I. 1983)). In circumstances not relevant here, the statute can also attach liability “if the employee’s work with the last employer caused an aggravation of the prior condition.” R.I. GEN. LAWS §28-34-8 (1956).
20. Gallagher, 44 A.3d at 749 (quoting Tavares, 462 A.2d at 980).
21. Id. at 751.
22. Id. (quoting Tavares, 462 A.2d at 980).
23. Id. at 751.
recovery, and the Court found that determination to be within the Appellate Division’s discretion.24

COMMENTARY

The court here clarifies its holding in Tavares, and correctly underscores that recovery from the “last employer” for an “occupational disease” under the statute is based not on the similarity of the work performed for a subsequent employer, but on the similarity of the exposure to conditions giving rise to the disease.25 Thus, National Grid is still liable to pay for Mr. Gallagher’s asbestos exposure under the statute, despite evidence that asbestos exposure at Electric Boat most likely caused his disease.26

A law that holds subsequent employers liable for diseases their employees contract at prior employer may not immediately seem fair. However, asbestos exposure is unique in that it has a long latency period, and without §28-34-8, an employer with an unsafe workplace could avoid liability due to the difficulty in proving many years later exactly which employers’ workplace conditions caused the disease. Such liability ultimately protects workers by incentivizing all employers to minimize disease-causing conditions in their workplace. As a result, the statute’s function is only served by attaching liability to employers with similar disease-causing conditions, rather than to employers where similar work performed. Therefore, under the Court’s reasoning, had Gallagher worked in a totally different capacity at National Grid, as an electrician for example, it is possible that he could still recover from National Grid for the mesothelioma he contracted as a welder at Electric Boat, as long as he was still exposed to asbestos at both jobs.

CONCLUSION

The Court affirmed the holding of the Appellate Division vacating USGEN’s liability and assessing liability against National Grid instead.27 In making this decision, the Court found

24. Id.
25. See id.
26. See id. at 747.
27. Id. at 751.
that Mr. Gallagher’s inability to prove similar disease-causing conditions at USGEN was fatal to recovery against USGEN and instead rendered National Grid his “last employer.”

Brendan F. Ryan
2012 RHODE ISLAND PUBLIC LAWS

2012 R.I. Pub. Laws ch. 088, 118. An Act Relating to Food and Drugs – The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act. Amended to state that a registered qualifying patient shall not be subjected to arrest or penalty in any manner for selling, giving, or distributing marijuana used for medicinal purposes that does not exceed twelve marijuana plants and two and one half ounces of usable marijuana. Additionally, a person who is qualified as the primary caregiver of the registered qualifying patient and who has in his or her possession a registry identification card shall not be subjected to arrest or penalty if the marijuana was cultivated for medicinal purposes and the qualifying patient that the caregiver is connected to has been provided with an adequate amount of the marijuana to meet their medicinal needs. The law was further amended to state that all registry identification card applicants must apply to the state police for a criminal background check, and, if a felony drug offense conviction or a plea of nolo contendere for a felony drug offense is discovered, the state police shall inform the applicant and the Rhode Island Department of Health in writing that a felony drug offense has been found. Furthermore, no state employees who are employed at a “compassion center” shall be subjected to arrest or penalty in any way for any and all conduct that occurs within the scope of his or her employment at the compassion center.

2012 R.I. Pub. Laws ch. 114, 133. An Act Relating to State Affairs and Government – State Police. Provides that local police officers who are assigned to the state police to be on a task force will have the same powers of arrest as sworn members of the state police when it is within their capacity as members of the task force and when they are working under the superintendent of the state police.
2012 R.I. Pub. Laws ch. 159, 172. An Act Relating to Criminal Procedure – Search Warrants. Amended to provide that a search warrant will issue upon complaint in writing under the oath of a sworn law enforcement member of any city or town where that member is serving on a statewide task force.

2012 R.I. Pub. Laws ch. 187, 199. An Act Relating to Health and Safety. The “Rights of the Terminally Ill Act” is amended to include a section directing the Department of Health to establish the structure and content of Medical Orders for Life Sustaining Treatment (“MOLST”) according to certain guidelines. According to the parameters set forth in the amendment, a medical order for life sustaining treatment may be recorded as such provided that the medical orders for life-sustaining treatment and medical intervention and procedures have been explained to the patient by a MOLST qualified health care provider, and the form documenting the declaration has been completed and signed by a MOLST qualified health care provider, as well as by the qualified patient or his or her recognized health care decision maker. Upon evaluation and consultation with the patient or health care decision maker, a MOLST qualified health care provider may issue a new MOLST consistent with any new information that has become available about the patient’s health status and care preferences. The patient or his or her health care decision maker may revoke a MOLST at any time by informing the MOLST qualified health care providers, other health care providers, or any member of the medical or nursing staff of the revocation.

