


Summer 2016

2015 Survey of Rhode Island Law: Cases and Public Laws of Note

Roger Williams University Law Review Staff

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

 Part of the [Civil Procedure Commons](#), [Constitutional Law Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Evidence Commons](#), [Family Law Commons](#), [Insurance Law Commons](#), [Labor and Employment Law Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Property Law and Real Estate Commons](#), and the [Torts Commons](#)

Recommended Citation

Roger Williams University Law Review Staff (2016) "2015 Survey of Rhode Island Law: Cases and Public Laws of Note," *Roger Williams University Law Review*: Vol. 21: Iss. 3, Article 7.

Available at: http://docs.rwu.edu/rwu_LR/vol21/iss3/7

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

2015 Survey of Rhode Island Law

CASES

Civil Procedure

<i>Ho-Rath v. R.I. Hosp.</i> , 115 A.3d 938 (R.I. 2015)	639
--	-----

Constitutional Law

<i>State v. Matthews</i> 111 A.3d 390 (R.I. 2015)	648
--	-----

Contract Law

<i>Emond Plumbing & Heating v. BankNewport</i> , 105 A.3d 85 (R.I. 2014).....	657
--	-----

Criminal Law

<i>D'Alessio v. State</i> , 101 A.3d 1270 (R.I. 2014).....	665
<i>State v. Armour</i> , 110 A.3d 1195 (R.I. 2015).....	671
<i>State v. Tucker</i> , 111 A.3d 376 (R.I. 2015).....	680
<i>State v. Rosenbaum</i> , 114 A.3d 76 (R.I. 2015).....	689
<i>State v. Austin</i> , 114 A.3d 87 (R.I. 2015).....	695
<i>State v. Whiting</i> , 115 A.3d 956 (R.I. 2015).....	708

2016] *SURVEY SECTION* 637

<i>State v. Virola</i> , 115 A.3d 980 (R.I. 2015).....	714
---	-----

Evidence

<i>State v. Arciliares</i> , 108 A.3d 1040 (R.I. 2015).....	725
--	-----

Family Law

<i>In re Max M.</i> , 116 A.3d 185 (R.I. 2015).....	733
--	-----

Insurance Law

<i>Western Reserve Life Assurance Co. v. ADM Associates, LLC</i> , 116 A.3d 794 (R.I. 2014).....	739
<i>Peerless Ins. Co. v. Luppe</i> , 188 A.3d 500 (R.I. 2015).....	746

Labor Law

<i>Town of N. Kingstown v. Int'l Ass'n of Firefighters, Local 1651 AFL-CIO</i> , 107 A.3d 304 (R.I. 2015).....	756
<i>State of R.I. Dep't of Corrections v. R.I.B.C.O.</i> , 115 A.3d 924 (R.I. 2015).....	767

Professional Responsibility

<i>In re Keven A. McKenna</i> , 110 A.3d 1126 (R.I. 2015).....	774
<i>FIA Card Services, N.A. v. Pichette</i> , 116 A.3d 770 (R.I. 2015).....	785

Property Law

<i>Renewable Resources, Inc. v. Town of Westerly</i> , 110 A.3d 1166 (R.I. 2015).....	797
--	-----

Public Contracts

<i>Kayak Centre of R.I. v. Town of Narragansett</i> , 116 A.3d 250 (R.I. 2015).....	804
--	-----

638 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:636

Real Property

Gianfancesco v. A.R. Bilodeau, Inc. et al,
112 A.3d 703 (R.I. 2015)..... 811

Tort Law

Medical Malpractice Joint Underwriting Ass'n of R.I. v.
Charlesgate Nursing Ctr., L.P.
115 A.3d 998 (R.I. 2015).....818

LEGISLATION

2015 Public Laws of Note.....826

Civil Procedure. *Ho-Rath v. R. I. Hospital*, 115 A.3d 938 (R.I. 2015). The Rhode Island Supreme Court ruled that the statute of limitations for medical malpractice actions provides a minor Plaintiff with an option of: (1) a parent or guardian filing on the minor's behalf within three years of the alleged malpractice or of its reasonable discovery or (2) the minor filing on his or her own behalf when the minor reaches the age of eighteen, at which time a parent's loss-of-consortium claim may be tolled alongside the minor's claim.

FACTS AND TRAVEL

On July 16 2010, the Plaintiffs Jean and Bunsan Ho-Rath¹ ("Jean" and "Bunsan") sued Rhode Island Hospital and associated medical professionals,² (collectively "RIH") and Woman and Infants Hospital of Rhode Island and associated medical professionals³ (collectively "WIH")⁴, on behalf of their minor daughter, Yendee Ho-Rath ("Yendee"), who was born on January 9, 1998.⁵ The Plaintiffs' claims were founded on theories of negligence, lack of informed consent, corporate liability, and vicarious liability in connection with the diagnosis and treatment of Yendee's genetic blood disorder, alpha thalassemia.⁶ The

1. *Ho-Rath v. R. I. Hosp.*, 115 A.3d 938, 940 (R.I. 2015). The Plaintiffs will be referenced by their first names, just as the case did, in order to avoid confusion.

2. *Id.* at 941, n.2. These medical professionals are: Lewis Glasser, M.D., William Ferguson, M.D., Fred Schiffman, M.D., and B.E. Barker, Ph.D. *Id.*

3. *Id.* at 941, n.3. These medical professionals are: Calvin E. Oyer, M.D., Jami Star, M.D., and Marsha Sverdup, M.S. f/k/a Marsha Pagnotto, M.S. *Id.*

4. *Id.* at 941. While the Plaintiffs named many other defendants in the complaint and amended complaint, the defendants named here are the only pertinent defendants discussed in this case. *Id.*

5. *Id.* at 941.

6. *Id.*

Plaintiffs also asserted individual loss-of-consortium claims.⁷ The Plaintiffs alleged that the Defendants failed to diagnose and treat Yendee despite Jean, Bunsan, and Yendee's brother being tested for the disorder as early as 1993.⁸

On February 8, 2011, RIH moved to dismiss the Plaintiffs' individual claims.⁹ On July 7, 2011, the trial justice granted the Defendants' motions to dismiss and held that the statute of limitations barred both the Plaintiffs' independent loss-of-consortium claims and the claims brought on behalf of Yendee.¹⁰ The trial justice noted that since Yendee was a minor, the tolling provision in section 9-1-14.1(1) would permit Yendee to sue on her own behalf upon reaching the age of eighteen, the age the disability is removed.¹¹ Final judgments were subsequently entered in favor of the Defendants.¹² The Plaintiffs appealed, and the Defendants cross-appealed.¹³ The Supreme Court issued its final decision on May 19, 2015.¹⁴

ANALYSIS AND HOLDING

A. *Medical Malpractice Claims Brought on Behalf of Minors*

Justice Suttell wrote for the majority.¹⁵ Upon review,¹⁶ the

7. *Id.*

8. *Id.*

9. *Id.* RIH argued that under § 9-1-14.1 of the *Rhode Island General Laws*, the Plaintiff's loss-of-consortium claims were not part of the tolling portion of the statute and therefore were time-barred. *Id.* On February 28, 2011 WIH moved to dismiss the Plaintiffs' claims on the same theory. *Id.* The Plaintiffs argued against the Defendant's motions to dismiss on the grounds that §9-1-14.1(1) may be interpreted to permit the tolling of the statute of limitations for a minor who sues on a medical malpractice theory, until three years after the minor's eighteenth birthday. *Id.* The Plaintiffs further argued that since loss-of-consortium claims derive from the claims brought on Yendee's behalf, the loss-of-consortium claims are also tolled until three years after Yendee's eighteenth birthday. *Id.*

10. *Id.* at 942.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 938.

15. *Id.* at 951. Justice Goldberg did not participate in the decision.

16. *Id.* at 942. For the court to affirm 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 *Mendes v. Factor*, 41 A.3d 994,

court looked to sections 9-1-14.1 and 9-1-19¹⁷ of the *Rhode Island General Laws* to address the dispute between the Plaintiffs¹⁸ and the Defendants¹⁹ regarding the Plaintiffs' medical malpractice claims brought on behalf of Yendee. The Supreme Court affirmed the Defendants' motions to dismiss, as it found the language of section 9-1-14.1 unequivocal; therefore, it found section 9-1-14.1 capable of only one rational interpretation.²⁰ Nevertheless, the court cited to its precedent cases of *Bakalakis v. Women & Infants' Hospital*²¹ and *Dowd v. Rayner*²² to illustrate its decision.²³ The

1000 (R.I. 2012)).

17. *Id.* at 944 ("§ 9-1-19 provides in pertinent part: 'If any person at the time any such cause of action *shall* accrue to him or her *shall* be under the age of eighteen (18) years . . . the person *may* bring the cause of action, within the time limited under this chapter, after the impediment is removed.'") (quoting R.I. GEN LAWS § 9-1-19 (1956)).

18. *Id.* Plaintiffs' argument was that § 9-1-14.1(1) contains only a maximum time limit and does not use language explicitly requiring the minor to wait until the disability of age is removed. *Id.* Thus, according to Plaintiffs, § 9-1-14.1(1) permits parents or guardians to bring medical malpractice claims on behalf of minors at any time until the minor's eighteenth birthday, at which time he or she has three years to bring suit on his or her own behalf. *Id.* Thus, Plaintiffs argued their suit was timely as it was filed before Yendee's twenty-first birthday. *Id.*

19. *Id.* WIH's argument was that § 9-1-14.1(1) instead limits the tolling provision of § 9-1-19, by requiring that when a suit is brought on a minor's behalf, it must be filed no later than three years after the alleged malpractice. *Id.* WIH argued that Plaintiffs' interpretation of § 9-1-14.1(1) leaves the statute interchangeable with § 9-1-19 since it would permit a minor's suit to be brought at any time before the minor's twenty-first birthday. *Id.* Additionally, WIH argued that since Plaintiffs brought a claim on behalf of Yendee, more than three years after the alleged malpractice, Yendee is no longer permitted to take advantage of the § 9-1-14.1(1) tolling provision, and thus, Yendee may not bring a suit when she turns eighteen. *Id.*

20. *Id.*

21. 619 A.2d 1105, 1106 (R.I. 1993). Parents filed a medical malpractice suit within the three-year limit of the alleged malpractice on behalf of minor-child against doctors involved in the prenatal and delivery of the minor. *Id.* The parents later sought to amend their complaint to add additional defendants after the three-year limit past. *Id.* The court held that the general tolling statute does not affect or supersede the requirement of the medical malpractice statute of limitations that one who is under disability of age, mental incompetence, or otherwise and on whose behalf no action is brought within three years of occurrence must bring action within three years of the removal of disability. *Id.* at 1107. The court noted that to permit otherwise would bring about the unwelcomed situation where the action brought within three years would merely be preliminary to the main event to

court further acknowledged, “if the Legislature did not intend to limit²⁴ a minor’s ability to initiate medical malpractice actions . . . section 9-1-14.1 would be unnecessary”²⁵ as section 9-1-19 already accomplishes the same result in a general manner for medical malpractice cases.²⁶ The court held that its decision provided the most sensible result given the dual purposes of the statute to promote certainty and finality and avoid stale claims, but also to protect individual plaintiffs from those limitations where those plaintiffs cannot exercise their legal rights while under certain constraints.²⁷ The parents had time to file, but did not; accordingly, Yendee’s ability to bring suit is not jeopardized because she may file suit when she turns eighteen.²⁸

B. *Loss of Consortium Claims of Parents*

Upon review, the court interpreted sections 9-1-14.1(1)²⁹ and 9-1-41³⁰ of the *Rhode Island General Laws* to determine whether

when the disability is later removed. *Id.*

22. 655 A.2d 679, 681–82 (R.I. 1995). The Legislature enacted the statute in 1976 in response to the medical malpractice “crisis” within the state at which time the legislature had an interest in limiting the number of medical malpractice suits, but also wanted provide minor victims a fair opportunity to have their claims adjudicated. *Id.* The rule exists to ensure that minors are not disadvantaged by their disability during minority to ensure that, the rule serves to restrict the number of suits or amendments of complaints when the suit is brought on behalf of the minor. *Id.* at 682.

23. *Ho-Rath*, 115 A.3d at 945–46.

24. The Limitation of Actions Chapter of R.I. Gen Laws (2012) includes §§ 9-1-14.1 and 9-1-19.

25. *Ho-Rath*, 115 A.3d at 945 (citing *Bakalakis*, 619 A.2d at 1107).

26. *Id.* at 947.

27. *Id.*

28. *Id.* at 948.

29. While courts must not interpret statutes with myopic literalism, “[u]nder no circumstances will this Court construe a statute to reach an absurd result.” *Id.* at 943 (quoting *National Refrigeration, Inc. v. Capital Properties, Inc.*, 88 A.3d 1150, 1156 (R.I. 2014)).

30. *Id.* at 948–49. The court provided:

Pursuant to § 9–1–41, parents are permitted to recover damages for the loss-of-consortium of a minor child caused by tortious injury. This statute provides in pertinent part: “(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.”

the claims between the Plaintiffs³¹ and the Defendants,³² derivative in nature, were time-barred. The court affirmed the decision to dismiss the Plaintiffs' loss-of-consortium claims.³³ The court declared that a parent's loss-of-consortium claim in a medical malpractice case should be tolled alongside the minor's claim to which it derived.³⁴ Therefore, the Plaintiffs' derivative claim may be brought alongside Yendee's when she reaches the age of eighteen.³⁵ The court ultimately found that consolidating the cases into one suit would be in line with the various policy interests regarding efficiency.³⁶

C. *Dissent*

Justice Flaherty dissented,³⁷ contending that section 9-1-14 (1) of the *Rhode Island General Laws* was capable of two reasonable interpretations, that the statute: (1) prohibits a suit

Id. (quoting R.I. GEN LAWS § 9-1-41 (2012)) (emphasis added).

31. *Id.* at 948. The Plaintiffs argued that their loss-of-consortium claims are derivative to those brought on behalf of Yendee. *Id.* Accordingly, § 9-1-14.1(1) is the applicable statute of limitations. *Id.* This statute attaches to the derivative claim and should be the same statute to which it derived, Yendee's. *Id.* Thus, the Plaintiffs argued that their individual claims should benefit from §9-1-14.1(1) and not be dismissed. *Id.*

32. *Id.* RIH argued that while the Plaintiffs' claims are governed by § 9-1-14.1(1), the Plaintiffs' claims were, nevertheless, untimely, as they were brought more than three years after the occurrence of the alleged malpractice. *Id.* RIH further argued that while § 9-1-14.1 applies to both the Plaintiffs' loss-of-consortium claims and to those brought on behalf of Yendee, the statute's application produces different results. *Id.* Since Yendee is "disabled" due to her age, she may file when she turns eighteen, the age the disability is removed. *Id.* But since the Plaintiffs' were not "disabled," they may not attach the claim to Yendee's. *Id.* Further, RIH argued that the Plaintiffs' loss-of-consortium claims were separate and distinct from the underlying tort claims and should, therefore, be analyzed as such. *Id.* WIH's argument was consistent with RIH. *Id.* WIH further noted that since the Plaintiffs' were not disabled, they were not part of the statute's protected class of individuals and, thus, cannot be afforded the statute's protections. *Id.* WIH further argued that permitting the attachment would be inconsistent with the purpose of the provision since it would allow stale claims to be brought when there is no real impediment to bring the claims earlier. *Id.*

33. *Id.* at 951.

34. *Id.* at 950.

35. *Id.* at 951.

36. *Id.* at 950–51.

37. *Id.* at 951.

until the minor's eighteenth birthday, if a parent or guardian did not bring a suit on his or her own behalf within three years of the alleged malpractice and (2) as setting the outside limit to the initiation of a suit brought by the minor.³⁸ Justice Flaherty believed that the majority's interpretation did not address the precise issue presented and effectively "[left the] complications for another day,"³⁹ Yendee's eighteenth birthday.⁴⁰ Justice Flaherty instead interpreted section 9-1-14(1) to mean that the Plaintiffs must lay all their cards on the table when the suit is brought, rather than extend the litigation by adding new defendants every three years until the minor becomes eighteen years old.⁴¹ According to Justice Flaherty, the Legislature intended to protect the rights of those laboring "under a legal disability."⁴² Justice Flaherty contended his interpretation better addressed the statute's goals of eliminating drawn-out litigation while protecting a minor's right to relief.⁴³ By allowing the minor to bring suit up until three year's after the disability is removed, there is less potential that a claim will be broken down and litigated on a "piecemeal" basis, as was the case here.⁴⁴

COMMENTARY

A. *Medical Malpractice Claims Brought on Behalf of Minors*

The majority's decision to prohibit the Plaintiffs to proceed with their claim brought on behalf of Yendee is sound and in accordance with the purpose of the statutes. While Justice Flaherty makes a great argument, his distinction is without a difference. The Legislature's intent for enacting section 9-1-14.1 clearly shows its intent to limit the ability to litigate medical malpractice cases.⁴⁵ What is noteworthy is that the court does not

38. *Id.*

39. *Id.* at 955 (Flaherty, J., dissenting).

40. *See id.* at 941.

41. *Id.* at 953 (Flaherty, J., dissenting).

42. *Id.* "[W]here suit has not been brought on a minor's behalf within three years of the incident of professional malpractice, once the minor does bring suit, she is expected to join all defendants to the action within a three-year period, even if she may remain a minor for many years." *Id.* at 955.

43. *Id.* at 956.

44. *See id.* at 952.

45. *See* R.I. GEN. LAWS § 9-1-14.1 (1956) ("[A]n action for medical, veterinarian, accounting, or insurance or real estate agent or broker

direct attention to the specific language in the statutes. Section 9-1-14.1, titled *Limitation on Malpractice Actions*, provides that “an action for medical . . . malpractice *shall* be commenced within three years from the time of the occurrence of the incident which gave rise to the claim.”⁴⁶ The Legislature’s use of the word “shall” strengthens the majority’s argument as it shows that the Legislature intended that suits brought on behalf of a minor *must* be done in that time period.⁴⁷ Conversely, if the parent or guardian fails to file suit in that time period, his or her opportunity to file closes.

Justice Flaherty’s argument that section 9-1-14.1(1) provides a window between the alleged malpractice and Yendee’s twenty-first birthday, is sound, but given the totality of the circumstances surrounding the case—the Legislature’s explicit language, the legislative history surrounding the statutes enactment, and the Plaintiff’s waiting to file until 2010, despite the alleged malpractice dating back to 1993—his argument is outshined by that of the majority. Further, this case is distinct from its precedent, as this is not a case where the Plaintiffs filed timely, and sought to amend their Complaint outside of the three years.⁴⁸ This is also not a case in which Yendee’s potential recovery is unknown.⁴⁹ Thus, the Majority’s decision provides the best result given the dual purposes of the statute.

B. *Loss of Consortium Claims of Parents*

The court’s decision permitting the Plaintiffs’ loss-of-consortium claims to toll alongside Yendee’s was an attempt by the court to afford the Plaintiffs relief. Today, the medical malpractice litigation is under greater control⁵⁰ than it was when

malpractice shall be commenced within three (3) years from the time of the occurrence of the incident which gave rise to the action.”).

46. *Id.* (emphasis added).

47. *See Ho-Rath*, 115 A.3d at 950.

48. *See Bakalakis*, 619 A.2d at 1107.

49. *See Ho-Rath*, 115 A.3d at 955 (Flaherty, J. dissenting). Yendee is disabled due to her age. *See id.* Her disability will be removed on her eighteenth birthday. *See id.* Thus, the time she will be able to file on her own behalf is certain. *See id.* However, had Yendee’s disability been mental incompetence, when she would be able to file on her own behalf is unknown, because we cannot be certain when her disability would be removed. *See id.*

50. *See generally* The Medical Liability Crisis: Talking Points, am. Med.

the Legislature enacted the statutes, and thus, such stringent application may not be needed.⁵¹ By holding that the Plaintiffs may bring their derivative claims alongside Yendee's, the court is attempting to lessen the procedural safeguards, where it can interpret the laws to do so.⁵²

The court's reasoning is not clear. In the court's analysis, it first established that the Plaintiffs' claims are in-fact derived from Yendee's.⁵³ The court then acknowledged that under section 9-1-41, the statute governing derivative suits, such cases "*shall* be brought under the time *limited* under sections 9-1-14 or 9-1-14.1."⁵⁴ The court seemingly interpreted this statute to permit the derivative suit.⁵⁵ But, the court did not say how it came to this interpretation. Notwithstanding the majority's decision, the Legislature's intent for section 9-1-41 is clear. The Legislature's use of the word "shall" and "limited" evince its intention that this statute is meant to curb the flow of claims, like the Legislature's intent in section 9-1-14.1.⁵⁶ Additionally, nothing in sections 9-1-41 or 9-1-14.1 permit the inference that derivative claim are permitted to toll until the minor's eighteenth birthday.⁵⁷ Had the Legislature intended derivative claims to benefit from the disability statute, it likely would have expressly provided so. Furthermore, the Plaintiffs were not within the class of persons section 9-1-14.1 sought to protect. Section 9-1-14.1 tolling provision serves to protect the disabled, in order to ensure that he

Ass'n, Jan, 2003 (on file with author) (The American Medical Association has cited twelve states as suffering a medical malpractice crisis; the state of Rhode Island is not included in that list).

51. *Id.* at 946. Faced with a medical malpractice crisis, the Legislature sought to limit the number of medical malpractice suits. *Id.* (quoting *Dowd v. Rayner*, 655 A.2d 679, 681–82 (R.I. 1995)).

52. See Press Release, AMERICAN BAR ASSOCIATION, Medical Malpractice Liability: A Case for Real Reform, (July 2003), http://www.abanet.org/media/jul03/july_oped.html (last visited October 31, 2015) (The ABA calls for the legal and medical malpractice communities to work together to find a solution to the medical malpractice problem. It further states that "the problem with medical malpractice is not the tort system; the problem with medical malpractice is medical malpractice").

53. *Id.* at 949.

54. R.I. GEN LAWS § 9-1-41(d) (1956).

55. *Ho-Rath*, 115 A.3d at 951.

56. *Id.* at 946.

57. *Id.* at 951.

2016]

SURVEY SECTION

647

or she has a fair chance to litigate their claim.⁵⁸ By that same token, part of having a fair chance to litigate is having a case litigated properly. The Plaintiff's failure to timely file on behalf of Yendee should not be rewarded by the benefits of section 9-1-14.1, when its only window of access to the statute's protections is through the back door of section 9-1-41.

CONCLUSION

As a matter of first impression, the Rhode Island Supreme Court held that the statute of limitations for medical malpractice actions provides a minor plaintiff with an option: have his or her parent or guardian file on his or her own behalf or wait until he or she turns eighteen, at which point he or she has three years to file on his or her own behalf. If the minor chooses to file on his or her own behalf, a parents' loss-of-consortium claim will be tolled along with it until his or her twenty-first birthday.

Clare M. Harmon

58. *Id.* at 946 (quoting *Dowd*, 655 A.2d at 681–82).

Constitutional Law. *State v. Matthews*, 111 A.3d 390 (R.I. 2015). The Rhode Island Supreme Court addressed whether a criminal defendant’s free speech rights were violated when he was charged under the “fighting words” provision of the disorderly conduct statute. In holding that the defendant’s speech was not constitutionally protected, the court reaffirmed its test for determining what speech constitutes fighting words, highlighting the necessity that the focus of these cases must be the context in which the words were spoken.

FACTS AND TRAVEL

In the early morning hours of January 31, 2012, two Rhode Island State Police troopers, Anthony Washington and Edward Viera, observed what appeared to be a physical altercation between an African-American man and woman at the corner of Smith Street and West Main Road in Middletown, Rhode Island.¹ The man was later identified as Thomas H. Matthews (“Defendant”).²

To assess the situation, the troopers pulled over.³ As the troopers got out of the police cruiser and approached the couple, the Defendant abruptly said, “take me now, take me now, I don’t care.”⁴ Trooper Washington asked the Defendant for his identification.⁵ The Defendant aggressively responded by physically moving toward the troopers calling them both “motherfuckers,” “queers,” “fags,” “niggers,” and threatening to kill them and “kick [their] asses.”⁶ Based on his training and

1. *State v. Matthews*, 111 A.3d 390, 391–94, 403 (R.I. 2015).

2. *Id.* at 392.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 392–95. The court acknowledged that these words are likely to offend some readers, but explains that it has chosen to print them in its opinion without redaction because “what the defendant is alleged to have

experience, Trooper Viera believed that the Defendant's agitated state posed a safety threat; he restrained the Defendant by placing him in an "arm bar"⁷ across the hood of the cruiser.⁸ The troopers attempted to calm the Defendant and "loosened" the arm bar, but the Defendant seemed like he might try to escape.⁹ For safety, the troopers handcuffed the Defendant and arrested him for disorderly conduct.¹⁰ The Defendant continued to yell, swear, and threaten the troopers throughout the ride to the Wickford Rhode Island State Police Barracks.¹¹

The Defendant's trial began on June 18, 2012, in Newport County Superior Court.¹² The State's case against the Defendant consisted solely of the troopers' testimony.¹³ After the State rested, the Defendant moved for a judgment of acquittal pursuant to Rule 29, which the trial justice denied.¹⁴ The trial justice instructed the jury in accordance with the Defendant's jury instructions, and the jury returned a guilty verdict.¹⁵ Pursuant to Rule 33, the Defendant moved for a new trial, which was also

actually said is so central to the issues on appeal." *Id.* at 392, n.3.

7. "Arm bar" is a restraint technique used by law enforcement to exert control over an individual and prevent injuries to others. *Id.* at 393, n.5.

8. *Id.* at 394.

9. *Id.* at 393.

10. *Id.* The Defendant was charged pursuant to R.I. GEN. LAWS § 11-45-1(a)(3) (2015), the "fighting words" provision of the disorderly conduct statute, which states: "[a] person commits disorderly conduct if he or she intentionally, knowingly, or recklessly . . . [d]irects at another person in a public place offensive words which are likely to provoke a violent reaction on the part of the average person so addressed." *Id.* at 391.

11. *Id.* The Defendant was transferred to the Wickford Rhode Island State Police Barracks for processing. *Id.* Trooper Washington testified that the Defendant said to him once they were in the police cruiser "you're nothing but a bitch-ass nigger," "I don't know why you're doing this," "you're going against me," "you're going against your own kind." *Id.* at 393 (internal quotation marks omitted).

12. *Id.* at 391-92.

13. *Id.* at 392.

14. *Id.* at 395-96. 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.

R.I. SUPER. CT. R. CRIM. P. 29(a).

15. *Id.* at 396.

650 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:648

denied.¹⁶ On July 5, 2012, the Defendant was sentenced to six months, thirty days to serve, balance suspended, with probation.¹⁷

The Defendant filed a timely appeal contending that the trial justice improperly denied his motions for judgment of acquittal and a new trial because the weight of the evidence did not support the jury's verdict, his speech to the troopers was constitutionally protected, and the criminal complaint did not provide sufficient notice of the charges against him as a matter of law.¹⁸

ANALYSIS AND HOLDING

The Rhode Island Supreme Court first reviewed the Defendant's motion for a new trial.¹⁹ The Defendant argued that the evidence presented at trial was not sufficient to support the jury's verdict.²⁰ The court concluded, however, that the trial justice's assessment of the evidence was proper.²¹ The trial justice

16. *Id.* at 391, 397. The relevant section of Rule 33 of the Rhode Island Superior Court Rules of Criminal Procedure reads, "[o]n motion of the defendant the court may grant a new trial to the defendant if required in the interest of justice." R.I. SUPER CT. R. CRIM. P. 33.

17. *Id.* at 391.

18. *Id.* at 391, 399, 406.

19. *Id.* at 398. The court started its review with the Rule 33 motion for a new trial because the burden of proof is less than a Rule 29 motion for judgment of acquittal. *Id.* at 397–98. The court explained that if the Defendant cannot meet his burden under Rule 33, then he necessarily cannot under Rule 29. *Id.* at 398.

20. *Id.* at 397.

21. *Id.* at 402. The applicable standard of review is as follows: "[w]hen addressing a motion for a new trial, the trial justice places himself or herself in the role of a 'thirteenth juror' and then exercises his or her independent judgment as to the credibility of the witnesses and the weight of the evidence." *Id.* at 398 (citing *State v. Stansell*, 909 A.2d 505, 511 (R.I. 2006)). The court set out the following approach in *State v. Hie* for trial justices acting as the "thirteenth juror":

In fulfilling his or her role as the thirteenth juror . . . the trial justice must (1) consider the evidence in light of the jury charge, (2) independently assess the credibility of the witnesses and the weight of the evidence, and then (3) determine whether he or she would have reached a result different from that reached by the jury If, after carrying out this three-step analytical process, the trial justice agrees with the jury's verdict or determines that reasonable minds could differ, then the analysis is complete and the verdict should be affirmed. . . . However, if the trial justice does not agree with the verdict or does not agree that reasonable minds could differ, then the trial justice must determine whether the verdict is against the fair

considered the evidence in light of the jury charge by reviewing his own instructions to the jury in detail and then summarizing the testimony given at trial.”²² Additionally, the trial justice independently reviewed the evidence and found that the troopers’ testimony was not only credible, but supported each element of the “fighting words” violation under section 11-45-1(a)(3).²³ Further, the trial justice agreed with the jury’s verdict.²⁴ Finding no clear error by the trial justice, the court affirmed his decision.²⁵

Next, the court addressed the Defendant’s contention that his conviction violated his free speech rights.²⁶ The Defendant argued that under Rhode Island and United States Supreme Court precedent, his speech to the troopers was constitutionally protected.²⁷ While “fighting words” are not protected speech, the Defendant argued that his speech did not rise to the level of “fighting words” because there was no evidence that “the troopers were, or likely would have been, provoked to imminent violent retaliation.”²⁸ The Defendant argued words, such as

preponderance of the evidence and fails to do substantial justice.
Id. at 398 (quoting *State v. Hie*, 93 A.3d 963, 974–75 (R.I. 2014)).

22. *Id.* at 402.

23. *Id.* at 402–03.

24. *Id.* at 403.

25. *Id.* at 399, 403, 406.

26. *Id.* at 399.

27. *Id.* at 399–401. See *Clift v. Narragansett Television L.P.*, 688 A.2d 805, 810 (R.I. 1996) (recognizing that “there are limitations on what types of speech may be proscribed” and that “specifically defined areas” including “obscenity, fighting words, defamatory invasions of privacy, and words likely to produce imminent lawless action” may be controlled by the state); *State v. McKenna*, 415 A.2d 729, 731 (R.I. 1980) (holding that a young female defendant’s abusive language to a group of five male police officers did not constitute fighting words because her speech did not create “an imminent likelihood of provoking an imminent retaliation.”); *Johnson v. Palange*, 406 A.2d 360, 365 (R.I. 1979) (stating that fighting words are “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”); *State v. Authelet*, 385 A.2d 642, 648 (R.I. 1978) (quoting *Gooding v. Wilson*, 405 U.S. 518, 524 (1972)) (acknowledging that for speech to constitute constitutionally *unprotected* fighting words it *must* “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”). In *Authelet*, a defendant’s speech to police officers “[h]ere come the motherfucking pigs again” did not constitute fighting words because it was not directed at the arresting police officer. *Id.* at 400.

28. Brief of the Defendant-Appellant at 17, *State v. Matthews*, 111 A.3d 390 (R.I. 2015) (No. 2012-299-C.A.), 2014 WL 10295554.

“motherfucker” and “queer” would not provoke the average person to violence, and argued further that such words were even less likely to provoke a police officer.²⁹ Further, the Defendant argued that his speech was “unspecific,” “idle,” and “conditional.”³⁰ The Defendant contended that his response was akin to an “emotional outburst” and that he was not capable of following through on any of his threats.³¹

The court provided an in-depth review of the First Amendment principles underpinning the “fighting words” doctrine and Rhode Island precedent on the issue.³² Fighting words are “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”³³ To be considered fighting words, speech must be directed at a specific person and be likely to provoke an *average* person to an imminent violent reaction.³⁴ The context of the speech must be the focus of the analysis; there are no *per se* fighting words.³⁵ Fighting words, “*even when addressed to a police officer*,” do not lose their character as fighting words, if . . . they would cause an average person to fight.”³⁶

The Defendant claimed that based on the court’s prior reasoning in *State v. McKenna*, his conviction should be reversed.³⁷ In *McKenna*, the court held that the young female

29. *Id.*

30. *Matthews*, 111 A.3d at 397.

31. Brief of the Defendant-Appellant, *supra* note 29, at 19.

32. *Matthews*, 111 A.3d at 399.

33. *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). *Chaplinsky* is the seminal United States Supreme Court case on fighting words. *Id.*

34. R.I. GEN. LAWS § 11-45-1(a)(3) (2015); *Matthews*, 111 A.3d at 400 (emphasis added). In *Authalet*, the court put forth the following test for determining whether speech constituted “fighting words”:

The test to be applied when the prosecution relies on the fighting words theory is an objective one: Are the defendant’s expressions words which, when directed to the average person, would cause the addressee to fight? . . . It is not necessary that the person who is personally insulted react violently. As long as the language is inherently likely to cause an average person to retaliate in a violent way, the defendant’s words may be punished as fighting words. Thus, . . . even though a police officer may be expected not to react to abusive language, words directed to an officer which would cause an average person to fight may be proscribed.

Matthews, 111 A.3d at 400 (citing *Authalet*, 385 A.2d at 649–50).

35. *Matthews*, 111 A.3d at 400, 404.

36. *Id.* at 401 (quoting *Johnson*, 406 A.2d at 365).

37. *Id.* at 403; *see also McKenna*, 415 A.2d at 731.

defendant's words did not rise to the level of "fighting words" when from a "nearby parking lot" she called a group of police officers "cocksuckers" and told them she would "blow [their] fucking heads off."³⁸ The defendant was eventually arrested after ignoring the officers' requests to quiet down.³⁹ In finding that the defendant's speech was constitutionally protected, the court considered the defendant's distance from the police officers, that she addressed the officers as a group and not individually, and that the officers were not threatened or provoked by her words because she was a "young girl" unable to "effectuate [her] threat[s]."⁴⁰ Additionally, the State acknowledged that the defendant's words were not "fighting words."⁴¹

Here, however, the court found that the Defendant was more than a bystander; he was "personally involved" in the incident as the actual subject of the troopers' inquiry.⁴² Moreover, the Defendant's physical proximity to the troopers was closer than that of the defendant in *McKenna*, and the Defendant here directed his speech specifically at the two troopers as individuals.⁴³ Additionally, the court considered that both troopers testified that the Defendant's speech provoked and threatened them, whereas the defendant in *McKenna* was more of an "annoyance" to the officers.⁴⁴ Furthermore, the State, in this case, did not concede at any point that the Defendant's words were not fighting words.⁴⁵ Based on these differences, the court ruled that the Defendant's speech did rise to the level of fighting words and, therefore, was not constitutionally protected.⁴⁶

Lastly, the court examined whether the criminal complaint against the Defendant provided him with sufficient notice as a matter of law.⁴⁷ The Defendant argued that the criminal complaint was insufficient because it referenced conflicting sections of the disorderly conduct statute and, thus, did not give

38. *Id.* at 401.

39. *McKenna*, 415 A.2d at 729, 730.

40. *Matthews*, 111 A.3d at 396.

41. *Id.* at 402.

42. *Id.* at 405.

43. *Id.* at 404.

44. *Id.* at 405.

45. *Id.* at 404.

46. *Id.* at 405–06.

47. *Id.* at 406.

adequate notice of the charges against him.⁴⁸ To effectively preserve an issue for appellate review the issue must be raised before the trial court.⁴⁹ The court held that because the Defendant did not raise the notice issue at trial he could not raise it on appeal.⁵⁰ Despite this holding, the court examined the issue and found the notice sufficient because the Defendant provided the trial court with the correct jury instructions for the applicable law.⁵¹

COMMENTARY

The United States Supreme Court has never again upheld a conviction for fighting words since its 1942 decision in *Chaplinsky*.⁵² Yet, the Rhode Island Supreme Court, as well as many other state courts across the country, continue to uphold these convictions, many of which involve police officers.⁵³ Given the current state of law enforcement relations with communities nationwide, especially racial minorities, it is worth exploring why Rhode Island continues to apply this doctrine and if it is appropriate in situations involving police officers.

It is well established that free speech protection is not absolute.⁵⁴ Thus, the context of the speech in question matters. The court in *Matthews* focused heavily on this point.⁵⁵ In the instant case, the Defendant's words to the troopers were personally abusive, provocative, and offensive. The question is whether the standard for determining what constitutes fighting words should be the same for officers of the law as it is for average citizens.

48. *Id.* at 396 n.9, 406.

49. *Id.*

50. *Id.*

51. *Id.*

52. ERWIN CHEMERINKSY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 1053–54 (5th ed. 2015). Since 1942, the United States Supreme Court has overturned fighting words convictions by ruling it only applies to speech directed at another person likely to cause a violent response and by finding laws overly broad, vague, or impermissible content-based restrictions of speech. *Id.* at 1054.

53. Burton Caine, *The Trouble With "Fighting Words": Chaplinsky v. New Hampshire Is A Threat To First Amendment Values And Should Be Overruled*, 88 MARQ. L. REV. 441, 445 (2004).

54. CHEMERINKSY at 1053.

55. *Matthews*, 111 A.3d at 400.

In a footnote, the court briefly touched on the following principle embraced in Justice Powell's concurring opinion in *Lewis v. City of New Orleans*: "[A] properly trained [police] officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fight words."⁵⁶ In *Lewis*, a woman called the police who were arresting her son, "god-damn-mother-fucker-police."⁵⁷ Under a city ordinance this speech was prohibited and Lewis was arrested.⁵⁸ Justice Powell explains that this type of speech restriction:

[C]onfers on police a virtually unrestrained power to arrest and charge persons with a violation. Many arrests are made in "one-on-one" situations where the only witnesses are the arresting officer and the person charged. All that is required for a conviction is that the court accept the testimony of the police officer.⁵⁹

The application of this standard in cases involving law enforcement is problematic because we expect police officers to be objectively restrained in situations where we might not expect the average person. In *Matthews*, if the standard for fighting words was whether an average police officer would be provoked to violent reaction, the Defendant may never have been convicted. Encounters with police are ripe for emotional outbursts, including the use of profane and offensive language. This increased tendency for the use of profane and offensive language in dealing with the police, coupled with the higher standard of restraint expected of police officers, supports the implementation of a different standard in fighting words cases involving law enforcement. Rhode Island should reexamine this doctrine and why the United States Supreme Court has not upheld a conviction for fighting words since 1942.

CONCLUSION

The Rhode Island Supreme Court upheld the Superior Court's

56. *Matthews*, 111 A.3d. at 401; *Lewis v. City of New Orleans*, 415 U.S. 130, 136 (1974).

57. *Lewis*, 415 U.S. at 131.

58. *Id.*

59. *Id.* at 136.

656 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:648

denial of the Defendant's motion for a new trial and motion for judgment of acquittal.⁶⁰ The Court reaffirmed its precedent that the determination of whether speech constitutes "fighting words" must be made on a case by case basis depending on the context in which the words were spoken.⁶¹

Laura Pickering

60. *Id.* at 406.

61. *Id.* at 400, 406.

Contract Law. *Emond Plumbing & Heating v. BankNewport*, 105 A.3d 85 (R.I. 2014). Mortgagee was not unjustly enriched despite subcontractors, hired by property owner, remaining unpaid for materials and labor furnished to improve property. After property owner defaulted on mortgage, mortgagee set-off funds dispersed from a construction loan to pay for improvements to the mortgaged premise contracted by the property owner. The court held that nonpayment by the mortgagee for the improvements made to the property was not inequitable because the mortgagee exercised its contractual right by setting off the property owner's accounts and foreclosing on the property. Moreover, because the mortgagee had not acted in bad faith or made any fraudulent misrepresentations to the unpaid contractor, with whom the mortgagee had no contractual relationship, the mortgagee had no legal obligation to pay the subcontractors.

FACTS AND TRAVEL

In May 2010, Anjan Dutta-Gupta, manager of AIDG Properties, LLC ("AIDG"), purchased an industrial office building in Middletown ("the property").¹ Advanced Solutions For Tomorrow, Inc. ("ASFT"),² a defense contracting company, planned to occupy the property.³ In order to acquire and prepare the property for ASFT's occupancy, AIDG and ASFT obtained a construction loan from BankNewport ("the Defendant").⁴ AIDG and ASFT executed a first and second mortgage on the property to secure the purchase and construction loans from the Defendant.⁵

In August, 2010, ABC Building Corporation ("ABC") was hired by AIDG as general contractor to replace the property's roof

1. *Emond Plumbing & Heating, Inc., et al. v. BankNewport*, 105 A.3d 85, 86 (R.I. 2014).

2. Dutta-Gupta was also the principal of ASFT. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

and HVAC systems.⁶ Emond Plumbing and Heating (“Emond”), and Tecta America New England, LLC (“Tecta”)⁷ were awarded bids to perform the work and subsequently entered into subcontractor agreements with ABC.⁸ The subcontractor agreement provided that the subcontractor submit detailed payment applications to ABC.⁹ ABC would compile the payment applications submitted by the subcontractors and remit a consolidated payment application to AIDG.¹⁰ AIDG would then forward the consolidated payment application to the Defendant to draw funds from the construction loan from the Defendant.¹¹ Prior to disbursement, the Defendant would conduct an inspection of the property to ensure that the work on the payment application was properly completed.¹²

The Plaintiffs began work at the property in September 2010 and October 2010.¹³ The Plaintiffs, pursuant to the subcontractor agreement, submitted detailed payment applications to ABC.¹⁴ It was undisputed that the Plaintiffs had received partial payment for the work.¹⁵ In January 2011, the Plaintiffs had substantially completed the renovations to the property and, on February 3, 2011, the Defendant’s inspector inspected the completed work and disbursed loan proceeds into AIDG’s account the following day.¹⁶ Prior to paying ABC for the work performed on the property, Dutta-Gupta was accused of bribing a government official to obtain AFST’s defense contract.¹⁷ In the wake of Dutta-Gupta’s arrest, AFST laid off all of its employees and ceased operations.¹⁸ The Defendant “then declared Dutta–Gupta’s arrest to be an event of default because it constituted a material adverse change in the circumstances of AIDG and its guarantors.”¹⁹ “Therefore, under

6. *Id.* at 87.

7. Emond and Tecta will be referred to collectively as the Plaintiffs.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 87.

15. *Id.*

16. *Id.* at 88.

17. *Id.*

18. *Id.*

19. *Id.*

the terms of the loan documents, [the Defendant] accelerated the loans, making the full amount immediately due and payable.”²⁰ Additionally, the Defendant “set off the February 4, 2011 [deposit] that had been made into AIDG’s account by ‘reversing’ it.”²¹ Unable to access construction loan proceeds, AIDG was unable to pay ABC, and “as a result, there [was] no dispute that Emond [and] Tecta” were each owed for materials and labor.²²

To protect its interest in the property, the Defendant petitioned the Newport County Superior Court for injunctive relief to enjoin any parties from entering the property.²³ The Defendant then commenced foreclosure proceedings against AIDG; however, the Defendant discontinued its foreclosure proceedings after AIDG filed for bankruptcy protection.²⁴ The Defendant, citing the Superior Court’s injunction, denied the Plaintiffs from accessing the property to remove materials.²⁵ Subsequently, ABC and the Plaintiffs began mechanic’s lien proceedings in Superior Court.²⁶

On July 18, 2011, the Defendant obtained permission from the United States Bankruptcy Court to foreclose on the property.²⁷ The following day, the Defendant petitioned the Superior Court for permission to foreclose the property in the pending mechanic’s lien cases, and without objection from Plaintiffs, the Defendant was granted permission by the Superior Court to foreclose on the property.²⁸

On September 16, 2011, a day after Emond notified the Defendant of its equitable lien on the proceeds of the foreclosure sale, the Defendant conducted a foreclosure sale.²⁹ At the sale, it was announced that the second mortgage was being foreclosed on and any potential bidder would be responsible for the first mortgage on record.³⁰ No bidders at the foreclosure sale bid against the Defendant’s opening credit bid of \$1,000,000 and, on

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 89.

