Countdown to 2021

60 Important Supreme Court Decisions for Rhode Island Civil Trial and Appellate Practitioners

2015 - 2020

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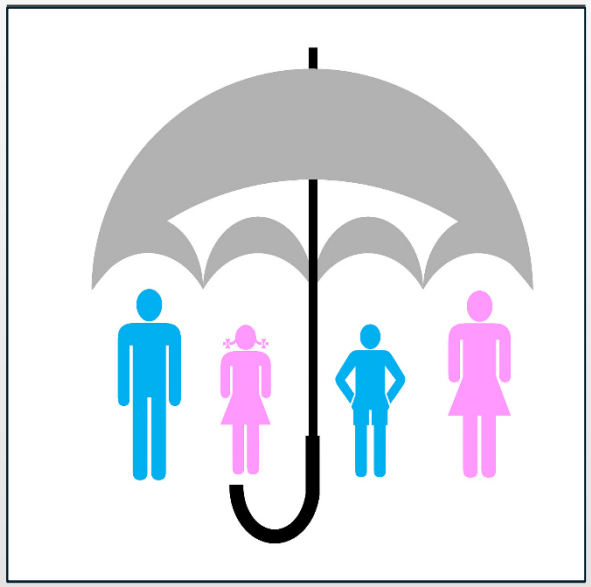
2019-2020 Term




DEADLINE


JUSTICE


We the Peo

Insurance

Frazier v. Liberty Mutual Ins. Co.,

229 A.3d 56 (R.I. 2020)

- Represents a departure from earlier precedent.
- **HELD**: A party can add an insurance company as a new party to a lawsuit during the one-year period provided by the Rhode Island's savings statute.

Frazier v. Liberty Mutual Ins. Co.,

229 A.3d 56 (R.I. 2020)

- **Nov. 11, 2013**: Plaintiff slipped and fell in the restroom of a Pizza Hut restaurant. The Pizza Hut was owned by Mita Enterprises, LLC.

- **Nov. 2, 2016**: Plaintiff filed suit against Mita. When Mita did not respond to the complaint, the Plaintiff moved for entry of default, which was granted. Mita later moved to vacate the default and to dismiss the case for insufficient service of process.

Frazier v. Liberty Mutual Ins. Co.,

229 A.3d 56 (R.I. 2020)

- **Aug. 4, 2017**: Court granted Mita's motion to vacate the default and its motion to dismiss for insufficient process.

Meanwhile:

- **July 31, 2017**: Plaintiff filed a second complaint against Mita. Service of process was returned unserved and the Plaintiff moved to substitute Liberty Mutual as a defendant.

Frazier v. Liberty Mutual Ins. Co.,
229 A.3d 56 (R.I. 2020)

- Liberty Mutual objected, arguing that the statute of limitations barred Plaintiff's claim against it.

- Liberty Mutual moved for summary judgment on the basis of the statute of limitations and the Court agreed and entered summary judgment in favor of Liberty Mutual.

Frazier v. Liberty Mutual Ins. Co.,
229 A.3d 56 (R.I. 2020)

- On appeal, the Court reversed.

- The question on appeal was whether the savings statute, R.I. Gen. Laws § 9-1-22, preserved Plaintiff's claim against Liberty Mutual for an additional year.

Frazier v. Liberty Mutual Ins. Co.,

229 A.3d 56 (R.I. 2020)

- R.I. Gen. Laws § 9-1-22: "If an action is timely commenced and is terminated in any manner other than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same claim within one year after the termination."

Frazier v. Liberty Mutual Ins. Co.,
229 A.3d 56 (R.I. 2020)

- *Luft v. Factory Mut. Liability Ins. Co. of America*, 155 A. 526 (1931):

  "There is no merit in the plaintiffs' further contention that they may prosecute their suits under [the savings statute], which permits the bringing of a new suit within one year if the original action was for any cause abated. *That statute is not applicable in the case of a defendant which was a stranger to the original action*." (emphasis added).

Frazier v. Liberty Mutual Ins. Co.,
229 A.3d 56 (R.I. 2020)

- Is a defendant insurance company a stranger to an original action brought against its insured?
- In *Luft,* the Supreme Court held that it was.
- But, in *Frazier*, the Supreme Court held otherwise, overruling *Luft*.

Frazier v. Liberty Mutual Ins. Co.,
229 A.3d 56 (R.I. 2020)

- "[M]odern society and evolving jurisprudence present a different view of whether an insurer that makes an appearance on behalf of its insured, even specially to contest jurisdiction over the insured, is a stranger to an original action against its insured. It is our opinion that, because an insurance company and its insured are sufficiently linked, an insurance company is not, under these circumstances, a stranger to the original action against its insured."

Frazier v. Liberty Mutual Ins. Co.,
229 A.3d 56 (R.I. 2020)

- “In today’s world, insurance companies open files on reported claims and begin an investigation promptly. In this case, it cannot be disputed that Liberty Mutual was aware of the lawsuit, because it dispatched lawyers to ask the court to dismiss the first action on grounds of inadequate service of process upon its insured.”

Frazier v. Liberty Mutual Ins. Co.,
229 A.3d 56 (R.I. 2020)

- **DISSENT**: Indeglia: "I disagree with the contention that we should depart from longstanding precedent and disregard the principles of *stare decisis*."

- The Court has more recently reaffirmed *Luft* on other grounds. "In my opinion, this Court should make its 'concerted effort to adhere to existing legal precedent,' and apply the meaning of the term 'stranger' as previously set out in our jurisprudence."

Employment Law
Rhode Island's
Whistleblower Protection Act

Crenshaw v. State,
227 A.3d 67 (R.I. 2020)

- Issue of first impression
- **HELD**: The protections of the Rhode Island Whistleblowers' Protection Act only apply "to activities that occurred while the employee was still employed by the defendant employer or one in close nexus with it."
- Plaintiff had been terminated by the Southborough Police Department because he blew the whistle against the department.

Crenshaw v. State,
227 A.3d 67 (R.I. 2020)

- Plaintiff subsequently was hired by CCRI as a security officer.
- CCRI terminated him when he failed to receive a waiver from the Rhode Island Municipal Training Academy, a prerequisite for his position.
- Plaintiff claimed that a CCRI officer and the director of the Training Academy retaliated against him for whistleblowing against his previous police department.

Crenshaw v. State,
227 A.3d 67 (R.I. 2020)

- The trial court dismissed the complaint and the Supreme Court upheld that dismissal on appeal.
- RIWPA only protects employees that claim retaliation against the employer against whom they blew the whistle.

Crenshaw v. State,
227 A.3d 67 (R.I. 2020)

- **HELD**: The discovery rule did not operate to toll the statute of limitations for Plaintiff's § 1983 claim.

- Plaintiff sought leave to amend his complaint to allege a § 1983 claim. He alleged that the statute of limitations did not begin to accrue until he learned of the wrongdoing of the two officers who submitted information related to Plaintiff's request for a waiver of the Training Academy requirement.

Crenshaw v. State,
227 A.3d 67 (R.I. 2020)

- The Court, however, observed that even if Plaintiff was not aware of the wrongful conduct, he was aware of his injury when he was informed that the Training Academy had denied his request for a waiver.

- Thus, the discovery rule did not apply.

Statute of Limitations/ Discovery Rule

Polanco v. Lombardi,

231 A.3d 139 (R.I. 2020)

- **HELD:** The tolling of a statute of limitations based on the discovery rule should occur only in certain narrowly defined factual situations.

- The Court has applied it to medical malpractice actions, drug product liability actions, and improvements to real property. But, it has never held that the discovery rule applies to tort claims such as negligence claims arising out of an allegedly wrongful arrest.

Polanco v. Lombardi,
231 A.3d 139 (R.I. 2020)

- Case represents another example of the Court's reluctance to extend the discovery rule beyond certain narrowly identified claims.

- *See also Boudreau v. Automatic Temperature Controls, Inc.*, 212 A.2d 594 (R.I. 2019).

Polanco v. Lombardi,
231 A.3d 139 (R.I. 2020)

- **HELD**: The statute of limitations was not tolled based on any fraudulent concealment because the evidence that Plaintiffs pointed to did not rise to the level of an actual misrepresentation, a necessary element of a fraudulent concealment claim.

Polanco v. Lombardi,
231 A.3d 139 (R.I. 2020)

- R.I. Gen. Laws § 9-1-20:

  If any person, liable to an action by another, shall fraudulently, *by actual misrepresentation*, conceal from him or her the existence of the cause of action, the cause of action shall be deemed to accrue against the person so liable at the time when the person entitled to sue thereon shall first discovery its existence. (emphasis added).

Polanco v. Lombardi,
231 A.3d 139 (R.I. 2020)

- To prove that a fraudulent concealment has taken place, “it is the plaintiff’s burden to show (1) that the defendant made an actual misrepresentation of fact; and (2) that, in making such misrepresentation, the defendant fraudulently concealed the existence of the plaintiff’s causes of action.”

Polanco v. Lombardi,

231 A.3d 139 (R.I. 2020)

- Mere silence or inaction on the part of the defendant does not constitute actual misrepresentation in this context.
- Failure to file a police report (nothing more than silence or inaction) does not rise to the level of fraudulent concealment.

Polanco v. Lombardi,

231 A.3d 139 (R.I. 2020)

- **HELD**: Equitable tolling also was not available to Plaintiffs because they were aware of their injury before the running of the statute of limitations.

Polanco v. Lombardi,
231 A.3d 139 (R.I. 2020)

- Equitable tolling is an exception to the general statute of limitations based on principals of equity and fairness.

- Black's Law Dictionary:
  The doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired, in which case the statute is suspended or tolled until the plaintiff discovers the injury.

Polanco v. Lombardi,
231 A.3d 139 (R.I. 2020)

- The prerequisites to extension of the statute of limitations based on equitable tolling were not met.

- Plaintiffs could not demonstrate that they were not able to discovery their injury despite diligent efforts or that extraordinary circumstances prevented them from complying with the deadline despite using reasonable diligence.

Polanco v. Lombardi,
231 A.3d 139 (R.I. 2020)

- **DISSENT**: Flaherty: Believes this case presents the highly unusual circumstances where equity demands that the statute of limitations be tolled.

- "This is an extraordinary case. If equity is to mean anything at all, its principles should be applicable in circumstances such as these."

Personal Jurisdiction

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- **HELD**: Personal jurisdiction did not exist over a bank incorporated and based in Texas because it did not have sufficient affiliations with Rhode Island to consider the bank at home in Rhode Island and it did not purposefully avail itself of Rhode Island law.

- Personal jurisdiction also did not exist over the plaintiff's client who was a resident of Florida because litigation in Rhode Island would have offended traditional notions of fair play and substantial justice.

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- Plaintiff: Resident of Rhode Island
- Defendant Baird: Resident of Florida
- Defendant USAA Bank: Texas

- Dispute over USAA Bank's rescission of payments, at the direction of Baird, that were directed to the Plaintiff's bank accounts in Rhode Island.

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- **Jurisdiction over USAA Bank**

  - **General Jurisdiction**: A court has general jurisdiction over a corporation in the state in which it is incorporated, where it has its principal place of business, and where the corporation's affiliations with the state are so continuous and systematic as to render it essentially at home in the forum state.

Daimler AG v. Bauman, 571 U.S. 117 (2014).

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- **Jurisdiction over USAA Bank**

  - USAA Bank was incorporated in Texas and had its corporate headquarters in Texas.
  - Only question was whether USAA Bank was “at home” in RI.
  - Plaintiff argued that USAA Bank’s direct deposit and online banking services as well as its advertising in RI made it “at home” in RI.

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- **Jurisdiction over USAA Bank**
  - Mere advertising and online banking options in the state do not rise to the level of being “essentially at home” here.
  - The level of affiliation necessary to make a corporation “at home” in RI must be comparable to that of a principal place of business or incorporation in order to render the corporation “essentially at home.”

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- **Jurisdiction over USAA Bank**

  - **Specific Jurisdiction**: Two-step inquiry:

    1. Are there sufficient minimum contacts within the forum state;

    2. Would litigation in the forum state "offend traditional notions of fair play and substantial justice."

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- **<u>Jurisdiction over USAA Bank</u>**
  - "A party makes a successful prima facie showing of specific jurisdiction over a defendant where 'the claim sufficiently ***relates to*** or ***arises from*** any of a defendant's purposeful contacts with the forum.'" (emphasis added)
  - The court looks to the quality and quantity of the contacts.

St. Onge v. USAA Fed. Sav. Bank,
219 A.3d 1278 (R.I. 2020)

- **<u>Jurisdiction over USAA Bank</u>**
  - "In order for a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum state."

    Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 1781 (2017).

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- **<u>Jurisdiction over USAA Bank</u>**
  - Plaintiffs' allegation was that USAA Bank became subject to personal jurisdiction in Rhode Island when, at Baird's direction, it rescinded credit card payments made to Plaintiff.
  - Court concluded that USAA Bank's actions were on behalf of Baird and happened to affect Plaintiff in RI because Plaintiff happened to be a RI resident.

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- **Jurisdiction over USAA Bank**
  - This, however, was insufficient to establish specific jurisdiction over USAA Bank.
  - The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- **Jurisdiction over Baird**
  - Only specific jurisdiction was alleged over Baird.
  - Trial court concluded that there were sufficient facts to make out a prima facie case of jurisdiction based on Baird's contacts with Rhode Island.

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- **Jurisdiction over Baird**
  - Plaintiff took issue with trial court's conclusion that exercising jurisdiction in RI would offend traditional notions of fair play and substantial justice.
  - On appeal, the Court applied the Gestalt factors and affirmed.