2012 R.I. Pub. Laws ch. 216, 230. An Act Relating to Criminal Offenses-Weapons. This law amended section 11-47-3.2: Using a firearm when committing a crime of violence to state that under (b)(4) involuntary manslaughter shall not be considered a “crime of violence” for the purpose of subdivision (b)(4). Section (b)(4) states that every person who, while committing an offense violating subsection (a), a crime of violence using a firearm shall be guilty of a felony and imprisoned for life if the crime of violence resulted in death or permanent incapacity of any person, other than the person convicted, from the discharge of the firearm. After the amendment, if a person uses a firearm while committing
involuntary manslaughter and death or permanent incapacitation results, the person committing the involuntary manslaughter is now not automatically imprisoned for life under (b)(4). Prior to this law, involuntary manslaughter did not qualify as an exception to section (b)(4).

2012 R.I. Pub. Laws ch. 221, 233. An Act Relating to Food and Drugs – Uniform Controlled Substances Act. Sets forth scheme to decriminalize the possession of one ounce or less of marijuana for all individuals who are not already exempted from penalties for possession for medical use. Provides that the sole penalty for the possession of one ounce of less of marijuana by individuals over 18 who are not otherwise exempted from penalties shall be a civil penalty of $150 and the forfeiture of the marijuana for any first or second offense within the previous eighteen months. Minors are subject to the same $150 civil penalty and forfeiture for any first or second offense within the previous eighteen months, provided the minor completes a court approved drug awareness and community service program. Additionally, the minor's parents/legal guardian shall be notified of the offense and the availability of court approved drug awareness and community service programs. If the minor fails to complete the drug awareness and community service program within one year of the offense, the civil penalty is increased to $300, but no other additional sanctions are rendered. Any third offense by any individual not otherwise exempted within eighteen months of two prior adjudications for possession of one ounce or less is subject to a misdemeanor punishable for not more than 30 days or a fine between $200 and $500 dollars. With this Act, Rhode Island joins 15 other states that have enacted some form of state-wide decriminalization legislation for the possession non-medical marijuana. NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS. http://norml.org/states.

2012 R.I. Pub. Laws ch. 251, 263. An Act Relating to Food and Drugs – Good Samaritan Overdose Prevention Act. Provides various forms of immunity from civil liability and criminal sanctions for individuals seeking to assist another experiencing a drug overdose or drug-related medical emergency and individuals suffering from a drug overdose or drug-related medical emergency.
2012 R.I. Pub. Laws ch. 256, 262. An Act Relating to Insurance-Health Insurance-Consumer Protection. This Act amended Rhode Island statutes to be consistent with health insurance consumer protections enacted in federal law. This Act establishes insurance rules, standards, and policies pursuant to, and in furtherance of the health insurance standards established in the federal Patient Protection and Affordable Care Act of 2010, as amended by the federal Health Care and Education Reconciliation Act of 2010.

2012 R.I. Pub. Laws ch. 278, 284. An Act Relating to Criminal Offenses-Assaults. This Act makes domestic assault by strangulation a felony punishable for up to ten years in jail. The Act defines strangulation as “knowingly and intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person with the intent to cause that person harm.”

2012 R.I. Pub. Laws ch. 289, 290. An Act Relating to Revenue Protection. This Act formally acknowledges the potential economic danger posed to the Rhode Island gaming facilities of Twin River (Lincoln, R.I.) and Newport Grand (Newport, R.I.) in light of neighboring Massachusetts’s approval of casino gambling
in several locations. The Act provides a regulatory framework designed to protect the amount of revenue to be received by the State and host municipalities if casino gaming is approved by voters in the 2012 referenda (casino gaming was approved statewide and by the Town of Lincoln, but was not approved by the City of Newport). Under the Act, the State will continue to receive approximately 61 percent of the net income from the video lottery terminals (VLTs) at Twin River (the same amount the State currently receives). In addition, the State will receive 18 percent of the net table game revenue from table games at Twin River. However, this amount will decrease to 16 percent the first full fiscal year that the net terminal income from VLTs is less than the net terminal income from VLTs in the prior fiscal year. Also, with the approval of casino gaming at Twin River, the Act provides that the Town of Lincoln shall receive continually 1.45 percent of the net terminal income from VLTs without having to obtain year-to-year approval. Further, should revenue from VLTs at Twin River decline, the Town of Lincoln shall receive 1 percent of net table game revenues from the share allocated to the licensed operator (the gaming company UTGR, Inc.) for a period of four years to ease the transition to table gaming. Lastly, the Act provides that the Lottery Division shall have the authority to oversee the regulation of table gaming at Twin River.