28. *Id.*

29. *Id.*

30. *Id.*

October 27, 2011, the Defendant recorded a foreclosure deed in the Middletown Land Evidence Records.³¹ Ultimately, the Defendant decided to use the property as its own corporate headquarters.³²

The Plaintiffs filed suit in Newport County Superior Court on November 15, 2011, “seeking to recover compensation for their work under the theory of unjust enrichment.”³³ On May 29, 2013, the court granted the Defendant’s motion for summary judgment holding that, as a matter of law, the Defendant “was not unjustly enriched by any improvements [the Plaintiffs] made to the premises when it purchased the property at foreclosure.”³⁴ The Plaintiffs timely filed a notice of appeal.³⁵

ANALYSIS AND HOLDING

The Supreme Court of Rhode Island conducted a *de novo* review of the case.³⁶ Writing for the court, Justice Flaherty stated that “it is well established that ‘recovery for unjust enrichment is predicated upon the equitable principal that one shall not be permitted to enrich himself at the expense of another by receiving property or benefits without making compensation for them.’”³⁷ The court assumed that the Plaintiffs had met the first two prongs of the unjust enrichment analysis and focused on whether it was inequitable for the Defendant to retain the benefit without compensating the Plaintiffs because the court considered the third prong of the unjust enrichment analysis dispositive to the claim of unjust enrichment.³⁸

“The [P]laintiffs argue[d] that it would be inequitable for [the Defendant] to retain disbursed portions of the construction loan, which it reversed and remitted to itself, as well as the improved collateral, because it is contrary to the purpose underlying the construction loan and the expectations of the parties.”³⁹ The Plaintiffs cited *Providence Steel & Iron Co. v. Flammand* for

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 90 (quoting *Narragansett Electric Co. v. Carbone*, 898 A.2d 87, 99 (R.I. 2006)).

38. *Id.* at 90–91.

39. *Id.* at 91.

support; in *Flammond* a subcontractor made a claim against a general contractor and landowner after not being paid for materials furnished to a property.⁴⁰ Rejecting the Plaintiffs argument, the court distinguished *Flammond* because there, the general contractor had both informed the land owner that the subcontractor had not been paid and “the landowner used the construction loan proceeds that had been earmarked for the subcontractor to pay other subcontractors on unrelated projects.”⁴¹

The Plaintiffs also cited *Metric Constructors, Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, another unjust enrichment case involving a lender and a contractor.⁴² The court differentiated *Metric* as well, highlighting that “[u]nder the terms of the construction contract, payments were made directly to the plaintiff by the lender, as opposed to the scenario here, where the lender released funds to the landowner who, in turn, was to pay plaintiffs.”⁴³ Furthermore, although the lender in *Metric* knew of the impending default of the landowner’s mortgage, the lender “induced the [subcontractor] to continue working,” ceased funding the project, foreclosed on the property, and refused to pay the subcontractor.⁴⁴

Lastly, the Plaintiffs looked to *J.G. Plumbing Service, Inc. v. Coastal Mortgage Co.*, where the court held that a construction lender “may be held liable if it affirmatively misleads ‘subcontractors and materialmen so as to induce them to continue to work upon and supply materials to the job to their detriment.’”⁴⁵

Here, the court stated that it was undisputed that there was no contractual relationship between the Plaintiffs and Defendant, and that the record did not show that the Plaintiff claimed that the Defendant had misled or acted fraudulently or in bad faith.⁴⁶ Furthermore, the court reviewed the terms in which the ABC was paid as being through AIDG and not directly from the

40. *Id.* (citing 413 A.2d 487, 487–88 (R.I. 1980)).

41. *Id.* (quoting 413 A.2d 487, 488 (R.I. 1980)).

42. *Id.* (citing 72 Fed.Appx. 916 (4th Cir. 2003)).

43. *Id.* (quoting 72 Fed.Appx. 916, 918–19 (4th Cir. 2003)).

44. *Id.* (quoting 72 Fed.Appx. 916, 919–20 (4th Cir. 2003)).

45. *Id.* (quoting 329 So.2d 393, 396 (Fla. Dist. Ct. App. 1976)).

46. *Id.* at 91–92.

Defendant.⁴⁷

The court held that Dutta-Gupta's arrest constituted a "material adverse change that was an event of default as defined in the loan documents," causing the Defendant to have the contractual right to reverse the February 4, 2011 disbursement of construction loan proceeds to AIDG.⁴⁸ Moreover, the court found that the most important fact was the absence of a contractual relationship between the Plaintiffs and the Defendant and "lack of any allegation that the defendant engaged in any type of misconduct or fraud" when it held that the Defendant's "retention of the property, including the improvements thereon, was not inequitable under our jurisprudence on unjust enrichment."⁴⁹

COMMENTARY

The Rhode Island Supreme Court clearly established that the third prong to the unjust enrichment analysis is dispositive to the claim of unjust enrichment.⁵⁰ Although the Plaintiffs claim that the Defendant had "appreciated" the benefit of the Plaintiffs improvements to the property where the Plaintiffs increased the value of the mortgaged collateral real estate, it was still essential to the claim of unjust enrichment that the Defendant have some sort of relationship with the Plaintiffs, whether by contract or misdealing.⁵¹

Although the holding of the court may appear to be fundamentally unfair or even inequitable, specifically because the Defendant's new corporate headquarters' roof and HVAC system was improved at the expense of the Plaintiffs, the court had little sympathy for the Plaintiffs as it found that the Defendant was exercising its contractual rights under the terms and conditions of the mortgage. It is not the fact that the Defendant came into ownership of the property that makes this case unique, but rather that the Defendant occupied the property subsequent to the foreclosure sale. The Plaintiffs had the opportunity to object to the mortgagee's foreclosure proceedings at the hearing on July 29, 2011, however, the Plaintiffs did not object to the Defendant's

47. *Id.* at 92.

48. *Id.*

49. *Id.*

50. *Id.* at 90–91.

51. *Id.* at 90.

petition to foreclose the property, nor did the Plaintiffs anticipate the Defendant's future occupancy of the property.⁵² Notwithstanding, there would have been very little likelihood of success objecting to the Defendant's petition to foreclose due to both the Defendant's superior title claims to the first and second mortgage and the lack of any inequity as described by the Rhode Island Supreme Court.

Had the court held for the Plaintiffs, the result on subsequent cases could have been absurd if applied to more probable circumstances. For example, if the property here was a residential home that had been improved at the expense of unpaid contractors, the holding would open the door for creditors with inferior title status to lay superior claim to a first position mortgage on the premise that the collateral property was improved. In that light, the only restriction of the contractor's claim would be the value of improvements made to the property by contractors. Thus, in theory, a disgruntled homeowner could contract for improvements on real estate for the homeowners own preference, such as a pool or a sauna, and the lender would be responsible to compensate the unpaid contractors regardless of the effect that the improvements have on the value of the underlying collateral, if any.

Unfortunately for the Plaintiffs, pursuit of AIDG on the basis of breach of contract may be the only viable avenue of relief, although that claim would be difficult to collect on considering that AIDG's principal is in federal prison.⁵³

CONCLUSION

The Rhode Island Supreme Court held that the third prong to the unjust enrichment analysis is dispositive. Additionally, the Rhode Island Supreme Court held that in order for it to be inequitable for a lender to retain a benefit to collateral property without making payment for the value of that benefit, the lender must have had a contractual relationship with the contractor on behalf of the landowner, paid the contractor directly, otherwise

52. *Id.* at 89.

53. Michael P. McKinney, *Dutta-Gupta sentenced to 3 years in Navy kickback scheme*, PROVIDENCE J. (Dec. 4, 2013, 9:42 PM), <http://www.providencejournal.com/article/20131204/NEWS/312049995>.

664 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:657

acted in bad faith, or made fraudulent misrepresentations to the claimant. The Plaintiffs were not paid directly, had no contractual relationship with Defendant, and did not claim that the Defendant acted fraudulently, thus the Defendant was not unjustly enriched by the Plaintiffs improvements to the property and was not required to compensate the Plaintiffs as a matter of law.

Michael Riley

Criminal Law. *D'Alessio v. State*, 101 A.3d 1270 (R.I. 2014). The Supreme Court of Rhode Island found it necessary to find that testimony of an expert witness was not sufficient or material enough to overturn a man's conviction because the testimony of the expert witness did not meet the two prong test showing that the evidence should be entered in. In order to receive post-conviction relief, the Defendant needed to meet this two prong test, which here the court determined the Defendant failed to do.

FACTS AND TRAVEL

In May of 2007, Rocco D'Alessio, the Defendant, filed for an application for post-conviction relief in the Providence County Superior Court.¹ The Defendant had previously been convicted of second-degree murder of his infant daughter.² On the night of January 13, 2000, the Defendant was left alone with his infant daughter when the infant's mother had to leave for work.³ A little while earlier, the Defendant and Ms. Greenhalgh, the infant's mother, got into a heated argument about the location of cocaine, which was hidden from the Defendant by Ms. Greenhalgh.⁴ After obtaining the location of the cocaine, the Defendant was left alone with the infant, but only after Ms. Greenhalgh had made sure the Defendant had calmed down.⁵ After about an hour alone with the child, Lieutenant Alan Fortes of the Providence Fire Department Rescue Company responded to a call at the Defendant's neighbor's house where he was met by the Defendant holding the infant.⁶ There, the child was examined and just appeared to be "simply colicky, or constipated."⁷ The Defendant was asked if he wanted

1. *D'Alessio v. State*, 101 A.3d 1270, 1272 (R.I. 2014).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

to bring the child to the hospital, but he declined to do so.⁸ Around 8 p.m., Lt. Fortes received another call, however this time it was from the Defendant's actual residence.⁹ The first responders to the site were met by the Defendant who came out of the house holding the infant who was clearly not breathing as noticed by Lt. Fortes.¹⁰ The infant was pronounced dead upon arriving at the hospital.¹¹

On May 19, 2000, the Defendant was indicted for first-degree murder.¹² At the trial, occurring two years later, Dr. Elizabeth Laposata, testified that the infant had died from Shaken Baby Syndrome.¹³ Dr. Laposata stated that the infant died from "violent trauma" via shaking and that death occurred within a matter of moments after the injuries were inflicted.¹⁴ The doctor came to this conclusion immediately upon seeing the dead infant.¹⁵ Before the trial, Dr. Laposata confirmed her findings with Dr. Selina Cortez, a neuropathologist.¹⁶ At the end of the trial, the jury returned a guilty verdict for second-degree murder and the Defendant was sentenced to serve a sixty year sentence.¹⁷

A few years later, the Defendant filed for post-conviction relief hoping that the testimony of Dr. Richard Callery, the chief medical examiner for the state of Delaware, would alleviate his sentence.¹⁸ Dr. Callery was accredited to be an expert witness in forensic sciences.¹⁹ Dr. Callery's testimony revealed that he was tasked by Dr. Laposata in reviewing and finalizing incomplete autopsy reports.²⁰ Among one of the autopsy reports was the file of the deceased infant.²¹ Dr. Callery testified that upon reviewing the file, he was unable to come to a conclusion as to whether the

8. *Id.* at 1272–73.

9. *Id.* at 1273.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* However, forty years were to be served as probation. *Id.*

18. *Id.*

19. *Id.* at 1274.

20. *Id.*

21. *Id.*

infant had died of Shaken Baby Syndrome or by other means.²² However, Dr. Callery's testimony revealed that he viewed the file in its preliminary stages and before Dr. Cortez reviewed the file and issued her opinion on it.²³ Dr. Callery also stated that he did not remember what was in the file and continued to repeat that he was unable to make a conclusion based off what he saw when he received the file.²⁴ At the end of his testimony, Dr. Callery conceded that the manner of death could have ranged anywhere between "homicide and undetermined."²⁵ At the conclusion of Dr. Callery's testimony, the hearing justice ruled that the testimony was "valueless" and would not have changed the jury's verdict.²⁶

ANALYSIS AND HOLDING

On appeal, the Defendant raised three arguments that the Supreme Court of Rhode Island heard.²⁷ The court focused its attention on the Defendant's argument that the hearing justice erred when he issued his ruling that the testimony of Dr. Callery would not change the verdict of the jury and was immaterial.²⁸ The court stated that when hearing new evidence for postconviction relief, the evidence presented must have material value, it cannot simply be used as cumulative or impeaching evidence.²⁹ The court defined material as evidence which tends to create a reasonable likelihood of a different result.³⁰ Furthermore, the court reasoned there needs to be a "nexus

22. *Id.*

23. *Id.*

24. *Id.* Dr. Callery also mentioned that it would have been possible to improve the file to such a degree that it would have been possible to determine that the infant's cause of death was indeed homicide. *Id.*

25. *Id.* at 1273–74. Dr. Callery listed the possible forms of death that medical examiners usually include in their reports such as suicide, accident, undetermined, natural, and homicide. *Id.* at 1274.

26. *Id.* at 1275. The hearing justice also went on to say that the credibility of Dr. Callery was in doubt as he seemed to be motivated by personal gain. *Id.*

27. *Id.* at 1276. However, the court threw out the second and third argument, since they were not raised in the postconviction relief proceedings. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

between the new evidence and the outcome of the trial.”³¹ The court found that the testimony of Dr. Callery was immaterial in the sense that it would not have shifted the jury’s verdict in a more favorable result to the Defendant.³² The court believed the testimony of Dr. Callery was trying to undermine the testimony of Dr. Laposata and did not add any material value to the evidence of the trial.³³ It also found that Dr. Callery’s testimony was so vague and inconclusive that even if the testimony were allowed to be entered as evidence, it would not have shifted the jury’s verdict.³⁴ The court also stated that Dr. Laposata’s testimony was credible and was complemented by receiving the outside opinion of Dr. Cortez before the start of the trial.³⁵

The court used a two-prong test in order to determine whether new evidence should be entered.³⁶ The first prong of the test is a threshold prong where the new evidence must meet certain criteria in order to be considered for the second prong.³⁷ The second prong determines whether or not the evidence is of a credible nature to allow relief.³⁸ Although, the court reached the same conclusion as hearing justice, it did so on different grounds.³⁹ The hearing justice determined the evidence passed the first prong of the test, but it was not credible to warrant relief.⁴⁰ The Rhode Island Supreme Court, however, determined that the testimony of Dr. Callery did not even pass the first prong of the test since it was being offered to undermine the testimony of Dr. Laposata and further determined the testimony would not have changed the jury’s verdict.⁴¹

The Defendant claimed next that he had ineffective assistance

31. *Id.*

32. *Id.* at 1276–77.

33. *Id.* at 1277.

34. *Id.*

35. *Id.*

36. *Id.* at 1275.

37. *Id.* In order to satisfy the first prong, the evidence must be (1) newly discoverable and not available at the time of the trial; (2) it must not have been discoverable by due diligence; (3) it must be material, not simply cumulative or impeaching; and (4) it must be of the type that would likely change the verdict at trial. *Id.*

38. *Id.*

39. *Id.* at 1277.

40. *Id.*

41. *Id.*

of counsel.⁴² However, the court ruled that since this issue was not raised by the Defendant or the state, it was not preserved for appeal and therefore the court did not address the claim.⁴³ Even though the hearing justice ruled that there was no claim for ineffective counsel, the court said that the hearing justice should not have ruled on the matter as it was not at issue before him.⁴⁴ The Defendant's final argument and again one that the court dismissed, was that the prosecution tried to suppress material that was favorable to the Defendant thereby violating his due process rights.⁴⁵ However, the court again ruled it was not preserved for appeal and therefore not reviewable by the court.⁴⁶

COMMENTARY

Here, the Rhode Island Supreme Court properly determined that the testimony of Dr. Callery was not sufficient for the Defendant to succeed on a claim for post-conviction relief. The two-prong test that the court applied to determine the viability of the Defendant's new evidence may have been a difficult standard to pass, but it is nonetheless a fair and just standard created by the courts. Here, the two-prong test was fairly applied to the Defendant's new evidence of Dr. Callery's testimony. This test creates narrow guidelines in order for a Defendant to succeed to get post-conviction relief. However, the narrow test is necessary in the sense that it helps to weed out senseless new evidence from those convicted trying to get out of their sentence.

The Defendant in this case tried to introduce evidence that was in no way beneficial to his case. The testimony he was trying to provide did not help his case, but sought to poke holes in the State's case, a clear violation of the first prong of the test because it attempted to impeach the credibility of Dr. Laposata's testimony and not actually add any value to the Defendant's testimony. It seems here as though the Defendant was simply trying to

42. *Id.*

43. *Id.* at 1278.

44. *Id.*

45. *Id.*

46. *Id.* The court also rejected the Defendant's argument that he did make this claim in court, but the Defendant simply points to "vague and scattered references" none of which the court deemed worthy of constituting this claim. *Id.* at 1278–79.

670 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:665

introduce any kind of evidence that he could muster in order to alleviate his sentence to some degree. He was simply trying to find an “out” in order to relieve himself of his sentence. The sentence that also seemed fair, considering forty of the sixty years the Defendant was going to be allowed on probation.

The other two claims brought forward by the Defendant, just seem to be him scraping the bottom of the barrel, trying to come up with any and all claims that may help him win the postconviction relief. However, the court correctly mentioned that in order for him to bring these claims, he should have brought them at trial. This makes procedural and common sense, as allowing people to make any claims they can muster when on appeal, backs up the court system, and allows people to bring in claims that were never argued in the first place.

The test for post-conviction relief helps to weed out claims that people bring in order to alleviate their sentences, but do not actually have viable claims that will benefit them. The Defendant’s claim was one like that: it had no basis to be brought in front of the court. This prevents bogging down the court system with immaterial claims or claims that Defendants such as D’Alessio try and bring simply for the sake of trying to get out of their sentence, not because they believe they were actually wronged.

CONCLUSION

The Rhode Island Supreme Court held that the hearing justice in the Defendant’s post-conviction hearing did not err when he ruled that the evidence of Dr. Callery was not material and therefore would not have influenced the jury to arrive at a different verdict. The court also determined that the Defendant’s other two claims had no merit before the court as they were never argued at trial, therefore making them non issues with this court.

Jamison Jedziniak

Criminal Law. *State v. Armour*, 110 A.3d 1195 (R.I. 2015). The Rhode Island Supreme Court affirmed the Defendant's conviction of second-degree child molestation, holding that a defendant's confession is voluntary when he is made aware of his rights, completely understands those rights, and subsequently provides an incriminating statement to law enforcement. The court also held that a witness's medical testimony was not beyond the scope of proper expert testimony or unfairly prejudicial, even if the testimony suggested an inference that a defendant committed a more serious crime.

FACTS AND TRAVEL

In the early morning hours of January 29, 2011, six-year-old Sarah awoke to a man inside her bedroom, touching her vagina.¹ The perpetrator, Defendant Joseph Armour, rented an upstairs unit of a multi-family home belonging to Sarah's mother, who resided in the first floor unit with Sarah.² The Defendant fled from Sarah's room, where her mother found her covered under her blanket, with her jeans and underwear pulled down below her waist.³ After confirming to her mother that the Defendant touched her inappropriately, Sarah was taken to the local hospital for an examination performed by Dr. Goldberg.⁴ At trial, Dr. Goldberg testified that the victim's examination appeared to be normal other than a few disclosures made by Sarah.⁵ Dr. Goldberg further testified that a normal examination does not necessarily mean the absence of child abuse, which raised several objections from defense counsel.⁶ Notably, the one answer to which defense counsel neither objected to nor moved to strike was

1. *State v. Armour*, 110 A.3d 1195, 1197 (R.I. 2015).

2. *Id.*

3. *Id.* at 1197–98.

4. *Id.* at 1198. The victim's mother asked her daughter if he touched her "cookie," to which the victim said "yes." *Id.*

5. *Id.* at 1202. The victim told the doctor she "felt wet," prompting the doctor to examine for sexual assault. *Id.*

6. *Id.*

Dr. Goldberg's statement that "[Sarah's] normal examination does not exclude the possibility of sexual abuse, or even penetration . . ." ⁷

One of the witnesses called at trial was Detective Mark Jones, the officer who initially spoke to the Defendant following his arrest.⁸ He testified that the Defendant agreed to speak to the two investigating detectives and was therefore moved to an interview room after being brought to the police station.⁹ Detective Jones provided the Defendant a standard rights form, advised the Defendant of his constitutional rights that were included in the form, and that following his advisement, the Defendant initialed every item and signed the document around 9:40 a.m.¹⁰ The Defendant then provided a full confession, which was typed, handed to him to confirm there were no inconsistencies or omissions, and then was signed by the Defendant.¹¹ The Defendant never indicated the statement was incorrect, and never asked to speak to an attorney or make a phone call.¹² The second detective testified that he was present when the Defendant read the rights form, signed and initialed the form, and provided the confession.¹³ The second detective also testified that the Defendant never asked for a lawyer, and that neither detective was advised that a lawyer attempted to contact them on the Defendant's behalf.¹⁴

The Defendant's trial testimony of his arrest and interrogation was substantially different than that of the detectives.¹⁵ The Defendant testified that, after being arrested, he was subjected to intimidation tactics including threats of violence from a large group of law enforcement officers and potential future prison inmates.¹⁶ Once he was brought to the

7. *Id.*

8. *Id.* at 1198.

9. *Id.*

10. *Id.* at 1198–1200.

11. *Id.* at 1199.

12. *Id.*

13. *Id.*

14. *Id.*

15. *See id.*

16. *Id.* The defendant testified that the officers said they were "really in the mood to mess him up," while touching their guns. He testified that the officers asked him "about what he could expect from other inmates at prison." *Id.*

2016]

SURVEY SECTION

673

police station, he was permitted to make a phone call from his cell phone, which he used to call his mother to secure an attorney for representation.¹⁷ The Defendant stated that before he was provided the rights form, he asked multiple times for his lawyer, but his requests were ignored by the officers who continued questioning him.¹⁸ He signed the form out of fear and exhaustion and admitted to giving a statement and signing it because he “was afraid not to”; although he admitted during cross-examination that he knew he was not required to continue answering the detective’s questions, but did so anyway.¹⁹ Finally, the Defendant testified that while being questioned, another officer entered the room and mentioned an outside phone call to the investigating detectives.²⁰

The Defendant’s mother also testified at trial.²¹ She stated that after receiving a phone call from her son requesting an attorney, she contacted the Defendant’s cousin to find him one.²² The Defendant’s cousin then testified that he contacted and secured a lawyer to represent the Defendant.²³ Next, the Defendant’s attorney testified that she contacted the police station around 9:45 a.m., but was denied the opportunity to speak to the Defendant.²⁴ The attorney left a message for her client and advised him of her representation of him and that he should not give a statement.²⁵

During trial, the Defendant moved to suppress his incriminating statement, which was subsequently denied.²⁶ The jury found the Defendant guilty of second-degree child molestation.²⁷ The trial justice denied the Defendant’s motion for judgment of acquittal and sentenced him to thirty years at the

17. *Id.*

18. *Id.*

19. *Id.* at 1199–1200. The defendant also claimed he signed the form because he thought the judge would assume he was guilty if he didn’t sign it. *Id.* at 1199.

20. *Id.* at 1199.

21. *Id.* at 1200.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 1197.

Adult Corrections Institution (ACI).²⁸ The Defendant timely appealed, asserting that the trial court erred in denying his motion to suppress the confession he gave to law enforcement, in permitting Dr. Goldberg to testify regarding the explanation of a normal examination over defense counsel's objection, and in denying the Defendant's motion for judgment of acquittal.²⁹

ANALYSIS AND HOLDING

A. *The Defendant's Motion to Suppress*

On appeal, the Defendant asserted that the trial court erred in denying his motion to suppress his statement to law enforcement, arguing the incriminating statement was made involuntarily.³⁰ The trial justice, concluding the Defendant's statement was made voluntarily, found the Defendant's testimony "implausible, unbelievable, and farfetched," and determined the Defendant's statement was not coerced, but rather that the Defendant "knowingly, intelligently, and voluntarily waived his rights."³¹ In its opinion, the Rhode Island Supreme Court discussed three things: (1) the State's burden of proof for establishing the voluntariness of the Defendant's confession; (2) the trial justice's standard for ruling on the motion to suppress the Defendant's confession; and (3) the two-step test that this appellate court must apply when reviewing the lower court's ruling on this motion.³²

28. *Id.* at 1198, 1203.

29. *Id.* at 1197.

30. *Id.* at 1120.

31. *Id.*

32. *Id.* at 1200–01. First, "[i]n order for the trial justice to admit a defendant's statement at trial, 'the state must establish, by clear and convincing evidence, that the defendant knowingly and intelligently waived his or her right against self-incrimination and that the statement was voluntary.'" *Id.* at 1200 (quoting *State v Monteiro*, 924 A.2d 784, 790 (R.I. 2007)). "This inquiry 'requires an analysis of the totality of the circumstances surrounding the interrogation.'" *Id.* (quoting *State v Jimenez*, 33 A.3d 724, 734 (R.I. 2011)). Then, the court "applies the following two-step review of a trial justice's finding of voluntariness:

'First, we review the trial justice's findings of historical fact with deference and we will not overturn those findings unless they are clearly erroneous. Second . . . we accept the historical facts and credibility determinations, and we then conduct *de novo* review of

First, in ruling that the Defendant's confession was voluntary, the court focused on the evidence presented at trial regarding the Defendant's condition and understanding of his rights at the time of interrogation.³³ The court reasoned that because the detectives advised the Defendant of his rights, both in written and oral form, and because the Defendant initialed and signed next to each right on the form, the Defendant was therefore capable at the time of the interrogation of providing a voluntary statement to the officers.³⁴ The court also relied on the Defendant's condition at the time of questioning, as he appeared alert and acknowledged that he understood his right to silence and to counsel.³⁵ Finally, the court determined that the Defendant's trial testimony was relevant to finding that his confession was voluntary, because the Defendant admitted at trial that he knew he was not required to speak to the officers during the interrogation but that he chose to do so anyway.³⁶

In asserting that the trial justice erred by denying his motion to suppress, the Defendant argued that he was denied his right to counsel when the officers refused his request to make a confidential phone call prior to questioning.³⁷ The court acknowledged that any "person who is arrested 'shall be afforded, as soon after being detained as practicable . . . the opportunity to make use of a telephone for the purpose of securing an attorney.'"³⁸ However, the court noted that the officers allowed the Defendant to call his mother in an attempt to obtain counsel, and therefore the officers did not deny the Defendant his right to counsel.³⁹

B. *Dr. Goldberg's Medical Testimony*

The Defendant's second assertion was that the trial justice erred in allowing Dr. Goldberg to testify about examination

the trial justice's conclusion that the confession was voluntary." *Id.* (quoting *Monteiro*, 924 A.2d at 790).

33. *Armour*, 110 A.3d at 1201.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 1202.

information involving first-degree sexual molestation, because the Defendant was charged with the lesser offense of second-degree sexual molestation.⁴⁰ The Rhode Island Supreme Court upheld the trial justice's admission of Dr. Goldberg's testimony, finding that the testimony was relevant, within "the scope of proper expert testimony," and not "substantially prejudicial."⁴¹ In reviewing the trial court's decision to admit Dr. Goldberg's testimonial evidence, the court applied the "abuse of discretion" standard.⁴² Because defense counsel expressly agreed to allow the doctor to testify regarding the absence of injuries and the results of the examination, the court ruled that there had been no abuse of discretion and thus no error.⁴³ Additionally, the court concluded that defense counsel failed to properly preserve this evidentiary issue for appeal under the "raise or waive" doctrine by failing to object to this specific line of questioning or moving to strike the doctor's answer during trial.⁴⁴ Moreover, the court ruled the doctor's testimony was not unfairly prejudicial had the issue been properly preserved for appeal because of the specific jury instructions provided by the trial justice and the State's burden to prove every element of the crime.⁴⁵ Thus, the court found no error in admitting Dr. Goldberg's testimony.⁴⁶

C. *The Defendant's Motion for Judgment of Acquittal*

The Defendant's third and final assertion was that the trial justice erred in denying the Defendant's motion for judgment of

40. *Id.*

41. *Id.*

42. *Id.* "It is well settled that this Court will 'review a trial justice's decision admitting or excluding evidence under an abuse of discretion standard.'" *Id.* (quoting *State v Brown*, 42 A.3d 1239, 1242 (R.I. 2012)).

43. *Armour*, 110 A.3d at 1202.

44. *Id.* at 1202–03. The raise or waive doctrine explains that the Rhode Island Supreme Court should "not review issues that were not presented to the trial court in such a posture as to alert the trial justice to the question being raised[.]" See *Bernard v HCP, Inc.*, 64 A.3d 1215, 1219 n.2 (R.I. 2013) (quoting *State v Kluth*, 46 A.3d 867, 876 (R.I. 2012)).

45. *Armour*, 110 A.3d at 1203. "In addition, 'because the state bears the burden of proving each element of the charge beyond a reasonable doubt, it has the right to present evidence establishing those elements in its case in chief.'" *Id.* at 1203 (quoting *State v Marmolejos*, 990 A.2d 848, 852 (R.I. 2010)).

46. *Armour*, 110 A.3d at 1202.

acquittal.⁴⁷ The Rhode Island Supreme Court noted that when ruling on a trial court's denial of a motion for judgment of acquittal, the same standard applies as when the trial justice is initially ruling on a defendant's motion for judgment of acquittal.⁴⁸ The fact that the young victim testified at trial about the Defendant's actions, combined with the corroborating testimony from the victim's mother, Dr. Goldberg, and the Defendant's own statement to police following his arrest, all led the Rhode Island Supreme Court to conclude that there was sufficient evidence to prove the Defendant committed one count of second-degree child molestation.⁴⁹ Thus, the Rhode Island Supreme Court held there was enough evidence to support the Defendant's conviction and withstand his motion for judgement of acquittal.⁵⁰

COMMENTARY

The Rhode Island Supreme Court addressed two issues regarding the constitutionality of the Defendant's confession to law enforcement: First, whether the Defendant's confession was voluntary; second, whether Defendant was denied his right to a confidential phone call.⁵¹ As to the first issue, the court focused its factual determination exclusively on the events that occurred during the Defendant's interrogation.⁵² By doing so, the court ignored the Defendant's assertions that law enforcement officers threatened and harassed him after being arrested.⁵³ By failing to address these contentions in the opinion, it could be argued the court purposefully limited its factual analysis to the interrogation and the Defendant's understanding of his rights, excluding from

47. *Id.* at 1203.

48. *Id.* "A motion for a judgment of acquittal should be granted only if the evidence, viewed in the light most favorable to the prosecution, is insufficient to establish the defendant's guilt beyond a reasonable doubt." *Id.* (quoting *State v Heredia*, 10 A.3d 443, 446 (R.I. 2010). "If, however, a reasonable juror could find the defendant guilty beyond a reasonable doubt, the motion should be denied." *Armour*, 110 A.3d at 1203 (quoting *Heredia*, 10 A.3d at 446).

49. *Armour*, 110 A.3d at 1203–04.

50. *Id.* at 1204.

51. *Id.* at 1198.

52. *See id.*

53. *Id.* at 1199.

678 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:671

their inquiry any factual assertions made by the Defendant regarding events prior to the interrogation.

The second issue raised by the Defendant was his right to a confidential phone call pursuant to Rhode Island law.⁵⁴ The court made clear that by calling his mother and requesting her assistance in finding an attorney, the Defendant was afforded the opportunity to use the telephone in order to secure an attorney, and therefore was not denied his right to invoke counsel.⁵⁵

It could be argued that the Rhode Island Supreme Court's conclusion on the evidentiary issue raised by the Defendant provides extensive latitude for prosecutors when questioning a medical examiner.⁵⁶ The court dismissed the Defendant's two arguments that the doctor's testimony was beyond the scope of proper expert testimony and that it was extremely prejudicial.⁵⁷ Although the court applied the "raise or waive" doctrine as one of the reasons for denying the Defendant's motion, the court also pointed to the State's burden of proof in criminal cases as a justification for allowing the doctor's testimony.⁵⁸ In doing so, the court indicated that had this issue been properly preserved for appeal, the testimony would still be admissible even though the doctor was clearly describing facts consistent with a more severe criminal charge. Also, the court acknowledged that defense counsel previously agreed to allow the doctor to testify as to the results of her examination.⁵⁹ Even though the results of the examination eluded to facts outside the relevant criminal charges, with the possibility of a prejudicial effect on the jury, the testimony should still be admissible to allow the State the opportunity to prove every element of the crime.

However, had Dr. Goldberg's testimony directly accused the Defendant of conduct consistent with first-degree child molestation, as opposed to mere speculation on the issue, the Rhode Island Supreme Court might have ruled in favor of the Defendant. A direct implication of sexual penetration would likely mislead the jury, focusing their attention on the possibility of first-

54. *Id.*

55. *Id.* at 1202.

56. *See id.* at 1202–03.

57. *Id.*

58. *Id.*

59. *Id.* at 1202.

2016]

SURVEY SECTION

679

degree child molestation, as opposed to the charged crime of second-degree child molestation. A trial justice would likely decide that the doctor's testimony in this instance would have an unfairly prejudicial effect on the Defendant's case, and conclude that this prejudicial effect outweighs the probative value of the testimony. In this case, however, Dr. Goldberg's testimony only suggested an inference of potential sexual penetration, which likely had a very minimal effect on the jury's determination of guilt.

CONCLUSION

The Rhode Island Supreme Court concluded that the Defendant's confession was voluntary because the Defendant was advised of his rights, signed a form acknowledging his understanding of his rights, and eventually testified at trial that he knew he was not required to continue speaking to detectives.⁶⁰ Further, the court ruled that because defense counsel failed to properly object at trial, the doctor's testimony was properly admitted even though it went outside the scope of the Defendant's second-degree child molestation charge.⁶¹

Brett Hargaden

60. *Id.* at 1201.

61. *Id.* at 1202–03.

Criminal Law. *State v. Tucker*, 111 A.3d 376 (R.I. 2015). The Rhode Island Supreme Court held that evidence of a prior criminal act is properly admitted to establish motive if the evidence is powerful, relevant, extraordinarily significant, and the probative value of the prior criminal act does not outweigh the potential prejudicial effect of the evidence on the jury. A witness's testimony of committing prior crimes with a defendant does not create grounds for mistrial when defense counsel is on notice of the prior crimes and chooses to push the subject anyway. A prosecutor's closing statements are permissible where they pertain only to evidence presented and are not of such a nature as to inflame the passions of the jury.

FACTS AND TRAVEL

In September 2006, Defendant Deaven Tucker ("Tucker"), Victoria Berardinelli (Berardinelli), and Tucker's friends Zachery Brown ("Brown"), John Soares ("Soares"), Ronald Spearin ("Spearin"), and Eugenia Gomes ("Gomes") went to Florida.¹ Everyone drove to Florida from Rhode Island, besides Berardinelli, who flew.² When Berardinelli arrived in Florida, she was surprised to discover that Jennifer Durate (Jennifer) was with the group.³ On the group's last night in Florida everyone except Brown went out to a club.⁴ When the group returned to the room where Brown was staying, Tucker declared that Spearin "had to be taken care of."⁵ Brown testified that at that time, Tucker told Brown the plan he came up with to kill Spearin.⁶ After the group executed the plan, Tucker, Jennifer, Brown, and Berardinelli packed their things and headed back to Rhode

1. *State v. Tucker*, 111 A.3d 376, 379 (R.I. 2015).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

Island.⁷

When the group returned to Rhode Island, Berardinelli warned Tucker that Jennifer “was going to tell on him.”⁸ Thereafter, Tucker maintained a low profile, hiding out in various hotels throughout Rhode Island and Massachusetts, often accompanied by Jennifer.⁹ Soon, a detective from Florida contacted Berardinelli, at which time she told the detective nicknames of those involved in the Florida incident.¹⁰ Tucker learned that Florida detectives had heard everything and believed it would only be a matter of time before they would identify the remaining accomplices, including Jennifer.¹¹ While Tucker was sure that Jennifer would not implicate him because she loved him, he was worried Jennifer might implicate Berardinelli.¹² Ultimately, Tucker declared that he did not “trust Jennifer, and that she had to go.”¹³

On November 20, 2006, Tucker, Ruiz and Jennifer, robbed a bank on the East Side of Providence.¹⁴ Ruiz testified that Tucker had informed him before the robbery that “there’s going to be a good, good lick.”¹⁵ Ruiz further explained that Tucker said that they would rob the bank and that Jennifer would drive the getaway car.¹⁶ Tucker and Ruiz wore all black clothing and bandanas over their faces to rob the bank, however only Tucker wore gloves.¹⁷ The group surveyed the area for a bank to rob and eventually decided on one.¹⁸ According to testimony, Ruiz entered the bank first and ordered the tellers to put the money in his bag.¹⁹ The tellers complied, but Ruiz became impatient and

7. *Id.* at 379–80. Tucker ordered that “[e]verybody keep their mouth shut.” *Id.* at 380.

8. *Id.* at 380.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 377

15. *Id.* at 381.

16. *Id.*

17. *Id.*

18. *Id.* Jennifer cased the bank they chose and determined that it had neither security officers nor bulletproof glass, which made it a good target. *Id.*

19. *Id.*

reached into the drawers.²⁰ During the robbery, Tucker stayed near the entrance to maintain order by displaying his gun and threatening to fire.²¹ After about forty seconds, Tucker and Ruiz left the bank and fled to Jennifer's car.²² Following the robbery, Tucker stated to the others that "he had used Jenny as much as he could. He didn't trust her anymore and she had to go."²³

In effort to prevent being connected to the Florida crime, Tucker decided that Jennifer had to die.²⁴ On November 21, 2006, Tucker, Jennifer and two others²⁵ parked a vehicle on the side of the road in Pawtucket.²⁶ Tucker lured Jennifer from the car, took out a semiautomatic handgun and fired one shot at point-blank range into Jennifer's back.²⁷ Tucker then stood over Jennifer and fired eight more shots into her body, including three shots in her back, one in her upper right arm, and four in her head.²⁸ Tucker left Jennifer's body where she fell.²⁹

By early December 2006, the Providence Police Department had made significant progress in their investigation into the bank robbery.³⁰ Detectives had obtained a latent fingerprint from the teller's cash drawer which was determined to be Ruiz's.³¹ On December 12, 2006, Ruiz turned himself into the police and was arrested on the spot.³² Tucker was arrested later that day.³³ Berardinelli visited Tucker numerous times while he was

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* Tucker asked Wilson to kill Jennifer for her share of the money from the bank robbery and Wilson declined. *Id.* Testimony stated that Tucker then made the same offer to Ruiz and Ruiz responded affirmatively, "F--- it. I'll kill her. I don't care." *Id.* Shortly after, Ruiz changed his mind and told Tucker he would not kill Jennifer and Tucker responded that he would take care of it. *Id.* at 382.

24. *Id.* at 378.

25. The two other passengers were Jason Ruiz and Dana Wilson. *Id.* at n.2.

26. *Id.* at 378.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 382.

31. *Id.* Ruiz was contacted by his mother after the police had been to her home and told her they wanted Ruiz to turn himself in for questioning. *Id.*

32. *Id.*

33. *Id.*

2016]

SURVEY SECTION

683

incarcerated and testified about many of their conversations.³⁴ Ruiz also testified at trial regarding Tucker's plan to rob the bank, as well as his desire to kill Jennifer.³⁵

ANALYSIS AND HOLDING

Tucker was charged with the murder of Jennifer and eleven other offenses.³⁶ The jury returned guilty verdicts on all counts.³⁷ Tucker was sentenced to three consecutive life sentences plus an additional thirty-five consecutive, non-parolable years.³⁸ Three issues were raised on appeal. First, Tucker argued that the trial justice abused his discretion when he admitted certain Rule 404(b) evidence³⁹ concerning the Florida incident, the Spearin murder, and the subsequent investigation spearheaded by one of the detectives.⁴⁰ Next, Tucker argued that the trial justice erred when he denied his motion for a mistrial after Ruiz revealed, during cross examination by the defense, that he knew that the term "good lick" meant a robbery because he had previously done such an act with Tucker.⁴¹ Finally, Tucker claimed that the trial justice committed reversible error when he failed to grant a mistrial because of the prosecutor's inappropriate and inflammatory comments during closing arguments.⁴²

34. *Id.*

35. *Id.* at 381. Tucker first had a plan that consisted of Ruiz hiding near Jennifer's house until he lured her outside, at which point Ruiz was to shoot and kill her, but that plan did not work because they were unable to get Jennifer out of her apartment. *Id.* at 380–81.

36. *Id.* at 378 (the murder of Jennifer was in violation of R.I. GEN. LAWS 1956 §§ 11-23-1 and 11-23-2).

37. *Id.*

38. *Id.*

39. Rule 404(b) of the Rhode Island Rules of Evidence states:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or to prove that defendant feared imminent bodily harm and that the fear was reasonable."

R.I. R. Evid. Art. IV, Rule 404.

40. *Tucker*, 111 A.3d at 383.

41. *Id.*

42. *Id.*

A. Admission of the Florida Evidence was Proper

Prior to the start of trial, the state filed a motion *in limine* seeking the court's guidance with respect to the admissibility of certain Rule 404(b) evidence.⁴³ The state argued that the evidence regarding the Florida incident was necessary to demonstrate Tucker's motive for killing Jennifer and to provide the jury with a full description of the events leading up to Jennifer's murder.⁴⁴ Tucker argued that the Florida evidence should be excluded because its admission would violate Rule 404(b), and because it was unfairly prejudicial, and therefore in violation of Rule 403.⁴⁵ The Rhode Island Supreme Court held that the trial judge did not abuse his discretion regarding the Rule 404(b) analysis when he determined that the Florida evidence was relevant and probative as it established Tucker's motive to kill Jennifer.⁴⁶ Additionally, the court reasoned that Tucker had a motive to kill Jennifer because she might have implicated him or Berardinelli for the murder in Florida, and Tucker was firm on not letting that happen.⁴⁷

After the 404(b) analysis was complete, the trial judge balanced the relevance and probative value of the Florida evidence against its potential prejudice, as required by Rule 403.⁴⁸ The court agreed with the trial judge that the probative value of the evidence outweighed the potential for prejudice, especially since the state chose to refrain from referring to the Florida incident as a murder.⁴⁹ Moreover, the various limiting instructions the judge gave to the jury, including those he gave right after the Florida events were brought up and before closing arguments, further supported that the judge did not abuse his discretion when he admitted the Florida evidence.⁵⁰

43. *Id.*

44. *Id.*

45. *Id.* at 383–84.

46. *Id.* at 386.

47. *Id.*

48. *Id.*

49. *Id.* at 386–87.

50. *Id.* at 387.

