Summer 2015

2014 Survey of Rhode Island Law

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Attractive Nuisance. Burton v. State, 80 A.3d 856 (R.I. 2013). The State of Rhode Island owed no duty to a seventeen-year-old trespasser who was injured while breaking into a facility at the abandoned Ladd Center. Although it was unreasonable that the State allowed bottles of sulfuric acid to remain on the premises, the doctrine of attractive nuisance did not apply. Despite Plaintiff-trespasser’s status as a minor, he was deemed capable of recognizing and assessing the risks associated with trespassing on the premises. As a result of the determination that Plaintiff was capable of recognizing the risks, even though he was a minor his injury resulted from a failure to protect himself rather than an inability to do so.

FACTS AND TRAVEL

In November 2005, seventeen-year-old Steven T. Burton (“Plaintiff”), entered the premises of the former Ladd Center in Exeter, Rhode Island with four friends.\(^1\) The purpose of the group’s excursion was to explore the abandoned facility, which had developed a reputation for being haunted after its closure in 1994.\(^2\) Plaintiff visited the property on two previous occasions and acknowledged that he did not seek permission to do so; additionally another member of the group (“L.V.”) later testified that it was “general knowledge” that the group should not get caught.\(^3\) While there were a number of “No Trespassing” signs posted around the property, no fence enclosed the grounds.\(^4\) Plaintiff and his friends sought entry into an old hospital building that was boarded up with plywood on the first two stories, in addition to metal grates being welded shut and the presence of chains on the doors.\(^5\) In order to access the interior of the building, Plaintiff and his friends “shimmied” up a pipe and

2. Id.
3. Id.
4. Id.
5. Id.
entered through a third story window.\textsuperscript{6}

Once inside, the group discovered a Styrofoam container among various broken and abandoned medical supplies in an unlocked locker.\textsuperscript{7} The contents of the container consisted of several gallon bottles with indecipherable labels, all of which contained a clear liquid.\textsuperscript{8} L.V. testified that he “poured a small amount of liquid from one of the bottles onto a table, to see what it was.”\textsuperscript{9} Given the liquid’s viscous consistency, the group recognized that it was not water.\textsuperscript{10} Although Plaintiff testified that he believed the liquid was hazardous, the group took three bottles with them as they proceeded through the building.\textsuperscript{11}

As the group exited the building from the first floor the carrier of two of the gallon bottles dropped one from his cargo, which broke open.\textsuperscript{12} The substance splattered Plaintiff who preceded the carrier in his exit.\textsuperscript{13} Plaintiff experienced a “burning sensation” on his legs where the material landed, and when he rubbed at it, his hand burned as well.\textsuperscript{14} Plaintiff then stripped off his clothes and ran to his friend’s truck, and from there the group drove him to Kent County Hospital.\textsuperscript{15} The liquid contained within the bottles was sulfuric acid.\textsuperscript{16} While being treated Plaintiff told staff he “found the bottles in the woods.” However after he was later transferred to Rhode Island Hospital, Plaintiff told staff he “found the bottles in sand dunes and then slipped on concrete.”\textsuperscript{17}

The following year in November 2006, Plaintiff brought an action in the Rhode Island Superior Court against the State of Rhode Island on the grounds the State (“Defendant”) “negligently failed to inspect, repair, and/or maintain its premises free from defect and/or dangerous condition.”\textsuperscript{18} A bench trial was conducted

\textsuperscript{6} Id.
\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id. at 859–60.
\textsuperscript{16} Id. at 859.
\textsuperscript{17} Id. at 860.
\textsuperscript{18} Id. at 860 n.7. The Plaintiff also filed claims against Phoenix Houses of New England and several John Does. Id. The claims against Phoenix
on January 18, 2012, at which, in addition to his own testimony, Plaintiff presented testimony from L.V. and Mr. Carl Abruzzese, the former State Buildings and Grounds Coordinator. Despite Mr. Abruzzese testimony that, “kids and adults” alike sought out “ghosts and spirits and whatever the hell else they were looking for” in buildings on the property, the trial justice ruled in favor of Defendant. The justice held that because Plaintiff was a trespasser, Defendant owed him no duty; furthermore, the justice ruled that the doctrine of attractive nuisance did not apply in this case.

Plaintiff appealed on the grounds that the trial justice erred in failing to apply the attractive nuisance doctrine because Plaintiff “did not fully realize the risk in taking the bottles of sulfuric acid and he further contends that the justice erred by not finding Defendant shared ‘some comparative fault for the accident.’” The Supreme Court of Rhode Island granted review and affirmed the ruling of the superior court.

**ANALYSIS AND HOLDING**

Upon review the Supreme Court of Rhode Island established the standard of review to overturn the decision of a trial justice sitting without a jury, requiring a finding that the trial justice’s decision was clearly erroneous. In light of this standard, the court examined the facts to determine what duty, if any, Defendant owed Plaintiff. The existence of a duty hinged on

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Houses were dismissed with prejudice on April 20, 2007. *Id.* at 860 n.7. Subsequently Plaintiff substituted Rhode Island Economic Development Corporation (“EDC”) for one of the John Does, and on January 4, 2011, summary judgment was entered in favor of EDC. *Id.*

19. *Id.* at 860.
20. *Id.* at 860, 862.
21. *Id.* at 860.
22. *Id.*
23. *Id.*
24. *Id.* at 858.
25. *Id.* at 860. In establishing the standard of review the court quoted from *Reagan v. City of Newport*, 43 A.3d 33, 37 (R.I. 2012) (quoting *Notarantonio v. Notarantonio*, 941 A.2d 138, 144 (R.I. 2008)) (internal quotation marks omitted), stating that “[i]t is well settled that [t]his Court will not disturb the findings of a trial justice sitting without a jury unless such findings are clearly erroneous.”
whether or not Plaintiff was a trespasser when the injury at issue occurred; if Plaintiff was found to be a trespasser then no duty existed. The court defined trespasser as “[o]ne who intentionally and without consent or privilege enters another’s property.” Plaintiff’s own testimony established that he did not have, nor did he seek, permission to be on the property. This lack of permission was further corroborated by L.V.’s testimony that it was “general knowledge” that the group should not be discovered on the property. This testimony sufficiently established that at the time Plaintiff’s injury occurred he was a trespasser, and therefore, the Defendant did not owe him a duty other than avoidance of willful or wanton conduct upon discovering him in a position of danger.

After determining that under the general rule Defendant did not owe Plaintiff a duty, the court then turned to whether or not the attractive nuisance doctrine was applicable. If the doctrine of attractive nuisance applied, then it was possible that, despite Plaintiff’s status as a trespasser, Defendant was liable for harm that Plaintiff suffered while he was on Defendant’s property.

As the trial justice found and the court upheld, the main focus in determining whether Plaintiff fell within the exception was whether Plaintiff could establish that “because of [his] youth” he “[did] not discover the condition or realize the risk involved in intermeddling with [the dangerous condition] or in coming within the area made dangerous by it.” This is due to Mr. Abruzzese’s

27. Id. The court quoted its decision in Hill v. National Grid, 11 A.3d 110, 113 (R.I. 2011) to establish the duty property owners owe to trespassers. Burton, 80 A.3d at 860–61. In that decision the court stated, “[i]t is a well-established principle of law that property owners owe no duty of care to trespassers but to refrain wanton or willful conduct; even then only upon discovering a trespasser in a position of danger.” Id.


29. Id. at 859, 861.

30. Id.

31. Id. at 860–61.

32. Id. at 861. The court first adopted the attractive nuisance doctrine according to the Restatement (Second) of Torts § 339 at 197 (1965) in Haddad v. First National Stores Inc., 280 A.2d 93, 94 (R.I. 1971). It is noteworthy that the plaintiff in this case was a five-year-old. Id.

33. Burton, 80 A.3d at 861.

34. Id.
testimony that the state was aware of the frequency with which “kids and adults” alike entered the Ladd Center grounds. The court’s rationale for adopting the doctrine in the first place was because “[a] young child cannot because of his immaturity and lack of judgment be deemed to be able to perceive all the dangers he might encounter as he trespasses.” If a child is in fact fully aware of the danger he or she encounters and capable of comprehending its magnitude then he or she is capable of avoiding it and there is no need for application of a doctrine intended to protect those incapable of appreciating the danger they encounter. The court found that Plaintiff was indeed capable of comprehending the risks associated with his behavior, as he testified regarding the bottles of sulfuric acid that he believed they contained some kind of hazardous material. Additionally L.V.’s testimony that he poured some of the liquid out onto a table indicates that there was enough caution within the group to initially avoid contact. In holding that, although Plaintiff was a minor he was old enough to appreciate the risks associated with breaking into the former hospital, the court noted that “[i]t strains credulity to think that a seventeen-year-old who was about to complete his G.E.D., did not realize the risk involved in climbing a pipe to an upper-story window and entering a dark abandoned building.” Due to Plaintiff’s status as a trespasser to whom the attractive nuisance doctrine did not apply, Defendant did not have a duty; therefore, no negligence was established on Defendant’s behalf, and it did not share “some comparative fault.”

**COMMENTARY**

The Rhode Island Supreme Court acknowledged the doctrine of attractive nuisance as an exception to the general rule that a landowner owes no duty to trespassers except to refrain from willful or wanton conduct. The rationale behind this exception

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35. Id. at 862.
36. Id. at 861.
37. Id. at 863.
38. Id. at 859, 863.
39. Id.
40. Id. at 863.
41. Id.
42. Id. at 860–61.
is that children often lack the ability to perceive danger in the same way as an adult can and are, therefore, more susceptible to harm.\textsuperscript{43} The doctrine is intended to protect those who are unable to protect themselves, and this goal takes precedence over a landowner's right to exclusive use and enjoyment of his or her land.\textsuperscript{44}

The court here applied the doctrine with that rationale in mind. Based on the facts, the court appropriately determined Plaintiff did not fall within the attractive nuisance exception, despite the fact that it was unreasonable and even irresponsible for the State to allow bottles of sulfuric acid to remain on a property frequented by trespassers.\textsuperscript{45} In determining whether or not Plaintiff was, because of his youth, incapable of recognizing the risk associated with breaking into an abandoned medical facility at night, the court relied on the Plaintiff's own statements and testimony regarding the trespass at issue.\textsuperscript{46} He had been to the property on two prior occasions, each time without permission,\textsuperscript{47} and another witness who was present the night of the trespass admitted that it was general knowledge that they should not get caught.\textsuperscript{48} Entering the building required the group to "shimmy" up a pipe to break into a third story window,\textsuperscript{49} which should have been an indication of the risk the group was undertaking. Plaintiff's testimony that he believed the bottles contained a hazardous material made it evident that he was indeed capable of perceiving the potential risk associated with coming into contact with the substance they contained.\textsuperscript{50} The fact that another member of the group testified that he poured a small amount of the liquid out onto a table to assess what it was, further demonstrates that the plaintiff was cognizant of the potential for harm and, therefore, capable of taking measures to prevent it.

However, the court's focus on age is somewhat concerning. The fact that Plaintiff was seventeen and the court had never

\textsuperscript{43} Id. at 861 (quoting Haddad v. First Nat'l Stores, Inc., 280 A.2d 93, 96 (R.I. 1971)).
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 862.
\textsuperscript{46} Id. at 863.
\textsuperscript{47} Id. at 859.
\textsuperscript{48} Id. at 859, 861.
\textsuperscript{49} Id. at 859.
\textsuperscript{50} Id. at 859, 863
before applied the doctrine of attractive nuisance to a child over the age of twelve was deemed significant. While the court did not go so far as to say the Plaintiff's age was the determinative factor, it did note that it “strained credulity” to think that a seventeen-year-old on the verge of completing his G.E.D. was incapable of recognizing the risks associated with his activity. In an overgeneralization, the court attributed Plaintiff's failure to protect himself to the general recklessness and bravado of seventeen-year-old boys. Though Plaintiff certainly appeared capable of recognizing risk, it would be unfair to assume that every time a teenager exercises poor judgment or fails to identify a potential source of harm, it is merely the result of bravado and recklessness. Seventeen-year-olds are still minors often lacking in experience, and compensating for “immaturity and lack of judgment” in children is the goal of the attractive nuisance doctrine. According to comment c of § 339 of the Restatement (Second) of Torts, “in our present hazardous civilization some types of dangers have become common, which an immature adolescent may reasonably not appreciate, although an adult may be expected to do so.” Additionally, even where minors recognize the presence of a dangerous condition, comment k of the Restatement specifies that “[t]he lack of experience and judgment normal to young children may prevent them from appreciating the full extent of the risk.” Minors as old as seventeen may be capable of understanding that there is some level of risk associated with their undertaking a particular activity, but that doesn't mean they are capable of fully appreciating the extent of the risk. So long as the trespasser is a minor, a stronger emphasis should be placed on the circumstances surrounding the injury, rather than the age of the trespasser. Such an emphasis is more faithful to the goals of the attractive nuisance doctrine, which is to protect those who because of their youth are incapable of protecting themselves.

CONCLUSION

51. Id. at 863.
52. Id.
53. See id. at 861.
54. RESTATEMENT (SECOND) TORTS § 339 cmt. c (1965).
55. RESTATEMENT (SECOND) TORTS § 339 cmt. k (1965).
The Rhode Island Supreme Court held that the State did not owe a duty to a seventeen-year-old trespasser who was burned by sulfuric acid while trespassing on the Ladd Center grounds. As a result of Plaintiff’s age and testimony regarding the lengths he went to gain access to the facilities and his recognition of the potential dangers associated with his actions, Plaintiff did not fall within the exception of the attractive nuisance doctrine. The doctrine is meant to protect child trespassers on the grounds they are less capable of assessing certain dangers and, therefore, less capable of protecting themselves.

Amy Brown
Civil Procedure. Burns v. Moorland Farm Condo. Ass’n, 86 A.3d 354 (R.I. 2014). A subset of condominium owners were levied repair assessments by the Condominium Association despite the fact that this subset would not benefit from the proposed repairs. Following a judicial declaration that the assessments were illegal, the Supreme Court of Rhode Island held that the judgment was null and void because the owners which would benefit from the repairs were not a party to the original declaratory judgment action. The court reasoned that the declaration would impact the interests of the benefitting owners and could lead to future controversies, thereby rendering them indispensable parties to the action.

**FACTS AND TRAVEL**

The Moorland Farm Condominium (“Moorland Farm”) in Newport, Rhode Island consists of thirty-three housing units in ten buildings.1 The units at Moorland Farm are not uniform, and vary in terms of time of construction, size, amenities, and configuration.2 Based on the time of construction, the housing units are classified as Phase I, Phase II, or Phase III.3 While Phase I contains smaller “A units” and larger “B units,” the Phase II and Phase III elements of the Moorland Farm Condominium contain only the smaller “A units.”4

Between 2005 and 2008, the Moorland Farm Condominium Association (the “Association”) and its management committee initiated repairs to decks attached to Moorland Farm housing units.5 According to the bylaws of Moorland Farm, the management committee had the authority to levy assessments on individual condominium owners for the purpose of repairing

2. Id.
3. Id.
4. Id. at 355–56. There was apparently some confusion at trial regarding whether the “A units” or “B units” are larger, but the Supreme Court of Rhode Island clarified that the “B units” are clearly larger than the “A units.” Id. at 355–56 nn.1–2.
5. Id. at 356.
common areas. Further, the bylaws allowed for the management committee to use discretion in its determination of expenses required for general repairs, provided that the expenses were only used for common and lawful purposes.

The management committee issued four special assessments which focused primarily on repairs to Phase I housing units. In its evaluation, the committee sought to repair various Phase I decks which were, in the eyes of the Phase II and Phase III owners, not “common areas” for the purposes of the Association’s bylaws.

Accordingly, Phase II and III unit owners (“Plaintiffs”) filed a declaratory judgment action in the Superior Court of Rhode Island which sought to establish that the four special assessments were illegal and unenforceable. Further, the Plaintiffs sought reimbursement of any monies previously paid to the Association for the purposes of the four assessments. Additionally, the Plaintiffs requested that the court order the Association to reevaluate and reallocate the cost of completed and future repairs to the Phase I owners who directly benefited from the deck repairs, rather than improperly spreading the cost to all unit owners.

Significantly, the Plaintiffs named only “the Association and individual members of the management committee, in their


7. Burns, 86 A.3d at 356.

8. Id. Specifically, the first assessment in the amount of $205,600 was allocated to repair four decks attached to Phase I units. Id. The second assessment in the amount of $500,000 was allocated to repair the remaining decks attached to Phase I units. Id. The third assessment in the amount of $180,000 was allocated, in part, for general repairs to Phase I buildings. Id. The fourth assessment in the amount of $100,050 was not explicitly explained by the Supreme Court of Rhode Island. Id.

9. Id. at 356–57; see Burns, 2010 WL 3451823, at *4, *10 (finding that certain decks are restricted for the “private, exclusive use of the unit to which they are connected” and that “Phases II and III unit owners received no benefit from the replacement of the decks and entry court areas in Phase I”).


11. Id. at 357.

12. Id.
capacity as members of that body, as defendants.”

In its answer, and again before the start of trial, the Association raised the affirmative defense that the Plaintiffs had failed to join all necessary and indispensable parties to the lawsuit. The Association argued that the Phase I owners had an interest in the action, and accordingly, joinder was required for the trial to continue. The trial justice proceeded despite the Association’s objections.

Following a two-day bench trial in July of 2010, the trial justice issued an order in favor of the Plaintiffs. The order declared the assessments to be illegal and ordered the Association to refund the Plaintiffs for any cost incurred as a result of the assessments. Additionally, the trial justice further instructed the Association to reassess the cost of deck replacements to the individual Phase I unit owners who had benefitted from the assessments. The Association timely appealed the adverse declaratory judgment to the Supreme Court of Rhode Island, arguing, in relevant part, that the trial justice erred by failing to acknowledge the Phase I owners as indispensable parties to the lawsuit.

13. Id. at 356.
14. Id. at 357.
15. Id. at 357–58.
16. Id. at 357.
17. Burns v. Moorland Farm Condo. Ass’n, No. NC-2007-0610, 2010 WL 3451823, at *1 (R.I. Super. Ct. Aug. 27, 2010). The trial justice, acting as the sole fact-finder in the bench trial, evaluated the case on its merits and concluded that the unambiguous language of The Condominium Act and the Moorland Farm Condominium Declaration established that the decks in question were not common areas and, thus, declared that the assessments levied to the non-benefitting plaintiffs for repairs to private decks were illegal. Id. at *11–16.
18. Id. at *15–16.
19. Id.
20. Burns, 86 A.3d at 355, 357–58. The Association further argued that the trial justice erred in his evaluation of the merits of the case and, additionally, in his imposition of sanctions on the Association for bringing a Rule 60(b) motion at trial. Id. The Supreme Court of Rhode Island declined to discuss the merits at length after finding judicial error in the threshold question of indispensable parties which thereby rendered the merits of the dispute moot. Id. at 360. However, the Court vacated the order imposing sanctions on the defendants for bringing a Rule 60(b) motion. Id. at 361.
ANALYSIS AND HOLDING

On appeal to the Supreme Court of Rhode Island, the Association argued “that the lawsuit’s critical defect [was] its failure to include the Phase I unit owners who received the benefit of the Association’s assessment for deck repairs but who would bear the financial burden of the reallocated costs as set forth in the judgment.”21 However, the Plaintiffs insisted “that the Association is the only necessary defendant because the judgment imposes an obligation only upon the Association to reallocate and reassess the deck repairs.”22 The Plaintiffs reasoned that the Phase I unit owners are not indispensable parties to the lawsuit because “[a]ny unit owner’s responsibility to pay legal assessments . . . is a contractual obligation that is based on the declaration [of condominium], and not on the result of this action.”23 The court sided with Association and declared that the owners of the Phase I units had an interest in the declaration and were therefore an indispensable party to the suit.24

The court turned to the Uniform Declaratory Judgments Act (“UDJA”) to evaluate the indispensable party issue on appeal.25 Section 9-30-11 of the UDJA provides “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”26 The court stated that this statutory requirement “furthers the purpose of [the act], which is ‘to facilitate the termination of controversies.’”27 The court relied on the statutory objective of section 9-30-11 as an analytical motif throughout the discussion.28

The court declared that section 9-30-11 is a mandatory provision in declaratory judgment actions and noted that it is generally fatal to a declaratory judgment when a party with an

21. Id. at 358.
22. Id.
23. Id.
24. Id. at 360.
25. Id. at 358.
26. Id. (quoting R.I. GEN. LAWS ANN. § 9-30-11 (2012)).
27. Id. (quoting Abbatematteo v. State, 694 A.2d 738, 740 (R.I. 1997)).
28. Id. at 358–60 (noting the importance of avoiding controversies throughout a discussion of case precedent and reiterating this concern in holding for the Association).
interest in the declaration is not properly joined.\textsuperscript{29} The court relied on several Rhode Island cases to establish how the courts have handled cases involving indispensable parties to declaratory judgments in the past.\textsuperscript{30} Additionally, the court drew from an Ohio case with similar factual circumstances in support of its conclusion that the Phase I owners were indispensable parties.\textsuperscript{31}

First, the court discussed Abbatematteo \textit{v. State}, where certain participants in the Employees' Retirement System of the State of Rhode Island sought “a declaration that the retirement system’s payment of more generous benefits to some [third-party] retirees was unconstitutional and ... an injunction putting an end to those payments.”\textsuperscript{32} There, the trial court dismissed a declaratory judgment action on the grounds that the third-party employees who had allegedly received better benefits were indispensable parties to the suit.\textsuperscript{33} The Supreme Court of Rhode Island affirmed the trial court’s ruling and reasoned that a declaration in the plaintiff’s favor “would reduce or eliminate the benefits for th[e] ‘favored’ members of the retirement system.”\textsuperscript{34} The court used this as an example of a third-party “interest” that would have been adversely affected in the event of a declaratory judgment, similar to the interest at issue in \textit{Burns}.\textsuperscript{35} Additionally, the court rationalized its reluctance to grant declarations where a third-party has an interest in the declaration, citing a concern for potentially needless future litigation arising out of the judicial decree.\textsuperscript{36}

\begin{itemize}
\item \textsuperscript{29} \textit{Id.} at 358.
\item \textsuperscript{30} \textit{Id.} at 358–59.
\item \textsuperscript{31} \textit{Id.} at 359–60.
\item \textsuperscript{32} \textit{Id.} at 358 (citing \textit{Abbatematteo} \textit{v. State} 694 A.2d 738, 740 (R.I. 1997)).
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.} (quoting \textit{Abbatematteo}, 694 A.2d at 740).
\item \textsuperscript{35} \textit{See id.} at 358, 360. The court also identified “a city council member’s interest in the municipal budget process” as an additional example of a third-party interest which would require joinder. \textit{Id.} at 358–59 (analyzing Sullivan \textit{v. Chafee}, 703 A.2d 748, 749–50, 754 (R.I. 1997)).
\item \textsuperscript{36} \textit{Id.} The court discussed a case where it had previously held that members of certain municipal boards in the City of Warwick, Rhode Island were indispensable parties to a declaratory judgment action by the Mayor which “sought a declaration as to whether the municipal charter or general statutes controlled the selection of members of certain municipal boards.” \textit{Id.} at 358 (citing In \textit{re City of Warwick}, 97 R.I. 294, 295–96 (R.I. 1964)). There, the court explained that all members of the boards were required parties
\end{itemize}
Moreover, the court went on to analyze a factually similar case decided in the Court of Appeals of Ohio.37 Much like Burns, the declaratory judgment action under review there originated when certain condominium owners were assessed the cost of balconies owned by other condominium owners.38 That court applied a similar declaratory judgment statute and “held that the unit owners whose condominiums had balconies were necessary parties”39 because the unit owners with balconies “[w]ere . . . individually responsible for the cost of the repair and maintenance of the balconies, whereas the cost was previous to be shared by the entire association.”40 There, the court also expressed a concern about the possibility of “piecemeal litigation” between the two groups of condominium owners if all parties were not properly joined to the case.41 While not bound to this unpublished Ohio decision, the Supreme Court of Rhode Island still made use of the remarkably similar factual circumstances in arriving at its conclusion.42

The Supreme Court of Rhode Island equated the interests discussed in previous declaratory judgment cases to the interests of the Phase I deck owners.43 The court noted that the judgment requested by the Plaintiffs, and eventually granted by the trial justice, sought “specific decrees that the association ‘allocate costs’ to [the Phase I owners].”44 In the eyes of the court, the fact that the Phase I owners were essentially ordered to shoulder the financial burden of the reallocated deck costs represented a clear and unmistakable interest in the litigation.45

The court further reasoned that a declaration that would adversely affect the interests of the Phase I owners would ultimately “undermine the purpose of declaratory-judgment

37. *Id.* at 359.
39. *Id.*
40. *Id.* (alterations in original) (quoting Cerio, 2004 WL 529106, at *3) (internal quotation marks omitted).
41. *Id.* at 359–60.
42. *See id.*
43. *See id.* at 358–60.
44. *Id.* at 359.
45. *Id.*
actions”—avoiding and eliminating controversies. The court juxtaposed this underlying rationale against constrictive precedential pronouncements in previous declaratory judgment actions and held that “the failure to join [the Phase I owners] in this case was fatal and that the judgment [by the trial court] is null and void.”

**COMMENTARY**

By all accounts, it appears that the court came to the correct conclusion in this case. The fact that the Plaintiffs explicitly sought a declaration which put a cognizable financial burden on the Phase I owners clearly made them indispensable parties to the action. The court correctly identified this purported cost-shifting as a genuine “interest” in the litigation which could potentially lead to “piecemeal” litigation between the Association and the Phase I owners or the Phase I owners and the Plaintiffs. Having identified the underlying rational of declaratory judgment actions for the purposes of the Uniform Declaratory Judgments Act—“to facilitate the termination of controversies”—the court correctly reiterated precedential concerns that could arise from declarations, such as this one, which fail to join indispensable parties.

The court correctly held that “failure to join indispensable parties in this case was fatal and that the [previous] judgment is null and void.” However, in a footnote attached to this holding, the court mentioned that it had previously “assumed without deciding that joinder might be excused if it would be impracticable because the parties to be joined were too numerous or service

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46. *Id.* at 359–60.
47. *Id.* at 360. “Our statutes and cases make clear that the Phase I unit owners should have been joined in this case.” *Id.* at 360 n.6.
48. *Id.* at 357 (“[P]laintiffs requested that the court ‘order defendants to reassess the four special assessments to the individual unit owners whose properties specifically benefited from the illegal assessments’ and, if those reassessments were not paid, to file liens against the benefited units.”).
49. *Id.* at 357–60.
50. *Id.* at 359 (quoting Abbatemateo v. State, 694 A.2d 738, 740 (R.I. 1997) (internal quotation marks omitted).
51. See *id.* at 358–60.
52. *Id.* at 360.
would be unreasonably burden[some].” The court correctly distinguished the factual circumstances of this case from this apparent limitation on mandatory required joinder rules. While this footnote could be read as mere dicta, it could also have an important impact on future complex litigation in Rhode Island.

As the public pension crisis looms in Rhode Island, it is reasonable to expect an upturn in complex declaratory judgment actions involving multiple parties. Rhode Island courts have already turned to the discussion in Burns as a means of succinctly reiterating the previously established rationales of required joinder. Thus, Burns currently stands as a tool for establishing the courts’ precedential standard for applying the rationales of the Uniform Declaratory Judgment Act. However, as complex litigation begins to involve more parties, it is reasonable to foresee the required joinder rationale, as presented through the policy prism of Burns, as a double-edged sword. In other words, at what point does the dismissal of declaratory judgment actions on the grounds of required joinder begin to encroach on the very policies the Burns court sought to protect?

The Supreme Court of Rhode Island correctly relied on precedent and further developed the procedural standards of required parties in Burns. However, adopting the Burns analysis to support a broader and more cumbersome set of facts may become unwieldy for the courts in the future. It will be interesting to observe how Rhode Island courts will address factual circumstances analogous to the “extremely large and hypothetical condominium development” noted in Burns, and if the courts will consider its role in “facilitat[ing] the termination of controversies”

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53. Id. at 360 n.6. (alterations in original) (internal quotation marks omitted).
54. See id. (“While this may prove to be true in the context of some extremely large and hypothetical condominium development, such a case is not before us.”).
57. Namely, the role of declaratory judgments as a method of eliminating controversies. See Burns, 86 A.3d at 358–60.
CONCLUSION

The Supreme Court of Rhode Island held that certain condominium owners were indispensable parties to a declaratory judgment action by other condominium owners against the condominium association. As the complaint and judgment shifted the cost of repairs to the non-party, they had a clear interest in the litigation, and the failure to join them was fatal to the judgment. The court evaluated the purpose of the Uniform Declaratory Judgment Act and concluded that it was obligated to render the dispute moot as the judgment would have adversely impacted the non-parties’ interest and could have potentially led to further controversies arising out of the same dispute.

William C. Burnham

58. Id. at 359, 360 n.6.
Civil Procedure. Ho-Rath v. R.I. Hosp., 89 A.3d 806 (R.I. 2014). The Rhode Island Supreme Court ruled that, when suing a medical laboratory for negligence, the medical malpractice statute of limitations does not apply, but instead courts are instructed to apply the general negligence statute of limitations.

FACTS AND TRAVEL

On July 16, 2010, Plaintiffs Jean and Bunsan Ho-Rath1 (“Jean” and “Bunsan”) sued Rhode Island Hospital (“RIH”), Women & Infants’ Hospital (“WIH”), as well as Corning Incorporated (“Corning”) and Quest Diagnostics, LLC2 (“Quest”) on behalf of the Ho-Raths’ minor daughter, Yendee Ho-Rath (“Yendee”).3 The Plaintiffs sued on theories of negligence, lack of informed consent, corporate liability, and vicarious liability based on Yendee’s diagnosis of a genetic blood disorder, alpha thalassemia.4 The Plaintiffs’ allege that the Defendants did not diagnose or treat Yendee for the disorder, even though Jean, Bunsan, and Yendee’s older brother had all been tested starting in 1993.5

The three Defendants moved to dismiss the Plaintiffs’ claims, and on June 27, 2011, a superior court justice heard the motions.6 On January 4, 2011, Corning argued that under R.I. General Laws section 9-1-14.1,7 Plaintiffs’ loss of consortium claims and

1. The Plaintiffs will be referenced by their first names to avoid confusion, just as the case did, but no disrespect is intended.
2. While the Plaintiffs named many other Defendants in both the original and amended complaints, the three Defendants listed here are the only pertinent Defendants discussed in this case.
4. Id.
5. Id.
6. Id. at 808–09.
7. Id. at 807–08 n.1 ("In pertinent part, G.L. 1956 § 9-1-14.1 provides that an action for medical . . . malpractice shall be commenced within three (3) years from the time of the occurrence of the incident which gave rise to the action; provided, however, that: (1) One who is under disability by reason of age, mental incompetence, or otherwise, and on whose behalf no action is
the claims brought by Plaintiffs for Yendee were barred by the statute of limitations. Additionally, regarding the Plaintiffs’ Amended Complaint, Corning argued that because the suit was filed on a minor’s behalf, the parent Plaintiffs could not be added beyond that three-year statute of limitations.

On February 8, 2011, RIH argued that the loss of consortium claims were not part of the tolling portion of the statute of limitations and, therefore, were time-barred. On February 28, 2011, WIH argued that Plaintiffs’ claims were barred because of the statute of limitations for medical malpractice claims and for the lack of pleading the necessary discovery rule in section 9-1-14.1(2). Lastly, Quest argued on April 13, 2011 that Plaintiffs’ claims were time-barred because the claims only dealt with blood tests taken in December 1993.

The Plaintiffs argued against the motions to dismiss on grounds that section 9-1-14.1(1) actually tolls the statute of limitations for any minor who sues on a medical malpractice theory for three years after that child is no longer a minor. Additionally, the Plaintiffs said that their loss of consortium claims are included in the claims that are tolled until after the child is no longer a minor for the very fact that the claims are brought within the period of three (3) years from the time of the occurrence of the incident, shall bring the action within three (3) years from the removal of the disability. (2) In respect to those injuries or damages due to acts of medical . . . malpractice which could not in the exercise of reasonable diligence be discoverable at the time of the occurrence of the incident which gave rise to the action, suit shall be commenced within three (3) years of the time that the act or acts of the malpractice should, in the exercise of reasonable diligence, have been discovered.” (quoting R.I. GEN LAWS § 9-1-14.1 (2012) (internal quotation marks omitted)).

8.  Id. at 808.
10. Defendant RIH also included some other defendants, including Miriam Hospital and four doctors. Ho-Rath, 89 A.3d at 809.
11.  Id.
12.  Defendant WIH also included three medical personnel. Id.
13.  Id. WIH also argued that Yendee cannot even bring a claim on her own behalf once she is no longer a minor as her parents have already filed a claim for her. Id; see also Bakalakis v. Women & Infants’ Hosp., 619 A.2d 1105, 1107 (R.I. 1993). Quest later made the same argument in its motion to dismiss. Ho-Rath, 89 A.3d at 809.
14.  Id.
15.  Id.
derivative. Finally, the Plaintiffs argued that the laboratory Defendants, Corning and Quest, would fall under section 9-1-19 since the laboratories only dealt with testing blood samples.

In a bench decision on July 7, 2011, the trial justice concluded that the Plaintiffs’ claims in their entirety should be considered under medical malpractice. After the final judgment was rendered for the Defendants, the Plaintiffs, WIH, Corning, and Quest each appealed.

**ANALYSIS AND HOLDING**

Upon review, the court sought to interpret section 19-1-14.1(1) in order to address the main dispute between the parties. The Plaintiffs’ argument was that a party can bring medical malpractice claims for a minor child at any time until the child is no longer a minor, when the statute then allows for three additional years that the child can bring his or her own claim.

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16. *Id.* On the contrary, RIH had argued that, because the loss of consortium claims were derivative and not the actual medical malpractice claims of the minor child, those claims of the parents were not included in the medical malpractice statute of limitations. *Id.*

17. R.I. General Laws section 9-1-19 is “the general disability tolling statute applicable to causes of action other than medical malpractice.” *Id.* (citing R.I. GEN. LAWS § 9-1-19 (2012)).