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- **Jurisdiction over Baird**
  - Burden on Baird: Baird had significant health issues, including hospitalizations and history of mental health issues.
  - RI's interest: RI has an interest in adjudicating a dispute about a check that was dishonored in a RI account.

St. Onge v. USAA Fed. Sav. Bank,

219 A.3d 1278 (R.I. 2020)

- **Jurisdiction over Baird**
  - Plaintiff's interest: Although Plaintiff was a resident of RI, the majority of what transpired occurred in Florida.
  - Shared interests of the states: Florida has an interest in this case because the majority of the transaction between the parties occurred there.
  - No jurisdiction over Baird in RI.

Attorneys

Vincente v. Pinto's Auto & Truck Repair, LLC,

230 A.3d 588 (R.I. 2020)

- Case falls into the category of what the Supreme Court wants attorneys and trial judges to know.

- Question was whether an expert witness was required to support the negligence claim plaintiff sought to maintain.

Vincente v. Pinto's Auto & Truck Repair, LLC,

230 A.3d 588 (R.I. 2020)

- In a supplemental statement submitted to the Court, plaintiff's counsel acknowledged that he was "guilty" of "bluffing about expert witnesses" and that such practice was the norm in Rhode Island.

Vincente v. Pinto's Auto & Truck Repair, LLC,

230 A.3d 588 (R.I. 2020)

- "Although the word 'bluffing' may be open to some interpretation, we read it to involve, at a minimum, a lack of candor to the court and opposing counsel. We reject the proposition that it is a standard practice among Rhode Island attorneys *and instruct our trial judges to root out such improper conduct whenever possible*." (emphasis added).

Constitutional Law

K&W Automotive, LLC v. Town of Barrington,

224 A.3d 833 (R.I. 2020)

- **Held**: Town ordinance that restricted the sale of flavored tobacco and raised the minimum age for the purchase of tobacco products was unconstitutional.

- The Home Rule Amendment (enacted in 1951) granted to municipalities "the right to self government in all local matters."
- The Town lacked authority under its Home Rule Charter to enact the tobacco ordinance because it addresses a matter of statewide concern.

K&W Automotive, LLC v. Town of Barrington,

224 A.3d 833 (R.I. 2020)

- Is regulation of tobacco sales a local concern?
  - Uniform regulation is desirable, if not necessary.
  - Tobacco regulation has traditionally fallen within the purview of the state.
  - Potential impact of municipalities across the state enacting similar ordinances would be significant.

K&W Automotive, LLC v. Town of Barrington,

224 A.3d 833 (R.I. 2020)

- “Although the Tobacco Ordinance was enacted to protect public health and safety, our review of the three O’Neil variables leads us to conclude that the Tobacco Ordinance constitutes legislation concerning a matter of statewide concern and that it, therefore, infringes upon the power of the state.”

Federal Hill Capital, LLC v. City of Providence,

227 A.3d 980 (R.I. 2020)

- **HELD**: College students are not a suspect class. Living with whomever one pleases is not a fundamental right.

- Therefore, an amendment to a zoning ordinance which restricts the number of college students who may live together in single-family homes in certain residential areas in Providence did not violate the constitutional rights of owners of property or of college students who rent those properties.

Federal Hill Capital, LLC v. City of Providence,

227 A.3d 980 (R.I. 2020)

- Amendment was in response to a number of complaints from City residents about noise, crowding, public drunkenness, parking problems, increased crime, etc. in the Mt. Pleasant/Elmhurst area.

- Amendment provided that a single-family dwelling, that is not owner occupied, shall not be occupied by more than 3 college students.

Federal Hill Capital, LLC v. City of Providence,

227 A.3d 980 (R.I. 2020)

- Competing interests
  - **Longtime residents** deserve quiet and peaceful neighborhoods in which to live and raise their families.
  - **Investors** are entitled to see a reasonable return on their capital and believe that, when they improve a home to make it lease-ready, they should not be punished for doing so.
  - **Students** often pursue the opportunity to further their education while residing with friends off campus.

Federal Hill Capital, LLC v. City of Providence,

227 A.3d 980 (R.I. 2020)

- Level of constitutional review
  - Depends on whether college students are a suspect class and on whether a fundamental right is at issue.
  - Strict scrutiny or rational basis review

Federal Hill Capital, LLC v. City of Providence,

227 A.3d 980 (R.I. 2020)

- College students are not a suspect class
  - "A class is considered to be a suspect class only if it has been saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or regulated to such a position of political powerlessness as to command extraordinary protection."

Federal Hill Capital, LLC v. City of Providence,

227 A.3d 980 (R.I. 2020)

- Is it a fundamental right to reside with whomever one pleases, wherever one pleases?
  - Court found no convincing authority to support such a fundamental right.

Federal Hill Capital, LLC v. City of Providence,

227 A.3d 980 (R.I. 2020)

- Rational basis scrutiny
  - Need only be a rational basis between the challenged ordinance and a legitimate state interest.
  - Court concluded that the Plaintiff was unable to negate, beyond a reasonable doubt, every conceivable basis which might support the amendment to the zoning ordinance.

Unauthorized Practice of Law

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- Decision applies only to residential real estate transactions.
- Court repeatedly emphasized that all parties to a real estate transaction should be represented by licensed attorneys.
-

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- Title insurance companies and their agents do not engage in the unauthorized practice of law when they:

1. conduct a residential real estate closing;
2. draft a residency affidavit; and
3. draft a limited durable power of attorney

so long as those activities are carried out in connection with the issuance of title insurance.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- It is the unauthorized practice of law to:

  1. conduct an examination of title for marketability or
  2. draft a deed *unless an attorney reviews it after it has been prepared*.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Real Estate Closings:**

- "[I]t is our opinion that the best course of action is to, for the most part, maintain the status quo of allowing *title insurance companies and their agents* to conduct closings *in conjunction with the issuance of a title insurance policy*." (emphasis added)

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Real Estate Closings:**

- Title insurance companies and their agents may conduct residential real estate closings so long as they limit their activities to functions such as identifying a document, directing a party where to sign, and delivering copies of the signed documents after execution.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Real Estate Closings:**

- Title insurance companies and their agents may not conduct residential real estate closings that involve the imparting of legal advice; involve representation, counsel or advocacy on behalf of another; or involve the rights, duties, obligations, liabilities or business relations of another.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **New Rules for Real Estate Closings:**

1. Before the closing begins, a non-attorney closing agent must communicate to the buyer and seller:

   a. the closing agent is not an attorney;
   b. he or she does not represent the buyer or the seller;
   c. he or she cannot and will not give legal advice;
   d. if the buyer or seller has a legal question, the buyer or seller should suspend the closing and seek counsel from an attorney.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **New Rules for Real Estate Closings:**

2. The closing agent must:

   a. present a written notice to the buyer and seller that contains all of the foregoing warnings and
   b. require that the buyer and seller read the document.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **New Rules for Real Estate Closings:**

3. The closing agent must require that the buyer and seller sign a copy of the notice to acknowledge that the closing agent has given these warnings and that the buyer and seller understand them.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **New Rules for Real Estate Closings:**

4. The closing agent must sign the notice to acknowledge that he or she has orally explained the notice to the buyer and the seller.

4. The closing agent must retain the signed copy of the notice and give a copy to the buyer and seller.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Notice Form:**
  - It is the Supreme Court's hope that title insurance companies, their agents or DBR will design a notice form.
  - The notice form must be separate from other documents and cannot contain additional material.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Title Examination:**
  - Title insurance companies and their agents may conduct title examinations so long as an attorney engaged or employed by the title insurance company conducts the title examination.

3. .

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Title Examination:**
  - It is the unauthorized practice of law for a non-lawyer to conduct a title examination for marketability.
  - A title insurance company is not required to engage outside counsel to represent the buyer's interest, nor must the buyer do so.
  - The title may be examined by a licensed attorney engaged by the insurance company.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Drafting a Deed:**
  - It is the unauthorized practice of law for a non-lawyer to draft a deed.
  - It is in the public interest that a licensed attorney must either draft the deed himself or carefully review a deed that has been drafted by a non-attorney.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Drafting a Deed:**
  - A non-lawyer may draft a deed so long as it has been carefully reviewed by a licensed attorney.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Drafting a Residency Affidavit:**
  - Title insurance companies and their agents may draft residency affidavits on behalf of sellers in conjunction with providing title insurance.
  - If the seller has questions about his or her residency, the seller must consult an attorney.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Drafting a Residency Affidavit:**
  - It is the unauthorized practice of law for title insurance companies and their agents to give advice to a seller about his/her residency.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Drafting a Residency Affidavit:**
  - The title insurance company and its agent may not provide legal advice or answer a seller's question about his or her residency but must refer the seller to an attorney (which may be an attorney engaged by or employed by the title insurance company).

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Drafting a Durable Power of Attorney:**
  - Title insurance companies and their agents may draft durable powers of attorney when issuing title insurance.
  - So long as the durable power of attorney is limited to addressing the closing.

In re William E. Paplauskas, Jr., In re Daniel S. Balkun and Balkun Title & Closing, Inc., In re South Coast Title and Escrow, Inc.

228 A.3d 43 (R.I. 2020)

- **Drafting a Durable Power of Attorney:**
  - It is the unauthorized practice of law for title insurance companies and their agents to draft a durable power of attorney addressing anything other than a closing.
  - If a durable power of attorney goes further than addressing the closing, the drafter is engaged in the unauthorized practice of law.

2018-2019 Term


DEADLINE
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Electronic Filing

Richard v. Robinson,
209 A.3d 1198 (R.I. 2019)

- Legal malpractice case that proceeded to court-annexed arbitration.
- **Feb. 7, 2018**: Arbitration award in favor of D.
- **Feb. 15, 2018**: Plaintiff filed a timely rejection of the arbitration award (via the EFS) using the incorrect filing code.
- **Feb. 15, 2018**: Filing is rejected.

Richard v. Robinson,

209 A.3d 1198 (R.I. 2019)

- **Feb. 16 or 19, 2018**: P's counsel leaves voicemail message for Clerk's Office.
- **March 8, 2018**: Court conducts pretrial conference. P's counsel tells court P filed a rejection of the award but doesn't tell court it was rejected.
- **March 9, 2018**: Deadline for rejecting award.

Richard v. Robinson,

209 A.3d 1198 (R.I. 2019)

- **March 12, 2018:** D receives an automatic notice via email that plaintiff had failed to reject the arbitration award.

- **March 12-16 2018**: D moves to confirm the award in Superior Court and, upon receipt of the motion, P's counsel contacts the Clerk's Office to determine the correct code for filing a rejection of an arbitration award. P's counsel files using the correct code but it is rejected as untimely.

Richard v. Robinson,
209 A.3d 1198 (R.I. 2019)

- **March 16, 2018:** P files an Objection to Defendant's Acceptance of Arbitration Award and/or Plaintiff's Motion to Accept his Rejection of the Arbitrator's Award Out of Time Pursuant to Superior Court Rule 6(b).

- Court hears the motion and denies D's motion to confirm the arbitration award.

- D appeals.

Richard v. Robinson,
209 A.3d 1198 (R.I. 2019)

- On appeal, the Supreme Court observed that there are 17 grounds for rejecting an electronically submitted document in a civil case. (R.I. R. Civ. P. 1(b)(4)).

- However, there only 2 grounds for rejecting an electronically submitted document in an arbitration matter. (R.I. R. Arbitration 1(f)(3)).

Richard v. Robinson,
209 A.3d 1198 (R.I. 2019)

- While the selection of an incorrect code for a filing in a general civil case *may* result in rejection of the filing, the Arbitration Rules do not authorize the Arbitration Office to reject a filing on that basis.

Richard v. Robinson,
209 A.3d 1198 (R.I. 2019)

- In addition, under the Electronic Filing Rules, when a filing has been rejected, the corrected filing – so long as promptly filed – will be deemed to have been filed on the initial filing date.

- The Rule does not require demonstration of excusable neglect.

Richard v. Robinson,
209 A.3d 1198 (R.I. 2019)

- **Electronic Filing Rule 5(c):**

  "A rejected filing shall be promptly corrected and resubmitted and shall be deemed to have been submitted and filed on the initial filing date for purposes of any statutory or rule-based deadline."

Richard v. Robinson,
209 A.3d 1198 (R.I. 2019)

- Justice Goldberg and Chief Justice Suttell dissented in part and concurred in part, largely to address their concern that the majority opinion had conflated the terms “filing” and “docketed.”

- In their view, while a clerical error that results in the rejection of an electronically filed document may affect whether the document is “docketed” it doesn’t change the fact that it has been “filed.”

Family Dollar Stores v. Araujo,
204 A.3d 1089 (R.I. 2019)

- **Aug. 16, 2016**: Superior Court issued a bench decision.
- **Aug. 16 – Sept. 7, 2016**: D's counsel filed a proposed order and judgment (via EFS).
- **Sept. 7, 2016**: P's counsel called the Court to see whether the order and judgment had entered. He was told it was still pending.

Family Dollar Stores v. Araujo,

204 A.3d 1089 (R.I. 2019)

- **Sept. 20, 2016**: Order and judgment enters.
- **Late Sept. – Early Oct. 2016**: P's counsel called the Court again to see whether the order and judgment had entered.
- **Oct. 19, 2016**: P's counsel emailed the clerk the same question.

Family Dollar Stores v. Araujo,

204 A.3d 1089 (R.I. 2019)

- **Oct. 31, 2016**: P's counsel emailed the clerk to see whether the order and judgment had entered and learns it entered on Sept. 20, 2016.