B. “Good lick” Testimony did not Warrant a Mistrial

The court next addressed Tucker’s argument regarding Ruiz’s “good lick” testimony.⁵¹ Tucker asserted that Ruiz’s testimony “easily could have distracted the jurors from the issues at hand and allowed them to convict [him] based on evidence that he and Ruiz were seasoned robbers.”⁵² Prior to Ruiz testifying, the trial judge conducted an extensive interview of Ruiz.⁵³ The judge learned that Ruiz was testifying because he was afraid Tucker would “snitch” on him about other “robberies and a shooting,” and then warned Tucker’s counsel about the dangers of certain questioning that could open a door to expose Tucker to other shootings and robberies.⁵⁴ However, Tucker’s counsel elected to proceed.⁵⁵ After the judge interviewed Ruiz, Tucker’s counsel continued his cross-examination where Ruiz responded to a question stating that he knew Tucker was talking about a robbery because he had done things like that with Tucker before.⁵⁶ Immediately after Ruiz revealed the past criminal acts he committed with Tucker, the trial judge granted Tucker’s motion to strike the statement from the record.⁵⁷

Tucker moved to pass the case at the beginning of the next day of trial.⁵⁸ In his ruling, the trial judge explained that Tucker’s counsel had been forewarned that Ruiz had participated in uncharged robberies with Tucker however Tucker’s attorney continued to repeatedly question Ruiz about how he knew what the phrase “good lick” meant.⁵⁹ The decision to pass a case and

51. *Id.* “Good lick” refers to Ruiz’s statements that he and Tucker had previously done similar criminal acts, so he knew the context of the phrase “good lick” when Tucker used it. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 388. The record revealed the following line of questioning:

[Defense Counsel]: . . . that the defendant indicated that he was going to— there’s going to be a good lick?

[Ruiz]: Yes.

[Defense Counsel]: Is that right? That’s a chance to get some money?

[Ruiz]: Yes. A lick is robbery. It’s a slang term for, like, robbery.

declare a mistrial belongs to the trial justice, and this Court gave great weight to that decision in coming to a conclusion here.⁶⁰

Ultimately, the court ruled that the trial justice did not err when he denied Tucker's motion to pass because Tucker's counsel had been forewarned about Ruiz's prior criminal experience with Tucker, and Tucker's counsel still proceeded to ask Ruiz how he knew a "good lick" was a robbery.⁶¹ Additionally, directly after Ruiz stated that he had done things like that with Tucker previously, the trial judge ordered that statement to be stricken from the record.⁶²

C. The Prosecution's Closing Statements Were Appropriate

Tucker's final argument on appeal was that the prosecutor made inappropriate and inflammatory comments during his closing argument which warranted a new trial.⁶³ However, in order for a prosecutor's comments to be deemed inappropriate the statements must be totally extraneous to the issues in the case and tend to inflame and arouse the passions of the jury.⁶⁴ The court concluded that the prosecutor's statement did not exceed the considerable latitude he was allowed because it related only to evidence presented at trial.⁶⁵ Tucker also argued that the prosecutor acted improperly when he referred to victim impact evidence that was not introduced into evidence before closing arguments.⁶⁶ The prosecution discussed Jennifer's son and

[Defense Counsel]: So, when you say that the defendant mentioned that, then you knew he was talking about a robbery?

[Ruiz]: Yes.

[Defense Counsel]: Not something else?

[Ruiz]: But I knew—but—knew it was a robbery, but I didn't know what kind of robbery, because I had before done things like that with [defendant].

Id. at 387.

60. *Id.* at 388.

61. *Id.* "[W]hen counsel goes fishing on cross-examination, he cannot assume that in playing with fire, he will not get burned." *Id.* (citing *State v. Edwards*, 478 A.2d 972, 975 (R.I. 1984)).

62. *Id.*

63. *Id.*

64. *Id.* at 389.

65. *Id.*

66. *Id.*

mother and the tragedy they were facing because of her murder, which Tucker believed to be impermissible “victim impact evidence.”⁶⁷ However, the court disagreed with Tucker because his own counsel had probed a number of the state’s witnesses about the nature of Jennifer’s relationship with her son and how much time she spent with him.⁶⁸ The court affirmed all of the trial courts findings.⁶⁹

COMMENTARY

The court properly affirmed the trial justice’s ruling on the Rule 404(b) argument. The trial justice did a thorough Rule 404(b) analysis regarding Tucker’s motive and how the evidence of the Florida crimes would go directly to that motive. Rule 404(b) expressly states that evidence of past crimes may be admitted for various purposes, such as to prove motive. It is clear from Ruiz’s testimony that Tucker expressly stated his motive through verbal communication. Next, the trial judge correctly moved on to a Rule 403 analysis. While the evidence could have potentially been prejudicial to Tucker, such prejudice does not outweigh the probative value of establishing a clear and convincing motive. The level of prejudice was also greatly reduced by the trial judge’s multiple limiting instructions to the jury regarding the Florida evidence both before and after closing arguments. The judge made a diligent effort in trying to avoid prejudice.

As to Ruiz’s “good lick” testimony, the court seemed to be more passionate about emphasizing Tucker’s counsel’s clear error of judgment in probing the witness on the meaning of “good lick”, as well as in establishing that Tucker’s attorney essentially deserved what was coming to him than it was in evaluating whether the trial judge’s ruling was appropriate based on the rule. However, as there is a very high standard for reversing the decision of a trial judge⁷⁰ on a mistrial ruling, this court’s

67. *Id.*

68. *Id.*

69. *Id.* at 390.

70. The standard for overruling a judge in the lower court on the mistrial ruling states, “a mistrial shall be declared when an “inappropriate remark [or action] has so inflamed the jurors that they no longer would be able to decide the case based on a calm and dispassionate evaluation of the evidence.” *Id.* at 388 (quoting *State v. Lynch*, 854 A.2d 1022, 1033 (R.I.

688 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:680

affirmation of that ruling was proper. A jury probably would not have been aroused to such a point, especially considering the vast array of testimony and evidence presented at trial.

Lastly, Tucker's claim that the prosecution made inappropriate statements seems unwarranted. The exact language of the prosecution's closing statement would probably better reflect the degree to which Tucker's claim was frivolous; however, the brief recap the court discusses makes it quite clear that Tucker's own counsel opened the doors to the subject matter of comments from the prosecution to which he claimed warranted a new trial.⁷¹ Moreover, other evidence in the trial was certainly more outrageous than the prosecution's closing statements about Jennifer's family's sorrow and mourning after her death. It would be a great stretch to say that such comments could inflame the passions of the jury so much as to impact their decision or to warrant the granting of a new trial.

CONCLUSION

The Rhode Island Supreme Court held that evidence of a prior crime is admissible to establish motive when the probative value is not outweighed by prejudice. The court determined that testimony by a witness of prior criminal acts committed by the defendant will not create grounds for mistrial when defense counsel was on notice that such events could come to light, and continues to push an issue likely to bring those facts to light. Finally, the Court established that prosecution's closing statements will not be considered inappropriate so long as they are not totally extraneous to the evidence presented at trial and do not inflame the passions of the jury.

Brianne M. Chevalier

2004)).

71. The only specific example the court discusses in the opinion is when Tucker's counsel asked Jennifer's sister, Susan, about how much time Jennifer spent with her son. *Id.* at 389.

Criminal Law. *State v. Rosenbaum*, 114 A.3d 76 (R.I. 2015). The Rhode Island Supreme Court held that a person who wants a restitution order reduced has the burden of proof to show that he or she has made a good faith effort to procure the additional funds that are purportedly missing. The court will not accept evasive and vague answers as evidence.

FACTS AND TRAVEL

In 2010, Defendant, Judith Rosenbaum (“Rosenbaum”), pled *nolo contendere* before the Rhode Island superior court to one count of uttering or delivering checks in an amount exceeding \$1,500 with intent to defraud, one count of misappropriating property, and one count of obtaining goods valued at more than \$500 by false pretenses with intent to cheat or defraud.¹ Rosenbaum was put on probation and ordered to pay \$95,000 in restitution.² Rosenbaum’s restitution payments were set at \$500 a month.³ On January 17, 2013, Rosenbaum appeared before a Superior Court magistrate in order to have her monthly payments reduced.⁴

At the hearing before the magistrate, Rosenbaum testified that her husband had lost his job as a physician and that her financial situation had changed since she was originally ordered to pay \$500 a month in restitution.⁵ Rosenbaum argued that her monthly payments should be reduced to \$237, the amount she received every month from a pension benefit.⁶ The hearing focused on various (although outdated) financial documents Rosenbaum submitted into evidence.⁷ The evidence revealed that

1. *State v. Rosenbaum*, 114 A.3d 76, 77 (R.I. 2015).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 78

6. *Id.* at 77

7. *Id.* at 78

690 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:689]

Rosenbaum and her husband resided in a house valued at \$950,000, which they had incurred negative equity in the amount of \$350,000.⁸ The Rosenbaums had had a monthly mortgage payment on the property for \$8,850 and a property tax obligation of \$1,542.⁹ At the time of the hearing, Rosenbaum and her husband were in the midst of foreclosure proceedings after falling more than a year behind on their mortgage and tax payments.¹⁰

Rosenbaum's financial statements showed that she and her husband owned two cars, making monthly payments of \$856 on the 2007 Toyota Highlander and \$680 on the 2008 Toyota Prius.¹¹ Rosenbaum and her husband spent \$175 a month on car insurance and \$256 a month on gas.¹² Rosenbaum's other monthly expenses included \$804 on homeowners insurance, \$745 on life insurance, \$200 on clothing and shoes, \$150 on cable and internet and \$100 on charitable donations.¹³ Rosenbaum and her husband also owed \$11,000 on a line of credit with Harris Furs¹⁴, which the couple had been making \$600 monthly payments on prior to Rosenbaum's husband losing his job.¹⁵ When asked at the hearing if she had thought about selling any of the furs or jewelry, Rosenbaum made no indication that she had considered reducing any of her monthly expenditures.¹⁶ The magistrate denied Rosenbaum's petition to have her monthly payments reduced, finding that Rosenbaum had failed to present evidence that she was financially unable to make the restitution payments without accessing her social security funds.¹⁷

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* Rosenbaum explained that her husband drove the Prius and she was previously driving the Highlander but now had "incredible difficulty driving" due to an injury. Because the car went essentially unused, the court reasoned that Rosenbaum could sell it as a means to repay her restitution. *Id.*

12. *Id.*

13. *Id.*

14. William Harris Furs is a luxury and couture full service fur retailer. See www.williamhharrisfurs.com.

15. *Rosenbaum*, 114 A.3d at 78.

16. *Id.* at 79

17. *Id.* Defendant's cannot, by law, be forced to use their social security funds towards restitution payments. The magistrate made note of the fact that Rosenbaum had several expenditures (including monthly car payments on a car she hardly used) that could be allocated toward her restitution

2016]

SURVEY SECTION

691

Rosenbaum argued that it was an error to conclude she had sufficient funds to pay the \$500 per month restitution and reminded the court that her husband was not obligated to pay restitution and therefore his assets could not be considered toward her ability to pay.¹⁸ The state argued that Rosenbaum had access to numerous assets that could be liquidated and could easily relocate funds that she was spending on unnecessary expenses in order to pay her restitution.¹⁹ In a hearing held in superior court, the hearing justice explained that the standard of review was very deferential to the decision of the magistrate and that under this standard, factual findings would only be overturned if clearly erroneous and issues of law would be reviewed *de novo*.²⁰

The hearing justice issued a bench decision denying Rosenbaum's appeal, holding that Rosenbaum had "willfully failed to meet"²¹ the burden of proof in order show that she was unable to make her restitution amount.²² The hearing justice noted several unnecessary expenditures that Rosenbaum could eliminate from her budget that could provide her with additional income sufficient to make her restitution payments.²³ The justice also vacated a previously imposed stay on the magistrate's order and ordered the defendant to pay an additional \$1,000.²⁴ Rosenbaum appealed this decision to the Rhode Island Supreme Court.²⁵

ANALYSIS AND HOLDING

In reviewing the decision of the Superior Court, the Rhode Island Supreme Court explained that it would review the questions of law *de novo*, but that it would "not disturb the factual determinations of the Superior Court justice unless he or she made clearly erroneous findings or misconceived or overlooked

obligation. *Id.* The magistrate also noted that Rosenbaum had not presented any evidence regarding the value of her assets in personal property. *Id.*

18. *Id.* There was an issue determining exact financial statements as Rosenbaum did not provide any tax returns for after the year 2007. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 80.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

material evidence.”²⁶

Rosenbaum argued that the “findings of the magistrate and hearing justice were “clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.”²⁷ Rosenbaum argued that the financial informative she submitted into evidence showed that her only source of income was from her social security and pension benefits.²⁸ Rosenbaum contended that most of the monthly expenses the lower courts found to be relevant in their decision were being paid for by her husband.²⁹ The court rejected this argument as Rosenbaum did not produce any new evidence to her argument that her husband was paying her expenses after previously claiming, as the State noted, that Rosenbaum was “continually [worried] about having money to feed herself and her husband.”³⁰ Much like the lower courts, the Rhode Island Supreme Court found that Rosenbaum bore the burden of proving that she was unable to comply with the restitution order and showing that she had made sufficient efforts to try and acquire the necessary funds to comply with the order.³¹

The court noted from Rosenbaum’s testimony that she had numerous assets that she could potentially liquidate.³² This, along with the lack of evidence to support her “vague claim that her husband is paying her monthly expenses,”³³ and the tax return documents that she failed to submit after being instructed to do so, was noted as the reasoning for why the court was affirming the Superior Court’s judgement.³⁴

COMMENTARY

In keeping with the decisions of the lower courts, the Rhode Island Supreme Court disregarded the admittedly ridiculous argument of being unable to pay a \$500 payment by a person who lives in a million-dollar home, pays a line of credit on furs, and has

26. *Id.* (citing *Wilby v. Savoie*, 86 A.3d 362, 372 (R.I. 2014) (supporting deference to the hearing justices)).

27. *Id.*

28. *Id.* at 81

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

a monthly clothing and shoe budget nearly half the amount she is being ordered to pay in restitution. While it is easy to want to agree with the court's ruling in this instant, there are several factors that were overlooked in making this determination.

Rosenbaum's argument on appeal that it was her, and not her husband who owed restitution, was an argument that should have received more thought and attention. If Rosenbaum could have shown that her finances were completely separate from her husband's, and that because she only personally made \$237 a month, far less than the restitution ordered, she might have been more successful.³⁵

However, because Rosenbaum did not produce any concrete evidence to the fact that her husband's finances were separate from her own, or that he was paying for the expenses noted on their financial statements, the court did not find this argument very compelling. This argument would have been much more persuasive had it been introduced at the very first appearance in front of the magistrate instead of only being introduced to the Rhode Island Supreme Court in order to argue a position such as this, with no evidentiary backing.

Furthermore, though the court requested Rosenbaum's tax returns, she continually failed to provide any returns after the year 2007. The court also questioned why none of the financial statements Rosenbaum did supply indicated how she, who claims she only has an income of around \$1,100 a month and a husband who lost his job, pays for any of the expenses listed.³⁶ The court did not find Rosenbaum's evidence satisfactory as it did not answer any of the basic questions the court had, meet the burden of proof or back up any of Rosenbaum's arguments.

In addition to the complete lack of evidence, Rosenbaum's list of extravagant expenses juxtaposed with her apparent worry about having enough money to feed herself and her husband did not help help the court to sympathize with her. In considering the lack of evidentiary support behind Rosenbaum's claims as compared to the extravagant life style she and her husband led,

35. *Id.* at 77. She also collected \$907 in Social security benefits. *Id.* However, it would be a violation of federal security law to require her to use money from her social security to fulfill her restitution obligation. *Id.*

36. *Id.* at 81

694 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:689

the court made an appropriate decision in affirming Rosenbaum's restitution order.

CONCLUSION

The Rhode Island Supreme Court upheld the magistrate's order for the Defendant to continue to pay her previously set restitution payments. The Defendant bore the burden of proof to show that she was unable to comply with the restitution order. The Superior Court found the Defendant did not meet this burden and the Supreme Court affirmed.

Cayman Calabro

Criminal Law. *State v. Austin*, 114 A.3d 87 (R.I. 2015). The Rhode Island Supreme Court adjudicated a second-degree sexual assault case regarding the admissibility of a complainant’s out-of-court identification procedure of the Defendant. When evaluating the reliability of testimony regarding identification of an assailant, the trial justice uses a five-factor test. On appeal, the Defendant filed a motion for a new trial, a motion to suppress evidence of the faulty identification procedure used, and a motion to use the Defendant’s proposed jury instructions. In denying the motion to suppress evidence and for a new trial, the Rhode Island Supreme Court reasoned that the procedure was not “unduly suggestive” and that the trial justice concurred with the jury’s verdict. Furthermore, the court denied the motion to use the Defendant’s proposed jury instructions because the instructions given adequately covered the law concerning eyewitness identifications. Thus, the court affirmed the Superior Court’s conviction.

FACTS AND TRAVEL

In the early afternoon on November 29, 2010, the complaining witness, Laura,¹ boarded the Rhode Island Public Transit Authority (RIPTA) at Kennedy Plaza in Providence, Rhode Island (R.I.).² Upon entering the bus, Laura elected to sit near the back; shortly thereafter, a man carrying a black duffel bag sat down in the seat right next to her.³ The man tried to start a conversation with Laura, which proved unsuccessful.⁴

Subsequently, as the bus approached a church⁵ in Barrington,

1. The name “Laura” is used in this case to refer to the complainant in order to protect her privacy.

2. *State v. Austin*, 114 A.3d 87 (R.I. 2015) 87, 89–90. The bus was scheduled to depart along Route 114 towards Newport, Rhode Island. *Id.*

3. *Id.*

4. *Id.*

5. The Barrington Congregational Church, commonly known as “the

the man sitting next to Laura plunged his hand between her legs and latched onto her vaginal area.⁶ Laura ordered the man to “stop,” but he persisted despite Laura’s numerous attempts to push his hand away.⁷ At this time, no passengers came to Laura’s aid.⁸ Laura then told the man that she needed to get off the bus because it was her stop, although this was not true.⁹ The man acknowledged her request and moved his duffel bag out of the way, allowing Laura to reach the aisle.¹⁰ After Laura moved to the front of the bus—where she remained—she notified the bus driver about what had just occurred; however, the bus driver ignored Laura’s complaint.¹¹ Laura then noted details of the incident.¹² Shortly after, the bus came to another stop in Barrington where the man vacated the bus, being sure to hide his face behind his jacket as he passed Laura.¹³

Soon thereafter, Laura departed the bus in Bristol and went directly to the Bristol police station to report the incident.¹⁴ The Bristol police then transported Laura to the Barrington police station where she met with Detective Ferreira.¹⁵ Laura stated that her perpetrator was a white male over six feet tall, weighing around 230 pounds, and was between the ages 30 and 50.¹⁶ Laura also asserted that her assailant was clean-shaven with short grayish-brown hair and had been wearing a gray sweat suit with a purple and yellow sports jacket,¹⁷ and was carrying a black duffel bag.¹⁸ After Detective Ferreira received this information,

white church.” *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* Laura then began noting details of the incident; she took note of: the bus and route number, the time of day that the incident occurred, and a description of her perpetrator. *Id.*

12. *Id.* Laura took note of: the bus and route number, the time of day that the incident occurred, and a description of her perpetrator. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Detective Ferreira concluded that Laura was likely describing the logo for the Minnesota Vikings, whose team colors are purple and yellow. *Id.*

18. *Id.*

he sent out a department-wide BOLO¹⁹ with a description of the perpetrator Laura described.²⁰

The following day, as a result of the BOLO, Patrolman Mark Haddigan (“Haddigan”) detained a man—clad in a purple and yellow Minnesota Vikings jacket—in Barrington.²¹ Haddigan informed the man, referred to as “McGill,” of the sexual assault that occurred the day before.²² McGill then voluntarily proceeded to the police station where he produced his RIPTA bus pass and was photographed.²³ McGill was released shortly thereafter.²⁴

On December 1, Patrolman Michael Gregorezek (“Gregorezek”) noticed a man fitting Laura’s description waiting for a RIPTA bus.²⁵ The man, identified as Robert Austin (“the Defendant”), was wearing a gray sweat suit, a purple and yellow Vikings jacket, and was lugging around a black duffel bag.²⁶ Patrolman Gregorezek approached the Defendant and asked him if he would be willing to go to the police station to answer a few questions.²⁷

While at the station, Detective Ferreria asked the Defendant whether he had traveled through Barrington on a RIPTA bus on November 29, 2010, and the Defendant replied that he had not.²⁸ The Defendant also informed the police that he was the only person in possession of his bus pass.²⁹ After this statement, the officers asked the Defendant for his bus pass, and after complying, permitted the Defendant to leave the station.³⁰

Detective Ferreira then proceeded to transfer the serial numbers from the Defendant’s and McGill’s bus passes to the

19. A BOLO notice alerts officers to “be on the lookout.” *See* State v. Pitts, 960 A.2d 240, 242 n.4 (R.I. 2008).

20. *Austin*, 114 A.3d at 89–90.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 90–91.

26. *Id.* at 91.

27. *Id.* Austin complied with the patrolman’s request and went to the station. *Id.*

28. *Id.* Although Austin did admit to Detective Ferreira that he had traveled on a bus that day, which was headed towards Warwick. *Id.*

29. *Id.*

30. *Id.*

RIPTA Assistant General Manager, James Dean.³¹ The scan of the serial numbers disclosed no activity on McGill's bus pass on the date in question; however, on the contrary, a scan of the serial numbers on the Defendant's bus pass revealed that it was used on November 29, 2010, at 1:06 p.m. to board a bus to Newport.³² The bus running to Newport was number 0545, which matched the number Laura recorded in her notes.³³

On December 1, 2010, Detective Ferreira contacted Laura and arranged for her to view an array of photographs at the Bristol Police Station.³⁴ After Laura read the Barrington police department procedure on how to correctly view a photo array, she was shown seven photographs in sequential order; the instructions stated that the array "may or may not contain a picture of the person who committed the crime."³⁵ The first photograph was of McGill, the third was of the Defendant, and the remaining five photographs were taken from the Adult Correctional Institutions WINFACTS computer database.³⁶ Detective Ferreira excluded photographs of any bald, mustached, and non-Caucasian men, and all of the men in the array were between the 30 and 42 years old, while McGill and the Defendant were both 51 years old.³⁷

After analyzing all seven photographs, Laura asked to see the photographs identified as numbes one and three in the lineup again.³⁸ After viewing the side-view of these photographs, Laura immediately identified the Defendant, as depicted in the third photograph, as her assailant.³⁹

Laura later testified that the side-view profile photograph of the Defendant helped assure her that "[r]ight away [she] knew which one it was."⁴⁰ Detective Ferreira then presented Laura a photograph of the black duffel bag and a photograph of the Defendant, with his face concealed, wearing a purple and yellow

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

Vikings jacket and holding a black duffel bag.⁴¹ Laura identified the purple and yellow Vikings jacket and black duffel bag as articles worn and carried by her assailant.⁴² Lastly, Detective Ferreira showed Laura a photograph of the Defendant wearing gray sweatpants and a Vikings Jacket.⁴³ At that time, Laura declared that she was “one hundred percent certain” that this was the individual who assaulted her on the RIPTA bus.⁴⁴

On January 27, 2011, the Defendant was charged with one count of second-degree sexual assault in violation of Rhode Island General Law 1956 §§ 11-37-4 and 11-37-5.⁴⁵ Thereafter, the Defendant filed a motion to suppress Laura’s out-of-court identification.⁴⁶ At the hearing on the motion, the Defendant argued that Laura’s out-of-court identification should be suppressed because of dissimilarities between the individuals in the photo array, the complainant’s disputable accuracy, and because the photo identification procedure was unduly suggestive, which created a high risk of misidentification.⁴⁷

The Defendant’s motion to suppress was ultimately denied because the trial court concluded that the identification procedure was not unduly suggestive.⁴⁸ The state argued in response to the Defendant’s motion that the photo array contained photographs of Caucasian men that were all of similar builds, weights, and were all similarly cleanly shaven like the Defendant.⁴⁹ The state also noted that Laura had four opportunities to identify her assailant in different photographs, and concluded after viewing these varying images that that the Defendant was her assailant.⁵⁰ Lastly, the trial justice considered the five-factor test for assessing the appropriateness of an eyewitness identification,⁵¹ and also

41. *Id.* at 91–92.

42. *Id.* at 92.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* The hearings were held on the motion to suppress issue on June 28, 2012 and July 2, 2012. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* The five factors for assessing an eyewitness identification are: the opportunity to observe, the degree of attention given to those observations; the accuracy of the prior description of the perpetrator; the level of certainty

700 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 21:695]

found that the identification procedure was not unduly suggestive.⁵²

The Defendant's trial began on July 2, 2012, and four days later, the trial justice gave instructions to the jury.⁵³ The Defendant objected to the instructions given to the jury because none of the instructions given were the Defendant had proposed.⁵⁴ Moreover, the Defendant objected because the trial justice did not include language concerning "accuracy versus

demonstrated by the witness at the identification procedure; and the time between the crime and confrontation. *See State v. Austin*, 731 A.2d 678, 682 (R.I. 1999) (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)).

52. *Austin*, 114 A.3d at 92.

53. *Id.* The trial court charged the jury as follows:

"The burden is on the State to prove beyond a reasonable doubt not only that the crime was committed but that the Defendant was the person who committed the crime. While this concept may seem rather fundamental you may consider one or more of the following as you determine whether the State has proven the identity of the Defendant as the person who committed the crime alleged in the complaint.

"(One) The witness's opportunity to observe the criminal acts and the person committing them, including the length of the encounter, the distance between the various parties, the lighting conditions at the time, the witness's state of mind at the time of the offense, and other circumstances affecting the witness's opportunity to observe the person committing the offense that you deem relevant.

"(Two) Any subsequent identification, failure to identify or misidentification by the witness. Also the certainty or lack of certainty expressed by the witness at the time of the identification, the state of mind of the witness at the time of the subsequent procedure, the length of time that elapsed between the crime and the subsequent identification and any other circumstances bearing on the reliability of the witness's identification that you as the jury deem relevant.

"(Three) Any other direct or circumstantial evidence which may identify the person who committed the offense charged which corroborates or fails to corroborate the identification by the witness.

"You as the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you convict him. If the circumstances of the identification of the Defendant are not convincing beyond a reasonable doubt then you must find the Defendant not guilty."

Id. at 92–93.

54. *Id.* at 93. One set of proposed instructions was based on instructions pursuant to *State v. Henderson*, 27 A.3d 872 (N.J. 2011), while the other proposed instructions were from the decision in *State v. Figuereo*, 31 A.3d 1283, 1290–91 (R.I. 2011). *Id.*

certainty” in his charge.⁵⁵ The state’s response was that this issue is normally relevant in the context of a defendant’s proffered eyewitness expert testimony, “but that [the] Court has consistently rejected these experts on the ground that ‘trustworthiness of eyewitnesses is not beyond the ken of the jurors.’”⁵⁶ Thus, the trial justice declined to give the Defendant’s proposed jury instructions and held that the jury instructions given sufficiently covered the law concerning eyewitness identifications.⁵⁷ On July 6, 2012, the jury returned a guilty verdict on one count of sexual assault.⁵⁸

The Defendant filed a motion for a new trial.⁵⁹ At the hearing on that motion, the Defendant argued that the evidence presented at his trial should have generated a not guilty verdict because the Defendant contended that the evidence showed that Laura “demonstrated a level of uncertainty” upon first observing the photo array.⁶⁰ The Defendant argued that Laura’s uncertainty resulted in a high likelihood of misidentification, which could have led a reasonable juror to find in favor of the Defendant.⁶¹ In response, the state asserted that Laura identified the Defendant as her assailant before she was shown the photograph of the Defendant wearing the purple and yellow jacket.⁶² When the trial justice denied the motion, he disclosed that the identification procedure was completed to his satisfaction and the complainant had testified credibly.⁶³

On November 13, 2012, the Defendant was sentenced to 15 years in prison.⁶⁴ Soon after, the Defendant filed a notice of appeal of his conviction, arguing that the trial justice erred in denying his motion to suppress, his motion for a new trial, and his

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* Moreover, the procedure became overly suggestive and “sloppy” when she was only shown a photograph of Austin in the jacket with the bag. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* The trial justice also expressed that if this had been a bench trial, he also would have found the Defendant guilty. *Id.*

64. *Id.*

request for jury instructions.⁶⁵

ANALYSIS AND HOLDING

A. *Motion to Suppress*

On appeal to the the Rhode Island Supreme Court, the Defendant asserted that it was error to deny his motion to suppress Laura's out-of-court identification because the arrangement of the photos was unfair, as it was unduly suggestive.⁶⁶ When courts evaluate the appropriateness of an eyewitness identification, the trial justice undertakes a two-step analysis.⁶⁷ The first step is determining "whether the procedure used in the identification was unnecessarily suggestive."⁶⁸ Next, if it is found that the identification procedure was unnecessarily suggestive, "the trial justice must "determin[e] whether in the totality of the circumstances the identification was nonetheless reliable."⁶⁹

In his appeal, the Defendant contended that the layout of the photos was unfair, and that the trial justice was incorrect to conclude that the physical characteristics of the men in the array were similar to Laura's description of her assailant.⁷⁰ The trial justice rejected the Defendant's contentions, determining that all seven photographs in the photo array portrayed men, fitting the general description of Laura's assailant.⁷¹ The Rhode Island Supreme Court noted that is well-established that "the images constituting a photographic array need not be 'look-alikes,' but rather need only possess similar general characteristics."⁷² Thus,

65. *Id.* at 93–94.

66. *Id.* at 94.

67. *See* State v. Gallop, 89 A.3d 795, 801 (R.I. 2014) (quoting State v. Brown, 42 A.3d 1239, 1242 (R.I. 2012)).

68. *See* State v. Brown, 42 A.3d 1239, 1242 (R.I. 2012) (quoting State v. Texter, 923 A.2d 568, 574 (R.I. 2007)).

69. *Austin*, 114 A.3d at 94 (quoting *Brown*, 42 A.3d at 1242-43).

70. *Id.* This was demonstrated by the fact that the photographs of the five younger men were instantly ruled out by Laura, and of the two remaining photographs, only the Defendant matched the weight of the described perpetrator. *Id.*

71. *Id.* All of the photographs depicted men between the ages of thirty and forty, with short hair, and no facial hair; furthermore, despite all of the men not matching the Defendant's weight of 230 pounds, five of the six men in the photo array weighed close to 230 pounds. *Id.*

72. State v. Imbruglia, 913 A.2d 1022, 1029 (R.I. 2007) (citing State v.

the court held that because the photographs in the array all shared roughly the same basic characteristics described by the complainant, the photo array was not unduly suggestive.⁷³

Furthermore, prior to the viewing of the photo array, Detective Ferreira informed Laura that the photo array “may or may not contain a picture of the person who committed the crime.”⁷⁴ This court reasoned that this instruction “mitigated the risk” that Laura would select a photograph “simply because she believed she was expected to do so.”⁷⁵

The court rejected the the Defendant’s argument that the display of the Defendant’s photographs after Laura’s initial selection was “impermissibly suggestive confirmation” of Laura’s original selection of the Defendant from the lineup array.⁷⁶ The court concluded that this argument failed because it was evident that these individual photographs of the Defendant were shown to Laura only after she had already identified the Defendant as her assailant.⁷⁷ Having concluded that the photo array was in fact not unduly suggestive, the court found unnecessary to engage in step two of the analysis.⁷⁸ Therefore, the court determined that the trial justice did not err in denying the Defendant’s motion to suppress the identification.⁷⁹

B. *Motion for a New Trial*

The Defendant asserted that it was error for the trial justice to deny the motion for a new trial because the only reasonable response to the evidence presented was that the identification was erroneous.⁸⁰ The Defendant also contested the probative value of

Gatone, 698 A.2d 230, 236 (R.I. 1997)).

73. *Id.* at 95.

74. *Id.*

75. *Id.*; *Gallop*, 89 A.3d at 802 (citing *Imbruglia*, 913 A.2d at 1029–30).

76. *Id.*

77. *Id.*

78. *Id.* Step two being, if it is found that the identification procedure was unnecessarily suggestive, the trial justice must determine in the totality of the circumstances whether the identification was nonetheless reliable. *See Gallop*, 89 A.3d at 803; *see also Brown*, 42 A.3d at 1242-43 (determining that a court should analyze a victim’s identification of a defendant under the totality of the circumstances to assess its reliability).

79. *Austin*, 114 A.3d at 95.

80. *Id.* at 96.

the testimony relating to the bus pass because he argued it was just as likely that the Defendant was on a Warwick-bound bus.⁸¹ The court rejected the Defendant's argument that the only reasonable response was that the identification was incorrect; in doing so, the trial justice assessed the credibility of the witnesses and the weight of the evidence and determined that the complainant credibly testified so that a reasonable jury could, and did, find that the Defendant was her assailant.⁸² In regard to the probative weight of the bus pass, the trial justice indicated that the data contained in the bus pass weighed heavily in the state's favor.⁸³

It is well established that because a trial justice "is in an especially good position to evaluate the facts and to judge the credibility of witnesses on appeal, [the Rhode Island Supreme] Court's review is deferential."⁸⁴ The court indicated that it was apparent the trial justice followed the appropriate procedure for assessing a challenge to the weight of evidence presented at trial.⁸⁵ For those reasons, the court concluded that the trial justice's denial of the Defendant's motion for a new trial was not clearly erroneous.⁸⁶

C. *Request for Jury Instructions*

The Defendant's lastly asserted that the trial justice erred in not using the Defendant's proposed jury instructions.⁸⁷ The court reasoned that "[w]hile [a] defendant may request that the trial justice include particular language in the jury instructions, the trial justice is not required to use any specific words or phrases when instructing the jury—so long as the instructions actually given adequately cover the law."⁸⁸ Notwithstanding the Defendant's argument, the court found that it was evident that the instructions given to the jury presented "the jury with *the*

81. *Id.*

82. *Id.*

83. *Id.*

84. *State v. Watkins*, 92 A.3d 172, 191 (quoting *State v. Clay*, 79 A.3d 832, 842) (quoting *State v. LaPierre*, 57 A.3d 305, 310).

85. *Austin*, 114 A.3d 87 at 96–97.

86. *Id.* at 97.

87. *Id.*

88. *Figuerio*, 31 A.3d at 1290 (quoting *State v. Adefusika*, 989 A.2d 467, 477).

essence of [the] defendant's requested instruction."⁸⁹ Thus, after review of the jury instructions given, the Rhode Island Supreme Court concluded that the instructions adequately covered the law regarding eyewitness identification.⁹⁰

COMMENTARY

In this case, The Rhode Island Supreme Court addressed an evidentiary appeal concerning the admissibility of a complaining witness's out-of-court identification.⁹¹ When Rhode Island courts rule on the admissibility of such evidence, it often turns to a five-factor test to assess the propriety of eyewitness identifications.⁹² The five factors used to assess an eyewitness identification are: (1) the opportunity to observe; (2) the degree of attention given to those observations; (3) the accuracy of the prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the identification procedure; and (5) the time between the crime and confrontation.⁹³ Here, it cannot be said that the photo array presented to Laura just days after⁹⁴ the assault occurred, constituted an identification procedure that was unduly suggestive.⁹⁵

For an identification procedure to be inadmissible in court, the procedure must have been "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."⁹⁶ The standard of review this court adhered to was the clearly erroneous standard, which is a hard standard to overcome.⁹⁷ Under a clearly erroneous standard, when a trial justice determines whether or not to grant a defendant's motion to suppress identification evidence, the trial justice evaluates the available evidence in the light most favorable to the state.⁹⁸ It is

89. *Id.*

90. *Austin*, 114 A.3d at 98.

91. *Id.* at 94

92. *Austin*, 731 A.2d at 682 (quoting *Manson*, 432 U.S. at 114).

93. *Id.*

94. *Austin*, 114 A.3d at 91. There was a mere 48-hour lapse between the assault and the identification procedure. *Id.*

95. *Id.* at 95.

96. *Gallop*, 89 A.3d at 801 (quoting *Gatone*, 698 A.2d at 235).

97. *Austin*, 114 A.3d at 96. *See also* *State v. Luciano*, 739 A.2d 222, 226 (R.I. 1999); *State v. Gardiner*, 636 A.2d 710, 716 (R.I. 1994).

98. *See, e.g., Gardiner*, 636 A.2d at 716.

apparent that this court came to the correct conclusion in denying the Defendant's motion to suppress.

It is evident that Laura had numerous occasions to observe her assailant on the bus and during the course of the incident.⁹⁹ While in most situations, the identification of an assailant may be more controversial, it cannot be said that this case is one of them. In an incident that occurs at night, the identification of a suspect becomes more susceptible to inaccuracy, given the less suitable lighting. Moreover, where an accusation involves a more rapid turn of events, such as a sudden robbery, it is more likely that that a complainant's description of their assailant is less reliable. We have none of those situations here. The man was not masked, the incident occurred during the day, and the man sat right next to her for some time on the bus before assaulting her.¹⁰⁰

Furthermore, when considering the description of the assailant that Laura initially gave to the police, it is evident that she had a fairly accurate perception of him; the first description she gave to the police was "a white male over six feet tall and weighing approximately 230 pounds . . . he was clean shaven, had short grayish-brown hair, carried a black duffel bag, and wore a gray sweatsuit as well as a purple and yellow sports jacket."¹⁰¹ It follows that the Defendant's assertion that the complaining witness had questionable accuracy during the out-of-court identification procedure is mere puffery.

Moreover, Laura stated she was "one hundred percent certain"¹⁰² that the Defendant was her assailant, and this confidence in her identification of the assailant may have impermissibly persuaded the jury. This is problematic because studies have shown that there is minimal, if any, correlation between one's confidence and the accuracy of their identification of a suspect.¹⁰³ In fact, although there is little correlation between the two, some courts have noted that an eyewitness's confidence "is the most powerful single determinant of whether . . . observers

99. *Id.* at 90.

100. *Id.*

101. *Id.*

102. *Id.* at 92.

103. G. Wells et al., *Eyewitness Identification Procedure: Recommendations for Lineups and Photospreads*, 22 LAW J. HUM. BEHAV. 603, 620 (1998).

2016]

SURVEY SECTION

707

. . . will believe that the eyewitness made an accurate identification.”¹⁰⁴ Thus, the best chance a defendant may have had at being found not guilty would have been having an expert testify as to the weakness of an eyewitness identification.¹⁰⁵

CONCLUSION

The Rhode Island Supreme Court reviewed on appeal a motion to suppress evidence of an identification procedure, a motion for a new trial, and motion to set aside the trial justice’s jury instructions.¹⁰⁶ After careful review of the motion to suppress, the court concluded that the photo array was not unnecessarily suggestive, thereby denying the Defendant’s motion to suppress evidence.¹⁰⁷ Moreover, on the Defendant’s appeal for a motion for a new trial, the trial justice’s denial of the Defendant’s motion for a new trial was not clearly erroneous.¹⁰⁸ Lastly, the trial justice also denied the Defendant’s request that his proposed jury instructions be used. For the following reasons, the Rhode Island Supreme Court affirmed the Defendant’s conviction of second-degree sexual assault.¹⁰⁹

Rebecca Cooper

104. *Id.*105. *State v. Clopten*, 223 P.3d 1103, 1110 (Utah 2009).106. *Id.* at 94.107. *Id.* at 95.108. *Id.* at 97.109. *State v. Austin*, 114 A.3d 87, 98 (R.I. 2015).

Criminal Law. *State v. Whiting*, 115 A.3d 956 (R.I. 2015). A statute amending the threshold amount for felony larceny during the pendency of a defendant's trial is not to be applied retroactively under the general savings clause. In deciding whether to apply a statutory change retroactively, courts consider the issue on a case by case basis and ask whether the application of the general savings clause would be clearly repugnant to the express provisions of the prevailing statute. Considerations include the language of the repealing statute, the nature of the amendment, the equitable considerations of the legislature, and the potential for inequitable application of the law.

FACTS AND TRAVEL

On November 22, 2011, prosecutors charged John Whiting with felony larceny for stealing over \$500 and criminal solicitation for soliciting another to receive stolen goods.¹ On June 8, 2012, prior to the start of Whiting's trial, the state amended its larceny penalty statute, increasing the threshold requirement from \$500 to \$1,500.²

The case went to a bench trial in Providence County Superior Court on June 18, 2012.³ During the majority of the trial, neither the parties nor the trial justice were aware of the amendment to the statute.⁴ However, after the close of both parties' cases-in-chief and before the trial justice rendered his decision, defense counsel informed the trial justice of the amendment to the statute and sought to have the charges amended to reflect the new statute.⁵ The trial justice chose to proceed with the counts as

1. *State v. Whiting*, 115 A.3d 956, 957 (R.I. 2015); *see also* R.I. GEN. LAWS 1956 § 11-1-9 (1979); R.I. GEN. LAWS 1956 §11-41-1 (1938); R.I. GEN. LAWS 1956 § 11-41-5 (2012).

2. *Whiting*, 115 A.3d at 957; *see also* R.I. GEN. LAWS 1956 § 11-41-5.

3. *Whiting*, 115 A.3d at 957.

4. *Id.*

5. *Id.*

charged, agreeing with the state's argument that changes in the law are only to be applied prospectively, and that since Whiting had been charged prior to the amendment, he should not receive its benefits.⁶ The trial justice rendered his decision from the bench on July 2, 2012, and found that Whiting had stolen \$714, thus rendering him guilty of committing larceny over \$500.⁷ The trial justice also found Whiting guilty of soliciting another to commit a felony.⁸ After denying a motion to reconsider his decision regarding Whiting's request to amend the charges, the trial justice sentenced Whiting on September 14, 2012, to two concurrent sentences of five years imprisonment with six months to serve with the remaining time suspended with probation.⁹

After a final judgment of conviction was entered, Whiting appealed and argued that the legislative intent of the amendment increasing the threshold for felony larceny was to reclassify offenses under \$1,500 from felonies to misdemeanors.¹⁰ Whiting further argued that the amendment was intended to be ameliorative in nature, and thus should inure to the benefit of defendants.¹¹ The state countered, invoking Rhode Island's general savings clause, which permits prosecution and sentencing of defendants in pending cases in accordance with statutes existing at the time defendants are charged.¹²

ANALYSIS AND HOLDING

Upon review of the trial court's decision, the Rhode Island Supreme Court traced the history of Rhode Island's general savings clause, beginning with its common law predecessor of abatement.¹³ Under the abatement rule, when statutes were repealed or amended, courts discharged all pending proceedings under the repealed statute in the absence of a savings clause in the new statute.¹⁴ In response to the abatement rule, the General

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 958

11. *Id.*

12. *Id.* & n.3 (citing R.I. GEN. LAWS 1956 § 43-3-23 (1938)).

13. *Id.* at 958.

14. *Id.*

710 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 21:708]

Assembly enacted a general savings clause, in part “to save the necessity of the burdensome formality of attaching an identical saving[s] clause to all repealing legislation.”¹⁵ The court then summarized the first application of the general savings clause in *State v. Lewis*, where the court authorized maintenance of the prosecution of a driving under the influence charge under the pre-amended form of the statute.¹⁶ There the court stated that the purpose of the savings clause was to abrogate the common law rule and to “authorize the continuance of prosecutions that were pending at the time of the repeal of the prior act.”¹⁷ The court noted that although ameliorative statutes may be applied retroactively, they should only do so if applying the savings clause “would be clearly repugnant to the express provisions of the repealing statute.”¹⁸ The court explained that in making such a determination, courts are to review the statute on a case by case basis, considering the language of the repealing statute and the nature of the amendment.¹⁹

In comparing the offense at bar to other cases applying the general savings clause, the court first noted the general presumption that “statutes will be given prospective application unless otherwise provided.”²⁰ Next, it distinguished Whiting’s case from two situations in which charges were dismissed because the amendments to the statutes rendered the defendants’ conduct legal, noting that under either statute, Whiting’s conduct remained illegal, the only difference being that of degree.²¹ The court also rejected Whiting’s attempt to analogize his case to *State v. Macarelli*, where the defendant was convicted of conspiring to corrupt horse trainers under a statutory scheme which allowed for a much larger sentence for the common law offense of conspiracy than the underlying statutory crime of corruption of a sports

15. *Id.* at 958–59 (quoting *State v. Lewis*, 161 A.2d 209, 212 (R.I. 1960)).

16. *Id.* at 958.

17. *Id.* at 959 (quoting *Lewis*, 161 A.2d at 212).