18. *Id.* at 809–10.

19. The trial justice also remanded the following issues to the court’s general calendar for a full hearing: (1) whether all of the Plaintiffs’ claims are time-barred due to the passage of time between the alleged injury and the time the action was actually filed in 2010; (2) whether the Plaintiffs’ claims against Corning and Quest are time-barred due to the complaint being amended far past the three-year mark of any blood testing; and (3) whether Yendee can still bring her own claim when she was no longer a minor. *Id.* at 810.

20. *Id.* The trial justice stated that minors had two options with medical malpractice suits, “either an action could be commenced on behalf of the child within three years of the injury . . . or the injured minor could bring suit on his or her own behalf within three years of attaining the age of majority.” *Id.*

21. *Id.*

22. For the court to affirm a lower court’s grant of a motion to dismiss, it must be “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 plaintiffs claim.” *Id.* (quoting Tarzia v. State, 44 A.3d 1245, 1251 (R.I. 2012)).

23. *Id.*

24. *Id.*
Additionally, the Plaintiffs pointed to section 9-1-41 to argue that they were correct in bringing all their derivative actions when they brought Yendee’s claims. Although the trial justice was right in dismissing the parents’ claims, the Defendants argued that the trial justice was incorrect in stating that the child can bring her own suit when she is no longer a minor.

The court determined that the claims against Corning and Quest were of ordinary negligence and not medical malpractice claims. The Defendants argued that the Plaintiffs’ claims against the laboratories are for medical malpractice and cited Vigue v. John E. Fogarty Memorial Hospital for the distinction between ordinary negligence and medical malpractice. The court looked to the legislative definition of medical malpractice and determined that laboratories are not included in the definition. Since laboratories are not explicitly included, the court concluded that the legislature did not intend for such claims against laboratories to be considered as medical malpractice.

25. R.I. General Laws section 9-1-41 provides that:
   (c) Parents are entitled to recover damages for the loss of their unemancipated minor child’s society and companionship caused by tortious injury to the minor. (d) Actions under this section shall be brought within the time limited under § 9-1-14 or 9-1-14.1, whichever is applicable, for actions for injuries to the person. 
   Id. at 810–11 n.8. (quoting R.I. GEN LAWS § 9-1-41 (2012)) (internal quotation marks omitted).
26. Id. at 810–11.
27. Id. at 811.
28. Id. at 812. This determination places the claims against Corning and Quest under the statute of limitations in section 9-1-19.
29. Id. at 811–12; Vigue v. John E. Fogarty Mem’l Hosp., 481 A.2d 1, 3 (R.I. 1984).
30. R.I. General Laws section 5-37-1(8) defines medical malpractice as “any tort, or breach of contract based on health care or professional services rendered, or which should have been rendered, by a physician, dentist, hospital, clinic, health maintenance organization or professional service corporation providing health care services and organized under chapter 5.1 of title 7, to a patient.” Ho-Rath, 89 A.3d at 812 (quoting R.I. GEN LAWS § 5-37-1(8) (Supp. 2014)) (internal quotation marks omitted).
31. The court concluded by looking at the plain language of section 5-37-1(8) that Corning and Quest do not fall under the definition of medical malpractice. Id. Additionally, since health maintenance organizations are licensed according to chapter 17 of title 23 or chapter 41 of title 27, laboratories are not even included in health maintenance organizations because laboratories are licensed under chapter 16.2 of title 23. Id. at 812 n.13.
actions. The court held that the claims against Corning and Quest are general negligence claims that fall under section 9-1-19.

COMMENTARY

The court has expanded risk for healthcare consumers in Rhode Island by ruling that the extra safeguards for plaintiffs provided by the medical malpractice statute of limitations exclude laboratories. The medical malpractice statute of limitation was expanded to provide extra time for plaintiffs to discover injuries caused by negligence on the part of healthcare professionals.

While the court here concluded that the legislature did not mean to include laboratories within the reaches of “medical malpractice,” the definition of “health care facility” provides that “(o) ‘[h]ealth care facility’ means an institution providing health care services or a health care setting, including but not limited to hospitals... diagnostic, laboratory and imaging centers, and rehabilitation and other therapeutic health settings.” Under this line of reasoning and plain language analysis, laboratories do indeed fall under the health maintenance organization overview that is mentioned within the medical malpractice definition.

However, the issue arises because “health care facility” is defined differently in chapter 17 of title 23, and the definition expressly excludes clinical laboratories. The definition refers to chapter 16.2 of title 23, where the licensing procedure of clinical laboratories is described, perhaps because laboratories require less-extensive licensing than hospitals that offer many more services. When there are conflicting definitions, the legislative

32. Id. at 812.
33. Id.
34. See 1 RHODE ISLAND TORT LAW AND PERSONAL INJURY PRACTICE § 188 (LEXIS Law Publishing 1999); see also Wilkinson v. Harrington, 243 A.2d 745 (1968).
35. The definition of “health care facility” is found in chapter 41 of title 27, which discusses the health maintenance organizations that are included within medical malpractice, as the court points out in its analysis. Ho-Rath, 89 A.3d at 812.
37. See id.
intent is relevant, and since the initial definition that seems to include laboratories is in the same section that defines medical malpractice, it seems more likely that the legislature would have included laboratories among the agencies against which a plaintiff may bring a medical malpractice claim.40

Here, the court seems to be lessening the liability on certain healthcare professionals, specifically laboratories, but it is unclear why.41 Perhaps the court views the difference between medical doctors and laboratory technicians as significant enough to loosen liability, yet that reasoning is never mentioned within the distinctions provided in the court’s analysis. Whatever the purpose may be behind the court’s analysis, a wider reading of the laws regarding health care organizations indicates that laboratories are included within the broad category of health maintenance organizations, and as such, were meant to be included under medical malpractice claims by the legislative drafters.42

CONCLUSION

The Rhode Island Supreme Court held that laboratories were not intended to be within the statute of limitation for medical malpractice and were subject to the statutes for ordinary negligence. The court requested further briefing on the issues of whether or not a claim may be brought for a child when the child is a minor and, further, what the implications of the relevant statute of limitations would be. Thus, the court vacated in part, remanded in part, and assigned to the court’s calendar in part.

Rita E. Nerney

42. See R.I. GEN. LAWS § 27-41-2.
**Contract Law.** *NV One, LLC v. Potomac Realty Capital, LLC*, 84 A.3d 800 (R.I. 2014). A usury savings clause in a commercial loan document does not validate an otherwise usurious contract as a matter of public policy. A contract is usurious when the interest rate calculated based on the amount paid to the borrower exceeds the state’s maximum allowable interest rate set by applicable usury or other such laws.

**FACTS AND TRAVEL**

On July 17, 2007, NV One, LLC, Nicholas E. Cambio and Vincent A. Cambio ("Plaintiffs")¹ entered into a loan agreement with Potomac Realty Capital, LLC ("Defendant") in order to renovate a former post office in West Warwick, RI.² The Plaintiffs signed a promissory note and a loan agreement for a total amount of $1,800,000³ and granted the Defendant a mortgage on the property as part of the security agreement.⁴ The parties also executed a Sources and Uses of Funds sheet and a Loan Disbursement Authorization (collectively referred to as the “loan documents”),⁵ which established an “interest reserve” and a “renovation reserve,” with amounts set at $62,500 and $940,000 respectively, and also set an interest rate at either 5.3%, or the LIBOR rate plus 4.7%, whichever was greatest.⁶ Significantly, the

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¹. Occasionally, there will be reference to Nicholas E. Cambio and Vincent A. Cambio collectively as “the Cambios.”
². NV One, LLC v. Potomac Realty Capital, LLC, 84 A.3d 800, 801 (R.I. 2014).
³. *Id.* at 801—02. There was also an initial deposit of $15,000 that increased the value of the loan to $1,815,000. *Id.*
⁴. *Id.* at 801. The security agreement also granted Defendant a “mortgage, assignment of leases and rents, security agreement, and fixture filing with respect to the property.” *Id.* at 801—02.
⁵. *Id.* at 802. The loan documents also set a number of fees ($18,000 exit fee, $25,000 origination fee) and provided that interest-only payments were due at the first of each calendar month until the loan’s maturity date (August 1, 2008). *Id.*
⁶. *Id.* The LIBOR Rate (London Interbank Offered Rate) is calculated based on a “daily compilation by the British Bankers Association of the rates that major international banks charge each other for large-volume, short-
loan documents also set a default interest rate at “the lesser of (a) twenty-four percent (24%) per annum and (b) the maximum rate of interest, if any, which may be collected . . . under applicable law.” 7 The maximum interest provisions in the promissory note and the mortgage also contained a usury savings clause 8 as an attempt to conform to Rhode Island usury laws. 9

By the time the note initially closed, Defendant had only disbursed $761,478.54—approximately forty-two percent of the principal amount. 10 In August 2008, Defendant and Plaintiffs agreed to the execution of an allonge, thereby extending the maturity date of the loan to June 1, 2009. 11 However, when the loan ultimately matured, the interest reserve had been completely exhausted but Defendant had only disbursed $1,007,390.52—

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7. Id. at 802 n.2 (quoting Black's Law Dictionary 1027 (9th ed. 2009)).
8. Id. The usury savings clause found in the note provides:
A. It is the intention of Maker [Plaintiffs] and Payee [Defendant] to conform strictly to the usury and similar laws relating to interest from time to time in force, and all agreements between Maker and Payee, whether now existing or hereafter arising and whether oral or written, are hereby expressly limited so that in no contingency or event whatsoever, whether by acceleration of maturity hereof or otherwise, shall the amount paid or agreed to be paid in the aggregate to Payee as interest hereunder or under the other Loan Documents or in any other security agreement given to secure the Loan Amount, or in any other document evidencing, securing or pertaining to the Loan Amount, exceed the maximum amount permissible under applicable usury or such other laws (the 'Maximum Amount').
B. If under any circumstances Payee shall ever receive an amount that would exceed the Maximum Amount, such amount shall be deemed a payment in reduction of the Loan owing hereunder and any obligation of Maker in favor of Payee . . . or if such excessive interest exceeds the unpaid balance of the Loan and any other obligation of Maker in favor of Payee, the excess shall be deemed to have been a payment made by mistake and shall be refunded to Maker.

Id. (internal quotation marks omitted).
9. Id.; see R.I. GEN. LAWS § 6-26-1 et seq. (1956). Additionally, the note provided that the Plaintiffs “would not accrue any interest on the [interest reserve and renovation reserve] funds” that were to be placed in escrow. NV One, 84 A.3d at 802—03.
10. Id. at 803. Defendant also failed to place the reserve funds in escrow. Id.
11. Id.
approximately fifty-six percent of the $1.8 million loan.\textsuperscript{12} Significantly, the Defendant continued to charge interest rates calculated against the face amount of the loan ($1.8 million) rather than the amount actually disbursed.\textsuperscript{13} Subsequently, on December 14, 2009, Plaintiffs “filed a verified complaint against Defendant claiming fraud, breach of contract, and usury” and sought to enjoin Defendant from foreclosing on the property and collecting the outstanding debt from the Cambios’ personal guarantees.\textsuperscript{14}

On August 16, 2011, Plaintiffs moved for partial summary judgment for liability due to Defendant’s violation of Rhode Island usury law, which the trial court granted in a written decision on December 16, 2011.\textsuperscript{15} In granting summary judgment, the trial justice stated that the maximum allowable interest rate in Rhode Island is twenty-one percent (21%)\textsuperscript{16} and that any loan agreement in violation of this percentage renders the agreement usurious and void.\textsuperscript{17} The trial justice found that since Defendant routinely charged interest on the face amount of the loan rather than the amount disbursed, the “rate was undoubtedly usurious, at least for some period” and that the Defendant “never . . . lower[ed] it below twenty-one percent.”\textsuperscript{18} Accordingly, in order to determine usury in such a situation, the trial justice determined that “the value for computing the maximum permissible interest is not the amount on the face of the loan, but, rather[] the actual amount

\textsuperscript{12} Id. \textsuperscript{13} Id. Interest rates were calculated at ten percent (10%) prior to the allonge, twelve percent (12%) from the execution of the allonge to February 2009, and twenty-four percent (24%) after Plaintiffs defaulted for failure “to complete renovations within the time provided in the security agreement” and for failing to cure the default within the thirty-day grace period (i.e. by March 2009). Id. On October 9, 2009, Defendant sent the Plaintiffs another notice of default along with a payment demand and, approximately one month later, Defendant also sent a foreclosure notice pursuant to the mortgage agreement for failure to pay the loan amount plus interest by its maturity date. Id. Additionally, Defendant demanded payment from the Cambios pursuant to their personal guarantees. Id. \textsuperscript{14} Id. at 803–04. \textsuperscript{15} Id. at 804. \textsuperscript{16} R.I. GEN. LAWS § 6-26-2 (1956); NV One, 84 A.3d at 804. \textsuperscript{17} NV One, 84 A.3d at 804; see also R.I. Gen. Laws § 6-26-4; Sheehan v. Richardson, 315 B.R. 226, 234 (Bankr. D. R.I. 2004). \textsuperscript{18} NV One, 84 A.3d at 803–04.
received by the borrower.” Therefore, since Defendant charged interest calculated against the entire amount rather than the amount disbursed, there was “no doubt that [the] interest amounts charged exceeded twenty-one percent (21%) of the disbursed loan.”

In response to the Defendant’s argument that the usury savings clause rendered them immune from liability, the trial justice found that since there was no binding case law regarding Rhode Island’s allowance of use and any effects of such a clause, he would need to examine the issue “in light of the public policy, legislative intent, and plain meaning” of the usury statutes. Accordingly, the court “embarked on an extensive analysis of the policies behind Rhode Island usury jurisprudence, as well as the policies of other states with substantially developed usury laws, such as Texas, Florida, and North Carolina.” After determining that the intent behind Rhode Island’s usury statutes aims toward strongly discouraging usurious transactions, the trial justice declined to honor Defendant’s request to uphold the loan because “[l]ending effect to a usury savings clause would contradict this state’s articulated public policy in favor of the borrower.” Therefore, he granted Plaintiffs’ motion for partial summary judgment and entered an order on January 11, 2012 declaring the loan agreement void.

Defendant timely appealed to the Rhode Island Supreme Court and contended that “the trial justice erred when [he] granted . . . partial summary judgment on liability . . . by declaring the usury savings clause of the loan agreement unenforceable” and that the trial court also “erred in failing to


20. *Id.* (quoting NV One, 2011 WL 6470557, at *10) (internal quotation marks omitted).

21. *Id.*

22. *Id.; see, e.g.*, TEX. FIN. CODE ANN. § 301.001 et seq. (West 2005); FLA. STAT. ANN. § 687.01 et seq. (West 2014); N.C. GEN. STAT. ANN. § 24-1 et seq. (West 2014).

23. NV One, 84 A.3d at 804 (quoting NV One, 2011 WL 6470557, at *16) (internal quotation marks omitted).

24. *Id.; see R.I. GEN. LAWS § 6-26-4* (1956). The trial justice also voided the mortgage and removed the liens on the property from the land records. NV One, 84 A.3d at 804.
perform a proper analysis when it rendered a commercial contract term unenforceable on the grounds of public policy.”

The Rhode Island Supreme Court granted certiorari.

ANALYSIS AND HOLDING

The Supreme Court of Rhode Island conducted a de novo review of the case, since summary judgment is considered a “drastic remedy, and ... should be dealt with cautiously.” The court first examined the interest rate to determine whether it was usurious under section 6-26-2(a) of the Rhode Island General Laws. Writing for the court, Chief Justice Suttell immediately stated that it was “abundantly clear ... that the loan between [Defendant] and [Plaintiffs] was usurious” and found it of “critical importance” that Defendant calculated the interest rate on the face amount of the loan rather than the amount actually disbursed. Additionally, the court stated it was not even necessary to “engage in complex arithmetic in order to discern usury” because the default rate, set at “the lesser of (a) twenty-four percent (24%) per annum and (b) the maximum rate of interest ... under applicable law [(twenty-one percent (21%)]” was usurious on its face, as the Defendant demanded twenty-four percent interest throughout the default period rather than conforming to Rhode Island usury laws. Nonetheless, the court examined the sequence of events between March 24, 2009 and November 19, 2009 to calculate the actual rate of interest

25. Id. at 804–05 (internal quotation marks omitted).
26. Id. at 801.
28. NV One, 84 A.3d at 805.
29. Id. at 805—06. The court determined that the August 2007 interest rate calculated at 10.125 percent of the face value ($1.8 million) resulted in a 23.17 percent rate per annum based on the amount actually disbursed by that time ($797,500). Id. at 806 n.10. This rate alone exceeded the maximum allowable 21 percent interest rate in section 6-26-2 of the Rhode Island General Laws, and was therefore usurious. Id. at 806.
30. Id. (alteration in original) (internal quotation marks omitted); see R.I. GEN. LAWS § 6-26-2 (1956).
31. The former date represents the end of the “cure period” Defendant provided for Plaintiffs to cure the initial default on February 23, 2009, while the latter date represents the date which Defendant sent a payment demand
Defendant charged.\textsuperscript{32} Again, throughout this time period Defendant charged twenty-four percent interest calculated on the face value of the loan, which in itself was “facially usurious.”\textsuperscript{33} However, the court found that when calculated in proportion to the amount Defendant had actually disbursed ($1,007,390.52), the interest rate “skyrocket[ted] to 43.48 percent per annum, more than double the maximum permissible interest rate.”\textsuperscript{34} Having found that the interest rate was unquestionably usurious, the court proceeded to analyze the heart of the Defendant’s appeal—the applicability of the usury savings clause.\textsuperscript{35}

The court stated that, as a matter of first impression, usury savings clauses should be examined in light of public policy.\textsuperscript{36} The court analyzed the plain language of the statute and found that by including the word ‘shall’ in the language of the statute, the Legislature “evince[d] a certainty . . . [that when a lender] charges interest in excess of 21 percent[,] [it] is liable for usury.”\textsuperscript{37} Furthermore, there is only one specific exception\textsuperscript{38} to the maximum allowable interest rate included in Rhode Island commercial usury law.\textsuperscript{39} Therefore, the court found it clear that

\textsuperscript{32} See id. at 803, 806.
\textsuperscript{33} Id. at 806.
\textsuperscript{34} Id.
\textsuperscript{35} See id. at 804—07.
\textsuperscript{36} Id. at 801, 807. The court noted that “[i]t is well settled in Rhode Island that ‘a contract term is unenforceable only if it violates public policy.’” Id. at 807 (quoting Gorman v. St. Raphael Acad., 853 A.2d 28, 39 (R.I. 2004)). A contract term violates public policy in four identified situations: 1) when it is “injurious to the interests of the public”; 2) when it “interferes with the public welfare or safety”; 3) when it “is unconscionable”; or 4) if it “tends to injustice or oppression.” Id. (quoting Gorman, 853 A.2d at 39) (internal quotation marks omitted).
\textsuperscript{37} NV One, 84 A.3d at 807.
\textsuperscript{38} R.I. GEN. LAWS § 6-26-2(e) (1956) (“Notwithstanding the provisions of subsection (a) of this section and/or any other provision in this chapter to the contrary, there is no limitation on the rate of interest which may be legally charged for the loan to, or use of money by, a commercial entity, where the amount of money loaned exceeds the sum of one million dollars ($1,000,000) and where repayment of the loan is not secured by a mortgage against the principal residence of any borrower; provided, that the commercial entity has first obtained a pro forma methods analysis performed by a certified public accountant licensed in the state of Rhode Island indicating that the loan is capable of being repaid.”).
\textsuperscript{39} NV One, 84 A.3d at 809.
the Legislature had “consider[ed] (and reject[ed]) . . . any and all other circumstances whereby a lender may charge interest in excess of 21 percent.”40 Additionally, in determining civil usury violations, the court found that the lender’s intent was immaterial based on the fact that intent is only mentioned in the criminal usury statute.41 Accordingly, it was clear to the court that the “Legislature intended an inflexible, hardline approach to usury that is tantamount to strict liability.”42 The court nevertheless continued to analyze binding precedent and ultimately declared that “the public policy behind the usury statute [is] [f]or [the] protection of the borrower.”43 Therefore, “it is incumbent upon the lender to ensure full compliance with the provisions for maximum rate of interest, and apart from the explicit exception in § 6-26-2(e) of Rhode Island’s General Laws, anything short of full compliance renders the transaction usurious and void.”44 Shifting the burden of compliance on the lender was a sufficient means to highlight the State’s “strong public policy against usurious transactions.”45

40. Id.; see § 6-26-2(e).
41. NV One, 84 A.3d at 807; see § 6-26-3.
42. Id. (emphasis added).
43. Id. at 809; see, e.g., Colonial Plan Co. v. Tartaglione, 147 A. 880, 881 (R.I. 1929) (reasoning that contracting around maximum interest laws would permit abuse and would allow lenders to “take advantage of small borrowers,” thereby undermining the deterrence aspect of the statute); Burdon v. Unrath, 132 A. 728, 730 (R.I. 1926) (holding that a lender’s intention to abide by the maximum interest rates “is no excuse for the violation of the statute” and that a contrary holding “would furnish to avaricious lenders a convenient excuse” when they fail to abide to usury laws).
44. NV One, 84 A.3d at 809 (emphasis added). The court additionally stated that “[u]surious interest rates are to be avoided at all costs.” Id. at 808.
45. Id. (quoting DeFusco v. Giorgio, 440 A.2d 727, 732 (R.I. 1982)) (internal quotation marks omitted). Two decisions from the U.S. District Court for the District of Rhode Island and the Rhode Island Bankruptcy Court were also persuasive in the court’s reasoning. See id. In Sheehan v. Richardson, the court refused to apply the in pari delicto doctrine against a borrower when usury arose in the context of bankruptcy proceedings, stating that “Rhode Island usury law places the burden on charging a legal interest rate on the lender.” 315 B.R. 226, 240 (D.R.I. 2004). The court here found that Sheehan was “illustrative of the public policy underlying the usury statute” that Rhode Island refuses to punish borrowers when lenders try to capitalize on usurious interest rates. NV One, 84 A.3d at 808; see 315 B.R. at 240. The court then cited In re Swartz as “perhaps the most telling reflection of the rigidity of the usury statute” where the Rhode Island Bankruptcy
The court additionally rejected Defendant’s argument that “sophisticated business entities” should be bound by usury savings clause terms to which they both agreed.\textsuperscript{46} Noting that section 6-26-2(e) applies to commercial loans, the court determined that “the very existence of th[e] exception . . . recogniz[es] that some borrowers are different” and are only eligible for protection if the transaction meets the codified requirements within the exception.\textsuperscript{47} However, since the Defendant did not “secur[e] the requisite pro forma analysis,”\textsuperscript{48} Defendant “failed to avail itself to the exception and [was] therefore bound by the maximum interest rate.”\textsuperscript{49}

With these policy considerations in mind, the court flatly rejected honoring any usury savings clauses as a matter of law, since “the enforcement of [such] clauses would entirely obviate any responsibility on the part of the lender to abide by the usury statute, [which] would, in essence, swallow the rule.”\textsuperscript{50} The court reasoned that if usury savings clauses were enforceable, lenders could “circumvent the maximum interest rate by including a boilerplate usury savings clause” which “would have the reverse effect of incentivizing lenders,” who are “typically in a better position to understand the terms of [a] loan,” to comply with usury laws.\textsuperscript{51} Furthermore, the burden of “ensuring compliance [would rest] squarely on the shoulders of the borrower,” with an end result “injurious to the money-borrowing public.”\textsuperscript{52} The court therefore held that “usury savings clauses are unenforceable as against the well-established public policy of preventing usurious transactions,” and as a result, Defendant was unable to shield itself from liability.\textsuperscript{53}

\textsuperscript{46}\textit{NV One}, 84 A.3d at 809, 810.
\textsuperscript{47}\textit{Id.} at 809.
\textsuperscript{48} Indeed, the loan in question fit into the exception because the loan exceeded the $1,000,000 requirement and neither of the Cambios’ primary residences secured the loan in the form of the mortgage. \textit{Id.} at 809 n.19; see R.I. GEN. LAWS § 6-26-2(e) (1956).
\textsuperscript{49} \textit{NV One}, 84 A.3d at 809 n.19; see § 6-26-2(e).
\textsuperscript{50} \textit{NV One}, 84 A.3d at 809—10.
\textsuperscript{51} \textit{Id.} at 810.
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.}
material fact . . . [Plaintiffs were] entitled to judgment as a matter of law” on the issue of the usury. 54

COMMENTARY

The Rhode Island Supreme Court took a rigid stance against usurious transactions by declaring that usury savings clauses in general are unenforceable as a matter of public policy. 55 In compliance with Rhode Island’s commercial usury statute, its underpinning legislative intent, and an ample amount of precedent and nonbinding authorities, the court took the stance advocated by the Supreme Court of North Carolina that protecting citizens against usurious transactions is one of the highest public interests. 56 It should be clear after this ruling that strict compliance with Rhode Island usury laws is the only method to evade severe penalties, 57 and the burden of doing so lies solely on commercial lenders. Furthermore, unless the loan agreement strictly adheres to the requirements of section 6-26-2(e), sophisticated business entities cannot contract loan agreements past twenty-one percent interest. Additionally, showing good faith on the lender’s behalf is futile, as intent is irrelevant when the standard is “tantamount to strict liability.” 58

54.  Id.
55.  See id. at 805—10.
56.  See id. at 810 (“The [usury] statute relieves the borrower of the necessity for expertise and vigilance regarding the legality of rates he must pay. That onus is placed instead on the lender, whose business it is to lend money for profit and who is thus in a better position than the borrower to know the law. A ‘usury savings clause,’ if valid, would shift the onus back onto the borrower, contravening statutory policy and depriving the borrower of the benefit of the statute’s protection and penalties.” (alteration in original) (quoting Swindell v. Fed. Nat’l Mortg. Ass’n, 409 S.E.2d 892, 896 (N.C. 1991)) (internal quotation marks omitted)). However, the Rhode Island Supreme Court did not mention that in North Carolina, a party arguing usury is required to show “corrupt intent to charge usurious interest” and that “[t]he penalty for usury . . . is only forfeiture of interest, not principal.” NV One, LLC v. Potomac Realty Capital, LLC, C.A. No. PB 09-7159, 2011 WL 6470557, at *14 n.5 (R.I. Super. Ct. Dec. 16, 2011). Although “corrupt intent . . . can be established simply by showing a usurious rate was actually imposed,” intent is nonetheless a factor considered in North Carolina’s usury analysis. Id.
57.  See R.I. GEN. LAWS § 6-26-4(a) (1956) (“Every [usurious] contract . . . and every mortgage, pledge, deposit, or assignment made or given as security for the performance of the contract, shall be usurious and void.”).
58.  See NV One, 84 A.3d at 807.
This decision further underscores the firmly rooted and unforgiving approach that Rhode Island courts take in deciphering usury, leaving no room for anything short of a lender’s full and utmost compliance. Although the agreement here seemed to fit the statutory exception for high dollar loan amounts on its face, without “first obtain[ing] a pro forma methods analysis performed by a certified public accountant licensed in the state of Rhode Island indicating that the loan is capable of being repaid,” the lender was cast to sea without a sail. Although the usury savings provision was freely contracted between both parties, the missing pro forma analysis was an inexcusable oversight in the court’s mind, with no mention of penalizing the borrower that had a practice of defaulting due to negligent nonpayment. This allowed the borrower to harbor the fruits of the seemingly superfluous provision to the tune of one million dollars in no strings attached principal. Consequently, Rhode Island usury law appears to be a punitive means to a protectionist end.

Although it was a dreary result for the Defendant here, the ultimate consequences of NV One, LLC v. Potomac Realty Capitol, LLC should be relatively nonexistent. Commercial lenders doing business in Rhode Island should already be aware of the state’s moored stance on usury given its strong jurisprudence. In light of this, diligent lenders should not rely on usury savings clauses in the first place. The only additional burden now rests on the legal and compliance departments of in-state and multi-state commercial lenders to review the Rhode Island form contracts and delete any usury savings clauses (if only to save the company dozens annually on ink). Absent a widespread mimicking of the practice at issue here, lenders should not face anything more

59. § 6-26-2(e); NV One, 84 A.3d at 809.
60. § 6-26-4(a).
61. See, e.g., Nazarian v. Lincoln Fin. Corp., 78 A.2d 7, 10 (R.I. 1951) (stating that the “best method” for preventing usurious transactions is displayed by the legislative policy that severely penalizes lenders who violate maximum interest statutes against aggrieved borrowers).
62. Furthermore, it should not be a surprise that the court stepped in to invalidate usury savings clauses. Cf. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting) (“[S]tate laws may regulate life in many ways that we... might think injudicious;... usury laws are [an] ancient example.”).
63. The Defendant here routinely charged usurious interest rates,
than a minor inconvenience. What this decision represents, however, is a symbolic tipping of the scales that has potential to deter the current and potential commercial lenders that provide the ancillary capital for businesses from a state that is notoriously bad for business. However, this is not the court’s fault—maybe it is time that the Rhode Island General Assembly considers less antiquated and draconian ways to protect the public from falling prey to overpowering lenders while also being more welcoming towards lenders with good faith.

For example, the trial judge in this case, although ultimately rejecting alternative approaches, analyzed the purpose of usury laws in various other states before doing so. For example, in Florida, where the usury laws, “[l]ike Rhode Island . . . [are designed] ‘to protect borrowers from paying unfair and excessive interest to overreaching creditors’” usury is, unlike Rhode Island, “largely a matter of intent” and usury savings clauses are merely one “factor in the determination of intent.” By making intent relevant in usury determinations, the Florida legislature sought to “balance [the public] policy of protecting borrowers with its

ultimately relying on the usury savings clause. If other commercial lenders have a similar practice, then there are surely many actionable contracts. Attorneys representing commercial borrowers ought to calculate the interest rate charged to their client based on the amount actually disbursed before renegotiating the terms of a loan agreement as a purely precautionary measure. If the amount at any point exceeds twenty-one percent, even by four dollars, the client can unquestionably reap the rewards of the lender’s unfounded reliance regardless of whether the client personally guaranteed repayment. See, e.g., NV One, LLC v. Potomac Realty Capital, LLC, C.A. No. PB 09-7159, 2011 WL 6470557, at *12 (R.I. Super. Ct. Dec. 16, 2011) (quoting Jersey Palm-Gross, Inc. v. Paper, 658 So. 2d 531, 534 (Fla. 1995)).
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interest in facilitating complex commercial loan transactions.” Until the General Assembly seeks such a balance, Rhode Island will remain unattractive to commercial lenders.

CONCLUSION

The Rhode Island Supreme Court held that usury savings clauses do not validate an otherwise usurious contract as a matter of law. The court found this to be the intent of the legislature in enacting section 6-26-2 and ultimately in favor of the strong public interest for protecting borrowers. Accordingly, the court voided the loan agreement between Defendant and Plaintiffs and affirmed the trial court’s partial summary judgment order in favor of the Plaintiffs.

Zachary H. Valentine

67. Id.
**Criminal Law. State v. Brown, 88 A.3d 1101 (R.I. 2014).** The Rhode Island Supreme Court addressed a procedural and an evidentiary issue for the first time, holding that: (1) when assessing whether joinder is proper the trial court should conduct its analysis based on the charges and allegations that are contained in the indictment and not based on the charges that are ultimately considered by the jury; and (2) a police sketch that cannot be authenticated in court by the person that gave the description to the sketch artist is not admissible under the Rule 804(b)(5) “catch-all” exception to hearsay.

**FACTS AND TRAVEL**

On the evening of August 4, 2008, Jorge Restrepo (“Mr. Restrepo”) was savagely beaten, robbed, and left for dead while making the short walk to his Watson Street home in Central Falls, Rhode Island after completing his shift at Vac-Forming Unlimited Inc. Central Falls police officer Patrick Rogan arrived on the scene at approximately 5:37 p.m. to find Mr. Restrepo lying on his back, surrounded by neighbors, with his eyes barely open, breathing slowly, having urinated on himself, and apparently unconscious. Within a minute, emergency rescue personnel arrived. Mr. Restrepo was stabilized and brought to Memorial Hospital for treatment.

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1. Vac-Forming, where Mr. Restrepo worked, is located at 161 Rand Street in Central Falls, Rhode Island. VAC-FORMING UNLIMITED, http://www.vac-formingunlimited.com/ (last visited Mar. 20, 2015). Mr. Restrepo lived on Watson Street in Central Falls, which directly connects to Rand Street. State v. Brown, 88 A.3d 1101, 1106 (R.I. 2014). Although the exact address of Mr. Restrepo’s home is unknown, the walk could not have been more than 0.2 miles and could have been as little as 370 feet. See GOOGLE MAPS, https://www.google.com/maps/dir/Vac+Forming+Unlimited+Inc,+161+Rand+St,+Central+Falls,+RI+02863/41.88838287,-71.4000852/@41.88444444,71.39563219/z/data=!4m9!4m8!1m5!1m0!3e2 (last visited Sept. 12, 2014).

2. Brown, 88 A.3d at 1106.
3. Id. at 1107.
4. Id.
Hospital. Due to the severe nature of the trauma Mr. Restrepo suffered, he was later transported to Rhode Island Hospital. Mr. Restrepo died at Rhode Island Hospital at 11:05 p.m. that same night.

There were multiple eyewitnesses to Mr. Restrepo’s attack. Two of the witnesses, Diego Rodriguez and James Major, testified that two men carried out the brutal robbery and that one of the two perpetrators was carrying a red handgun. Although the descriptions of the assailants varied slightly, the eyewitnesses generally agreed that the two men who attacked Mr. Restrepo were young, black, and one of the men was wearing a doo-rag.

On August 6, two days after Mr. Restrepo was murdered, two Providence police officers initiated a traffic stop after observing a white Acura drive between forty to forty-five miles per hour in a twenty-five-mile-per-hour zone on North Main Street. Although the vehicle did briefly pull over, the traffic stop resulted in a chase through Providence that approached 100 miles per hour. Eventually, the Acura became disabled, and the two occupants fled on foot. In the end, both suspects were apprehended and identified as Kayborn Brown (the “Defendant”) and his brother Keishon Brown. During the pursuit, one of the officers observed that the passenger of the vehicle had a gun in his right hand. Subsequently, the officers found a red Cobra handgun in the bushes near where the car was abandoned. “Police later identified [D]efendant [Kayborn Brown] as the driver of the Acura.”