- **Nov. 3, 2016:** P's counsel files an emergency motion for a 30-day extension of time within which to file its notice of appeal on the basis of excusable neglect.

Family Dollar Stores v. Araujo,
204 A.3d 1089 (R.I. 2019)

- Plaintiff argued that although he had received numerous notifications through the EFS in the past, he did not receive notification when the order and judgment entered.

- The hearing justice granted the motion for a 30-day extension and noted that he himself was “not totally familiar and comfortable with the way our [EFS] deals with the orders and judgments.”

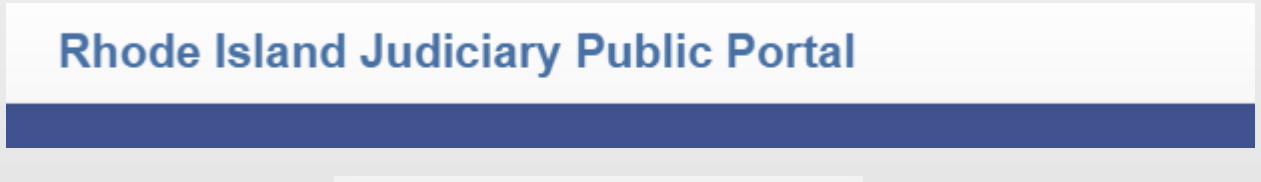
Family Dollar Stores v. Araujo,
204 A.3d 1089 (R.I. 2019)

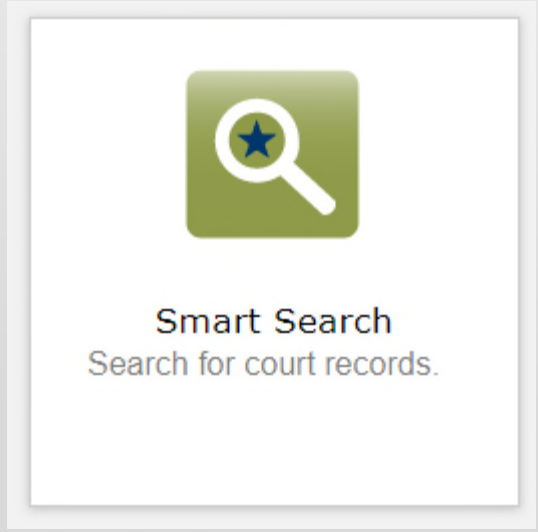
- Defendant appealed, relying on R.I. R. Civ. P. 77(d), which provides:

  "[i]mmediately upon the entry of an order or judgment the clerk shall make a note in the docket. Such notation is sufficient notice for all purposes for which notice of entry of an order is required by these rules."

Family Dollar Stores v. Araujo,

204 A.3d 1089 (R.I. 2019)





Family Dollar Stores v. Araujo,
204 A.3d 1089 (R.I. 2019)

- Supreme Court held that “under the circumstances of the instant case and bearing in mind that the electronic filing system was of recent vintage at the time in question, . . . the hearing justice did not abuse his discretion in holding that the delay was the result of excusable neglect.”

Family Dollar Stores v. Araujo,
204 A.3d 1089 (R.I. 2019)

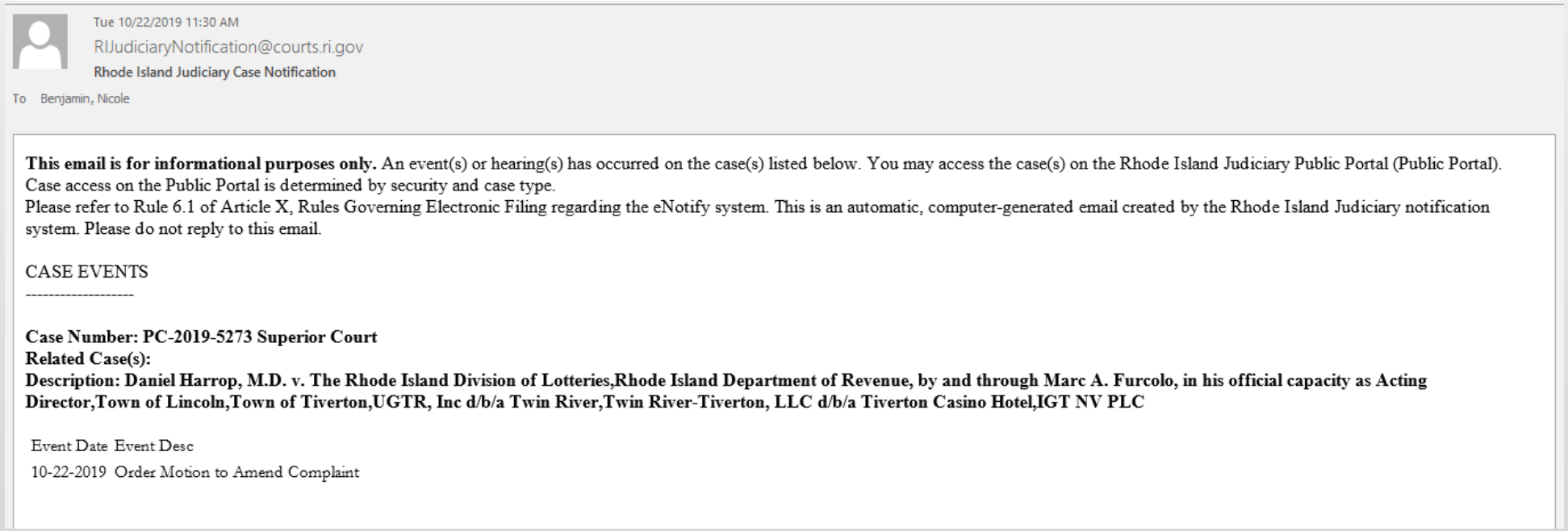
- “[I]n view of the plethora of information provided to litigants through the [EFS], now may well be the time for revisiting the provisions of Rule 77(d) of the Superior Court Rules of Civil Procedure, especially with respect to the giving of notice of the entry of an order or judgment, one of the most significant events in the travel of a case.”

Family Dollar Stores v. Araujo,

204 A.3d 1089 (R.I. 2019)

- While the rule has not yet changed, in practice notices are now given of the entry of orders and other activity in a case.

Family Dollar Stores v. Araujo,
204 A.3d 1089 (R.I. 2019)



Tue 10/22/2019 11:30 AM
RIJudiciaryNotification@courts.ri.gov
Rhode Island Judiciary Case Notification
To Benjamin, Nicole

This email is for informational purposes only. An event(s) or hearing(s) has occurred on the case(s) listed below. You may access the case(s) on the Rhode Island Judiciary Public Portal (Public Portal). Case access on the Public Portal is determined by security and case type.
Please refer to Rule 6.1 of Article X, Rules Governing Electronic Filing regarding the eNotify system. This is an automatic, computer-generated email created by the Rhode Island Judiciary notification system. Please do not reply to this email.

CASE EVENTS

Case Number: PC-2019-5273 Superior Court
Related Case(s):
Description: Daniel Harrop, M.D. v. The Rhode Island Division of Lotteries,Rhode Island Department of Revenue, by and through Marc A. Furcolo, in his official capacity as Acting Director,Town of Lincoln,Town of Tiverton,UGTR, Inc d/b/a Twin River,Twin River-Tiverton, LLC d/b/a Tiverton Casino Hotel,IGT NV PLC

Event Date	Event Desc
10-22-2019	Order Motion to Amend Complaint

Expert Witnesses

Sandy Point Farms, Inc. v. Sandy Point Village, LLC,

200 A.3d 659 (R.I. 2019)

- Supreme Court granted a petition for writ of certiorari to review an order denying a motion for a protective order concerning the deposition of a non-testifying expert witness.

- The Court quashed the Superior Court's order, thereby protecting the non-testifying expert from a deposition in which facts known to the non-testifying expert would be subject to disclosure.

Sandy Point Farms, Inc. v. Sandy Point Village, LLC,

200 A.3d 659 (R.I. 2019)

- Property dispute.
- **Peter M. Scotti**: P's Disclosed Expert Witness
- **Lawrence Rainey**: Assisted Scotti in the preparation of his appraisal report.

Sandy Point Farms, Inc. v. Sandy Point Village, LLC,

200 A.3d 659 (R.I. 2019)

Sandy Point Farms, Inc. v. Sandy Point Village, LLC,

200 A.3d 659 (R.I. 2019)

- As a general rule, non-testifying experts may not be deposed absent exceptional circumstances.
- Contrary to that rule, the Superior Court concluded that Rainey should be deposed because Scotti considered information presented by Rainey when forming his opinions.
- The Superior Court denied the motion for protective order.

Sandy Point Farms, Inc. v. Sandy Point Village, LLC,

200 A.3d 659 (R.I. 2019)

- On appeal, the Defendants argued that they were entitled to depose Rainey because the work he performed was exclusively within his cognizance.

- The Supreme Court concluded that “to find an exceptional circumstance for this conclusory purpose could broaden the rule significantly.”

Sandy Point Farms, Inc. v. Sandy Point Village, LLC,

200 A.3d 659 (R.I. 2019)

- Based on defendants' theory, "a party would be able to depose any person who contributed to an expert's work in any capacity because the basis of knowledge for that work would be exclusively within that person's awareness."

Depositions

Estate of Chen v. Ye,

208 A.3d 1168 (R.I. 2019)

- Court granted a petition for writ of certiorari to review a Superior Court order allowing a minor to answer written deposition questions rather than testify at an oral deposition.

- The Court quashed the order and remanded the case to the Superior Court so that the plaintiffs could conduct an oral deposition of the minor.

Estate of Chen v. Ye,

208 A.3d 1168 (R.I. 2019)

- The issue arose in the context of a wrongful death action brought by the estate of a minor who tragically drowned in a swimming pool while attending a party at the defendants' home.

- Plaintiff served a deposition notice seeking to depose the defendants' minor daughter.

Estate of Chen v. Ye,
208 A.3d 1168 (R.I. 2019)

- Defendants filed a motion to quash, arguing that the child had mental health problems and provided a letter from the child's therapist who stated the child was being treated for anxiety.

- The Defendants argued that that Rule 26(c) permits the court "for good cause shown" to enter an order to protect a person from discovery.

Estate of Chen v. Ye,

208 A.3d 1168 (R.I. 2019)

- The Supreme Court has never before defined “good cause” but, as it does with many rules, it looked to the federal courts for guidance.

- In doing so, the Court pointed to many cases detailing the advantages of an oral deposition, including the advantage of allowing cross-examination of an evasive, recalcitrant or hostile witness.

Estate of Chen v. Ye,

208 A.3d 1168 (R.I. 2019)

- By contrast, there was no evidence that the child had any life-threatening or other serious condition that would satisfy the good cause requirement under Rule 26(c).

Motions to Amend

Gannon v. City of Pawtucket,
200 A.3d 1074 (R.I. 2019)

- Rule 15 allows a party to move the court for leave to amend and provides that "leave shall be freely given when justice so requires."

- "That said, 'a number of reasons – such as undue delay, bad faith, undue prejudice to the opposing party, or, most relevant to this case, futility of the amendment – *may* nonetheless warrant the denial of a motion to amend.'" (emphasis added).

Gannon v. City of Pawtucket,

200 A.3d 1074 (R.I. 2019)

- The Rhode Island Supreme Court has not clearly defined whether the standard for demonstrating futility in opposing a motion for leave to amend is the same as the standard for a motion to dismiss.

Statute of Limitations
The “Discovery Rule”

Boudreau v. Automatic Temperature Controls, Inc.,

212 A.3d 594 (R.I. 2019)

- One of at least four cases addressing the “discovery rule” exception to the statute of limitations.

- Concerned claims brought under the Rhode Island Computer Crime Act and Software Fraud Act.

Boudreau v. Automatic Temperature Controls, Inc.,

212 A.3d 594 (R.I. 2019)

- "A cause of action accrues and the applicable statute of limitations begins to run at the time of the injury to the aggrieved party."

- The "Discovery Rule": When "the fact of the injury is unknown to the plaintiff when it occurs, the applicable statute of limitations will be tolled and will not begin to run until, in the exercise of reasonable diligence, the plaintiff should have discovered the injury or some injury causing wrongful conduct."

Boudreau v. Automatic Temperature Controls, Inc.,

212 A.3d 594 (R.I. 2019)

- Plaintiff was employed by ATC. Before terminating his employment, ATC installed a software program called “System Surveillance Pro” on Plaintiff’s work computer.

Boudreau v. Automatic Temperature Controls, Inc.,

212 A.3d 594 (R.I. 2019)

- The software captured intermittent screenshots of the content displayed on the plaintiff's computer screen, which were saved to the computer's hard drive and sent to a remote email address.


System Surveillance Pro (SSPro) v6.8 - [Snapshots taken between 5/2/2011 and 5/3/2011 28 screenshots]
File View Tools Help
Stop Monitoring
Home
Keystrokes
Websites
Chat Messages
Programs
Screenshots
Refresh Data
Settings
Help
Machine HOME_PC
User All Users
View From 5/2/2011
To 5/3/2011
Search Snapshot Titles
Snapshot Entries
Snapshot Timestamp
5/2/2011 06:16:34 PM
5/2/2011 06:17:40 PM
5/2/2011 06:26:25 PM
5/2/2011 06:27:19 PM
5/2/2011 06:27:41 PM
5/2/2011 06:31:54 PM
5/2/2011 06:32:59 PM
5/2/2011 06:34:24 PM
5/2/2011 06:35:25 PM
5/2/2011 06:36:06 PM
5/2/2011 06:37:44 PM
5/2/2011 10:22:57 PM
5/2/2011 10:23:34 PM
5/3/2011 12:50:28 PM
First
Previous
Play
Next
Last
Player Settings
Zoom In
Zoom Out
Fit Standard
Fit Screen
System Monitoring Active
Bath
HotKey Event
Solitaire
5/3/2011 12:50:28 PM

Boudreau v. Automatic Temperature Controls, Inc.,

212 A.3d 594 (R.I. 2019)

- Although Plaintiff was not aware that the software had been installed on his computer before he was terminated, after his termination, he filed for unemployment benefits.