18. *Id.*

19. *Id.* (citing *State v. Mullen*, 740 A.2d 783, 786 (R.I. 1999)).

20. *Id.* (quoting *State v. Briggs*, 58 A.3d 164, 168 (R.I. 2013)).

21. *Id.*; see also *Mullen*, 740 A.2d at 786 (applying statute retroactively where the amendment effectively decriminalized sodomy); *State v. Babbitt*, 457 A.2d 1049, 1055 (R.I. 1983) (vacating convictions where amended statute added a pecuniary gain requirement to transporting another for indecent purposes offense).

participant or official.²² While the appeal was pending, the General Assembly codified conspiracy offenses to match the crimes defendants conspired to commit.²³ As a result, the court in *Macarelli* amended the charges, reasoning that “it is apparent that the legislature thought it inequitable to punish a conspiracy to commit a crime more harshly than the underlying substantive offense itself.”²⁴ Here, the court determined that no such equitable considerations existed, where the amendment contained only an increase in the monetary threshold.²⁵ Unlike in *Macarelli*, where the enactment fundamentally changed the sentencing scheme based on equitable considerations, there was no such large shift here, nor an equitable principle embodied in the amendment which would render the old statute “clearly repugnant to the express provisions of the repealing statute.”²⁶

The court also drew guidance from the Connecticut Supreme Court decision of *State v. Kalil*, which addressed a nearly identical issue to Whiting’s and rejected the defendant’s argument that the amended statute should have applied.²⁷ There the court reasoned that the amended law contained no language indicating retroactive application, and it expressed concern that inequities could result if defendants committed crimes on the same day but had trials on different days and thus were subject to different laws.²⁸ In light of the *Kalil* decision and Rhode Island precedent, the Rhode Island Supreme Court held that the general savings clause was applicable to Whiting’s charge, and thus the amended statute should not be applied retroactively.²⁹

COMMENTARY

The Rhode Island Supreme Court’s decision attempts to give the general savings clause its full effect, while still providing for situations in which amended laws should be applied retroactively in order to comport with the legislature’s intent. In distinguishing

22. *Id.* at 960; *see also* *State v. Macarelli*, 375 A.2d 944, 944–46 (1977).

23. *Whiting*, 115 A.3d at 960.

24. *Id.* (quoting *Macarelli*, 375 A.2d at 947).

25. *Id.*

26. *Id.* (quoting *Lewis*, 161 A.2d at 212).

27. *Id.* at 961; *see also* *State v. Kalil*, 107 A.3d 343, 361 (Conn. 2014).

28. *Whiting*, 115 A.3d at 961; *see also* *Kalil*, 107 A.3d at 361.

29. *Whiting*, 115 A.3d at 961.

the mere changing of a threshold amount for felony larceny from those cases in which there is a clear attempt by legislature to ameliorate a legislative deficiency or accommodate for a clear societal change, the court maintained the integrity of the savings clause while leaving the door open for those rare circumstances where retroactive application is necessary. The court's case by case analysis allows for the fair result of extreme scenarios, while fending off attempts to swallow the rule with its exceptions.

The court's formulation also bears in mind the difficulty in deducing legislative intent from statutory construction and accordingly maintains a high bar for applying statutory changes retroactively with its clearly repugnant test. While here it might be argued that the statutory change was made in response to the reality of inflation and a change in government policy on criminal punishment, the application of the old statute to the crime does not so clearly undermine the new statute as to render it clearly repugnant. Indeed, the legislature's decision to amend a statute must necessarily stem from some consideration of the statute's deficiency or inapplicability in its modern context. However, a defendant's ability to point to that vague intent alone cannot be enough to trigger application of the new law, else nearly every defendant could find some justification for receiving the benefit of a new statute. The clearly repugnant test, while likely considered too high a bar by some, is a necessary means to prevent the erosion of the general savings clause, which is by its very nature designed to be expansive.

Further, while not explicitly mentioned in the court's decision here, applying a broad amelioration doctrine despite a lack of clear intent to do so in the new statute might be considered an overreach of judicial power.³⁰ As addressed in *Kalil*, broad amelioration in a general savings jurisdiction flies in the face of the legislature, undermining the legislative process by judicial fiat.³¹ While the intent of the legislature is important in considering the amended statutes in cases such as this, the intent of the legislature in enacting the general savings clause must be given equal weight. Thus, when judicial attempts to discern the intent of one statute are likely to offend another statute, it is

30. See *Kalil*, 107 A.3d at 358–59.

31. *Id.*

2016]

SURVEY SECTION

713

likely best left to the legislature to make the appropriate changes to the law.³²

Another important consideration that the court adds to its analysis is the concern for inconsistency of application.³³ There can be no adequate explanation as to why two people who commit the same crime on the same day should be punished differently according to the dates of their trials. This is a problem that not only could arise by mere coincidence under a different ruling, but one that might encourage parties to delay the conclusion of litigation in the face of pending litigation. The ruling here helps to allay those concerns and ensures that decisions on these types of issues are rendered consistently.

Overall, the court's thorough analysis of this issue's history leads it to the case's logical conclusion, drawing a line as to the reach of the exception to the general savings clause, thus preserving that statute's intent and avoiding inconsistent application of the law.

CONCLUSION

The Rhode Island Supreme Court held that applying the general savings clause and prosecuting Whiting under the pre amendment version of R.I. Gen. Laws 1956 § 11-41-5 was not clearly repugnant to the express provisions of the new statute. In considering whether there was clear intent to apply the law retroactively in its language, and whether there were equitable concerns meriting retroactive application, the court found that no such evidence existed.

Andrew J. Piombino

32. *See id.*

33. *See Whiting*, 115 A.3d at 961.

Criminal Law. *State v. Virola*, 115 A.3d 980 (R.I. 2015). The Supreme Court of Rhode Island affirmed the Superior Court’s judgment of conviction and its denial of Defendant’s motion for a new trial. On appeal, the Defendant claimed that the trial justice erred in denying his motion for a new trial and in admitting certain witness testimony. The court held that the standard for reversal does not depend on whether the court agrees with the trial justice’s determination, but rather whether the trial justice has overlooked or misconceived material evidence or was otherwise clearly wrong in denying a motion for a new trial.

FACTS AND TRAVEL

On August 16, 2004, Christopher Nelson, a graduate of Johnson & Wales University, was shot in his second floor apartment in Providence, Rhode Island.¹ Nelson died as a result of the shooting.² Following an investigation, four men were taken into custody—David Mercado, Lazaro “Casper” Martinez, Martin “Malik” White, and Wayman “Kevin” Turner.³ At that time, the police also issued an arrest warrant for Defendant, Ramon Virola.⁴ Mr. Mercado subsequently entered into a cooperation agreement with the state, and he pled *nolo contendere* to one count of conspiracy to commit robbery.⁵

1. *State v. Virola*, 115 A.3d 980, 983 (R.I. 2015).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* The relevant section of Rule 11 of the Rhode Island Superior Court Rules of Criminal Procedure reads:

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of

On December 10, 2004, the Defendant, Martinez, White and Turner were indicted by a grand jury for the murder of Christopher Nelson, assault with intent to commit robbery, conspiracy to commit robbery, and discharge of a firearm during a crime of violence.⁶ Defendant was not apprehended until approximately seven years later, on November 16, 2011, in Glendale, Arizona, where he was then known by the name “Benny Delgado.”⁷

At trial, Mercado and White testified that the day of Nelson’s murder, Martinez had discussed with the two men a plan to rob Mercado’s former drug dealer, who lived with Nelson.⁸ At the same time, Turner told White that the men needed a gun for the robbery, and Turner volunteered to attempt to acquire a gun by contacting the Defendant.⁹ Before the robbery, Mercado drove himself and Martinez to meet the other three men (White, Turner and the Defendant) who would be involved in the robbery, yet, Mercado had never met before.¹⁰

On the night of the murder, Christopher Nelson had been watching the Olympics and playing video games with three of his friends in the comfort of his second floor apartment in Providence.¹¹ After hearing a knock at the door, Nelson answered, but then appeared to be “trying to close the door” as he “struggle[d]” with someone.¹² An intruder wearing a mask then stepped into the room, pointed a gun at Nelson and repeatedly asked: “Where is the money?”¹³ After Nelson replied that he did

not guilty. The court shall not enter a judgment upon a plea of guilty or nolo contendere unless it is satisfied that there is a factual basis for the plea.

RI SUPER. R. CRIM. P. Rule 11.

6. *Viola*, 115 A.3d at 983. On November 14, 2005, Martinez plead nolo contendere to second-degree murder and conspiracy to commit robbery. Turner plea of guilty to second-degree murder and conspiracy to commit the crime of robbery was filed and he had the remaining charges against him dropped. *Id.*

7. *Id.* at 984.

8. *Id.* at 985. It is undisputed by both parties that Nelson was not involved in any drug activity. *Id.*

9. *Id.* at 987.

10. *Id.* at 985. Mercado, Martinez, White and Turner drove to the site of the murder in one car, while the Defendant drove separately in another car.

11. *Id.* at 984.

12. *Id.*

13. *Id.*

716 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:714

not have any money, “the gun went off” and the intruder continued to brandish the gun in the direction of the other occupants of the apartment.¹⁴ After realizing that the other occupants did not know where the money was, the intruder left the apartment.¹⁵ It was then that the other occupants realized that Nelson had been shot and called rescue services.¹⁶ Nelson was later pronounced dead.¹⁷

After the men left the apartment, Turner, White, and the Defendant ran back to White’s car and fled the scene, while Martinez called to ask Mercado to pick him up near the apartment.¹⁸ When Martinez picked up Mercado, he learned that the Defendant had shot someone.¹⁹ The next day, when Mercado learned from a news broadcast that Nelson had died, he drove Martinez and himself to meet with Turner so they could dispose of the weapon.²⁰ In an attempt to potentially dispose of the gun, Mercado was driving with Martinez while the gun was in a shoebox on the floor of the front passenger seat.²¹ While he and Martinez were en route to dispose of the weapon, the police pulled his car over, arrested them, and seized the weapon.²² While in custody, Mercado eventually gave a statement implicating Defendant, Martinez, White, Turner, and himself in the murder of Nelson.²³ After learning that he had been implicated in the attempted robbery and the murder of Nelson, White turned himself in and entered into a cooperation agreement “in order to get the best deal.”²⁴

At trial, Patricia “Vicky” Gallardo testified that in 2008 she met Defendant, who went by the name “Benny Delgado,” in Arizona through an online dating service and the two eventually began a romantic relationship.²⁵ The couple continued their

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 985, 987.

19. *Id.* at 987.

20. *Id.* at 986.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 987.

25. *Id.*

2016]

SURVEY SECTION

717

relationship until 2011, with a short break in 2009, when Gallardo complained that the Defendant had “[become] controlling and wanted to know everything that she was doing[.]”²⁶ Gallardo discovered that she was pregnant with their child and moved in with the Defendant where she began to overhear the Defendant identify himself as “Ray” during phone calls.²⁷ Prior to the end of their relationship, Gallardo learned that the Defendant’s first name was “Ramon” and that he was “wanted” by law enforcement authorities in Rhode Island.²⁸ In June of 2011, Gallardo and the Defendant ended their relationship.²⁹ In November 2011, she came to believe that Defendant knew where she was living when she received a message from him stating that he “knew where she was” and that “he was coming.”³⁰ Fearing for her life, Gallardo contacted the Chino Valley Police Department and told the police that the Defendant was wanted by law enforcement in Rhode Island.³¹ Subsequently, Defendant was apprehended in Phoenix, Arizona.³²

On March 13, 2013, a jury found the Defendant guilty of all four counts of the indictment, including the first-degree felony murder of Christopher Nelson.³³ Consequently, the Defendant moved for a new trial, arguing that Mercado, White, and Gallardo were, in his view, “all compromised witnesses,” and that, therefore, the court should refuse to credit their testimony. The Defendant thus requested that “the [c]ourt grant the motion for a new trial in the interest of justice.”³⁴ On April 23, 2013, the trial justice denied the motion and the Defendant filed a timely appeal to the Rhode Island Supreme Court contending (1) that, in denying his motion for a new trial, the trial justice inappropriately credited the testimony of Mercado, White, and Gallardo; and (2)

26. *Id.* During trial, Gallardo testified that the Defendant “was preventing her from being independent and enjoying her own life. Gallardo stated that after the Defendant got physically abusive with her, she moved out. *Id.*

27. *Id.* at 988.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 989.

33. *Id.*

34. *Id.*

that the trial justice erred in permitting Gallardo to testify as to the Defendant's purportedly "controlling" behavior during their romantic relationship.³⁵

ANALYSIS AND HOLDING

A. *Defendant's Motion for a New Trial*

In his appeal, the Defendant first argued that in denying his motion for a new trial, the trial justice inappropriately credited the testimony of Mercado, White, and Gallardo because they were all biased witnesses with motivation to lie and were unworthy of belief.³⁶ The Defendant argued that with respect to Gallardo, "it was clearly in her interest to do anything to make sure that the [D]efendant never again saw the light of day, as he was the one impediment to her enjoying the rest of her life with her new family."³⁷ The Defendant averred that Mercado's testimony was not credible for the fact that Mercado entered into a cooperative agreement with the State in exchange for a lenient sentence, and that Mercado admitted to repeatedly using marijuana on the day of the robbery.³⁸ Lastly, when addressing White's testimony, the Defendant claimed that it too was unworthy of credence because White entered into a cooperative agreement with the State.³⁹

In reviewing the appeal, the Rhode Island Supreme Court placed great weight on the trial justice's analysis and reasoning for the denial of the Defendant's Motion for a New Trial.⁴⁰ The court reasoned that the trial justice sits in the role of the metaphorical "thirteenth juror;" and, in that role, the trial justice must exercise independent judgment on the credibility of witnesses and on the weight of the evidence."⁴¹ The court acknowledged that it affords a great deal of respect to the factual determinations and credibility assessments made by each judicial officer and will not overturn that decision unless the trial justice has overlooked or misconceived material evidence or was

35. *Id.*

36. *Id.* at 989, 991.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *State v. Barrior*, 88 A.3d 1123, 1128 (R.I. 2014).

otherwise clearly wrong.⁴² The court noted that while the Defendant was asking the court to second guess the credibility determinations of the trial justice, all the facts that would make those witnesses biased, were known to the jury.⁴³

The court took into consideration that jury knew that while Gallardo testified that the Defendant was a bad guy, she also said that he loved their child and that while he was possessive, she did not seek help from the police or family.⁴⁴ Likewise, while Mercado agreed to cooperate, the jury knew that he only did so ultimately to save [his] own neck and “minimize the harm” that would befall him.⁴⁵ Lastly, while the jury knew that White was testifying in exchange for a more lenient sentence, he agreed to make a statement in order to get the best deal.⁴⁶ Thus, the jury was aware of all the information which the Defendant argued demonstrated the lack of credibility of the witnesses.⁴⁷ The court stated that the trial justice found all three witnesses to be credible and agreed with the jury’s verdict, and further stated that “the mere fact that a defendant disagrees with the trial justice’s conclusions about credibility is not a sufficient basis to warrant the granting of a motion for a new trial.”⁴⁸

B. The Admissibility of Gallardo’s Testimony

The Defendant next argued that the trial justice erred in permitting Gallardo to testify as to the Defendant’s purportedly “controlling” behavior during their romantic relationship.⁴⁹ The Defendant argued that Gallardo’s testimony, with respect to Defendant’s behavior during their relationship, was admitted in error because “the unfair prejudice of [the] testimony greatly outweighed its slight probative value.”⁵⁰ The Defendant argued

42. See *State v. Paola*, 59 A.3d 99, 106 (R.I. 2013); *State v. Clay*, 79 A.3d 832, 842 (R.I. 2013).

43. *Viola*, 115 A.3d at 993.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*; see also *State v. Ferreira*, 21 A.3d 355, 367 (R.I. 2011).

49. *Viola*, 115 A.3d at 989.

50. *Id.* at 994. Defendant provided the Court with a list of statements which he contends Gallardo inappropriately testified to his “controlling behavior,” specifically that she testified that Defendant “wanted to know

that the evidence was not relevant under Rule 401 of the Rhode Island Rules of Evidence, and even if the testimony were relevant, its admission should have been barred by the provisions of Rule 403.⁵¹ The Defendant claimed that the only purpose served by the statement at issue was “to depict him as a violent individual who engaged in a pattern of domestic abuse during his relationship with Gallardo.”⁵²

1. *Rule 401*

The Defendant first contended that the specific statements of Gallardo regarding his controlling behavior and refusal to be photographed were not relevant under Rule 401.⁵³ The court recognized that “inherent in Rule 401 are two basic facets of relevant evidence-materiality and probativeness and if the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial and should be excluded.”⁵⁴ The court was unable to detect any abuse of discretion in the trial justice’s decision to admit Gallardo’s testimony.⁵⁵ The court reasoned that because that Defendant told Gallardo that his behavior was a result of being “wanted by the State of Rhode Island, this helped illustrate the [D]efendant’s consciousness of guilt.”⁵⁶

2. *Rule 403*

The Defendant next contended that, even if Gallardo’s

everything she was doing and who she was talking to,” was “possessive,” and never let her take his photograph. *Id.*

51. *Id.* at 995.

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RI R. Evid. Art. IV, Rule 401:

Although 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.

RI R. Evid. Art. IV, Rule 403.

52. *Viola*, 115 A.3d at 995.

53. *Id.* at 996.

54. *State v. Thomas*, 936 A.2d 1278, 1282 (R.I. 2007).

55. *Viola*, 115 A.3d at 996.

56. *Id.*

statements were relevant, the trial justice erred in failing to exclude them pursuant to Rule 403.⁵⁷ The court, however, has applied a standard which “asks whether [the evidence] will inflame the jurors and therefore prejudice them beyond the ordinary prejudice that is always sustained by the introduction of relevant evidence intended to prove guilt.”⁵⁸ The trial justice stated on the record that some of the issues surrounding Gallardo’s testimony about the Defendants purportedly controlling behavior had been “aired” in chambers.⁵⁹ The justice determined, however, that Gallardo’s testimony, including statements properly at issue on appeal, were admissible the statements were evidence of the Defendant’s risk of flight.”⁶⁰

The Rhode Island Supreme Court has held on numerous occasions that it “will not reverse a trial justice’s ruling admitting evidence over a Rule 403 objection unless it constitutes a clear abuse of discretion,” and here, the court was satisfied that the trial justice soundly exercised his discretion and properly articulated the grounds on which he was permitting the testimony.⁶¹ The court agreed with the trial judge when he said: “This is all evidence of guilty knowledge and is very, very relevant. And to the extent that there’s any prejudice involved, it is minimal, indeed, compared to the high relevance, and I will certainly permit this kind of evidence to be adduced.”⁶²

COMMENTARY

The Rhode Island Supreme Court was presented with two issues in *State v. Virola*, and the court’s opinion reaffirmed the importance of the role of the trial justice. Here, the court deferred to the trial justice’s findings “because a trial justice, being present during all phases of the trial, is in an especially good position to evaluate the facts and to judge the credibility of the witnesses.”⁶³

In this case, the Defendant tried to diminish the credibility of

57. *Id.*

58. *State v. O’Brien*, 774 A.2d 89, 107 (R.I. 2001).

59. *Id.*

60. *Virola*, 115 A.3d at 997.

61. *State v. Brown*, 42 A.3d 1239, 1242 (R.I. 2012); *See Virola*, 115 A.3d at 997.

62. *Virola*, 115 A.3d at 997.

63. *State v. Mendez*, 116 A.3d 228, 247 (R.I. 2015).

722 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:714]

the witnesses by arguing that each witness had motivation to lie.⁶⁴ The Defendant contended that the trial justice erred in denying his motion for a new trial because Gallardo, Mercado, and White were all biased witnesses with motivation to lie about the murder of Nelson.⁶⁵ With respect to Gallardo, the Defendant argued that it was clearly in Gallardo's interest to do anything to make sure the Defendant never again saw the light of day, as he was the one impediment keeping her enjoying the rest of her life.⁶⁶ As for Mercado, the Defendant avers that his testimony was not credible for two reasons: (1) the fact that Mercado entered into a cooperative agreement with the State in exchange for a particularly light sentence; and (2) the fact that Mercado admitted to repeatedly using marijuana on the day of the robbery and, according to Defendant, was "stoned at the time of the commission of the crime."⁶⁷ Lastly, the Defendant contends that White's testimony was unworthy of credence because White entered into a cooperative agreement with the State and had access to all the discovery in the case, including Mercado's statement, before making his statement to police.⁶⁸ While this argument may have proven that these witnesses demonstrated bias, the trial judge discussed the fact that the State had called twelve witnesses and had never set out to prove that the Defendant had personally shot Nelson.⁶⁹ The trial justice observed that the state intended to prove that the Defendant was vicariously responsible for the offenses as either a co-conspirator or as an aider and abettor.⁷⁰ Further, the trial justice found that there was overwhelming evidence that the Defendant was the one who orchestrated obtaining the pistol that ultimately caused Nelson's death and that the jury came to the same conclusion.

Additionally, the Defendant contended that Gallardo's testimony with respect to Defendant's behavior during their relationship was admitted in error because the unfair prejudice of the testimony greatly outweighs its slight probative value.⁷¹

64. *Viola*, 115 A.3d at 992.

65. *Id.* at 991.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Viola*, 115 A.3d at 992.

71. *Id.* at 994.

However, the danger of unfair prejudice is one that all evidence at trials presents.⁷² While the defendant argued that there was no relevance, the trial justice found that there was. The testimony given by Gallardo time and time again proved the guiltiness of the Defendant. His possessive behavior, and fear of being photographed, noted by the trial justice, helped illustrate Defendant's consciousness of guilt.. While the holding of this case reaffirmed that the Rhode Island Supreme Court will defer to the discretion of the trial justice absent a showing of clear error or that he or she overlooked or misconceived material and relevant evidence, it remains unclear at what point a higher court will overturn a trial justice who has abused his discretion. Historically, courts have defined the meaning of judicial discretion to be the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law.⁷³ Therefore, only when the judge has failed to exercise sound, reasonable, and legal decision-making skills has he abused his discretion. This is a very broad standard because, as the Rhode Island Supreme Court has stated, the trial justice is in the best position to judge the facts of the case in relation to the law as the trial justice is sitting in the front row of the audience in the courtroom.⁷⁴

In the past decades, there have only been a limited number of occasions that the Rhode Island Supreme Court has reversed a judgment due to an abuse of discretion on the part of the trial justice. One prominent example occurred in *Beaton v. Malouin*, in which the Court found that the trial justice failed to make any finding that the evidence was prejudicial, confusing, misleading, or would result in undue delay and that the evidence was highly probative and its exclusion was an abuse of discretion.⁷⁵ There, the plaintiff was traveling west on Route 195 near the northbound and southbound split, when her automobile skidded on the wet surface of the road and ended up perpendicular in the left high-

72. United States v. LeCompte, 131 F.3d 767, 770 (8th Cir. 1997).

73. See Stephen C. Aldrich & Michael Cass, *Judicial Discretion: Melding Messy Facts and Pristine Law*, BENCH AND BAR OF MINNESOTA (Nov. 11, 2013), <http://mnbenchbar.com/2013/11/judicial-discretion>.

74. See State v. Mendez, 116 A.3d 228, 247 (R.I. 2015).

75. 845 A.2d 298, 302 (R.I. 2004).

724 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:714

speed lane and middle lane of traffic.⁷⁶ Although several drivers managed to successfully avoid colliding with plaintiff's automobile, the defendant came upon plaintiff and struck the rear quarter of her vehicle and plaintiff's vehicle spun 180 degrees from its original position.⁷⁷ During trial, in which the plaintiff filed a negligence action against the defendant, the trial court limited the testimony of plaintiff's expert engineer to his own personal observations of the accident scene based on a finding that his opinion of the sight-line distance defendant had before the accident had not been verified by actual measurements and refused to permit counsel to introduce into evidence two answers to interrogatories provided by defendant.⁷⁸ The court noted that the exclusion of this evidence was made in clear error, and its probative value was outweighed by its prejudicial effect.⁷⁹ Therefore, it seems that only when the trial justice has clearly acted unreasonably in the judicial making process and has ordered an erroneous judgment, that the Rhode Island Supreme Court will overturn his judgment.

CONCLUSION

The Rhode Island Supreme Court held that the trial justice correctly executed the correct analytical approach to a motion for a new trial and that his ultimate agreement with the jury's verdict did not overlook or misconceive material evidence and that he was not otherwise clearly wrong in denying Defendant's motion for a new trial. In addition, the Rhode Island Supreme Court held that because the Defendant's contention that the witnesses statements were not relevant was not persuasive and that the trial justice did not abuse his discretion under Rule 403 when he admitted the witnesses statements over defendants objections.

Caroline Dias

76. *Id.* at 299.

77. *Id.*

78. *Id.* at 299, 302.

79. *See id.* at 302.

Evidence. *State v. Arciliares*, 108 A.3d 1040 (R.I. 2015). Where a defendant in a criminal matter is not permitted to sufficiently cross-examine a material witness as to statements made by that witness to the defendant, reversible error has occurred, and the verdict must be vacated and remanded for a new trial. The court's decision in *State v. Harnois*,¹ which limits the admissibility of statements made to police by a defendant that elects not to testify, applies only to statements made by a defendant, not to statements made to a defendant, and mirrors longstanding rules barring hearsay.

FACTS AND TRAVEL

At about 3:00 a.m. on October 30, 2010, Alfredo Barros was shot and killed in his vehicle while stopped at an intersection in Pawtucket, Rhode Island.² After an eight-month long investigation, an inmate at the Rhode Island Adult Correctional Institute (ACI), Raymond Baccaire, came forward and provided testimony of an alleged jailhouse confession from defendant Victor Arciliares.³ Baccaire informed the lead investigator, Detective Richard LaForest, of an alleged conversation between Baccaire and Arciliares.⁴ Baccaire claimed Arciliares offered details of Barros's murder, including admitting Arciliares's involvement.⁵ As a result of the information provided by Baccaire, a grand jury indicted Arciliares for, *inter alia*, first degree murder.⁶

-
1. See *State v. Harnois*, 638 A.2d 532 (R.I. 1994).
 2. *State v. Arciliares*, 108 A.3d 1040, 1041–42 (R.I. 2015).
 3. *Id.* at 1042–43.
 4. *Id.* at 1043.
 5. *Id.*
 6. *Id.* at 1042. The court explained:

The six counts against defendant were counts: (1) murder in the first degree of Alfredo Barros, in violation of § 11–23–1; (2) discharging a firearm while committing a violent crime, the murder of Alfredo Barros, in violation of G.L.1956 § 11–47–3.2; (3) discharging a firearm from a motor vehicle in a manner that created a substantial risk of death to [passenger of Barros's vehicle], in violation of § 11–

At trial, the State called an Assistant Medical Examiner to testify to the nature of the injuries that caused Barros's death.⁷ The State introduced a number of autopsy photos into evidence to demonstrate that the trajectory of the bullets that hit Barros suggested that there was only one shooter.⁸ Arciliares objected to the admission of the photos, arguing that they were too gruesome and would unfairly prejudice the jury.⁹ The trial judge overruled the objection and admitted the photographs into evidence.¹⁰

Following the Assistant Medical Examiner's testimony, Det. LaForest testified regarding his June 7, 2011 meeting with Baccaire, where Baccaire alleged that Arciliares had confessed to shooting Barros.¹¹ Det. LaForest testified that he did not offer any details of the shooting to the ACI investigator who initially contacted LaForest about Baccaire's information.¹² On cross-examination, Arciliares inquired about a May 17, 2011 meeting between Arciliares and Det. LaForest.¹³ Det. LaForest testified that he remembered the meeting, but when asked about the content of the discussion the State objected.¹⁴ Arciliares argued that this conversation could provide the jury with an alternative narrative for how Baccaire learned the details of the shooting.¹⁵ Arciliares may have "vented" to his cell mate about Det. LaForest's accusation.¹⁶ Seeing an opportunity to negotiate an early release, Baccaire could have used that information to fabricate Arciliares's confession.¹⁷ The State argued that Det. LaForest could not testify about this conversation because it

47–51.1; (4) assault with intent to murder [passenger of Barros's vehicle], in violation of G.L.1956 § 11–5–1; (5) use of a firearm in the attempted commission of a violent crime resulting in an injury to [passenger of Barros's vehicle], in violation of § 11–47–3.2; and (6) conspiracy to do an unlawful act, to wit, murder, in violation of G.L.1956 § 11–1–6.

Id.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 1042–43.

11. *Id.* at 1043.

12. *Id.*

13. *Id.* at 1043–44.

14. *Id.*

15. *Id.*

16. *Id.* at 1050–51.

17. *See id.* at 1044 n.7.

would lead to an inquiry of Arciliares's statements at the meeting.¹⁸ Criminal defendants are not permitted to introduce testimony of the defendant's past favorable statements through a third party as the prosecutor does not have the ability to cross-examine the declarant as to the content of those statements.¹⁹ Arciliares argued that he intended to only inquire as to what Det. LaForest told Arciliares and not what Arciliares said to Det. LaForest.²⁰ Despite the limited scope requested by Arciliares, the trial judge sustained the State's objection and did not permit cross-examination regarding the meeting.²¹ Arciliares later attempted to recall Det. LaForest to inquire about the May 17, 2011 meeting, but the trial judge again sustained the State's objection.²² Det. LaForest never retook the stand.²³ During closing arguments, the State focused on Baccaire's inability to have learned details of the shooting in any way other than from Arciliares's confession.²⁴

During jury deliberations, the foreperson sent a note to the trial judge indicating that the jury believed it was deadlocked.²⁵ The note stated that the issue troubling the jury was how Baccaire received the information to which he testified.²⁶ Despite an objection from Arciliares, the judge "encourage[d the] jurors to listen to the opinions of other jurors to resolve [the] deadlock."²⁷ The jury returned a guilty verdict later that afternoon.²⁸ Arciliares moved for a new trial because he was not allowed to properly cross-examine Det. LaForest, but the motion was

18. *Id.* at 1044 n.8.

19. *Harnois*, 638 A.2d at 535–36.

20. *Arciliares*, 108 A.3d at 1044.

21. *Id.*

22. *Id.* at 1045.

23. *Id.* at 1046.

24. *Id.* at 1046–47.

25. *Id.* at 1047.

26. *Id.* The note read:

We are at a point when we cannot arrive at a unanimous verdict. We are currently at an 11–1 impasse. The issue is the information given to Mr. Baccaire and if he was given all of this by the defendant or if some or all was from another source.

Id. at 1047 n.15.

27. *Id.* at 1047.

28. *Id.*

denied.²⁹ Arciliares was subsequently sentenced and filed a timely appeal.³⁰

ANALYSIS AND HOLDING

Arciliares's appeal was based on four perceived errors of law;³¹ though, only two issues were discussed at length by the Rhode Island Supreme Court:³² (1) the trial judge's refusal to allow Arciliares to cross-examine Det. LaForest as to the May 17, 2011 conversation;³³ and (2) the admission of the gruesome autopsy photos.³⁴ The court held that the trial judge's only error was refusing to allow sufficient cross-examination of Det. LaForest.³⁵ As a result of this error, the court vacated the conviction and remanded the case to the Superior Court for a new trial.³⁶

The conversation Det. LaForest had with Arciliares on May 17, 2011 was relevant as to the source of Baccaire's information.³⁷ Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."³⁸ All relevant evidence is assumed admissible, though it can be excluded based on the applicability of several exceptions.³⁹ The State argued that the evidentiary bar set forth in *State v. Harnois* was one such exception, which would bar the

29. *Id.* at 1047–48.

30. *Id.* at 1048. ("The defendant was subsequently sentenced to two consecutive life sentences, . . . two concurrent sentences of twenty years . . . to be served consecutively to the two life sentences, and an additional twenty years . . . to be served consecutively to the entire sentence.").

31. *Id.* at 1048–49.

32. The court did not discuss the trial judge's instruction to the jury but stated simply that it was not an error. *See id.* at 1049.

33. *Id.* at 1049–51.

34. *Id.* at 1051–52.

35. *Id.* at 1049.

36. *Id.*

37. *Id.*

38. *Id.* (quoting *State v. Brown*, 42 A.3d 1239, 1244 (R.I. 2012)).

39. *Id.* at 1049; *id.* at 1049 n.19 ("Rule 402 of the Rhode Island Rules of Evidence provides: 'All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the constitution of Rhode Island, by act of congress, by the general laws of Rhode Island, by these rules, or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.'").

line of questioning suggested by Arciliares.⁴⁰ In *Harnois*, the court determined that while a defendant has a constitutional right to not testify at their trial, they could not avoid cross-examination by admitting evidence of the defendant's previous statements.⁴¹ In essence, a defendant is not permitted to "testify through" another person.⁴² The State would be unable to cross examine Arciliares on the statements made through Det. LaForest.⁴³ Here, Arciliares did not seek the ability to testify through Det. LaForest; rather, Arciliares sought to enter into evidence only Det. LaForest's statements to Arciliares;⁴⁴ *Harnois* does not bar such evidence from being admitted.⁴⁵

The State also argued that the testimony of Det. LaForest, as to the content of the May 17, 2011 meeting with Arciliares, would be barred because it would create "confusion in the minds of jurors."⁴⁶ The court again disagreed.⁴⁷ The court further disagreed with the State's argument that Det. LaForest's testimony would unfairly prejudice the jury⁴⁸ because the probative value of the evidence would outweigh any unfair prejudice to the State.⁴⁹

The court also addressed the issue of the autopsy photos entered into evidence over Arciliares's objection.⁵⁰ The court found that weighing the prejudicial value of the photographs was within the discretion of the trial judge and would only be overturned if the trial judge went beyond the bounds of that discretion.⁵¹ The court determined that an abuse of discretion did not occur in the instant case.⁵² While the photographs may have

40. *Id.* at 1049.

41. *See Harnois*, 638 A.2d at 535–36.

42. *Id.* at 536.

43. *Arciliares*, 108 A.3d at 1049; *see Harnois*, 638 A.2d at 535–36.

44. *Arciliares*, 108 A.3d at 1050.

45. *Id.*; *See Harnois*, 638 A.2d at 535–36.

46. *Arciliares*, 108 A.3d at 1050.

47. *Id.* at 1050–51.

48. *Id.* at 1051.

49. *Id.* at 1050 (providing that "[a]ll evidence supportive of [defendant's theory of the case] is prejudicial to a prosecutor's case, but such evidence will be excluded only if its prejudicial effect outweighs the degree of its probative value.") (quoting *State v. Tavarozzi*, 446 A.2d 1048, 1051 (R.I. 1982)).

50. *Id.* at 1051–52.

51. *Id.* at 1051.

52. *Id.* at 1052.

been gruesome, they are relevant for the jury to understand the Assistant Medical Examiner's testimony.⁵³ The trial judge, therefore, did not err in admitting the photos.⁵⁴

COMMENTARY

Here, the Rhode Island Supreme Court clarified the role of *Harnois* when evaluating evidence⁵⁵ presented at trial and affirmed the importance of allowing criminal defendants to put forth a proper defense, which includes the sufficient cross-examination witnesses.⁵⁶ The evidentiary bar against hearsay enforced in *Harnois* prevents defendants from *de facto* testifying without being subject to cross-examination.⁵⁷ That goal is not effectuated by a rule that prevents statements made to defendants from entering evidence.⁵⁸

The court shows concern about the potential for creating reversible error by limiting the evidence admitted by a criminal defendant.⁵⁹ The court's opinion in this case stands as a warning sign to the justices of the Superior Court to proceed with caution when considering excluding evidence that a criminal defendant seeks to admit at trial.⁶⁰ The likelihood of reversal is heightened when probative evidence proffered by the defendant is suppressed.⁶¹

The court did affirm the discretionary function of the trial justice in determining the probative value of a piece of evidence in the context of autopsy photos,⁶² but indicated that that discretion is not without limit.⁶³ The issue of photographs was secondary to the discussion of Det. LaForest's testimony and was reached in an effort to preempt the possibility of a future appellate claim should Arciliares be convicted upon re-trial.⁶⁴

53. *Id.* at 1051–52.

54. *Id.* at 1052.

55. *See id.* at 1049.

56. *See id.* at 1052 (Goldberg, J., concurring).

57. *Harnois*, 638 A.2d at 535–36.

58. *See Arciliares*, 108 A.3d at 1049 (majority opinion).

59. *See id.* at 1052 (Goldberg, J., concurring).

60. *See id.* (majority opinion).

61. *See id.*

62. *Id.* at 1051.

63. *Id.*

64. *Id.*

The trial court's decision in this case departed from the Rhode Island Rules of Evidence, which closely mirror the Federal Rules of Evidence with regard to hearsay.⁶⁵ Det. LaForest should have been able to testify to the statements he made because the purpose of the testimony was not to demonstrate the truth of those statements, but to offer an alternative means by which Baccaire could have learned the details of the crime.⁶⁶ Arciliares intended only to demonstrate that the statements were made,⁶⁷ and statements proffered for such a reason are not hearsay.⁶⁸ Regardless of the accuracy of Det. LaForest's statements to Arciliares, by demonstrating that Det. LaForest provided Arciliares with details of Barros's murder Arciliares could establish a defense⁶⁹ and quite possibly reasonable doubt.

Despite the prosecutions assertion to the contrary,⁷⁰ *Harnois* did not establish a new evidentiary bar; it merely enforced the longstanding bar against hearsay.⁷¹ The Rhode Island Supreme Court simply applied the hearsay rule to the facts of *Harnois*.⁷² The *Harnois* defendant's argument under Rule 403⁷³ necessitated a discussion of defendants testifying through another person; however, it created no additional rule prohibiting the admission of such statements⁷⁴ as they were already barred as hearsay.⁷⁵

65. Compare FED. R. EVID. 801, with R.I. R. EVID. 801.

66. See R.I. R. EVID. 801(c).

67. *Arciliares*, 108 A.3d at 1044.

68. See R.I. R. EVID. 801(c).

69. *Arciliares*, 108 A.3d at 1051.

70. *Id.* at 1044 n.8.

71. *Harnois*, 638 A.2d at 535–36.

72. *Id.*

73. See R.I. R. EVID. 803(24) (“Other Exceptions. 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. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his or her intention to offer the statement and the particulars of it, including the name and address of the declarant.”).

74. *Id.*

75. See R.I. R. EVID. 801.

CONCLUSION

The Rhode Island Supreme Court held that *Harnois* is limited to statements made by the defendant and does not include statements made to the defendant thus mirroring longstanding rules barring hearsay. The court further held that it is reversible error to deny a criminal defendant the ability to sufficiently cross-examine a material witness when the testimony sought is probative, not unfairly prejudicial to the prosecution, and not otherwise barred by the rules of evidence.

Kenneth J. Sylvia

Family Law. *In re Max M.*, 116 A.3d 185 (R.I. 2015). The Rhode Island Supreme Court upheld a ruling of termination of parental rights where the father refused to cooperate with the Department of Children, Youth and Families and had an overall lack of interest in the child. DCYF made reasonable efforts of reunification where it attempted to work with the father, but he refused to cooperate.

FACTS AND TRAVEL

On September 13, 2013, the Department of Children, Youth and Families (DCYF) filed a petition to terminate the parental rights of Eric M., the respondent father, regarding his son Max.¹ DCYF alleged two grounds for the termination of Eric's rights.² First, pursuant to R.I. General Laws Section 15-7-7(a)(3) (1956), DCYF alleged that Max had been in the legal custody of DCYF for at least twelve months and there was not a substantial probability that Max could be returned in a reasonable time.³ Second, pursuant to R.I. General Laws Section 15-7-7(a)(4) (1956), DCYF alleged that Eric had abandoned Max.⁴

In support of its petition, Cheryl Csisar, a caseworker assigned to Max's case, testified as a witness for DCYF.⁵ Ms. Csisar replaced another caseworker in June of 2013.⁶ She testified as to how Max came into the custody of DCYF.⁷ She testified that in May of 2012, DCYF was notified that Max's mother, Amanda⁸, was "abusing heroin. . . [and] leaving [Max]

1. *In re Max M.*, 116 A.3d 185, 188 (R.I. 2015).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. A petition to terminate the parental rights of Amada was filed at the same time as Eric's. Amanda did not show up to the initial hearing and did not appeal. *Id.* at n.2.

734 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:733]

with relatives for extended periods of time and not providing for his care.”⁹ Ms. Csisar also testified that Eric could not take care of Max because he was serving time at the Adult Correctional Facility (ACI).¹⁰ In response, Max was placed in foster care with his maternal aunt and uncle on May 23, 2012.¹¹

Although Eric was in prison, a previous case worker created two case plans for Eric with the goal of reunification.¹² In July of 2013, a month after Eric was released from prison, Ms. Csisar created a third case plan for Eric with the same goal.¹³ As a part of the third case plan, Eric was expected to develop parenting skills, find housing, attend substance abuse treatment, address anger management problems and refrain from any illegal activities.¹⁴ Ms. Csisar was unable to execute the third case plan because Eric felt that he had already completed anger management and parenting classes while at ACI.¹⁵ Ms. Csisar testified that these classes were not adequate, although she never contacted ACI to determine if the classes met DCYF’s standards.¹⁶ Ms. Csisar also originally testified that Eric’s home would be suitable for Max, but later stated that it would not because Amanda¹⁷, Max’s mother, lived there. Ms. Csisar also stated that the home did not have heat or hot water when she visited in March of 2014.¹⁸

Ms. Csisar testified that Eric only saw his son five times between June 2013 and May 2014, although he was entitled to visit with his son weekly, and the last visit had taken place in January 2014.¹⁹ Ms. Csisar stated that Eric never requested that the visits be lengthened and after January 2014, she could no longer get ahold of Eric to arrange visits.²⁰ Ms. Csisar testified

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 188–89.

15. *Id.* at 189.

16. *Id.* at 189, 190.

17. *Id.* Amanda was also Eric’s wife and since her parental rights had already been terminated she would not be an appropriate care giver. *Id.* at n.2.

18. *Id.* at 189.

19. *Id.*

20. *Id.*

2016]

SURVEY SECTION

735

that Max did not know Eric, and although Eric fed Max when visiting, Eric got very flustered and did not seem to know what to do when Max was upset.²¹ Ms. Csisar also testified that she talked to Eric about terminating his parental rights and at one point he agreed to sign a direct consent adoption.²²

Ms. Csisar testified that Eric had not met the goals of the case plan and a new case plan was undertaken for Max with the goal of adoption.²³ Susan Carlson, a DCYF supervisor, also testified that Eric had not met the goals of his case plan.²⁴

Eric also testified at trial.²⁵ Eric stated that he had done nothing to obtain custody of his son and he had not provided financially for his son since Max had been in the custody of DCYF.²⁶ Eric stated that he did not visit Max when he got out of jail because he wanted to be stable first and he also stated that he could not remember the last time that he had seen Max.²⁷ Eric also testified that when he agreed to sign the direct consent adoption he had many mixed feelings and nothing had been official decided.²⁸

The trial justice entered a finding that Eric was an unfit parent and a final decree terminating Eric's parental rights was entered on August 21, 2014.²⁹

ANALYSIS AND HOLDING

On review, the Rhode Island Supreme Court sought to determine two issues.³⁰ First, whether the trial justice had erred in ruling that Eric was unfit to parent Max and second, whether

21. *Id.* at 190.

22. *Id.* According to Ms. Csisar, "[Eric] said to me that he decided he knew he couldn't parent and that he just wanted to sign the direct consent [adoption]. He did not want to go forward with the trial. That he knew there was no point in it. That he felt he would lose and that he couldn't parent." *Id.* In a direct consent adoption, the biological parent agrees to an adoption for the child with the child's current caregivers. See R.I. Code R. 14-1-1100.0025.