2012 R.I. Pub. Laws ch. 301, 358. An Act Relating to Animals and Animal Husbandry – Dogs. Amended to include a new section that describes violations in relation to the treatment of dogs. Violations include keeping any dog on a tether that restricts movement to an area less than a six foot radius, tethering a dog with a choke-type collar, keeping any dog tethered for more than 10 hours during a 24 hour period, or keeping a dog in a pen or cage for longer than 14 hours in a 24 hour period. Tether is defined as the practice of fastening a dog to a stationary object or stake by a chain, rope or other tethering device as a means of keeping the dog under control.

2012 R.I. Pub. Laws ch. 309, 354. An Act Relating to Motor and Other Vehicles- Accidents and Accident Reports. The Act places a duty on individuals involved in a motor vehicle accident which results in any physical injury or death to pull over and request
police assistance. None compliance with this new law constitutes a felony with an automatic one-year minimum driver's license suspension, a maximum 5 year imprisonment, and $5,000 fine.

2012 R.I. Pub. Laws ch. 311, 333. An Act Relating to Commercial Law – General Regulatory Provisions – Unfair Sales Practices. This Act provides specific protections for consumers against price gouging of essential commodities during states of emergency declared by the Governor or during federal disasters declared by the President. The Act supplements the broad protective powers set forth in the Rhode Island Emergency Management Act. R.I. GEN. LAWS § 30-15-1 et. seq. The Act declares that it shall be an unfair trade practice to sell or offer to sell consumers an unconscionably high price for any essential commodity in any area in which there has been declared a state of emergency or federal disaster. Whether a price is unconscionably high is determined by comparing the price of the allegedly overpriced commodity to the 30 day average price for which the commodity was offered for sale in the particular effected area (legitimate discounts offered by sellers during the 30 day period are not to impact the calculation). The Act defines essential commodities as any goods, services, materials, merchandise, supplies, equipment, resources, or other article of commerce, and includes, without limitation, home heating fuels, motor fuels, food, water, ice, chemicals, petroleum products and lumber necessary for consumption or use as a direct result of the market emergency. Further, the Act sets forth the penalties to be paid for violation of the Act, including up to $1,000 per violation and up to $25,000 per twenty-four hour period, the costs of litigating the offense, and the disgorgement of profits earned from the violation. In light of the extensive damage and declarations of emergency by both the Governor and the President in response to Superstorm Sandy, there is the potential that consumers could file actions this coming year under this Act.

2012 R.I. Pub. Laws ch. 316, 356. An Act Relating to Property-Rhode Island Fair Housing Practices Act- Chapter 37.1 Homeless Bill of Rights. Rhode Island has passed the country’s first Homeless Bill of Rights. The Bill prohibits governments, police, healthcare workers, landlords or employers from treating
homeless people unfairly because of their housing status. Homeless individuals who believe they have faced discrimination now have grounds to sue.