- During his unemployment benefits hearing, ATC's president testified that he had installed the software on plaintiff's work computer and he explained how the software worked.

Boudreau v. Automatic Temperature Controls, Inc.,

212 A.3d 594 (R.I. 2019)

- Four years later, Plaintiff filed suit alleging claims under Rhode Island's Computer Crime Act and Software Fraud Act.

- The Plaintiff argued the SOL had been tolled because he was not aware that the software had been installed during his employment.

Boudreau v. Automatic Temperature Controls, Inc.,

212 A.3d 594 (R.I. 2019)

- While the Court implicitly acknowledged that the discovery rule could apply to claims brought under the Computer Crime Act and the Software Fraud Act, the Court held that Plaintiff knew of his alleged injury at the time of his unemployment hearing when ATC's president testified at length about the software.

- Court also rejected the continuing tort doctrine.

Raise-or-Waive

Boudreau v. Automatic Temperature Controls, Inc.,

212 A.3d 594 (R.I. 2019)

- Plaintiff asked the hearing justice to convert a motion to dismiss to a motion for summary judgment but the plaintiff waived his argument that the hearing justice erred by not granting him time for discovery before converting the motion.

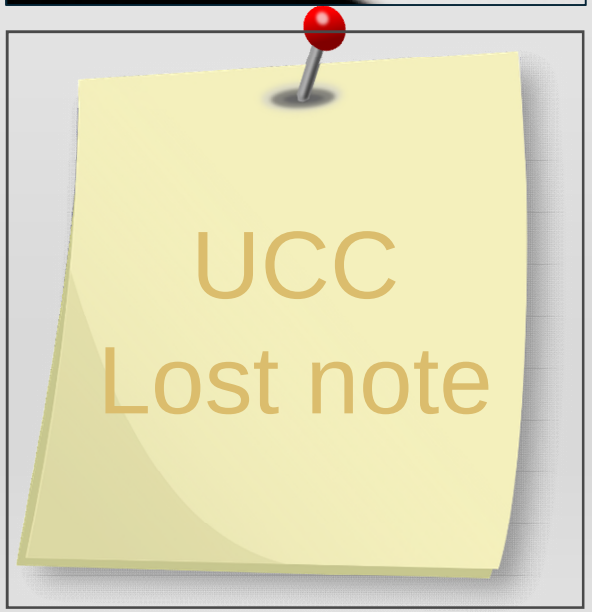
Boudreau v. Automatic Temperature Controls, Inc.,

212 A.3d 594 (R.I. 2019)

- To preserve that argument, the plaintiff should have first moved for a continuance or submitted an affidavit stating why he could not present facts in opposition to the motion in accordance with Rule 56(f).

2017-2018 Term


CONFIDENTIAL


UCC
Lost note

Attorneys' Fees

Arnold v. Arnold,
187 A.3d 299 (R.I. 2018)

- **Held**: The Uniform Declaratory Judgment Act permits the Court to "make such award of *costs* as may seem equitable and just" (emphasis added) but costs do not include attorneys' fees.

- "This Court has never once held that 'costs' under R.I. Gen. Laws § 9-30-10 include attorneys' fees."

Class Actions

Clifford v. Raimondo,
184 A.3d 673 (R.I. 2018)

- First decision of the RI Supreme Court to address the fairness of a settlement agreement in a class action.

- “While there are a number of factors a trial justice may use to decide whether a settlement is reasonable, the ultimate decision by the judge involves a balancing of the advantages and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations of the proffered settlement.”

Clifford v. Raimondo,
184 A.3d 673 (R.I. 2018)

- Nine factors used to evaluate the fairness of class action settlements:

1. The complexity, expense and likely duration of the litigation
2. The reaction of the class to the settlement
3. The stage of the proceedings and the amount of discovery completed
4. The risks of establishing liability
5. The risks of establishing damages

Clifford v. Raimondo,
184 A.3d 673 (R.I. 2018)

6. The risks of maintaining the class action through the trial
7. The ability of the defendants to withstand a greater judgment
8. The range of reasonableness of the settlement fund in light of the best possible recovery
9. The range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Clifford v. Raimondo,
184 A.3d 673 (R.I. 2018)

- A settlement following sufficient discovery and genuine arm's length negotiation is presumed fair.

Clifford v. Raimondo,
184 A.3d 673 (R.I. 2018)

- Court also addressed issues related to class certification.
- Courts may not conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

Motions to Dismiss

Goodrow v. Bank of America, N.A.,

184 A.3d 1121 (R.I. 2018)

- **Held**: In ruling on a motion to dismiss, the court may consider:
  - public documents, the authenticity of which are not disputed by the parties
  - documents central to plaintiff's claim, or
  - documents sufficiently referred to in the complaint.

Goodrow v. Bank of America, N.A.,

184 A.3d 1121 (R.I. 2018)

- Documents that constitute public records for purposes of this exception are those that the court may take judicial notice of and include judgments previously entered by the court that have the effect of res judicata, pleadings and answers to interrogatories.

Pontarelli v. RIDE,
176 A.3d 472 (R.I. 2018)

- **Held**: In ruling on a motion to dismiss, the court may consider "a document so intertwined with the complaint as to become part of it, even without appending the request thereto or incorporating it by reference therein."

- When "a complaint's factual allegations are expressly linked to – and admittedly dependent upon – a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss."

Pontarelli v. RIDE,
176 A.3d 472 (R.I. 2018)

- A complaint's mere mention or reference to documents does not cause them to be incorporated in the complaint.

Whistleblowers' Protection Act/ Internal Affairs Doctrine

Rein v. ESS Group, Inc.,

184 A.3d 695 (R.I. 2018)

- **Held**: Supreme Court adopted the internal affairs doctrine.

- The internal affairs doctrine provides that only one state – the state of incorporation – should have the authority to regulate a corporation's internal affairs.

Rein v. ESS Group, Inc.,

184 A.3d 695 (R.I. 2018)

- Plaintiff alleged that the defendants, Delaware corporations, violated the RI Whistleblowers' Protection Act.

- The defendants moved to dismiss on the grounds that the plaintiff had not identified a law that defendants had allegedly violated, as is necessary to make out a claim under the WPA.

Rein v. ESS Group, Inc.,

184 A.3d 695 (R.I. 2018)

- Plaintiff responded that the complaint had alleged that defendants' conduct violated the RI Business Corporations Act.
- Court held that under the internal affairs doctrine, Rhode Island was unauthorized to regulate the affairs of Delaware corporations, therefore, Plaintiffs' reliance on the BCA was insufficient.

Attorney Client Privilege

North Kingstown Sch. Comm. v. Wagner,

176 A.3d 1097 (R.I. 2018)

- **Held**: When attorneys testify either in person or by deposition, the party claiming privilege may assert a claim of privilege on a question-by-question basis.

- After the school committee's attorneys conducted an investigation, they were served with subpoenas compelling their testimony.

North Kingstown Sch. Comm. v. Wagner,

176 A.3d 1097 (R.I. 2018)

- The school committee moved to quash the subpoenas and the hearing justice granted the motion in part and denied the motion in part.
- On appeal, the Supreme Court held that the hearing justice had interpreted the attorney client privilege too broadly.
- Attorneys are not immune from discovery.

North Kingstown Sch. Comm. v. Wagner,

176 A.3d 1097 (R.I. 2018)

- The Court remanded the case to the Superior Court with instructions to “make an attorney-client privilege determination on a question-by-question basis, bearing in mind that the burden of persuasion rests upon the party seeking to assert the privilege.”

Uniform Commercial Code
Lost Note

SMS Financial XXV, LLC v. Corsetti,

186 A.3d 1060 (R.I. 2018)

- **Held**: As a matter of first impression, the transferee was not entitled to enforce a lost note because the note was in the possession of the lender, not the transferee, when it was lost.

SMS Financial XXV, LLC v. Corsetti,

186 A.3d 1060 (R.I. 2018)

- Sovereign Bank had loaned defendants $200,000.
- In exchange for the loan, defendants issued a promissory note to the bank.
- The bank lost the note.

SMS Financial XXV, LLC v. Corsetti,

186 A.3d 1060 (R.I. 2018)

- On June 23, 2011, the bank assigned its interest in the note to SMS and, because the bank had lost the note, it delivered to SMS an allonge and a lost note affidavit.
- Years later, SMS brought suit against defendants for breach of the terms of the note.
- Defendants claimed that SMS was not able to enforce or collect on the note because the note had been lost.

SMS Financial XXV, LLC v. Corsetti,

186 A.3d 1060 (R.I. 2018)

- Defendants argued that under § 6A-3-309 of the RI UCC, SMS was not entitled to enforce the note because SMS never had possession of the note and, therefore, had not been in possession of the note when it was lost.

SMS Financial XXV, LLC v. Corsetti,

186 A.3d 1060 (R.I. 2018)

- **§ 6A-3-309. Enforcement of lost, destroyed, or stolen instrument.**

  (a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

SMS Financial XXV, LLC v. Corsetti,

186 A.3d 1060 (R.I. 2018)

- The Supreme Court noted that some states have amended their codes to specify that a transferee of a lost instrument need only prove that its transferor was entitled to enforce, not that the transferee was in possession at the time the instrument was lost.

- RI is not among the states that have adopted such an amendment.

- Lesson: Don’t purchase a lost note in RI.

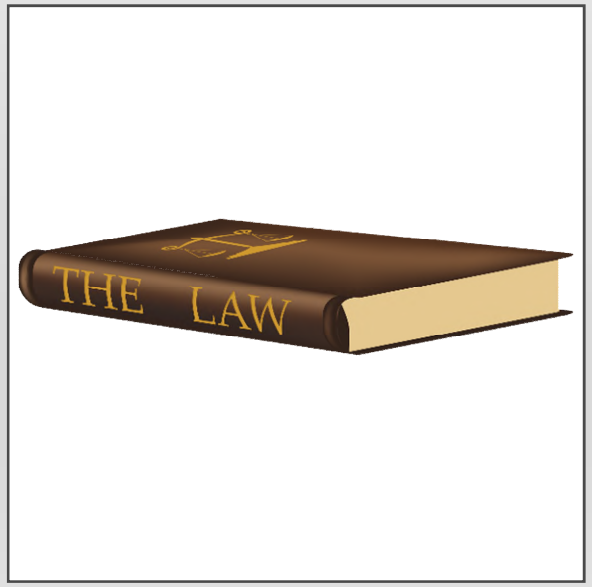
2016-2017 Term


CHECKLIST


JUSTICE


YOU'RE
HIRED


CONFIDENTIAL


THE LAW

Limited Scope Representation

Limited Scope Representation

- “Unbundling” of legal services.

- Allows an attorney and a client to agree to limit the scope of the attorney’s involvement, leaving responsibility for those other aspects of the case to the client to save the client money.

Limited Scope Representation

Frequently unbundled legal services include:

- Advising on court procedures and courtroom behavior
- Coaching on strategy or role playing
- Collaborative lawyering
- Conducting legal research
- Document review
- Drafting pleadings, briefs, declarations, or orders
- Drafting contracts and agreements
- Ghostwriting
- Making limited appearances
- Negotiating
- Online dispute resolution
- Organizing discovery materials
- Preparing exhibits
- Providing legal guidance or opinions

Source: https://www.americanbar.org/publications/gp_solo/2012/september_october/law_a_la_carte_case_unbundling_legal_services.html

Limited Scope Representation

- May 23, 2017: Supreme Court issued order provisionally amending Article V “Rules of Professional Conduct” to permit certain limited scope-representation services.

Limited Scope Representation

- **Invites comments from others**: Court adopts the limited scope-representation rules on a provisional basis "to encourage on-going assessment and commentary from interested persons."

- **Directs Chiefs to report**: Court directs Chief Judges of the Superior, Family, District and Workers' Compensation courts and the Traffic Tribunal to report on limited-scope representation in their respective courts by May 23, 2018.

Limited Scope Representation

- **Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer.**

  (d) “A lawyer may limit the scope of the representation ***if the limitation is reasonable under the circumstances*** and ***the client gives informed consent***.”

Limited Scope Representation

- **Must be documented in writing:**

  Rule 1.2 (d):
  "The client must provide knowing and informed consent as part of the ***written limited scope representation engagement or retainer agreement***."

Limited Scope Representation

Sample Limited Scope Representation Engagement Agreement attached as Exhibit B to Supreme Court's May 23, 2017 Order

Limited Scope Representation

- **Attorney/Client relationship will exist:**

  Rule 1.2 (d):
  "Upon entering into a written limited scope representation engagement or retainer agreement, an attorney/client relationship arises between the client and lawyer."