23. *Id.* at 190.

24. *Id.* at 192.

25. *Id.* at 190.

26. *Id.* at 191.

27. *Id.*

28. *Id.*

29. *Id.* at 192.

30. *Id.* at 193.

736 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 21:733]

DCYF had made reasonable efforts to reunify Eric and Max.³¹ Eric argued that DCYF had failed to prove either of these points by clear and convincing evidence³² and as such, his parental rights should not have been terminated.³³ The Rhode Island Supreme Court affirmed the lower court's decision.³⁴

First, the court addressed the issue of whether the lower court had erred by ruling that Eric was an unfit parent.³⁵ The court acknowledged that several principles are used to determine whether or not a parent is unfit.³⁶ First, a parent has an obligation to maintain contact with a child and plan for the child's future when the child is in the custody of DCYF.³⁷ Second, the court has stated that an unwillingness to cooperate with DCYF is a demonstration of a parent's lack of interest in a child.³⁸

The court examined the facts relied on by the trial justice to reach the conclusion that Eric was an unfit parent.³⁹ Eric refused to cooperate with DCYF.⁴⁰ He would not participate in case planning, and he refused to participate in any recommended programs because he felt that he had done enough while in prison.⁴¹ The trial justice also found support for deeming Eric an unfit parent based on his "overall lack of interest [in Max]."⁴² The court did not find that the trial justice had overlooked or misconstrued any material evidence when determining Eric was an unfit parent.⁴³

Second, the court addressed the issue of whether DCYF had

31. *Id.*

32. *Id.* "[D]ue process requires that, before the state may terminate a parent's rights in his or her own children, the state must support its allegations by clear and convincing evidence." *Id.* (quoting *In re Steven D.*, 23 A.3d at 1154, 1155).

33. *Id.* at 193.

34. *Id.* at 196.

35. *Id.* at 193.

36. *Id.*

37. *Id.* (quoting *In re Rosalie H.*, 889 A.2d 199, 205 (R.I. 2006)).

38. *Id.* at 194 (quoting *In re Rosalie H.*, 889 A.2d at 205).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 195. The trial justice noted Eric's sporadic visits, failure to support Max and his belief that his family members or wife, whose parental rights had been terminated, would be primary caretakers as evidence of his parental unfitness. *Id.* at 194–95.

43. *Id.* at 195.

made reasonable efforts at reunifying Eric and Max.⁴⁴ DCYF has to prove that reasonable efforts were made to strengthen the parent-child relationship.⁴⁵ Reasonable efforts may vary and the reasonable efforts standard is subjective.⁴⁶ In order to demonstrate reasonable efforts, DCYF must show that “. . . it has satisfied certain requirements, including case panning with the parent, arrangements for visitation, and keeping the parent informed of the child’s well-being.”⁴⁷ However, the court also noted that DCYF cannot be to blame when “the treatment received does not resolve the underlying problem or when a parent’s recalcitrance to treatment precludes reunification.”⁴⁸ The court found that the trial justice’s findings were sufficiently supported to show that DCYF had made efforts at reunification.⁴⁹ The court found that DCYF had made reasonable efforts at reunification, supported by clear and convincing evidence.⁵⁰

COMMENTARY

The Rhode Island Supreme Court affirmed earlier decisions that involved the termination of parental rights. The court upheld a reasonable rule that provides a clear standard for terminating the rights of parents. The court continues to allow the facts for each situation to be considered. There is no one single objective rule that could be used to determine when parental rights should be terminated and the court continues to recognize this. The court’s ruling continues to make it difficult for parents to prevent a termination of the parental rights when they make no reasonable efforts to allow for reunification. Parents cannot simply prevent a termination when they refuse to cooperate with DCYF and when they fail to take opportunities available to them to reunite with a child. This standard not only protects the best

44. *Id.*

45. *Id.* (quoting *In re Gabrielle D.*, 39 A.3d 655, 665 (R.I. 2012)).

46. *Id.* (quoting *In re Steven D.*, 23 A.3d at 1156).

47. *Id.* (quoting *In re Lyric P.*, 90 A.3d 132, 141 (R.I. 2014)).

48. *Id.* (quoting *In re Natalya C.*, 946 A.2d 198, 203 (R.I. 2008)).

49. *Id.* at 196. The trial justice found that Eric had the opportunity for weekly visits with Max and DCYF had participated in case planning with Eric on three separate occasions. *Id.* The trial justice also found that DCYF did not need to make specific referrals for Eric because of his repeated and clear refusal to participate in any further programs. *Id.*

50. *Id.*

738 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:733

interest of a child, it also protects parents. The rule allows parents to be protected when DCYF does not try and work with them and it protects parents who are working steadily towards being reunited with their children.

The court's ruling also upheld the steps that need to be taken by DCYF to make reasonable efforts at reunification and continued to allow a subjective test as to what reasonable efforts include. DCYF does need to meet certain requirements, regardless of the chances of success, in order for a finding of reasonable efforts. This makes sense because regardless of how the parent reacts, DCYF needs to attempt to case plan with parents and set up visitation, as well as keeping parents informed about their children.

CONCLUSION

The Rhode Island Supreme Court upheld a termination of parental rights and ruled that the lower Court did not err by finding a father was an unfit parent and that DCYF had made reasonable efforts at reunification.

Cassandra A. Foley

Insurance Law. *Western Reserve Life Assurance Co. of Ohio v. ADM Associates, LLC*, 116 A.3d 794 (R.I. 2014). The beneficiary of a life insurance policy must have an insurable interest in the life of the insured. The Rhode Island Supreme Court concluded in this case, as a matter of first impression, that this insurable interest requirement should not be extended to annuity policies. In addition, the court held that an incontestability clause that takes immediate effect is enforceable, precluding all causes of action that seek to invalidate the policy.

FACTS AND TRAVEL

“Joseph Caramadre was an attorney who specialized in finding loopholes in insurance and annuity products that would be personally lucrative to him.”¹ He took advantage of the application process and structure of annuity policies designed and sold by Western Reserve Life Assurance Company of Ohio (“Western Reserve”).² Western Reserve’s “Freedom Premier III” annuity policy allows the investor, who is the owner of the policy, to direct how premiums are to be invested after paying for the premiums and also to choose to whom annuity payments are to be made.³ The investor also selects an annuitant, whose life is used as a measuring tool for the policy.⁴ The “Double Enhanced Death Benefit,” an additional option with the policy, guarantees that when the annuitant’s die, the beneficiary selected by the investor

1. *Western Reserve Life Assurance Co. of Ohio v. ADM Associates, LLC*, 116 A.3d 794, 796 (R.I. 2014). Annuity is defined by the General Assembly as “all agreements to make periodic payments for a certain period or where the making or continuance of all or some of a series of the payments, or the amount of any payment, depends on the continuance of human life, *except payments made in connection with a life insurance policy.*” *Id.* at 799 (quoting R.I. GEN. LAWS § 27-4-0.1(a)).

2. *Id.* at 796.

3. *Id.*

4. *Id.*

receives whichever is greater: “(1) the highest market value of the policy at a specified anniversary date or (2) a return of all the premiums paid into the policy plus five percent per annum interest.”⁵

An investor who purchased the “Double Enhanced Death Benefit,” was essentially making a risk-free investment because it allowed the investor “to direct that his premiums be invested in speculative securities, name himself as beneficiary, and thus be assured that he would receive no less than the total premiums invested, plus five percent annual interest, upon death of the annuitant.”⁶ If the life of the annuitant was shorter, the potential for profits on the policy increased.⁷

After discovering this loophole in Western Reserve’s policy, Caramadre recruited terminally ill individuals as annuitants by circulating flyers to hospice patients and churches and offered to pay the individuals cash for their role as the annuitant.⁸

Charles Buckman served as the annuitant on a policy that ADM Associates, LLC (“Defendant”) owned and benefited from.⁹ Buckman was paid a total of \$5,000 for his participation as annuitant.¹⁰ Initially, the Defendant invested \$250,000 as a premium to initiate Buckman’s policy, which included the Double Enhanced Death Benefit, and later invested \$750,000 as an additional premium payment.¹¹ Western Reserve issued the policy, which included a clause that made it incontestable from the date of creation.¹² Camaradre repeated this process many times over several years using plaintiff’s variable annuity policies and a variety of terminally ill individuals, brokerage companies, and their agents.”¹³ A year after its issuance, Western Reserve attempted to rescind the Buckman policy after learning that the policy may have been tainted by Caramadre’s scheme.¹⁴

Plaintiff filed suit in the United States District Court for the

5. *Id.*

6. *Id.* at 796–97.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

District of Rhode Island against Caramadre and ADM seeking “rescission of the annuity policy or a declaratory judgment that the policy was void because ADM lacked an insurable interest in Buckman.”¹⁵ The Plaintiff also sought damages for fraud, civil liability for crimes and offenses, and conspiracy.¹⁶ The Defendant made two arguments in opposition to the complaint: “that the insurable interest requirement for life insurance policies was not applicable to annuities and that incontestability clauses in the annuity policies precluded plaintiff from litigating any of its claims.”¹⁷

The District Court dismissed plaintiff’s claims and held that insurance and annuities are separate, distinct financial investment vehicles and that the lack of an insurable interest by ADM in Buckman did not render the Buckman policy void pursuant to Rhode Island Law.”¹⁸ The District Court also concluded “that the incontestability clause in the policy . . . was not in contravention of public policy and ‘serve[d] to deflect claims to rescind the annuities or have them declared void because of fraud.’”¹⁹ The plaintiff appealed to the First Circuit.²⁰

ANALYSIS AND HOLDING

The Supreme Court of Rhode Island sought to determine whether the insurable interest requirement should extend to annuity policies and whether an incontestability clause that takes immediate effect precluding all causes of action that seek to invalidate the policy is enforceable.²¹ The court held that the insurable interest requirement does not extend to annuity policies and an incontestability clause that takes immediate effect, precluding all causes of action that seek to invalidate the policy, is enforceable.²²

The insurable interest requirement for life insurance policies,

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* (quoting *W. Reserve Life Assurance Co. of Ohio v. Conreal LLC*, 715 F. Supp.2d 270, 279, 280 (D.R.I. 2010)).

20. *Id.* at 797–98.

21. *Id.* at 798, 804.

22. *Id.* at 804, 806.

which is the requirement that the beneficiary of a life insurance policy have an insurance interest in the life of the insured, has long been established in Rhode Island based on public policy concerns against speculative contracts upon human life because “to wager on human life is to provide an incentive to shorten the human life wagered upon.”²³ In the court’s opinion, “the plain text of § 27-4-27(a) clearly indicates that the insurable interest requirement applies to life insurance only, as the phrase ‘any insurance contract upon the life or body of another individual’ is synonymous with ‘life insurance.’”²⁴ The court also pointed out that looking at the entirety of Chapter 4 of Title 27 “reveals that the General Assembly contemplated annuities in some sections of [the] chapter that govern life insurance policies, but not others.”²⁵ Therefore, if the General Assembly intended the insurable interest requirement to extend to annuities, it would have expressly indicated that through the language of the section.²⁶ The court also looked to the express language of the Life Settlements Act (LSA), which expressly prohibits stranger-oriented life insurance policies (STOLIs) and is silent on annuities.²⁷

In regard to whether this kind of annuity is a wagering contract, and therefore void as a matter of public policy, the court held that the lack of an insurable interest does not convert the investment into a wagering contract because “the investor’s payment of the premium does not depend on the occurrence of a certain event, and the periodic payouts to the beneficiary do not depend on the occurrence of a contrary event”—they are

23. *Id.* at 800–01; *see* Grigsby v. Russell, 222 U.S. 149, 154 (1911).

24. *Id.* at 801.

25. *Id.* The court explained:

In the other sections within chapter 4 that mention annuities, the language expressly includes annuities within each of the sections by the use of phrases such as “life insurance and/or annuities” and “all life insurance policy forms and annuity contract forms” in § 27-4-24, “life insurance contract or annuity contract” in § 27-4-26, “[a]ny policy of life or endowment insurance or any annuity contract” in § 27-4-12, and “[e]very individual life insurance policy delivered . . . and every individual annuity contract delivered” in § 27-4-6.1.

Id.

26. *Id.*

27. *Id.* at 802 (“A STOLI is defined in § 27-72-2(26) as ‘a practice or plan to initiate a life insurance policy for the benefit of a third-party investor who, at the time of policy origination, has no insurable interest in the insured.’”).

guaranteed by contract.²⁸ The court reasoned that since the unknown variable (the timing of the annuitant's death) effects only whether the investor/beneficiary will either yield a large profit or simply a return of their baseline investment plus interest, the annuity is not a "purely speculative contract on the life of another."²⁹

In determining whether an incontestability clause that takes immediate effect and is enforceable, precluding all causes of action that seek to invalidate the policy, the court pointed to the arguments in favor of enforceability in a leading treatise on contract law.³⁰ These arguments reason that "the insurer drafted the clause and so should be bound by it" and "the insurer has an unlimited length of time to investigate the policy applicant prior to issuing the policy" and therefore "could have discovered whatever errors or misrepresentations might have existed before it accepts the risk of issuing a policy to the applicant."³¹ The court disregarded the argument against enforcement to discourage fraud, and determined the clause is "enforceable against all attempts to escape the 'deliberately assumed obligation[s]' contained within these contracts."³²

COMMENTARY

Justice Robinson dissented from the majority and argued that "if the owner and beneficiary of an annuity with a death benefit like the one at issue in this case is a stranger to the annuitant, the annuity is indeed infirm for want of an insurable interest."³³ While annuities are not the equivalent of life insurance contracts, are in fact "separate and distinct," he points out that the focus should not be on whether or not the annuity is distinct in definition from a life insurance policy, but instead "whether or not the 'Double Enhanced Death Benefit' makes this annuity a wagering contract which this Court should refuse to enforce as a

28. *Id.* at 803.

29. *Id.* (quoting *Cronin v. Vt. Life Ins. Co.*, 40 A. 497, 497 (R.I. 1898)).

30. *Id.* at 805.

31. *Id.* (citing 16 WILLISTON ON CONTRACTS § 49.97 at 845–46 (4th ed. 2014)).

32. *Id.* at 806 (quoting *Murray v. State Mut. Life Ins. Co.*, 48 A. 800, 801 (R. I. 1901)).

33. *Id.* at 807.

matter of venerable and sound public policy.”³⁴ The Rhode Island Supreme Court, as well as the United States Supreme Court, has consistently held that wagering contracts are detrimental to society and against public policy.³⁵ While the majority opinion does consider whether the contract at hand is a wagering contract, it fails to consider that “[i]f one turns to the reason that certain wagering contracts were determined to be void without an insurable interest—namely, the concern that the individual who would profit from the death of the other individual involved has a motive to potentially harm that individual—it becomes clear that the annuity in this case is an impermissible wagering contract.”³⁶ As Justice Robinson points out, “[d]ue to the ‘Double Enhanced Death Benefit,’ if the market is performing well, the owner of the annuity would have an incentive to end the life of the annuitant in order to reap a larger gain” since profits from the investment depend on the time of the death of the annuitant.³⁷

The majority admits that the structure of annuities has become “increasingly complex” and has “evolved to offer a variety of elective features, including a smorgasbord of investment and payout options, as well as death benefits” but fails to fully address how the feature of death benefits changes an annuity in regard to public policy concerns.³⁸ With an investor standing to possibly gain large profits from their financial investment, depending on the time of death of the annuitant, it seems that death benefits may transform annuities into a “speculative contract on the life of another.”³⁹

CONCLUSION

“[A]n annuity is not infirm for want of an insurable interest when the owner and beneficiary of an annuity with a death benefit is a stranger to the annuitant.”⁴⁰ Furthermore, “an incontestability clause that takes immediate effect is enforceable,

34. *Id.*

35. *Id.* at 807–08.

36. *Id.* at 809.

37. *Id.*

38. *Id.* at 801.

39. *Id.* at 800–01.

40. *Id.* at 804.

2016] *SURVEY SECTION* 745

precluding all causes of action that seek to invalidate the policy.”⁴¹

Christina Volpe

41. *Id.* at 806.

Insurance Law. *Peerless Ins. Co. v. Luppe*, 188 A.3d 500 (R.I. 2015). A child of divorced parents can have multiple residences for the purpose of determining insurance coverage under a homeowner's policy. In determining whether a child is a resident of a given home, a court must resolve, using a totality of the circumstances approach, whether that child has the requisite intent to fulfill the definition of resident as set forth in *Aetna Life and Casualty Co. v. Carrera*, 577 A.2d 980 (R.I. 1990). If the child maintains a personal presence in a home with the intent to continue that presence for more than a temporary period, he or she is a resident of that home.

FACTS AND TRAVEL

Maya is the minor child of divorced parents living in Rhode Island. Maya's parents, Denise Luppe ("Luppe") and Christopher Henderson ("Henderson"), terminated their marriage pursuant to a judgment of absolute divorce entered in the Family Court in May 2010.¹ The judgment awarded Maya's parents joint legal custody, with Luppe gaining physical custody of Maya, and giving Henderson "all reasonable rights of visitation."² Maya infrequently stayed overnight at Henderson's small studio apartment, which he obtained shortly after the couple separated in January 2009.³ Sometime after June 2010, Henderson purchased a two bedroom home with enough space to allow for "a regular schedule of overnight visitation with [Maya]."⁴ Per this schedule, Maya would stay overnight at Henderson's house on

1. *Peerless Ins. Co. v. Luppe*, 118 A.3d 500, 502 (R.I. 2015).

2. *Id.* The property settlement agreement defined joint custody as "shared responsibility for all major decisions concerning the upbringing, education, medical care, dental care, spiritual care, and all matters concerning the general welfare of the child." *Id.*

3. *Id.* Henderson testified that Maya spent the night at his studio apartment "no more than a couple" of times between January 2009 and June 2010. *Id.*

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

Wednesdays and Sundays.⁵ Luppe or her parents would pick up Maya from school after Henderson dropped her off on Thursday and Monday mornings.⁶ Maya generally slept in her father's bedroom when visiting, however, she sporadically slept in the spare bedroom that contained some of her toys and extra clothing.⁷ Occasionally, Maya would use a bag to bring her belongings between houses.⁸ Maya also had toiletries at Henderson's, including a toothbrush, hairbrush, and a hair dryer.⁹ On Sunday, August 22, 2010, Maya was at Henderson's house when his dog attacked Maya in an unknown part of the house while Henderson was in the kitchen.¹⁰ The dog severely injured Maya, who required "significant medical attention."¹¹

In 2011, Luppe filed a personal injury lawsuit on behalf of Maya against Henderson.¹² The complaint alleged that Maya "was disfigured, suffered personal injuries," "may continue to suffer great pain of mind and body, and incurred medical expenses in connection" with the dog attack.¹³ Henderson sought a defense from Peerless Insurance Company ("Peerless"), which held Henderson's homeowner's liability policy at the time the dog injured Maya.¹⁴ Peerless denied coverage to Henderson, asserting that Maya was a resident of Henderson's home at the time of the attack and so her injuries, as an insured of the policy, were not covered.¹⁵ The policy defined "insured" as the homeowner and "residents of [the homeowner's] household who are: a. [the homeowner's] relatives; or b. [o]ther persons under the age of

5. *Id.* at 503.

6. *Id.*

7. *Id.* Spare clothing and "backup items" included a "[s]weatshirt . . . shorts, a pair of jeans, sandals, [and] sneakers." *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* Luppe also filed her own complaint, not addressed by the Court's opinion, alleging she "suffered a loss of consortium with [Maya] because of Maya's injuries." *Id.* at n.4 (alteration in original).

14. *Id.*

15. *Id.* Peerless point to "Section II—Exclusions" of the homeowner's policy in denying coverage, which excluded coverage for "[b]odily injury" to you or an 'insured' within the meaning [of this policy]." *Id.*

748 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:746

[twenty-one] and in the care o[f] any person named above.”¹⁶

On January 10, 2012, Peerless filed a complaint for declaratory judgment with the Washington County Superior Court, seeking a determination on Maya’s status as a resident of Henderson’s home.¹⁷ During discovery, Luppe testified that Maya was listed as a resident of Luppe’s home on all of her school forms, Maya’s mail was addressed to Luppe’s home, and Luppe claimed Maya as an exemption on her tax return.¹⁸ Henderson testified that, despite the presence of Maya’s belongings at Henderson’s home, neither he nor Maya considered his house to be Maya’s home.¹⁹ Peerless filed a motion for summary judgment on August 16, 2013, claiming that there were “no issues of fact in dispute” and arguing that “the undisputed facts supported a finding that Maya was a resident of [Henderson’s] household when she was injured.”²⁰ Both Henderson and Luppe objected to the motion, and Luppe filed a cross-motion for summary judgment.²¹

On November 18, 2013, arguments were heard on the summary judgment motions filed by Peerless and Luppe by a justice of the Superior Court.²² The parties agreed that there were no genuine issues of material fact and that application of the test recited in *Aetna Life and Casualty Co. v. Carrera*, a prior Rhode Island Supreme Court decision, was proper for determining residency in the context of insurance policies.²³ During arguments, Luppe tried to introduce an affidavit offering a conclusion on the status of Maya’s residency, but the affidavit did not persuade the hearing justice that “custody could have been

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

17. *Id.* at 504. Henderson filed a counterclaim in response to Peerless’s pursuit of declaratory judgment, alleging breach of contract, breach of fiduciary duty, and bad faith, which was stayed pending the outcome of Peerless’s action. *Id.* at 504 & n.6.

18. *Id.* at 504.

19. *Id.* at 503. “[Maya] knows it as daddy’s house. You know, she knows [her mother’s] home as, let’s say, home, and she knows my home as daddy’s house.” *Id.*

20. *Id.* at 504 (alteration in original).

21. *Id.*

22. *Id.*

23. *Id.* In determining residency for insurance purposes, courts look at “(1) the amount of time [one] spends in the locality (2) the nature of [one’s] place of abode (3) [one’s] activities in the locality and (4) [one’s] intentions with regard to the length and nature of [one’s] stay.” *Id.* at 508. (citing *Aetna Life and Cas. Co. v. Carrera*, 577 A.2d 980, 984 (R.I. 1990)).

crafted differently.”²⁴ After hearing the arguments on the motions, the hearing justice held that “Maya was a resident of Mr. Henderson’s home and therefore concluded that there was no coverage for her injuries under the Peerless policy.”²⁵ The justice, observing the issue before her as a question of law, issued a bench decision granting summary judgment for Peerless.²⁶ Henderson and Luppe both filed timely notices of appeal.²⁷

ANALYSIS AND HOLDING

Conducting a *de novo* review of the summary judgment ruling, the Rhode Island Supreme Court sought to determine whether the hearing justice disregarded the “unpersuasive” affidavit in error, whether the term “resident” as used in the insurance policy was ambiguous, and whether the hearing justice erred in her application of the *Carrera* test.²⁸ Though Luppe argued that the affidavit submitted during the summary judgment hearing should be conclusive on the question of Maya’s residency, the court viewed the affidavit merely as the affiant’s legal conclusion and as raising “no material issue of fact.”²⁹ The purpose of an expert, the court observed, is to formulate an opinion of fact to “assist the fact-finder,” and not to draw legal conclusions.³⁰ The court further noted that because the parties agreed that no facts were in dispute and that the *Carrera* test governed, consideration of the affiant’s expert opinion was

24. *Id.* at 504–05. The affidavit was prepared by an experienced family law attorney who concluded that, “because during their divorce proceedings the parties had agreed that Maya’s physical placement would be with her mother, the young girl’s residence was with her mother only.” *Id.* at 505.

25. *Id.* at 504.

26. *Id.*

27. *Id.*

28. *Id.* at 505–09. “Summary judgment is appropriate when the hearing justice, after considering the ‘pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ finds ‘no genuine issue as to any material fact and that the moving party is entitled to judgment as [a] matter of law.’” *Id.* at 505 (quoting *Miller v. Metro. Prop. and Cas. Ins. Co.*, 111 A.3d 332, 339 (R.I. 2015)).

29. *Id.* at 505–06. “[I]t is well settled that such an opinion is permissible only ‘when the subject matter is wholly scientific or so far removed from the usual and ordinary experience of the average lay person’” *Id.* at 506 (quoting *Vallinoto v. DiSandro*, 688 A.2d 830, 851 (R.I. 1997)).

30. *Id.* (quoting *BLACK’S LAW DICTIONARY* 699 (10th ed. 2014)).

750 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 21:746]

unnecessary.³¹ Accordingly, the court found that, although it believed the hearing justice could have been clearer in her finding as to the affidavit, she committed no legal error.³²

The court then evaluated the ambiguity of the term “resident” as it applied to the insurance policy, with the resolve of construing any ambiguity against Peerless.³³ The court interpreted the policy *de novo*, giving the words their plain meaning.³⁴ Prior cases had already defined the term resident in the context of insurance policies, and the court recognized the “common existence of multiple residences.”³⁵ Being a resident of a home implies more than “being a mere transient guest,” explained the court; that a home to a resident is a “place . . . where he or she lives, sleeps, and carries on life with regularity.”³⁶ The court determined that the plain meaning of the phrase “residents of your household,” when read in conjunction with a phrase in the same definition, “who are [] your relatives,” communicated an unambiguous understanding of the meaning of resident within the context of the Peerless policy.³⁷

Finally, the court addressed the hearing justice’s application of the *Carrera* test to the uncontested facts of the case to determine whether or not Maya was a resident of Henderson’s

31. *Id.* The *Carrera* test “does not contemplate matters that are outside the usual and ordinary experience of a layperson.” *Id.*

32. *Id.*

33. *Id.* “An ambiguity in an insurance policy is strictly construed against the insurer.” *Id.* (alteration in original) (quoting *Koziol v. Peerless Ins. Co.*, 41 A.3d 647, 651 (R.I. 2012)).

34. *Id.* “[W]e refrain from ‘engaging in mental gymnastics or from stretching the imagination to read ambiguity into a policy where none is present.’” *Id.* (quoting *Mallane v. Holyoke Mut. Ins. Co. in Salem*, 658 A.2d 18, 20 (R.I. 1995)).

35. *Id.* at 507 (citing *Barricelli v. American Universal Ins. Co.*, 583 A.2d 1270, 1271 (R.I.1990)). “Shared-custody arrangements are increasingly frequent . . . and we recognize that a child may call multiple dwellings his or her home.” *Id.* (alteration in original) (citation omitted). *See also*, *Canfield v. Peerless Ins. Co.*, 692 N.Y.S. 562, 563 (N.Y. App. Div. 1999) (child bitten by dog during a scheduled visit in the home of her father) (“[T]he child of divorced parents can be a resident of both her mother’s and her father’s home for the purpose of being insured under the homeowner’s policy of each parent.”).

36. *Luppe*, 118 A.3d at 507.

37. *Id.* at 506. The court traditionally gathers the meaning of seemingly ambiguous terms by reviewing the term in context. *See Aetna Life and Cas. Co. v. Carrera*, 577 A.2d 980, 983 (R.I. 1990).

home for the purposes of the Peerless policy.³⁸ Determining residency in the context of a homeowner's policy was a matter of first impression for the court.³⁹ Drawing on past experience with uninsured and underinsured motorist insurance policies, the court reasoned that "the term resident should not have vastly different meanings across multiple types of insurance contracts."⁴⁰ To determine residency in the context of a homeowner's policy, the court adopted its reasoning in *Flather v. Norberg*, which addressed the definition of residency for state income tax purposes, and handed down several factors to be considered in determining residency: "(1) the amount of time [one] spends in the locality (2) the nature of [one's] place of abode (3) [one's] activities in the locality and (4) [one's] intentions with regard to the length and nature of [one's] stay."⁴¹

In *Carrera*, the court focused on the fourth factor—intent—and found that, after reviewing the totality of the circumstances, "one who maintains a personal presence in a home with the intent to continue that presence for more than a temporary period is considered a resident of that home under [Rhode Island] law."⁴² Shortly after the court pronounced the definition of residency in *Carrera*, it addressed the question in the context of divorce.⁴³ In *Barricelli v. American Universal Insurance Co.*, the daughter of divorced parents maintained "structured, albeit intermittent" contact with her mother's household, including weekly visits to the mother's home as well as overnight visits on alternate weekends, during which she would sleep on a pullout sofa.⁴⁴ The daughter kept "one or two changes of clothing" at her mother's house, but would use a suitcase when staying overnight.⁴⁵ The

38. *Luppe*, 118 A.3d at 507-509.

39. *Id.* at 507.

40. *Id.*

41. *Id.* at 508 (citing *Carrera*, 577 A.2d at 984).

42. *Id.* (alteration in original) (citing *Carrera*, 557 A.2d at 985). In *Carrera*, the Court ruled that the decedent was not a resident of his mother's home, and that the decedent's estate was unable to maintain a claim under his mother's insurance policy because the decedent lacked the intent to return to his mother's home, or to the state of Rhode Island in general at the time of his fatal accident. See *Carrera*, 557 A.2d at 985.

43. *Luppe*, 118 A.3d at 508 (citing *Barricelli v. American Universal Ins. Co.*, 583 A.2d 1270, 1271 (R.I.1990)).

44. *Id.* at 508-09 (quoting *Barricelli*, 583 A.2d at 1271).

45. *Id.* at 509 (quoting *Barricelli*, 583 A.2d at 1271).

752 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 21:746]

court held that the daughter's presence in her mother's home was "mere[ly] transitory" in nature, and that the girl's infrequent stays, lack of a regular bed to sleep in, and her need for a suitcase in transporting her belongings militated against her being a resident of her mother's home.⁴⁶

Applying the *Carrera* test to the case at bar, the court distinguished the facts of *Barricelli* from the facts of *Luppe* and, after reviewing the totality of the circumstances, was "convinced by an analysis of the agreed facts that Maya was a resident of [] Henderson's household" on the day she was injured because it was a place at which she had a "recent history of physical presence together with circumstances that manifest[ed] an intent to return to the residence within a reasonably foreseeable period."⁴⁷ Specifically, the court pointed to Maya's regular schedule of weekly overnight visits at Henderson's house per an amicable custody agreement, which was maintained even after the date of the injury which brought rise to the lawsuit; Maya's many belongings which stayed at Henderson's house, including clothes, toys, and toiletries, and Maya receiving visitors at Henderson's house.⁴⁸ While the court acknowledged the argument that Maya's residency was with her mother due to Maya being listed on Luppe's tax returns, Maya's mail being sent to Luppe's house, and Maya being listed as residing at Luppe's house, the court said that those facts did not disprove that Maya also resided with her father.⁴⁹ Accordingly, the court held that the hearing justice committed no error in granting summary judgment, because of the uniform definition of resident across "all types of insurance," regardless of the policy considered.⁵⁰

COMMENTARY

This case culminates the efforts of the Rhode Island Supreme Court to coalesce the understanding of residency as it relates to

46. *Id.* (quoting *Barricelli*, 583 A.2d at 1271-72).

47. *Id.* (quoting *Aetna Life and Cas. Co. v. Carrera*, 577 A.2d 980, 985 (R.I. 1990)). "[Maya's] presence in her father's home establishes that Maya was there for more than 'a mere transitory period' . . . when Maya was at Mr. Henderson's house, it was functionally her home." *Id.* (alteration in original) (citing *Barricelli*, 583 A.2d at 1272).

48. *Id.*

49. *Id.*

50. *Id.* at 507.

insurance policies under Rhode Island law, as well as reflects its desire to comport with the sentiments of other jurisdictions on the issue of a child's residency in the home of a divorced noncustodial parent with whom the child visits under circumstances similar to those in the *Luppe* case.⁵¹ Favoring a "general principle . . . [of] broad coverage" in interpreting homeowner's insurance policies, the court believed that it pronounced a holding consistent with the "purpose of homeowner's insurance policies, which is to protect against claims from outsiders, and not for intrafamily injuries."⁵² The court also took its analysis a much needed step further when reinforcing its approach in *Carrera* and, by focusing heavily on the factor of intent in the residency consideration test, ostensibly foreshadowing the substantial role intent will play in the determination of future cases.⁵³ In fact, without a determination of intent, the distinguishability of the facts the court relied on in ruling on the residency issue in the *Barricelli* and *Luppe* cases becomes far more debatable.⁵⁴

In this case, Maya kept a select few belongings, as well as a few spare articles of clothing at Henderson's, transported some clothing and supplies in a bag for overnight visits and, though a spare bedroom existed, Maya rarely slept in it, instead sleeping in Henderson's room.⁵⁵ Similarly, the daughter in *Barricelli* kept a few changes of clothing and select personal belongings at her mother's house, routinely transported further articles in a suitcase for overnight visits and, though there was no spare bedroom for the decedent, she was routinely accorded sole use of a pullout sofa,

51. *Id.* at 509–10; *see, e.g.*, *Canfield v. Peerless Insurance Co.*, 692 N.Y.S.2d 562, 563 (N.Y. App. Div. 1999) (holding that a regular schedule of visitation coupled with the child's keeping personal items at her father's home was a "sufficient degree of permanency to establish that she was a resident of that household as a matter of law."); *see also* *Estate of Adams v. Great American Ins. Cos.*, 942 P.2d 1087, 1091 (Wash. Ct. App. 1997) (holding child a resident of her father's home because "the child regularly spen[t] time in the household in question, such that there exist[ed] a continuing expectation of the child's periodic return on intervals regular enough that the household [wa]s the child's home during the time the child [wa]s there, as opposed to a place of infrequent and irregular visits.").

52. *Luppe*, 118 A.3d at 510 (quoting *Carrera*, 577 A.2d at 983) (citing Steven Plitt et. al., COUCH ON INSURANCE 3d § 128:2 at 128-7).

53. *Id.* at 508.

54. *See id.* at 503, 509.

55. *Id.* at 503.

which for the purposes of sleeping when visiting is essentially a bed, during her stays.⁵⁶ On these facts, it is not at all apparent that Maya's activities at Henderson's home warrant an outcome different than that reached in *Barricelli*.

Whereas the decedent in *Barricelli* had designated use of the pullout sofa during her visits, which is a bed for all intents and purposes, Maya slept almost exclusively in Henderson's bedroom, sharing it with Henderson, and used the spare room primarily to store belongings, using it for herself only when relatives visited.⁵⁷ In a way, because the first three elements of the *Carrera* test focus on the activities and time spent in the home, and not the intentions of the stay in the home, without the element of intent, Maya, because she shared a bedroom with Henderson, had a less stable arrangement than that of the decedent in *Barricelli*, who was provided a bed of her own, albeit convertible.⁵⁸ Absent the element of intent, the court would have a much harder time reconciling the two outcomes, as the cited lack of a "regular" bed to sleep in and the necessity to bring a suitcase in *Barricelli* also can apply to Maya's circumstances. However, when one takes into account the element of intent, the court's reasoning becomes much clearer.

While the decedent in *Barricelli* stayed at her mother's on alternate weekends, her stay at her mother's home was only "structured" insofar as she expressed a desire to visit.⁵⁹ In fact, she generally stayed with her father, despite her mother obtaining physical placement in the divorce.⁶⁰ Unlike that pattern of visitation, Maya's personal presence in Henderson's home was ongoing even after the dog bite and was more frequent, being a weekly occurrence, and was part of an amicable and adhered to plan of visitation, which delineated a clear intent for Maya to continue a routine presence at Henderson's home.⁶¹ The Supreme Court, in granting summary judgment for Peerless and affirming the ruling of the Superior Court, delineated and reinforced the

56. *Id.* at 509 (citing *Barricelli v. American Universal Ins. Co.*, 583 A.2d 1270, 1271 (R.I.1990)).

57. *Id.* at 503, 509.

58. *Id.* at 503, 509 (citing *Aetna Life and Cas. Co. v. Carrera*, 577 A.2d 980, 984 (R.I. 1990)).

59. *Id.* at 509 (citing *Barricelli*, 583 A.2d. at 1271).

60. *Id.*

61. *Id.*

2016]

SURVEY SECTION

755

intent element in the *Carrera* test as the hook upon which the issue of residency will turn, and provided a concrete, uniform, and very workable method of determining residency in the insurance context.

CONCLUSION

The Rhode Island Supreme Court held that in the context of homeowner's policies, a person is a resident of a home when that person maintains a personal presence in a home with the intent to continue that presence for more than a temporary period.

Daniel F. Miller

Labor Law. *Town of N. Kingstown v. Int’l Ass’n of Firefighters, Local 1651 AFL-CIO*, 107 A.3d 304 (R.I. 2015). A firefighters’ union has the right to negotiate with a town for the implementation of a unilateral change to the firefighters’ schedule, even if that implementation is considered a management decision. The union waives its right to negotiate if it has been formally notified of the proposal and fails to timely notify the town under R.I. General Laws Section 28-9.1-13 of the Firefighters Arbitration Act.¹ Additionally, a party waives its right to request interest arbitration if it has been formally notified of the proposal and fails to timely file such a request under Section 28-9.1-7 of the Firefighters Arbitration Act.²

FACTS AND TRAVEL

On June 30, 2010, a collective bargaining agreement (“CBA”) between the Town of North Kingstown (“Town”) and the North Kingstown Firefighters, Local 1651, International Association of Firefighters (“Union”) expired.³ Negotiations were ongoing, but both parties had vastly different views regarding the structure of the fire departments’ schedules.⁴ The Town proposed a three-platoon structure which increased the average workweek from forty-two hours to fifty-six hours and made the firefighters work twenty-four consecutive hours followed by a forty-eight hour recess.⁵ The Union, on the other hand, wished to keep the current four-platoon structure which contained a forty-two hour workweek.⁶ When these negotiations failed, an interest arbitration panel was assembled to create a new CBA that would

1. See *Town of N. Kingstown v. Int’l Ass’n of Firefighters, Local 1651 AFL-CIO*, 107 A.3d 304, 316 (R.I. 2015); R.I. GEN. LAWS § 28-9.1-13.

2. See *North Kingstown*, 107 A.3d at 317; R.I. GEN. LAWS § 28-9.1-7.

3. *North Kingstown*, 107 A.3d at 307.

4. *Id.*

5. *Id.* at n. 2.

6. *Id.* at 307.

last from July 1, 2010, to June 30, 2011.⁷ Disagreeing with the Town's position on its proposal, the panel awarded the same work schedule as the prior CBA.⁸

Nearing the end of the arbitration CBA, on February 23, 2011, the Union contacted the Town to negotiate for a new CBA.⁹ The parties met together on October 28, 2011, and five more times after that, but negotiations again failed because the Town continued to press the three-platoon structure that the Union did not want.¹⁰ Most notably, an interest arbitration panel was never requested to resolve any disputes at this time.¹¹ On December 19, 2011, the Town informed the Union that it was going to enact an ordinance that would establish the three-platoon structure reorganization of the fire departments' schedules.¹² After two more failed negotiation attempts, the ordinance went into effect on January 30, 2012.¹³

The Union then sued the Town on February 28, 2012, seeking relief in three forms: "(1) a declaratory judgment that the ordinance was invalid because it was passed in violation of the Town charter; (2) a declaratory judgment that the Town violated the Firefighters Arbitration Act (FFAA or 'the Act') and the State Labor Relations Act (SLRA); and (3) injunctive relief."¹⁴ Nearly three months later, on May 23, 2012, the Superior Court concluded that the ordinance was invalid because it violated the Town's charter and, even if the ordinance were properly passed, it still violated the Union's rights under the FFAA.¹⁵ Although the

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 308.

13. *Id.* The Union and the Town assembled for another negotiation meeting to reach a settlement after the ordinance was enacted, but again it was to no avail. *Id.*

14. *Id.* The parties were ordered by the Superior Court to enter into mediation before a decision was rendered, but no settlement was reached, and on March 11, 2012, the ordinance went into effect. *Id.*

15. *Id.*; see also Int'l Ass'n of Firefighters, Local 1651 AFL-CIO v. Town of N. Kingstown, No. C.A. WC 12-0127, 2012 WL 1948338, at *1 (R.I. Super. May 23, 2012) (hereinafter "*North Kingstown I*"). The Firefighters Arbitration Act ("FFAA") gave the Union its rights to negotiate changes to wages, hours, and terms and conditions of employment, as well as a right to an arbitration process. *North Kingstown*, 107 A.3d at 308. Because of this

758 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 21:756]

Superior Court did admit that implementing a three-platoon structure was within the Town's control if the parties' could not come to an agreement, it nevertheless stressed that "... unilateral implementation of changes to wages, hours and terms and conditions of employment' was improper."¹⁶

Prior to this ruling, on February 23, 2012, the Union contacted the Town to negotiate a new CBA for the contract period beginning July 1, 2012 through June 30, 2013.¹⁷ On March 14, 2012, the Union requested an interest arbitration panel for the July 1, 2011-June 30, 2012 contract year and that request was granted (hereinafter "2011-2012 Arbitration Panel").¹⁸ However, negotiations for the 2012-2013 contract year again fell through between the parties, and another arbitration panel was requested and granted for that contract year (hereinafter "2012-2013 Arbitration Panel").¹⁹ In response to the Town standing firm on its new proposal, the Union then filed an unfair labor practice charge (ULP-6088) against the Town to the State Labor Relations Board (SLRB) on June 14, 2012.²⁰ The SLRB, in response to receiving the complaint, then sued the Town on August 2, 2012, arguing that the Town's implementation of the three-platoon structure violated state law.²¹ On September 5, 2012, the Town filed a complaint of its own, seeking various forms of relief.²² The

ordinance, the Superior Court determined that these rights were stripped from the Union. *Id.*

16. *Id.* (quoting *North Kingstown I*, 2012 WL 1948338, at *1).

17. *North Kingstown*, 107 A.3d at 308.

18. *Id.*

19. *Id.*

20. *Id.* On July 9, 2012, the Town had also requested and was granted arbitration to determine the effects of the three-platoon structure reorganization (hereinafter "Effects Arbitration Panel"), but had withdrawn this demand for arbitration on November 5, 2012. *Id.* at 308–09; n. 3.

21. *Id.* at 309.

22. *Id.* The Town, in its original complaint, plead:

(1) [T]he SLRB was without jurisdiction to enforce ULP-6088; (2) the Town's actions in implementing the three-platoon structure were lawful; (3) jurisdiction to determine the effects of the Town's decision to implement the three-platoon structure rests exclusively with the Effects Arbitration Panel; (4) the Union waived its right to submit to interest arbitration the unresolved issues arising out of the parties' negotiations for a CBA for the July 1, 2011 through June 30, 2012 period; and (5) the 2011–2012 Arbitration Panel was without jurisdiction to decide any unresolved issues between the parties for the July 1, 2011 through June 30, 2012 period.

Town's central argument was that it had the inherent right to reorganize into the three-platoon structure because the Union failed to meet the statutory deadline to request interest arbitration when the CBA had expired.²³ It also argued that the Union waived its right to collectively bargain altogether for it failed to properly notify the Town within the statutory requirement under Section 28-9.1-13.²⁴ After listening to arguments on both sides, the Superior Court, on February 4, 2013, held that (1) the Town's actions in implementing unilateral changes to a three-platoon structure were unlawful; (2) the SLRB, and not the Superior Court, had jurisdiction over the claim arising out of the ULP-6088 charge "insofar as it is necessary to determine which terms and conditions have existed between the parties since the expiration of the previous CBA"; (3) the arbitration panel does not have jurisdiction over the unilateral changes because these changes are invalid; (4) the Union and the Town both waived their rights to an arbitration panel; and (5) the arbitration panel had no jurisdiction over the above-mentioned claims because both parties waived its rights to arbitration for the 2011–2012 contract year.²⁵ The Superior Court also reinstated the original four-platoon structure.²⁶ In response to the decision, the Town timely appealed to the Rhode Island Supreme Court.²⁷

Id. Additionally, the Town sought a motion to stay both the 2011–2012 Arbitration Panel and the 2012–2013 Arbitration Panel, as well as a declaration that the SLRB was without jurisdiction to enforce ULP-6088. *Id.* The Town amended its complaint on September 24, 2012, additionally seeking that the Union failed to meet requirements under Rhode Island statutory law for both the 2011–2012 and 2012–2013 contract years, thus forfeiting its right to collectively bargain "firefighters' wages, rates of pay, or any other matter requiring appropriation of money by the Town." *Id.*; see also R.I. GEN. LAWS § 28-9.1-13. The Town also pleaded that the Union waived its right to request interest arbitration for the 2012-2013 contract year, and that the 2012-2013 Arbitration Panel was without jurisdiction to decide any disputes for that period. *North Kingstown*, 107 A.3d at 309.