When Central Falls police learned that the Providence police recovered a red gun near a vehicle abandoned during a car chase,
they determined that there was a high probability that the occupants of the Acura were connected to Mr. Restrepo’s murder.\(^\text{18}\) The Central Falls Police showed a photo array that included a picture of Defendant to Diego Rodriquez, one of the eyewitnesses.\(^\text{19}\) Mr. Rodriguez identified Defendant as one of the attackers.\(^\text{20}\)

On February 27, 2009, Defendant was charged with ten offenses stemming from his roles in both the death of Mr. Restrepo on August 4th and the traffic stop and ensuing high-speed chase on August 6th.\(^\text{21}\) Three of the charges were dismissed pursuant to Rule 48(a),\(^\text{22}\) and Defendant was tried for the remaining seven charges in a single jury trial that began on November 18, 2010.\(^\text{23}\) After the State’s case concluded, Defendant moved for and was granted, judgment of acquittal on two more charges under Rule 29.\(^\text{24}\) The jury returned a guilty verdict on the five remaining charges on November 23.\(^\text{25}\) Defendant then moved for and was denied his motion for a new trial, and on April 14, 2011, Defendant was sentenced.\(^\text{26}\)

Defendant filed a timely appeal arguing improper joinder of charges, denial of severance of charges, that a police sketch should have been admitted into evidence, that certain autopsy

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18.  *Id.* at 1108.
19.  *Id.*
20.  *Id.*
21.  *Id.*
22.  *Id.* Rule 48(a) of the Rhode Island Superior Court Rules of Criminal Procedure reads, “[t]he attorney for the State may file a dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.” *R.I. Super. Ct. R. Crim. P.* 48(a).
24.  *Id.* at 1105, 1108. The relevant section of Rule 29 of the Rhode Island Superior Court Rules of Criminal Procedure reads:

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.

25.  *Brown*, 88 A.3d at 1108. The five charges that Defendant was found guilty of were: (1) first-degree murder; (2) first-degree robbery; (3) conspiracy to commit robbery; (4) carrying a pistol without a license; and (5) reckless driving. *Id.* at 1105–06.
26.  *Id.* at 1108–09.
photographs should have been excluded from evidence, and that his motion for a new trial should have been granted.27

ANALYSIS AND HOLDING

A. Rule 8(a) Joinder

Defendant asserted on appeal that the August 4 and August 6 incidents were separate events that had “no similarity of character, plan, or purpose” and, therefore, were improperly joined.28 The trial justice allowed the joinder of charges, noting that the unusual nature of the red gun29 involved in both the August 4 and August 6 incidents created a “clear nexus” between the events of both days.30 The court reviewed the trial justice’s decision to allow joinder de novo because it was a question of law, noting that Rule 8(a) is generally interpreted broadly to enhance judicial efficiency.31

The court recognized that the procedural circumstances surrounding this case were unusual in that they created a joinder question that the court had not yet faced.32 At first glance, there did not appear to be sufficiently similar character between the charges arising from the August 4 and August 6 incidents because five of the ten original charges were either dismissed or received a judgment of acquittal prior to jury deliberations.33 Of the five remaining charges, the lone surviving count from the August 6 incident was a reckless driving charge, while the other four

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27. Id. at 1109.
28. Id. Rule 8(a) allows for:
[t]wo (2) or more offenses [to] be charged in the same indictment, information, or complaint . . . if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.
R.I. SUPER. CT. R. CRIM. P. 8(a).
29. At trial, the State called three expert witnesses to testify about the unusual nature of the red gun involved in both incidents; during their combined forty-two years of experience, none had ever seen another red handgun with the same or similar color as the one seized after the car chase. Brown, 88 A.3d at 1108.
30. Id. at 1109.
31. Id. at 1109–10.
32. Id. at 1110.
33. Id.
surviving charges were from the August 4 murder of Mr. Restrepo ("murder, robbery, conspiracy, [and] carrying a firearm without a license").\textsuperscript{34}

The court held that joinder was proper and in doing so defined the point in time that is critical to a Rule 8(a) analysis.\textsuperscript{35} The court clarified that when assessing whether joinder is proper the trial court should conduct its analysis based on "the charges and allegations that are contained in the indictment, perhaps supplemented by a bill of particulars" and not on the charges that the jury ultimately considers.\textsuperscript{36}

Here, although a charge of carrying a pistol without a license stemming from the August 6 incident was not considered by the jury because it was subject to a judgment of acquittal, it was present in the indictment, and, therefore, should be included in the Rule 8(a) joinder analysis.\textsuperscript{37} Consequently, two of the base offenses—carrying a pistol without a license—one arising from August 4 and the other from August 6, were not just similar, but identical.\textsuperscript{38} Because the offenses were identical and they both involved a unique red handgun that served to identify the Defendant, the court held that joinder was proper.\textsuperscript{39}

B. \textit{Rule 14 Severance}

The Defendant asserted that even if joinder were proper, the trial justice should have granted his Rule 14 motion to sever the charges.\textsuperscript{40} The Defendant argues that joinder of the August 4 and August 6 charges was unduly prejudicial because the jury inferred

\begin{footnotesize}
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  \item 34. \textit{Id.}
  \item 35. \textit{Id.} at 1111.
  \item 36. \textit{Id.}
  \item 37. \textit{Id.}
  \item 38. \textit{Id.}
  \item 39. \textit{Id.} at 1112–13. The court also noted that because the red handgun was used to identify the Defendant, even if the charges had not been joined, evidence of the red handgun would certainly have been admissible at both trials. \textit{Id.} at 1112. Therefore, having one trial using the same evidence promotes judicial efficiency. \textit{Id.}
  \item 40. \textit{Id.} at 1113. The relevant part of Rule 14 reads, "[i]f it appears that a defendant or the State is prejudiced by a joinder of offenses . . . in an indictment, information, or complaint . . . the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." \textit{R.I. Super. Ct. R. Crim. P.} 14.
\end{itemize}
\end{footnotesize}
from the joinder that he had a propensity to commit criminal acts, which culminated in a guilty verdict.\textsuperscript{41} The court stated that when reviewing a trial justice’s decision to deny a Rule 14 motion it is looking only for abuse of discretion.\textsuperscript{42} Notably, the court also said that it would not overturn a trial justice’s decision to deny a Rule 14 motion if “the outcome would have been the same had separate trials been held.”\textsuperscript{43}

Here, the court reiterated the rule that “[w]here evidence of one crime would be admissible at a separate trial of another charge, a defendant will not suffer any additional prejudice if the two charges are tried together.”\textsuperscript{44} The court went on to say that evidence of the red handgun and the August 6 car chase would have been admissible at both trials if they were severed and that “[i]t is unlikely that testimony relating to charges arising from the police chase prejudiced the jurors, [who were] deciding the more serious charges emanating from the August 4 incident.”\textsuperscript{45} Therefore, the trial justice did not abuse his discretion in denying the Defendant’s Rule 14 motion.\textsuperscript{46}

C. The Police Sketch

The Defendant argued that the trial justice interfered with his right to present a defense when he excluded a police sketch from evidence.\textsuperscript{47} The Defendant asserted that Captain Linda Eastman’s drawing of the suspect in Mr. Restrepo’s murder, which was created using a description from Efrain Benitez, an eyewitness, did not look like the Defendant.\textsuperscript{48} The Defendant wanted to present the sketch to rebut Diego Rodriguez’s eyewitness identification, but by the time the trial was underway, Mr. Benitez could not be located to be called as a witness to

\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id. (quoting State v. Rice, 755 A.2d 137, 144 (R.I. 2000)) (internal quotation marks omitted).
\textsuperscript{44} Id. at 1115 (quoting State v. Cline, 405 A.2d 1192, 1209 (R.I. 1979)) (internal quotation marks omitted).
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 1114.
\textsuperscript{47} Id. at 1115.
\textsuperscript{48} Id. at 1115–16. Linda Eastman is a sketch artist and retired Warwick police captain. Id. at 1116.
authenticate the drawing.\textsuperscript{49} Therefore, the trial justice excluded
the sketch from evidence, ruling that it was hearsay.\textsuperscript{50} The
Defendant next attempted to get the drawing admitted into
evidence by calling Captain Eastman as an expert witness and
having her authenticate the drawing as representative of Mr.
Benitez’s description of Mr. Restrepo’s assailant.\textsuperscript{51} Again, the
trial justice excluded the sketch as hearsay, ruling that Captain
Eastman was not an expert.\textsuperscript{52} On appeal, the Defendant argued
that sketch was admissible because it fell under the Rule 804(b)(5)
“catch-all” exception to the hearsay rule, or because Captain
Eastman was an expert under Rule 702 and that the sketch could
be admitted into evidence supported by her explication.\textsuperscript{53}
Alternatively, the Defendant asserted that the sketch was not
subject to the hearsay rule at all because the sketch was the
functional equivalent of a photograph, which does not amount to
an assertion.\textsuperscript{54}

The court recognized that it had not previously ruled on
whether a police sketch is hearsay.\textsuperscript{55} Furthermore, the court
noted that circuit and state courts are split on the issue.\textsuperscript{56}
However, the court declined to rule definitively on whether the
police sketch was hearsay, stating that it merely needed to
determine whether the trial justice abused his discretion in

\begin{footnotesize}
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\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Id.} Rule 804(b)(5) allows for exceptions to the hearsay rule when:
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\item [a] statement not specifically covered by any of the foregoing
exceptions but having equivalent circumstantial guarantees of
trustworthiness, if the court determines that (A) the statement is
offered as evidence of a material fact; (B) the statement is more
probative on the point for which it is offered than any other evidence
which the proponent can procure through reasonable efforts; and (C)
the general purposes of these rules and the interests of justice will
best be served by admission of the statement into evidence.
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excluding it.\textsuperscript{57} Mr. Benitez was not available to testify at trial to authenticate the sketch; so, even if it was not considered an assertion similar to a photograph, the sketch would not have been admitted into evidence.\textsuperscript{58}

Defendant argued that even if the police sketch was hearsay, it should still be admitted under Rule 804(b)(5)’s exception to the hearsay rule, which allows an out-of-court statement made by an unavailable witness if “the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.”\textsuperscript{59} However, the court did not accept Defendant’s argument because in “each case where Rule 804(b)(5) is invoked, the court is essentially creating a new exception to the hearsay rule. If the hearsay rule is to retain any life, a demand for the creation of a new exception counsels caution and should be granted only where special ‘trustworthiness’ is shown.”\textsuperscript{60} The court was reluctant to carve out a new exception to the hearsay rule, and although the court did not cast any doubt on the work of Captain Eastman, it also concluded that there is no “indication of special trustworthiness that would justify a conclusion that the trial justice abused his discretion.”\textsuperscript{61}

Alternatively, the Defendant asserted that the sketch was admissible under Rules 702 and 703 because, the Defendant maintained, Captain Eastman was an expert.\textsuperscript{62} He argued that had Captain Eastman been allowed to testify as an expert, the sketch would have then been admissible.\textsuperscript{63} However, the trial

\begin{footnotes}
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\item[57.] \textit{Id.}
\item[58.] \textit{Id.}
\item[59.] \textit{Id.} (quoting State v. Briggs, 886 A.2d 735, 750 (R.I. 2005)) (internal quotation marks omitted).
\item[60.] \textit{Id.} at 1118 (quoting Estate of Sweeney v. Charpentier, 675 A.2d 824, 827 (R.I. 1996)).
\item[61.] \textit{Id.}
\item[62.] \textit{Id.} Rule 702 is quoted \textit{supra} in note 53, and Rule 703 states that:
\[\text{[a]n expert’s opinion may be based on a hypothetical question, facts or data perceived by the expert at or before the hearing, or facts or data in evidence. If of a type reasonably and customarily relied upon by experts in the particular field in forming opinions upon the subject, the underlying facts or data shall be admissible without testimony from the primary source.}\]
R.I. R. Evid. 703.01 (emphasis added).
\item[63.] \textit{Brown}, 88 A.3d at 1118.
\end{itemize}
\end{footnotes}
justice ruled that Captain Eastman was not an expert, and the court agreed, reasoning that a “sketch artist must rely solely upon the word of another person to produce his product,” while a doctor, for example, “performs his own examination and diagnostic tests seeking objective conditions and symptoms. It is those findings, combined with his education and experience that allows the physician or other expert to render an opinion.”

D. The Autopsy Photos

The Defendant argued that the trial justice was wrong to include three of the eight autopsy photographs that the State wished to submit into evidence. The Defendant maintained that the three photos in dispute were so graphic and disturbing that they were unfairly prejudicial and should be excluded pursuant to Rule 403. The court reviewed the trial justice’s decision under an abuse-of-discretion standard.

In Brown, the court was asked to consider “a more nuanced argument” regarding the admissibility of photographs than ever before. Normally, the court allows any photograph into evidence that tends prove or disprove some material fact at issue because the state has the burden of proving each element beyond a reasonable doubt. However, here, Defendant did not challenge all of the photographs presented by the State, but only the three most gruesome ones. Furthermore, Defendant contended that “because the cause of death was not in dispute, the photos served

64. Id.
65. Id. at 1118–19.
66. Id. at 1119. The first of the three photos in dispute pictured the deceased Mr. Restrepo’s “neck, shoulders, and head with his skin peeled back over his skull and hair protruding from the folded over skin from his scalp,” while the second and third photos showed Mr. Restrepo’s “brain, one after the top of the skull [had] been cut away and the other with the brain removed from the skull and placed by itself on a towel.” Id. at 1120.

Rule 403.01 reads, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” R.I. R. EVID. 403.01.
67. Brown, 88 A.3d at 1119.
68. Id. at 1120.
69. Id.
70. Id.
no purpose but to inflame the jury.”

The court recognized that the contested photographs were “disturbing to the point of being grisly,” and only a few other courts had dealt with circumstances similar to the one presented by the Defendant. Furthermore, the court noted that the courts that had taken up the issue provided inconsistent guidance on the matter. Ultimately, the court held that the trial justice did not abuse his discretion even though the court appeared troubled by the graphic nature of the photographs, stating that “even though the cause of death was not in dispute, the state still bore the burden of proving every element of the case beyond a reasonable doubt.”

E. Rule 33 Motion for a New Trial

The Defendant’s final issue on appeal was his contention that the trial justice was wrong not to grant a new trial. The Defendant argued that a new trial was appropriate because one of the State’s witnesses used a “purported language barrier” to gain

71. Id.
72. Id.
73. Id.
74. Because the court merely held that the trial justice did not abuse his discretion, it avoided drawing a clear line about when autopsy photos are so prejudicial that they should not be admitted into evidence. The court recognized that it was supposed to take up the Rule 403 balancing test to determine whether the photos were “marginally relevant and enormously prejudicial” when reviewing the trial justice’s discretion; however, the court never actually walked through that analysis. Id. The court never discussed the probative value of the photographs—why these three photographs shed light on the cause of the death in a way the five other photographs that were uncontested did not—but it did seem to recognize that they were highly prejudicial when it noted that the contested photographs were “disturbing to the point of being grisly.” Id.

Although the court did not make any new law with this part of the decision, it let us know that the bar is very high to have a photo excluded. See id. at 1120–21. Here, the cause of death was not contested, and furthermore, the Defendant did not challenge all the photographs that the State used to prove cause death. Id. at 1120. Rather, the Defendant challenged only the most gruesome photographs. Id. This holding begs the question, how “grisly” and prejudicial must a photograph be before it is unfairly prejudicial? Id.
75. Id. at 1121.
76. Id.
more time to formulate his answer and was generally nonresponsive to defense counsel’s cross-examination questioning.”

However, the court stated:

[We are] loath to overturn the credibility findings of a trial justice because it is the trial justice who has the opportunity to observe the witnesses as they testify and therefore is in a better position to weigh the evidence and to pass upon the credibility of the witnesses than is this court.

The court held that the “trial justice’s denial of the motion for new trial was not clearly wrong,” therefore the Court saw “no basis for disturbing his decision.”

COMMENTARY

The court was presented with two new issues in State v. Brown and gave varying degrees of guidance on each. The clearest point the court made was defining that a Rule 8(a) joinder analysis should be based on the charges that are present in the indictment and not the charges that remain for a jury to consider. This holding brings Rhode Island in line with many other jurisdictions and is a logical holding because the relevant moment for a joinder decision is before a trial begins. Otherwise, courts that found inappropriate joinder midway through a trial would be faced with either starting over with new trials for the separate charges or having to give limiting instructions to juries.

77. Id. at 1122.
78. Id. (quoting State v. Richardson, 47 A.3d 305, 318 (R.I. 2012)) (internal quotation marks omitted).
79. Id.
80. See id. at 1111.
81. In its analysis the court cited the following examples of other jurisdictions that assess joinder at the time of the indictment: United States v. Locklear, 631 F.3d 364, 368 (6th Cir. 2011) (“Whether joinder was proper under Rule 8(a) is determined by the allegations on the face of the indictment.”) (quoting United States v. Chavis, 296 F.3d 450, 456 (6th Cir. 2002))); United States v. Jawara, 474 F.3d 565, 578 (9th Cir. 2007) (“[T]he bottom line is that the similar character of the joined offenses should be ascertainable—either readily apparent or reasonably inferred—from the face of the indictment.”). See also, e.g., United States v. Fenton, 367 F.3d 14, 21 (1st Cir. 2004) (“A plausible basis for the joinder of multiple counts ordinarily should be discernible from the face of the indictment.”).
that would be confusing and unhelpful.

The court was less clear on the issue of whether a police sketch is hearsay. The court avoided making a definitive ruling by merely concluding that the trial justice did not abuse his discretion in excluding the sketch form evidence. The court appears to have decided that a sketch is inadmissible unless the person that gave the description to the sketch artist authenticates it in court. If the court’s decision is taken at face value it effectively bars the admission of police sketches by a defendant because the situation in which a defendant would need to use the sketch is precisely the situation that arose in Brown; that is, if the witness is no longer available to testify in court that the defendant is not the person he saw commit the crime, then all that remains of that eyewitness account is the sketch.

However, the court’s rationale for deciding that the trial justice did not abuse his discretion was, at best, confusing. The court appears to have conflated two evidentiary rules into one when it reasoned that the sketch was inadmissible because the person that gave the description was not available to authenticate the sketch at trial. Authentication and hearsay are separate evidentiary rules that are not co-dependent. Evidence that is hearsay does not become admissible if it is authenticated; rather, it becomes admissible if there is some compelling reason that the evidence is reliable.

Here, Captain Eastman or any other police officer that was present when the sketch was made could easily have authenticated the sketch under Rule 901 (so authentication couldn’t have been the real reason that the sketch was not admitted into evidence). Presuming that the sketch was hearsay—that is, the reason the defendant was trying to get the out-of-court assertion admitted into evidence was for the truth of the matter—the court ably reasoned that the facts surrounding Captain Eastman’s sketch did not meet the standard of “special trustworthiness” that would allow an 804(b)(5) exception to hearsay. However, the court failed to take up the constitutional

82. See Brown, 88 A.3d at 1117.
83. Id.
84. See id. at 1116.
85. See id. at 1118. This holding implies that police sketches are generally not trustworthy enough to be admitted into evidence without some
argument\textsuperscript{86} that the Defendant had a right to introduce any evidence, including hearsay evidence, if it helps his case, unless the prosecution can show that the evidence is so inherently unreliable that the jury would have no rational basis for evaluating its truth.\textsuperscript{87}

Additionally, there was another avenue through which the police sketch could have been properly admitted that the court, and perhaps the Defendant, did not address. It is possible that the sketch was not hearsay at all. Instead, the sketch could have been used to impeach the other eyewitnesses that testified at the trial. Under this theory, the sketch would not have been admitted for the truth of the matter, but rather to show that there were conflicting descriptions of the person that attacked Mr. Restrepo. Here, the sketch would simply have been used to cast doubt on the reliability of the identification provided by the eyewitnesses that made an in-court identification of the Defendant as the assailant.

CONCLUSION

The Supreme Court of Rhode Island affirmed all of the trial justice’s decisions. The court held that the joinder of charges was proper, and going forward, joinder should be assessed based on the charges in the indictment, not on the charges the jury ultimately considers. The court also held that the trial justice did not abuse his discretion in determining that the police sketch was hearsay and that the sketch artist was not an expert, which will have the effect of barring any unauthenticated police sketches from being introduced into evidence.

\textsuperscript{86} It is unclear from the case whether the Defendant ever raised a constitutional argument for admitting the evidence. It is possible that the court chose not to address this argument because the Defendant did not ask them to consider it.

Criminal Law. *State v. Matthews*, 88 A.3d 375 (R.I. 2014). A defendant who is charged with two counts of the same crime rather than one count with different theories or lesser included offenses cannot utilize the Double Jeopardy Clause as a defense to the charges. While bringing one count of the charge is preferable, the Rhode Island Supreme Court holds that bringing two counts of the same crime is not impermissible.

**FACTS AND TRAVEL**

In May 2009, Markus Matthews (“Defendant”) and two other men attacked Cesar Lopez, who was delivering a pizza.\(^1\) The Defendant and his accomplices phoned in their order to Domino's and listed as the delivery address an abandoned building in Providence.\(^2\) Mr. Lopez realized that something was amiss at the address and called the phone number from the order, which directed him to deliver the pizza to the back door.\(^3\) When Mr. Lopez attempted to complete the delivery, one of the assailants struck him with a pipe as he exited his vehicle.\(^4\) Another assailant, who later was identified as the Defendant, held Mr. Lopez in a choke-hold.\(^5\) The assailants stole twenty dollars from Mr. Lopez and continued to beat him with their fists and the pipe as they attempted to drag him up the driveway.\(^6\) Mr. Lopez eventually fought back and escaped his assailants, despite suffering injuries that continue to cause Mr. Lopez problems.\(^7\)

Several days later, Mr. Lopez was driving with his wife and spotted one of the assailants, who was standing on a street corner.\(^8\) He phoned the police and pursued the man on foot.\(^9\) Mr.

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2. *Id.* at 378.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
Lopez caught up with the assailant and held him until police arrived.\textsuperscript{10} Police arrested and questioned the assailant, Michael Long, who eventually confessed to the crime and implicated the Defendant as an accomplice.\textsuperscript{11}

At trial, the prosecution called Long to testify regarding the statements he made to police at the time of his arrest, but when he was called to the stand he claimed not to remember any of the events.\textsuperscript{12} The professed memory loss and a failed attempt to refresh Long’s memory caused the prosecution to treat Long as an adverse witness and ask specific leading questions.\textsuperscript{13} The defense’s objection was overruled, and the admission of Long’s testimony into evidence was at issue on appeal.\textsuperscript{14}

Also at issue was the key testimony of Jeannine Labossiere, Long’s former fiancé.\textsuperscript{15} Labossiere testified that Long borrowed her cell phone the night of the attack and used it to order the pizza from Domino’s; that he was away with her phone for a few hours before returning with the Defendant; and that while Long disclosed the details of the robbery to her, the Defendant did not deny Long’s disclosure.\textsuperscript{16} Labossiere further testified that the Defendant demonstrated a choke-hold as Long disclosed the events of the robbery and that the Defendant replied “[w]e just told you what we did” when Labossiere asked what they had done.\textsuperscript{17} The trial court justice overruled the hearsay objection and admitted Ms. Labossiere’s statements.\textsuperscript{18}

The Defendant was charged with three offenses: first degree robbery with a dangerous weapon, first degree robbery resulting in injury, and conspiracy to rob.\textsuperscript{19} He was found guilty of first degree robbery resulting in injury, but acquitted of the conspiracy and first degree robbery with a dangerous weapon charges.\textsuperscript{20} The jury was instructed that the Defendant was only charged with one

\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id. at 379.
\textsuperscript{13} Id. at 382.
\textsuperscript{14} Id. at 382–83.
\textsuperscript{15} Id. at 379.
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 386–87.
\textsuperscript{18} Id. at 387.
\textsuperscript{19} Id. at 379.
\textsuperscript{20} Id.
count of robbery, but that there were two theories on how it had been committed.\textsuperscript{21} The instructions were as follows:

There’s only one robbery being charged but two factual elements that are different from each count. One is the dangerous weapon; one is the injury. You make separate decisions for each one. But they clearly are one count, one charge of the robbery. He’s not being charged with two separate counts of robbery.\textsuperscript{22}

Furthermore, the Defendant’s motion for a new trial was denied.\textsuperscript{23}

\textbf{Analysis and Holding}

Upon review, the Defendant argued that “[c]harging one robbery as two crimes and permitting the jury to deliberate twice on one robbery violated double jeopardy principles.”\textsuperscript{24} The Defendant did not raise the defense to double jeopardy prior to trial, thereby waiving the defense on appeal.\textsuperscript{25} However, the court addressed the double jeopardy issue as if it had been preserved for appeal, and determined that the argument lacked merit.\textsuperscript{26}

The court reasoned that the main purpose of the double jeopardy clause is to protect an individual from receiving “multiple criminal punishments for the same offense,” and this Defendant was only being punished once for one crime.\textsuperscript{27} Furthermore, it is proper for the prosecution to charge lesser-included offenses at trial for the greater offense.\textsuperscript{28} The court held that although the trial court brought two separate counts of robbery, the harm that the double jeopardy clause seeks to protect against was not at issue because the Defendant here was punished for only one offense.\textsuperscript{29} The court said that because the trial justice instructed the jury there was “only one robbery being charged but two factual elements that are different from each count,”\textsuperscript{30} the danger that

\begin{itemize}
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} \textit{Id.}
  \item \textsuperscript{23} \textit{Id.}
  \item \textsuperscript{24} \textit{Id.} at 380.
  \item \textsuperscript{25} \textit{Id.}
  \item \textsuperscript{26} \textit{Id.}
  \item \textsuperscript{27} \textit{Id.} (citing Hudson v. United States, 522 U.S. 93, 99 (1997)).
  \item \textsuperscript{28} \textit{Id.} (citing State v. Grabowski, 644 A.2d 1282, 1286 (R.I. 1994)).
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{30} \textit{Id.} at 379.
\end{itemize}
the Defendant would be punished twice was mitigated.\(^{31}\)

The court also rejected the Defendant’s double jeopardy argument that he was acquitted of first degree robbery with a deadly weapon but convicted of first degree robbery resulting in injury. The Defendant argued that according to precedent set in \textit{State v. Bolarinho}, the court should vacate his conviction and order a new trial because he could not be “both innocent and guilty of the same crime.”\(^{32}\) Similar to the facts here, the \textit{Bolarinho} defendant was charged and convicted of two counts of felony assault arising from a single incident.\(^{33}\) There, the court vacated one of the convictions rather than vacating both and ordering a new trial.\(^{34}\) Here, the court distinguished \textit{Bolarinho} by stating that the Defendant was only convicted on one count, so there was no danger of double jeopardy.\(^{35}\)

The court also made a point of instructing the trial court that, although permissible, it is better practice to charge a defendant for one count of a crime and allege multiple theories rather than charging multiple theories as multiple counts.\(^{36}\) The court explained that “[n]othing precludes the assertion of multiple theories in a single count,”\(^{37}\) and that asserting multiple theories in a single count is fair to the Defendant because it reduces the risk of multiple convictions for the same offense.\(^{38}\) It also does not disadvantage the prosecution because it allows multiple theories to be asserted and allows the jury to determine which theories are credible.\(^{39}\) Ultimately the court determined “it is the trial justice’s responsibility . . . to ensure that a defendant stands convicted, if at all, of a single offense.”\(^{40}\)

Also at issue in this case was the admission of the recorded statement Michael Long made to the police. This recorded statement was admitted at trial because Mr. Long claimed not to

\(^{31}\) \textit{Id.} at 380.

\(^{32}\) \textit{Id.} at 380–81; see also \textit{State v. Bolarinho}, 850 A.2d 907 (R.I. 2004).

\(^{33}\) \textit{Matthews}, 88 A.3d at 380.

\(^{34}\) \textit{Id.}

\(^{35}\) \textit{Id.} at 381.

\(^{36}\) \textit{Id.}

\(^{37}\) \textit{Id.} The court cited both Rule 7(c) of the Superior Court Rules of Criminal Procedure and R.I. GEN. LAWS § 12–12–1.4 (2002). \textit{Id.}

\(^{38}\) \textit{Matthews}, 88 A.3d at 382.

\(^{39}\) \textit{Id.}

\(^{40}\) \textit{Id.} at 381–82.
remember any of the statements he made to the police, and attempts to refresh his memory using leading questions failed.\textsuperscript{41} In evaluating the trial justice’s decision to admit the statements over the defense’s objections, the court reasoned that “the applicable standard of review . . . is a clear abuse of discretion,” which was not the case here.\textsuperscript{42}

Likewise, the court rejected the defense’s argument that admitting the statements violated the Confrontation Clause of the Sixth Amendment.\textsuperscript{43} The court held here that the Confrontation Clause was a “procedural, rather than substantive, guarantee[,]” and because Mr. Long took the stand and was available for cross examination, the procedural prong was met.\textsuperscript{44}

Moreover, the defense argued that the court should not have admitted the statements Mr. Long made to Ms. Labossiere as adoptive statements by the Defendant.\textsuperscript{45} The court replied that the Defendant’s demonstration of a chokehold can be construed as an admission by conduct, and consequently, the admission of the adoptive statement was permissible.\textsuperscript{46}

Finally, the court held that the trial justice did not err in denying the defendant’s motion for a new trial.\textsuperscript{47} Only if the trial justice “misconceived material evidence relating to a critical issue or . . . was otherwise clearly wrong” would the court reverse the

\textsuperscript{41} Id. at 382. In accordance with Rhode Island Rule of Evidence 801(d)(1)(A), the trial justice allowed the prosecution to admit the recorded statement over the defense’s hearsay objection. Matthews, 88 A.3d at 382–83. The defense also argued that admitting the statement violated the Confrontation Clause. Id. at 383.

\textsuperscript{42} Matthews, 88 A.3d at 383 (quoting State v. McManus, 990 A.2d 1229, 1234 (R.I. 2010)). Rule 801(d)(1)(A) states that “[a] statement is not hearsay if . . . [t]he declarant testifies at the trial . . . concerning the statement, and the statement is . . . inconsistent with the declarant’s [previous] testimony.” Id. (alterations in original) (quoting R.I. R. Ev. 801(d)(1)(A)). Further, the court stated that it was for the jury to decide if Long’s lack of memory regarding his prior statements was actually a denial of the prior statements, and therefore the trial justice did not abuse her discretion in admitting them as evidence. Id.

\textsuperscript{43} Id. at 384–85.

\textsuperscript{44} Id. “[T]he [Confrontation] Clause’s ultimate goal is to ensure reliability of evidence, but . . . it commands, not that evidence be reliable, but that reliability be assessed in a particular manner.” (quoting Crawford v. Washington, 541 U.S. 36, 61 (2004)).

\textsuperscript{45} Id. at 383.

\textsuperscript{46} Id.

\textsuperscript{47} Id. at 388.
decision. Here, the court found no reason to disturb the trial justice’s ruling.

COMMENTARY

The court has determined that charging a defendant with two counts of the same crime does not violate the Double Jeopardy Clause. The defense offers a compelling argument that the court’s decision allows the jury to deliberate twice for the same crime. Seemingly, this is comparable to having two trials. However, given the facts here, it is apparent that the jury was convinced that the Defendant had committed a robbery, but was divided on how it was committed. Therefore, the Defendant was never in danger of being convicted of two robberies when he only committed one.

In the event that he was convicted on both counts of robbery, the court reasoned that there existed a common law solution, which is enunciated in State v. Bolarinho. There, the defendant was convicted on two counts of the same crime and the court vacated one of the convictions and upheld the other. What the court did not discuss was how to determine which conviction should be overturned; this is where a defendant is likely to face injustice.

Suppose a defendant is convicted on two counts of a crime, one count carrying a twenty-year sentence and the other carrying a ten-year sentence. Is the court arbitrarily assuming the right to determine which verdict to impose, thus eliminating the jury’s role? Presumably, if the defendant is convicted on both counts, he is guilty of the offense that carries the longer sentence, as if it were one charge with lesser included offenses. Facially it is logical, but allowing the judge to decide which count to vacate could deprive the defendant of his right to have the jury determine his guilt, which in turn influences his punishment. This calls into question whether the justice process is properly carried out, which

48. Id. (citation omitted) (quoting State v. Ferreira, 21 A.3d 355, 365 (R.I. 2011)) (internal quotation marks omitted).
49. Id.
50. Id. at 380.
51. Id.
52. 850 A.2d 907 (R.I. 2004)
53. Id. at 911.
may be the reason the court so strongly admonished the trial justice to ensure that a defendant is only charged with one count of a single crime.

The court was clear that the trial justice must ensure that a defendant is charged with only one count, even if multiple theories are present. The trial justice probably is more capable than the jury to distinguish the nuance between one count alleging multiple theories and two counts of the same crime. Entrusting this responsibility to the trial justice mitigates the risk that a defendant is charged twice for the same crime, and helps avoid the Bolarinho problem. Although there is a common law solution if a defendant is convicted on two counts of one crime, the court understands that it is more expedient to prevent the problem than to fix it.

CONCLUSION

The Rhode Island Supreme Court determined that it is permissible to charge a defendant with two counts of the same crime without violating the Double Jeopardy Clause. While the court warns the trial court that this is not the preferred method of alleging multiple theories of a crime, it is not unconstitutional. The court established that the trial justice is responsible for ensuring that multiple theories of a crime are charged as a single count.

Ann P. Bryant

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54. Matthews, 88 A.3d at 381–82.
Criminal Law. State v. Patino, 93 A.3d 40 (R.I. 2014). The Supreme Court of Rhode Island affirmed in part and vacated in part a superior court order granting numerous motions to suppress evidence on the part of the Defendant in the criminal first-degree murder trial of a six-year-old boy. The appeal, brought by the Rhode Island Attorney General pursuant to Rhode Island General Laws section 9-24-32, argued that the decision, written by the hearing justice after a month-long series of evidentiary hearings was in error. The Rhode Island Supreme Court vacated part of the order and held that for cellular phone text message communications, the Defendant in a criminal case does not have a reasonable expectation of privacy if the messages have been received and stored on the cellular phone of a third party. The court affirmed the suppression of evidence related to the Defendant’s personal cellular phones holding that the State waived the issue of the illegality of the search of those phones. Additionally, the court determined that in order to have a facially valid Franks challenge, the Defendant has to have a reasonable expectation of privacy in the item that is to be searched and the item has to be searched and seized legally.