Limited Scope Representation

- **Rule 1.2(d)(1): Ghostwriters Can No Longer Be Ghosts**

- *For limited scope representation matters involving only the provision of drafting services, such as drafting a pleading, motion, or other written submission:*

  1. ***Drafter must sign**: The lawyer shall sign the document(s) and disclose thereon his or her identity and the nature and extent of the assistance that he or she is providing.*

Limited Scope Representation

2. ***Drafter's signature is not an entry of appearance**: The lawyer shall indicate on the written document that his or her signature does not constitute an entry of appearance or otherwise mean that the lawyer represents the client in the matter beyond assisting in the preparation of the document.*

Limited Scope Representation

3. ***Attorney/Client relationship will terminate automatically***: The attorney/client relationship between the client and the lawyer engaged to provide limited scope drafting services shall terminate in accordance with Rule 1.16(d) upon the filing of all documents(s) the lawyer was engaged to draft.

Limited Scope Representation

- **Rule 1.2(d)(2): Limited Appearances Necessary if Work Involves Court Proceeding and is More Than Drafting**

- *For limited scope representation matters involving court proceedings in connection with, in addition to, or independent of the provision of drafting services:*

  1. ***Lawyer Must File Entry of Limited Appearance**:* The lawyer must file an Entry of Limited Appearance.

Limited Scope Representation

2. ***Client Must File Pro Se Appearance:*** The client must file a pro se appearance before the lawyer files an Entry of Limited Appearance.

3. ***Contents of Limited Entry of Appearance***: Must state precisely the court event to which the limited appearance pertains.

4. ***Limited to One Court Event***: A lawyer may not file an Entry of Limited Appearance for more than one court event in a civil case without leave of court and written consent from the client.

Limited Scope Representation

5. ***Entry of Limited Appearance Not Permitted for Evidentiary Objections***: A lawyer may not enter a limited appearance for the sole purpose of making evidentiary objections.

6. ***Lawyer and Pro Se Cannot Both Argue***: A limited appearance shall not allow both a lawyer and a litigant to argue at the same court event.

Limited Scope Representation

Sample Entry of Limited Appearance attached as Exhibit B to Supreme Court's May 23, 2017 Order

Limited Scope Representation

7. ***Rule 1.2(d)(3):***

   Termination of Limited Scope Representation when the purpose of for which the limited scope appearance was made has been accomplished: The lawyer shall withdraw by filing a Notice of Withdrawal of Limited Appearance with the Court and with written notice to the client.

   - No motion to withdraw is required.

Limited Scope Representation

- Notice of Withdrawal must certify that the purpose for which the appearance was entered has been accomplished and that written notice has been given to the client.
- Notice of Withdrawal must include the client's name, address and telephone number.
- *See also* Comment 4 to Rule 1.16.

Limited Scope Representation

8. Rule 1.2(d)(3):

Termination of Limited Scope Representation when the purpose of for which the limited scope appearance was made has not yet been accomplished: The lawyer must file a motion to withdraw with notice to the client.

Limited Scope Representation

Sample Withdrawal of Limited Appearance attached as Exhibit B to Supreme Court's May 23, 2017 Order

Limited Scope Representation

- **Rule 4.2: Communications With Persons Represented by Counsel**

1. ***Pro se is treated as represented only for event for which Entry of Limited Appearance has been filed***: An otherwise unrepresented person for whom an Entry of Limited Appearance has been filed pursuant to Rule 1.2 is considered to be unrepresented for purposes of this Rule as to any matter other than the subject matter of the limited appearance.

Limited Scope Representation

- **Rule 4.2: Communications With Persons Represented by Counsel**

2. ***No Communications with Pro Se on Event which Entry of Limited Appearance has been filed***: When an Entry of Limited Appearance has been filed and served on the opposing lawyer, or the opposing lawyer is otherwise notified that an Entry of Limited Appearance has been or will be filed, that lawyer may directly communicate with the client only about matters outside the scope of the limited appearance.

Personal Jurisdiction

Pullar v. Cappelli,
148 A.3d 551 (R.I. 2016)

- Typically, a defendant may move to dismiss a case for lack of personal jurisdiction so long as the defendant previously raised that defense in an answer.

- However, the defense “may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.”

Pullar v. Cappelli,
148 A.3d 551 (R.I. 2016)

- The passage of time alone is generally not sufficient to forfeit the defense of lack of personal jurisdiction but the court will consider the passage of time, along with the defendant's conduct, the litigation activity and the opportunity the defendant had to litigate the jurisdictional issue.

Pullar v. Cappelli,
148 A.3d 551 (R.I. 2016)

- **Held**: A defendant who litigated a case for over three years, conducted discovery, appeared at numerous pretrial hearings, participated in arbitration and filed several motions, including a motion to assign the case to a jury trial, had forfeited his defense of lack of personal jurisdiction.

Pullar v. Cappelli,
148 A.3d 551 (R.I. 2016)

- Court noted that the defendant had participated in court-annexed arbitration and received an unfavorable result before moving to dismiss for lack of personal jurisdiction.

- In the Court's opinion: "The defendant, confronted with an impending trial, cannot now pull [personal jurisdiction] out of the hat like a rabbit in the face of an inhospitable sea."

Employment Law

Mancini v. City of Providence,
155 A.3d 159 (R.I. 2017)

- Case of first impression
- Court answered certified question from the D.R.I. under Art. I, Rule 6(a).
- The Supreme Court has discretion in deciding whether to answer a certified question.
- Both the Superior Courts and the D.R.I. had reached differing conclusions.

Mancini v. City of Providence,
155 A.3d 159 (R.I. 2017)

- Certified question:

  Does Section 28-5-7(6) of the Rhode Island Fair Employment Practices Act provide for the individual liability of an employee of a defendant employer and, if so, under what circumstances?

- **Held**: The Fair Employment Practices Act does not allow for individual liability of an employee of a defendant employer.

Mancini v. City of Providence,
155 A.3d 159 (R.I. 2017)

- Court concluded the statute itself is ambiguous.
- Looked to the interpretation of other courts of similar statutes.
- Court explained that it based its decision “squarely on traditional principles of statutory construction” but noted that policy reasons also supported its conclusion.

Mancini v. City of Providence,
155 A.3d 159 (R.I. 2017)

- “[A]llowing for the possibility of individual liability would have a predictably chilling effect on the discretionary management decisions of supervisory employees – since such a regime would, in all likelihood, result in supervisors frequently tending to make employment decisions based on their apprehensiveness as to the possibility of suit rather than on what they deem to be in the best interest of the employer.”

Mancini v. City of Providence,
155 A.3d 159 (R.I. 2017)

- “It is our view that, as a matter of public policy, a supervisor should not have to be concerned about keeping his or her house or car, or having enough wherewithal to pay for the education of his or her children when deciding, for example, between two employees who are candidates for promotion.”

Mancini v. City of Providence,
155 A.3d 159 (R.I. 2017)

- “If the supervisor makes such a decision for unlawful reasons, the individual aggrieved has recourse against the employer under FEPA and therefore has a means to remedy the harm done.”

Attorney Client Privilege and Work Product Doctrine

DeCurtis v. Visconti, Boren & Campbell, Ltd.,

152 A.3d 413 (R.I. 2017)

- Case serves as a good reminder of the parameters of the attorney-client privilege and the work product doctrine.

DeCurtis v. Visconti, Boren & Campbell, Ltd.,

152 A.3d 413 (R.I. 2017)

Attorney-Client Privilege:

- Protects communications made by a client to his attorney for the purpose of seeking professional advice and the responses by the attorney to such inquiries.

DeCurtis v. Visconti, Boren & Campbell, Ltd.,
152 A.3d 413 (R.I. 2017)

Attorney-Client Privilege:

- The attorney-client privilege is a personal privilege, therefore, only the client can implicitly or explicitly assert or waive the privilege.

  i.e.: privilege belongs to company, not its employees

DeCurtis v. Visconti, Boren & Campbell, Ltd.,

152 A.3d 413 (R.I. 2017)

Attorney-Client Privilege:

- An attorney may not assert the attorney-client privilege on behalf of a client if the client is not a party to the subject lawsuit and the only interests at stake are those of the attorney.

DeCurtis v. Visconti, Boren & Campbell, Ltd.,
152 A.3d 413 (R.I. 2017)

Attorney-Client Privilege:

- It is well established that a fact does not become privileged simply because it is communicated to an attorney.

  i.e.: cannot shield from disclosure smoking gun by giving it to your attorney
  i.e.: attachments to email to attorney (that are not otherwise privileged)

DeCurtis v. Visconti, Boren & Campbell, Ltd.,
152 A.3d 413 (R.I. 2017)

Attorney-Client Privilege:

- ***Final Executed Agreements vs. Drafts:*** "It is . . . illogical to categorize the drafting and review of stock language in a final and executed contract as a privileged communication between an attorney and client. These documents represent the end product that arose from communications between the attorney and his or her client."

DeCurtis v. Visconti, Boren & Campbell, Ltd.,

152 A.3d 413 (R.I. 2017)

Work Product Doctrine:

- "Materials obtained or prepared by an attorney ***in anticipation of litigation*** are not . . . discoverable unless protection of those materials is necessary for the preparation of one's own case."

DeCurtis v. Visconti, Boren & Campbell, Ltd.,

152 A.3d 413 (R.I. 2017)

Opinion Work Product:

- "[A] document or other written material containing the mental impressions of an attorney or his or her legal theories."
- Opinion work product receives absolute immunity from discovery.

DeCurtis v. Visconti, Boren & Campbell, Ltd.,

152 A.3d 413 (R.I. 2017)

Factual Work Product:

- "Any material gathered in anticipation of litigation."
- Afforded only qualified immunity from discoverability. It is subject to disclosure when the party seeking has a substantial need for the materials and cannot obtain the substantial equivalent without undue hardship.

DeCurtis v. Visconti, Boren & Campbell, Ltd.,

152 A.3d 413 (R.I. 2017)

Work Product Doctrine:

- ***Final Executed Agreements***: Contracts (such as a prenuptial agreement) are not prepared in anticipation of litigation, therefore, they are not work product.

DeCurtis v. Visconti, Boren & Campbell, Ltd.,
152 A.3d 413 (R.I. 2017)

Work Product Doctrine:

- ***Drafts of Agreements***: "That is not to say that an earlier or incomplete draft of an agreement may not be protected by the work product doctrine; by their very nature, pre-drafts may contain both mental impressions and legal strategy."

Law of the Case Doctrine

Hamilton v. Ballard,
161 A.3d 470 (R.I. 2017)

- **Law of the Case Doctrine**: "[O]rdinarily, after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a subsequent phase of the suit with the same question ***in the identical manner***, should refrain from disturbing the first ruling."

Hamilton v. Ballard,
161 A.3d 470 (R.I. 2017)

- **Question must be presented in the identical manner**: "Although we have not explicitly said so previously, we believe, and our case law indicates, that when we have held that law-of-the case applies if the same question is presented in an 'identical manner,' ***that does not mean that it is appropriate to apply law-of-the-case from an interlocutory ruling to a dispositive motion***."

Hamilton v. Ballard,
161 A.3d 470 (R.I. 2017)

- Case concerned an easement on property in Newport's historic Edgehill used for transporting mowing equipment.

- In litigation concerning the easement, SVF, the owner of the servient estate, was ordered to construct a "farm-type road" to accommodate the Ballards' easement.

Hamilton v. Ballard,
161 A.3d 470 (R.I. 2017)

- The parties were unable to agree on the specifications for the road or the gate that would be placed at either end of the easement but SVF went ahead a constructed a dirt road and 10 foot gates in 2006.

Hamilton v. Ballard,
161 A.3d 470 (R.I. 2017)

- In January 2007, a hearing justice entered an order (based on a view) starting that SVF had “constructed a farm road providing reasonable access to the [Ballards]” and that “[b]ased on the evidence presented at the hearing, and the [c]ourt’s view of the subject property, the [c]ourt finds that the 10 foot gates do not impinge on the Ballards’ reasonable use of the access easement.”

Hamilton v. Ballard,
161 A.3d 470 (R.I. 2017)

- Thereafter, in 2014, SVF moved for summary judgment on a count of Ballards' counterclaim that alleged SVF was interfering with their easement.

- The hearing justice (a different judge than that in 2007) granted summary judgment in favor of SVF under the law of the case doctrine.

Hamilton v. Ballard,
161 A.3d 470 (R.I. 2017)

- **Held**: Trial justice erred when he employed the law-of-the-case doctrine in his ruling on the MSJ.

- The issues in the January 2007 order and the MSJ were not presented in the identical manner.

- The January 2007 order was interlocutory, while the summary judgment was dispositive.

Hamilton v. Ballard,
161 A.3d 470 (R.I. 2017)

- The Court also was troubled by the passage of time between the January 2007 order and the MJS in 2014.

Hamilton v. Ballard,
161 A.3d 470 (R.I. 2017)

- Justice Goldberg concurred and dissented: In her opinion, the January 2007 order became a final order when counsel neglected to file a timely notice of appeal.

- The January 2007 order entered in the context of a Rule 60(b) motion for relief from judgment (which sought relief from an original partition order).

Hamilton v. Ballard,
161 A.3d 470 (R.I. 2017)

- “Because the Rule 60(b) motion for relief from judgment field by the Ballards . . . sought relief from the original and only Rule 54(b) judgment, it was not an interlocutory order.”

- In Justice Goldberg’s opinion, although the Ballards sought review by certiorari, a petition for certiorari did not lie because the order was appealable.

Quillen v. Macera,
160 A.3d 1006 (R.I. 2017)

- The law-of-the-case doctrine is “a flexible rule that may be disregarded when a subsequent ruling can be based on ***an expanded record***.”

- Hearing justice made certain factual findings in response to a motion for a preliminary injunction.

- Thereafter, at trial, the plaintiff argued that the hearing justice’s factual findings constituted law-of-the case. The trial justice disagreed.

Quillen v. Macera,
160 A.3d 1006 (R.I. 2017)

- **HELD**: Factual findings made by a hearing justice on motion for preliminary injunction were not law-of-the-case.