23. *Id.*; see also R.I. GEN. LAWS § 28-9.1-7.

24. *North Kingstown*, 107 A.3d at 309; see also R.I. GEN. LAWS § 28-9.1-13.

25. *North Kingstown*, 107 A.3d at 310 (quoting *Town of N. Kingstown v. Int'l Ass'n of Firefighters, Local 1651 AFL-CIO*, 2012 WL 6638703 at *13 (R.I. Super. Dec. 14, 2012) (hereinafter "*North Kingstown II*").

26. *North Kingstown*, 107 A.3d at 310.

27. *Id.* Additionally, the SLRB held for the ULP-6088 charge that the Town had committed unfair labor practices by "failing to bargain in good faith and unilaterally implementing its reorganization in violation of the

ANALYSIS AND HOLDING

Upon review of the *North Kingstown II*²⁸ holding, the Rhode Island Supreme Court first discussed whether the Town could unilaterally implement the three-platoon structure.²⁹ Under the FFAA, the Union obtains the “right to bargain collectively * * * as to wages, rates of pay, hours, working conditions, and all other terms and conditions of employment.”³⁰ Additionally, a Town will be obligated to bargain in good faith with the Union on these matters so long as the Union complies with the applicable notice provisions provided for in the FFAA.³¹ While there are numerous matters and rights that are nonnegotiable on the Town’s part,³² one in particular that is related to this case is the Town’s managerial decisions.³³ Such decisions may still be nonnegotiable and not subject to review even when they may have profound effects on the terms and conditions of employment.³⁴ However, if

FFAA.” *Id.* at 311; see also *In re Rhode Island State Labor Relations Board & Town of N. Kingstown*, 2013 WL 5755149 (R.I. Lab. Rel. Bd. September 27, 2013). The SLRB found numerous remedies for the Union, including reverting back to the four-platoon structure, back pay and interest on back pay, and all contractually bargained-for benefits lost by the Union since the three-platoon structure had been implemented. *North Kingstown*, 107 A.3d at 311; see also *In re Labor Relations Board*, 2013 WL 5755149. The Superior Court, upon appeal by the Town, had affirmed the SLRB’s decision, but granted the Town’s stay until the Rhode Island Supreme Court rendered this decision. *North Kingstown*, 107 A.3d at 311; see also *Town of N. Kingstown v. Rhode Island State Labor Relations Board*, 2014 WL 185327 (R.I. Super. Jan. 6, 2014) (hereinafter “*North Kingstown III*”). Thus, *North Kingstown III* is not reviewed in this case. *North Kingstown*, 107 A.3d at 311.

28. See *supra* note 26.

29. See *North Kingstown*, 107 A.3d at 312.

30. *Id.* at 313 (quoting R.I. GEN. LAWS § 28-9.1-4).

31. See *North Kingstown*, 107 A.3d at 313.

32. Such nonnegotiable rights belonging to the Town are its statutory duties and “powers and responsibilities . . . [in] the essence of [its] mission.” *Vose v. Rhode Island Brotherhood of Correctional Officers*, 587 A.2d 913, 915 (R.I. 1991); *North Providence School Committee v. North Providence Federation of Teachers, Local 920, American Federation of Teachers*, 945 A.2d 339, 347 (R.I. 2008). These same rights also cannot be delegated to an interest arbitration panel. See *North Providence School Committee*, 945 A.2d at 347; *State, Department of Mental Health, Retardation, and Hospitals v. Rhode Island Council 94, A.F.S.C.M.E., AFL-CIO*, 692 A.2d 318, 324 (R.I. 1997).

33. See *North Kingstown*, 107 A.3d at 313.

34. See *id.* at 314 (quoting *Providence Hospital v. National Labor Relations Board*, 93 F.3d 1012, 1018 (1st Cir. 1996)).

the problem involved concerns both a question of management and a term of condition of employment, the employer has the duty to negotiate with the individuals involved, so long as the individuals do not waive their right to bargain.³⁵ Upon reviewing other jurisdictions' rulings, the Rhode Island Supreme Court held that the Town's unilateral change into a three-platoon structure was indeed a management decision.³⁶

Even though the Town's implementation of the three-platoon structure was a management decision, the court noted that the Union originally retains a right to bargain.³⁷ The court next determined whether or not the Union waived its right to negotiate the implementation of the three-platoon structure.³⁸ Under Section 28-9.1-13 of the FFAA, for matters related to "wages, rates of pay, or any other matter requiring appropriation of money [by the town]," the Union has the obligation to request collective bargaining at least 120 days before the day of final approval of the Town's budget.³⁹ The Rhode Island Supreme Court previously held that failing to abide by this statute is fatal, for its terms are mandatory, not merely directive.⁴⁰ Here, the day the Town's budget was considered final for 2011 was May 4, 2011; thus the latest the Union could have requested bargaining the three-platoon structure was 120 days before that date, which was

35. See *North Kingstown*, 107 A.3d at 314; see also *Providence Hospital*, 93 F.3d at 1018.

36. See *North Kingstown*, 107 A.3d at 314; see also *State ex rel. Quiring v. Board of Educ. of Indep. School District No. 173, Mountain Lake, Minnesota*, 623 N.W.2d 634, 640 (Minn. Ct. App. 2001) (reorganization of organizational structure is a management decision); *Appeal of Int'l Ass'n of Firefighters, AFL-CIO Local 1088*, 462 A.2d 98, 100 (N.H. 1983) (alteration of fire department's platoon size was a management decision); *Borough of Atlantic Highlands v. Atlantic Highlands PBA Local 242*, 469 A.2d 80, 85 (N.J. Super. Ct. App. Div. 1983) (a shift change in structure is a managerial decision). Additionally, although the 2007–2010 CBA by no means adds terms to later CBAs between the parties, the court nonetheless noted how the 2007–2010 CBA Agreement between the Town and the Union contained a management rights clause which retained all other rights and responsibilities to the Town. See *North Kingstown*, 107 A.3d at n. 7.

37. See *North Kingstown*, 107 A.3d at 315.

38. See *id.* at 316.

39. *Id.* (quoting R.I. GEN. LAWS § 28-9.1-13).

40. See *Town of Tiverton v. Fraternal Order of Police, Lodge # 23*, 372 A.2d 1273, 1275 (R.I. 1977).

762 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:756]

January 4, 2011.⁴¹ The Union, however, did not request bargaining the three-platoon structure until February 23, 2011.⁴² Therefore, the Union failed to meet the notice requirement of Section 28-9.1-13 of the FFAA, leaving the Town no obligation to bargain any matter requiring the appropriation of money.⁴³

Even though matters involving appropriation of money did not require bargaining, there were still other matters in dispute between the Town and Union.⁴⁴ Section 28-9.1-7 of the FFAA states that if the Town and Union are unable to come to an agreement on any issues within thirty days from and including the date of their first meeting, the parties may submit a request for interest arbitration to resolve the matters.⁴⁵ Here, the Town and Union first met to negotiate on October 28, 2011; therefore, thirty days from that date was the deadline to request interest arbitration.⁴⁶ However, the Union did not demand interest arbitration until March 14, 2012, clearly beyond the thirty-day time frame.⁴⁷ In response, the Union argued that there was an agreement to extend the notification deadline for interest arbitration; however, because there was no evidence indicating an express agreement between the parties, the court affirmed the Superior Court's decision to reject that argument and keep the original deadline.⁴⁸ Therefore, the Union failed to timely file for interest arbitration and thus waived its right to pursue that remedy.⁴⁹ As a result, the 2011-2012 Arbitration Panel had no jurisdiction over any unresolved issues between the parties or to determine the effects of the three-platoon structure.⁵⁰

41. *See North Kingstown*, 107 A.3d at n. 9.

42. *See id.*

43. *See id.* at 316; R.I. GEN. LAWS § 28-9.1-13.

44. *See North Kingstown*, 107 A.3d at 316.

45. *See id.*; R.I. GEN. LAWS § 28-9.1-7.

46. *See North Kingstown*, 107 A.3d at 316.

47. *See id.*

48. *See id.* at 316–17.

49. *See id.* at 317; *see also* *Lime Rock Fire District v. Rhode Island State Labor Relations Board*, 673 A.2d 51 (R.I. 1996) (holding that even though firefighters' union complied with § 28-9.1-13 and timely requested bargaining on matters dealing with appropriation of money, and that both union and town had different views regarding town's decision to lay off an entire class of employees, decision was nonetheless lawful because union failed to timely submit any issues to arbitration).

50. *See North Kingstown*, 107 A.3d at 320.

Furthermore, the Union knew that the Town had intentions to implement the three-platoon structure as early as 2010, at the hearings before the 2010–2011 Arbitration Panel.⁵¹ Formal notice of the three-platoon structure proposal for the 2011-2012 contract year was also given on October 28, 2011.⁵² In *Town of Burrillville v. Rhode Island State Labor Relations Board*, the Rhode Island Supreme Court held that “a union with sufficient notice of a contemplated change waives its bargaining rights if it fails to request bargaining prior to the implementation of that change.”⁵³ The Town of Burrillville implemented a change of procedure to police officers’ receipt of injured-on-duty benefits, and notified the union one week before the change went into effect.⁵⁴ The court noted that this notification by the town, though it was given only a week before the change was implemented, was nonetheless adequate notice to the union, and the union’s failure to timely notify Burrillville to negotiate thus waived this right.⁵⁵ Here, then, because (1) the Union had knowledge of the three-platoon structure; (2) the Union failed to timely comply with Section 28-9.1-13 of the FFAA; (3) the Town formally proposed to the Union the three-platoon structure on October 28, 2011; and (4) the Union failed to timely comply with Section 28-9.1-7 of the FFAA in requesting arbitration, “the Town’s implementation of its decision to reorganize into a three-platoon structure was lawful.”⁵⁶

In addition to these findings, the court found that because the Town’s action in implementing the three-platoon structure was justified, there was nothing for the SLRB to review and therefore the Board had no jurisdiction over any matters from the 2011-2012 contract year.⁵⁷ The court also noted that this decision rendered the Union’s injunction against the Town from implementing the three-platoon structure meaningless and therefore vacated the order.⁵⁸ Lastly, the court shifted its attention to *North Kingstown III* and assured the Superior Court

51. *See id.* at 317.

52. *See id.*

53. 921 A.2d 113, 120 (R.I. 2007).

54. *Id.* at 116.

55. *See id.* at 120.

56. *See North Kingstown*, 107 A.3d at 318.

57. *See id.* at 320.

58. *See id.*

764 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 21:756]

that if the issues surrounding the 2012-2013 Arbitration Panel in that case parallel the issues surrounding this decision, then there is no need to re-litigate a matter that has already been decided.⁵⁹

COMMENTARY

Although some may believe this holding seems harsh because the firefighters will be forced to adhere to the new three-platoon structure, in actuality it was the Union who made the mistake here by not filing bargaining or arbitration requests on time.⁶⁰ Even though the court determined that implementing the three-platoon structure was within the Town's powers of management, the Union still had the power to bargain because it was a matter dealing with "wages, rates of pay, or any other matter requiring appropriation of money [by the Town]."⁶¹ This power of bargaining, however, was subject to the Union timely notifying the Town that they wished to negotiate the Town's decision before implementation.⁶² If the Town does not hear from the Union by that deadline, the Town assumes the Union abides by its decision and thus has every right to implement its management power without having to negotiate.⁶³ This same notion applies to requesting arbitration.⁶⁴ If the parties cannot come to an agreement on a key issue thirty days after their first meeting, one party, if they so wish to be heard by an interest arbitration panel, must file a request for arbitration within that time frame.⁶⁵ Again, the Union failed to meet this deadline, leaving the Town with the impression that silence means acceptance.⁶⁶

The court had also stressed that these statutory deadlines were mandatory, not merely directive, and pointed to numerous Rhode Island Supreme Court cases supporting that viewpoint.⁶⁷

59. *See id.* at 320–21.

60. *See id.* at 316.

61. *Id.* at 315 (quoting *Town of Tiverton v. Fraternal Order of Police, Lodge # 23*, 372 A.2d 1273, 1275 (R.I. 1977)).

62. *See id.* at 316; R.I. GEN. LAWS § 28-9.1-13.

63. *See North Kingstown*, 107 A.3d at 316; R.I. GEN. LAWS § 28-9.1-13.

64. *See North Kingstown*, 107 A.3d at 316.

65. *See id.*; R.I. GEN. LAWS § 28-9.1-7.

66. *See North Kingstown*, 107 A.3d at 316.

67. *See Town of Burrillville v. Rhode Island State Labor Relations Board*, 921 A.2d 113, 120 (R.I. 2007); *Lime Rock Fire District v. Rhode Island State Labor Relations Board*, 673 A.2d 51, 54 (R.I. 1996); *Town of Tiverton v. Fraternal Order of Police, Lodge # 23*, 372 A.2d 1273, 1276 (R.I. 1977).

2016]

SURVEY SECTION

765

What's more, the Union had every reason to file these requests on time if they were displeased with the proposal, for they knew the Town's intentions to implement the three-platoon structure at every negotiation meeting since the moment the parties began negotiating before the 2010-2011 Arbitration Panel.⁶⁸

As easy as it seems to say the Union missed deadlines and thus lost this case, it nonetheless is difficult to ignore the Union's position on this matter. Firefighters indulge in one of the most courageous and hardworking everyday tasks that we, as citizens, take for granted. It is fair to say, then, that their voices should be heard when a town uses its management power to take away their hard-earned pay and wages. Also important is that their voices be heard when their schedules are modified that take away much needed time with their families. Maybe in another setting or in another profession can a decision this crucial be handed down because an employee missed a deadline. But when we are dealing with a profession that promotes safety and wellness to our society, we must also pay attention to public policy considerations. Some current or prospective firefighters may pursue another career because they may believe that meeting a deadline to file an action is now more important than the right to negotiate. Regardless, the public may nonetheless fear that a town's "managerial decisions" over a union has now officially exceeded its limits.

Still, as much as these arguments may be convincing, the court has precedent to point out that these statutory deadlines were mandatory, and thus the Union had every reason to know how important meeting these deadlines were. Perhaps if the Union was blindsided with the three-platoon structure, instead of having knowledge of the Town's intentions for four years, the court might come to a different conclusion. But regardless, a life lesson was certainly garnered from this decision: always meet your deadlines.

CONCLUSION

The Rhode Island Supreme Court held that (1) North Kingstown's decision to implement a three-platoon structure was within the Town's management powers; (2) the Union had knowledge of the three-platoon structure; (3) the Union failed to

68. See *North Kingstown*, 107 A.3d at 317.

766 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:756

timely comply with Section 28-9.1-13 of the FFAA; (4) the Town formally proposed to the Union the three-platoon structure on October 28, 2011; and (5) the Union failed to timely comply with Section 28-9.1-7 of the FFAA in requesting arbitration. Because of these rulings, the Town's unilateral implementation of the three-platoon structure was lawful.

Joseph Galindo

Labor Law. *State of Rhode Island Department of Corrections v. Rhode Island Brotherhood of Correctional Officers*, 115 A.3d 924 (R.I. 2015). In disciplinary-action cases taken against a state employee, which are arbitrated, an arbitrator’s job is two fold: first, to determine if the State has “just cause” for that particular form of disciplinary action, and second, if the State does not have “just cause” for that particular penalty, he or she must fashion an appropriate punishment. In determining whether the State has just cause to take disciplinary action against an employee, the arbitrator is required to resolve a dispute based on a portion of the applicable collective bargaining agreement (“CBA”). The arbitrator is not to look outside the four corners of the CBA in crafting his or her decision if an applicable section therein can solve the dispute. If the arbitrator ignores an applicable section of the CBA then he or she has abused his or her power and the award is subject to reversal.

FACTS AND TRAVEL

On March 2, 2009, Department of Corrections (“DOC”) Chief Inspector Aaron Aldrich (“Inspector Aldrich”) received notice that Gene Davenport (“Officer Davenport”) and James Maddalena (“Officer Maddalena”) were smoking marijuana while on duty.¹ Inspector Aldrich confronted Officer Davenport—armed and on perimeter duty—and smelled a strong odor of marijuana emanating from Officer Davenport’s vehicle.² Inspector Aldrich also noted that Officer Davenport’s eyes were blood shot.³ Officer Davenport then confessed to smoking marijuana and claimed that although Officer Maddalena was in the car with him while he

1. R.I. Dept. of Corrs. v. R.I. Bhd. of Corr. Officers, 115 A.3d 924, 926 (R.I. 2015).

2. *Id.*

3. *Id.*

768 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 21:767]

smoked marijuana, Officer Maddalena did not participate.⁴ The Rhode Island State Police investigated the matter and questioned Officer Maddalena regarding the marijuana incident and ultimately discovered that Officer Maddalena had not been truthful during his interview.⁵ As punishment, Officer Maddalena was placed on administrative leave with pay and a pre-disciplinary hearing was scheduled for April 8, 2009.⁶ Director Ashbel T. Wall, II (“Director Wall”) subsequently notified Officer Maddalena that he was being terminated for his conduct, and the Rhode Island Brotherhood of Correctional Officers (“RIBCO”) filed a grievance on Officer Maddalena’s behalf, arguing that Officer Maddalena’s termination was without just cause.⁷

On July 26, 2010, the matter proceeded to arbitration where the arbitrator was to determine whether Officer Maddalena was terminated with just cause; if it was determined that Officer Maddalena’s termination was not with just cause, then the arbitrator would dictate the appropriate remedy.⁸ RIBCO submitted documents as evidence, detailing the DOC’s past disciplinary action vis-à-vis dishonesty, which did not result in termination.⁹ Inspector Aldrich and State Police Sargent Benjamin Barney (“Sargent Barney”) testified on behalf of the DOC, outlining the imperativeness of safety and security in perimeter posts and the need for confidence in DOC officers.¹⁰

4. *Id.*

5. *Id.* Officer Maddalena initially told police that he was present with Officer Davenport inside the vehicle, but denied seeing him smoke marijuana. It was not until Inspector Aldrich informed Officer Maddalena that a witness reported seeing the two officers together while Officer Davenport smoked marijuana that Officer Maddalena confessed to witnessing Officer Davenport smoking marijuana while on duty. *Id.*

6. *Id.* Officer Maddalena was charged with failure to report a fellow correctional officer smoking marijuana on duty, dishonesty during an interview with State Police, and dishonesty during an interview with the DOC’s Office of Inspections. *Id.*

7. *Id.* at 926–27.

8. *Id.* at 927.

9. *Id.*

10. *Id.* Additionally, Inspector Aldrich and Sargent Barney focused on the fact that officers receive training on reporting threats to institutional security and on site criminal activity and the need for trust and reliability in its employed officers to avoid any lapse in security, which could yield deadly consequences. *Id.*

Despite noting that the DOC's evidence and testimony were "compelling and convincing," the arbitrator found that terminating Officer Maddalena would not be consistent with past disciplinary measures for the DOC in dishonesty cases and found there was no just cause for Officer Maddalena's termination.¹¹ The arbitrator instead held that a sixty-day suspension without pay, making Officer Maddalena whole for lost wages and benefits less the sixty-day suspension, was more appropriate.¹²

On November 19, 2010, the DOC filed a petition in Superior Court, seeking to vacate the arbitration award on the grounds that the arbitrator exceeded his power, while RIBCO contended that the dispute was arbitrable based upon the evidence presented as well as relevant law.¹³ The Superior Court justice determined that the dispute was indeed arbitrable pursuant to R.I. Gen. Law Section 42-56-10(24) and found that the arbitrator reached an irrational result as he disregarded the CBA.¹⁴ RIBCO filed a timely appeal to the Rhode Island Supreme Court, seeking to have the Superior Court justice's holding overturned and the arbitration award reinstated.¹⁵

ANALYSIS AND HOLDING

At the very outset of the case, the Rhode Island Supreme Court sought to reiterate the standard of review for arbitration awards.¹⁶ In doing so, the court was swift and precise in reminding the parties that there is a strong public policy in favor of an arbitration award's finality,¹⁷ which will only be disturbed for "disregard [to] a contractual provision, a completely irrational result, a decision that is contrary to public policy, or any award

11. *Id.* The arbitrator relied on one instance submitted by RIBCO, which purported an instance where an officer lied twice concerning knowledge he had of a fellow officer's participation in criminal activity, which did not result in termination. *Id.*

12. *Id.*

13. *Id.* The DOC believed that R.I. GEN. LAWS § 42-56-10, which enumerates the Director of the DOC's power, including the ability to discharge employees, meant that the issue of Officer Maddalena's termination was not arbitrable. *Id.* at 927–28.

14. *Id.* at 928.

15. *Id.*

16. *Id.*

17. *Id.* (citing *Berkshire Wilton Partners, LLC v. Bilray Demolition Co.* 91 A.3d 830, 834 (R.I. 2014)).

770 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 21:767]

that determined a matter that was not arbitrable in the first place.”¹⁸

Before immediately jumping into the merits of the case, the court addressed the issue of arbitrability, determining that the issue was properly before them,¹⁹ and—on *de novo* review—that the issue of Officer Maddalena’s termination was substantively arbitrable because of the language contained in Article XVI, Section 16.4 of the CBA.²⁰

The court then delved into the arbitration award itself and properly recognized the two issues that the arbitrator was to determine: whether just cause existed to terminate Officer Maddalena, and if not, what the appropriate remedy would be.²¹ The court ultimately concluded that the Superior Court justice overturning the arbitration award was valid for two reasons: first, the arbitrator impermissibly substituted his own remedy for that of the DOC’s, and second, the arbitrator failed to base his decision on any relevant provision of the CBA.²² In reaching its holding, the court noted that the arbitrator, by finding RIBCO’s evidence of past DOC disciplinary action limited in terms of usefulness and by finding Director Wall’s testimony “compelling,” regarding the need to take action to ensure safety and security, substituted his own remedy for the DOC’s.²³ Furthermore, the court reasoned that the arbitrator blatantly ignored his duty to base his decision on any relevant portion of the CBA, specifically noting that the arbitrator did not turn to Section 4.1 (“Management Rights”), which gives the DOC power to “suspend, demote, [and] discharge . . . such employees.”²⁴ Lastly, to support its finding, the court cited to R.I. Gen. Law Section 28-9-18(a)(2), which states that an arbitrator’s award can be overturned where the arbitrator exceeded his power

18. *Id.*

19. *Id.* at 928-29. Here, the DOC properly raised the issue of arbitrability in its memorandum to the Superior Court and argued the issue before the Supreme Court at oral arguments. *Id.* at 929.

20. *Id.* at 930. Article XVI, Section 16.4 allowed for arbitration if RIBCO or the employee notified the DOC of the request for arbitration. *Id.* The court also declined to find the DOC’s argument that R.I. Gen. Laws § 42-56-10(2), which states the DOC is responsible for maintaining safety and security of all correctional facilities, overrode the CBA provision. *Id.*

21. *Id.*

22. *Id.* at 931.

23. *Id.* at 930-31.

24. *Id.* at 931.

if “[a] definite award upon the subject matter submitted was not made.”²⁵

As an ancillary argument, both RIBCO and the DOC contended that R.I. Gen. Law Section 42-56-10(24)²⁶ was unconstitutional; RIBCO contended that the director’s authority vis-à-vis security is reviewable by an arbitrator, and the DOC countered that RIBCO essentially purported to classify all arbitration awards as unreviewable by the judiciary, thus making the amendment in violation of the separation of powers.²⁷ However, the court was able to avoid answering the constitutionality question²⁸ and affirmed the Superior Court’s decision to vacate the arbitration award.²⁹

COMMENTARY

The Rhode Island Supreme Court definitively reiterated the statutory grounds for vacating an arbitration award—where the arbitrator fails to base his decision on a relevant portion of a CBA—and the duties of the arbitrator in this labor dispute—whether the DOC had just cause to terminate Officer Maddalena and, if not, what an appropriate remedy would be.³⁰ Although the court laid the proper foundation for determining this case, it nevertheless appears to have departed from that very foundational basis. In this instance, it would seem that the court substituted its own authority for that of the arbitrator’s, admonishing the arbitrator for looking outside of the CBA. This,

25. R.I. GEN. LAWS §28-9-18 (1956); *id.*

26. *RIBCO*, 115 A.3d at 932. The court explained:

Notwithstanding the enumeration of the powers of the director as set forth in this section and notwithstanding any other provisions of the general laws, the validity and enforceability of the provisions of a collective bargaining agreement shall not be contested, affected, or diminished, nor shall any arbitration be vacated, remanded or set aside on the basis of an alleged conflict with this section or with any other provision of the general laws.

Id. at 932-33.

27. *Id.* at 933.

28. The Supreme Court held that because it ruled the arbitration award was irrational, it need not venture into the constitutionality of §42-56-10(24). *Id.*

29. *Id.* at 934.

30. *Id.* at 930-31.

772 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:767]

however, is exactly what an arbitrator is supposed to do.³¹ Indeed, the majority seems to contradict itself; it argues that the arbitrator substituted his own judgment for that of the DOC's by ignoring the DOC's "compelling" evidence; shortly thereafter, the majority reasons the entire award is irrational because the arbitrator's decision was not based on a relevant portion of the CBA.³² There is both substantive and logical error with this finding. As the dissent points out, the arbitrator's finding that the DOC offered "compelling" evidence was in regards to the need for disciplinary action to be taken, not the fact that the DOC had just cause to terminate Officer Maddalena, as that was the exact issue to be determined.³³ If, however, the majority's interpretation in applying "compelling" evidence to the issue of whether there was just cause for Officer Maddalena's termination is correct, it would seem that the court is vacating the arbitrator's award simply for his classification on a piece of evidence's strength.

Additionally, the majority overlooks the fact that the arbitrator did indeed look through the CBA in searching for a relevant provision that spelled out offenses and corresponding penalties.³⁴ Not finding one, the arbitrator proceeded to look outside the four corners of the CBA, weighing the relevant evidence presented to him and ruling that just cause did not exist to terminate Officer Maddalena, but rather that a sixty-day suspension was more appropriate.³⁵ The majority improperly and narrowly construed the Management Rights Section of the CBA; the exclusivity given to the DOC within that section implies that no other entity is responsible to enforce the rights enumerated within Section 4.1A, not that the DOC is granted the power to make unreviewable determinations. If we follow the majority's rationale, we are left with the scenario where almost no employee termination will be without just cause because Section 4.1A of the CBA grants the DOC exclusivity in terminating employees. Put in other words, the majority believes that Section 4.1A automatically

31. *Id.* at 934–35 (Flaherty, J., dissenting) (citing *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (explaining that arbitrators may indeed look outside the CBA for guidance in determining an award)).

32. *Id.* at 930–31 (majority opinion).

33. *Id.* at 935 (Flaherty, J., dissenting).

34. *Id.* at 934.

35. *Id.* at 927 (majority opinion).

2016]

SURVEY SECTION

773

grants just cause, eliminating the need for the arbitrator to look elsewhere within or even outside the CBA and completely removing the ability for him to formulate another appropriate remedy.

CONCLUSION

The Rhode Island Supreme Court held, vis-a-vis union members, that an arbitrator exceeds his or her authority when he or she does not base an award on a relevant provision within the CBA and looks outside the CBA's four corners. Furthermore, the Court held that when an arbitrator does find just cause for the State to take disciplinary action, he or she has no authority to craft an alternative remedy; the finding of just cause is inextricably tied to the proposed disciplinary action taken by the State.

Trevor T. Bernard

Professional Responsibility. *In re Keven A. McKenna*, 110 A.3d 1126 (R.I. 2015). The Rhode Island Supreme Court has jurisdiction over attorney conduct that occurs outside Supreme Court proceedings, including attorney conduct in federal courts. Additionally, the procedures utilized by the Rhode Island Supreme Court—promulgating and enforcing Rules of Professional Conduct, appointing persons to a disciplinary board, and ultimately determining how to sanction attorneys—do not result in a merger of investigatory and prosecutorial functions so as to deny an attorney due process.

FACTS AND TRAVEL

In May 2009, attorney Keven McKenna was practicing law under the duly licensed entity “Keven A. McKenna, P.C.” (“the PC”) when an employee of the PC, Sumner Stone, filed a claim for worker’s compensation alleging work-related injuries.¹ The PC was unable to provide proof that it carried workers’ compensation insurance as required by statute and a pretrial order was entered ordering McKenna to make weekly compensation payments to Stone.² McKenna did not pay Stone and repeatedly reiterated the same arguments to the court, as to why he should not have to make payment, despite the court’s denial of all of McKenna’s motions.³ The Chief Judge observed that McKenna was “simply using the procedures of this court to delay and harass.”⁴ Thus, the court dismissed McKenna’s claim for a trial and the pretrial order to pay Stone became the court’s final order.⁵ The Workers’

1. *In re Keven A. McKenna*, 110 A.3d 1126, 1131 (R.I. 2015).

2. *Id.*

3. McKenna refused to make payment on the ground that the order violated his due process rights. *Id.* He further argued that the Chief Judge of the Workers’ Compensation Court should recuse himself. *Id.*

4. *Id.*

5. *Id.*

Compensation Court records contain numerous examples of McKenna showing contempt for the court proceedings, including a statement that McKenna would “drag this on forever”⁶ and, after being asked a question from the judge, McKenna responded “I’m not going to answer that question. You’re not the prosecutor, Your Honor.”⁷ In December 2009, the Worker’s Compensation Court entered an order finding McKenna in contempt for his refusal to make payments to Stone as required by the pretrial order.⁸

McKenna appealed this decision and his appeal was repeatedly denied.⁹ McKenna ultimately filed a motion with the Worker’s Compensation Court claiming an inability to meet the payment obligations “due to circumstances beyond his control, including but limited [*sic*] to a priority U.S. I.R.S. [*sic*] [levy] of [\$]171,000 upon his bank account.”¹⁰ On January 25, 2010, one day before a hearing on this motion, McKenna filed a Chapter 11 bankruptcy petition on behalf of the PC.¹¹ He argued that this automatically stayed the worker’s compensation action against him.¹² The Workers’ Compensation Court then asked for arguments that same afternoon regarding whether the bankruptcy applied to McKenna personally. During a break in the proceedings, McKenna filed for bankruptcy personally.¹³

Subsequent to the appointment of a Chapter 11 trustee for the PC, McKenna applied to the Rhode Island Supreme Court for a license to practice law as a limited liability company as “The Law Offices of Keven A. McKenna, LLC.”¹⁴ The court denied McKenna’s request until he could satisfy the court that the PC would no longer engage in the practice of law.¹⁵ Despite the court’s order, McKenna continued to use a bank account in the name “Law Offices of Keven A. McKenna, LLC,” to cash checks for

6. *Id.* at 1132.

7. Other examples include McKenna’s statement to the judge that “[Stone is] making a mockery of this court, Your Honor, because of your dislike for me,” and “[t]his is a rump court proceeding.” *Id.*

8. *Id.* at 1132–33.

9. *Id.* at 1133.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

776 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:774]

expenses related to the practice of law.¹⁶ These actions formed the basis for count one, alleging McKenna's violation of Rules 3.3, 7.1, 7.5, and 8.4(c)¹⁷ by engaging in the unauthorized practice of law in violation of the court's order.¹⁸

The second count—alleging violations of Rules 3.3 and 8.4(c) for failure to disclose his income to the Bankruptcy Court, misrepresenting his interest in a receivable to that court, and engaging in conduct that amounted to dishonesty to the bankruptcy trustee—was based on McKenna's failure to disclose the existence of a receivable for legal fees, totaling \$63,000, on his initial corporate bankruptcy filing.¹⁹ On June 7, 2011, McKenna appeared in Probate Court in Bristol and asserted a lien for attorney's fees in the amount of \$93,000 against real property owned by his client's estate.²⁰ Although McKenna informed the bankruptcy court that the receivable was largely uncollectable, he did not disclose that there was real property that could potentially be used to satisfy the debt.²¹

On August 4, 2011, the bankruptcy trustee filed a complaint objecting to discharge.²² In his answer, McKenna neither admitted nor denied many of the allegations, including those that were clearly within his knowledge.²³ McKenna's actions in Bankruptcy Court and his actions during the Workers' Compensation Court proceedings formed the basis of count four, alleging violations of Rules 3.3 and 3.5(d) by demonstrating a lack of candor and an attempt to disrupt the proceedings.²⁴

Finally, on September 12, 2011, the Assistant Disciplinary Counsel, who was charged with bringing charges against McKenna for violations of the rules of professional conduct, issued a subpoena to McKenna directing him to produce certain records and to testify about them.²⁵ While McKenna appeared at the

16. *Id.*

17. *See* Article V, Rules 3.3, 7.1, 7.5, 8.4(c) of the Supreme Court Rules of Professional Conduct.

18. *McKenna*, 110 A.3d at 1133–34.

19. *Id.* at 1134.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1134–35.

25. *Id.* at 1135.

deposition, he failed to produce the records and challenged the authority of the Assistant Disciplinary Counsel to issue the subpoena.²⁶ McKenna's failure to comply with the subpoena was the basis for count three, alleging a violation of Rule 1.19, which requires that attorneys keep financial records pertaining to the practice of law.²⁷

The Disciplinary Board, consisting of a three-member panel, conducted a series of eight hearings.²⁸ During these hearings, both the Assistant Disciplinary Counsel and McKenna examined witnesses and entered exhibits into evidence.²⁹ With regard to the first count, McKenna argued that he changed the name of his LLC to "McKenna Support Services LLC" and that the use of the account and checks bearing the name of the former LLC did not constitute the practice of law.³⁰ Further, with respect to count two, McKenna argued that he had made no false statements on his bankruptcy filings and that he valued the Wells receivable at \$63,000 because "[n]ot all of the estate[s] billing had been posted" and the unbilled time increased to \$93,000.³¹ Next, McKenna denied the charges under count three by arguing that he had brought the records to the deposition but he only made them available for inspection, not for copying.³² Finally, as to count four, McKenna argued that his actions in Workers' Compensation Court and Bankruptcy Court are outside the Supreme Court's jurisdiction.³³ He further represented that there was no evidence that he had engaged in conduct intended to disrupt any tribunal.³⁴

ANALYSIS AND HOLDING

Under Article III, Rule 6(d) of the Supreme Court Rules of Disciplinary Procedure for Attorneys³⁵, the Rhode Island Supreme Court reviewed the record submitted by the disciplinary board to

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1135–36.

33. *Id.*

34. *Id.*

35. Rhode Island Supreme Court Rules of Disciplinary Procedure for Attorneys, Article III, Rule 6(d).

778 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 21:774]

determine whether McKenna should be disciplined for his conduct.³⁶ While McKenna alleged many constitutional claims in his correspondence with the court, the claims were essentially two issues: first, he challenged the authority of the Supreme Court to regulate attorneys; and second, he argued that the proceedings before the board and the court had violated his procedural due process rights.³⁷

The court first addressed McKenna's claim that the court's authority was limited to appellate jurisdiction over statutory courts and/or that the judiciary's inherent power was limited to adjudicating cases and controversies.³⁸ The court rejected McKenna's argument saying that the General Assembly had affirmed the court's power to license attorneys and admit them to practice under section 2, chapter 322, G.L.1923, which said that "[t]he [S]upreme [C]ourt . . . shall by general or special rules regulate the admission of attorneys to practice in all the courts of the state."³⁹ Additionally, in *In the Matter of Almeida*, the court held that it had "the authority to exercise necessary means to regulate and control the practice of law by promulgating and enforcing rules to discipline attorneys."⁴⁰

McKenna further argued that the court did not have jurisdiction over attorney conduct outside of the Supreme Court's proceedings. Specifically, McKenna claimed that the Supremacy Clause of the United States Constitution⁴¹ prevented the Rhode Island Supreme Court from exercising authority over attorney conduct in federal courts.⁴² The court found no merit in either of these claims stating that these assertions would not only render much of the professional rules of conduct useless, but it also flew in the face of the well-established notion that the "power inherent in this [C]ourt to control and supervise the practice of law generally, [applied] *whether in or out of the Court*."⁴³ The court

36. *Id.*

37. *Id.* at 1137.

38. *Id.*

39. *Id.* at 1137–38. This statute is now codified at R.I. GEN. LAWS 1956 § 8-1-2.

40. *Id.* at 1138 (quoting *In re Almeida*, 611 A.2d 1375, 1381 (R.I. 1992)).

41. U.S. CONST. art. VI, § 2.

42. *McKenna*, 110 A.3d at 1140–41.

43. *Id.* at 1140 (quoting *Rhode Island Bar Ass'n. v. Automobile Service Ass'n*, 179 A. 139, 142 (R.I. 1935)).

also cited how rarely, if ever, attorneys come before the Supreme Court explaining that this would “utterly prevent this Court from protecting the public from incompetent, unethical, or irresponsible representation.”⁴⁴ Finally, the court dismissed McKenna’s supremacy clause argument by stating that the supremacy clause was only relevant when “there [was] impermissible state interference with federal law.”⁴⁵ The court explained that there is no such implication here because “state and federal courts have consistently been in harmony as to the proper ethical conduct of attorneys practicing in their respective courts.”⁴⁶ As an example, the court pointed to the United States District Court for the District of Rhode Island, which had adopted the Supreme Court Rules of Professional Conduct.⁴⁷

The court next considered McKenna’s claim that his procedural due process right to “present evidence and argue law” and to be heard by the full board were violated.⁴⁸ McKenna argued that because the court promulgates and enforces the Rules of Professional Conduct, appoints persons to the board, hires disciplinary counsel, and ultimately determines whether and how to discipline an attorney for misconduct, this amounted to a merger of investigatory, prosecutorial, and adjudicatory functions so as to deny him procedural due process.⁴⁹ The court used the *Mathews* test’s three factors to determine whether a procedure violated due process.⁵⁰ The three factors were: “the private interest that will be affected by the official action”; “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and “the Government’s interest, including the function involved and the fiscal administrative burdens that the additional or substitute procedural requirement would

44. *McKenna*, 110 A.3d at 1140.

45. *Id.* at 1141 (quoting *In re* Petition of Almond, 603 A.2d 1087, 1090 (R.I. 1992)).

46. *Id.* at 1141.

47. *Id.*

48. *Id.* at 1142.

49. *Id.* at 1142.

50. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that an evidentiary hearing was not required prior to termination of disability benefits, and that administrative procedures in place during the case fully comported with due process).

entail.”⁵¹

The court considered each of the *Mathews* factors and found that under the first factor, it was undisputed that McKenna’s license to practice law was “a property interest sufficient to invoke due process protections.”⁵² The third factor, which was conceded by McKenna, is met because the state clearly had an interest in regulating attorneys.⁵³ With respect to the second factor, McKenna argued that he was not able to present evidence and argue law and was denied a full hearing by the board.⁵⁴ The court disagreed, explaining that “it [was] indisputable that [McKenna] was given a meaningful opportunity to be heard.”⁵⁵ The court went on to state “the mere existence of a combination of ‘investigatory, inquisitorial, and adjudicative roles in a single administrative body’ d[id] not amount to a denial of due process or signify that the agency’s structure or operations is subject to constitutional attack.”⁵⁶

The court then addressed McKenna’s motion to have members of the Rhode Island Supreme Court recuse themselves on allegations of bias against him.⁵⁷ McKenna asserted three bases for this allegation: first, he claimed that Assistant Disciplinary Counsel was appointed by the court; second, that the chair of the board that heard McKenna’s case applied to the Chief Justice to be appointed a magistrate during the disciplinary proceeding; and third, that the members of the court were friendly with a retired Chief Justice who McKenna claims is biased against him.⁵⁸ The court rejected McKenna’s argument stating that McKenna “ha[d] failed to provide any facts that would demonstrate either bias or the appearance of bias.”⁵⁹ The court noted that a party that raises this claim must overcome a “presumption of honesty and integrity in those serving as adjudicators”⁶⁰ and that while judges are

51. *McKenna*, 110 A.3d at 1142 (quoting *Mathews*, 424 U.S. at 335).

52. *McKenna*, 110 A.3d at 1143.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1143 (quoting *In re Commission on Judicial Tenure and Discipline*, 916 A.2d 746, 750 (R.I. 2007)).

57. *Id.* at 1145.

58. *Id.*

59. *Id.* at 1146.

60. *Id.* at 1145 (quoting *La Petite Auberge, Inc.*, 419 A.2d at 284).

required to recuse themselves under certain circumstances, they “have an equally great obligation not to disqualify themselves when there is no sound reason to do so.”⁶¹

Lastly, the court dismissed McKenna’s motion to stay the proceedings pursuant to G.L.1956 § 9-33-2, known as the anti-SLAPP statute, as there were no merits for this claim.⁶² McKenna argued that the purpose of the disciplinary proceedings against him was to “chill the free speech rights of Keven A. McKenna as an attorney by having his [*sic*] suspended from the practice of law.”⁶³ The court noted that the “purpose and application of the anti-SLAPP statute are wholly inapplicable to attorney disciplinary proceedings.”⁶⁴

The court then turned to the disciplinary board’s findings and McKenna’s sanction, and pointed out a unique characteristic to this particular litigation: that a client never brought these allegations forward and there was no allegation that McKenna improperly accessed any client funds.⁶⁵ However, the court explained that “[t]he duty of candor...is the foundation of a lawyer’s profession.”⁶⁶ This duty is not limited to Rule 3.3, rather there is a general duty of candor to the court that is broader than the rule.⁶⁷ Here, the integrity of the judicial system was not served when an attorney who had been sworn to tell the truth, refused to answer simple questions or when an attorney disregarded orders of the Supreme Court or deliberately misrepresented his assets to a bankruptcy trustee.⁶⁸ As such, the court found that the board’s findings were appropriate that McKenna violated Rules 1.19, 3.3, 7.1, 7.5, and 8.4(c).⁶⁹ Finally, the court stated that it was satisfied with the board’s recommendation that McKenna receive a one-year suspension from the practice of law.⁷⁰ The court noted that “the purposes of

61. *McKenna*, 110 A.3d at 1145 (quoting *State v. Mlyniec*, 15 A.3d 983, 999 (R.I. 2011)).

62. *McKenna*, 110 A.3d at 1147.

63. *Id.* at 1146.

64. *Id.*

65. *Id.* at 1147.

66. *Id.* at 1148.

67. *Id.*

68. *Id.* at 1148.

69. *Id.* at 1149.

70. *Id.* at 1150.

782 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 21:774]

discipline are not punishment of the attorney but protecting the public and maintaining the integrity of the profession” and that this sanction appropriately served the dual purpose of professional discipline.⁷¹

COMMENTARY

The Rhode Island Supreme Court detailed the reasoning behind its authority to regulate attorney conduct regardless of whether the conduct occurs within its courtroom or not, ultimately concluding that “it is undeniable that this Court may investigate and discipline attorney conduct regardless of where that conduct takes place.”⁷² The court explained that confining its authority to discipline attorney conduct to instances where attorneys appear before the court would effectively “prevent this Court from protecting the public from incompetent, unethical, or irresponsible representation”⁷³ due to the infrequency in which attorneys actually appear before the court, if at all. Additionally, the court traced the history of its authority to discipline attorneys concluding that the regulation of attorneys is an “*inherent* judicial function.”⁷⁴

Moreover, the court explained that while no client brought this action and there was no allegation that McKenna improperly accessed any client funds, it was the responsibility of the court to “give full force and effect to all of the Rules of Professional Conduct.”⁷⁵ The court noted the importance of demanding a high level of ethics and professionalism from members of the bar because “[w]e cannot maintain the integrity of the profession if we ignore persistent, intentional, and repeated violations of the Rules of Professional Conduct.”⁷⁶ The court sought to balance this duty to uphold the integrity of the profession and the protection of the public with Chief Justice Marshall’s observation that, “the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously

71. *Id.*

72. *Id.* at 1141.