FACTS AND TRAVEL

At approximately 6:15 a.m. on October 4, 2009, Cranston Rescue and Fire Department and Cranston Police responded to the apartment of Trisha Oliver (“Ms. Oliver”) because she had called 9-1-1, indicating that her six-year-old son was “unresponsive and not breathing.”1 Within minutes, the ambulance arrived and “transported Marco [Ms. Oliver’s son] to Hasbro Children’s Hospital.”2 Later that same day, despite the efforts of rescue and medical personnel, Marco succumbed to his injuries and died.3

When police arrived at the scene that morning, Ms. Oliver showed Sergeant Matthew Kite (“Sgt. Kite”) from the Cranston

2. Id. Marco arrived at the hospital shortly after 6:30 am. Id.
3. Id. at 48.
Police Department around the apartment. While inside, he observed Michael Patino ("Mr. Patino"), the Defendant, with the couple’s fourteen-month-old daughter, the remnants of Marco’s illness throughout the house, and numerous cellular phones. Sgt. Kite testified that at this time he did not consider Ms. Oliver’s apartment to be a crime scene; however, Sgt. Kite requested another officer to start a crime scene roster to document those who came into and left the apartment.

Cranston police transported Ms. Oliver to Hasbro Children’s Hospital soon after they arrived and started their investigation. Ms. Oliver’s daughter, Jazlyn, was transported there by ambulance a short time later “as a precaution.”

Sgt. Kite testified that while at the scene, Mr. Patino asserted to him that “he [did] not own a cell phone” and had arrived at Ms. Oliver’s apartment that morning “by chance.” During their conversation, the LG cell phone on the kitchen counter indicated that it was receiving a message. Sgt. Kite went to the phone and picked it up, “checking to see if it was Marco’s father or someone else calling regarding Marco’s condition.” Sgt. Kite testified that when he picked up the phone he “viewed an alert on the front screen of the phone indicating there was one new message,” and he “opened the phone to view the interior screen.” The interior screen of the phone indicated that there was a new message but insufficient credit on the account to receive the message. Sgt. Kite testified that “[i]n an effort to acknowledge

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4. *Id.* at 43.
5. *Id.* The phones observed were “[1] an LG Verizon cell phone (LG phone) on the kitchen counter; [2] a Metro PCS Kyocera cell phone (Metro PCS phone) on the dining room table; [3] a T-Mobile Sidekick cell phone (T-Mobile phone) on the headrest of the couch behind defendant; and [4] an iPhone (iPhone) on the armrest of the couch.” *Id.* at 44.
6. *Id.* at 43.
7. *Id.* at 43–44.
8. *Id.* After telephone conversations with Sgt. Kite regarding activities at the scene, Lt. Sacoccia consulted with the Department of Children, Youth, and Family ("DCYF") headquarters, who recommended transportation by ambulance for Jazlyn. *Id.* at 44.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
receipt of the message and thereby avoid repeat notifications... he ‘manipulated the button’ on the phone, which led to a mailbox listing incoming and outgoing text messages.” 14 Finally, Sgt. Kite testified “upon seeing the word ‘hospital’ in a text message, he clicked the phone to view the message in the ‘outbox’ folder.” 15

After Mr. Patino was escorted to the police headquarters, Sgt. Kite noticed that “the T-Mobile phone that had been on the headrest behind [the] defendant was no longer there.” 16 Sgt. Kite called headquarters “and suggested that, [t]here is possibly some information that needs to be protected on [the missing phone].” 17 When Mr. Patino emptied his pockets at headquarters, the T-Mobile phone from the apartment was amongst his belongings and it was “confiscated immediately.” 18

There is “considerable discrepancy” about what happened at the apartment while the officers waited to continue their investigation. 19 The hearing justice determined that “detectives received a call from Lt. Sacoccia informing them that a search warrant had been signed, at which time they began to photograph and videotape the scene, as well as gather and bag items for evidence.” 20 Items bagged for evidence included the LG phone, “the contents of which had been previously photographed.” 21 The LG phone belonged to Ms. Oliver and the contents of the phone, photographed by the detectives, “reveal[ed] text messages that include[d] not only vulgar and profane language, but also information inculpating [the] defendant with respect to Marco’s injuries.” 22

14. Id.
15. Id. The message stated: “wat if I got2 take him 2 da [hospital] wat wil I say and does marks on his neck omg.” Id. “The message was addressed to ‘DAMASTER’ at phone number (401) XXX-XX80; a subsequent investigation revealed that ‘DAMASTER,’ the intended recipient of the text message was, in fact, [Mr. Patino].” Id.
16. Id. at 45.
18. Id. at 44.
19. Id. at 45.
20. Id.
21. Id. Bureau of Criminal Investigation (“BCI”) detectives placed the phone in a brown paper bag, rather than securely sealing it; Sgt. Kite took the phone to headquarters and eventually returned it to the detectives. Id.
22. Id. For example, the following text messages were “sent between
While the investigation was being conducted at Ms. Oliver’s apartment, Detective Jean Slaughter (“Det. Slaughter”) and Detective John Cardone (“Det. Cardone”) interrogated Mr. Patino “at the police headquarters for nearly three hours, during which time, [Mr. Patino] signed a form waiving his Miranda rights.”

Throughout the interrogation, the detectives “raised the topic of the defendant’s incriminating text messages to [Ms.] Oliver” and left the interrogation room several times to discuss the cell phone messages with other officers, adjusting their questioning tactics accordingly. Initially, Mr. Patino denied “his participation in the text messaging, as well as any physical contact with Marco,” but eventually, after additional text messages were revealed and after Det. Slaughter explained the possibility of leniency, the “defendant admitted playing with Marco before he died, even admitting that he hit him in the ribs.”

Oliver’s LG phone and defendant’s T-Mobile Phone” on October 3, 2009, between approximately 4:48 p.m. and 5:57 p.m.:

Sent: of course he is gonna be all hurt and cryin cuz u fuckin beat the crap out of him im not with that shit.
Read: I PUNCH DAT LIL BITCH 3 TIMES AND DAT WAS IT. DA HARDEST 1 WAS ON HIS STOMACH CUZ HE MOVED. BUT LET HIM BE A MAN AND NOT A LIL BITCH LIKE YOU.
Read: WAT KIND OF DISCIPLINE OR ANYTHIN U GONNA KNO
Sent: wateva u always think u didn’t hit hard but u du u hurt me could imagine wat u did 2 him 4 ur info he isn’t complaining just him throwin up and in pain is enough
Sent: idk wat u did but u hurt is stomach real bad

Sent: wtf did u do 2 my son mike
Read: I TOLD U. I WENT 2 PUNCH HIM ON HIS BACK AGAIN AND HE MOVED AN I HIT HIM ON HIS STOMACH.

Sent: mike he is in madd pain u had 2 hit him real hard mike wtf
Read: I HIT HIM DA SAME WAY EVERYWHERE BUT ITS DAT HE MOVED AND I HIT HIM BAD.

Id. at 45 n.5.
23. Id. at 46.
24. Id. at 46, 47.
25. Id. at 47. The Defendant eventually provided a formal statement that the detectives had him modify when it did not include “some of the language used earlier in the interview with regard to Marco” including “a statement about Marco taking a ‘body shot.’” Id.
After Mr. Patino made this statement, the detectives proceeded to Hasbro Children’s Hospital to continue their investigation with Ms. Oliver.26 Ms. Oliver provided two detailed statements regarding the events leading up to the morning’s activities and the interactions between Marco and Mr. Patino.27 In the first statement she stated that the “[Defendant] said he went to go hit [Marco] and [Marco] moved causing him to hit my son in the stomach.”28 In the second statement, the timeline was basically the same, but Ms. Oliver focused on “the [D]efendant’s involvement with the situation,” including stating that the “[Defendant] said Marco was ‘acting stupid and I hit him.'”29 She also detailed her strained relationship and fear of Mr. Patino to the police, stating, “in the past his temper gets . . . out of control. He throws things and sometimes [gets][physical] with me.”30

Mr. Patino was indicted on a charge of first-degree murder for the death of Marco on April 2, 2010.31 The Defendant filed several evidentiary motions prior to his trial on the grounds “that collection of such evidence violated his rights against unreasonable searches and seizures in violation of the Fourth Amendment of the United States Constitution and article 1, sections 6 and 13 of the Rhode Island Constitution.”32 These motions included: motions in limine prior to the trial to “exclude text messages, including those sent by and to Trisha Oliver”; “motions to suppress evidence that had been seized during the course of the October 4, 2009, investigation”; and motions to suppress “all [of] the information seized from the cell phones.”33

26. Id.
27. Id. at 47, 48.
28. Id. at 47. The first statement was taken by Cranston police personnel at 12:30 p.m. Id.
29. Id. at 48.
30. Id. (alterations in original). The second statement was taken by Det. Cardone at 6 p.m., approximately an hour after Marco’s death. Id.
32. Id. at 48–49.
33. Id. at 48; see also id. at 49 n.14 (“Specifically, [D]efendant filed motions to suppress: (1) evidence seized on or about October 4, 2009; (2) all information seized from [D]efendant’s T-Mobile phone; (3) all information seized from Oliver’s LG phone; (4) all information seized from Marco’s biological father, Rafeel Nieves’s phone; (5) all information seized from [D]efendant’s friend, Mario Palacio’s phone; (6) all information seized from Oliver’s landline phone; (7) the 8mm videotape of the crime scene; and (8) all
Additionally, the Defendant argued that his statements to the police on October 4, 2009, both video taped and written, were the result of “coercive and threatening police tactics, and thus were made involuntarily in violation of his due process rights under the United States and Rhode Island Constitutions.”

The superior court held a multi-week series of evidentiary hearings to “address the issues raised by [the D]efendant in his pretrial motions.” During the course of the hearings, the Defendant, “filed an amended motion seeking a Franks hearing, arguing that the evidence adduced at the suppression hearing indicated that members of the Cranston Police Department made numerous material misrepresentations in their affidavits to obtain warrants throughout the course of the investigation.”

Following the evidentiary hearings, the hearing justice “rendered a one-hundred-ninety page decision and order” on September 4, 2009, “granting [the D]efendant’s motions to suppress the evidence seized at scene and all information seized from the various cell phones, including all of the text message evidence” and denying the “[D]efendant’s motion to suppress the videotape of the crime scene.” Within the decision and order, the hearing justice “made comprehensive findings with respect to the [D]efendant’s constitutional claims.”

Specifically, the hearing justice found that with respect to standing, the “Defendant has a reasonable expectation of privacy in his alleged text messages, so as to confer upon him standing to challenge the police search that led to the discovery of the text

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34. Id. at 49.
35. Id.
36. Franks v. Delaware, 438 U.S. 154 (1978). In Franks, the Court held:

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant’s request.

Id. at 156–57. Subsequently, hearings held for this purpose have been referred to as Franks hearings.
37. Patino, 93 A.3d at 49. The amended motion was filed on June 29, 2012. Id.
38. Id.
39. Id.
messages.”  

Additionally, the hearing justice found “people have a reasonable expectation of privacy in the contents of their text messages with no distinction between whether the messages were sent or received by them, and the third-party doctrine should not apply to diminish the expectation of privacy in the contents of electronic communications.”  

Finally, with regard to standing, the hearing justice found that, “as a frequent overnight guest, [the Defendant] had standing to challenge the search and seizure of evidence in [Ms. Oliver’s] apartment.”  

The hearing justice also found that “Sgt. Kite’s action of viewing the text messages on the LG phone during the initial stages of the October 4, 2009 sweep of [Ms. Oliver’s] apartment did not fall within the exigent circumstances, plain view, or consent exceptions to the warrant requirement, and therefore constituted an unreasonable search.”  

Additionally, the hearing justice found “that the searches and seizures by the police of all the cell phones in evidence, as well as the photographs taken of the contents thereof, were either ‘illegal as warrantless or in excess of the warrants obtained’” and, thus, violated the Fourth Amendment.  

Finally, it was found that nearly all of the evidence obtained by the Cranston Police Department during the investigation was inadmissible at trial due to the “illegal search made by Sgt. Kite or the other illegal searches and seizures of cell phones and their contents” making the evidence “fruit of the poisonous tree.”

40. Id. (internal quotation marks omitted).
41. Id. (internal quotation marks omitted).
42. Id.
43. Id.
44. Id.
45. Id. at 49–50 & n.15 (“Specifically, the hearing justice excluded from use at trial the following pieces of evidence: (1) the LG phone; (2) the Metro PCS phone; (3) the iPhone; (4) the landline phone; (5) the T-Mobile phone; (6) the photographs of the contents of the LG phone taken at [Ms.] Oliver’s apartment; (7) the photographs of the contents of the LG phone taken at police headquarters; (8) the photographs of the contents of the Metro PCS phone; (9) the photographs of the contents of the T-Mobile phone; (10) the contents of the LG phone extracted by use of Cellebrite software; (11) the phone records and communications of [Defendant] provided by T-Mobile; (12) the phone records and communications of Mario Palacio provided by T-Mobile; (13) the phone records and communications of [Ms.] Oliver provided by Verizon; (14) the phone records and communications of Rafael Nieves provided by Sprint Nextel; (15) the phone records and communications of
Regarding the Franks motion, “the hearing justice found that there existed sufficient evidence in the record to ‘find that Defendant made a preliminary showing that the affidavits for the warrants do contain certain false statements, as specifically identified by Defendant, that were deliberate or made in reckless disregard of the truth.’”46 Despite that, the hearing justice “reserved decision” regarding the Franks hearing, “subject to further argument as to standing and probable cause.”47

The State appealed the hearing justice’s decision on September 12, 2012.48 “That same day, the hearing justice entered an order that the Franks motion trial proceedings” would continue, despite the appeal and “were not to be stayed by operation of law or in the discretion of the hearing justice, and that, absent a stay by [the Rhode Island Supreme Court], the proceedings would continue forthwith.”49 The State immediately filed a motion with the Rhode Island Supreme Court to “compel compliance with R.I. GEN. LAWS § 9-24-33 (1956) to stay the Franks proceedings in the Superior Court” until resolution of the appeal.50 The court granted the motion on September 25, 2012, “determining that because section 9-24-33 provides for a stay of any further proceedings with respect to those findings pending the State’s appeal, all further proceedings are stayed until further Order of this Court.”51

On appeal, the State, pursuant to Rhode Island General Laws section 9-24-32, argued that:

1. [D]efendant lacks standing to contest the lawfulness of the search of Trisha Oliver’s cell phone;
2. [D]efendant does not have an objectively reasonable expectation of privacy in sent text messages;
3. [D]efendant has no

[D]efendant’s sister, Angie Patino, provided by Sprint Nextel; (16) the landline phone records for the apartment provided by Cox Communications; (17) certain portions of [D]efendant’s interrogation as memorialized on videotape and in a written transcript; and (18) [D]efendant’s confession regarding the death of Marco Nieves.”).

46. Id. at 50 (quoting Rhode Island v. Patino, No. P1-10-1155A, 2012 WL 3886269, at *83 (R.I. Super. Sept. 4, 2012)).
47. Id.
48. Id.
49. Id.
50. Id.
51. Id.
standing to make a *Franks* challenge; and (4) even with the removal of the materials identified by the hearing justice, the relevant affidavits were sufficient to establish probable cause.  

**ANALYSIS AND HOLDING**

**A. Standing**

The court first looked at the general question of standing and the search of Ms. Oliver’s apartment by Sgt. Kite. The Defendant argued “Sgt. Kite was not lawfully in the apartment when he searched the LG phone and that, therefore, all the evidence seized as a result of that unlawful search should be excluded at trial.” The court was quick to “dispel [the D]efendant’s contention that, because he has standing to challenge the search of [Ms.] Oliver’s apartment, everything seized without a warrant is subject to suppression as violative of his Fourth Amendment rights.” The court stated that “as a frequent overnight guest at [Ms.] Oliver’s apartment, [he] did have a reasonable expectation of privacy in her apartment, [but] that does not end our inquiry . . . . it is not sufficient that a defendant merely have standing . . . he must also have an expectation of privacy.”

Additionally, the court held that the hearing justice’s opinion that “the police were not lawfully in the apartment after Marco and [Ms.] Oliver had been transported to the hospital” was a clear error. The Defendant claimed that the search of the LG cell phone was clearly unconstitutional, but the court held that under the circumstances of the case, “an hour was not an unreasonable time for Sgt. Kite and other police officers to remain on the scene.”

52. *Id.* at 42–43.
53. *Id.* at 57.
54. *Id.* at 53–54.
55. *Id.* at 54.
56. *Id.*
57. *Id.*
58. *Id.*
B. *Expectation of Privacy in Text Messages*

The court next examined the relatively narrow question regarding the expectation of privacy in text messages.\(^{59}\) Specifically, the court addressed an “issue of first impression in the state” of “whether a person has a reasonable expectation of privacy in his or her text messages stored in a cell phone belong to, or possessed by, another person.”\(^{60}\)

The court looked to other jurisdictions that had issued opinions regarding “whether a person has an objectively reasonable expectation of privacy” in text messages and found that the courts that examined the issue, like the hearing justice below, drew “parallels between text messages and other forms of communication to aid in their ultimate determination.”\(^{61}\) Ultimately however, the court found that the determination of whether the Defendant had a reasonable expectation of privacy was based on “whether the [D]efendant owned or was the primary user of the cell phone.”\(^{62}\)

After careful analysis, the court held that “[i]n determining whether a person has an expectation of privacy in his text messages, the most important factor, in our opinion, is from whose phone the messages were accessed.”\(^{63}\) They continued, “when the recipient receives the message, the sender relinquishes control over what becomes of that message on the recipient’s phone. The idea of control has been central to our prior determinations of . . .

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\(^{59}\) Id.
\(^{60}\) Id. at 55.
\(^{61}\) Id. The hearing justice in the instant case had reasoned that Mr. Patino had a reasonable expectation of privacy not because a cell phone is similar to a closed container, but rather due to the “increasing role that cell phones and text messages play in modern society.” Id. at 53. The hearing justice made a detailed analysis of the text message and “rejected the comparison of text messaging to other similar forms of communication, such as telephone conversations and email exchanges, and determined that text message are a ‘technological and functional hybrid’” that required a better analogy. Id. The hearing justice found that “based on their similar back-and-forth nature” text messages were more like oral communications; however, that analogy was also not perfect because “text messages are more vulnerable to discovery than oral communications, which may in itself cause individuals to have less of a subjective expectation of privacy, in the content of those communications.” Id.
\(^{62}\) Id. at 55.
\(^{63}\) Id.
objectively reasonable expectation of privacy” in Fourth Amendment cases. The court also looked to decisions of the United States Supreme Court and found that they too “considered control as a factor when determining whether a defendant has a reasonable expectation of privacy in a given place or item” and “when an individual reveals private information to another a reasonable expectation of privacy no longer exists because 'he assumes the risk that his confidant will reveal that information to the authorities.”

1. The LG Cell Phone

After a general discussion, the court specifically looked at the application of the principles to the primary cell phone involved in this case, the LG cell phone belonging to Ms. Oliver. The court held that the Defendant “did not have an objectively reasonable expectation of privacy in any text messages contained in Ms. Oliver's phone” and therefore, had “no reasonable expectation of privacy in the LG phone... [and] did not have standing to challenge the search and seizure thereof.” The court found that Mr. Patino did not in any way try to control that phone and did not try to exclude others from using the phone, noting specifically that “he made no motion towards the phone in response to the message alert, did not attempt to prevent Sgt. Kite from accessing the contents of the phone, and did not bring the phone with him” when he went to the police station. The Defendant’s only connection to the LG phone “[was] the fact that a digital copy of the messages he sent from this T-Mobile phone existed on the LG

64. Id. at 55–56.
65. Id. at 56 (quoting United States v. Jacobsen, 466 U.S. 109, 117 (1984)).
66. Id.
67. Id. at 56–57. In so doing, the court vacated:
   the September 12, 2012, order of the Superior Court insofar as it excludes from evidence the LG cell phone; the pictures of the contents of the LG cell phone taken at Trisha Oliver’s apartment; the pictures of the contents of the LG cell phone taken at Cranston Police Department headquarters; the Cellebrite extraction report for the LG cell phone; and the phone records and communications of Trisha Oliver provided by Verizon.
68. Id. at 56.

Id. at 57 (internal quotation marks omitted).
phone,” and since he had already sent those messages, he “no longer had any control over what became of the messages contained in that phone.” Additionally, Ms. Oliver “signed a consent form allowing the Cranston police officers to search her phone, albeit after they had already viewed the incriminating messages.” The court agreed with the dissent in a Washington State Supreme Court case and highlighted the Defendant’s lack of standing in this case.

Additionally, based on the analysis regarding the LG phone, the court “vacated the order insofar as it excludes from trial evidence that the hearing justice found to be ‘tainted’ as fruits of the poisonous tree.”

2. The T-Mobile and Metro PCS Cell Phones

The court next reviewed the decisions of the hearing justice with regard to the other cellular phones that were present during the Cranston police investigation. For these phones, “[the hearing justice] reasoned that the police ‘focused on the cell phones and text messages at the earliest stages of the investigation and well before they sought or obtained the first search warrant for the apartment.’” The hearing justice explained, “the abysmal handling of the evidence by the police in this case—specifically the critical cell phones at issue—play[ed]…

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69. Id.
70. Id. at 56–57.
71. Id. at 57 (“[The sender] did not have a reasonable expectation of privacy in [the recipient’s] cell phone. He had neither possession nor control of the cell phone, and he did not have the right to exclude others from using it. Furthermore, once the text message was delivered to [the recipient’s] cell phone, [the sender] had no control over who viewed it… [The recipient] could have simply shared the contents of the message with others. [The sender] assumed the risk that once sent, the message would no longer be kept private.” (alterations in original) (quoting State v. Hinton, 319 P.3d 9, 22 (Wash. 2014) (Johnson, J., dissenting)) (internal quotation marks omitted)).
72. Id. Evidence allowed based on this vacated ruling included: “the phone records and communications of Mario Palacio provided by T-Mobile; the phone records and communications of Angie Patino provided by Sprint Nextel; and the landline phone records for Trisha Oliver’s apartment provided by Cox Communications.” Id. at 58 (internal quotation marks omitted).
73. Id.
74. Id.
into [her] view that the police seized and searched all these cell phones without a warrant.” 75 The hearing justice held that “the Cranston Police Department engaged in an illegal warrantless search and seizure of all phones in evidence and the contents of those phones . . . in violation of [D]e­fendant’s rights under the Fourth Amendment.” 76

For these phones, the State conceded that the “[D]e­fendant had standing with respect to his own cell phones—the T-Mobile and Metro PCS phones—but it appeals the hearing justice’s decision” only due to the [D]e­fendant’s Franks challenge. 77 The court affirmed the findings of the hearing justice with regard to the order suppressing the evidence from the other cellular phones, 78 holding that “[w]ith respect to the legality of the searches and seizures, however, the state raises only a cursory challenge to the hearing justice’s findings as it pertains” to the cell phones, and because the state did not “meaningfully contest the hearing justices findings . . . we consider the issue waived.” 79

C. Franks Determination 80

The court held that “because a Franks hearing concerns the Fourth Amendment warrant requirement, in order to raise a Franks challenge, a defendant must establish standing in the area or items sought to be searched and seized by the challenged warrants.” 81 The State made two arguments on appeal: (1) the

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75. Id. (alterations in original) (internal quotation marks omitted).
76. Id. (internal quotation marks omitted).
77. Id.
78. Id. at 59 (“Accordingly, we affirm the Superior Court order suppressing evidence of the Metro PCS phone, the iPhone, the T-Mobile phone, and the pictures of the contents of the Metro PCS [and T-Mobile] cell phone[s].” (alteration in original) (internal quotation marks omitted)).
79. Id. at 58 (“[S]imply stating an issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue.” (quoting State v. Chase, 9 A.3d 1248, 1256 (R.I. 2010)) (internal quotation marks omitted)).
80. In Franks v. Delaware, “the United States Supreme Court established a procedure for challenging warrants alleged to have been obtained through the use of affidavits containing ‘false statement[s] made knowingly and intentionally, or with reckless disregard for the truth.’” Id. at 59 (quoting Franks v. Delaware, 438 U.S. 154, 155–56 (1978)).
81. Id.
defendant “except with respect to [his] own phones, he has no standing to make a Franks challenge,” and (2) concerning his own phones, “the relevant affidavits were more than sufficient to establish probable cause, even with the removal of the material by the hearing justice, and the lower court’s Franks determination cannot stand.”82

The court decided that based on their previous reasoning, they did not have to decide on either basis.83 They agreed with the State that with the exception of his own phones, the Defendant did not have standing “to raise a Franks challenge to those warrants.”84 Additionally, with regard to his own phones, the court upheld “the hearing justice’s findings that the Metro PCS cell phone, the T-Mobile phone, and the iPhone were searched and seized illegally, [and] the [S]tate is precluded from introducing those items at trial,” rendering the Defendant’s challenges of “the warrants seeking those items and their derivatives” moot.85

**COMMENTARY**

In this case, the Supreme Court of Rhode Island was faced with several difficult evidentiary rulings regarding the searches of cellular phones, text messages, and the validity of search warrants that were obtained by the Cranston Police Department. One of the most interesting facets of this case is that it was decided on June 20, 2014,86 just five days before the United States Supreme Court decided *Riley v. California*.87 In this section we will examine the holdings of the Rhode Island Supreme Court in this case and also look at the impact that *Riley* might have on the case following remand.

The Supreme Court of Rhode Island acknowledged the difficulty in determining if a defendant has a reasonable right to privacy in text messages that were sent from his phone and received by a third party. Since this was an issue of first

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82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 60.
86. *Id.* at 40.
impression for the court, they had to look to other jurisdictions and the reasoned opinion of the hearing justice to determine the proper analysis. The court did not agree with the hearing justice that text messages could be likened to “oral communications, based on their similar back-and-forth nature;... a person has a reasonable expectation of privacy in the contents of his or her text messages” regardless of where the messages were eventually viewed.\(^88\) In my opinion, the court in the end rightly determined that the privacy in cellular phone text messages depended primarily on “whether the defendant owned or was the primary user of the cell phone.”\(^89\) The court also rightly determined that the fact that the Cranston police were still at the scene of a reported crime one hour after the victim was removed was a reasonable period of time for their presence. These decisions left the Defendant without a reasonable expectation of privacy to the text messages that had been received and stored on Ms. Oliver’s cellular phone, and the messages could be admitted into evidence.

However, the court held that Mr. Patino did have a reasonable expectation of privacy in his own cellular phones.\(^90\) The State had failed to argue the legality of the search and seizure of those phones, and therefore, the evidence that was found on Mr. Patino’s cell phones could be suppressed.

The court also properly held that in his challenge of the warrants under \textit{Franks}, Mr. Patino either did not have standing to challenge the warrants, or if he did have standing, his challenges on the other warrants were moot because of the evidentiary holdings of the court. The court also found that “to the extent that any of the warrants yet have vitality, we perceive no basis to disturb the hearing justice’s findings that the [D]efendant has made a substantial preliminary showing that the warrant affidavits contain certain false statements that were deliberate or made in reckless disregard for the truth.”\(^91\) Here, the court highlighted the fact that the trial justice will have to look carefully at any remaining warrants to ensure that the warrants were valid during the lower court proceedings.

This brings us to our analysis of the case under the new

\(^{88}\) \textit{Patino}, 93 A.3d at 55.
\(^{89}\) \textit{Id.}
\(^{90}\) \textit{Id.} at 58.
\(^{91}\) \textit{Id.} at 60.
standard that was developed in Riley. In that case, the United States Supreme Court held that, generally, searches of cellular phones without a warrant are a violation of a person’s Fourth Amendment rights.\(^92\) The United States Supreme Court acknowledged that there may be cases where a cell phone search may be allowed without a warrant, such as exigent circumstances; however, in Riley the fact that police officers had manipulated phones and discovered data and evidence on those phones was a violation of the defendants’ constitutional rights under the Fourth Amendment.\(^93\)

The holding in Riley may call into question the information that Sgt. Kite received from Ms. Oliver’s LG cell phone. In the instant case, long before a search warrant was issued, Sgt. Kite “picked up the phone and viewed and alert on the front screen . . . opened the phone to view the interior screen . . . manipulated the button on the phone which led to a mailbox listing incoming and outgoing text messages . . . and clicked on the phone to view . . . [a] message in the outbox folder.”\(^94\) The Rhode Island Supreme Court noted that the fact that Mr. Patino did not have any control over the text messages was “underscored by the fact that Oliver signed a consent form allowing the Cranston Police officer to search the phone, albeit after they had already viewed the incriminating messages.”\(^95\)

It would appear that the search of the LG cell phone was conducted in violation of the mandates of Riley. However, in Riley the phones in question belonged to the defendants themselves and therefore, the court found that they had a reasonable expectation of privacy and the phones could not be searched without a warrant.\(^96\) In this case, the LG cell phone was owned by Ms. Oliver and the trial court on remand will still have to determine whether Mr. Patino would have standing to challenge the search of Ms. Oliver’s phone. Based on the analysis of the Supreme Court of Rhode Island in this case, the answer to that question would probably be “no,” and the fact that Sgt. Kite manipulated the buttons on the phone before obtaining a search warrant would

\(^{92}\) See Riley, 134 S. Ct. at 2493.
\(^{93}\) Id.
\(^{94}\) Patino, 93 A.3d at 44.
\(^{95}\) Id. at 56–57 (emphasis added).
\(^{96}\) Riley, 134 S. Ct. at 2493.
not cause the text messages on her phone to be suppressed.

CONCLUSION

As stated by the Rhode Island Supreme Court, in order to determine the reasonableness of the expectation of privacy the court must "look backwards to history... as well as forward, considering modern technological developments."97 In this case, the court examined several different evidentiary concerns and determined that a defendant does not have a reasonable expectation of privacy in the text messages that they send once the text messages have been sent and received by a third party recipient. The court highlighted the importance of standing when determining if the defendant has a reasonable expectation of privacy under the Fourth Amendment to ensure that evidence is not improperly excluded during trial. This case, along with the decision of the United States Supreme Court in Riley, is sure to be a wake up call for the police departments throughout Rhode Island of the importance of the control and proper handling of cellular phones, especially those phones which may contain critical evidence about the case that they are investigating.

D. Thomas Peterson

97. Id. at 52.
Criminal Law. Rose v. State, 92 A.3d 903 (R.I. 2014). The Rhode Island Supreme Court decided that good-time credits, and “dead time” credits, which qualify a prisoner for early release from prison, do not qualify the party for an early start to their probationary period if the total sentence would fall under the mandatory minimum set by the state legislature.

FACTS AND TRAVEL

The State of Rhode Island accused Alexander Rose ("Rose") of first-degree child molestation on December 23, 1992. As Rose was unable to produce bail, he was incarcerated in the Adult Correctional Institution ("ACI") to await the disposition of the accusation. More than a year later, on March 14, 1994, Rose pled nolo contendere to a sole charge of first-degree child molestation. On March 17, 1994, the trial court entered a judgment of twenty years, consisting of eight years to serve in the ACI and twelve years of probation.

During the sentencing, the judge spoke to Rose about the amount of time he would be serving on probation.

THE COURT: You heard the [state's] recommendation of a 20–year sentence, eight years to serve. You'll receive credit for time served retroactive to December 23, 1992. What I want to make sure you understand is that after you're released from that eight years to serve, you still have a 12–year suspended sentence hanging over you and 12 years' probation. Do you understand that?
[Rose]: I understand.
THE COURT: When I say, 'hanging over you,' I just mean that for 12 years after your release you are going to be on

2. Id.
3. Id.
4. Id.
probation[,][D]uring that period * * * you will comply with the terms and conditions of probation. If * * * a judge after a hearing were to find that you violated probation, that judge could then revoke the 12-year suspended sentence and you could be ordered to serve up to 12 years at the ACI. You understand all that?

[Rose]: Yes.

* * *

THE COURT: In this matter, the defendant is sentenced to 20 years at the ACI, eight years to serve, credit retroactive to December 23, 1992, the balance, 12 years, suspended, and upon release the defendant is placed on 12 years probation.\(^5\)

Three years and nine months after the trial court entered judgment, Rose was released from the ACI on parole.\(^6\) Rose received credit for good behavior and his participation in institutional industries under Rhode Island General Laws section 42-56-24 and another fifteen months credit for time served before his case’s disposition.\(^7\) In July 1999, Rose completed his period of parole.\(^8\)

On October 13, 2010, Rose filed a writ of habeas corpus to the Rhode Island Superior Court and twelve days later filed for post-conviction relief under Rhode Island General Laws section 10-9.1-1(a)(5).\(^9\) Rose argued that his probation concluded on December 17, 2009.\(^10\) This, he argued, was because that date was twelve years after his release on December 17, 1997.\(^11\) Rose argued in the alternative that his probation ended in July 2011, twelve years after the end of his parole.\(^12\) The superior court justice, denied both petitions on September 22, 2011.\(^13\) The hearing justice stated that the “20-year full sentence began on March 14, 1996.”\(^5\)

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5. *Id.* (alterations in original) (internal quotation marks omitted).
6. *Id.*
7. *Id.* at 906.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
194 and [runs] until March 13, 2014.”

**ANALYSIS AND HOLDING**

The Rhode Island Supreme Court granted certiorari and examined the statute’s “plain and ordinary meaning[]” to determine whether Rose’s credits for good-time and time served affected the length of his sentence.