- Not only did the trial justice have an expanded record before him, but the issues involved in the two proceedings were markedly different such that it cannot be said that the trial justice was presented with the same question in an identical manner.

Quillen v. Macera,
160 A.3d 1006 (R.I. 2017)

- Moreover, in ruling on the motion for preliminary injunction, the hearing justice "did not purport to decide the merits, stating rather, "[w]hat transpired is an issue that needs to be left to discovery and a decision on the merits."

Raise-or-Waive

Salvati Masonry, Inc. v. Andreozzi,

151 A.3d 745 (R.I. 2017)

- **Failure to develop issues on appeal.**

- On appeal, the plaintiff did "little to develop or articulate a discussion of its arguments for its book account, quantum meruit, unjust enrichment, or mechanics lien claims."

- "Generally, we deem an issue waived when a party simply states an issue for appellate review, without meaningful discussion thereof."

Deutsche Bank Nat'l Trust Co. v. McDonough,

160 A.3d 306 (R.I. 2017)

- **Failure to develop issues on appeal.**

- When defendant took "a scattershot approach and suggest[ed], without sufficient development or discussion, a multitude of errors committed by the motion justice," the Court deemed those arguments that were minimally developed on appeal waived.

Giddings v. Arpin,
160 A.3d 314 (R.I. 2017)

- **Failure to develop issues in prebriefing statement.**

- Plaintiff's three-page prebriefing statement contained only a handful of sentences on a claimed error. Given the cursory and undeveloped nature of his prebriefing statement, and its failure to apprise either the Court or the defendant of the issues he claimed on appeal, the Supreme Court deemed his arguments waived.

Tri-Town Constr. Co. v. Commerce Park Assocs. 12, LLC,

161 A.3d 500 (R.I. 2017)

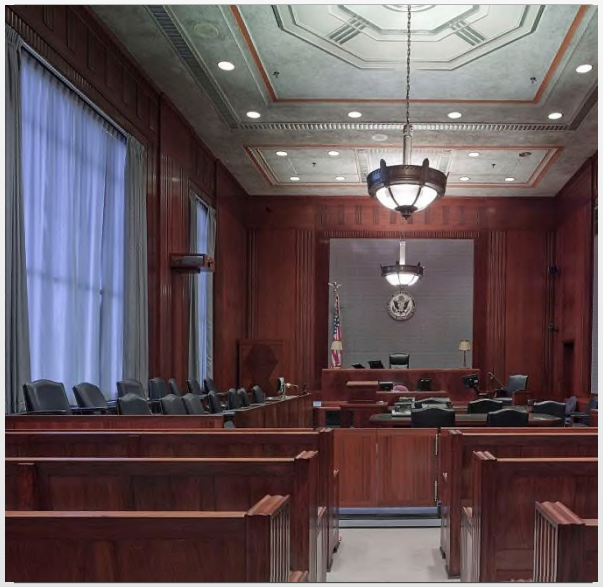
- **Failure to raise issue in Superior Court.**

- Although the hearing justice asked both parties on several occasions whether a particular statute permitted assignment, counsel for Mr. Cambio opted not to voice his objection or articulate an argument on that issue. Accordingly, Mr. Cambio waived his opportunity to challenge the issue on appeal.

2015-2016 Term

54(B) JUDGMENT

VERDICT



Petition for Writ of Certiorari

In the Supreme Court of the State of Rhode Island

Attorneys' Fees

Tri-Town Const. Co. v. Commerce Park Assoc. 12, LLC,

139 A.3d 467 (R.I. 2016)

- Affidavits or testimony offered to support claim for attorneys' fees must be from a member of the Rhode Island bar **who is not representing any of the parties** in the action in which the fees are sought.

Tri-Town Const. Co. v. Commerce Park Assoc. 12, LLC,

139 A.3d 467 (R.I. 2016)

- Affidavits or testimony regarding the reasonableness of fees has always been required.
- Informal practice of practitioners offering their own affidavits has developed.
- That practice is no longer accepted.

Tri-Town Const. Co. v. Commerce Park Assoc. 12, LLC,

139 A.3d 467 (R.I. 2016)

- Ensures submission of affidavits and testimony is not a pro forma exercise.
- May burden litigants in small value cases.

Sisto v. America Condo. Ass'n Inc.,

140 A.3d 124 (R.I. 2016)

Issue 1:

- Court addressed the sufficiency of billing records submitted in connection with request for attorneys' fees.

- Party was only entitled to fees for counsel's work on one issue.

Sisto v. America Condo. Ass'n Inc.,

140 A.3d 124 (R.I. 2016)

- Counsel's invoices failed to distinguish between time spent on that issue and other issues.

- Trial justice applied an across-the board reduction to eliminate time that may have been spent on other issues.

Sisto v. America Condo. Ass'n Inc.,

140 A.3d 124 (R.I. 2016)

- On appeal, the Supreme Court affirmed the trial justice's methodology.

- Supreme Court cautioned: "in the future, [it] will require more meticulous recordkeeping by attorneys seeking an award of fees."

Sisto v. America Condo. Ass'n Inc.,

140 A.3d 124 (R.I. 2016)

Issue 2:

- The Mandate Rule
- In a prior appeal, the Supreme Court remanded the record to the Superior Court.

Sisto v. America Condo. Ass'n Inc.,

140 A.3d 124 (R.I. 2016)

- The Supreme Court's mandate made no mention of attorneys' fees in connection with that appeal.

- After the case was remanded, the defendants sought an assessment of attorneys' fees incurred on appeal.

Sisto v. America Condo. Ass'n Inc.,

140 A.3d 124 (R.I. 2016)

- The Superior Court awarded fees incurred in connection with the appeal and the plaintiffs appealed.

- The Supreme Court concluded that the Superior Court's award of attorneys' fees was proper under the mandate rule.

Sisto v. America Condo. Ass'n Inc.,

140 A.3d 124 (R.I. 2016)

- The mandate rule requires a court, on remand, to follow the Supreme Court's mandate.

- The trial court may not vary it, examine it for any purpose other than execution, review it or intermeddle with it.

Sisto v. America Condo. Ass'n Inc.,

140 A.3d 124 (R.I. 2016)

- However, the trial court may consider and decide any matters left open by the mandate.

- Because the mandate did not address attorneys' fees on appeal, and left that issue open, the trial court's award of attorneys' fees was permissible.

Electronic Filing

Santos v. D. Laikos, Inc.,

139 A.3d 394 (R.I. 2016)

- First Supreme Court decision to address the Judiciary's new electronic filing system.

Santos v. D. Laikos, Inc.,

139 A.3d 394 (R.I. 2016)

- Court's decision cautions counsel to confirm the accuracy of their service contact information to ensure receipt of electronic filings.

- Failure to do so does not constitute excusable neglect.

Santos v. D. Laikos, Inc.,

139 A.3d 394 (R.I. 2016)

- Defendant filed a motion to dismiss and memorandum of law through e-filing system and by mail.
- Plaintiff's counsel did not respond or appear. Court granted motion to dismiss.

Santos v. D. Laikos, Inc.,

139 A.3d 394 (R.I. 2016)

- Plaintiff moved to vacate on the grounds that his counsel had not received notice of the motion to dismiss because (1) she was not listed as a service contact when the motion was filed and (2) she did not receive a copy by mail because of an apparent mishap with the mail.

Santos v. D. Laikos, Inc.,

139 A.3d 394 (R.I. 2016)

- Superior Court denied motion to vacate and plaintiff appealed.
- The Supreme Court affirmed, concluding that “failure to update the electronic filing system with correct service contact information in a timely fashion” does not constitute excusable neglect.

Expert Discovery

Cashman Equipment Corp., Inc., v. Cardi Corp., Inc.,

139 A.3d 379 (R.I. 2016)

- Decision highlights an important distinction between expert discovery in state and federal court.

NOTE: Rule 26 was amended in 2020 to address the issues presented by this decision.

Cashman Equipment Corp., Inc., v. Cardi Corp., Inc.,

139 A.3d 379 (R.I. 2016)

- **Federal Court:**

  Expert must produce a report that identifies the facts and data considered by the witness in forming his/her opinions.

Cashman Equipment Corp., Inc., v. Cardi Corp., Inc.,

139 A.3d 379 (R.I. 2016)

- **Rhode Island State Court:**

  Documents considered by a testifying expert in formulating his or her opinion are not discoverable.

  Subpoenas to experts for production of documents not permitted.

Cashman Equipment Corp., Inc., v. Cardi Corp., Inc.,

139 A.3d 379 (R.I. 2016)

- After *Cashman*, there are additional distinctions between practice in state and federal court that may inform a plaintiff's decision to file in Federal Court or a defendant's decision to remove a case to Federal Court.

NOTE: Rule 26 was amended in 2020 to address the issues presented by this decision.

Judicial Notice

Curreri v. Saint,
126 A.3d 482 (R.I. 2015)

- Powerful tool, especially for defendants at motion to dismiss stage.
- Courts may take judicial notice of court records.

Curreri v. Saint,
126 A.3d 482 (R.I. 2015)

- Caution: not every document that has been placed in the court file may be regarded as part of the record.

- Judicial notice applies to those aspects of the court record that cannot be reasonably disputed; examples: judgments, pleadings and answers.

Motions for Entry of Partial Final Judgment Rule 54(b)

Cathay Cathay, Inc. v. Vindalu,

136 A.3d 1113 (R.I. 2016)

- **Supreme Court expresses a strong disfavor for Rule 54(b) judgments.**

- Rule 54(b) permits the Court to enter final judgment as to one or more but fewer than all of the claims or parties if it determines there is no reason for delay.

Cathay Cathay, Inc. v. Vindalu,

136 A.3d 1113 (R.I. 2016)

- However, in a number of recent decisions the Supreme Court has expressed disfavor for Rule 54(b).

- Decisions suggest it may become more difficult to obtain a Rule 54(b) judgment in Rhode Island.

Cathay Cathay, Inc. v. Vindalu,

136 A.3d 1113 (R.I. 2016)

- By applying Rule 54(b) only in those instances where there is no reason for delay, the Court is “spared from having to keep relearning the facts of a case on successive appeals.”

Damages

Newstone Development, LLC v. East Pacific, LLC,

140 A.3d 100 (R.I. 2016)

- **HELD: A plaintiff may not recover loss-of-use damages if the plaintiff does not incur actual economic loss.**

- In *Newstone*, a water pipe froze and burst causing extensive property damage to several waterfront condominiums in Newport.

Newstone Development, LLC v. East Pacific, LLC,

140 A.3d 100 (R.I. 2016)

- Newstone's insurer paid for all necessary repairs to the units.
- At the time of the incident the condo units were being marketed for sale. The units were sold for full market value.

Newstone Development, LLC v. East Pacific, LLC,

140 A.3d 100 (R.I. 2016)

- The plaintiff, however, sought to recover damages for its loss of use of the condo units during the time they were under repair.

Newstone Development, LLC v. East Pacific, LLC,

140 A.3d 100 (R.I. 2016)

- The Supreme Court held that plaintiff was required to allege and put forth competent evidence that it suffered an actual injury to be able to recover loss-of-use damages.

- To hold otherwise would give the plaintiff a windfall by placing it in a better position than it was in prior to the incident.

The Free and Clear Co. v. The Narragansett Bay Comm'n.,

131 A.3d 1102 (R.I. 2016)

- **HELD: Prejudgment interest begins to run when the action accrues for purposes of the statute of limitations, not when the complaint is filed.**

- Defendant argued that prejudgment interest accrued when plaintiff filed its complaint.

The Free and Clear Co. v. The Narragansett Bay Comm'n.,

131 A.3d 1102 (R.I. 2016)

- Court disagreed and held that prejudgment interest begins to run when the action accrues. In a property damage case, an action accrues when the injury occurs. Thus, prejudgment interest begins to run when the injury occurs.

Jury Verdict Forms

The Free and Clear Co. v. The Narragansett Bay Comm'n.,

131 A.3d 1102 (R.I. 2016)

- Supreme Court sends a cautionary message to trial counsel about the importance of special interrogatories.

The Free and Clear Co. v. The Narragansett Bay Comm'n.,

131 A.3d 1102 (R.I. 2016)

- Defendant argued on appeal that the jury award was based on speculation and that the jury wrongfully applied damages beyond the date of the termination of the lease at issue.

The Free and Clear Co. v. The Narragansett Bay Comm'n.,

131 A.3d 1102 (R.I. 2016)

- The Supreme Court rejected the defendant's argument because the defendant did not object when the jury was asked to enter its verdict on a general verdict form.

The Free and Clear Co. v. The Narragansett Bay Comm'n.,

131 A.3d 1102 (R.I. 2016)

- By failing to object, the defendant, in effect "agreed that the jury should indicate the amount of damages awarded, if any, in a lump sum rather than have them separated and delineated by time period."

The Free and Clear Co. v. The Narragansett Bay Comm'n.,

131 A.3d 1102 (R.I. 2016)

- When special interrogatories are not requested, the Supreme Court will neither question nor theorize about the jury's findings.

Juror Misconduct

Roma v. Moreira,
126 A.3d 447 (R.I. 2015)

- **If you hear something, say something.**
- On the third day of trial, the plaintiffs' lead counsel left a voicemail message for the court reporting that his co-counsel had overheard a conversation between two jurors regarding the case.

Roma v. Moreira,
126 A.3d 447 (R.I. 2015)

- The next morning, co-counsel informed the court that he believed he had heard one juror say to another juror:

  “If he can survive melanoma, he can survive this.”