2012 R.I. Pub. Laws ch. 373, 395. An Act Relating to Courts and Civil Procedure – Procedure Generally – Evidence. The stated goal of this Act is to “relieve physicians and the other medical professionals...who are associated with hospitals and other health care facilities from the hardship and inconvenience of attending court as witnesses.” R.I. GEN. LAWS § 9-19-27. Accordingly, the Act calls upon trial courts to “liberally construe this section to admit what is presumptively reliable medical evidence.” Id. The Act provides for the admissibility of medical record affidavits which are admissible for the fair and reasonable charge for the services and/or the necessity of the services or treatment, the diagnoses and prognoses, opinions as to causation of conditions diagnosed, and opinions as to disability, incapacity or permanency, if any, proximately resulting from the condition so diagnosed. The new legislation allows for affidavits to incorporate by reference other records or written statements, whether contemporaneous with the treatment or not, which are relied upon by the affiant in reaching the opinions set forth in the affidavit. Additionally, the Act allows an authorized agent of the hospital or health care facility to subscribe and swear to the statements in the medical records and provides that such records shall not be deemed inadmissible simply because a particular physician affiant employed by the hospital or health care facility has not subscribed to the affidavit. This addition allows individuals other than those who treated a particular individual to provide testimony regarding the medical necessity of treatment and the causation of injury. However, the Act provides the protection of allowing the adverse party, at the expense of the affidavit proponent, to a reasonable cross-examination of the affiant at the affiant’s office for up to an hour (additional cross-examination time is to be paid by the adverse party). Further, the more relaxed evidentiary rules do not apply to medical malpractice cases. R.I. GEN. LAWS § 9-19-27(h). R.I. GEN. LAWS § 9-19-27.2 essentially maintains the original requirements for the use of medical record affidavits in medical malpractice cases.
2012 R.I. Pub. Laws ch. 375, 394. An Act Relating to Businesses and Professions- Real Estate Sales Disclosures. The Act requires that every contract for the purchase and sale of real estate allow a potential purchaser to conduct inspections of the property before the purchaser is bound by the contract terms. The inspection shall occur within a ten day period, exclusive of Saturdays, Sundays and holidays. The parties have the right to mutually agree upon a different period of time; provided, a potential purchaser may waive this right to inspection in writing. This inspection period has become an implied term for all real estate purchases, and its failure to appear in the agreement is not detrimental to the existence of a contract nor does it entitle a party to avoid the contract.

2012 R.I. Pub. Laws ch. 408, 414. An Act Relating to Health and Safety- Food Allergy Awareness in Restaurants. This Act mandates that all Rhode Island food-service establishments (1) prominently display a poster in the staff area, which must be approved by the director of health or his or her duly appointed agents (“Director”), providing information about allergies to restaurant employees; (2) include on all menus a notice to customers of the customer’s obligation to inform the server about any food language, which the Director must also approve; and (3) that restaurants have a manager who has knowledge about food allergies as they relate to food preparation, either through mandatory trainings or certification programs. Further, the Act established a “Food Allergy Friendly” designations for restaurants that meet certain requirements. Restaurants that receive this title will be listed on the department of health’s website.

2012 R.I. Pub. Laws ch. 420, 485. An Act Relating to Public Officers and Employers-Merit System. This Act eliminates the definition of a veteran under Section 36-4-19 Placement of names on employment lists—Listing of veterans. In place of the past definition, the Act splits up veteran into two categories: “war veteran” and “veteran.” A war veteran is any veteran of any conflict of war, undeclared war or contingency operation who has earned a campaign ribbon or expeditionary medal for his or her service. The war veteran must have been honorably or generally
discharged from the armed forces. A veteran is a person who served on active duty for other than training for a period of more than thirty days and was discharged or released from anything other than dishonorable discharge; or war discharged or released from active duty because of a service-connected disability; or served as a member of the national guard of reserve forces and served a minimum of twenty years of honorable service in the national guard or reserve forces, has received a certificate of retirement and has been honorably or generally discharged from the national guard or reserve forces.

**2012 R.I. Pub. Laws ch. 436, 476.** An Act Relating to Elections. The Act prohibits the government from creating a polling place serving less than five hundred total eligible registered voters, and amends the Act to make an exception for when a polling place is located in a low income or elderly residential development. The amendment also prohibits the government from eliminating an existing polling place presently located in a low-income or elderly residential development.

**2012 R.I. Pub. Laws ch. 448, 454.** An Act Relating to Public Records- Access to Public Records Act. The Act provides greater protection for individuals seeking public records by allowing them to remain anonymous. The Act makes more information public, and increases fines on non-complying agencies. Agencies must now pay the legal fees of citizens and journalists who have to bring suit to get access to public records, and who eventually win those suits. The most significant change of the new law is the “balancing test” between the public and the private information, which is designed to counter a broad exemption of the old law that concealed all “personally identifiable” records from the public and now mirrors the federal Freedom of Information Act. The Act makes personnel records of government officials and employees public, except when disclosure would constitute “an unwarranted invasion of personal privacy” pursuant to 5 U.S.C. 552. Further, the Act requires that certain details of an arrest, such as name, alleged crime and crime scene location, to be released in terms of an arrest log within 48 hours on weekdays or 72 hours on weekends of an arrest. It also clarifies that contracts with public employees and pension data are public information.