A. **R.I.G.L § 42-56-24 and Good-Time Credits**

Rhode Island law creates a possibility of early release from prison for good behavior. For every month of good behavior, the Director of the Department of Corrections may deduct several days from the sentence of the prisoner. When the State released Rose because of the good-time credits he had earned, he argued, his probationary period immediately started. Rose supported his argument, by citing the sentencing justice’s instructions during his sentencing hearing. At that hearing, the sentencing justice stated that “[i]n this matter, the defendant is sentenced to 20 years at the ACI, eight years to serve, credit retroactive to December 23, 1992, the balance, 12 years, suspended, and upon release the defendant is placed on 12 years probation.”

Rose also argued that the good-time credits impose an additional burden by extending his probationary period. The court stated that Rose was under no additional hardship as he was “still obliged to abide by the same conditions to keep the peace and be of good behavior for that period of time.”

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14. *Id.* (alteration in original) (internal quotation marks omitted).
17. See *Rose*, 92 A.3d at 908. The calculation of the amount of days deducted is described in the statute. See R.I. GEN. LAWS § 42-56-24. According to *Barber v. Vose*, the calculation for deducting time from a sentence must comply with the law at the end of the sentencing. 682 A.2d 908, 913 n.3 (R.I. 1996).
19. *Id.*
20. *Id.* at 905 (emphasis in original) (internal quotation marks omitted).
21. *Id.* at 911.
22. *Id.*
The court, however, stated that the good-time statute is meant to simply deduce time from imprisonment.\(^{23}\) Justice Indiglia cited *Gonsalves v. Howard*, in which the Rhode Island Supreme Court ruled that a sentencing justice’s ruling regarding the start of probation could not be enforced if it conflicts with a statutory provision.\(^{24}\) Rose was convicted under Rhode Island General Laws section 11-37-8.2, which prescribes twenty years as the mandatory minimum for the crime of first degree child molestation.\(^{25}\) The court reasoned that, because the Legislature imposed a *minimum sentence* for the crime, a lesser sentence could not be given for such a conviction and mitigation is against the statutory intent.\(^{26}\)

In his dissent, Justice Flaherty disagreed with how the majority has defined “sentence” as used in the statute to only mean “imprisonment.”\(^{27}\) He wrote that “it is my opinion that the majority is in error by concluding that the only 'sentence' from which the Legislature intended the credits to be deducted is one of imprisonment.”\(^{28}\)

The majority, however, stated that “we have previously refused to construe a sentencing provision, even an ameliorative one, in a manner that would ‘authoriz[e] sentencing justices to impose a sentence less than that for which the Legislature ha[s] otherwise specifically provided.”\(^{29}\) The court ruled that Rose’s good-time credit could not cause his probation to start immediately upon Rose’s release from incarceration, but that he was to serve his probation until the full twenty year sentence was completed.\(^{30}\)

In his dissent, Justice Flaherty wrote that the court’s conclusion with regards to good-time credits creates two problems.\(^{31}\) The first problem is that the court has, in essence,

\(^{23}\) *Id.*

\(^{24}\) *Id.* at 909 (citing Gonsalves v. Howard, 324 A.2d 338, 340–41 (R.I. 1977)).

\(^{25}\) *Id.*

\(^{26}\) *Id.*

\(^{27}\) *Id.* at 913. (Flaherty, J.dissenting).

\(^{28}\) *Id.*

\(^{29}\) *Id.* (majority opinion) (alterations in original) (quoting State v. Holmes, 277 A.2d 914, 917 (R.I. 1971)) (internal quotation marks omitted).

\(^{30}\) *Id.* at 909.

\(^{31}\) *Id.* at 913. (Flaherty, J., dissenting).
added to the good-time credit statute. That addition creates a new part that restricts the use of good-time credits if the application of the time credits of the sentence would then fall below the mandatory minimum. Justice Flaherty explained that another problem with the ruling is that it extends probation further than the sentencing judge had prescribed.

B. Rule of Lenity and R.I.G.L. § 42-56-24

The court also disagreed with Rose’s argument that the rule of lenity requires the court to apply the credit to his overall sentence. Rose argued that there is an inconsistency and ambiguity between mandatory minimum statutes and that the good-time deduction statute requires the court to make a decision in his favor. The rule of lenity requires that a court, in all criminal contexts, resolve any ambiguity in favor of the defendant. The majority did not find the legislation to be ambiguous but rather unambiguous; therefore, there was no reason to apply the rule of lenity to the statute.

C. Credit for Time Served Under R.I.G.L. § 12-19-2(a)

In addition, Rose argued on appeal that his probation should have started and ended sooner according to Rhode Island General Laws section 12-19-2(a), as he had already served more than a year and two months while awaiting the outcome of the charges. Rose argued that this “dead time” provision should have allowed him to be released from probation in January 2013 in acknowledgment of the time he spent awaiting trial.

The majority stated that this time did not count towards reducing his time on probation either. The court referenced State v. Bergevin, in which the defendant argued that his

32. Id.
33. Id.
34. Id.
35. Id. at 909 (majority opinion).
36. Id.
37. Id. at 909–10; see also generally Note, The New Rule of Lenity, 119 Harv. L. Rev. 2420 (2006).
38. Rose, 92 A.3d at 910.
39. Id. at 911.
40. Id. at 912.
41. Id.
probation was no longer in force because it had been started earlier due to time served.\textsuperscript{42} The court in \textit{Bergevine} did not count the dead time served to calculate the probation retroactively, and the court declined to do that here for Rose.\textsuperscript{43} The court acknowledged that Rose was careful not to argue that his sentence should be retroactive to his imprisonment after failing to make bail, but instead, in response to \textit{Begevin}, Rose argued that his probationary period began fifteen months earlier because of his time in jail awaiting trial.\textsuperscript{44} The court stated that this argument is simply a different way of looking at the problem and refused to deduct such time from Rose’s sentence.\textsuperscript{45}

Justice Flaherty’s dissent acknowledged that this ruling goes against the decision made in \textit{State v. Holmes}.\textsuperscript{46} In that case, the court stated that every person who has committed an identical crime will “be deprived of their liberty for identical periods of time.”\textsuperscript{47} Justice Flaherty argued that the time served credit should not elongate the probation of a person simply because they were incarcerated before trial.\textsuperscript{48} He wrote that the court denied Rose the relief that the General Assembly had specifically designed.\textsuperscript{49} He further stated that the majority’s holding “effectively requires Rose to make up the fifteen months he served at the Adult Correctional Institution awaiting disposition by extending his probation, an extension that the statute simply does not authorize this Court to do.”\textsuperscript{50}

\textbf{Commentary}

When looking at this opinion, it is important to realize the precedent this case will set for future offenders sentenced to crimes that prescribe mandatory minimum sentences. In \textit{Rose}, the court determined that, when a minimum mandatory sentence

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} (citing \textit{State v. Bergevine}, 883 A.2d 1158, 1158–59 (R.I. 2005)).
\item \textit{Id.} at 912; \textit{Bergevine}, 883 A.2d at 1158–59.
\item \textit{Rose}, 92 A.3d at 912.
\item \textit{Id.} (“We cannot countenance a result that we have previously forbidden simply because it is painted in different terms.”).
\item \textit{Id.} at 918 (Flaherty, J., dissenting).
\item \textit{Id.} (quoting \textit{State v. Holmes}, 277 A.2d 914, 917 (1971)) (internal quotation marks omitted).
\item \textit{Id.} at 918–19.
\item \textit{Id.} at 919.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
has been given, good-time and "dead time" credits cannot impact the length of the sentence as a whole.\textsuperscript{51} Instead, these credits simply count towards early release from incarceration and impose a longer probationary period by default.\textsuperscript{52}

When one looks at the good-time statutes, this case comes down to the meaning of one word, "sentence" and what the legislature means when it uses it. The court held in Rose that it means the incarceration of a convicted person.\textsuperscript{53} However, the disagreement is whether the legislature intended it to be that way.

Justice Indeglia's opinion is that the good-time credits are simply an act of legislative grace.\textsuperscript{54} This means that the legislature is permitting convicted persons to be released early from prison for good behavior, but that release is the sole benefit of the good-time credit and that an extension of probation is not a burden on those who leave jail early.

Some may argue that his reasoning does not consider probation to be an actual burden that causes any hardship to the offender.\textsuperscript{55} Yet, probation inherently limits freedom; just the act of reporting to another person to evaluate one's actions has a direct impact on one's life. There are inherent difficulties for one who is on probation, stigma perhaps being the most challenging. This elongation of probation seems simply to be unfair to an offender who has taken great lengths to serve their time responsibly.

However, the General Assembly enacts mandatory minimums for a reason. And in this instance, probation seems much better than the alternative. The reasoning of the court is clear that good-time credits are a way for the General Assembly, and the Department of Corrections, to reward good behavior in the ACI.\textsuperscript{56} The benefit to the prisoners to be released from prison early, when weighed against the potential burden of more parole, is great.

Rose's argument that he was sentenced to only 12 years on probation, so therefore he should only have to serve that amount

\textsuperscript{51} Id. at 909.
\textsuperscript{52} Id. at 913. (Flaherty, J., dissenting).
\textsuperscript{53} See generally id. (majority opinion).
\textsuperscript{54} Id. at 911.
\textsuperscript{55} See id.
\textsuperscript{56} See id. at 908.
of time at first blush, seems a good one. But when his prison term was cut short, a longer probation period seems to be a price worth that benefit. As the court suggests, all citizens are under an obligation to be good citizens, and probation, a form of good citizen enforcement, cannot be seen as too high a burden. Rose did not dispute this obligation either.\textsuperscript{57}

Rose made an argument to the court that it should apply the rule of lenity.\textsuperscript{58} The majority made quick work of Rose’s argument that the statutes combined created ambiguity, and the dissent did not mention the rule at all.\textsuperscript{59} This argument does not seem to have been one that the court ceased upon; however if inclined, the legislature could clarify the rule of lenity’s impact on good-time and “dead time” in order to prevent cases like this from arising in the future under different guises.

Rose’s most compelling argument was that his probation should not extend out to twenty years after his sentencing date, but from when he began to serve time.\textsuperscript{60} Although the reasoning is similar to that in the good-time analysis, the court may unintentionally punish those who make bail.

In his dissent, Justice Flaherty wrote, “[t]he court’s holding today counters our previous pronouncements about the purpose of the statute regarding credit for time served, which was meant to result in equal time for an equal sentence to balance out the situation of the person who can make bail and the person who cannot.”\textsuperscript{61} Unfortunately, the court seems to say that the time served before conviction cannot count toward the mandatory minimum. In this case, it is a punishment to those who cannot post bail.

Unlike the good-time credit, which confers a benefit on the convicted person by releasing them from jail early, the time served credit is not a benefit. Instead, it is a logical and fair relief to those who are not able to post bail. Those who can post bail will serve less probation than those who cannot post bail. In this instance, the justice system will thus punish poorer people more than those who can afford bail.

\textsuperscript{57} Id. at 907.
\textsuperscript{58} Id. at 909–10.
\textsuperscript{59} Id.; see id. at 913–19 (Flaherty, J., dissenting).
\textsuperscript{60} Id. at 911–13 (majority opinion).
\textsuperscript{61} Id. at 918 (Flaherty, J., dissenting).
This is where the legislature should step in to make clear that time served credits should also move up the probation time so that our justice system does not have that inequality.

CONCLUSION

The Rhode Island Supreme Court held that “dead time,” in this case fifteen months served before disposition of the case, did not move up the beginning and end date of the probationary period ordered. The court also held that when applying good-time credits, a defendant may be released early from prison, but this too does not move up the beginning and end date of the probationary period ordered. The court goes further in stating that there are no legislative inconsistencies within the statutes, and the rule of lenity is not applied to the issue of whether time served could move the start date of the probationary period forward.

Andrew Blais
Criminal Law. *State ex rel. Town of Little Compton v. Simmons*, 87 A.3d 412 (R.I. 2014). The Rhode Island Supreme Court held that a reasonable individual would feel free to leave a confrontation with a police officer if the officer did not use demanding language in making a request to return to a scene of an accident. Where a police officer uses demanding and authoritative language that causes a reasonable person to believe he does not have the ability to decline the officer’s request, an arrest has been made. If an officer does not, however, use demanding language when requesting an individual to act, a reasonable person would feel free to decline the request and leave.

**FACTS AND TRAVEL**

At approximately 3:40 a.m. on December 24, 2011, two police officers, Officer Farrar (“Farrar”) and Corporal Harris (“Harris”), saw David Simmons (“Defendant”), running down the street wearing a t-shirt and shorts while they responded to a rescue call on Old Stone Church Road in Little Compton.1 Approximately five minutes later, the two officers received a call from the Little Compton dispatch informing them of a single-vehicle accident on Colebrook Road in Little Compton.2 The driver of the vehicle involved in the one-car accident was not found on the scene.3 While a third officer reported to the scene of the accident, Farrar and Harris “decided to pursue the erstwhile jogger” they observed earlier under the assumption that he may have been involved in the one-car accident.4

Farrar and Harris followed the path of the jogger into the town of Tiverton, and after spotting Simmons, they pulled over their police cruiser alongside of him.5 Farrar asked the Defendant

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2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
if he was out for a jog, to which the Defendant responded positively. Harris then asked the Defendant if he had been involved with the one-car accident on Colebrook Road, to which the defendant stated he had. At that time, Harris exited his vehicle and conducted a frisk of the Defendant “for officer safety” and questioned him about why he had left the accident scene. While speaking with the Defendant, Harris observed that there was a “strong odor of alcohol coming from [his] breath and that Mr. Simmons’ eyes were extremely bloodshot and watery.” The Defendant asked what he had hit and whether anyone had been hurt, to which Harris responded that she believed there were no injuries “but that [they] need[ed] to respond back to the scene.” The Defendant voluntarily offered to accompany the officers back to the scene of the accident and got into the backseat of the police cruiser, “which, as is typical of such vehicles, was separated from the front by a partition.” Significantly, the Defendant was not read his Miranda rights and was not handcuffed. As police cruisers typically do not allow for backseat passengers to exit the vehicle once inside, Simmons was unable to open the vehicle door “in the event he desired to get out.”

Upon arrival to the accident scene in Little Compton, the Defendant was released from the backseat of the vehicle and was advised to seek medical attention. At no point during this time

6. Id.
7. Id.
8. Id. See also Terry v. Ohio, 392 U.S. 1 (1968). In Terry, the United States Supreme Court held that when a police officer has reasonable suspicion that an individual is in the act of or had just committed a crime, the officer can “stop” and “frisk” the individual. Id. at 30–31. The scope of the frisk is limited to the suspect’s outer garments to search for weapons and is reasonable as a matter of law under the Fourth Amendment to ensure the officer’s safety. Id.
9. Simmons, 87 A.3d at 414.
10. Id. (internal quotation marks omitted).
11. Id.
12. Id. See also Miranda v. Arizona, 384 U.S. 436 (1966). In Miranda, the United States Supreme Court outlined specific warnings a police officer must read to a suspect before conducting a custodial interrogation. Id. at 444–45. These warnings include the right to remain silent, the right to an attorney, and that anything the suspect says may be used against them in court. Id.
13. Simmons, 87 A.3d at 414.
14. Id.
was the Defendant “restrained in any way.” After the Defendant refused medical assistance, Harris administered a series of field-sobriety tests on the Defendant, which he failed. The Defendant was then placed under formal arrest, read his Miranda rights, and transported to the Little Compton police station in handcuffs. Subsequently, the town of Little Compton charged Simmons with operating a motor vehicle while under the influence of drugs and/or alcohol in violation of Rhode Island General Laws section 31-27-2.

On January 9, 2012, the Defendant filed a motion to dismiss in the district court, claiming unlawful arrest. The Defendant argued that he was arrested in Tiverton, and as such, the Little Compton police did not have the authority to arrest him. In deciding the motion, the district court judge “dutifully considered the factors outlined in State v. Bailey.” These factors include: (i) the extent to which a person’s freedom of movement is restricted; (ii) the belief of a reasonable person that he or she has the ability to leave the confrontation with the police officer and refuse to speak to the officer; and (iii) the amount of force used by officers during the confrontation. In consideration of these factors, the district court judge arrived at the decision that the Little Compton officers made the arrest in Tiverton and, therefore, exceeded their authority to arrest. As a result, the case was dismissed, and the

15. Id.
16. Id.
17. Id.
18. Id. R.I. GEN. LAWS ANN. § 31-27-2 (2013) (“Whoever drives or otherwise operates any vehicle in the state while under the influence of any intoxicating liquor, drugs, toluene, or any controlled substance as defined in chapter 28 of title 21, or any combination of these, shall be guilty of a misdemeanor . . . and shall be punished as provided in subsection (d) of this section.”).
19. Simmons, 87 A.3d at 414.
20. Id.
22. See Bailey, 417 A.2d 917–18.
23. Simmons, 87 A.3d at 414. The judge concluded that the officers’ actions amounted to an arrest because “(1) . . . defendant could not voluntarily leave [the cruiser]; (2) the police had not observed defendant commit any crimes; and (3) the police had not informed defendant that he could decline to accompany them back to the collision.” Id. The arrest was therefore ruled unlawful, and the evidence obtained from the encounter was suppressed. Id.
Upon review of the trial court decision, the Rhode Island Supreme Court sought to address the issue of whether the Defendant’s arrest was lawful. The Town of Little Compton contended that the arrest was lawful because it was made in Little Compton only after the Defendant had failed the field sobriety tests that Harris administered. The court focused on the lower court’s application of the factors laid out in Bailey in determining whether a lawful arrest had been made. Laying out the factors, the court noted that “no one factor [was] dispositive” of the outcome and that the court would “analyze the interchange between [the] suspect and the authorities pragmatically to determine whether an arrest or seizure [had] in fact occurred.”

The court concluded that although the trial judge correctly cited the factors established in Bailey and “engaged in a thoughtful analysis,” the court disagreed with the trial judge’s ruling and held that the Defendant was not placed under arrest in Tiverton because a request to return to a scene of an accident is not the same as a request to return to the police station.

The court applied the Bailey factors to the relevant facts from the night of the arrest. In addressing the Defendant’s freedom of movement, the court determined that the degree of the Defendant’s curtailment while riding in the backseat of the police cruiser was minimal because the Defendant was only in the

24. Id. The court granted the petition. Id.
25. Id. at 414–15. The supreme court noted that its review of the case would be “limited to an examination of the record to determine if an error of law has been committed.” Id. at 414 (quoting State v. Poulin, 66 A.3d 419, 423 (R.I. 2013)). The court also noted that the record would be examined to determine if the findings of the lower court were supported by “legally competent evidence.” Id.
26. Id. at 415.
27. Id. (citing State v. Bailey, 417 A.2d 915, 917–18 (R.I. 1980)).
28. See Bailey, 417 A.2d at 917–18.
29. Simmons, 87 A.3d at 415 (alteration in original) (quoting State v. Collins, 543 A.2d 641, 650 (R.I. 1988)) (internal quotation marks omitted).
30. Id. (quoting Collins, 543 A.2d at 650) (internal quotation marks omitted).
31. Id.
32. See id. at 415–17.
cruiser for a few moments and was not restrained. The court stated that it would be unreasonable to suggest that the two police officers had any other way of escorting the Defendant back to the scene other than in the back of the police cruiser. Next, the court addressed the lack of physical force used by the officers and concluded that the pat down conducted by Harris for officer safety did not rise to the level of force required for an arrest. The court then addressed the argument that the police had an affirmative duty to inform the Defendant of his freedom to decline the request to return to the scene of the accident. Although the trial court found it “significant that the police did not inform [the Defendant] that he was free to leave,” the supreme court acknowledged that the police did not have the duty to inform Defendant of this ability. Therefore, this Bailey factor was insignificant in the matter.

Finally, the court sought to determine if a reasonable person in like circumstances would have understood that he was free to object to return with the officers to the scene of the accident. First, the court noted that the test to be applied was objective and

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33. Id. at 415.
34. Id. The court analogized this instance to State v. Collins, where the court found that no arrest was made when the defendant, although unable to voluntarily leave a police vehicle, had somewhat reluctantly volunteered to go with the police. Id. (citing Collins, 543 A.2d at 650).
35. Simmons, 87 A.3d at 416; see also Terry v. Ohio, 392 U.S. 1 (1968). In conducting this analysis, the court specifically noted that the Defendant was not restrained in handcuffs while riding in the police cruiser, and the officers never drew their service weapons. Simmons, 87 A.3d at 416. The court compared this case to State v. Aponte, where no arrest was made when the defendant was “frisked and physically manhandled by the officers” as the defendant was being moved into the police cruiser. Id. (quoting State v. Aponte, 800 A.2d. 420, 426 (2002)).
36. Simmons, 87 A.3d at 416.
37. Id. See State v. Girard, 799 A.2d 238 (R.I. 2002). In Girard, the court found that the defendant “had the option of not going to the station . . . and, considering that he left freely, his personal freedom apparently had not been curtailed.” Id. at 248. The court stated that their conclusion “that no seizure occurred [at that time was] not affected by the fact that [Girard] was not expressly told by the [officers] that [he] was free to decline to cooperate with their inquiry, for the voluntariness of [his] responses does not depend upon [his] having been so informed” Id. (quoting State v. Kryla, 742 A.2d 1178, 1182 (R.I. 1999)).
38. Simmons, 87 A.3d at 416. See also Girard, 799 A.2d 238.
39. Id. (citing State v. Freola, 518 A.2d 1339, 1343 (R.I. 1986)).
should not take into account the Defendant’s subjective view of the exchange between himself and the officers.\textsuperscript{40} The court then reasoned that an arrest can occur when police use language that makes it clear to an individual that he does not have the ability to decline to cooperate with the request.\textsuperscript{41} As the court noted, “the outcome of [this] case weigh[ed] heavily” on this factor.\textsuperscript{42} In addressing Harris’s statement that “we need[] to respond back to the scene,” the court found it was a critical exchange because it “appear[ed] to indicate that the [D]efendant should return with them.”\textsuperscript{43} The court stated that the statement exchange was crucial because it could affect whether the Defendant believed he was free to object to returning with the officers because Harris’ wording could have “indicate[d] that [the D]efendant should return with them.”\textsuperscript{44}

The court ultimately concluded that “a reasonable person under like circumstances would have felt free to leave when Harris stated that we need to respond back to the scene.”\textsuperscript{45} To reach this conclusion, the court reasoned that the statement made by Harris in this instance was similar to the statement made by the officers in Kennedy and, therefore, did not constitute an arrest.\textsuperscript{46} Harris’s statement was not like the statement made by officers in State v. Mattatall because Harris did not demand that the Defendant return to the scene of the accident, and therefore, a reasonable person in like circumstances would have felt free to

\textsuperscript{40} Id. (citing Aponte, 800 A.2d at 426).
\textsuperscript{41} Id. Compare State v. Kennedy, 569 A.2d 4, 5–6 (R.I. 1990) (holding that a defendant was not under arrest when police offered to transport him to the police station because the defendant did not have his own transportation), with State v. Mattatall, 510 A.2d 947, 951–52 (R.I. 1986) (concluding that a defendant was not free to leave when police ordered him to go to the police station, finding there was absolutely no option for the defendant to decline), vacated on other grounds, 479 U.S. 879, aff’d on other grounds, 525 A.2d 49 (R.I. 1987).
\textsuperscript{42} Simmons, 87 A.3d at 417.
\textsuperscript{43} Id. The court also noted that the hearing judge had not considered this factor in making her determination in the case. Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id. (internal quotation marks omitted); see also Kennedy, 569 A.2d at 5–6; Mattatall, 510 A.2d at 951–52.
\textsuperscript{46} Simmons, 87 A.3d at 417; see also Kennedy, 569 A.2d at 5–6. There was no arrest made in Kennedy where the officers offered to give the defendant a ride to the police station and the defendant accepted. 569 A.2d at 5–6.
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decline to return with the officers. In reaching this conclusion, the court summarized the results from the Bailey test and noted that “[t]he [D]efendant did not express any reluctance” in response to the officer’s statements, but rather “exhibited a willingness to accompany the police” back to Little Compton. Again, the court emphasized that a reasonable individual in like circumstances “would have felt free to leave” when Harris stated “we need[] to respond back to the scene.” Therefore, the court below erred in dismissing the action because the Little Compton officers did not abuse their authority as no arrest had been made in Tiverton.

COMMENTARY

In applying the Bailey factors to Simmons, the court concluded that a reasonable person in like circumstances would have felt free to decline to return to the scene of the accident with the Little Compton Police. In considering this Bailey factor, the court made note of the possibility that words or actions of an officer could essentially render a defendant unable to refuse to cooperate with the requests of the police. What the court fails to address, however, is how this reasoning would apply to Harris’ statement that they “need[ed] to respond back to the scene.” In making this statement, Harris essentially told the Defendant that “they,” collectively, had to return to the scene of the accident. This wording may have influenced the Defendant in a way that a different wording may not have. Had Harris said that they “should return to the accident scene,” the argument that a reasonable person would have felt able to decline to return with the officers would be much stronger. Harris’ use of the word “need” resembles a demand that would cause a reasonable person in like circumstances to believe that he could not refuse to cooperate with the police.

The court continued by assessing the Defendant’s lack of

47. Simmons, 87 A.3d at 417; see Mattatal, 510 A.2d at 951–52.
48. Simmons, 87 A.3d at 417.
49. Id.
50. Id.
51. Id.
52. Id.
53. Id. at 414 (emphasis added).
reluctance to accompany the officers when Harris said they “need[ed] to respond back to the scene.”

This line of reasoning suggests that a reasonable person in like circumstances that does not show reluctance to comply with the requests of police officers believes he is free to deny compliance. What the court is asserting is that because the Defendant was not reluctant to go with the Little Compton officers back to the scene of the accident, he was establishing his voluntary compliance with their request. This reasoning can cause confusion. Is the court saying that a reasonable person in like circumstances would not show reluctance in returning with the officers if he believed to have such an ability to refuse to return with them?

What the court is suggesting is that a reasonable person would not see the choice of words used by Harris as a demand to return to the scene of the accident. The court is effectively saying a reasonable person in like circumstances would not succumb to the authority of a police officer making a statement that on its face demands the individual to comply with the officer’s request. However, it is more likely here that the Defendant’s “voluntary act” of accompanying the officers back to Little Compton was an acquiescence to the officer’s authority. A reasonable person in the Defendant’s circumstances—that is, a reasonable person who had just fled the scene of an accident which that person had caused—would not believe he had the ability to refuse to accompany an officer who states they “need” to return to the scene.

If the court is asserting that an individual who shows no reluctance in complying with the requests or demands of a law enforcement officer is demonstrating his belief that he is free to decline the interaction and requests of the officer, then what would a person who is reluctant to comply with an officers’ request be demonstrating? The court does not address this possibility. Although it was noted in State v. Collins that a showing that a defendant acted “somewhat reluctant[ly]” in accompanying the police did not constitute an arrest, the court did not address just

54. Id. at 416.
55. See supra note 37.
56. But see Simmons, 87 A.3d at 417.
how reluctant a suspect must be to establish that he is asserting his freedom to decline an officer’s request. Therefore, the court is telling a person to demonstrate that he does not want to comply with the requests of police officers by showing reluctance to do the requested acts, which also casts the individual in a suspicious light to the officer.

The court in Simmons does not provide a meaningful test to conclude when an individual’s actions can be deemed voluntary or when such actions are a mere acquiescence to authority. It is unclear if the court is asserting that an individual must be reluctant to comply with the request of an authority figure in order to demonstrate his belief that he is free to refuse to comply with the officer’s request. The Defendant in Simmons did not show reluctance and voluntarily returned with the officers to the accident in Little Compton, but this was only after Harris told the Defendant that they “need[ed]” to return. The court did not address the demanding nature of the phrasing used by Harris in making this statement, but rather said that the exchange showed that Harris made a request and not a demand of the Defendant. Therefore, the court is concluding that a reasonable person in like circumstances would have shown reluctance in returning with the officers to the scene of the crime after being told by a law enforcement officer that they “needed” to return to the scene. This reasoning is unlikely to transfer into reality. A reasonable person in like circumstances, that is, a reasonable person that had just fled the scene of an accident, would not feel free to decline the request of an officer that they “need[ed]” to return to the scene, and would certainly not feel comfortable showing reluctance to such a request that would almost unquestionably give the officers added suspicion that the defendant was implicated in the crime.

CONCLUSION

The Rhode Island Supreme Court held that a reasonable individual would feel free to leave a confrontation with a police

58. Simmons, 87 A.3d at 417.
59. Id. at 414 (emphasis added).
60. Id. at 416.
61. Id.
62. Id.
officer who made a request that was not demanding in nature. Because the court found that Harris’ statement to the Defendant was not a demand, the court ruled that the Defendant was not placed under arrest in Tiverton by the Little Compton police officers.

Sarah E. Driscoll
Employment Law.  *Panarello v. State, Dep’t of Corr.*, 88 A.3d 350 (R.I. 2014).  The Rhode Island Supreme Court adopted the First Circuit’s two-prong, burden-shifting paradigm for employment discrimination actions brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA).  When an employee alleges discrimination by his or her employer based on the employee’s military status, in violation of USERRA, the employee must show, by a preponderance of the evidence, that his or her military status or accompanying unavailability was a motivating or substantial factor in the adverse employment action.  If the employee satisfies the motivating or substantial factor test, the burden of proof shifts to the employer to show that it would have taken the same action regardless of the employee’s military status.

FACTS AND TRAVEL

In June of 2000, Donald Panarello (“Panarello”) left his full-time job as a corrections officer at the Department of Corrections (“DOC”) to report for active duty with the Rhode Island Air National Guard.  He returned to the DOC in September of 2006; the alleged discrimination occurred when the DOC failed to promote him to the position of lieutenant on three separate occasions during his six-year military leave.

The first instance of alleged discrimination occurred in 2001, when the DOC interviewed twelve corrections officers, including Panarello, for five vacant lieutenant positions.  The interview panel recommended seven candidates for promotion, but he was not one of them.  Panarello showed up to the interview wearing his military uniform, and he later testified that one of the panel members, David Caruso (“Caruso”), “chastised” his appearance, stating, “[i]t’s not going to look good.”  Caruso, however, denied

2.  *Id.*
3.  *Id.*
4.  *Id.*
5.  *Id.* at 354, 356.
commenting on Panarello’s attire and further testified that Panarello had “lacked knowledge of minimum [DOC] standards.”6 Another panelist testified that Panarello’s interview was merely “average,” but he also conceded that he felt Panarello would be a better candidate once he had more experience as a corrections officer.7 Panel members acknowledged that their leader did not recommend candidates for a second interview in accordance with their interview rankings.8 Regardless, Panarello’s interview score was ranked eleventh out of the twelve candidates.9

The next alleged discrimination occurred when more lieutenant positions opened up in May of 2002; the DOC interviewed Panarello again and did not recommend him for promotion.10 On this occasion, Panarello, again outfitted in his fatigues, brought up the significance of the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), which provides employment protections for members of the armed services.11 Panarello alleged at trial that one of the panelists, Walter Whitman, had told him that he would not be eligible for promotion while out on military leave because it would be a bad management move, and another, Carol Getter, had commented on his active military duty status.12 Yet, these panelists testified that Panarello was not “up-to-date” on, and demonstrated merely “average” knowledge of, DOC policies and procedures.13 Furthermore, serving as a panelist for the second time, Caruso noted that Panarello did not seem prepared and that at both this interview as well as the prior year, there were better candidates with more knowledge.14 Panarello’s interview score this time ranked him fifth out of seven candidates.15

Finally, in June of 2002, the last instance of alleged discrimination occurred when the DOC offered Panarello a “three-day rule” appointment as a temporary lieutenant, but

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6. Id. at 359.
7. Id.
8. Id. at 359, 360.
9. Id. at 356.
10. Id. at 355.
11. Id. at 355, 356–57; see also 38 U.S.C. § 4311 (2012).
13. Id. at 358.
14. Id. at 359.
15. Id. at 357.
subsequently withdrew the offer.\textsuperscript{16} When a position is vacant for an extended period of time as a result of leave, the Director can decide to temporarily appoint someone of a lower rank to that position.\textsuperscript{17} Panarello testified at trial that he told the person who offered him the “three-day rule” position that he would be unable to begin until late August or early September as that was the earliest he could return from active duty.\textsuperscript{18} The DOC then withdrew the offer allegedly because Panarello could not start immediately, although he later learned that the position remained vacant until late October to early November.\textsuperscript{19}

Panarello filed a declaratory judgment action on October 21, 2003, seeking relief from the superior court with respect to the DOC’s alleged discrimination based on his military status.\textsuperscript{20} He brought suit under USERRA, as well as the parallel state statute, the Employment Rights of Members of Armed Forces.\textsuperscript{21} Before a lengthy bench trial during July and August of 2009 commenced, the trial justice issued a preliminary decision in which she ruled that the two-prong, burden-shifting paradigm employed by the United States Court of Appeals for the First Circuit in \textit{Velázquez-García v. Horizon Lines of P.R., Inc.} was the appropriate method for analyzing Panarello’s federal claims under USERRA, as well as his parallel state claims.\textsuperscript{22}

The trial justice rendered her decision on November 23, 2010, finding that Panarello had not met his burden of proof under the first prong of the \textit{Velázquez-García} analysis of proving that his military leave was “a substantial or motivating factor” in the

\textsuperscript{16} \textit{Id.} at 355.

\textsuperscript{17} \textit{Id.} at 355 n.7.

\textsuperscript{18} \textit{Id.} at 356.

\textsuperscript{19} \textit{Id.} Upon his return to the DOC from military leave in 2006, Panarello took the written examination for promotion again, and this time he received “27A” as his final ranking. \textit{Id.} The DOC promoted him in September of 2007. \textit{Id.} at 355, 356. According to Caruso, who was a panelist for the third time, Panarello was more prepared and interviewed better, appearing to have reviewed DOC policies. \textit{Id.} at 359.

\textsuperscript{20} \textit{Id.} at 353

\textsuperscript{21} \textit{Id.} at 353, 363–64; see also 38 U.S.C. § 4311 (2012); R.I. GEN. LAWS §§ 30-11-1 to -9 (2013).

\textsuperscript{22} \textit{Panarello}, 88 A.3d at 360–61; \textit{Velázquez-García v. Horizon Lines of P.R., Inc.}, 473 F.3d 11, 17 (1st Cir. 2007). See also 38 U.S.C. § 4311; R.I. GEN. LAWS § 30-11-3.
DOC’s decision not to promote him.”