Roma v. Moreira,
126 A.3d 447 (R.I. 2015)

- The lawyer told the court that he had not thought to report the statement at the time he heard it but he told his co-counsel about the statement later that evening.

Roma v. Moreira,
126 A.3d 447 (R.I. 2015)

- Plaintiffs' counsel asked that the Court discharge both jurors.

- Plaintiffs' counsel argued that questioning the jurors would be prejudicial because they would know the statement had been reported by Plaintiffs' counsel given the proximity of counsel's table to the jury box.

Roma v. Moreira,
126 A.3d 447 (R.I. 2015)

- The trial justice disagreed and interviewed the jurors separately.

- Based on those interviews, the trial justice noted that she was satisfied that the two jurors were “talking about gum” and that plaintiffs’ counsel must have misunderstood that conversation.

Roma v. Moreira,
126 A.3d 447 (R.I. 2015)

- Plaintiffs' counsel moved to pass the case, which was denied and the plaintiffs appealed.

- On appeal, the Supreme Court noted that it would have been preferable for the trial justice to have asked each juror whether he or she could remain impartial.

Roma v. Moreira,
126 A.3d 447 (R.I. 2015)

- Nevertheless, the Supreme Court affirmed the decision, concluding the trial justice had made an appropriate credibility determination and found that the jurors had not talked about the case.

Roma v. Moreira,
126 A.3d 447 (R.I. 2015)

- Neither the Supreme Court nor the Superior Court faulted plaintiffs' counsel for the delay in reporting the conversation.

- However, the Court's decision serves as an important reminder to trial counsel that if you hear something that leads you to believe there has been juror misconduct, you should promptly report it.

Certiorari

Cashman Equipment Corp., Inc., v. Cardi Corp., Inc.,

139 A.3d 379 (R.I. 2016)

- Two procedural mechanisms for obtaining review by the Supreme Court.

    1. Appeal

    2. Extraordinary writ

Cashman Equipment Corp., Inc., v. Cardi Corp., Inc.,

139 A.3d 379 (R.I. 2016)

- The most common form of extraordinary writ is the petition for writ of certiorari.
- They are extraordinary.
- The Supreme Court has expressed great reluctance to review on certiorari interlocutory decisions.

Cashman Equipment Corp., Inc., v. Cardi Corp., Inc.,

139 A.3d 379 (R.I. 2016)

- The decision in *Cashman* represents an exception.
- On rare occasions, the Court will review certain discovery rulings that would result in irreparable harm if not immediately reviewed. (i.e. privilege issues)

Cashman Equipment Corp., Inc., v. Cardi Corp., Inc.,

139 A.3d 379 (R.I. 2016)

- In rarer circumstances, the Court will issue writs of certiorari to review rulings that will significantly impact the remainder of a case if not immediately reviewed. (i.e. a ruling prohibiting discovery of certain relevant information).

Cashman Equipment Corp., Inc., v. Cardi Corp., Inc.,

139 A.3d 379 (R.I. 2016)

- In *Cashman*, the Court granted a petition for writ of certiorari to review the Superior Court's denial of a motion to compel.
- Impact the discovery being sought would have had on the remainder of the case.
- Issue of first impression.

Sufficiency of Prebriefing Statements and Appellate Briefs

McMahon v. Deutsche Bank Nat'l Trust Co.,

131 A.3d 175 (R.I. 2016) (mem.)

- Prebriefing Statements (12A Statements) are often viewed as preliminary statements of issues that will be later briefed on appeal.

- Filed within 20 days of docketing; limited to 10 pages.

McMahon v. Deutsche Bank Nat'l Trust Co.,

131 A.3d 175 (R.I. 2016) (mem.)

- Plaintiff's Prebriefing Statement "failed to present any argument grounded in specific facts and law to support his claim that the Superior Court erred in granting summary judgment."

McMahon v. Deutsche Bank Nat'l Trust Co.,

131 A.3d 175 (R.I. 2016) (mem.)

- In declining to address the merits of plaintiff's appeal, the Supreme Court noted that it "decline[s] to scour the record to identify facts in support of the plaintiff's broad claims, and we will not give life to arguments the plaintiff has failed to develop on his own."

Gregoire v. Baird Properties, LLC,

138 A.3d 182 (R.I. 2016)

- Supreme Court held that defendants waived their right to claim that the trial justice's award of attorneys' fees was unreasonable.
- Defendants' Pre-Briefing Statement contained only one sentence claiming that the trial justice's award was unreasonable.

Gregoire v. Baird Properties, LLC,
138 A.3d 182 (R.I. 2016)

- Defendants had the opportunity to submit a supplemental statement but chose not to do so.

- Accordingly, the issue was waived.

Nuzzo v. Nuzzo Campion Stone Enterprises, Inc.,

137 A.3d 711 (R.I. 2016)

- Supreme Court will not address issues on appeal that are not sufficiently developed in the appellant's submissions to the Court.

Nuzzo v. Nuzzo Campion Stone Enterprises, Inc.,

137 A.3d 711 (R.I. 2016)

- A party spent “a total of four short sentences” in his brief asserting an issue related to his counterclaim on appeal.

- He “completely fail[ed] to direct [the Court] to what he consider[ed] to be erroneous with the trial justice’s findings.”

Nuzzo v. Nuzzo Campion Stone Enterprises, Inc.,

137 A.3d 711 (R.I. 2016)

- Supreme Court concluded the issue had been waived.

Raise-or-Waive

The Free and Clear Co. v. The Narragansett Bay Comm'n,

131 A.3d 1102 (R.I. 2016)

- **Failure to object to jury instruction.**
- The objection was waived.
- Court is most "exacting about applying the raise-or-waive rule in the face of inadequate objections to jury instructions."

Ribeiro v. The Rhode Island Eye Institute,

138 A.3d 761 (R.I. 2016)

- **Failure to renew Rule 60 motion for judgment as a matter of law.**

- Defendants moved for JML at the close of Plaintiffs' case but failed to renew their motion at the close of all the evidence.

Ribeiro v. The Rhode Island Eye Institute,

138 A.3d 761 (R.I. 2016)

- Defendants waited until after the jury returned its verdict to renew the motion for judgment as a matter of law.

- Court held Defendants had waived the issue.

Ribeiro v. The Rhode Island Eye Institute,

138 A.3d 761 (R.I. 2016)

- The Court “reaffirmed [its] established rule that if one party makes a motion for judgment as a matter of law at the close of the opponent’s case and then presents evidence on his . . .own behalf, the motion must be renewed at the close of all [the] evidence.”

In re Estate of William B. Ross,

131 A.3d 158 (R.I. 2016)

- **Arguments that were not raised before the trial court.**
- Supreme Court “will not entertain on appeal an issue that the aggrieved party did not specifically raise before the trial court.”

DePasquale v. Cwiek,

129 A.3d 72 (R.I. 2016)

- **Arguments that were not raised before the trial court.**

- Supreme Court questioned whether an issue had been preserved for appeal when the record contained only a passing reference by the hearing justice to the issue.

Behroozi v. Kirshenbaum,

128 A.3d 869 (R.I. 2016)

- **Arguments that were not raised before the trial court.**

- When appellant advanced argument for the first time on appeal, Supreme Court determined it had been waived.

Joachim v. Straight Line Productions, LLC,

138 A.3d 746 (R.I. 2016)

- **Arguments that were not raised before the trial court.**

- When appellant argued for the first time on appeal that the trial justice erred in failing to apply a clear and convincing standard, that argument was deemed to be waived.

Transcripts

Loppi v. United Investors Life Ins. Co.,

126 A.3d 458 (R.I. 2015)

- **Failure to provide the Supreme Court with a transcript is risky business.**

- In *Loppi*, the issue on appeal was a pure question of law, which the Court was able to address without the benefit of the transcript of the proceedings below.

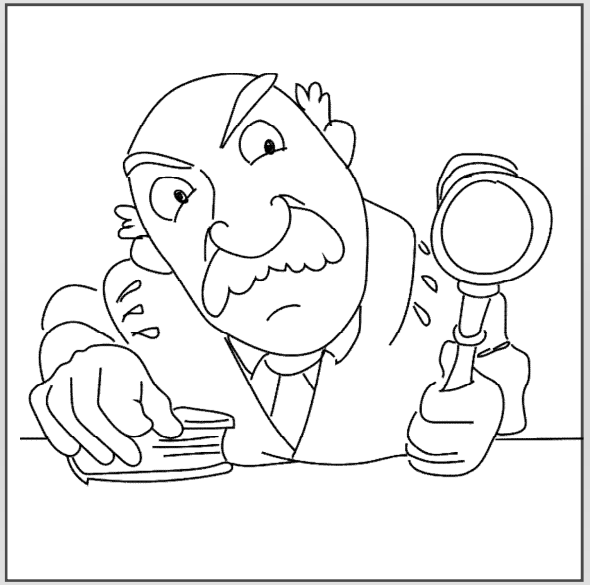
Baker v. Mitchell,
126 A.3d 482 (R.I. 2015) (mem.)

- ***Cf. Loppi*.**

- In *Baker*, the appellant failed to provide the Court with a transcript of the hearing, thereby depriving the Supreme Court of “a meaningful opportunity to review the hearing justice’s findings and decision.”

2014-2015 Term

COMPLAINT



OFFER OF JUDGMENT

54(B) JUDGMENT

Ghostwriting

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

- **HELD**: An attorney may not ghostwrite or otherwise assist a *pro se* litigant unless the attorney signs the document and discloses his or her identity and the extent of his or her assistance.

- Decision strikes balance between interests served by limited-scope representation and the duty of candor owed to the Court.

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Limited-Scope Representation:

"A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."

R.I. Sup. Ct. R. Prof'l Cond. 1.2(c)

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Limited-Scope Representation:

Rule 1.2(c) does not specify the ways in which an attorney may limit the scope of his or her representation.

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Limited-Scope Representation:

Is ghostwriting one form of limited-scope representation?

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Arguments in Favor of Ghostwriting:

- Gives *pro se* litigants greater access to justice.

- In Rhode Island, 1/3 of the divorce petitions and 1/2 of miscellaneous petitions (seeking custody, visitation or child support of children born to parents who were never married) filed in 2010 involved at least one self-represented litigant.

  R.I. Bar Association Amicus Brief

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Arguments in Favor of Ghostwriting:

- In Massachusetts, "[u]pwards of 80 percent of litigants in some probate and family court matters and 90 percent of litigants in some housing court matters come to the court without an attorney."

Swain Rule 12A Statement

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Arguments in Favor of Ghostwriting:

- Litigants who may be unable to afford the full services of an attorney may be able to afford certain legal tasks, such as an attorney's brief writing services.

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Arguments in Favor of Ghostwriting:

- Ghostwriting encourages attorneys to accept *pro bono* matters, knowing that their involvement will be limited to brief writing.

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Arguments in Favor of Ghostwriting:

- "Allowing an attorney to coach a client, or assist in the preparation of a court document, or appear at less than all hearings in a particular matter, would significantly advance a proceeding that otherwise would be bogged down by a self-represented litigant's attempt to litigate without assistance of counsel."

RI Bar Association Amicus Brief

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Arguments Against Ghostwriting:

- The practice of ghostwriting may violate the duty of candor.

- "If neither a ghostwriting attorney nor her *pro se* litigant client disclose the fact that any pleadings ostensibly filed by a self-represented litigant were actually drafted by an attorney, this could itself violate the duty of candor."

Attorney General Amicus Brief

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Arguments Against Ghostwriting:

- Ghostwriting may inhibit communications between adverse parties because opposing counsel may not communicate with an individual who they know is represented by counsel.

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Arguments Against Ghostwriting:

• "If opposing counsel does not know the extent of a party's representation, opposing counsel may inadvertently communicate with the party about matters for which the party is represented. Or worse, opposing counsel may initiate appropriate communication and purposely wander into matters that are off limits."

Attorney General Amicus Brief

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Arguments Against Ghostwriting:

- *Pro se* litigants could unfairly benefit from the filing of *pro se* pleadings because courts often afford greater leniency in construing *pro se* pleadings.

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Arguments Against Ghostwriting:

- Risk that *pro se* litigants will be unable to explain complex ghostwritten counterclaims or defenses without the assistance of the attorney who drafted them.

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Arguments Against Ghostwriting:

- Ghostwriters escape the rigorous requirements imposed on attorneys by the Rules of Civil Procedure and Rules of Professional Conduct.

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Arguments Against Ghostwriting:

- For example, ghostwriters evade Rule 11's requirement that counsel sign pleadings, certifying that to the best of his or her knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact, warranted by existing law and not interposed for any improper purpose.

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Rhode Island's Position:

1. An attorney may provide legal assistance to litigants appearing *pro se* before courts, provided the scope of the attorney's representation is reasonable and the litigant gives informed consent in a writing that sets forth the nature and extent of the attorney-client relationship.

FIA Card Services, N.A. v. Pichette,

116 A.3d 770 (R.I. 2015)

Rhode Island's Position:

2. An attorney may not assist a pro se litigant with the preparation of pleadings, motions, or other written submissions unless the attorney signs the document and discloses thereon his or her identity and the nature and extent of the assistance that he or she is providing.

FIA Card Services, N.A. v. Pichette,
116 A.3d 770 (R.I. 2015)

Rhode Island's Position:

3. The attorney may indicate on the document that his or her signature does not constitute an entry of appearance.

Pleadings

***DiLibero v. MERS*,**
108 A.3d 1013 (R.I. 2015)

- In a pair of cases, *Iqbal* and *Twombly*, the federal courts modified the standard of review applied to motions to dismiss in federal court. A federal court complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

***DiLibero v. MERS*,**
108 A.3d 1013 (R.I. 2015)

- In 2014, the Rhode Island Supreme Court reminded litigants that it "has not yet addressed whether continued adherence to our traditional Rhode Island standard is appropriate or whether the new Federal guide of plausibility should be adopted." *Chhun v. Mortgage Electronic Registration Systems, Inc*., 84 A.3d 419, 422-23 (R.I. 2014).