73. *Id.* at 1140.

74. *Id.*

75. *Id.* at 1147.

76. *Id.*

taken from him.”⁷⁷

However, as Justice Goldberg explains in her dissent “the sanction adopted by the majority is inadequate and fails to respond to the egregious nature and sheer number of material misrepresentations made by the respondent and, importantly, also ignores the respondent’s conduct before the board.”⁷⁸ While the court detailed the numerous violations of the Rules of Professional Conduct, it adopted the board’s recommendation that McKenna be suspended for one-year, despite the Assistant Disciplinary Counsel’s recommendation that McKenna be disbarred.⁷⁹ The majority offers little explanation for rejecting the Assistant Disciplinary Counsel’s recommendation other than that they “customarily give great weight to the recommendation of the board.”⁸⁰ But as Justice Goldberg notes the court has not always chosen to adopt the recommendation of the board.⁸¹ Further, Justice Goldberg points out that the sanction adopted by the majority appears inadequate especially when compared to discipline imposed on other attorneys for a single violation of the rules.⁸² Thus, while the majority details the importance of judicial regulation of attorneys, it undercuts this by imposing a sanction that seems inadequate, at least when compared with similar sanctions imposed for far less.⁸³

CONCLUSION

The Rhode Island Supreme Court held that the court has jurisdiction over attorney conduct that occurs outside the Supreme Court’s proceedings. Further, the court determined that the promulgation and enforcement of the Rules of Professional Conduct, the appointment of persons to a disciplinary board, and the determination on how to sanction attorneys did not result in a merger of investigatory and prosecutorial functions so as to deny

77. *Id.* at 1149.

78. *Id.* at 1151.

79. *Id.* at 1157.

80. *Id.* at 1150 (quoting *In re Cozzolino*, 811 A.2d 638, 641 (R.I. 2002)).

81. *See In re Schiff*, 677 A.2d 422, 424-25 (R.I. 1996); *Lisi v. Resmini*, 603 A.2d 321, 324 (R.I. 1992).

82. *McKenna*, 110 A.3d at 1157.

83. *See, e.g., Schiff*, 677 A.2d at 425; *Lisi*, 603 A.2d at 324.

784 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:774

an attorney due process.

Christopher M. Moran

Professional Responsibility. *FIA Card Services, N.A. v. Pichette*, 116 A. 3d 770 (R.I. 2015).¹ Any attorney who prepares pleadings, motions, or other written submissions on behalf of a *pro se* client appearing in court² is not in violation of the Rules of Professional Conduct or the Superior Court Rules of Civil Procedure, so long as she signs the prepared documents and discloses to the court her identity as well as the nature and extent of the assistance provided.³ The attorney must obtain informed consent, in writing, setting out the nature and extent of the legal representation she is undertaking and may note on the prepared documents that the signature does not constitute an entry of appearance.⁴

FACTS AND TRAVEL

In three separate, unrelated cases, the Superior Court, Providence County, sanctioned two attorneys for drafting pleadings, motions, and legal memoranda without signing their names or entering their appearances to the Court, on behalf of three separate and unrelated *pro se* litigants who were in court regarding debt collection actions. The sanctions were imposed under Rule 11 of the Rhode Island Superior Court Rules of Civil Procedure⁵ and under Article V, Rule 1.2(c) of the Rhode Island

1. This case addresses the facts from three separate cases: *FIA Card Servs., N.A. v. Pichette*, 116 A.3d 770 (R.I. 2015) (No. 12-272A); *HSBC Bank Nevada, N.A., v. Cournoyer*, 116 A.3d 770 (R.I. 2015) (No. 2013-156A); *Discover Bank v. O'Brien-Auty*, 116 A. 3d 770 (R.I. 2015) (No. 2013-157A).

2. This practice is colloquially referred to as “ghostwriting.” *Pichette*, 116 A.3d at 771.

3. *Id.* at 784.

4. *Id.*

5. R.I. SUPER. R. CIV. P. 11. Rule 11 states in relevant part:

[E]very pleading, written motion, and other paper of a party represented by an attorney shall be personally signed by at least one attorney of record . . . The signature of an attorney . . . or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper . . . and that the pleading, motion,

Supreme Court Rules of Professional Conduct.⁶

In the titular action, FIA Card Services initiated a credit card debt collection action against James D. Pichette in May 2011.⁷ In response to the action, Mr. Pichette consulted with the debt consolidation company, Morgan Drexen, which referred him to attorney Charles M. Vacca, Jr.⁸ In the first hearing, FIA's counsel informed the hearing justice that Mr. Pichette's pleadings had been drafted, but not signed, by an attorney licensed in Rhode Island.⁹ Mr. Pichette acknowledged that his documents were prepared by an attorney and admitted that he had not understood the affirmative defenses pled in his answer, the basis or substance of the counterclaims alleged, or the content of the objection to the motion to dismiss.¹⁰ Mr. Pichette further stated that he had declined Mr. Vacca's full representation when he entered into a limited-scope representation agreement.¹¹

The hearing justice issued a notice to Mr. Vacca to appear before the court in order to determine three things: (1) the extent of Mr. Vacca's representation of Mr. Pichette, (2) whether Mr. Vacca's actions in drafting these documents violated either Rhode Island law or the Rules of Professional Conduct, and (3) whether Mr. Vacca's actions warranted sanctions pursuant to any violations.¹² At his hearing, Mr. Vacca reiterated that Mr. Pichette had declined full representation and had opted for a

or other paper is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . may impose upon the person who signed the pleading, motion, or other paper, a represented party, or both, any appropriate sanction.

6. R.I. SUP. CT. R. PROF'L CONDUCT 1.2(C). This rule provides, in relevant part: "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

7. FIA Card Services, N.A. v. Pichette, 116 A.3d 770, 772 (R.I. 2015).

8. *Id.*

9. *Id.* Among the documents Mr. Vacca prepared for Mr. Pichette were: an answer, including affirmative defenses; a two-count counterclaim to FIA's complaint; an objection to FIA's motion to dismiss; and a memorandum in support of the objection to the motion to dismiss. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

limited-representation agreement.¹³ Mr. Vacca argued that his representation was reasonably limited in scope and thus permissible pursuant to Rule 1.2 of the Rules of Professional Conduct.¹⁴ Ultimately, the hearing justice found that Mr. Vacca had provided partial and inadequate representation in violation of Rule 1.2 of the Rules of Professional Conduct and was therefore subject to sanctions.¹⁵

The facts of the second and third actions are parallel and concurrent, but with different parties and attorneys.¹⁶ In each case, a bank initiated a debt collection action against a *pro se* litigant and moved for summary judgment. The *pro se* defendants in these actions contracted with the debt-consolidation firm, Morgan Drexen, which provided each defendant with an attorney to draft, but not sign, the necessary court documents.¹⁷ Both defendants represented to the court that they did not fully understand the documents they had filed and that they believed the attorneys who drafted the documents were, in fact, representing them in their respective actions before the court.¹⁸ The hearing justice telephoned each attorneys during the initial hearing and ordered the attorneys to appear at a hearing on June

13. *Id.*

14. R.I. SUP. CT. R. PROF'L CONDUCT 1.2(C); *Pichette*, 116 A.3d at 773.

15. *Pichette*, 116 A.3d at 772–73 (reasoning that Mr. Vacca had “clearly provided only partial and inadequate representation”).

16. The two actions are referred to in the opinion as “the HSBC Action” and “the Discover Bank Action.” In the HSBC action, the *pro se* defendant was Robert L. Cournoyer and the attorney drafting his documents was Wendy Taylor Humphrey. *Id.* at 773. In the Discover Bank Action, the *pro se* defendant was Diana L. O'Brien-Auty and the attorney drafting her documents was Michael Swain. *Id.* at 775. One notable distinction between the two cases is that, in the Discover Bank Action, the filings included a written disclosure stating: “[t]his document was prepared by, or with the assistance of, an attorney licensed in RI and employed by Consumer Law Associates, LLC.” *Id.* at 774–75. The hearing justice did not find the written disclosure to be a distinguishing factor. *Id.* at 775.

17. *Id.* at 773, 775. Each defendant filed an answer, an objection to the motion for summary judgment, and a memorandum in support of that objection. *Id.*

18. In the HSBC action, “Cournoyer also testified that he had not yet met [his attorney] Taylor Humphrey and thought she was going to be in court for the hearing that day to represent him.” *Id.* at 773. In the Discover Bank action, “O'Brien-Auty testified that she had been paying a monthly fee . . . and that she had never met Swain in person—had only spoken to him on the telephone—but believed that he was her attorney.” *Id.* at 775.

6, 2011.¹⁹

At the June 6 hearing, both attorneys testified that they had prepared, but not signed, the court filings pursuant to limited-scope representation agreements, which were offered as “unbundled legal services.”²⁰ The hearing justice issued a show-cause order demanding each attorney show why their conduct should not result in Rule 11 sanctions for misrepresentation to the tribunal.²¹ Ultimately, the hearing justice found that both attorneys had ghostwritten pleadings and that this conduct was unethical and in violation of Rule 11.²²

The hearing justice issued a written decision on January 17, 2013.²³ In that decision, the hearing justice found the following: an attorney-client relationship existed as a matter of fact and law between each of the three *pro se* defendants and their respective attorney. Furthermore, each attorney’s conduct violated Rule 8.4 of the Rules of Professional Conduct, and the attorneys’ failures to disclose their identities to the court was a violation of the Superior Court Rules of Civil Procedure. Finally, the hearing justice found that Rule 1.2(c) of the Rules of Professional Conduct did not preclude a finding of a Rule 11 violation.²⁴

Upon *de novo* review of the three cases, the Rhode Island Supreme Court reversed the hearing justice’s sanctions as a matter of law, finding that Rule 11 did not apply to the drafting assistance provided by these three non-signatory counsel and, therefore, there was no Rule 11 violation on which to base the sanctions.²⁵

19. *Id.* at 773, 775. Both HSBC’s motion for summary judgment and Discover Bank’s motion for summary judgment were heard on the same day by the same hearing justice. *Id.* at 775.

20. *Id.* at 775, 781.

21. *Id.* at 775.

22. *Id.* The hearing justice also imposed a \$750 sanction on each attorney. *Id.* at 773–75. With respect to Mr. Swain and the Discover Bank Action, the Supreme Court quashed the initial imposition of the sanction on the grounds that Mr. Swain had not been provided with an adequate notice and opportunity to be heard prior to the imposition of the sanction at the June 6 hearing. *Id.* at 775.

23. *Pichette*, 116 A.3d at 774.

24. *Id.*

25. *Id.* at 781.

ANALYSIS AND HOLDING

Despite that trial justices typically receive wide latitude to formulate what they consider to be appropriate sanctions, the Supreme Court engaged in *de novo* review of these cases because it found that the sanctions at issue were “imposed based on an erroneous view of the law.”²⁶ The court’s ultimate holding – that ghostwriting was not a Rule 11 violation – reversed the hearing justice’s conclusion that the attorneys violated the “clear intent of Rule 11” and breached their ethical duties of candor and honesty toward the tribunal when they failed to sign documents they drafted for *pro se* clients.²⁷ The Supreme Court found this was a flawed application of Rule 11.²⁸

In answering the “threshold question”²⁹ of whether an attorney who drafts court documents for a *pro se* litigant without disclosing his identity to the court has violated Rule 11, the court considered three factors:³⁰ (1) the plain language of Rule 11; (2) the proper interpretation of *Ellis v. State of Maine*³¹, one of the grounds upon which the hearing justice imposed sanctions; and (3) the spirit or intent behind Rule 11.³²

The court found that the plain language of Rule 11 did not address the ‘author’ or ‘drafter’ of documents and only held the “attorney of record” accountable.³³ Since all of the cases were brought by *pro se* defendants, none of the cases had an “attorney of record.”³⁴ Thus, the plain language of Rule 11 could not apply to these attorneys, regardless of their influence on the defendants’

26. *Id.* at 776, 781.

27. *Id.* at 779.

28. *Id.* at 781.

29. *Id.* at 778.

30. *Id.* at 778–781.

31. In *Ellis*, the First Circuit addressed the practical concerns underlying ghostwriting and found that an attorney who failed to sign a document could “escape the [Rule 11] obligation imposed on members of the bar.” *Id.* at 779. The fact that an attorney could shirk her Rule 11 obligations and consequences simply by withholding her signature from a court document suggests that the attorney’s signature was vital to the application of Rule 11 and, consequently, to the imposition of Rule 11 sanctions. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 781.

pleadings.³⁵

Contrary to the hearing justice's interpretation, the court found that *Ellis* explicitly excepted non-signatory attorneys from Rule 11 sanctions.³⁶ Additionally, the court noted that the First Circuit had never imposed Rule 11 sanctions on an attorney who had failed to sign documents, and so there was no precedent for the sanctions.³⁷ As such, it was consistent with the circuit's jurisprudence to reverse the hearing justice's imposition of sanctions.³⁸

The court declined to apply Rule 11 as the enforcement arm of the rules of ethics, finding that Rule 11 was written in light of a binary system in which there was either full representation or no representation and that this system was at odds with "the reality of today's legal practice."³⁹ The court suggested that it was self-defeating to read Rule 11 in such a way that it punished conduct permitted by Rule 1.2(c).⁴⁰ Instead, it distinguished between conduct that violated Rule 11 and conduct that offended the Rules of Professional Conduct, concluding that ghostwriting did not necessarily violate either.⁴¹

35. *Id.* at 779.

36. *Id.* at 779. The court noted, "[w]e view the First Circuit's acknowledgement that ghostwriting attorneys evade Rule 11 as support for our ultimate opinion that Rule 11 is not applicable to attorneys for the assistance they provided in drafting papers subsequently filed by pro se litigants." *Id.* Nevertheless, the hearing justice determined that "the clear intent of Rule 11 *** is to enforce an attorney's ethical obligations of candor and honesty in interactions with the tribunal," and thus the imposition of sanctions on attorneys who failed to sign documents they prepared was both proper and in-keeping with the 'spirit' of Rule 11. *Id.*

37. *Id.*

38. *Id.* at 779–80. The court did note, in footnote 12, that it distinguished between Rule 11 sanctions and sanctions imposed based on the inherent authority of the trial courts. The implication is that the First Circuit may have previously imposed *other* sanctions upon attorneys who drafted, but did not sign certain court documents. However, whatever the bases for these potential, hypothetical sanctions, none of them were based on a Rule 11 violation. *Id.* at 780.

39. *Id.* at 780–81 ("[W]e draw a distinction between conduct that offends Rule 11 and that which may violate one of the Rules of Professional Conduct.").

40. *Id.* at 781 ("We decline to interpret Rule 11 as applying to the drafting assistance provided by these three nonsignatory counsel and, consequently, perceive no violations thereof.") *Id.*

41. *Id.* at 781–82.

To determine the terms on which Rhode Island courts should permit ghostwriting, the court solicited amicus briefs addressing the benefits and detriments of the practice as a form of limited-scope representation.⁴² Based on these submissions and its own opinion, the court concluded that an attorney who prepares written submissions on behalf of a *pro se* client appearing in court is not in violation of the Rules of Professional Conduct or the Rules of Civil Procedure, so long as she signs the prepared documents and discloses to the court her identity as well as the nature and extent of the assistance she provided.⁴³

COMMENTARY

In allowing limited scope representation, the Rhode Island Supreme Court relied on several amicus briefs, which outlined three primary benefits of ghostwriting and other forms of limited scope representation.⁴⁴ First, limited scope representation can help the legal profession to ward off obsolescence by complementing, rather than combating, the “do-it-yourself” mentality that has emerged in response both to new legal technologies and to the wealth of free information available on the

42. *Id.* at 781.

43. *Id.* at 784.

44. The Rhode Island Supreme Court also took note of potential pitfalls inherent to limited scope representation, most of which were proffered by the Attorney General’s office in its amicus brief. *See* Amicus Brief of the Attorney General of the State of Rhode Island, *FIA Card Servs. v. Pichette*, 116 A.2d 770 (R.I. 2015) (No. 2012-272A) [hereinafter AG Amicus]. The brief makes two arguments opposing limited scope representation in Rhode Island: (1) that ghostwriting gives a *pro se* litigant an “unfair advantage” in court proceedings, and (2) that opposing counsel may walk into an “ethical minefield” if it communicates directly with the supposedly *pro se* litigant about “matters for which the party is represented.” AG Amicus at 45. The latter critique arguably has merit, but the former criticism presents two serious issues. First, it reveals that the Attorney General lacks faith in the judiciary’s ability to distinguish the work of a layperson from the work of a practicing attorney. Second, and more problematically, the suggestion that *pro se* plaintiffs will be at an “unfair advantage” because they have received limited support during their ordeal with the court systems clearly discounts the incredible disadvantages facing *pro se* litigants in the first place. *See* AG Amicus at 44 (emphasis added). Such a suggestion is akin to the suggestion that children with dyslexia are at an unfair advantage when they receive extra time on spelling tests. Indeed, the most common form of accommodation offered to *pro se* litigants comes in the form of additional time to file documents.

Internet.⁴⁵ Second, limited scope representation can increase the efficiency of the court by mitigating the “tedious delay[s]” that self-represented clients unintentionally create as a result of their unfamiliarity with our complex and nuanced court systems.⁴⁶ Third, limited scope representation bridges the “justice gap” that exists “between those who need legal services and those who cannot afford them” by removing some of the barriers that have historically prevented attorneys from choosing to take on pro bono projects.⁴⁷

The question now “is not whether Rhode Island will or should have limited scope representation, but how best to implement limited scope representation across the state[?]”⁴⁸ To answer that

45. Amicus Brief for the Rhode Island Bar Association for the Appellants at 11-12, *FIA Card Servs. v. Pichette*, 116 A.2d 770 (R.I. 2015) (No. 2012-272A) [hereinafter “RIBA Amicus”]. According to the Rhode Island Bar Association (RIBA), “attorneys attempting to make ends meet are likely to find that offering limited legal services will provide a new client base among litigants who are ‘do-it-yourself’ motivated.” *Id.* at 13; *see also*, Dee Crocker, *Highlights from the 2012 ABA Techshow Technology Matters*, OR. ST. B. BULL., June 2012, at 37 (“The growing number of [. . .] automat[ed] [. . .] legal services cannot be ignored by lawyers[. . .] However, lawyers can use some of those same systems, tools and techniques to boost their own law practices to attract clients”).

46. Amicus Brief for the Rhode Island Bar Association for the Appellants at 11-12, *FIA Card Servs. v. Pichette*, 116 A.2d 770 (R.I. 2015) (No. 2012-272A). In the same section, RIBA points out that limited scope representation “benefits all actors in *pro se* litigation” – from the clerks of court who attempt to give direction without giving legal advice, to the attorneys who work opposite of a *pro se* litigant, to the court which has to balance the interests of justice in the face of a litigant who has failed to meet procedural requirements. *Id.* at 13.

47. *See* Amicus Brief of the Pro Bono Collaborative at 5-7, *FIA Card Servs. v. Pichette*, 116 A.2d 770 (R.I. 2015) (No. 2012-272A) [hereinafter PBC Amicus]. One of the most pervasive barriers is what the Pro Bono Collaborative (PBC) has termed “mission creep”: when an attorney takes a case for a discrete purpose and ends up tied to that case “far beyond the point that [she] initially envisioned.” *Id.* at 7. A common example that arises in the context of prisoner re-entry in Rhode Island is when a child visitation dispute becomes entangled with a child custody case. *Id.* at 8. Relying on the various amici briefs and its own sound judgment, the Court ultimately concluded that “allowing attorneys to provide limited drafting assistance to pro se litigants will serve to encourage pro bono participation by more attorneys, will remove barriers and disincentives to such participation and will promote greater access to justice.” *Pichette*, 116 A.3d at 783.

48. Judah Rome, Comment, *Give Up the Ghost Hunt: A Defense of Limited Scope Representation and Ghostwriting in Rhode Island*, 20 ROGER WILLIAMS L. REV. 461, 462 (2015).

question, the Rhode Island Supreme Court must address three key elements of limited scope representation: how an attorney begins the representation, how the attorney and client define the precise scope of that representation, and how an attorney withdraws once he has fulfilled his limited purpose. The court will also need to determine how much out-of-court oversight it will impose upon attorneys providing limited scope representation. Lastly, because the rules governing the procedure of limited scope representation will be used by lawyer and layperson alike, it is essential that the procedures are simultaneously comprehensive and user-friendly. To achieve this, I recommend the court adopt a procedure that is a hybrid of those currently employed in Colorado,⁴⁹ Illinois,⁵⁰ and New Hampshire.⁵¹ In all three states, attorneys must fully disclose their name, address, and registration number on the documents they prepare for pro se clients, although the signature does not constitute an appearance.⁵²

Colorado courts inserted the procedure governing limited representation directly into their existing Rule 11, “Signing of Pleadings,” which requires that attorneys identify themselves and sign all filings in order to hold the attorneys accountable for the veracity of the document’s content.⁵³ Subsection (b) specifically establishes that ‘limited representation’ does not amount to an ‘appearance’ and does not hold the attorney accountable for full representation of the client.⁵⁴ However, Colorado courts also state that any in-person appearance before a judge, magistrate, or other judicial officer on behalf of the pro se client will constitute an entry of appearance, thereby committing the attorney to full representation.⁵⁵

In Illinois, the procedure governing limited representation functions as a sub-category of “appearances,” inserted into Rule 13

49. C.R.C.P. 11(B).

50. IL. R. S. CT. RULE 13.

51. N.H. SUPER. CT. R. 14.

52. C.R.C.P. 11(B); IL R S CT RULE 13; N.H. SUPER. CT. R. 14.

53. C.R.C.P. 11.

54. C.R.C.P. 11. “Limited representation of a pro se party under this Rule 11(b) shall not constitute an entry of appearance by the attorney for purposes of C.R.C.P. 121, section 1-1 or C.R.C.P. 5(b), and does not authorize or require the service of papers upon the attorney.” *Id.*

55. *Id.*

of the Illinois Supreme Court Rules of Procedure.⁵⁶ Taking a much more thorough and comprehensive approach than Colorado, Illinois requires attorneys to file a Notice of Limited Scope Appearance with the court, stating the precise nature of the representation.⁵⁷ Additionally, a lawyer may only withdraw his appearance by motion or notice to the parties; if the attorney has completed the tasks enumerated in the Limited Scope Appearance form, the court must grant the motion for withdrawal of appearance.⁵⁸ Likewise, a party may only object to an attorney's motion to withdraw his appearance if the objecting party believes the attorney has not yet fulfilled the duties required under scope of his limited appearance.⁵⁹

In a similar vein, New Hampshire has inserted these new procedural rules into their existing Rule 14 of the New Hampshire Superior Court Rules, which addresses "Appearances - General, Special, and Limited."⁶⁰ There, courts permit limited scope representation only in non-criminal cases, and, like Illinois, they characterize limited-representation as a form of appearance before the court.⁶¹ New Hampshire attorneys must file an appearance explaining the precise scope of representation offered.⁶² The courts presume that any action the attorney takes that is outside the scope of the limited representation is simply an extension of the limited representation, and does not commit the attorney to full representation.⁶³

In *Pichette*, the Rhode Island Supreme Court voiced its preference for full identification of the attorneys and an upfront articulation of the scope of the representation.⁶⁴ As a practical matter, attorney identification is essential to ensure candor towards the courts and accountability in counsel. The court

56. IL. R. S. CT. RULE 13.

57. *Id.*

58. *Id.*

59. *Id.*

60. N.H. SUPER. CT. R. 14

61. *Id.*

62. *Id.*

63. *Id.*

64. See *Pichette*, 116 A.3d at 784 (holding that an attorney must "sign[] the document and disclose[] thereon his or her identity and the nature and extent of the assistance that he or she is providing to the tribunal and to all parties to the litigation").

should further establish that limited scope representation constitutes a “limited appearance,” as the New Hampshire and Illinois courts have because this allows attorneys to appear in-person at proceedings without committing them to full representation of the client. Additionally, the court should strongly consider extending the options for limited scope representation to criminal defendants, to increase access to necessary legal services for those defendants who do not meet the low threshold required to obtain publicly funded legal counsel. Finally, the court should *not* adopt New Hampshire’s “presumption of extension” as this has a strong likelihood of blurring the lines between full representation and limited representation and risks misleading clients as to the role their lawyer plays. Rather, Rhode Island should follow the example set by Colorado and Illinois and require that any additional tasks the client and lawyer wish to add to the scope of the limited representation must be specifically outlined and filed with the court. For the sake of uniformity and simplicity, Rhode Island should adopt a standard form for extending the scope of representation, rather than requiring attorneys to request an extension of the scope of representation by motion. This will allow the court filings to clearly and succinctly reflect the development of the lawyer-client relationship throughout a particular dispute and will limit the frequency with which the court must play “referee.”

To maximize the impact of the court’s opinion and ensure that *Pichette* serves as the springboard for formally establishing a new category of accessible legal services in Rhode Island, these procedures and protocols must be imminently forthcoming. In shaping these procedures, the court must address: “when it is appropriate to limit the scope of representation; how to apply the ethical standard of competence to limited scope representation; how the court and opposing parties should communicate with a party who is engaged in limited scope representation how an attorney can enter a limited appearance and then withdraw; and whether the rules surrounding conflicts of interest should be relaxed for limited scope representation.”⁶⁵

65. See Rome, *supra* note 48 at 483.

CONCLUSION

A Rhode Island attorney who prepares written submissions on behalf of a pro se client appearing in court is not in violation of the Rules of Professional Conduct or the Rules of Civil Procedure, so long as she signs the prepared documents and discloses to the court her identity as well as the nature and extent of the assistance she provided. Although the Court's decision is not novel on its face,⁶⁶ it still signals a new direction for the legal profession in Rhode Island that has the potential to increase access to quality legal services in while simultaneously encouraging attorneys to take on more pro bono work. However, the long-term benefits of this decision will depend entirely on the quality and breadth of the procedural rules the Court implements.

Katherine Berling

66. See Rome, *supra* note 48 at 473, 475, 477 (discussing the procedures for addressing limited scope representation as they have been enacted in Massachusetts, Connecticut, and New Hampshire, respectively).

Property Law. *Renewable Resources, Inc. v. Town of Westerly*, 110 A.3d 1166 (R.I. 2015). The Rhode Island Supreme Court held that the lower hearing justice did not abuse his discretion in granting the town’s emergency motion for relief. The advanced deterioration of the mill’s building in the wake of Hurricane Sandy, as well as the plaintiff’s continued noncompliance with the signed memorandum of agreement, satisfied the requisite change in circumstances required to modify a preliminary injunction.

FACTS AND TRAVEL

The Potter Hill Mill ceased operation in the 1950s.¹ In 1980 the town of Westerly sought to have the mill demolished because of its worsening condition and eventually issued an order to that effect.² In 1984, the order was affirmed by a Rhode Island District Judge, however the demolition never took place.³ In 1992, the plaintiff, Renewable Resources Inc., purchased the mill for \$50,000.⁴ In 2006, the plaintiff and the town signed a memorandum of agreement (MOA) “in which plaintiff recognized the validity of the condemnation order and pledged to meet a series of conditions in order to stave off demolition.”⁵

The town requested proposals for the mill to be demolished in a newspaper advertisement in August of 2009, because the plaintiff had failed to “expeditiously pursue its development plan” and because of the ongoing deterioration of the mill.⁶ The plaintiff re-

1. *Renewable Res., Inc. v. Town of Westerly*, 110 A.3d 1166, 1168 (R.I. 2015).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* “The MOA required that plaintiff fence off the property, clean up debris, and expeditiously pursue its development plan. Furthermore, the MOA explicitly granted the town the power to determine whether plaintiff was in breach of the MOA’s conditions.” *Id.*

6. *Id.*

798 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 21:797]

sponded in September “seeking a temporary restraining order, a preliminary injunction, and a permanent injunction against the town” preventing the demolition of the mill.⁷ The town answered, alleging that the plaintiff’s failure to adhere to the MOA’s requirements of due diligence granted “the Town the right to condemn. . .and demolish the building.”⁸ A Superior Court justice granted the plaintiff’s motion for a temporary restraining order.⁹

In April of 2011, the Superior Court justice dismissed part of the plaintiff’s complaint that requested the court issue a mandatory injunction against the town.¹⁰ The justice then ordered an agreement between the plaintiff and the town.¹¹

In June of 2012 an order was entered allowing the town’s building official to inspect the mill every quarter.¹² The order also allowed for the issuance of permits for the demolition and reconstruction of the property, as well as a viewing of the mill by the court.¹³ The parties and the hearing justice viewed the property on October 16, 2012.¹⁴ On October 29, 2012, Hurricane Sandy made landfall and “wreak[ed] havoc on what was left of the mill.”¹⁵ The town filed an emergency motion for relief from the preliminary injunction describing “the advanced rate of deteriora-

7. *Id.*

8. *Id.* at 1169. The town also objected to the temporary restraining order as well as the request for the court to view the mill. *Id.*

9. *Id.* *Id.* The parties litigated the preliminary injunction for more than a year while the temporary restraining order was in effect. *Id.*

10. *Id.* The plaintiff sought the authority of a court order in forcing the town to conform to the zonings classifications of the mill proposed in the plaintiff’s comprehensive plan. *Id.*

11. *Id.* “The order provided plaintiff with a timetable for both submission of development plans and actual repair work for the mill, and it also provided that a preliminary injunction against demolition of the mill would remain in effect until further notice.” *Id.* In June of 2011, the town filed a motion to hold the plaintiff in contempt of this agreement. *Id.* at 1169 & n.2. The town alleged that the plaintiff had failed to submit a reconstruction plan and failed to repair a gravel road. *Id.* The court did not hold the plaintiff in contempt, but did order to begin reconstruction and repair of the mill and a court-appointed architect was assigned to oversee the project. *Id.* The plaintiff filed its development plan, but did not follow up when additional information was requested by the town. *Id.* The town filed again to hold the plaintiff in contempt and again the motion was not granted. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 1169 n.2 (alteration in original).

tion and collapse of the buildings since the summer and requested that it be allowed to demolish the buildings so that it might prevent immediate harm to children.”¹⁶

In December of 2012, the town’s building official, David Murphy, testified that the mill’s buildings were “unsafe” and “beyond repair.”¹⁷ Mr. Murphy concluded that the buildings should be demolished because “they posed a threat to persons on the property and in the adjacent waterway.”¹⁸ Mr. Murphy also acknowledged the potential risk and problems posed by trespassers and children on the mill property.¹⁹ The town planner, Marilyn Shellman, testified at the same hearing that she visited the mill property twice over the past year, and that during her second visit “[t]he integrity of the buildings seem[ed] to be worse than [on her] first viewing.”²⁰

On December 18, 2012, the hearing justice relieved the town from the restraining order and permitted the town to issue a demolition order for the mill property.²¹ On January 22, 2013, the hearing justice, in a written decision, found that the plaintiff breached the MOA and, on February 6, 2013, vacated the preliminary injunction.²²

16. *Id.* The town made its motion pursuant to Rule 60(b)(5) of the Superior Court Rules of Civil Procedure. *Id.* The operative language of that rule is “[o]n motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: . . . the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application [.]” *Id.* at 1169 & n.4.

17. *Id.* at 1169-70.

18. *Id.* at 1170. “Mr. Murphy issued a notice of unsafe condition and order to demolish, citing eight of the unsafe conditions listed in G.L.1956 § 23-27.3-124.1” *Id.* at 1170 & n.5. Westerly’s Building Code Board of Appeals denied the plaintiff’s appeal of the demolition order. *Id.* The plaintiff again appealed, unsuccessfully, to the Rhode Island Building Code Standards Committee. *Id.* Finally, the plaintiff appealed on administrative grounds to the Sixth Division District Court. *Id.*

19. *Id.*

20. *Id.* Ms. Shellman specifically referred to the deterioration of the roof and sidewalls. *Id.* Two neighbors of the property, Bonnie Bennet and Allison Goodsell, testified to the presence of children and trespassers on the property before and after Hurricane Sandy. *Id.*

21. *Id.*

22. *Id.* at 1170.

ANALYSIS AND HOLDING

The dispute on appeal centered on whether the trial justice abused his discretion in vacating the preliminary injunction.²³ The plaintiff argued that the trial judge erred in “failing to find a ‘substantial’ change in circumstances warranting the vacating of the preliminary injunction.”²⁴ The plaintiff specifically pointed to the trial justice’s “absence of any findings of significant deterioration” between the date that the preliminary injunction was granted and the date of the filing of motion for relief.²⁵ The town argued that the plaintiff’s failure to adhere to the terms of the MOA, as well as the increased deterioration of the mill in the aftermath of Hurricane Sandy, “were sufficient evidence of a change in circumstances.”²⁶

Upon review, the court initially sought to determine whether there had been a sufficient change in circumstances that would enable the preliminary injunction to be modified.²⁷ The court recounted the town’s series of witnesses at the December 11, 2012 hearing.²⁸ All of these witness “testified to the escalation of the dangerous condition” of the mill property.²⁹ Specifically, the court cited to the fact that Mr. Murphy, the building official, testified that the buildings were “unsafe and on the verge of collapsing.”³⁰ The justice also relied on Mr. Murphy’s testimony that he was led to believe that the plaintiff had violated the MOA’s diligence requirement.³¹ Furthermore, the court relied on the testimony of Ms. Shellman, the town planner, who spoke to the “worsening of the buildings’ condition,” the plaintiff’s “inaction with respect to

23. *Id.* at 1171. Before addressing the merits of the case, the Supreme Court explained their standard of review and clarified that even though the town’s emergency motion for relief was improperly brought under Rule 60(b)(5), “a trial justice still retains the inherent power to modify any interlocutory judgment or order prior to final judgment.” *Id.* at 1170–71 (quoting *Murphy v. Bocchio*, 338 A.2d 519, 522 (R.I. 1975)).

24. *Id.*

25. *Id.* The plaintiff obtained the preliminary injunction on April 26, 2011 and the town filed a motion for relief on November 16, 2012. *Id.*

26. *Id.*

27. *Id.*; see also *Harris v. Town of Lincoln*, 668 A.2d 321, 328 (R.I. 1995).

28. *Renewable Resources*, 110 A.3d at 1172.

29. *Id.*

30. *Id.*

31. *Id.* The plaintiff filed an incomplete demolition permit application. *Id.*

the MOA,” and failure to submit a master plan.³²

The court held that the hearing justice acted within his discretion in vacating the preliminary injunction even though he did not “specifically explain what constituted a change in circumstance.”³³ The court determined that the hearing justice was in compliance with Rule 52(a) of the Superior Court Rules of Civil Procedure because the justice “detailed the witness testimony he found credible.”³⁴ The court also noted that the hearing justice “stressed that plaintiff’s noncompliance with the MOA was the impetus for vacating the preliminary injunction.”³⁵ The plaintiff failed to persuade the court that the hearing justice’s references to the MOA were improper.³⁶ In fact, the court found that the plaintiff had waived that argument when it failed to object when the town itself invoked the terms of the MOA as “a basis for vacating the preliminary injunction.”³⁷

Additionally, the court noted that the hearing justice’s determination that the plaintiff’s breach of the MOA was “sufficient to constitute the requisite change in circumstances.”³⁸ The court reasoned that the preliminary injunction had certain requirements, most notably the repair and reconstruction of the mill’s buildings, and that the plaintiff failed to be faithful to these requirements.³⁹ Further, the court noted two prior unsuccessful motions to hold the plaintiff in contempt.⁴⁰ The court emphasized that the plaintiff had been shown leniency on both occasions and that this “continued noncompliance” was sufficient to be classified as a change in circumstances.⁴¹ Finally, the court held that the

32. *Id.*

33. *Id.*

34. *Id.* “[I]n granting or refusing interlocutory injunctions the court shall [] set forth the findings of fact and conclusions of law which constitute the grounds of its action . . . It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court . . .” R.I. SUPER. R. CIV. P. 52(a).

35. *Id.*

36. *Id.*

37. *Id.*; see also *Town of Smithfield v. Fanning*, 602 A.2d 939, 942 (R.I. 1992) (“[T]his court will not consider an issue raised on appeal that has not been raised in reasonably clear and distinct form before the trial justice.”).

38. *Renewable Resources*, 110 A.3d at 1173.

39. *Id.*

40. *Id.*

41. *Id.* The court elaborated and said that “[a]lthough plaintiff’s

hearing justice did not abuse his discretion in granting the town's emergency motion because the town effectively demonstrated, with sufficient evidence, that a change in circumstances occurred with regard to the condition of the buildings on the mill property.⁴²

COMMENTARY

The Rhode Island Supreme Court made a reasonable ruling in finding that there was adequate evidence presented to the hearing judge so as not be found as an abuse of discretion.⁴³ The hearing judge was presented with evidence from city officials and neighbors that documented how the mill had continued to deteriorate before and after Hurricane Sandy.⁴⁴ Discretion to lower courts is essential to an efficient and just legal system, especially in cases that are so heavily fact-based. Here, there was incontrovertible evidence that the property had subsequently been damaged by the hurricane and that the plaintiff had failed to comply with the MOA between the parties.⁴⁵

The court's decision demonstrates the outer-bounds of a hands-off approach to dealing with parties that attempt to find their own agreement and parameters through a MOA. The court also observed that the lower court was lenient on the plaintiff during the towns prior motions requesting the court hold the plaintiff in contempt for failure to comply with the MOA requirements.⁴⁶ Society wants to encourage parties to find settlements that work for the parties involved in any given dispute while, at the same time, encouraging them to honor those agreements. Parties that can amicably settle their dispute will save their own resources, as well as those of the courts. However, the court's emphasis on the plaintiff's continued noncompliance demonstrates that the legal system can sometimes run out of patience with those parties that do not follow what they say they will do.⁴⁷ This mill had been out

profered 'substantial' change in circumstances standard was not proper, we note in any case that the hearing justice heard and recited enough testimony to satisfy even that standard." *Id.* at 1173 & n.9.

43. *Id.*

44. *Id.* at 1172.

45. *Id.*

46. *Id.* at 1173.

47. *Id.*

2016]

SURVEY SECTION

803

of service since the 1950s, the plaintiff had purchased the property in 1992, and the MOA was agreed to in 2006.⁴⁸ There comes a time when parties need to move forward. The result from this case may shorten the leash on the noncompliance of MOAs and encourage parties to act with more speed and alacrity in the face of potential legal consequences to their inaction.

CONCLUSION

The Rhode Island Supreme Court held that the testimony of advanced deterioration of the mill's building in the wake of Hurricane Sandy, as well as the plaintiff's continued noncompliance with the signed memorandum of agreement, satisfied the requisite change in circumstances required to modify a preliminary injunction. The court affirmed the lower court's decision and held that the hearing justice did not abuse his discretion in granting the town's emergency motion for relief.

Peter M. MacArthur

48. *Id.* at 1168.

Public Contracts. *Kayak Centre of Rhode Island v. Town of Narragansett*, 116 A.3d 250 (R.I. 2015). The Rhode Island competitive bidding statute, R.I. General Laws 1956 Section 45-55-5, clearly and unambiguously does not apply to public concession contracts. Nevertheless, the competitive bidding process is still subject to the *Gilbane*¹ standard of good faith in order to protect against public corruption.

FACTS AND TRAVEL

In August of 2012, the Town of Narragansett (“the Town”) acquired a 9.5-acre parcel of land that included a property on which a Rhode Island company operated a paddle sports business.² Subsequent to the Town’s acquisition of the property, the paddle sports business continued to operate on the land until August of 2013 when the Town invited competitive bidding for a five-year concession contract to operate a paddle sports business on the property.³ In preparation for the competitive bidding process, the Town’s purchasing agent and the Director of the Town’s Parks and Recreation Department jointly prepared a package and an invitation to bid on the concession award.⁴

Ultimately, two companies submitted bids to the town: The first was Narrow River, also a Rhode Island limited liability company that operated a paddle sports business currently operating on the land in question.⁵ The second bidder was Kayak

1. *Gilbane Bldg. Co. v. Bd. of Trs. of State Colls.*, 267 A.2d 396, 399 (R.I. 1970).

2. *Kayak Centre of R.I. v. Town of Narragansett*, 116 A.3d 250, 252 (R.I. 2015). The property at issue is located at 94 Middlebridge Road in Narragansett, Rhode Island. *Id.*

3. Robert O’Neill, the Chairman of the town’s Land Conservancy Trust, explained the rationale behind the invitation. Mr. O’Neill explained that it made “good business sense” for the Town to review interest in other proposals for the paddle sport’s concession at the property. *Id.*

4. *Id.*

5. *Id.* at 251.

2016]

SURVEY SECTION

805

Centre of Rhode Island, a Rhode Island limited liability company that operates paddle sports businesses at two locations. The Town asked each of the bidders to state the “annual payment” they would be willing to make to the Town for comparison.⁶ Kayak Centre submitted a five-year combined annual payment total of \$180,505, whereas Narrow River submitted a five-year combined annual payment total of \$100,500.⁷

Once all the bids had been received, the Town’s Parks and Recreation Department examined the submitted bids and prepared a report that was subsequently submitted to the town council.⁸ The report established that Kayak Centre was “the best and most qualified bidder and recommended that the [t]own [c]ouncil award the municipal contract to [] Kayak Centre.”⁹ According to the report, the Town recommended the award be given to Kayak Centre based on the totality of its 18-year experience in the paddle sports business, positive references, and bid offering.¹⁰

The Department presented the report at the October 7, 2013 town council meeting and a motion was made to award the contract to Kayak Centre.¹¹ However, after comments from the public and discussion amongst the members of the town council, the council voted three to one to reject the motion seeking to award the concession contract to Kayak Centre.¹² Following the town council’s decision to reject Kayak Centre’s motion, the town solicitor suggested that, under the review of the town council, a new bid package with additional criteria and qualifications be developed before the bid package would go back out to bid.¹³ At the advice of the town solicitor, the town council voted three to one to reject all submitted bids and begin the bidding process anew.¹⁴

On December 3, 2013, Kayak Centre filed a complaint in Rhode Island Superior Court consisting of three counts: (1) a request for declaratory judgment that the Town violated Rhode

6. *Id.* at 252.

7. *Id.*

8. *Id.*

9. *Id.* (quoting Parties Stipulated Facts).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

Island's competitive bidding statute, R.I. Gen. Laws 1956 Section 45-55-5; (2) an allegation that the Town committed a criminal misdemeanor in its violation of Section 45-55-5; and (3) a prayer for injunctive relief alleging that it would be irreparably harmed if the Town was allowed to reject the bid and rebid the concession.¹⁵ A Superior Court justice heard the case on February 10, 2014 and issued a written decision in which the court found that the provisions of Section 45-55-5 were inapplicable to the bidding process at issue and that the standard for fairness in competitive bidding did not apply.¹⁶ The justice ultimately denied Kayak Centre's request for declaratory and injunctive relief and found for the Town on all counts.¹⁷

ANALYSIS AND HOLDING

On appeal, Kayak Centre argued that the trial justice erred in ruling that the requirements of Section 45-55-5 were inapplicable to the case and thereby erred in denying declaratory relief.¹⁸ While Kayak Centre urged the court to rule that Section 45-55-5 did apply, the court held that the statute did not apply to concession contracts.¹⁹ Conducting a *de novo* review of the statutory interpretation, the court concluded that the language of the statute was clear and unambiguous where Section 45-55-9 required competitive bidding for contracts that exceeded "ten thousand dollars (\$10,000) for construction and five thousand dollars (\$5,000) for all other purchases."²⁰ The court focused on the language in Section 45-55-5 requiring that the contract be awarded to the "responsive and responsible bidder whose bid is either the lowest bid price, or lowest evaluated or responsive bid price."²¹

The court noted that a contract for expenditures did not include all of the same considerations as a concession contract.²²

15. *Id.* at 252–53 (citing in relevant part R.I. Gen. Laws § 45-55-5 (2013)).