Regarding the evidence that Panarello produced which he claimed was demonstrative of anti-military bias in the DOC’s promotional process, the trial justice found that Caruso’s alleged comments at the 2001 interview about Panarello’s military uniform were not indicative of bias, and Whitman’s comments at the 2002 interview with respect to Panarello’s availability, although “ill-advised,” were not enough to show that the DOC discriminated against Panarello. She held that the evidence was insufficient to show that Panarello’s unavailability factored into the interview score that Whitman gave him.

Furthermore, Panarello had drastically improved as a candidate when the DOC promoted him to lieutenant in 2007, given that he received a bachelor’s degree in criminal justice and became more familiar with the DOC’s rules and operations. Thus, the trial justice ruled that, in light of said candidacy improvements, the fact that the DOC promoted Panarello in 2007 after he returned from active duty did not serve as evidence that it had improperly denied his promotion based on bias in 2001 and 2002. Finally, regarding the temporary “three-day rule” promotion that the DOC offered to Panarello in 2002, the trial justice found that such a position required immediate availability, and Panarello had not offered any evidence that a “three-day rule” position had ever been awarded to another employee on leave. Therefore, she held that Panarello had also failed to meet his burden of proving that his unavailability accompanying his military status was improper for the DOC to take into account when it withdrew its offer to temporarily appoint him to a “three-day rule” position.

Following the trial justice’s ruling that the DOC had not engaged in employment discrimination against him, Panarello timely filed a notice of appeal from the judgment entered on

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23. Panarello, 88 A.3d at 361.
24. Id.
25. Id. The trial justice went on to rule that the DOC provided sufficient evidence of the fact that Panarello had not been one of the best candidates in 2001 or 2002. Id.
26. Id. at 361–62.
27. Id. at 362.
28. Id.
29. Id.
November 26, 2010.  

ANALYSIS AND HOLDING

The dispute on appeal centered on the trial justice’s application of the Velázquez-García analytical approach. Panarello conceded that the “the trial justice correctly articulated the burden-shifting method of proof applicable in employment discrimination cases brought under the [USERRA].” Rather, he simply argued that the trial justice had erred by incorrectly applying said burden-shifting test. Further, Panarello asserted that the trial justice had overlooked what he considered to be relevant and material evidence of his employment discrimination case.

The court began its analysis by noting that the trial justice correctly held that the three-part, burden-shifting paradigm set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, and traditionally applied in Rhode Island employment discrimination cases, was not applicable to claims brought under USERRA. Rather, the court agreed that the substantial or motivating factor test adopted by the First Circuit was the appropriate test to apply to Panarello’s USERRA and parallel state law claims. Thus, the court found no error in the trial justice’s decision to follow Velázquez-García. The court went on to hold that an employee alleging discrimination under USERRA has to initially establish, by a preponderance of the evidence, that his or her military status or relating work unavailability was “at least a motivating or substantial factor’ in the adverse employment action.” If the employee satisfies the first prong, the burden of proof then shifts to the employer to
prove, by a preponderance of the evidence, that it would have taken the same action regardless of the employee's protected status.\textsuperscript{39}

Yet, Panarello's main argument on appeal was that the trial justice had improperly applied the Velázquez-García analysis to his particular set of facts.\textsuperscript{40} In order to meet the test, Panarello need not have shown that his military status was the sole cause of the DOC's failure to promote him, just that the DOC “relied on, took into account, considered, or conditioned its decision on that consideration.”\textsuperscript{41} Moreover, Panarello could have used direct or circumstantial evidence to prove discriminatory intent or motivation.\textsuperscript{42} If Panarello had met the substantial or motivating factor test, the burden of proof would have shifted to the DOC to show that its reason for not promoting Panarello was not pretextual.\textsuperscript{43} With this legal framework in mind, the court noted its desire that, in future USERRA cases, the two prongs of the burden-shifting paradigm be looked at individually.\textsuperscript{44} The court found it clear that, although the trial justice explicitly referenced in her opinion only the first prong of the USERRA burden-shifting paradigm, she had actually assessed both parts simultaneously.\textsuperscript{45} Therefore, the court held that the trial justice's failure to explicitly assess the two prongs separately did not invalidate her decision.\textsuperscript{46}

The court first turned to the trial justice's application of the substantial or motivating factor test to Panarello's 2001 and 2002 interviews.\textsuperscript{47} Panarello contended that the trial justice had erroneously believed that, if the DOC presented any evidence of a legitimate motive for not promoting Panarello, she did not need to consider whether his protected military status was also a factor; “in other words, according to [Panarello], the trial justice required him to prove pretext and failed to require the DOC to prove lack of

\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 366.
\textsuperscript{41} \textit{Id.} at 367 (quoting Coffman v. Chugach Support Servs., Inc., 411 F.3d 1231, 1238 (11th Cir. 2005)) (internal quotation marks omitted).
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.} at 367–68.
\textsuperscript{44} \textit{Id.} at 369.
\textsuperscript{45} \textit{Id.} at 368–69.
\textsuperscript{46} \textit{Id.} at 369.
\textsuperscript{47} \textit{Id.} at 366.
However, the court found that the trial justice had indeed utilized the correct burden of proof. She acknowledged in her opinion that the panel members’ statements which Panarello had felt to be discriminatory. Based on the interviewers’ testimony about Panarello’s qualifications, as well as her own credibility determinations, the trial justice “held that [Panarello] had not been promoted because he was less qualified than those individuals who were selected for promotion—and not because of (even partly) his military status.” By determining that Panarello had not provided any rebuttal to the DOC’s ample evidence that he was not the most qualified for promotion in 2001 and 2002, “the trial justice was not, as [Panarello] contend[ed], improperly requiring him to prove pretext; she was appropriately taking all the evidence on the record, from both parties, into account in making her conclusion.”

With respect to the 2001 and 2002 interviews, Panarello further submitted that it was erroneous to find that he had not met his burden of proof, as USERRA prohibits the DOC from considering military unavailability at all. While the court agreed that Panarello’s unavailability need not have been the sole motive behind the DOC’s decision not to promote him, it reiterated that the first prong of the USERRA burden-shifting paradigm clearly requires a showing that Panarello’s military status or accompanying unavailability was a “substantial or motivating factor” in the DOC’s adverse employment action; “[i]t does not suffice for an employee to simply show that his military status was mentioned or noted in the promotional process.” Therefore, the court concluded that the trial justice had not erred in her application of the two-prong, burden-shifting test with respect to the 2001 and 2002 interview processes.

The court next turned to the trial justice’s application of the substantial or motivating factor test to the “three-day-rule”

48. Id. at 369.
49. Id.
50. Id. at 369–70.
51. Id. at 370.
52. Id.
53. Id.
54. Id. at 370–71 (citing Velázquez-García v. Horizon Lines of P.R., Inc., 473 F.3d 11, 17 (1st Cir. 2007)).
55. Id. at 371.
position. Panarello argued that the trial judge had erred by concluding that availability was a legitimate factor for the DOC to consider in filling this temporary position, as unavailability should not be considered under USERRA. The DOC, on the other hand, contended that immediate availability was a prerequisite for appointment to a “three-day rule” position. The court found that the trial justice erred neither factually nor legally by determining that the DOC had presented credible and adequate testimonial evidence that the ability to begin immediately was a basic requirement of a “three-day rule” appointment. Additionally, the court ruled that, “[w]hile an employer may not discriminate based on military unavailability during a general promotional process, common sense dictates that this rule simply should not apply to a temporary position.” Therefore, just as anyone else who was not available would not have been awarded the position, no matter what the reason for the absence, the court found that the same prerequisite was applied to Panarello.

In light of the foregoing analysis, the court affirmed the decision of the trial justice to deny Panarello’s claim for a declaratory judgment under USERRA. Panarello failed to carry his burden of proving that his military status or accompanying unavailability was a “substantial or motivating factor” in the DOC’s decision not to promote him on three occasions. Furthermore, the DOC succeeded in showing that it would not have promoted Panarello even if he had not been on military leave. Thus, the court held that the DOC did not discriminate against Panarello due to his protected military status, in violation of USERRA.
The Rhode Island Supreme Court clearly reached the correct result in this case. Under USERRA, it was not enough for Panarello simply to show that the DOC knew he was on active military duty when it decided not to promote him to lieutenant; he was required to show that such a consideration was a substantial or motivating factor behind its decision. After all, it appears as though Panarello came into his interviews and paraded the fact of his military service in front of the panelists, daring them not to promote him. Yet, in reality, his perception of his qualifications was plainly not supported by the facts, mainly his interview performances. While the court regarded some of the panelists’ comments as imprudent, they were insufficient for Panarello to carry his burden of proof. Furthermore, the DOC succeeded at proving that it had valid reasons not to promote him apart from his military leave, rebutting any allegations of discrimination. Particularly with regards to temporary positions, it is idealistic and unrealistic to think that employers cannot consider immediate availability. Although the court may seem to have placed a more difficult burden on plaintiffs bringing suit under USERRA, this case just was not the one in which to relax the standard. The court gave deferential review to the factual findings and credibility determinations of the trial justice, who apparently did not believe parts of Panarello’s testimony and his exaggerated claims of qualification in the face of contrary indications.

CONCLUSION

The Rhode Island Supreme Court held that the First Circuit’s two-prong, burden-shifting paradigm articulated in Velázquez-García is the proper analytical method to apply in employment discrimination cases brought under USERRA. This requires an initial showing by the employee alleging discrimination that his or her military status or accompanying unavailability was a substantial or motivating factor in the adverse employment action.

Brendan Sullivan
Employment Law. Russo v. State, Dep’t of Mental Health, Retardation, & Hosps., 87 A.3d 399 (R.I. 2014). An employer’s decision to place an employee on paid administrative leave and require him to undergo an independent medical examination is not an adverse employment action under the Rhode Island Whistleblower’s Protection Act.1

FACTS AND TRAVEL

Peter W. Russo (“Russo”), a housekeeper employed by the Rhode Island Department of Mental Health, Retardation and Hospitals (“MHRH”), was placed on paid administrative leave and required to undergo an independent medical examination (“IME”) after he became the subject and source of numerous complaints.2 Russo had previously made several complaints about co-workers bringing dogs to work in addition to reporting to his supervisor what he believed to be the theft of a state-owned vacuum cleaner by another employee.3 Russo claimed that after a memorandum was issued banning the presence of pets in the workplace, his co-workers retaliated by harassing him and lodging complaints about the quality of his work and his workplace behavior.4

1. R.I. GEN. LAWS § 28-50-3 (2003) (preventing an employer from retaliating against an employee for reporting a “violation . . . of a law or regulation or rule promulgated under the law of this state” by “discharge[ing], threaten[ing], or otherwise discriminate[ing] against [the] employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment”).


3. Id. at 401–02. Russo claimed these complaints prompted a supervisor to issue a memorandum in an effort to stifle the practice; however, the supervisor testified that it resulted from his “history of disliking dogs in the workplace.” Id. at 402. From August of 1999 until October 13, 2000, Russo complained three times about the presence of dogs in the workplace, and on May 12, 2000, Russo reported the alleged theft. Id.

4. Id. at 402, 404. Russo admitted that there had been two complaints filed about his job performance prior to the issuance of the memorandum. Id. at 402. One complaint in particular concerned a comment allegedly made by Russo about an office shooting that had recently occurred in Wakefield,
supervisor, however, testified that complaints about Russo’s work "had been going on for years."5

On January 19, 2001, as a result of the continuous exchange of complaints, MHRH management placed Russo on paid administrative leave and required him to undergo an IME.6 Management told Russo “his job was safe” and that management was trying to reconcile an issue that had arisen in his building, but that it “wasn’t his problem.”7 After being placed on leave however, Russo hired an attorney because he felt that his job was in jeopardy.8 From January 19, 2001 until March 14, 2001, Russo was placed on paid administrative leave after which he returned to work with no loss of pay or job responsibilities.9 Following his return to work, Russo brought a civil suit against MHRH in Providence superior court alleging that his employer had “discriminated against him… by requiring that he take an administrative leave” in violation of the Whistleblower’s Protection Act ("WPA").10

The trial justice rendered a decision from the bench, holding that Russo had established a prima facie case against MHRH, finding:

[T]he reporting by Mr. Russo of the alleged theft, which was never really appropriately responded to by the State, and his reporting of the canines coming into the office in rather large numbers, is sufficient to get over the tenets of the statute by reporting what he believed to be violations of statutes and/or regulations.11

MHRH appealed the judgment of the trial court claiming that the justice erred in finding: (1) that requiring Russo to take an administrative leave and undergo an IME was a violation of the

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5 Id. at 402.
6 Id. at 403.
7 Id.
8 Id.
9 Id.
10 Id. at 406. Russo sought recovery for losses that he attributed to being placed on paid leave, namely, fees for the attorney whom he hired while on administrative leave and compensation for suffering from “anxiety and emotional trauma.” Id.
11 Id. at 403–04.
WPA; (2) that Russo’s reports and complaints satisfied the preconditions for obtaining relief under the WPA; (3) that the decision to place Russo on leave was caused by his reports and complaints; and (4) that MHRH did not have sufficient grounds to place Russo on leave and require him to undergo an IME.\textsuperscript{12}

\section*{Analysis and Holding}

On appeal, the Rhode Island Supreme Court reviewed de novo the trial justice’s finding that placing Russo on paid administrative leave constituted a violation of the WPA and ultimately reversed the decision, concluding that the justice made a clear error of law.\textsuperscript{13}

MHRH argued that because Russo continued to receive full pay, including his shift differential while on leave, and because he ultimately returned to the same job for the same pay, it did not “discharge, threaten, or otherwise discriminate” against Russo when it placed him on administrative leave.\textsuperscript{14} Russo responded by arguing that the trial justice’s decision was not in error because the WPA states that a civil action can be brought under the WPA to obtain injunctive relief or actual damages and that he is, thus, entitled to recover the losses he sustained as a result of the MHRH decision to place him on administrative leave.\textsuperscript{15}

Confronted with an issue of first impression, the court began by analogizing the facts to those of \textit{Martone v. Johnston School Committee}, where the court addressed the issue of how to define the suspension of a schoolteacher.\textsuperscript{16} There, the court determined that “[i]f an individual continues to be paid during the period in question, he or she ha[d] not been suspended,” and “[t]he use of paid administrative leave provides a reasonable means of immediately neutralizing a potentially contentious situation while

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 400.
\item \textsuperscript{13} \textit{Id.} at 405–06, 411.
\item \textsuperscript{14} \textit{Id.} at 406 (quoting R.I. GEN. LAWS §28-50-3(1) (2003)).
\item \textsuperscript{15} \textit{Id.} at 406. Russo claimed two losses: (1) the expense incurred as a result of having to hire an attorney to participate in negotiations regarding his IME and his return to work and (2) anxiety and emotional trauma that he suffered as a result of MHRH’s alleged violation of the WPA. \textit{Id.}
\item \textsuperscript{16} \textit{Id.} at 407; \textit{Martone v. Johnston Sch. Comm.}, 824 A.2d 426 (R.I. 2003).
\end{itemize}
minimally affecting the [employee].”\textsuperscript{17} In reliance upon its reasoning in \textit{Martone}, the court thus concluded that, because it considered paid administrative leave to be a viable option for employers to use in order to solve problems in the workplace while “minimally affecting the employee,” then it could not hold that MHRH violated the WPA by placing Russo on paid administrative leave while it sought to cope with a difficult internal situation.\textsuperscript{18} In addition, the court highlighted several federal appellate court decisions that specifically held that administrative leave with pay is not an adverse employment action,\textsuperscript{19} while Russo only had one case to support his position, which was in stark contrast to the facts presented.\textsuperscript{20}

The court then went on to address whether the added requirement of having to undergo an IME altered the facts sufficiently enough to distinguish it from \textit{Martone}.\textsuperscript{21} Citing several federal cases, the court ultimately relied on the reasoning in \textit{Breaux v. City of Garland},\textsuperscript{22} where the Fifth Circuit held “that neither the psychiatric examination nor the administrative leave with pay constituted an adverse employment action.”\textsuperscript{23} The court found no material difference between the facts of the federal cases cited and the facts presented by Russo and, therefore, concluded that the added requirement of having to undergo an IME does not turn a paid administrative leave into an adverse employment action.\textsuperscript{24}

In conclusion the court held that because Russo continued to receive his salary while on leave, it was not disciplinary and would thus not deter a “reasonable employee” from “engaging in further whistleblowing.”\textsuperscript{25} As such, the court vacated the judgment of the

\begin{itemize}
  \item \textsuperscript{17} \textit{Id.} at 407 (alterations in original) (quoting \textit{Martone}, 824 A.2d at 433) (internal quotation marks omitted).
  \item \textsuperscript{18} \textit{Id.} at 407–08.
  \item \textsuperscript{19} \textit{Id.} at 408–10.
  \item \textsuperscript{20} \textit{Id.} at 411; \textit{see also} \textit{Bushfield v. Donahoe}, 912 F. Supp. 2d 944, 957 (D. Idaho 2012) (finding that the paid administrative leave was coupled with an “unrelenting” investigation into the severity and effects of the plaintiff’s posttraumatic stress disorder). The two other cases that Russo relied upon concerned suspensions \textit{without} pay. \textit{Russo}, 87 A.3d at 411.
  \item \textsuperscript{21} \textit{Russo}, 87 A.3d at 410.
  \item \textsuperscript{22} 205 F.3d 150 (5th Cir. 2000).
  \item \textsuperscript{23} \textit{Russo}, 87 A.3d at 409 (citing \textit{Breaux}, 205 F.3d at 158).
  \item \textsuperscript{24} \textit{Id.} at 410.
  \item \textsuperscript{25} \textit{Id.}
superior court and held that, as a matter of law, the actions of MHRH did not “discharge, threaten, or otherwise discriminate against” Russo in violation of the WPA.26

COMMENTARY

The Rhode Island Supreme Court exhibited an appreciation for the complex situations that can arise in the workplace.27 Employers, according to the court, must strike a balance between “neutralizing a potentially contentious situation” and substantially affecting the employee.28 It is doubtless that being placed on paid administrative leave would have an affect on an employee. One is likely to have apprehension about his or her job security and suffer some feelings of anxiety, fear, or embarrassment. These feelings would no doubt be exacerbated with the added burden of having to undergo an IME. However, an employer faced with a contentious and potentially dangerous workplace situation must have an available option to conduct a sufficient inquiry in order to take appropriate action.29 Ultimately, the best course of action for an employer is to place a worker on paid administrative leave.30 If, during an investigation, the employee’s medical health comes into question, it would be reasonable for an employer to require the employee to undergo an IME to obtain an unbiased medical assessment. This provides a qualified basis upon which the employer can rely when making a final decision.31

The WPA is intended to prevent employers from retaliating against employees for reporting unlawful activity.32 However, the WPA should not be construed so as to cripple an employer’s ability to adequately manage the workplace. The court here correctly drew a moderate line by properly balancing the need for protection of workers’ rights with an employer’s need to maintain a safe and

26. Id. at 411.
27. See id. at 408.
28. Id. at 407–08.
29. See id. at 407 (“The MHRH quite understandably opted to use paid administrative leave in order to defuse a difficult situation before it might escalate further.”).
30. See id.
31. See id.
productive workplace.

CONCLUSION

The Rhode Island Supreme Court held that under the WPA, employers are free to place an employee on paid administrative leave, with the requirement that he or she undergo an independent medical examination in order to cope with a disruptive situation in the workplace. Such action, according to the court, does not constitute “an adverse employment action” and thus cannot be the basis for a claim seeking recovery under the WPA.33

Casey M. Charkowick

33. Russo, 87 A.3d at 411.
Evidence and Damages. *Morabit v. Hoag*, 80 A.3d 1 (R.I. 2013). Where there is sufficient evidence for a reasonable jury to conclude that an expert witness’s “novel” methods or theories are grounded in valid science, a trial justice abuses her discretion when she applies the *Daubert* analysis too rigidly, excludes the testimony, and assumes the jury’s role as trier of fact. When trees are removed in violation of section 34-20-1 of the Rhode Island General Laws, damages should depend on the trees’ use and whether the trees provided special value to the land or the property owner.

FACTS AND TRAVEL

Since 1991, Plaintiff George E. Morabit (“Morabit”) has owned fifty-three acres of mostly undeveloped woodland property adjacent to land owned by Defendant Dennis Hoag (“Hoag”).1 Hoag acquired his property in 1986.2 A stone wall marks the boundary between the properties.3 According to Hoag’s testimony, he started clearing his property of trees in 1988 or 1989, trucked in loads of fill to raise the level of the property, and began constructing a residence around 2000 that was completed in 2005.4 Morabit testified that, from the time he acquired his property and lasting for about ten years, trees were cleared from and fill was dumped on Hoag’s property, and this often involved the use of bulldozers, backhoes, and other heavy machinery.5 Sometime in the early 2000’s, Morabit walked his property and discovered that a substantial portion of the stone wall had been destroyed, and a significant number of trees were missing from his side of the wall.6 Morabit filed a complaint in Washington County Superior Court in April 2005, seeking damages for the destruction and removal of both the trees and the stone wall and injunctive

2. *Id.* at 3.
3. *Id.* at 4.
4. *Id.* at 9.
5. *Id.* at 5.
6. *Id.* at 4.
and declaratory relief to prevent any further alteration of his property.\textsuperscript{7}

The trial justice limited, after a voir dire hearing, the testimony of Morabit’s expert witness Robert Thorson (“Thorson”), a geology professor who had studied and published books and articles about historic stone walls.\textsuperscript{8} The justice allowed Thorson to offer testimony grounded in his knowledge of geology, but barred testimony based on “stone wall science” due to her concern that the field was not well-established to be reliable.\textsuperscript{9} In effect, Thorson was able to testify that a 120-foot portion of the wall appeared to have been deliberately damaged with heavy equipment, but he was not allowed to offer his estimate of the cost to restore the wall.\textsuperscript{10}

Morabit also called Matthew Largess (“Largess”), an arboriculture expert.\textsuperscript{11} Taking into account the nature of the surrounding uncut forest, Largess formed conclusions about the amount of trees removed, along with their age, species, and quality.\textsuperscript{12} He estimated, based on the new growth in the affected area, that the trees were removed around 2001 or 2002.\textsuperscript{13} Largess concluded that the tree-related damages totaled about $439,600, 

\textsuperscript{7} Id. There were five counts in Morabit’s complaint: (1) that Hoag interfered with Morabit’s easement over Hoag’s land; (2) that Hoag was liable for damages for the removal of trees and (3) portions of the stone wall; and (4) that Hoag be enjoined from further altering Morabit’s property and (5) from further interfering with Morabit’s easement. Id. at 4 & n.3. The easement issues did not factor in this appeal. Id. See also R.I. GEN. LAWS § 34-20-1 (2011) (providing that anyone who removes trees from another’s property without permission shall be civilly liable for twice the value of the trees removed); R.I. GEN. LAWS ANN. § 11-41-32(b) (West 2006) (“[A]ny person convicted of the theft of an historic stone wall, or portions of a wall, shall be subject to the penalties for larceny.”); R.I. GEN. LAWS ANN. § 11-41-32(d) (West 2006) (“Anyone convicted of the larceny of an historic stone wall, or portions of a wall, or convicted of attempt to commit larceny, shall be civilly liable to the property owner for the cost of replacing the stones and any other compensable damages related to the larceny.”); R.I. GEN. LAWS § 9-1-2 (2012) (providing for civil liability where someone is convicted of a crime that injures someone else’s person, reputation, or estate).

\textsuperscript{8} Morabit, 80 A.3d at 5–6.

\textsuperscript{9} Id.

\textsuperscript{10} Id. at 6, 8.

\textsuperscript{11} Id. at 6.

\textsuperscript{12} Id. at 6–7.

\textsuperscript{13} Id. at 6.
based on the replacement cost of similar trees. At the conclusion of Morabit’s case, Hoag moved for judgment as a matter of law. Although Morabit could not produce any admissible evidence regarding wall-related damages, he asked that the jury still be presented the question of liability and sought to amend his pleadings to suit the available evidence. The trial justice denied the motion to amend and granted Hoag’s motion for judgment as a matter of law with respect to count 3—damaging a portion of the wall. The trial justice reserved ruling on judgment as a matter of law with regard to count 2—the removal of the trees—until Hoag presented his evidence.

Hoag admitted in his testimony that he hired professionals to clear and raise the level of his land, that this work at least involved backhoes, and that at one point he directed a backhoe operator to place boulders on top of the stone wall. He denied removing any portion of the wall or clearing any trees from Morabit’s property.

After Hoag presented his evidence, he renewed his motion for judgment as a matter of law with respect to count 2. The trial justice allowed this motion, reasoning that the proper measure of tree-related damages was the change in the fair market value of

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14. *Id.* at 7–8.
15. Before concluding his case, Morabit called a third expert witness, a biologist experienced in interpreting aerial photographs. *Id.* at 8. She examined a series of aerial photographs of the area and testified that the damage to the trees and the wall likely occurred between 1999 and 2003. *Id.* Further, she found that heavy equipment could only have accessed Morabit’s property by way of Hoag’s land. *Id.*
16. *Id.*
17. *Id.* (“The plaintiff suggested that the trial justice should nonetheless submit the issue of liability to the jury. If the jury found in plaintiff’s favor on liability, the trial justice could grant equitable relief in lieu of damages. The trial justice pointed out, however, that plaintiff had failed to prove a criminal conviction for theft of the stone wall, as required to recover under § 11-41-32(d). The plaintiff then suggested that he be allowed under Rule 15(b) of the Superior Court Rules of Civil Procedure to amend his pleadings to conform to the evidence.”); see also *R.I. GEN. LAWS ANN.* § 11-41-32(d) (West 2006).
19. *Id.*
20. *Id.* at 8–9.
21. *Id.* at 9.
22. *Id.*
the land caused by the removal of the trees, rather than the trees’ replacement cost.\textsuperscript{23} Furthermore, Largess, in formulating his estimate of damages, presumably relied on replacement tree values from between 2005 and 2009, rather than the values from the estimated earlier time of removal.\textsuperscript{24} The trial justice denied Morabit’s motion for a new trial.\textsuperscript{25}

In his appeal, Morabit contended that the trial justice made several errors at trial, including her denial of Morabit’s motion for a new trial and motion to amend his pleadings, her granting of Hoag’s motions for judgment as a matter of law, and her exclusion of a neighbor’s testimony\textsuperscript{26} and some of Thorson’s testimony.\textsuperscript{27}

**ANALYSIS AND HOLDING**

A. *Exclusion of Expert Testimony on Stone Walls*\textsuperscript{28}

The court first discussed the “gatekeeping role” of the trial justice with respect to “novel or complex evidence.”\textsuperscript{29} Rule 702 of the Rhode Island Rules of Evidence permits an expert in a technical or specialized field to testify to certain facts or to help the trier of fact understand the evidence.\textsuperscript{30} Before an expert witness may testify before a jury, the trial justice must determine

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} Id. at 10.

\textsuperscript{26} On the first day of trial, Morabit sought permission to depose Bruce Walker outside of court. Id. at 5. Walker was Hoag’s former neighbor and was the only witness who could directly testify about Hoag’s actions during the relevant period of time, and Morabit’s counsel had learned only the previous day that Walker had been unexpectedly confined to a nursing home. Id. The trial justice denied this motion, reasoning that Morabit could have deposed Walker prior to trial and should have known to preserve Walker’s testimony, given Walker’s age of eighty-four years. Id.

\textsuperscript{27} Id. at 3, 10.

\textsuperscript{28} The court will only reverse a trial justice’s ruling on whether to allow an expert witness’s testimony if it determines the trial justice abused her discretion. See id. at 11 (citing Dawkins v. Siwicki, 22 A.3d 1142, 1154 (R.I. 2011); Foley v. St. Joseph Health Servs. of R.I., 899 A.2d 1271, 1280 (R.I. 2006)).

\textsuperscript{29} Id.

\textsuperscript{30} Id. (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of . . . opinion.” (quoting R.I. R. EVID. 702)).
that his testimony will be “based on ostensibly reliable scientific reasoning and methodology.”

31. In DiPetrillo v. Dow Chemical Co., Rhode Island adopted the “Daubert standard,” whereby a trial justice looks for any of four nonexclusive factors to support a determination of reliability of novel or complex theories or methods. In this case, the trial justice found the study of historic stone walls to be a “new bod[y] of science” and, after assessing the DiPetrillo/Daubert factors (“Daubert factors”), determined that this field was not sufficiently accepted to be considered scientifically reliable.

32. The court was skeptical of the trial justice’s conclusion that the study of historic stone walls was a novel field. Furthermore, even assuming that the field was novel and complex, the court found error in the trial justice’s “rigid” application of the Daubert factors in this case. The court stressed that the Daubert analysis is intended to be more, not less, inclusive of expert testimony in novel fields. The factors need not all be satisfied to find evidence admissible, and ultimately all that needs to be established is that “the expert arrived at his or her conclusions in a 'scientifically sound and methodologically reliable manner.'”

33. According to the court, Thorson’s theories were rooted in well-settled disciplines of earth science and his published books, while not subjected to any formal peer review process, have won awards

31. Id. at 11–12 (quoting Owens v. Silvia, 838 A.2d 881, 891 (R.I. 2003)).
32. 729 A.2d at 689 (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593–94 (1993)). The four factors are “(1) whether the proffered knowledge can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) whether the theory or technique has gained general acceptance in the relevant scientific field.” Id.
33. Morabit, 80 A.3d at 5–6, 12.
34. Id. at 12–13. The court noted that Rhode Island courts have long heard cases involving damage to such historic walls and have not shied away from calculating damages. Id. (citing Sweeney v. Brow, 100 A. 593, 595 (R.I. 1917); Chapman v. Pendleton, 82 A. 1063, 1067 (R.I. 1912)). It therefore may have been inappropriate for the trial justice to analyze the Daubert factors. See id.
35. Id. at 13–14.
36. Id. at 13 (citing Owens, 838 A.2d at 892).
37. Id. at 12 (“Satisfaction of one or more of these factors may suffice to admit the proposed evidence.”).
38. Id. at 13 (citing Owens, 838 A.2d at 892).
as well as positive feedback from his peers. Believing that a reasonable jury could find Thorson’s testimony reliable, the court concluded that the trial justice abused her discretion in excluding Thorson’s testimony on historic stone walls and that this constituted reversible error. A new trial was required on count 3 because Morabit’s lack of evidence of damages was the basis for the trial justice’s denial of Morabit’s motion to amend his pleadings and her granting of Hoag’s motion for judgment as a matter of law on this count.

B. Judgment as a Matter of Law on Count 2

When considering a motion for judgment as a matter of law, a trial justice must make all inferences, reasonably supported by the record, in favor of the position of the nonmoving party. Here, though, the trial justice based her decision to grant Hoag’s motion for judgment as a matter of law for the tree-related count 2 on inferences that did not favor Morabit. She improperly assumed that Largess’s estimate of replacement costs was based on tree values from 2005–2009. But Largess never testified to when he inquired at these nurseries about tree replacement values, nor whether he asked the nurseries for then-current tree prices or 2001 prices. There was also varied testimony as to when, exactly, the injuries took place. It was for the jury to determine the questions of fact as to when the injuries occurred and the time upon which Largess’s replacement tree values were based. As the party opposing this motion, Morabit was entitled to the inference that Largess’s estimate of damages was based on

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39. Id. at 14.
40. Id.
41. Id.
42. The court reviews de novo a trial justice’s decision on a motion for judgment as a matter of law. Id. at 10 (citing Tarzia v. State, 44 A.3d 1245, 1251 (R.I. 2012)). The decision to grant such a motion will be overturned if the court determines that the trial justice usurped the jury’s proper role in weighing evidence and assessing witnesses’ credibility. Id. at 11 (citing Franco v. Latina, 916 A.2d 1251, 1259 (R.I. 2007)).
43. Id. at 14 (citing McGarry v. Pielech, 47 A.3d 271, 285 (R.I. 2012)).
44. Id. at 15.
45. Id.
46. Id.
47. Id.
48. Id.
the time of the injury.\textsuperscript{49}

The trial justice also abused her discretion when she weighed the credibility and ultimately discounted Largess’s estimates of the number of trees removed and their quality.\textsuperscript{50} Since an assessment of damages need not be exact as long as “they are based on reasonable and probable estimates,” it was for the jury to assess Largess’s estimates and his methods of producing them.\textsuperscript{51} The trial justice’s weighing of this evidence in a Rule 50 motion was an improper invasion of the jury’s role and constituted reversible error.\textsuperscript{52} Therefore, a new trial was required on count 2.\textsuperscript{53} Having already found reversible error on counts 2 and 3, the court did not address Morabit’s other grounds for appeal.\textsuperscript{54}

C. Proper Methods of Valuing Trees

The court had never before determined how to calculate damages for trees removed in violation of section 34-20-1,\textsuperscript{55} so it set out some guidelines for the superior court to consider if damages need to be assessed upon remand.\textsuperscript{56} In essence, the court said that the proper valuation method will depend upon “the use of the trees and their intrinsic value to the property.”\textsuperscript{57} Where trees are meant to be eventually sold as commodities, damages should be based on the fair market value of the intended commodity.\textsuperscript{58} However, there is no “single uniform measure” where, as here, the trees were not meant to be sold.\textsuperscript{59} The question was whether damages in such situations should only be based on the loss, if any, of fair market value of the land caused by the removal of trees, or if some circumstances allow for awards in

\begin{itemize}
\item[\textsuperscript{49}]{Id. at 14–15.}
\item[\textsuperscript{50}]{Id. at 15–16.}
\item[\textsuperscript{51}]{Id. (quoting Butera v. Boucher, 798 A.2d 340, 350 (R.I. 2002)).}
\item[\textsuperscript{52}]{Id.}
\item[\textsuperscript{53}]{Id. at 16.}
\item[\textsuperscript{54}]{Id. at 19.}
\item[\textsuperscript{55}]{Id. at 16. The statute provides that a landowner is entitled to “twice the value of any tree . . . cut, destroyed, or carried away” without his permission. R.I. GEN. LAWS § 34-20-1 (2011).}
\item[\textsuperscript{56}]{Morabit, 80 A.3d at 16.}
\item[\textsuperscript{57}]{Id. (citing Evenson v. Lilley, 282 P.3d 610, 614 (Kan. 2012)).}
\item[\textsuperscript{58}]{Id. (citing Bangert v. Osceola Cnty., 456 N.W.2d 183, 190 (Iowa 1990)).}
\item[\textsuperscript{59}]{Id. at 17.}
\end{itemize}
excess of the change in fair market value—perhaps amounting to the full cost of restoration, as Morabit sought here.\footnote{60} Generally, other jurisdictions have awarded damages exceeding the decrease in fair market value where the removed trees had a peculiar value to the land or the landowner.\footnote{61} This condition is more often present in smaller, developed properties than in larger, unimproved ones.\footnote{62} On smaller, developed properties, it is often the case that the trees provide some specific value such as shade, privacy, ornamentation, or sentimental value.\footnote{63} Another factor is whether the trees were installed by the owner (or a previous owner) or were the products of indigenous growth.\footnote{64} Here, the trees were indigenous, and were removed from a fairly large unimproved tract of woodland.\footnote{65} While some courts have found reasons to award restoration costs in similar circumstances,\footnote{66} most courts are more reluctant.\footnote{67} The court acknowledged the trial justice’s valid concern that Largess’s estimate of damages might have exceeded not just the diminishment in value, but the total value of the unimproved land, which would thereby provide Morabit with a significant windfall.\footnote{68} The court stressed that “an overall limit of reasonableness on restoration costs” is key to a fair assessment.\footnote{69} At trial, the parties presented no evidence of the decrease in value of Morabit’s property, but such evidence will be necessary on remand to ensure that any damages award based on restoration costs is reasonable.\footnote{70}

\footnote{60}{See id. at 16–18.}
\footnote{61}{Id. at 17 (citing 25 C.J.S. Damages § 154 (2013)).}
\footnote{62}{See id.}
\footnote{63}{See id.}
\footnote{64}{Id. at 17–18.}
\footnote{65}{Id. at 3–4, 18. The court noted, however, that there was some evidence that the trees had special value to Morabit and that he had reasons to keep this part of his land undeveloped. Id. at 19.}
\footnote{67}{Id. (citing Evenson v. Lilley, 282 P.3d 610, 617 (Kan. 2012)).}
\footnote{68}{Id. at 19.}
\footnote{69}{Id. at 18.}
\footnote{70}{Id. at 19.}
COMMENTARY

In this case the court found occasion to clarify that the Daubert analysis, incorporated into Rhode Island law in DiPetrillo,71 is meant to make it easier, not harder, to admit expert testimony related to a novel field.72 This seems to be a wise approach. A novel field of science or a particular expert’s theories need not be impeccable to be admissible. Upon remand, when the trial justice admits Professor Thorson’s testimony rooted in stone wall science, opposing counsel will have the opportunity to cross-examine the witness. Counsel could then highlight for the jury the same weaknesses identified by the trial justice when she originally excluded much of the testimony. As long as expert testimony is relevant and a reasonable jury could find the underlying science reliable, a trial justice should not rob jurors of the chance to weigh the evidence according to their own judgment. So long as cross-examination can point out any novelty-related deficiencies, more expert testimony will help juries fully understand the evidence and ultimately render the fairest possible outcomes.