***DiLibero v. MERS*,**
108 A.3d 1013 (R.I. 2015)

- Before the decision in *Chhun* was issued, the trial justice in *DiLibero* dismissed the plaintiff's complaint after finding it was "rife with conclusory statements and erroneous legal theories, all of which he discredited."

- The *DiLibero* case did not reach the Supreme Court for argument until a year after the decision in *Chhun*.

***DiLibero v. MERS*,**
108 A.3d 1013 (R.I. 2015)

- The Supreme Court concluded that it appeared the trial justice relied upon the standard in *Iqbal* despite that Rhode Island has yet to adopt that standard.

DiLibero v. MERS,
108 A.3d 1013 (R.I. 2015)

- Significantly, rather than addressing whether Rhode Island should adopt the federal court's plausibility standard, the court examined plaintiff's allegations under the traditional Rhode Island rule and concluded that plaintiff had adequately stated a claim upon which relief may be granted.

Statute of Limitations

***McNulty v. Chip*,**
116 A.3d 173 (R.I. 2015)

- Plaintiffs argued that defendants had waived the defense of statute of limitations by failing to plead it as an affirmative defense when answering the complaint.

- Under Rhode Island law, the expiration of a statute of limitations is an affirmative defense that must be raised at or before trial or it is waived.

McNulty v. Chip,
116 A.3d 173 (R.I. 2015)

- **Held**: The defendants raised the statute of limitations defense at the time they filed their motion for summary judgment, well in advance of trial. Before their motion for summary judgment was heard, defendants moved to amend their answer to plead the statute of limitations as a defense. Thus, defendants properly raised the statute of limitations as a defense.

***McNulty v. Chip*,**
116 A.3d 173 (R.I. 2015)

- In *McNulty*, the Supreme Court also addressed the tolling of a statute of limitations.

- As a general rule, the statute of limitations begins to run at the time of injury. However, when the fact of the injury is unknown to the plaintiff, it will be tolled until, in the exercise of reasonable diligence, the plaintiff should have discovered the injury.

McNulty v. Chip,
116 A.3d 173 (R.I. 2015)

- In *McNulty*, within weeks of purchasing their home, plaintiffs experienced significant flooding in the driveway, garage and basement. The flooding continued over the next several years and culminated with severe flooding in 2010. As a result, plaintiffs filed suit against the seller seeking to recover on a variety of theories, including negligence.

***McNulty v. Chip*,**
116 A.3d 173 (R.I. 2015)

- When the plaintiffs filed suit, the three year SOL had long run. Plaintiffs argued that the SOL should be tolled until 2010 when the significant flooding occurred.

***McNulty v. Chip*,**
116 A.3d 173 (R.I. 2015)

- **HELD**: The SOL was not tolled because "[w]hen confronted with numerous instances of flooding and water problems during the years that followed the purchase of the property, as well as information that the area has been flood-prone since 1968, a reasonable person would have been put on notice more than three years before suit was filed that a potential claim existed."

In Camera Review

City Nat'l Bank v. Main and West,

108 A.3d 989 (R.I. 2015)

- Issue of first impression.
- In considering plaintiff's motion for summary judgment, hearing justice reviewed *in camera* a document without providing defense counsel an opportunity to review it.

City Nat'l Bank v. Main and West,
108 A.3d 989 (R.I. 2015)

- Supreme Court held that this was impermissible.
- The right to due process encompasses an individual's right to be aware of and refute the evidence against his case.

City Nat'l Bank v. Main and West,

108 A.3d 989 (R.I. 2015)

- A trial justice may only examine materials *in camera* to prevent the discovery or use of evidence.

- A trial justice may not consider *in camera* submissions to determine the merits of litigation unless the submissions involve national security concerns or if a statute permits such *in camera* review.

Sua Sponte Rulings

Brayman Builders, Inc. v. Lamphere,
109 A.3d 395 (R.I. 2015)

- **HELD**: The trial justice erred as a matter of law by denying the plaintiff's request for declaratory relief by *sua sponte* relying on the doctrine of administrative exhaustion.

Brayman Builders, Inc. v. Lamphere,
109 A.3d 395 (R.I. 2015)

- "[W]hen a trial justice considers and rules on an issue *sua sponte*, the parties must be afforded notice of the issue and an opportunity to present evidence and argue against it.'"

Depositions

***Plante v. Stack*,**
109 A.3d 846 (R.I. 2015)

- Rhode Island follows the rule announced in *Kelvey v. Coughlin*, 625 A.2d 775 (R.I. 1993), that “the only instance in which an attorney is justified in instructing a deponent not to answer is when the question calls for information that is privileged.”

***Plante v. Stack*,**
109 A.3d 846 (R.I. 2015)

- Notwithstanding the Court's admonition in *Kelvey*, in *Plante*, plaintiffs' counsel instructed plaintiffs not to answer certain questions about their divorce (the reasons for the divorce, the wife's current living arrangement, romantic life, and discussions with plaintiffs' son concerning those issues).

Plante v. Stack,
109 A.3d 846 (R.I. 2015)

- Defense counsel concluded the deposition and moved to compel additional testimony from plaintiffs regarding their separation and divorce.

- The hearing justice denied the defendants' motion to compel and the defendants' petitioned the Supreme Court for a writ of certiorari.

Plante v. Stack,
109 A.3d 846 (R.I. 2015)

- The Supreme Court determined that although the questions were of a personal nature, there was no basis for plaintiffs' counsel to instruct plaintiffs not to answer.

- Plaintiffs' counsel should have ceased the deposition and brought the matter to the attention of a Superior Court justice.

***Plante v. Stack*,**
109 A.3d 846 (R.I. 2015)

- Nevertheless, because the plaintiffs' counsel's instruction not to answer was made toward the end of the 4-hour-long deposition, the Supreme Court concluded that defendants were not entitled to additional deposition testimony from the witness.

- In doing so, the majority was particularly cautious to note that its decision should not be read as a "retreat from [its] holding in *Kelvey*."

Independent Medical Examinations

Plante v. Stack,
109 A.3d 846 (R.I. 2015)

- Issue of first impression.

- Trial justice had entered a protective order prohibiting the defendants' expert, a neuropsychologist, from taking a history from plaintiff in conjunction with a court-ordered examination.

Plante v. Stack,
109 A.3d 846 (R.I. 2015)

- Plaintiff argued that the history was unnecessary because the plaintiff's own deposition testimony and the reports of plaintiff's treating physicians were sufficient to establish the plaintiff's history.

Plante v. Stack,
109 A.3d 846 (R.I. 2015)

- **HELD**: "The doctor must be permitted to take the party's history and to ask such other questions that will enable him or her to formulate an intelligent opinion concerning the nature and extent of the party's injuries."

Plante v. Stack,
109 A.3d 846 (R.I. 2015)

- Issue of first impression.
- Trial justice entered a protective order allowing plaintiff to have up to two representatives in the examination room while plaintiff's independent medical examination was conducted.

Plante v. Stack,
109 A.3d 846 (R.I. 2015)

- Defendants argued, based on an affidavit submitted by their expert, that the presence of third parties would disrupt the testing protocols.

Plante v. Stack,
109 A.3d 846 (R.I. 2015)

- **HELD**: The presence of an attorney or other representative of the examinee has the potential to disrupt or defeat the purpose of the examination.

- Supreme Court held that an attorney may not be present but another third-party representative, such as a nurse paralegal, may be present.

Offer of Judgments

Raiche v. Scott,
101 A.3d 1244 (R.I. 2014)

- Issue of first impression.

- Whether a tender made in connection with an offer of judgment that is accepted as part payment, in accordance with R.I. R. Civ. P. 68(b)(3), includes prejudgment interest.

Raiche v. Scott,
101 A.3d 1244 (R.I. 2014)

- Rule 68(b)(3) provides that a plaintiff may “accept the tender [of an offer of judgment] as part payment only and proceed with the action on the sole issue of the amount of damages.”

- Rhode Island is unique in this regard. Most jurisdictions and federal courts do not allow for part payment only.

Raiche v. Scott,
101 A.3d 1244 (R.I. 2014)

- In *Raiche*, the defendant made an offer of judgment of $50,000.
- The trial justice later awarded statutory interest on the $50,000 tender.
- The defendants maintained that the trial justice erred in doing so because the $50,000 offer was made with the intent to fully resolve the case.

Raiche v. Scott,
101 A.3d 1244 (R.I. 2014)

- The Supreme Court agreed with the trial justice that when an offer of judgment is accepted as part payment only and does not explicitly state that prejudgment interest is included in the offer, it will be treated as not including prejudgment interest.

***Raiche v. Scott*,**
101 A.3d 1244 (R.I. 2014)

- However, when the deposit is accepted as part payment, the plaintiff is only entitled to interest on the amount of the deposit to the extent it accrued prior to the deposit (the plaintiff is not entitled to interest on the amount deposited after the date of the deposit).

Punitive Damages

***Sherman v. Ejnes*,**
111 A.3d 371 (R.I. 2015)

- RI has long recognized that a discovery request seeking information about a defendant's personal finances is invasive.

- RI also long recognized the importance of evidence of a defendant's personal finances in assessing the amount of punitive damages that would adequately serve as a punishment.

***Sherman v. Ejnes*,**
111 A.3d 371 (R.I. 2015)

- Thus, RI requires a *Palmisano* hearing before a plaintiff may seek discovery of a defendant's personal financial information.

***Sherman v. Ejnes*,**
111 A.3d 371 (R.I. 2015)

- In *Sherman*, the plaintiff requested disclosure of the defendant's financial information.
- When the defendant refused, the plaintiff moved to compel.
- The defendant also filed a motion to strike the plaintiff's claim for punitive damages and requested a *Palmisano* hearing.

***Sherman v. Ejnes*,**
111 A.3d 371 (R.I. 2015)

- The trial justice, however, informed the parties that his practice was not to afford a *Palmisano* hearing until after the plaintiff proves liability.

- **HELD**: A *Palmisano* hearing was required, therefore, the Supreme Court quashed the Superior Court's order and remanded the case.

Annuities

W. Reserve Life Assurance Co. v. ADM,

116 A.3d 794 (R.I. 2015)

- Issue of first impression.

- **HELD**: An 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.

W. Reserve Life Assurance Co. v. ADM,

116 A.3d 794 (R.I. 2015)

- Issue of first impression.
- **HELD**: An incontestability clause that takes immediate effect is enforceable and precludes all causes of action that seek to invalidate the policy.

Appeal from Grant of Summary Judgment in Favor of One Defendant Without 54(b) Judgment

Carlson v. Town of South Kingstown,
111 A.3d 819 (R.I. 2015)

- Summary judgment entered in favor of one of several defendants.
- Plaintiff appealed from the grant of summary judgment.
- There was a question as to whether judgment had actually entered.

Carlson v. Town of South Kingstown,
111 A.3d 819 (R.I. 2015)

- Supreme Court remanded the case for formal entry of judgment pursuant to R.I. Super. Ct. R. Civ. P. 54(b), describing it as a "minor procedural remand."

Timeliness of Appeal

Duffy v. Estate of Bartolomie Scire,

111 A.3d 358 (R.I. 2015)

- Plaintiffs sought to appeal a probate decision to the Superior Court.

- Statute then in place required plaintiffs to file in the Superior Court a certified copy of the record within 30 days of the probate court order.

Duffy v. Estate of Bartolomie Scire,

111 A.3d 358 (R.I. 2015)

- 17 days after the probate court order, plaintiffs wrote to the Superior Court requesting a certified copy of the record.
- 20 days after the probate court order, plaintiffs' counsel wrote to opposing counsel requesting a stipulation as to the probate record.

Duffy v. Estate of Bartolomie Scire,

111 A.3d 358 (R.I. 2015)

- 25 days after the probate court order, plaintiffs filed a complaint in Kent County appealing the decision of the probate court and attached to the complaint certified copies of the claim of appeal, decision, order and an uncertified transcript of the probate court hearing. Plaintiffs also filed a motion to extend time for submission of the record.

Duffy v. Estate of Bartolomie Scire,

111 A.3d 358 (R.I. 2015)

- Defendants opposed the motion and moved to dismiss plaintiffs' appeal, arguing that plaintiffs had failed to perfect their appeal.

- 31 days after the probate court order, the probate court clerk wrote to plaintiffs' counsel with the cost of copying the record.

Duffy v. Estate of Bartolomie Scire,

111 A.3d 358 (R.I. 2015)

- The Superior Court denied the motion for extension and dismissed plaintiffs' appeal.
- On appeal, the Supreme Court reversed, finding there was excusable neglect for plaintiffs' failure to timely perfect the appeal.

Duffy v. Estate of Bartolomie Scire,

111 A.3d 358 (R.I. 2015)

- The Supreme Court found that the delay in submitting the certified record was out of the plaintiffs' control.

- Plaintiffs' counsel could not make copies of the record himself. Plaintiffs' counsel made a clear and explicit request for a copy of the record; no reasonable person needed have done more.

Duffy v. Estate of Bartolomie Scire,

111 A.3d 358 (R.I. 2015)

- Justice Indeglia and Justice Flaherty dissented, arguing that the majority's decision represented a relaxation of the excusable neglect standard.

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