16. *Id.* at 253 (citing *Gilbane*, 267 A.2d at 399).

17. *Id.*

18. *Id.*

19. *Id.* (citing in relevant part R.I. Gen. Laws § 45-55-5 (2013)).

20. *Id.* at 254 (citing in relevant part R.I. Gen. Laws § 45-55-9 (2013)).

21. *Id.* (quoting in relevant part R.I. Gen. Laws § 45-55-5(e)).

22. *Id.*

The court found that Section 45-55-9 required competitive bidding for contracts that included “procurements” and “purchases,” thus Section 45-55-5 does not apply to competitive bidding processes involving concession contracts, which *produce* revenue rather than spend it.²³ Absent an explicit mention of concession contracts, the court held that Section 45-55-5 makes clear that the statute is inapplicable to the concession contract at issue.²⁴ The court considered the intent of the Legislature in enacting Section 45-55-5 and noted that, in the court’s opinion, the Legislature “sought to regulate contracts that require the expenditure of public funds.”²⁵ The court further noted that the Legislature was free to include concession contracts within Section 45-55-5, but chose not to do so.²⁶ Accordingly, the court held that the justice did not err in refusing to apply the statute to the Town’s action and, therefore affirmed the court’s denial of Kayak Centre request for declaratory relief.²⁷

Kayak Centre additionally argued that the trial justice erred in denying injunctive relief because the Town’s actions were governed by the standard of fairness established in *Gilbane Building Co. v. Board of Trustees of State Colleges*.²⁸ Conducting a *de novo* review, the court considered the standards for conduct in concession bidding and noted that before the Legislature enacted the competitive bidding statute, the Rhode Island Supreme Court used the *Gilbane* standard when it reviewed bid disputes.²⁹ The court explained that the *Gilbane* standard provides that “[i]n the absence of any legislative requirement pertaining to competitive bidding, it is the duty of the appropriate public officials to act honestly and in good faith as they determine which bidder would best serve the public interest.”³⁰ The court held that although Section 45-55-5 does not apply to concession contracts, the *Gilbane* standard does.³¹

23. *Id.* (quoting in relevant part R.I. Gen. Laws § 45-55-9).

24. *Id.* at 255.

25. *Id.* at 254.

26. *Id.* at 254–55 (citing *Narragansett Food Servs., Inc. v. R.I. Dep’t of Labor*, 420 A.2d 805, 808 (R.I. 1980)).

27. *Id.* at 255.

28. *Id.* at 253 (citing *Gilbane*, 267 A.2d at 399).

29. *Id.* at 255 (citing *Gilbane*, 267 A.2d at 399).

30. *Id.* (quoting *Gilbane*, 267 A.2d at 399).

31. *Id.* (citing *Gilbane*, 267 A.2d at 399).

The Town asserted that the issue was not reviewable because the Town had not yet completed the bidding process, and so there was no award for the court to review.³² The court, however, relied on *National Car Rental System, Inc. v. Fazzano* where the Rhode Island Supreme Court reviewed an action brought in a competitive bidding case before the commencement of the bidding process.³³ Accordingly, the *Kayak Centre* court rejected the Town's argument that its conduct was not reviewable.³⁴ Furthermore, the court disagreed with the trial justice's determination that the *Gilbane* standard did not apply and, therefore, mandated that the case be remanded for findings of fact and conclusions of law on the issue of whether the Town acted "corruptly or in bad faith, or so unreasonably or arbitrarily as to be guilty of a palpable abuse of discretion."³⁵

COMMENTARY

Although the Supreme Court ultimately ruled that the plain language of Section 45-55-5 rendered it inapplicable to the concession contract at issue, Justice Goldberg disagreed. Justice Goldberg describes an alternative and, in her opinion, equally plausible, reading of the statute, which renders it ambiguous.³⁶ Justice Goldberg advises that rather than being read narrowly, the statute should be read in accordance with the entirety of the regulatory scheme, which requires the incorporation of all sections in the statute.³⁷

Historically, when the Rhode Island Supreme Court interprets "clear and unambiguous statutory provision[s], it is entirely proper [] to look to the sense and meaning fairly deducible from the context."³⁸ Typically, the court "consider[s] the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were

32. *Id.*

33. *Kayak Centre*, 116 A.3d at 255 (citing *National*, 307 A.2d at 771).

34. *Id.*

35. *Id.* (quoting *Gilbane*, 267 A.2d at 399).

36. *Id.*

37. *Id.*

38. *State v. Hazard*, 68 A.3d at 485 (quoting *In re Brown*, 903 A.2d 147, 150 (R.I. 2006)).

independent of all other sections.”³⁹ In the past, when the Supreme Court has faced with statutory provisions that are *in pari materia*, it has “construe[d] [the statutory provisions] in a manner that attempts to harmonize them and that is consistent with their general objective scope.”⁴⁰ Yet, here the court has failed to follow its own precedent. The court’s narrow interpretation undermined the legislative intent of the statute; the statute was enacted in order to develop a uniform system for the award of contracts by municipalities utilizing open cooperative bids.⁴¹ The court erred in holding otherwise where the concession contract before the court undoubtedly fits cleanly within the Legislative intent of the statute.

The Rhode Island Supreme Court’s decision presents obstacles to Kayak Centre beyond those typically associated with an unfavorable ruling. By finding that the statute was not ambiguous and hence ruling that the statute did not apply to the Town’s actions, the Supreme Court invites public corruption. Justice Goldberg hints at the risk of public corruption in her concurrence/dissent, pointing to the “dangerous waters” to which the Majority embarks.⁴² The risk of public corruption that Justice Goldberg noted is further illustrated by the strict *Gilbane* standard that Kayak Centre faces on remand.⁴³ Kayak Centre must be able to exemplify that the Town committed a demonstrable abuse of discretion, a feat likely to prove difficult for the small-town business as the Town has demonstrable proof to the contrary.⁴⁴ The record that was before the court demonstrates that the Town faced backlash from the public regarding the impending bid award to Kayak Centre, providing the Town with a justifiable reason to reconsider the award.

Only if Kayak Centre is able to show that despite this noted public outcry, the Town itself demonstrated corruption and bad faith so as to warrant a holding that the *Gilbane* standard was

39. *Raiche*, 101 A.3d at 1248 (quoting *Mendes v. Factor*, 41 A.3d 994, 1002).

40. *Horn v. S. Union Co.*, 927 A.2d 292, 295 (R.I. 2007).

41. *Kayak Centre*, 116 A.3d at 257 (Goldberg, J., concurring in part and dissenting in part) (citing R.I. Gen. Laws § 45-55-1).

42. *Id.*

43. 267 A.2d at 399.

44. *Gilbane*, 267 A.2d at 399.

810 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:804

breached will its claim survive.⁴⁵ Considering the uphill battle that Kayak Centre faces, Kayak Centre's claim will likely be extinguished on remand because, even beyond the general undetectable nature of corruption, the proof of the townspeople's concern will further protect the Town from any allegation of corruption or bad faith.

CONCLUSION

The Rhode Island competitive bidding statute, R.I. General Laws 1956 Section 45-55-5, does not apply to the bidding for public concession contracts because the statute explicitly applies only to contracts that produce purchases. In the absence of an applicable statute, the *Gilbane*⁴⁶ standard of good faith must nevertheless be applied to consider whether a party "acted corruptly or in bad faith, or so unreasonably or so arbitrarily as to be guilty of a palpable abuse of discretion" during the competitive bidding process.⁴⁷

Breegan Semonelli

45. 267 A.2d at 399.

46. *Gilbane*, 267 A.2d at 399.

47. *Kayak Centre*, 116 A.3d at 255 (quoting *Gilbane*, 267 A.2d at 400).

Real Property. *Gianfrancesco v. A.R. Bilodeau, Inc. et al*, 112 A.3d 703 (R.I. 2015). The Rhode Island Supreme Court found no abuse of discretion when the Superior Court granted the Plaintiff landowner's preliminary injunction to prevent the Defendant landowner from trespassing onto, interfering with, obstructing, or blocking the Plaintiff's business. The court further held that the lower court properly ruled on the merits of exclusive ownership and easement by prescription as the justice advised the parties he would not consider those claims.

FACTS AND TRAVEL

The Plaintiff, Mario Gianfrancesco, owned the Geneva Diner at 1162 Douglas Avenue, North Providence, since 1992.¹ The Defendant, A.R. Bilodeau Inc., owned a neighboring factory, located at 1164 Douglas Avenue, which began operating in 1998, which he leased to the co-defendant, Service Tech. Inc.² The Plaintiff's parking lot and the Defendant's driveway abutted each other; divided by an unmarked boundary line.³ To conduct its business, Service Tech used independently owned and operated tractor-trailers ("trucks"), that ranged from thirty to fifty feet in length.⁴ During business, the trucks routinely drove through the Plaintiff's property to access the Defendant's property.⁵ The Plaintiff never gave the Defendant permission to do so.⁶

A few incidents occurred between 1998 and 2001, whereby the trucks caused damage to the Plaintiff's property.⁷ After those incidents, the Plaintiff "aggressively policed" his property to

1. *Gianfrancesco v. A.R. Bilodeau, Inc. et al*, 112 A.3d 703, 705 (R.I. 2015).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

prevent further damage.⁸ Despite his policing, the trucks continued to pass through the Plaintiff's parking lot.⁹ Conversely, diner customers would park in the lot directly to the right of the diner, encroaching on the Defendant's property, and preventing trucks from entering the driveway.¹⁰ There was no mention of any specific incidents between 2001 and 2010.¹¹

On March 28, 2013, the Plaintiff filed a complaint in the Providence County Superior Court,¹² seeking declaratory judgment and injunctive relief.¹³ On April 12, 2014, the Defendant filed his answer, which included counterclaims for: (1) easement by prescription; (2) possession by acquiescence; (3) and trespass.¹⁴ On May 13, 2013 the Defendant sought a temporary restraining order seeking to enjoin the Plaintiff from blocking access to the diagonal path to the parking lot.¹⁵

The hearing on the motions was held on May 23, 2013. The Plaintiff testified that a Service Tech employee asked him to move a car that was parked on the Defendant's property.¹⁶ The Plaintiff called the police, who arrived and instructed him to put up a sign and traffic cones to prevent his patrons from parking in the driveway.¹⁷ The Plaintiff also told the officer he wanted to install a fence along the boundary line.¹⁸ Afterward, the Plaintiff installed a plywood sign and cones; however, on June 5, 2013, the Defendant testified that Service Tech employees moved the cones to make way for a truck.¹⁹ The Plaintiff also introduced photographs showing large trucks parking in front of the diner, obscuring the building from the street.²⁰ A witness further testified the trucks would pass through the parking lot "every few

8. *Id.*

9. *Id.*

10. *Id.* at 706.

11. *Id.* at 705–06.

12. *Id.* at 706. The complaint demanded the Defendant cease and desist, requested quiet title, and claimed tortious interference with business relations and *quantum meruit*. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 707.

20. *Id.*

2016]

SURVEY SECTION

813

days.”²¹

The Defendant stated that he allowed the trucks to use the parking lot because “[it] was the only way to get the product into [the] facility.”²² The Defendant also testified that he had never given permission for any trucks to park in the parking lot.²³ He further stated that if the Plaintiff erected a fence, Service Tech “would be shut down for the most part” because it “wouldn’t be able to get deliveries.”²⁴ However, a video, recorded on May 31, 2013, showed a large truck using the driveway without using the parking lot.²⁵ The Defendant also conceded that skilled drivers could enter his property without using the parking lot, but they would have to make a “hard enough swing” to do so.²⁶

After the hearings, the hearing justice issued a bench decision granting the Plaintiff’s request for preliminary injunctive relief and denying the Defendant’s request.²⁷ The Defendant then filed an interlocutory appeal to the Supreme Court.²⁸

ANALYSIS AND HOLDING

In reviewing the preliminary injunction,²⁹ the Rhode Island Supreme Court limited its review to “whether the hearing justice erred in granting the Plaintiff’s request for preliminary injunctive relief.”³⁰ To determine whether the trial justice erred, the Plaintiff must establish a *prima facie* case warranting preliminary injunctive relief.³¹ The trial justice must consider four factors to

21. *Id.*

22. *Id.* at 705.

23. *Id.* at 706.

24. *Id.* at 707. A witness for the Defendant further testified that the driveway could not be used alone because “there is just not enough room. They wouldn’t be able to make it to the facility otherwise.” *Id.* at 705.

25. *Id.* at 707.

26. *Id.*

27. *Id.* The Defendant also moved to stay and/or modify the order, which was denied. *Id.*

28. *Id.* at 708.

29. *Id.* at 708 n.6. (“General Laws 1956 §9-24-7 provides in pertinent part: Whenever, upon a hearing in the superior court, an injunction shall be granted or continued, . . . an appeal may be taken from such order or judgment to the supreme court in like manner as from a final judgment, and the appeal shall take precedence in the supreme court”) (quoting R.I. GEN LAWS §9-24-7 (2012)) (internal quotation marks omitted).

30. *Id.* at 709.

31. *Id.* at 708.

make his or her determination, including: whether the Plaintiff: (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the injunctive relief, (3) has the balance of equities tip in his or her favor; and, (4) has shown the issuance of a preliminary injunction will preserve the status quo.³²

In analyzing the first prong, the court did not dispute the Superior Court's finding that the Plaintiff owed the diner and parking lot for thirty years and had the right to use and control the property.³³ The court then focused on the Defendant's easement by prescription defense.³⁴ According to the Defendant, he had gained title to the parking lot because the trucks continually crossed Geneva Diner's parking lot for over ten years in an actual, open, notorious, and hostile manner to the Plaintiff.³⁵ The court dismissed the defense, finding no error when the trial justice found that the Defendant lacked a reasonable likelihood of success on that claim,³⁶ because of the undisputed fact that the Plaintiff continually objected to the trucks using his parking lot, thus preventing the ten years from accruing.³⁷ Concluding that the trial justice did not abuse his discretion, the court found the first prong satisfied.³⁸

The court then briefly addressed the remaining prongs, finding no abuse of discretion.³⁹ For the second prong, the trial justice properly found the size of the trucks posed an incredible disruption, and an economic and safety hazard to the Plaintiff, thus causing irreparable harm.⁴⁰ For the third prong, the trial

32. *Id.* (citations omitted).

33. *Id.* at 709. The trial justice found that "there has been no evidence that the [P]laintiff do[es] not own . . . the entire parcel including the area travel over from time to time by the [D]efendants." *Id.*

34. *Id.* at 710.

35. *Id.* (citing *Butterfly Realty v. James Romanella & Sons, Inc.*, 93 A.3d 1022, 1030 (R.I. 2014)).

36. *Id.* at 710.

37. *Id.* (quoting *Reitsma v. Pascoag Reservoir & Dam, LLC*, 774 A.2d 826, 832 (R.I. 2001)). The true owner can "stop the statutory prescriptive period from running" by "affirmatively communicat[ing] objection to the use").

38. *Id.*

39. *Id.* The court noted that the trial justice's analysis was "somewhat scant" but "adequately addressed the issues." *Id.* at 711.

40. *Id.* at 710. The justice relied on the Plaintiff's video showing a large truck enter the Defendant's property in supporting that the Plaintiff would

justice properly balanced the equities by finding that the Plaintiff suffered greater hardships than the Defendant.⁴¹ Finally, the trial justice found that the status quo of the clear separation of properties would allow the Plaintiff full use of his parking lot.⁴² According to the Supreme Court, none of these conclusions were abuses of discretion.⁴³

Finally, the Supreme Court struck down the Defendant's argument that the trial justice abused his discretion by ruling on the merits.⁴⁴ The court found no evidence of abuse of discretion as the trial justice consistently stated he would withhold deciding the case on the merits until the injunction issue was decided.⁴⁵

COMMENTARY

The Rhode Island Supreme Court gave wide discretion to the trial justice for preliminary injunctions by finding no abuse of discretion. Such discretion is necessary for trial justices to carry out their role as the primary deciders of justice. The court refused to become a helicopter parent of the lower courts, noting its limited review.⁴⁶ However, the court noted the "somewhat scant" analysis of the trial justice's rationale in granting the preliminary injunction,⁴⁷ suggesting that lower court justices may need to further engage in the case at bar and begin more in-depth analyses of the law and facts of the case. The court did not set the minimum standard justices must meet in applying the law, but agreed that the trial justice's emphasis on the first prong was adequate when compared to the thin analyses of the remaining prongs.⁴⁸

suffer irreparable harm without the injunction. *Id.* at 710-711.

41. *Id.* at 711.

42. *Id.* (quoting *Iggy's Doughboys, Inc.*, 792 A.2d at 705). "Prospective damage to a business's good will and reputation 'is precisely the type of irreparable injury for which an injunction is appropriate.'" *Id.* (quoting *The Fund for Community Progress v. United Way of Southeastern New England*, 695 A.2d 517, 523 (R.I. 1997)).

43. *Id.* at 710.

44. *Id.* at 711.

45. *Id.* During the hearings, the trial justice consistently stated he was not considering the merits of the claims and the injunction would remain in effect until the complaint was heard on its merits. *Id.*

46. *Id.* (citing *Vasquez*, 57 A.3d at 318).

47. *Gianfrancesco*, 112 A.3d at 711.

48. *Id.*

The weighing of the various prongs suggests that preliminary injunctions are not merely a check-list, but a balancing scale, where one very strong prong may supplement the weaker prongs. Indeed, the court agreed that the trial justice did not err in emphasizing the first prong.⁴⁹ However, an emphasis on one prong does not mean the other prongs can be ignored. The court's review of the remaining prongs shows that all four factors must be considered by a trial justice when deciding a preliminary injunction.⁵⁰ Yet, even one fact in favor of each factor is sufficient to satisfy them. For example, the court found the third factor, the balancing of equities, was satisfied simply by finding no error in the finding that the Plaintiff's hardships were much greater than the Defendant's.⁵¹ One fact can satisfy one factor.

Regarding the first factor, trial justices must carefully tread the fine line between finding a reasonable likelihood of success without ruling on the merits of the complaint. The close similarities between ruling on the merits and reasonable likelihood of success could lead a justice to cross the fine line. Indeed, the Defendant argued the trial justice ruled on the merits of the case.⁵² Yet, the court took the trial justice's refusal to rule on the merits of the claims at face value. It did not probe into the justice's actions, other than his statements during the hearings,⁵³ nor his visitation of the disputed property at the outset of the hearings.⁵⁴ Such discretion by the court allows justices room to rule on injunctions without ruling on the merits of claims or constraining the formalistic rules and procedures.

CONCLUSION

The Rhode Island Supreme Court held that the Superior Court did not abuse its discretion when it granted the Plaintiff's preliminary injunction and denied the Defendant's request for an

49. *Id.*

50. *Id.* at 708 (citing *Iggy's Doughboys, Inc.*, 729 A.2d at 705).

51. *Id.* at 711. The fourth prong of preserving the status quo was similarly satisfied by one fact: the preliminary injunction favoring the Plaintiff would allow him the full use of his property. *Id.*

52. *Id.*

53. *Id.* The trial justice specifically stated the injunction "will stay in effect until the complaint, underlying complaints are heard on their merits." *Id.*

54. *Id.* at 706 n.4.

2016]

SURVEY SECTION

817

injunction despite a minimal decision from the trial court. The court further found the trial justice did not rule on the merits of the complaint by his explicit refusal to do so, leaving the matter for the Superior Court.

Gregory Henninger

Tort Law. *Medical Malpractice Joint Underwriting Ass’n of Rhode Island v. Charlesgate Nursing Ctr., L.P.*, 115 A.3d 998 (R.I. 2015). The Rhode Island Supreme Court determined that the claim of negligence alleged against Charlesgate Nursing Center did not constitute an intentional act. The court found that allegations against Charlesgate were in fact an “occurrence” or “accident” to which commercial general liability (CGL) applies. A duty to defend an insured exists unless and until the tortious actions of the insured amount to an intentional act.

FACTS AND TRAVEL

Medical Malpractice Joint Underwriting Association of Rhode Island (JUA) insured the Charlesgate Nursing Center under a policy that provided coverage for both hospital professional liability (HPL) as well as commercial general liability (CGL) from December 2008 until December 2009.¹ In June of 2009, a resident at Charlesgate Nursing Center claimed that Josiah Ajibade Olowoporoku, a certified nursing assistant (CNA) and employee at Charlesgate, sexually assaulted her.² The resident passed away in October 2011 and her son, acting as the administrator to her estate, “filed suit in the [Rhode Island] Superior Court against Charlesgate” as well as various partners and employees of Charlesgate for negligence and sexual assault.³

The complaint asserted that Olowoporoku physically and sexually assaulted the resident on June 16, 2009.⁴ Furthermore, the complaint alleged that at the time of the assault, another CNA, Sandra James, “was at the nurse’s station where she heard the resident’s cries for help, but she did not respond.”⁵ The

1. *Med. Malpractice Joint Underwriting Ass’n of Rhode Island v. Charlesgate Nursing Ctr., L.P.*, 115 A.3d 998, 1000 (R.I. 2015).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

complaint alleged that James reported the assault to a fellow employee, Lynda Gaboriault, who similarly failed to report the assault.⁶ On June 16, the resident reported the assault to a medical technician, Sharon Scott, and to James.⁷ On June 18, the family of the resident was informed of the assault and the family immediately insisted that Charlesgate file a report regarding the assault with the police department.⁸ That day a rape kit was administered to the resident and revealed “bruising, a laceration, excoriation, and trauma or penetration to the vaginal area.”⁹

The estate’s complaint contained six counts altogether, five of which were claiming negligence against Charlesgate and its employees.¹⁰ The complaint alleged that Charlesgate and its employees failed to “properly supervise, train or screen its employees; to provide proper security measures; to report that a resident had been abused or mistreated within twenty-four hours in accordance with [General Laws] 1956 § 23-17.8-2; and to discipline its employees following the alleged sexual assault.”¹¹ The complaint also alleged that as a “direct and proximate result of [Charlesgate’s] alleged negligence” the resident suffered “severe personal injuries, shock and injury to her nervous system, extreme pain and suffering, mental anguish, loss of capacity for the

6. *Id.*

7. *Id.* When notified of the assault, Scott reported the incident to Gaboriault on June 16 and 17. The opinion is unclear as to whether Gaboriault ever reported the incident. It is also noted that following the assault Charlesgate continued to employ Olowoporoku. *Id.*

8. *Id.*

9. *Id.* The complaint also noted that the resident had been given at least three bed baths and one shower at Charlesgate in between the time of the assault and the time the rape kit was administered. *Id.*

10. *Id.* at 1001. One count of the complaint made a claim of assault and battery against Olowoporoku. *Id.*

11. *Id.* The court stated:

General Laws 1956 § 23-17.8-2 provides, in pertinent part, that: “(a) Any physician, medical intern, registered nurse, licensed practical nurse, nurse’s aide, orderly, certified nursing assistant . . . or any person, within the scope of their employment at a facility or in their professional capacity, who has knowledge of or reasonable cause to believe that a patient or resident in a facility has been abused, mistreated, or neglected shall make, within twenty-four (24) hours or by the end of the next business day, a telephone report to the director of the department of health or his or her designee for those incidents involving health care facilities.”

Id. at n.4.

820 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:818

enjoyment of life, humiliation, embarrassment, [and] severe emotional distress.”¹²

Once notified of the complaint against Charlesgate, the JUA conducted an investigation to determine whether it had a duty to defend Charlesgate in the pending matter.¹³ Upon investigation, the JUA concluded that no duty existed to defend Charlesgate against this particular suit, and that according to their policy, Charlesgate was not entitled to either HPL or CGL insurance coverage.¹⁴ The JUA decided that “the alleged sexual assault did not constitute a ‘medical incident’ within the ambit of HPL coverage, and . . . the alleged sexual assault ‘cannot be construed as an accident under any definition’ and therefore is not an ‘occurrence’ within the meaning of the CGL insurance coverage.”¹⁵

Upon this decision, the JUA filed an action in Superior Court seeking a declaration stating that it had no obligation to defend Charlesgate against the pending allegations.¹⁶ Charlesgate responded with a counterclaim seeking a declaratory judgment that the JUA had “a duty to defend each of the Charlesgate defendants” and also sought damages for the JUA’s alleged breach of contract.¹⁷ To follow up the JUA filed a motion for summary judgment in January 2013 and Charlesgate responded in February 2013 with an objection as well as its own cross-motion for summary judgment requesting the declaratory judgment from the court.¹⁸ In May 2013 the Superior Court denied the JUA’s motion for summary judgment and subsequently granted Charlesgate’s cross-motion for summary judgment.¹⁹ The court held that the JUA did owe a duty to defend Charlesgate and its defendants against the allegations.²⁰

ANALYSIS AND HOLDING

Upon review of the Superior Court order, the Supreme Court determined that it was most appropriate to interpret the terms of

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 1001, 1002.

19. *Id.* at 1002.

20. *Id.*

the disputed insurance policy according the general rules that govern the construction of contracts.²¹ Essentially, the court would only consider the literal language of the policy unless they found any ambiguous language, in which case they would only apply the ordinary meaning to the ambiguous term.²² Furthermore, the court decided that when it found an ambiguous term in the policy, it would interpret that term in favor of the insured and against the insurer.²³ Once the court interpreted the literal meaning of the policy, it applied the “pleadings test” to determine whether the JUA owed Charlesgate a duty to defend it in the contested suit.²⁴ Under the “pleadings test,” an insurer has “an unequivocal duty to defend” an insured party when “a complaint contains a statement of facts which bring the case within or potentially within the risk coverage of the policy.”²⁵

The literal language of JUA’s insurance policy is the central question in this suit.²⁶ On appeal, the JUA argued that Charlesgate was not entitled to the CGL coverage included in the policy because the sexual assault complained of by the estate did “not constitute an ‘occurrence,’ which is defined in the policy as an ‘accident.’”²⁷ On the other hand, Charlesgate argued that the negligence claims against them in the suit did in fact constitute an “occurrence” under the policy’s guidelines, and they are therefore entitled to coverage by the JUA’s policy.²⁸ It is then up to the court to determine if the language purported in the policy does in fact apply to the negligence allegations set forth in the complaint against Charlesgate.

The court found that because the complaint only contained

21. *Id.*

22. *Id.*

23. *Id.* at 1003.

24. *Id.* at 1004.

25. *Id.* (quoting *The Employers’ Fire Insurance Co. v. Beals*, 103 R.I. 623, 632, 240 A.2d 397, 403 (1968)). In Rhode Island, “a liability insurer’s duty to defend is predicated not upon information in its possession which indicates or even proves non-coverage, but instead upon the allegations in the complaint filed against the insured.” *The Employers’ Fire Insurance Co. v. Beals*, 103 R.I. 623, 632, 240 A.2d 397, 403 (1968). Essentially, the insurer has a duty to defend the insured when the facts alleged in the complaint are within the scope of the insurance policy. See *id.*

26. See *Charlesgate Nursing Ctr.*, 115 A.3d at 1003.

27. *Id.*

28. *Id.*

allegations of negligence against Charlesgate, the court would not consider any allegations of intentional or sexual assault in the matter.²⁹ In order to determine whether the JUA owed a duty to defend Charlesgate, the court endeavored to evaluate the precise and literal definitions of the terms essential to the JUA's insurance policy.³⁰ The court concentrated on the clause in the policy that offers coverage to Charlesgate "only for the risks of 'bodily injury' or 'property damage' that are caused by an 'occurrence.'"³¹ The court was thus tasked with determining if "the facts alleged in the estate's complaint constitute[d] an 'occurrence' to which CGL coverage potentially applies."³² The JUA's policy defined "occurrence" to mean an "accident, including continuous or repeated exposure to substantially the same general harmful conditions," but failed to define exactly what the policy meant by "accident."³³ The court acknowledged that it had to define the ambiguous term "accident" in order to determine if the JUA had a duty to defend Charlesgate under the policy.

The court first referred to Black's Law Dictionary to determine the ordinary definition of "accident" and found the term to mean an "unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated."³⁴ The court further found that this definition of "accident" should be interpreted from the viewpoint of the insured, rather than from the viewpoint of the insurer.³⁵ Therefore, the court held that the events alleged in the complaint qualified as unexpected and unforeseen to Charlesgate, because the alleged sexual assault was not within the usual course of events that generally took place between residents and employees at the nursing center.³⁶ Upon the determination of this definition, the JUA attempted to argue that because the sexual assault itself was an intentional act, the facts alleged in the complaint did not amount to an accident that would be covered by

29. *Id.* at 1004.

30. *Id.*

31. *Id.*

32. *Id.* at 1005.

33. *Id.*

34. *Id.* (quoting Black's Law Dictionary 1248 (10th ed. 2014)).

35. *Id.*

36. *Id.*

the policy.³⁷ The court, however, found that allegations against Charlesgate qualified as an accident because the complaint alleged the count of sexual assault (the intentional act) against the individual defendant Olowoporoku, and not against Charlesgate.³⁸ Ultimately, the court opined that the particular language expressed in the policy should be interpreted according to “the intent expressed by the language of the contract,” rather than by the intent of the insurer and, therefore, should be read more broadly than the JUA initially suggested.³⁹ The court held that under a broader reading of the policy, the JUA did have a duty to defend Charlesgate against the claims made in the estate’s complaint.

COMMENTARY

The Rhode Island Supreme Court interpreted this particular insurance policy in light of the fact that Charlesgate was not defending against claims of intentional sexual assault, but rather, was only facing charges of negligence.⁴⁰ The JUA favored a very narrow interpretation of their policy, insisting that the facts alleged in the complaint did not constitute an accident, but only an intentional act that should not be covered by their policy.⁴¹

The JUA relied on a number of Rhode Island cases attempting to argue that, in the past, insurance agencies were not obligated to insure against claims of intentional sexual assault.⁴² The JUA, however, failed to recognize that in both cases prior, the insured party had personally and directly committed the intentional sexual assault against the complainant,⁴³ whereas Charlesgate did not directly commit the sexual assault, but is only defending against allegations of negligence.⁴⁴

The court in this case interpreted the intentions of the policy more broadly than the JUA would have liked.⁴⁵ The court

37. *Id.*

38. *See id.* at 1006.

39. *Id.* at 1007.

40. *Id.* at 1004.

41. *Id.* at 1005.

42. *Id.*

43. *Id.* at 1006.

44. *Id.* at 1004.

45. *See id.* at 1007.

determined the most basic and ordinary meaning for the terms in question and applied that meaning to the facts alleged in the complaint.⁴⁶ Charlesgate was not directly responsible for the assault, but rather the sexual assault can easily be interpreted as an event or occurrence that was “neither expected nor intended” by the nursing center and is not something that happens in the “usual course of events.”⁴⁷ Therefore, because Charlesgate’s alleged negligence was not intentional, but purely circumstantial, the claims of negligence appropriately fit within the coverage of JUA’s insurance policy.

This entire opinion hinged on the fact that the JUA was not specific enough with the terms and conditions in their policy. Had the JUA simply defined what an “accident” was and constructed its policy in accordance with that definition, it very well could have avoided litigation altogether. Furthermore, a more specific policy could have resulted in a different outcome since the court would have had to do more than just apply plain legal language. If the JUA had defined the terms “accident” and “occurrence” according to their objectives, the court would have been left to interpret the policy in a way the JUA had preferred for it to be read. A specific contract ultimately gives a court less interpretive discretion regarding the terms in question.

This case may be a warning to insurance companies going forward. The court’s broad reading of the JUA’s policy should alert other insurance companies that courts are more inclined to interpret contracts in a light more favorable to the insured parties.⁴⁸ The court’s decision here should warn insurance companies, in some sense, to be more careful and more specific when constructing and enforcing coverage policies in order to avoid liability in cases where accidents are concerned. This decision shows that Rhode Island courts are more inclined to interpret insurance policies against the insurer and going forward, insurance companies should be very wary of the terms and definitions they do or do not include in their policies.⁴⁹ A contract’s specificity could ultimately relieve an insurer of their duty to defend certain clients in certain instances.

46. *Id.* at 1005.

47. *See id.* (quoting Black’s Law Dictionary 1248 (10th ed. 2014)).

48. *See id.* at 1003.

49. *See id.*

2016]

SURVEY SECTION

825

This decision may also put a heavier burden on companies and individuals who choose to be insured. If insurance companies have been put on notice and begin to clean up their policies, it will be the insured party's obligation to inspect their policies more closely than they may have prior. Of course, insured parties today do not sign policies without some kind of reasonable inspection. However, this case should put any insured party on notice that, in the event that a dispute arises, insurance companies may be more prepared to defend their policies with more directed language and specific conditions. As a result, this case may, as a whole, make both insured parties and insurers more accountable.

CONCLUSION

The Rhode Island Supreme Court held that the JUA had a duty to defend Charlesgate Nursing Center against the negligence allegations lodged against them in the estate's complaint. The court concluded that the terms "occurrence" and "accident" specified in the insurance policy applied to the negligence claims against Charlesgate, and therefore, under the "pleadings test" the JUA had an explicit duty to defend the Charlesgate Nursing Center against the estate's complaint.

Olivia Phetteplace

2015 RHODE ISLAND PUBLIC LAWS

2015 R.I. Pub. Laws ch. 44, 46. An Act Relating to Criminal Offenses – Threats and Extortion. This Act adds magistrates to the list of public officials against whom it is felonious to threaten with bodily harm or death.

2015 R.I. Pub. Laws ch. 98, 110. An Act Relating to Uniform Controlled Substances – Offenses and Penalties. This Act requires that a civil fine for possession of one ounce or less of marijuana be paid 30 days after the disposition of the case, a change from previous language that said “the offense.” The act further specifies that no record by a state agency or tribunal that includes personally identifiable information of possession of one ounce or less of marijuana, by adults or juveniles, be open to public inspection.

2015 R.I. Pub. Laws ch. 119, 153. An Act Relating to Courts and Civil Procedure – Post Conviction Remedy. This Act allows for someone convicted of a crime to file a petition requesting forensic DNA testing of evidence. The Act eliminated any requirement that the petitioner be incarcerated or imprisoned in order to file such a petition.

2015 R.I. Pub. Laws ch. 129, 151. An Act Relating to Labor and Labor Relations – Fair Employment Practices. This Act prohibits employers from refusing to make reasonable accommodations for employees or prospective employees if they have conditions related to pregnancy, childbirth, or related medical conditions, unless the employer can show that the accommodation would create an undue hardship to the employer’s business. An employer may not require their employees to take leave if the employer can make another reasonable accommodation related to the employee’s condition. An employer cannot prevent an employee or prospective employee from

2016]

SURVEY SECTION

827

opportunities if they are preventing it because of the pregnancy, childbirth, or a related medical condition. Employers must provide written notice to all of their employees regarding employees right to freedom from discrimination due to pregnancy, childbirth and related conditions. New, perspective and current employees should also be notified of their right to reasonable accommodations for conditions related to pregnancy, childbirth or related conditions. Any person violating the terms of this act or coercing others to do so would engage in an unlawful employment practice. This act does not compel employers to create new positions that they would not have created, unless they do so for other employees. Further, this Act does not compel employers to terminate or transfer any employee with more seniority or promote an unqualified person, unless they do so for other employees.

2015 R.I. Pub. Laws ch. 138, 148. An Act Relating to Criminal Offenses – Identity Theft Protection Act. This Act seeks to protect Rhode Island citizens from identity theft. Any state or municipal agency that stores or uses Rhode Island residents personal information must implement a risk-based information security program, containing reasonable security procedures and practices in line with other organizations of the same nature, purpose, size and scope. The agencies must protect Rhode Islander's personal information from any unauthorized access or disclosure, so that the information is confidential. Any information that is collected is required to be destroyed in an appropriate manner, once the information has been used for its intended purpose. If there is a disclosure of any Rhode Island resident's personal information to a nonaffiliated third party there must be a written contract with the party that requires the third party maintain the information with reasonable security in line with other organizations of the same nature, purpose, size and scope. The third party must also destroy the information after it has been used for the purpose for which the organization acquired the information. If there is a breach of information collected by the agency or the information security system, which would threaten that information, the agency must provide notice, within forty five (45) calendar days, to any Rhode Islander who may have been affected. If there are more than five hundred (500) Rhode

828 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:826]

Island residents affected than the agency shall notify both the Rhode Island Attorney General and the major credit reporting agency of the timing, content and distribution of notices and the approximate number of those effected. Notification may be delayed if a law enforcement agency notifies the breaching agency without unreasonable delay that they believe that the notification will slow or negatively affect a criminal investigation. If there is a law enforcement agency delay, then law enforcement will notify the breaching agency when there is no more threat to an investigation, and the agency will make notification to Rhode Island residents as soon as practicable. The breaching agency will cooperate with any law enforcement agency. Any notification to Rhode Island residents who could or are victims of a breach must include a brief description of the breach and the number of those affected, the information that was involved in the breach, the date of the breach and its discovery, and a description of remedial measures that the agency will take, including contact information for credit reporting agencies, remediation service providers, and the Attorney General. The agency will also provide information on how to seek a security freeze, file a police report or the fees required for consumer reporting agencies. Any reckless violation of the chapter is a violation, each instance will have a penalty of not more than one hundred dollars (\$100) per record. Any knowing and willful violation of the chapter is a civil violation with a penalty of two hundred dollars (\$200) per record. The Attorney General, if there is suspicion of a violation, may bring an action against a person or business who has violated this section. Any agency, person or business will be in compliance with this section if the organization complies with this law or 15 U.S.C. § 6809(2). Any financial institution in compliance with the Federal Interagency Guidelines on Response Programs for Unauthorized Access to Customer Information and Customer Notice will be in compliance. Any health care industry organization or covered entity governed by HIPAA will be deemed in compliance.

2015 R.I. Pub. Laws ch. 160, 183. An Act Relating to Animal and Animal Husbandry – Regulation of Vicious Dogs. This Act requires that any dog seized by law enforcement be placed in the care of the Rhode Island Society for the Prevention of Cruelty to Animals (“RISPCA”). The RISPCA is required to use a

2016]

SURVEY SECTION

829

process that is timely to determine where to place the dog, whether with a rescue organization or adoptive home. The Act also requires that there be humane euthanization if the dog's medical or behavioral condition requires it or after reasonable time and effort, there is no appropriate placement for the dog. The Act further requires that the determination of whether a dog trained for fight is deemed vicious can be made only after the RISPCA assess the dog.

2015 R.I. Pub. Laws ch. 162, 178. An Act Relating to State Affairs and Government – Department of Children, Youth, and Families. This Act adds to the Children's Bill of Rights a nondiscrimination clause for any child under the supervision of the Rhode Island Department of Children Youth & Families.

2015 R.I. Pub. Laws ch. 174, 184. An Act Relating to Property – Condominium Ownership. This Act prohibits any landlord, owner or association from preventing or enforcing a restrictive covenant that prevents a tenant or unit owner displaying or posting on the entry to their dwelling any religious items displayed with sincere religious belief. The Act is not meant to prohibit items that threaten public health or safety, discriminate in housing according to the Rhode island Fair Housing Practices Act, or federal or state law. The Act does not apply to religious items located in any other part of the property not considered the entry way or displays that combined or individually total a size of twenty-five square inches. The Act does not authorize material changes to the unit entry, changing material, color or other alteration to the entry door or door frame unauthorized by the covenant. The property owner's association is permitted to remove items that violate a restrictive covenant that the act permits.

2015 R.I. Pub. Laws ch. 204, 224. An Act Relating to Education – Health and Safety of Pupils. This Act requires that all public schools providing sixth through twelfth grade educations provide on-site an opioid antagonist, a drug that binds to opioid receptors that prevent opioids effects, like Narcan or naloxone. Any trained "nurse-teacher" may administer to opioid antagonist in an emergency to a student or staff, whom the "nurse-teacher"

830 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:826]

suspects of being under the effects of an opioid overdose, whether there is a history or not. A “nurse-teacher” may receive training in the administration of an opioid antagonist by the department of health. School physicians shall make standing orders that create procedures to follow in the case of a suspected opioid overdose at the school. Those orders shall not require a specific “nurse-teacher” to administer the drug. The drugs will be kept in a quantity required by the department of elementary and secondary education and the department of health and shall be kept in an obvious place that is readily available, but secure. Those departments will create regulations and procedures for the health and safety of students. No “nurse-teacher” or school will be liable for civil damages for negligence or liable for criminal prosecution resulting from good faith administration of the opioid antagonist, but this does not apply to gross negligence or willful or wanton conduct. Further, no “nurse-teacher” will be subject to penalty or discipline for refusing training for opioid antagonist administration.

2015 R.I. Pub. Laws ch. 208, 232. An Act Relating to Education – Curriculum. The Act “strongly encourage[s]” all secondary public schools to offer music courses to their students. The Act further specifies that the curriculum should make an emphasis of and attempt to develop appreciation for creative expression.

2015 R.I. Pub. Laws ch. 210, 241. An Act Relating to Probate Practice and Procedure – Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. This Act adopted the “Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act” that is now in use in forty-four states. Rhode Island courts may communicate with other state courts regarding the proceedings of guardianship and protective orders, including scheduling, calendars, court records and other administrative matters without a record. The courts must allow all parties to participate in the communication and make a record of the communication, including the fact that the communication occurred and the identification of the participants, if it is not for administrative purposes. Courts may cooperate with one another in a guardianship or protective proceeding by holding evidentiary

hearings, evidentiary or witness orders, evaluation or other investigatory orders. The courts holding these hearings or making these orders must forward to the other court an official transcript of the proceedings. Outside courts may also issue orders to appear and may, after a hearing, issue an order for the production of medical, financial or other relevant information in compliance with federal and state law. Rhode Island courts may allow for testimony in a guardianship or protective proceeding to be taken in deposition or through video or audio of those in other states. Evidence taken by another state court and transmitted through electronic means, so that it is not an original writing, may be objected to because of the transmission. The Act enumerates factors to consider when determining if a respondent has significant connections to the state. The act allows for special circumstances to claim jurisdiction, and for specific reasons for jurisdiction. A court may decline jurisdiction, however, if there is a more appropriate forum or because of unjustifiable conduct. Notice of any proceeding is required by the act and must be granted to parents who would have been given notice in another state. If there are two or more concurrent proceedings, then if Rhode Island has jurisdiction under this act, the court may continue. If the Rhode Island court does not have jurisdiction, they are to stay the proceedings and communicate with the other court. Any party may petition to transfer proceedings to another state or to have their proceedings transferred to Rhode Island. Registration may be filed for recognition in Rhode Island from other states with regards to both guardianship and protective orders. After registration, those orders are to be respected in full by Rhode Island.

2015 R.I. Pub. Laws ch. 214, 235. An Act Relating to Motor and Other Vehicles – Comprehensive Community-Police Relationship Act of 2015. This Act amends pieces of the racial profile act. The Act allows law enforcement to ask for consent to search a pedestrian without reasonable suspicion or probable cause that the person is included in criminal activity. The Act also requires reasonable suspicion or probable cause for any search of juveniles and that police may not ask for consent to a search. The Act also required to document any search, even the search did not result in arrest, in a computer-aided dispatch

832 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 21:826

("CAD") or another police-generated report. The Act requires data collection be police departments to show any disparities in traffic stops regarding race, and that they report this information to the department of transportation or its designee. The information is to be used to address any inconsistencies that show disparities or impermissible profiling.