This case also reminds us that unless expert testimony is first determined to be based on novel or technical theories, the Daubert analysis should not come into play at all.73 The court’s apparent skepticism that stone wall science was indeed novel74 suggests that it was probably inappropriate for the trial justice to apply the Daubert factors at all. But while the court offered several reasons to doubt the novelty of stone wall science, it never clearly stated a conclusion on the issue. Perhaps it did not see the need to explicitly overturn this finding of the trial justice since it was able to reverse her decision based on the way she applied the Daubert

72. See Morabit, 80 A.3d at 13 (“[T]he factors mentioned in DiPetrillo were intended ‘to liberalize the admission of expert testimony by providing a mechanism by which parties can admit new or novel scientific theories into evidence that may have previously been deemed inadmissible.’” (quoting Owens v. Silvia, 838 A.2d 881, 892 (R.I. 2003))).
73. See id. at 12 (“We have emphasized . . . that ‘when the proffered knowledge is neither novel nor highly technical, satisfaction of one or more of these factors is not a necessary condition precedent to allowing the expert to testify.’” (quoting Owens, 838 A.2d at 892)).
74. See id. at 12–13.
analysis. It would be interesting to see whether, upon remand, the trial justice adjusts course on her finding of novelty and avoids the Daubert analysis altogether or if she will sustain her original finding but apply the test in the flexible manner prescribed by the court.

One lingering issue is how the court’s guidelines for tree valuation should be applied in light of section 34-20-1 and its mandate that the victim of unpermitted tree removal be compensated for “twice the value” of any tree so removed. Are juries supposed to calculate a fair and reasonable baseline figure, based on the court’s guidelines in this case and then simply double it? We cannot presume that the court meant to ignore the statute and its clear language. In its discussion of these guidelines, the court references cases from several other states, but does not mention whether any of those states’ approaches are controlled by a statutory damages regime similar to section 34-20-1. While the court shared the trial justice’s concern about avoiding a windfall for Morabit, the plain language of the statute suggests that the Rhode Island General Assembly was perfectly willing to let plaintiffs profit from the untimely demise of their trees in the interest of punishing wrongdoers and deterring intentional or negligent tree destruction. Indeed, the same statute provides for triple compensation for any “wood or underwood” destroyed or removed from a plaintiff’s property. It would have been helpful for the court to clarify whether this statute creates an exception to

75. Id. at 13 (“Nonetheless, even if we accept the trial justice’s assertion that the study of stone walls is a novel science, we ultimately conclude that the trial justice erred in excluding Professor Thorson’s testimony because she applied an overly rigid standard for the admission of expert opinions.”)

76. See R.I. GEN. LAWS § 34-20-1 (2011) (emphasis added). The entire section reads:

Every person who shall cut, destroy, or carry away any tree, timber, wood or underwood whatsoever, lying or growing on the land of any other person, without leave of the owner thereof, shall, for every such trespass, pay the party injured twice the value of any tree so cut, destroyed, or carried away; and for the wood or underwood, thrice the value thereof; to be recovered by civil action.

Id. (emphasis added).

77. See Morabit, 80 A.3d at 16–18.

78. Id. at 19.

79. See § 34-20-1.

80. Id.
the usual policy of “placing] the injured landowner as near as possible to his or her pre-injury position” while “not [granting] the landowner a windfall.”

CONCLUSION

The Rhode Island Supreme Court held that a trial justice should not apply the Daubert analysis too rigidly, and as long as proposed expert testimony is supported by reliable and established scientific concepts and methodologies, a trial justice should allow the testimony lest she abuse her discretion and usurp the jury’s task of weighing the evidence; that, in any case, historic stone wall science is probably not a novel field for purposes of a Daubert analysis; and that for purposes of calculating damages, trees should be valued according to whether they were intended to be sold as commodities or, if not, whether they held some peculiar value to the land or the landowner.

Erik Edson

81.  Morabit, 80 A.3d at 18 (citing Lampi v. Speed, 261 P.3d 1000, 1004 (Mont. 2011); Evenson v. Lilley, 282 P.3d 610, 617 (Kan. 2012)).
Family Law.  O’Donnell v. O’Donnell, 79 A.3d 815 (R.I. 2013). The Rhode Island Supreme Court concluded that in the absence of a written settlement, the stenographic record of an oral agreement reached in open court is sufficient to form an enforceable, binding nonmodifiable marital settlement agreement. Mere wishes to no longer be bound by such an agreement will not inform the court to set it aside, especially when the stenographic record clearly reflects the parties’ intentions to be bound.

FACTS AND TRAVEL

In December of 1999, after nineteen years of marriage, John O’Donnell ("Plaintiff") filed a complaint for divorce based on irreconcilable differences.1 The defendant, Anne Alexandra deBaun Allardt2 ("Defendant") counterclaimed for divorce, also based on irreconcilable differences.3 In 2002, three years after Plaintiff first filed for divorce, the case reached trial; however, in November of 2002 the parties requested a court hearing to formalize settlement talks.4 At the November hearing, Plaintiff requested that he be allowed to read the outlines of the agreement into the record.5 The family court justice allowed the parties’ agreement to be read into the record and warned the parties that they were bound to the outlines of the settlement agreement—therefore, the parties could not “come back to court and say, ‘Gee, we changed our mind . . . I don’t want to do that.’”6 The idea was that the outlines read into the record would be form the basis for the written agreement presented at a later hearing.7 Plaintiff’s

2.  Following the divorce action, the Defendant retook her maiden name.  Id. at 817 n.1.  For purposes of clarity, the Rhode Island Supreme Court referred to her by first name or as the Defendant throughout the opinion. Id.
3.  Id. at 817.
4.  Id.
5.  Id.
6.  Id.
7.  Id.
counsel then proceeded to go over the terms of the parties’ agreement in open court.\textsuperscript{8}

The terms of the agreement included a provision that required Plaintiff to pay for Defendant’s healthcare.\textsuperscript{9} The detailed healthcare provision specifically obligated Plaintiff “to maintain coverage for [D]efendant under the health and dental insurance plan in effect at the time of [the parties’] divorce, or provide coverage under an equivalent plan.”\textsuperscript{10} After this agreement was read into the record, the family court justice questioned both parties to determine “whether they had . . . reflect[ed] on the terms” of the agreement, “whether they were entering into the agreement voluntarily,” and “whether they understood that they would be bound by those terms.”\textsuperscript{11} With each party’s counsel present, both parties answered affirmatively to the justice’s questions.\textsuperscript{12} The justice then allowed for a continuance in order for the parties’ attorneys to prepare a written agreement incorporating the terms agreed upon at the hearing.\textsuperscript{13}

The hearing was held on December 6, 2002.\textsuperscript{14} However, the attorneys had not yet completed the written agreement.\textsuperscript{15} Instead, the attorneys for both parties agreed to enter the stenographic transcript from the November 12, 2002 hearing as a joint exhibit, “evidencing the terms of the parties’ agreement.”\textsuperscript{16} During questioning, Plaintiff “affirmed his understanding” that he would provide Defendant with healthcare in accordance with the healthcare provision and recognized that he was also obligated to pay for any copay expenses, were Defendant to have employer-
provided health insurance. When asked “whether [he] understood the terms of the agreement and if he agreed it [would] become a binding agreement between [him] and [his] wife,” Plaintiff answered affirmatively. Defendant similarly agreed that she understood the terms of the agreement reflected in the stenographic transcript. The justice approved the marital settlement, holding that the agreement “was to remain a separate and independent contract between the parties and was to be incorporated by reference but not merged into the final decree of divorce.” The final decree of divorce was entered six months later in June of 2003, and it included a specific reference to the marital settlement from the December 6, 2002 hearing.

On June 21, 2011, Defendant filed a motion to enforce Plaintiff’s obligation to pay for her health insurance under the marital settlement. Defendant alleged that Plaintiff sent her a certified letter explaining that he would no longer pay for her health insurance because he had remarried and enrolled his new spouse in his health insurance plan. In his answer, Plaintiff argued, “the mere reading of an agreement’s outline on the record, without a written agreement having been executed by the parties . . . was not binding.” Plaintiff specifically argued that the court transcript was not a valid writing to serve as a valid marital settlement agreement.

The family court justice found in favor of Defendant and held that the November 12, 2002 hearing transcript was valid as the written settlement agreement. She determined that it properly served as a written agreement because the hearing transcript was submitted as a joint exhibit and because the parties affirmed their assent at the December 6, 2002 hearing. The justice’s order and opinion, issued on January 6, 2012, “required [P]laintiff to comply
with the terms of the agreement and to obtain and maintain the health insurance pursuant to the parties’ agreement.”28 From that decision, Plaintiff timely appealed.29

ANALYSIS AND HOLDING

Upon review, the Rhode Island Supreme Court primarily addressed the question of whether a stenographic record of an oral agreement reached in open court is sufficient to form a nonmodifiable marital settlement agreement.30 The court affirmed the family court decision and held that the stenographic transcript was sufficient to form a valid marital settlement agreement.31

While noting that special attention must be paid to contractual agreements between divorcing spouses, the court explained that the record in this case showed “that the parties freely entered into and agreed to be bound by the terms that were submitted on the record in open court.”32 The parties intended for the stenographic transcript to serve as the memorialization of their agreement and, in open court, acknowledged and assented to

28. Id. at 820 (internal quotation marks omitted).
29. Id. The Rhode Island Supreme Court explained that it did not need to address the issue of whether a contract exists between parties that incorporate but do not merge an agreement into the final divorce decree because Plaintiff did not raise the issue on appeal to the court. Id. at 819 n.5.
30. Id. at 820. While this was the issue of utmost concern, the court also addressed the following: whether there was a meeting of the minds between the parties to establish mutual assent for contract formation; whether the agreement, if one had been formed, needed additional provisions included within its terms; and whether it was necessary to have a writing signed by the parties in place of the hearing transcript. Id. On the first two questions, the court found that there was sufficient mutual assent to form a contract and that the lack of additional provisions could not upend the agreement made in open court and submitted as a joint exhibit. Id. at 820, 822. On the third issue, the court held that a writing was not necessary, relying on Rule 1.4 of Family Court Rule of Practice, which only required that “[a]ll agreements of parties or attorneys touching the business of the court shall be in writing, unless orally made or assented to by them in the presence of the court.” Id. at 821–22 (alteration in original). The transcript was not a collection of stenographic notes as Plaintiff contested; rather, as the Court found, the transcript was a valid mode of agreement, given the overwhelming evidence of assent in open court. Id.
31. Id. at 820, 822.
32. Id.
its binding effect.\textsuperscript{33} The court concluded that the stenographic transcript entered as the settlement agreement was a binding and enforceable contract—one which Plaintiff was obligated to perform.\textsuperscript{34} In affirming the family court decision to order Plaintiff to provide health insurance to his ex-wife pursuant to their agreement, the court remarked, “[i]t is not the function of this Court, or the Family Court, to set aside [an agreement] simply because a party no longer wishes to be bound by its terms or is unhappy with the result.”\textsuperscript{35} As such, Plaintiff’s new marriage did not exempt him from the healthcare provision of his marital settlement agreement.\textsuperscript{36}

\textbf{COMMENTARY}

In holding that the stenographic record coupled with evidence of mutual assent to an agreement, the Rhode Island Supreme Court made a reasonable ruling. The court was presented with insurmountable evidence that both Plaintiff and Defendant freely and voluntarily entered into a marital settlement. The lack of a writing drawn up by the parties’ attorneys was not enough to overcome the evidence. Not only did both parties testify under oath to understanding and assenting to the terms of the marital settlement, they also agreed to enter the stenographic record as a joint exhibit as the memorialization of their fully formed agreement.\textsuperscript{37} This evidence left the court with no choice but to enforce the healthcare provision as a binding and enforceable contract to which Plaintiff must adhere.\textsuperscript{38} As Justice Goldberg put it, Plaintiff could “not retreat from that agreement simply by entering into a new marriage.”\textsuperscript{39} In other words, a party cannot divorce himself from the obligations of his first marital settlement merely by wishing it away.

This decision puts attorneys representing divorcing parties in a creative position. On the one hand, allowing a hearing

\begin{itemize}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.} at 822 (first alteration in original) (quoting Vanderheiden v. Marandola, 944 A.2d 74, 78 (R.I. 2010)) (internal quotation marks omitted).
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{See id.}
\item \textsuperscript{39} \textit{Id.}
\end{itemize}
transcript to serve as a valid marital settlement agreement will lift the burden on attorneys to compose a written agreement. Undoubtedly forming a written and signed agreement is a contemptuous process in a divorce action. On the other hand, the newfound ability to enter hearing transcripts as nonmodifiable, binding marital settlement agreements offers attorneys greater liberty to forego the fine-tooth-combing process of composing a written settlement agreement. This may result in agreements that present future contractual disputes—this case serves as such an example. Yet the principle of freedom of contract is unlikely to be lost, and attorneys looking to ensure optimal results for their clients are likely to still craft a written agreement.

With this in mind, the court set a considerably high standard for parties looking to submit a hearing transcript as a marital settlement agreement in lieu of a written agreement. Not only must the agreement comport with Rule 1.4’s requirement of assent in open court, but there also must be clarity as to the parties’ intentions to be bound. The court has lifted part of an attorney’s burden in a divorce action by allowing a stenographic transcript as a binding marital settlement agreement. Yet, the written agreement has little to fear, as parties looking to avoid future litigation should still prefer to contract in writing. As with most legal precedent, only time will tell how attorneys use this new tool for crafting marital settlement agreements.

CONCLUSION

In affirming the decision of the family court, the Rhode Island Supreme Court held that in the absence of a written and signed settlement agreement, a stenographic transcript can serve as sufficient evidence of a binding and enforceable contract. In other words, a marital settlement, agreed to in open court, will not fail for lack of a drafted writing where the weight of the evidence indicates mutual assent and a presentable “writing” is available.

Edward Pare
Remedies. Carrozza v. Voccola, 90 A.3d 142 (R.I. 2014). The proper method to calculate compensatory damages in an action for slander of title is to subtract the property’s fair market value on the day that the encumbrance on the property’s title was removed from the property’s highest achieved fair market value during the time period when the property was subject to slander. This method of valuation applies regardless of whether the owner of the property in question had an actual buyer who was ready, willing, and able to purchase the property at the time that the property had reached its highest value.

FACTS AND TRAVEL

In November, 2002, Frederick Carrozza, Sr. (“Frederick Sr.”), a Counterclaim Defendant, filed a petition in the superior court seeking to enforce a trust over four properties that were part of his deceased son’s, Frederick Carrozza, Jr.’s (“Frederick Jr.”), estate. On November 15, 2002, in connection with his petition, Frederick Sr. filed notices of lis pendens on each property at issue. In response to Frederick Sr.’s filings, the Counterclaimants filed a claim for slander of title, alleging that Frederick Sr. filed the notices of lis pendens maliciously. The Counterclaim Defendants

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1. Since the court’s opinion focuses on the original Defendants’ counterclaim for slander of title brought against the original Plaintiffs, for clarity, in this survey, the original Defendants are referred to as the “Counterclaimants” and the original Plaintiffs are referred to as the “Counterclaim Defendants.” Carrozza v. Voccola, 90 A.3d 142, 146 n.1 (R.I. 2014).

2. Id. at 146–47. The properties which were at issue in this case were: “[(1)] Unit 47 River Farms Condominium, West Warwick, Rhode Island; [(2)] 1101 Post Road, Warwick, Rhode Island; [(3)] Prospect Hill Street in Newport, Rhode Island; and [(4)] 103-111 Bellevue Avenue, Newport, Rhode Island.” Id. at 147 n.2 (quoting Carrozza v. Voccola, 962 A.2d 73, 74 (R.I. 2009)).

3. Id. at 147. The notice of lis pendens was not removed until February of 2009, despite both the superior court and the Supreme Court of Rhode Island’s holdings that there was no resulting trust in the properties at issue. See id.

4. Id. at 147. The Counterclaimants included: the executor of Frederick
did not remove the notices of lis pendens “until February of 2009,” even though the superior court had previously granted the Counterclaimants’ motion for summary judgment, holding that there was no resulting trust associated with any of the properties at issue. In December of 2010, the Superior Court, after a jury-waived trial, held the Counterclaim Defendants liable for slander of title because the court found that Frederick Sr. did file the notices of lis pendens maliciously, and, therefore, the court awarded the Counterclaimants: compensatory damages; prejudgment interest accrual from the date the original suit was filed; attorneys’ expenses; attorneys’ fees; and punitive damages.

The trial court’s compensatory damage award represented the Jr.’s estate (Michael Voccola), Frederick Jr.’s widow (Angela Giguere), and Frederick Jr.’s adopted daughter (Christine Giguere–Carrozza). See id. at 146 n.1.

5. Id. at 147.

6. Id. at 148–49. Frederick Sr. actually filed the notices of lis pendens; however, the trial court also held his living children liable for slander of title, even though they were not joined as parties to the action when Frederick Sr. filed the notices. Id. at 150. The court upheld the trial justice’s determination that Frederick Sr.’s living children were also liable for slander of title because the court reasoned that Rule 15(c) of the Rules of Civil Procedure can be applied so that the amended complaint (that joined Frederick Sr.’s living children as parties to the action) can relate back to the date Frederick Sr. filed the notices of lis pendens. Id. at 172–74. Thus, it was possible to ascribe Frederick Sr.’s malice in filing the lis pendens to his living children. Id. at 172.

Furthermore, the court upheld the trial justice’s conclusion that Frederick Sr.’s living children were liable for slander of title because the children essentially “adopted the notices of lis pendens through their own actions (or lack of action) subsequent to being joined as plaintiffs in the case.” Id. The children “affirmatively embraced the [l]is [p]endens and the consequences that followed therefrom” because they did not “renounce an interest in the properties at issue,” even though they knew that there was no support to their claim. Id. at 173. Moreover, the children affirmatively ratified the notices at trial by objecting to the “Defendants’ Motion to Quash and Remove Lis Pendens” in an effort to assert their interest in the properties at issue. Id. Therefore, the court held that the children possessed the malice necessary to be held liable for slander of title. Id. at 173–74. The trial justice did not improperly attribute Frederick Sr.’s malice to his children; rather, he properly found the children possessed malice themselves, since they “affirmatively embraced” the notice of lis pendens with the knowledge that their claim to title was unsubstantiated. Id. at 172 n.33, 174. (internal quotation marks omitted). Therefore, the court also held the children liable to pay the compensatory damages; however, the punitive damages were awarded only against Frederick Sr. Id. at 150, 173–74.
properties' greatest loss in value during the time that the properties were subject to slander of title; the trial justice measured the damages by subtracting the properties' fair market value on the day that the notices of lis pendens were removed from the properties' highest attained fair market value during the time the properties were encumbered by the notices of lis pendens.\(^7\) In February, 2011, the superior court denied the Counterclaim Defendants’ motion for a new trial.\(^8\) The Counterclaim Defendants appealed the superior court’s judgment.\(^9\)

On appeal, the Counterclaim Defendants disputed all of the superior court’s rulings on damages.\(^10\) Specifically, the Counterclaim Defendants argued that the trial justice’s measure of compensatory damages was erroneous; they proposed a different method of calculation (which, if applied here, would result in the finding that the Counterclaimants did not sustain any compensable loss).\(^11\) The Counterclaim Defendants also asserted that the trial justice’s award of prejudgment interest was incorrect because the justice calculated the interest from the date the suit was filed, rather than from the date of injury (the date when the properties at issue had reached their highest value, according to the trial court).\(^12\) Finally, the Counterclaim Defendants argued that the trial justice erred in calculating the punitive damage award because he “failed to take [Frederick Sr.’s] current financial condition into account when assessing punitive damages” and ultimately awarded an amount of punitive damages that was “excessive as a matter of law.”\(^13\)

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7. Id. at 163.  
8. Id. at 147.  
9. Id.  
10. See id. at 150–51. The Counterclaim Defendants also disputed the superior court’s finding that Frederick Sr. filed the notices of lis pendens maliciously. Id. at 150.  
11. Id. The Counterclaim Defendants argued that the court should have measured the Counterclaimants’ damages based on the difference in the properties’ values from “the time the notices of lis pendens were filed in 2002 [to] the time at which clear title was restored in 2009.” Id.  
12. Id.  
13. Id. at 150–51 (alteration in original) (internal quotation marks omitted).
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ANALYSIS AND HOLDING

A. Compensatory Damages

To prove a claim for slander of title, the complainant must show that he or she suffered an “actual pecuniary loss.” However, because the tort of slander of title causes harm of an intangible nature, it is difficult to value a party’s actual loss in

14. Id. at 160 (quoting Peckham v. Hirschfeld, 570 A.2d 663, 666–67 (R.I. 1990)) (internal quotation marks omitted). In a claim for slander of title, the complainant must also prove by a preponderance of the evidence “(1) that the alleged wrongdoer uttered or published a false statement about the plaintiff’s ownership of real estate [;]” and “(2) that the uttering or publishing was malicious.” Id. at 151–52 (alterations in original) (quoting Beauregard v. Gouin, 66 A.3d 489, 494 (R.I. 2013)) (internal quotation marks omitted). On appeal the Counterclaim Defendants also argued (in addition to their contention that the trial justice erred in calculating compensatory damages) that Frederick Sr. had a colorable claim to title of the properties, since he had provided funds with which to purchase the properties. Id. at 152–53. Next, they argued the trial justice misconceived Frederick Sr.’s testimony regarding his intention in filing the lis pendens. Id. Finally, they argued that the trial justice impermissibly shifted the burden of proof from the Counterclaimants to the Counterclaim Defendants by requiring the Counterclaim Defendants to prove Frederick Sr. did not act with malice. Id. at 153.

The court gave deference to the trial justice’s findings of fact regarding Frederick Sr.’s credibility and intent to determine whether Frederick Sr. acted with malice. See id. 152–54. The court found no evidence in the record that indicated the trial justice erred in holding the Counterclaim Defendants liable for slander of title and found nothing to support the contention that the trial justice misconceived or overlooked any material evidence. Id. at 151, 158. The court held that the evidence in the trial record clearly supported the finding that Frederick Sr. “could not honestly have believed in the existence of the right he claim[ed]” in the properties at issue. Id. at 155 (quoting Peckham v. Hirschfeld, 570 A.2d 663, 667 (R.I. 1990)) (internal quotation marks omitted). Frederick Sr.’s claim that he had provided the funds used to purchase the properties was wholly lacking in evidentiary support. Id. Further, the Counterclaimants did fulfill their burden to prove that Frederick Sr. acted with malice, and thus, the trial justice did not improperly shift the burden of proof onto the Counterclaim Defendants. Id. at 155–56. The court reasoned that because Frederick Sr.’s contrived and inconsistent statements were the only evidence offered to prove Frederick Sr.’s interest in the properties at issue, the trial justice did not err in requiring Frederick Sr. to further substantiate his testimony. Id. at 156. Finally, the court rejected the Counterclaim Defendants’ assertion that malice requires an intention to frustrate the property’s development or to injure the property; a false filing of a notice of lis pendens is sufficient to give rise to a claim for slander of title. Id. at 155, 157. Therefore, the Court affirmed the trial justice’s judgment and held the Counterclaim Defendants liable for slander of title. Id. at 158.
such an action. Here, the court resolved this issue by adopting a bright line formula to calculate compensatory damages in an action for slander of title.\textsuperscript{15} The court’s decision was guided by the policy that the purpose of awarding compensatory damages is to make an injured party whole.\textsuperscript{16} Therefore, the court’s measure of damages should reflect the amount that would be needed to put the injured party back into the position that he or she would have been had the wrong not occurred.\textsuperscript{17}

The trial justice determined that the compensatory damages in an action for slander of title should be equal to the loss in value that the properties sustained during the time that the notices of lis pendens were in effect.\textsuperscript{18} The trial justice calculated the properties’ loss in value by subtracting the properties’ fair market value on the date the lis pendens was removed from the highest value the properties attained during the time period that the notices of lis pendens were in force.\textsuperscript{19} The Counterclaim Defendants argued that the trial justice’s compensatory damage calculation was incorrect because it did not reflect the Counterclaimants’ actual loss.\textsuperscript{20} The Counterclaim Defendants asserted that the Counterclaimants did not suffer any loss because they did not have a ready buyer for the properties and had continued to “enjoy[] the profits of continued ownership of the properties (receiving rental income, for example)” during the time the notices of lis pendens were in effect.\textsuperscript{21} The Counterclaimants, on the other hand, argued that the trial court’s valuation was proper because the notices of lis pendens rendered their properties inalienable, thereby preventing the Counterclaimants from collecting any possible profits that may have been gained during the time the notices were in force.\textsuperscript{22} Further, the Counterclaimants contended that the measure of compensatory damages should not depend on whether a property owner has a ready buyer because the property owner “should not be faulted for

\textsuperscript{15} See id. at 163.
\textsuperscript{16} See id. at 162.
\textsuperscript{17} See id.
\textsuperscript{18} Id. at 158. Real estate appraiser, Paul Hogan, determined the properties’ fair market values. Id. at 147.
\textsuperscript{19} Id. at 158–59.
\textsuperscript{20} Id. at 159.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
failing to sell unmarketable properties.”

The court conducted a de novo review to determine the proper method to calculate the compensatory damage award; after a thorough review of the record, the court upheld the trial justice’s method of valuation.

The court determined the value of the Counterclaimants’ loss by assessing the type of injury that they sustained. The court noted that “[t]he thrust of the tort of . . . slander of title is protection from injury to the salability of property,” thus “pecuniary loss in this context includes that from the impairment of vendibility or value by the disparagement . . . .” In its essence, slander of title renders a complainant’s title to property unmarketable. The injured party is deprived of the ability to do what he or she wishes with his or her own property; the party cannot sell, gift, or even refinance the property. The injured party effectively loses the opportunity to realize any gains from the encumbered property. Thus, the court held that the Counterclaimants’ loss is most accurately approximated by determining the amount of potential profit the Counterclaimants would have realized had the properties not been wrongfully deprived of marketable title while “held hostage” by the notices of lis pendens. This measure would effectively put the Counterclaimants back in the position they would have been had the wrong not occurred and, thus, would properly compensate the Counterclaimants for their loss.

The court held that the trial justice’s compensatory damage calculation was correct because it awarded the Counterclaimants the greatest amount of profit that they could have realized had the
properties' titles been alienable at the most lucrative time during the period when the properties were subject to slander.\textsuperscript{32} Thus, the court reasoned that the award properly compensated the Counterclaimants for the loss of their ability to profit from the increased market value of their properties.\textsuperscript{33} Therefore, the trial justice's compensatory damage award “properly accounted for the real harm suffered by the [C]ounterclaimants.”\textsuperscript{34}

Further, the court held that it is not necessary for a complainant to show that he or she had an actual purchaser ready to buy the property “for the damages to be calculated from the date the properties involved in the case were at their highest value during the time period when the properties were subject to the notices of \textit{lis pendens},” because the Complainant's loss still “exist[s] even where no purchaser is involved, as where the plaintiff is harmed by a loss of value to the property.”\textsuperscript{35} The court refused to “create a situation whereby the owner of a property encumbered by a notice of lis pendens would be placed in the position of having to constantly attempt to sell a property even though he or she could not provide a clear marketable title.”\textsuperscript{36} If the court required a complainant to show that they had a prospective buyer for the property, the complainant would be forced to “continuously look for buyers” even though “it is a fruitless endeavor to attempt to sell a property with a cloud on its title.”\textsuperscript{37} The court reasoned that the Counterclaimants suffered a pecuniary loss even though they did not have a prospective buyer ready to purchase their properties since they were “rendered unable to sell or refinance their property for a period of approximately seven years solely due to the malicious acts of the [C]ounterclaim [D]efendants.”\textsuperscript{38}

Moreover, the court found that the trial justice's method of

\begin{itemize}
\item \textsuperscript{32} \textit{Id.} at 163.
\item \textsuperscript{33} \textit{See id.} at 160.
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.} at 161 (quoting C.J.S. \textit{Libel and Slander; Injurious Falsehood} § 321, at 419 (2005)). Attorney Michael Voccola testified that “he saw no reason to go through the motions of attempting to sell any of the properties when he could not ‘provide a clean, marketable and insurable title.’” \textit{Id.} at 159 (internal quotation marks omitted).
\item \textsuperscript{36} \textit{Id.} at 162.
\item \textsuperscript{37} \textit{Id.} at 163.
\item \textsuperscript{38} \textit{Id.} at 161.
\end{itemize}
valuation was warranted because of the intangible nature of the tort of slander of title.\(^{39}\) Further, here, and in all cases where slander of title is proven, an actual injury has occurred—the property at issue has been “held hostage by the lis pendens,” which inhibits the property’s alienability.\(^{40}\) It is necessary to compensate the injured party for the loss of the right “to freely decide what to do with the properties,” which can only be accomplished by putting the injured party back in the same “position the person would have occupied had” the property’s title never been subject to slander.\(^{41}\) Therefore, the court held that the trial justice’s method of calculation, which compared “the highest value of the properties during the time period they were subject to the notices of lis pendens with the value of the properties on the date the notices of lis pendens were removed,” was the proper method to calculate loss in an action for slander of title because that measure puts the complainant in the closest possible position to that which he or she would have occupied had the wrong not occurred.\(^{42}\) Thus, the trial court’s formulation did remedy the Counterclaimants’ harm.\(^{43}\)

B. Pre-judgment Interest

The court held that the trial justice did not err in calculating the prejudgment interest beginning on the day that the notices of lis pendens were filed in 2002, rather than from the date the properties were at their highest value in 2005, as urged by the Counterclaim Defendants.\(^{44}\)

The court reasoned that prejudgment interest should begin to accrue “from the date the cause of action accrued” pursuant to the express command in the governing statute, section 9-21-10(a)

\(^{39}\) Id. at 162. A claim for slander of title requires that the accused acted with malice—an “intent to deceive or injure.” Id. (quoting Arnold Rd. Realty Assocs., LLC v. Tiogue Fire Dist., 873 A.2d 119, 126 (R.I. 2005)) (internal quotation marks omitted).

\(^{40}\) Id.


\(^{42}\) Id. at 160–63.

\(^{43}\) Id.

\(^{44}\) Id. at 164.
of the Rhode Island General Laws. Here, the court found that because the notice of lis pendens effectively held the Counterclaimants’ property hostage “from the moment the notices of lis pendens were filed,” a “cause of action for slander of title accrued at the moment the notices of lis pendens were filed.”

Therefore, the prejudgment interest properly began to accrue from the date the notices of lis pendens were filed in November 2002.

C. Punitive Damages

The court rejected Frederick Sr.’s argument that the trial justice erred in awarding punitive damages because Frederick Sr. lacked the ability to pay the award. The court did not find any precedent to support Frederick Sr.’s proposition that a party’s “ability to pay” is a necessary prerequisite to hold the party liable for punitive damages. Furthermore, the court reasoned that Frederick Sr. cannot now complain that he is unable to pay the award when he had every opportunity at trial to present evidence to show his inability to pay, but presented nothing to substantiate such claims. If a party liable to pay punitive damages wishes to have the award mitigated by his or her financial circumstances, then that party has the burden to prove his or her inability to pay. Here, the court found that Frederick Sr. conveniently chose not to offer evidence of his poor financial condition because “evidence of his wealth was helpful to his theory of the case.” The court did not allow Frederick Sr. to “have his cake and eat it too” and, thus, held that there was no indication the trial justice

45. Id. (quoting R.I. Gen. Laws § 9-21-10(a) (2012)). The pertinent language in section 9-21-10(a) reads “there shall be added by the clerk of the court to the amount of damages interest at the rate of twelve percent (12%) per annum thereon from the date the cause of action accrued.” § 9-21-10(a) (emphasis added).
46. Carrozza, 90 A.3d at 164.
47. Id.
48. Id. at 168–69.
49. Id. at 167.
50. Id. at 167–68; see also Greater Providence Deposit Corp. v. Jenison, 485 A.2d 1242, 1245 (R.I. 1984) (holding the defendant liable to pay the punitive damages ordered in the lower court where he “was on notice that punitive damages were being sought, and he made no effort to introduce any evidence of his modest means”).
51. Carrozza, 90 A.3d at 167–68.
52. Id. at 168 (internal quotation marks omitted).
misconceived any evidence or abused his discretion in determining that Frederick Sr. was able to pay the punitive damages ordered.53

However, the court did hold that the trial court’s punitive damage award of $845,000 was excessive because it exceeded the amount required to deter like behavior in the future.54 The court ultimately held Frederick Sr. liable to pay $422,500 in punitive damages (one-half of the trial justice’s award) because that amount would be “adequate to punish’ Frederick Sr. and deter future misuse of notices of lis pendens.”55

COMMENTS

The court’s valuation of compensatory damages in an action for slander of title, while appropriate on the facts of the case at bar, has the potential to yield both too generous and too stringent results. The court’s method of calculation reveals the need for a case-by-case determination of damages in actions for slander of title.56 Given that the tort of slander of title causes intangible harm, it was necessary for the court to create some artificial guideline to determine the value of the loss suffered by a person whose property is maliciously encumbered.57 However, the court’s formula will result in making future complainants either more than whole or less than whole.58

The court’s formula may over-compensate future complainants because he or she will be compensated whether or not he or she suffered an actual loss, since the formula compensates the complainant for his or her loss of ability to sell the property at issue, regardless of whether he or she ever intended to sell that property. Further, the formula may put the complainant in a better position than he or she would have been 53. Id. at 168–69.

54. Id. at 169. Again, the compensatory damages ordered in this case were equal to $630,000; thus, the amount of the trial justice’s punitive damage award was greater than the amount of compensatory damages themselves. Id. at 149.

55. Id. at 169 (quoting Minutelli, 668 A.2d at 319).

56. See id. at 161–62.

57. Encumbered by a notice of lis pendens or whichever utterances or publications constituted slander of title such that a court will have to calculate compensatory damages.

58. See id. at 161–62.
had the property's title never been subject to slander because the court's compensatory damage formula does not expressly take into account whether, or when, the injured party had a ready buyer to purchase the property. Rather, the formula indiscriminately awards the injured party the greatest diminution in the property's fair market value during the period of time the title was rendered unmarketable. Even if the complainant did not or could not have found a ready buyer willing to pay the highest market value ascribed to the property, the complainant would still recover the maximum unrealized profit even though, in reality, the complainant would not have realized such a large profit.

Therefore, the court's holding may function to deter persons from asserting an interest in a property because it is possible to be held liable to pay a windfall judgment to the property's owner if the interest asserted in the property is not substantiated. Future litigants should take caution in pursuing claims in which they assert an interest in another's property—where the interest asserted is knowingly improper, there is a risk that the party may be held liable for damages in an amount that could even exceed the value of that party's asserted interest in the property at issue.

Simultaneously, the court's formula may undercompensate future complainants because it only pays damages to a complainant if the property at issue lost value during the time its title was subject to slander. The formula does not account for situations in which the property's value remains the same. This is problematic because, even though the complainant can sell the property at no loss once the title is relieved from slander, the complainant was still wrongfully deprived of his or her alienable title for a period of time. Therefore, the complainant would still be

59. See id. In this case the notices of lis pendens were filed on the properties for seven years; the price of a property can drastically fluctuate over such a large period of time, as can the owner's prospects of finding a buyer. See id.

60. See id. at 161.

61. For example, here, Frederick Sr. was held liable to pay a large amount of punitive damages, attorney's fees, attorney's expenses, and prejudgment interest; since Frederick Sr. was not asserting a full interest in the properties at issue, it is possible that he, in the end, had to pay a larger sum in damages than he would have recovered had his claim to title been held to be legitimate. See id. at 149.
harm and deserving of compensation. Further, the formula would also undercompensate a complainant where the complainant had a buyer for the property willing to pay more than the market value for the property because the formula does not take prospective buyers into account.

The court’s efforts to protect the Counterclaimants in this case reflect its commitment to protect individual property rights. However, it is possible that the court’s holding was influenced by the specific, sympathetic facts of this case, which may have lead the court to implement an arbitrary bright-line formula to calculate compensatory damages even though a case-by-case analysis would be more appropriate. In this case, the notices of lis pendens encumbered the properties at issue for many years, despite the fact that the Counterclaim Defendants knew that their claim to title was unsubstantiated. This may have influenced the court’s decision because the Counterclaimants were dispossessed of marketable title to four of their properties and, thus, were “deprived of their rightful inheritance” for over seven years. Further, the court was likely sympathetic to the Counterclaimants, Frederick Jr.’s widow and adopted daughter who, in the wake of Frederick Jr.’s death, could have benefitted from selling the properties, as evidenced by the fact that they did try to find a buyer in an effort to liquidate their assets. To make matters worse, as discussed, Frederick Sr. was not a sympathetic witness due to his perceived lack of veracity throughout the trial. In an effort to make the sympathetic Counterclaimants whole, the court implemented an arbitrary formula that is capable of producing inconsistent and inequitable results. In future cases,

62. See id. at 161–62.
63. See id.
64. Further, because this was a jury-waived trial, the trial justice was responsible for determining factual issues; the sympathetic nature of the facts of this case likely had a strong impact on the trial justice’s ultimate determinations. See id. at 147.
65. See infra notes 4–6 and accompanying text.
67. See id. at 147, 159, 165. It is important to note that the trial justice found that the only buyer who testified at trial on behalf of the Counterclaimants was not a serious purchaser; instead, the trial justice “found that the testimony of the only interested buyer was not credible and that the buyer had merely been engaging in ‘tire-kicking.’” Id. at 159.
68. See id. at 154.
this method of calculation may overcompensate or undercompensate the injured party.

The intangible harm caused by slander of title makes it nearly impossible to avoid over or under compensation because it is difficult to calculate the actual damages the injured party sustained. Therefore, in such actions, one party is bound to get a windfall. This supports the contention that such damages are better decided on a case-by-case basis so that the facts of each individual case may guide a court’s calculation in order to best approximate the actual loss the injured party suffered.

CONCLUSION

The Rhode Island Supreme Court held that the proper method to calculate compensatory damages in an action for slander of title is to subtract the value of each property when the notices of lis pendens were removed from the highest value of each property during the time period that the notices of lis pendens were in force.69 This method of calculation will apply regardless of whether the injured party had an actual buyer ready to purchase the property at that time.70 In addition to compensatory damages, the court held that a party liable for slander of title may also be ordered to pay punitive damages in an amount sufficient to deter future misconduct, regardless of the party’s ability to pay.71

Given the sympathetic facts of this case, the Rhode Island Supreme Court’s holding likely was intended to maximize the compensation provided to the injured property owner and, simultaneously, to deter malicious findings against a person’s property ownership interest. However, the court’s artificial construction of the proper measure of compensatory damages

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69. Id. at 149.
70. Id. at 162. Further, the court held that prejudgment interest will be calculated pursuant to section 9-21-10(a) of the Rhode Island General Laws, which expressly states that prejudgment interest begins to accrue “from the date the cause of action accrued,” and not the date of injury. Id. at 164 (quoting R.I. GEN. LAWS § 9-21-10(a) (2012)).
71. Id. at 166. Any punitive damage award which exceeds the amount necessary to deter future misconduct is excessive and will be reduced. See id. at 169. An individual’s ability to pay punitive damages will only be taken into account to mitigate the amount of punitive damages awarded if the liable party offers probative evidence of his or her financial circumstances at the appropriate time. See id. at 167.
could result in inequitable results, such as windfall judgments that chill future filings of lis pendens or, conversely, vastly inadequate judgments that undercompensate aggrieved property owners.72

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72.  See infra notes 56–71 and accompanying text.
Tort Law. *Woodruff v. Gitlow*, 91 A.3d 805 (R.I. 2014). Upon appeal of a motion for summary judgment, the Rhode Island Supreme Court used an ad hoc approach to determine that an independent medical examiner hired by an employer to review employee medical documents does not establish a traditional physician-patient relationship. Additionally, there is no imposition of a duty of care on independent medical examiners when the review is only of medical documents and not a physical examination of the employee.

FACTS AND TRAVEL

In September 2008, Michael Woodruff (“Woodruff”), who had been a commercial pilot for approximately twenty years, was involved in a car accident that required him to submit his second-class medical certificate to the Federal Aviation Administration (“FAA”).\(^1\) He was subsequently placed on temporary leave.\(^2\) One year later, Woodruff submitted a request to the FAA for reinstatement.\(^3\) In response to Woodruff’s reinstatement request, the FAA had its chief psychiatrist, Dr. Charles Chesanow (“Dr. Chesanow”) review Woodruff’s medical records to determine if Woodruff would meet standard criteria to return as a commercial pilot.\(^4\) Dr. Chesanow determined from his examination of Woodruff’s medical records that Woodruff was dependent on alcohol and, therefore, required recovery for such dependence.\(^5\)

After such determination, the FAA retained psychiatrist Dr. Stuart Gitlow (“Dr. Gitlow”) to offer a second opinion on Woodruff’s medical records.\(^6\) At the subsequent trial, Dr. Gitlow stated that he had only received portions of Woodruff’s medical

\(^1\) Woodruff v. Gitlow, 91 A.3d 805, 808 (R.I. 2014).
\(^2\) *Id.*
\(^3\) *Id.* (citing 14 C.F.R. § 61.3(c) (2014) (concerning medical certificate requirements)).
\(^4\) *Id.*
\(^5\) *Id.*
\(^6\) *Id.*
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records and that his expert opinion derived from only those files that were provided to him by the FAA and not any physical examination of Woodruff.\(^7\) In September 2009, Dr. Gitlow determined that Woodruff was alcohol dependent in concurrence with Dr. Chesanow's original review.\(^8\) As a result of the findings, the FAA refused to reinstate Woodruff as a commercial pilot.\(^9\)

In November 2010, Woodruff sued Dr. Gitlow in Rhode Island Superior Court under the theory that Dr. Gitlow had acted negligently in conducting a review of Woodruff’s medical records.\(^10\) Alleging that there was no duty of care and that his review was protected under the state’s Anti-SLAPP statute,\(^11\) Dr. Gitlow moved for summary judgment.\(^12\) The superior court denied Dr. Gitlow’s motion after determining that a genuine issue of material fact existed as to the relationship between Dr. Gitlow and Woodruff.\(^13\)

ANALYSIS AND HOLDING

The court first addressed whether the superior court trial justice erred in finding that there was a genuine issue of material fact regarding the relationship between Dr. Gitlow and Woodruff.\(^14\) Dr. Gitlow argued that his analysis for the medical review was based solely on the files the FAA had provided to him.\(^15\) Dr. Gitlow further argued that, not only did he not conduct a physical examination on Woodruff, but he did not have any

\(^7\) Id. Dr. Gitlow had received Woodruff’s “hospital, medical, and driving records, along with FAA forms that had been filled out by Woodruff.” Id.

\(^8\) Id.

\(^9\) Id.

\(^10\) Id.

\(^11\) “The legislature finds and declares that full participation by persons and organizations ... are essential to the democratic process ... that such litigation is disfavored and should be resolved quickly with minimum cost to citizens who have participated in matters of public concern.” R.I. GEN LAWS § 9-33-1 (1995); see Woodruff, 92 A.3d at 808.

\(^12\) Woodruff, 91 A.3d at 808.

\(^13\) Id. at 808–09.

\(^14\) Id at 810. In establishing its standard of review, the court determined that it would affirm the judgment of the superior court only if it found that, in the light most favorable to Woodruff (the nonmoving party), there was no genuine issue of material fact. Id. at 810 (quoting Reynolds v. First NLC Fin. Servs., LLC, 81 A.3d 1111, 1115 (R.I. 2014)).

\(^15\) Id.
direct contact with Woodruff when conducting his review. The court agreed with Dr. Gitlow and found that there was no traditional physician-patient relationship between Dr. Gitlow and Woodruff. In addition, the court concluded that the trial justice should have resolved the issue instead of attempting to send the issue to the jury since “the facts suggest[ed] only one reasonable inference.” Therefore the trial justice should have resolved the issue as a matter of law.

After it determined that no traditional physician-patient relationship existed, the court then addressed the second issue as to whether Dr. Gitlow owed Woodruff a duty of care under an alternative theory. In order for Woodruff’s negligence claim to survive, he had to show that Dr. Gitlow owed him a duty of care, and that Dr. Gitlow breached that duty. Dr. Gitlow argued that he did not owe a duty of care to Woodruff because he had been retained as an independent medical examiner and rendered his expert opinion based solely on the files that the FAA provided without any contact with Woodruff. The court considered decisions from other jurisdictions and determined that none of them addressed the issue of duty when an independent medical examiner had not physically examined the patient during the review. The court also failed to find guidance in the Restatement (Second) of Torts § 552, which limits liability “to loss suffered . . . by the person or one of the limited group of persons for whose benefit the guidance he intends to supply the

16. *Id.*
17. *Id.*
18. *Id.* at 811.
19. *Id.* (quoting Berard v. HCP, Inc., 64 A.3d 1215, 1218 (R.I. 2013)). “We disagree with the trial justice . . . and are of the opinion that the undisputed facts lead only to one reasonable conclusion. We conclude . . . that the record does not establish a traditional physician-patient relationship.” *Id.*
20. *Id.*
21. *Id.* (quoting Wyso v. Full Moon Tide, LLC, 78 A.3d 747, 750 (R.I. 2013)).
22. *Id.*
23. *Id.* at 811–13; see also Peace v. Weisman, 368 S.E.2d 319, 321 (Ga. Ct. App. 1988) (holding that the doctor had a duty to not injure the patient in the course of an examination); Reed v. Bojarski, 764 A.2d 433, 445 (N.J. 2001) (holding that an independent medical examiner has a duty to his or her patients “to the extent of the examination and in communicating its outcome”).
24. *Id.* at 814; RESTATEMENT (SECOND) OF TORTS § 552 (1977).
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information.” In response to this analysis, the court reasoned that, because the FAA hired Dr. Gitlow for its own purposes, the FAA was the only group to benefit from Dr. Gitlow’s report, not Woodruff.

Due to a lack of direction from other jurisdictions and the Restatement, the court took an ad hoc approach to the case. The court then applied the five factors from Banks v. Bowen’s Landing Corp. When the court applied the Banks factors to the facts, it determined that Woodruff’s alcohol dependence caused him the harm, not Dr. Gitlow’s review reporting the dependence. Additionally, in its analysis of the fourth Banks factor, the court found that holding Dr. Gitlow responsible for his report would “do little to prevent future harm because the harm Woodruff suffered arose from the conclusion that he was alcohol dependent; a conclusion the FAA had already reached.” Lastly, the policy concerns raised by the fifth Banks factor exposed great concern for the community as placing liability on independent medical examiners may alter their neutrality and “could result in a chilling effect on their willingness to serve as independent evaluators.” Based on the application of the Banks factors to the facts of this case, the court ultimately declined to impose any duty of care on Dr. Gitlow as an independent medical examiner.

COMMENTARY

In this matter of first impression, the Rhode Island Supreme Court refused to impose a bright-line rule but rather adopted an

25. Restatement (Second) of Torts § 552.
27. Id. (quoting Ouch v. Khea, 963 A.2d 630, 633 (R.I. 2009)).
28. Id. at 815; Banks v. Bowen’s Landing Corp., 522 A.2d 1222 (R.I. 1987). The Banks factors include: (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff has suffered an injury, (3) the closeness of connection between the defendant’s conduct and the injury suffered, (4) the policy of preventing future harm, and (5) the extent of the burden to the defendant and consequences to the community for imposing a duty to exercise care with resulting liability for the breach. Id. at 1125.
29. Woodruff, 91 A.3d at 815.
30. Id. at 816 (emphasis added). The FAA sought Dr. Gitlow for a second opinion of Dr. Chesanow’s finding. Id.
32. Woodruff, 91 A.3d at 816.
ad hoc approach to the issue of whether an independent medical examiner has a duty of care when only reviewing a patient’s medical files. While the court’s ad hoc approach creates uncertainty for similar issues in the future, the intended focus on the specific facts of each case are wholly consistent with the public policy concerns the court relied on.

The main concern was imposing liability on an independent medical examiner whose main purpose is to act as a neutral party between parties with sometimes competing interests. The court rightfully acknowledges that the potential for bias towards one party due to a fear of litigation is a cause for concern because the profession might lose the credibility upon which its occupation is based on—neutrality.

Additionally, should the occupation lose its credibility as a neutral party, the number of independent medical examiners might decrease. While the court does not state outright that independent medical examiners have an essential role in the complexities of employer and employee, an inference can certainly be drawn that the court values the independent nature of the independent medical examiner. It appears that the court, in refusing to impose liability, preserves the ability of independent medical examiners to review records neutrally without fear of recourse.

**CONCLUSION**

Upon appeal of a motion for summary judgment, the Rhode Island Supreme Court used an ad hoc approach to determine that a traditional physician-patient relationship between an independent medical examiner and his or her patient does not exist in a situation where the opinion comes solely from a review of medical files and not a physical examination of the person under review. In addition, the court refused to impose a duty of care on such independent medical examiners, finding issues with causation, prevention of future harm, and policy concerns.

Kelley Nobriga

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33. *Id.* at 814.
34. *Id.* at 816.
35. *Id.*
36. *See id.*
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2014 R.I. Pub. Laws ch. 048, 055. An Act Relating to Food and Drugs – Uniform Controlled Substances Act. This Act adds a class of individuals to whom information contained in the prescription drug monitoring database maintained by the Department of Health may be disclosed. In addition to a practitioner who is prescribing or considering prescribing a controlled substance, or a pharmacist who is dispensing or considering dispensing a controlled substance, an authorized designee of the practitioner or pharmacist may consult the prescription drug monitoring database on behalf of the practitioner or pharmacist. The designee must be employed by the same professional practice or pharmacy. The practitioner or pharmacist must ensure that such designee is sufficiently competent in the use of the database, ensure that access to the database by the designee is limited to authorized purposes and occurs in a manner that protects the confidentiality of information obtained from the database, and terminate the designee’s access to the database upon termination of the designee’s employment. Any breach of confidentiality resulting from the designee’s access to the database is the responsibility of the practitioner or pharmacist. Furthermore, the practitioner or pharmacist, reasonably informed by the relevant controlled substance history information obtained from the database, shall make the ultimate decision as to whether or not to prescribe or dispense a controlled substance. Finally, this Act adds the requirement that all practitioners, as a condition of the initial registration for or renewal of their license to prescribe controlled substances, register with the prescription drug database maintained by the Department of Health.

2014 R.I. Pub. Laws ch. 83, 86. An Act Relating to Criminal Procedure – Domestic Violence Prevention Act. This amendment expands the protections of this Act to include more
victims of domestic violence. As amended, those who are not married or related to his or her attacker but have been in a substantive dating relationship with his or her attacker within the past one year have the right to request from the district court an order restraining the attacker from committing abuse and directing the attacker to leave the household, unless the attacker has the sole legal interest in the household. The Act also provides these victims with information on the services available to them. In cases where the officer has determined that no cause exists for an arrest, the Act requires that the officer remain at the scene as long as there is danger to the safety of the person or until the person is able to leave the dwelling. The officer shall transport the person if no reasonable transportation is available and inform the person that she or he has the right to file a criminal complaint with the responding officer or the local police department.

**2014 R.I. Pub. Laws ch. 151, 168.** An Act relating to Taxation – Cigarette Tax. This Act establishes enhanced penalties and increases already existing penalties for violations of cigarette tax stamp requirements. Any person who distributes a tax stamp that fails to conform to state standards faces a mandatory fine for a first offense not to exceed ten thousand dollars, with each subsequent offense resulting in a fine not to exceed twenty thousand dollars or five years imprisonment. Those who use or store cigarettes that are improperly stamped and subsequently fail to report such violations are now guilty of a felony, facing a ten thousand dollar fine, not more than three years of imprisonment, or both. Any distributor found to have sold, offered for sale, displayed for sale, or possessed with intent to sell any cigarettes, packages, or boxes that do not bear stamps evidencing the payment of the tax imposed by this chapter shall be fined, imprisoned, or both. The fine or prison term is determined in accordance with a subsequent offense calculation, which includes enhanced fines and consideration of evidence of mitigating factors such as history, severity, and intent. Each subsequent offense proscribed in this Act as to unstamped cigarettes, general violations, and civil penalties is limited to a twenty-four month parameter and calls for consideration of evidence of mitigating factors, including history, severity, and intent. Generally, penalties for a myriad of tax stamp violations,
including fines and terms of imprisonment, were significantly increased.

2014 R.I. Pub. Laws ch. 153, 170. An Act Relating to Health and Safety – Schools. This Act requires the person in charge of an educational institution having more than twenty-five students to train the students, through drills, to exit the school buildings without confusion or panic in the event of an emergency. In all school buildings that house students through the twelfth grade, which are occupied by six or more persons for four or more hours per day or more than twelve hours per week, there must be at least one emergency egress drill conducted every month that the facility is in use. One additional drill must be conducted in buildings that are not open on a year-round basis within the first thirty days of operation. At least one out of every four emergency egress drills or rapid dismissals shall be obstructed by means of which at least one or more exits and stairways in the school building are blocked off or not used. In addition, there shall be two evacuation drills and two lockdown drills. The amended portion of the Act raises the fine for noncompliance from fifty dollars to two hundred dollars.

2014 R.I. Pub. Laws ch. 157, 164. An Act Relating to Criminal Offenses – Sexual Assault. This Act amends the crime of second-degree sexual assault. This Act expands the scope of sexual conduct for second-degree sexual assault to include the element of surprise.

2014 Pub. Laws ch. 180, 181. An Act relating to State Affairs and Government – State Emblems. This Act designates calamari as Rhode Island’s official state appetizer. Calamari’s designation as the official state appetizer was inked to recognize both the economic importance of squid fishing and the appetizer’s uniquely delicious taste.

R.I. Pub. Laws ch. 188, 207. An Act Relating to Education and Labor – Social Media Privacy and Student Data – Cloud Computing. This Act, as amended, adds a host of protections for student and employee users of social media networks throughout the State. The Act forbids educational institutions and employers
from requesting passwords or access to a student, employee, or applicant’s social media page. It also forbids the educational institution or employer from disciplining a student, employee, or applicant for failing to grant access to their page. This Act does not apply to publicly available information and does not restrict employers from complying with duties established by the Securities and Exchange Act of 1934, 15 U.S.C. 78c(a)(26), which requires the supervision of certain communications of regulated financial institutions.

2014 R.I. Pub. Laws ch. 202, 215. An Act Relating to Criminal Offenses – Computer Crime. This Act criminalizes online impersonation. A person commits such a crime if he or she uses the name or persona of another person to create a webpage, post messages to a social networking site, or send an electronic communication, without obtaining the other person’s consent and with the intent to harm, defraud, intimidate, or threaten any person. A person also commits this crime if he or she sends an electronic communication that references an item of identifying information belonging to any person without obtaining the other person’s consent and with the intent to cause the recipient of the communication to believe that the other person authorized or transmitted the communication with the intent to harm or defraud any person. Finally, a person commits the crime of online impersonation if he or she uses the name or persona of a public official to create a webpage, post messages to a social networking site, or send an electronic communication, without obtaining the public official’s consent and with the intent to induce another person to submit to such pretended authority in order to solicit funds or otherwise to act in reliance upon that pretense to the other person’s detriment. Every person convicted of online impersonation is guilty of a misdemeanor for the first offense and is subject to imprisonment up to one year and a fine of one thousand dollars. For a second or subsequent offense, every person convicted of online impersonation is guilty of a felony and is subject to imprisonment up to three years and a fine of three thousand dollars. Every person convicted of an offense shall also be subject to an order for restitution.
**2014 R.I. Pub. Laws ch. 262, 320.** An Act Relating to Animals and Animal Husbandry – Cruelty. This Act, as amended, seeks to prohibit any person from entrapping any animal in a motor vehicle in a manner that poses risk to the animal’s life or threatens health consequences to the animal by subjecting the animal to extreme heat or cold without proper ventilation. After making a reasonable attempt to locate the owner of a motor vehicle in which an animal is kept, an animal control officer, law enforcement officer, or firefighter with probable cause to believe that this section is being violated may enter such vehicle using any reasonable means under the circumstances. The officer may use any reasonable means to extricate the animal from the vehicle to prevent injury to the animal’s health. When entering the vehicle with the sole purpose to rescue the animal, the officer may not search the vehicle unless otherwise authorized by law. After extracting the animal, the officer must leave written notice, including the officer’s name and the address of the location where the animal may be retrieved in a secure and conspicuous location to notify the owner of the vehicle of the animal’s whereabouts. The officer will not be held criminally or civilly liable for the removal of the animal. Only after the owner makes payment of all charges incurred can the owner be reunited with the animal. Such charges include fines, maintenance, care, impoundment, and medical treatment of the animal. Any person who knowingly violates this section is subject to imprisonment not to exceed one year or a fine of no more than one thousand dollars, or both.

**2014 R.I. Pub. Laws ch. 263, 311.** An Act Relating to Criminal Procedure. As amended, the Act defines a criminal street gang as “an ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of criminal or delinquent acts; having an identified name or common identifiable signs, colors, or symbols; and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.” Any person convicted of knowingly committing a felony for the advancement or benefit of or in association with a criminal street gang with the intent to further, assist, or promote the affairs of a criminal street gang will be subject to imprisonment of not more than ten years, in addition to the penalty for the underlying felony.
committed. If the Attorney General believes that the felony was committed for the benefit of a street gang, he or she shall file with the court, at a time no later than the first pretrial conference, a notice that the defendant is subject to the additional sentence upon conviction of the felony. At trial, the defendant will be allowed to produce additional evidence to rebut the assertion that the felony was committed for the advancement or in association with a criminal street gang. If the jury finds the defendant was acting in association with a gang or the defendant pleads guilty or nolo contendere to the additional charge, the additional penalty will be added to the sentence for the felony committed. The additional penalty imposed by this Act is to run consecutively with the penalty imposed for the underlying offense.

R.I. Pub. Laws ch. 279, 280. An Act Relating to Elections – Conduct of Elections. This Act, as amended, requires that voting machines and paper ballots not include an option that allows the voter to vote for all members of a single party through the push of one button or the making of a single mark. The amended Act requires voters seeking to vote along a party line to cast each vote individually.


2014 R.I. Pub. Laws ch. 404, 373. An Act Relating to Education – Curriculum. This Act acknowledges that child sexual abuse, affecting up to one in four girls and up to one in six boys, has long lasting damaging effects on the health and safety of those affected. Child sexual exploitation, including child pornography, child prostitution, and child abduction pose similar threats to the health and well-being of children and puts victims of such offenses at a greater risk of death or severe bodily or mental injury. Raising awareness of such offenses by telling children of the common dangers and warning signs empowers children to protect themselves from sexual predators and to obtain any necessary assistance. This Act establishes a comprehensive program that
will provide age-appropriate instruction in preventing child abduction, child sexual exploitation, and child sexual abuse. To be known as “Erin Merryn’s Law,” this section provides that all public school children in grades kindergarten through grade eight shall receive instructions designed to prevent child abduction, sexual exploitation, and sexual abuse. Such instructions will either be provided or supervised by regular classroom teachers. Such instructions will also be assisted by the Department of Elementary and Secondary Education through guidance and technical assistance. It is the responsibility of the school committees to incorporate the curricula described into existing health education courses.

2014 R.I. Pub. Laws ch. 412, 441. An Act Relating to Education – Adult Education. This Act, as amended, requires the education board to consider all available high school equivalency tests that meet Rhode Island academic standards. The board shall give priority to tests that are provided at the lowest costs to test takers. The board must consider: (1) the recognition of the test by other states, (2) the portability of the test, and (3) any other criteria that meets the needs of test takers. The board must adopt a rule that grants a waiver of fees associated with the high school equivalency test for those with limited income and financial hardship. To be eligible for such a fee waiver, the individual must receive a passing score on the equivalency practice test or pertinent section of the test. A sliding scale based on individual income may be used to determine the waiver.

2014 Pub. Laws ch. 413, 449. An Act relating to Labor and Labor Relations – Payment of Wages. This Act expands the penalties for the misdemeanor offense of failure to pay wages in accordance with state law to include imprisonment of up to one year. The first violation remains a misdemeanor, carrying the punishment of a fine of up to one thousand dollars, imprisonment not more than one year, or both. A second or subsequent violation is now a felony that requires a punishment of imprisonment for not more than three years, a fine of three thousand dollars, or both.
2014 R.I. Pub. Laws ch. 423, 455. An Act Relating to Behavioral Healthcare, Developmental Disabilities, and Hospitals – Relief from Firearms Prohibitions. This Act permits the firearms prohibitions board to consider petitions for relief from a firearms prohibition due to an adjudication of commitment. The board is comprised of a licensed psychiatrist, a licensed psychologist, an active member of law enforcement in the state, the director of the Department of Behavior Health, Developmental Disabilities and Hospitals, or his/her designee, and the Attorney General or his/her designee. In considering the petition for relief, the petitioner may present evidence to the board in a closed and confidential hearing on the record, and a record of the hearing must be maintained for purposes of appellate review. In determining whether to grant relief, the board shall consider evidence of the following: the circumstances regarding the firearms disqualifiers, the petitioner's mental health record (including a certificate of a medical doctor or psychiatrist certifying that the petitioner is no longer suffering from a mental disorder that prevents the petitioner from handling deadly weapon), petitioner's criminal history, and evidence of the petitioner's reputation through character witness statements or testimony. The board also has the authority to require the petitioner to undergo a clinical evaluation and risk assessment, which may also be considered as evidence. The board must grant relief if it finds, by a preponderance of the evidence, that the petitioner is not likely to act in a manner dangerous to public safety and granting the relief will not be contrary to the public interest. The board shall issue a decision in writing justifying its reasons for granting or denying relief.

2014 R.I. Pub. Laws ch. 437, 467. An Act Relating to Human Services – Youth Pregnancy and At-Risk Prevention Program. This Act serves the purpose of reducing and preventing youth pregnancies and other at-risk behavior (including drug abuse, gang involvement, child abuse, and failure in school) by establishing and expanding after-school and summer programs for such at-risk teens. The Act looks to expand programs that offer prevention services such as mentor and developmental programs in accordance with the federal Temporary Assistance for Needy Families Program (“TANF” program) as enacted in Title IV Part A
of the federal Social Security Act, 42 U.S.C. 601 et. seq. The Department of Human Services (the “Department”) administers the prevention program, and its development is contingent upon the availability of federal funding. If such funds are made available, the director of the Department may allocate up to two hundred fifty thousand dollars annually to the program. It is the responsibility of the director of the Department to promulgate rules and regulations necessary to advance the goals of this chapter.

The Rhode Island Alliance of Boys and Girls Clubs is authorized to make application to receive funding under this chapter. In order to be eligible to receive funding, an organization must demonstrate that its members are affiliated in good standing with a nationally chartered organization as under Title 36, Subtitle II, Part B of the Patriotic and National Organizations, 36 U.S.C. 311 et. seq. The organization must also provide programs that are tested and proven to prevent or reduce at-risk youth activities, demonstrate that programs are facility-based, and have programs offered for a minimum of ten hours weekly during the school year and twenty hours weekly during the summer vacation months. The available programs must meet or exceed the TANF guidelines, and the organization must exist in a minimum of seven towns within the State. The organization must also show that it is eligible to receive TANF funding and raise four dollars for every one dollar of funding received from the State through federal TANF funding.

The director of the Department must make reports available annually to the General Assembly, no later than March 1st of each year, indicating the program’s impact on at-risk youth as well as the success of the program. The Department shall also provide reports to the federal government and comply with any request or direction of the federal government.

2014 R.I. Pub. Laws ch. 483, 546. An Act Relating to Criminal Offenses – Assaults. This Act adds to the crime of assault or battery an assault or battery for the purpose of causing unconsciousness, otherwise known as a knockout assault. It is a felony for any person to make an assault or battery, or both, by causing or attempting to cause another person to be rendered unconscious by a single punch, kick, or other singular striking motion to the head of the other person. It is also a felony to
knowingly assist, aid, abet, solicit, encourage, counsel, command, or conspire to coerce any person to commit such a knockout act. Any person convicted of this crime shall be imprisoned for up to three years and fined up to one thousand five hundred dollars.

2014 R.I. Pub. Laws ch. 488, 521. An Act Relating to Insurance – Rhode Island Title Insurance Act. This Act creates a duty to redact for attorneys who face conflicting duties to both produce documents for review as well as ethical duties to their clients. This provision addresses situations when the title insurance producer is also an attorney and that attorney asserts an ethical duty to withhold the disclosure of documents in connection with the state-mandated title insurer’s biennial review. If such privilege concerns arise in the context of this review, the title insurance producer/attorney must identify in writing the particular document and the applicable privilege and provide a redacted copy of that document to the title insurer.

R.I. Pub Laws ch. 518, 554. An Act Relating to Criminal Procedure – Sentence and Execution. This Act, as amended, allows the parole and probation unit of the Department of Corrections to ask the courts, at any time during the sentence imposed, to modify the conditions of a defendant’s probation or parole by either adding or removing conditions set at the time of sentencing to provide for more effective supervision of the defendant.