Five Things the Rhode Island Supreme Court Wants You to Know About Civil Trial and Appellate Practice

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Much can be gleaned from a close examination of the Court's decisions and, in particular, the footnotes that shed light on the Court's views. If one thing is clear, the Supreme Court wants practitioners to know the matters that trouble it and to heed its words of caution.

Introduction

As lawyers, we are trained to follow the rules. For civil practitioners, the Rhode Island Superior Court Rules of Civil Procedure and the Rhode Island Supreme Court Rules of Appellate Practice are familiar sources. Some of the most important rules, however, are not found in those carefully organized and numbered rules.

Buried within the footnotes of the Atlantic Reporter are some of the most important rules governing civil trial and appellate practice. The Rhode Island Supreme Court's decisions and, in particular, the footnotes to its decisions, are laden with important rules governing civil trial and appellate practice.

In recent years, the Rhode Island Supreme Court has developed a practice of sending admonitions and reminders to practitioners, largely through the footnotes of its decisions, on not only the Court's rules, but also its expectations for trial and appellate practice. The following are just a few of the reoccurring themes the Court has developed.

1. The Raise-or-Waive Rule

The raise-or-waive rule, arguably one of the most important rules for trial lawyers and appellate practitioners, is one of the Rhode Island Supreme Court's most frequently invoked legal doctrines. As of March 2017, the Rhode Island Supreme Court has already applied the rule in five civil decisions in its 2016-2017 term.[1] In three of the five decisions, the Supreme Court concluded that the raise-or-waive doctrine precluded review of at least one issue raised on appeal, underscoring the importance of properly raising issues and objections at trial.[2]

The Court applied the raise-or-waive rule in at least seven civil decisions in its 2015-2016 term[3] and in at least eight civil decisions in its 2014-2015 term.[4] Notwithstanding the Court's repeated reminders on the importance of adherence to the rule, preservation issues continue to arise.

As a general matter, the Rhode Island Supreme Court has "consistently adhered to the venerable 'raise or waive rule,' which provides that 'an issue that has not been raised and articulated previously at trial is not properly preserved for appellate review.'"[5] Thus, "'a litigant cannot raise an objection or advance a new theory on appeal if it was not raised before the trial court.'"[6] This is true regardless of whether the matter proceeds to trial or is disposed of at some earlier stage, such as summary judgment.[7]

The Supreme Court has applied the raise-or-waive rule when trial counsel has failed to properly preserve objections at various stages of the lower court proceedings. There are, however, notable trends. Most often the raise-or-waive doctrine is applied in the context of evidentiary rulings and jury instructions.

A. Evidentiary Rulings

With respect to evidentiary rulings, the Supreme Court consistently has held that "if 'the introduction of evidence is objected to for a specific reason, other grounds for objection are waived and may not be raised for the first time on appeal.'"[8] The Supreme Court's holdings highlight the need for counsel to inform the trial justice of all the bases for his or her objection to the introduction of evidence. For example, when an appellant argued recently that the trial justice had erred by admitting into evidence a medical report and testimony concerning the report because it was unduly prejudicial under Rule 403 of the Rhode Island Rules of Evidence, the Supreme Court held that the appellant had waived that argument by objecting to the evidence only on the grounds of relevancy.[9]

Related to the need to preserve objections to evidentiary rulings is the need to make a sufficient offer of proof. In a decision this term, the Supreme Court held that plaintiffs had preserved an argument related to the trial justice's preclusion of the plaintiffs' expert from testifying by making a sufficient offer of proof.[10] In so concluding, the Supreme Court explained "[i]t is well established that a litigant must make [an offer of proof] after a sustained objection to preserve the issue for appeal."[11] Thus, "'an examiner, after objection to a question propounded to a witness has been sustained, [must] advise the

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trial court what he expected the witness would have said if allowed to answer.'"[12]

B. Jury Instructions

The Rhode Island Supreme Court is most "exacting about applying the raise-or-waive rule in the face of inadequate objections to jury instructions."[13] In addition to the raise-or-waive rule, Rule 51(b) of the Superior Court Rules of Civil Procedure "'bars a party from challenging an erroneous instruction unless [the party] lodges an objection to the charge which is specific enough to alert the trial justice as to the nature of [the trial justice's] alleged error.'"[14] Accordingly, the Supreme Court is "especially rigorous in the application of the raise-or-waive rule when considering objections to jury instructions."[15]

In each of the past three court terms, the Supreme Court has refused to address arguments related to jury instructions on the grounds that the arguments had been waived.[16] For example, this term in **Bates-Bridgmon,** the Supreme Court concluded that plaintiffs in a premises liability case waived their request for a jury instruction on the mode of operation rule.[17] In that case, the plaintiffs maintained that the trial justice had told both parties that the court would instruct the jury on the mode of operation rule and the parties had extensively briefed the rule in the context of a motion in limine.[18] However, plaintiffs did not specifically request an instruction on the mode of operation rule and they did not object when the trial justice did not instruct the jury on it.[19] Accordingly, the Supreme Court concluded that the plaintiffs had waived their right to challenge the trial justice's decision not to instruct the jury on the rule.[20]

In other recent decisions, the Supreme Court reached the same conclusion and refused to address challenges to jury instructions where the party claiming error had not raised its objection at trial.[21] In doing so, the Supreme Court has explained that an objection on the record is required "even if a party has previously made a request for a particular instruction or if the trial justice has previously expressed an opinion on a particular instruction at an unrecorded charging conference or otherwise."[22] The rationale behind such a rigorous requirement is "'to allow the trial justice an opportunity to make any necessary corrections to his or her instructions before the jury begins its deliberations.'"[23]

2. The Failure to Order Transcripts for Appeal is "Risky Business"

The Supreme Court consistently has reminded practitioners and litigants about the risks inherent in failing to provide it with a transcript of the proceedings in the trial courts.[24] The Supreme Court has addressed this issue in three decisions thus far this term and in two of the three decisions has concluded that it could not review the claimed error because it had not been provided with the transcript.[25]

Most notably, in **Bailey v. Saunders,** the Supreme Court affirmed the Superior Court's decision on the sole basis that it was unable to consider the issues raised by the defendant on appeal because the defendant failed to include the transcript of the Superior Court proceedings within the record.[26] In doing so, the Supreme Court noted its oft-recited admonishment that "[t]he deliberate decision to prosecute an appeal without providing the Court with a transcript of the proceedings in the trial court is risky business."[27]

In limited circumstances, where the matters at issue are questions of law, and reference to the transcripts of the proceedings is unnecessary, the Supreme Court has addressed the question of law without the need for a transcript.[28] However, "'[u]nless the appeal is limited to a challenge to rulings of law that appear sufficiently on the record and the party accepts the finding of the trial justice as correct, the appeal must fail.'"[29]

Notwithstanding Supreme Court's words of caution, cases continue to reach the Court without transcripts.

3. Rule 54(b) Judgments Are Disfavored

In recent years, the Supreme Court has expressed its disfavor of Rule 54(b) judgments.[30] Last term, in **Cathay Cathay, Inc. v. Vindalu, LLC**, the Supreme Court noted its "strong preference for 'avoid[ing] piecemeal appellate review by delaying entry of judgment until all claims involving all parties are ripe for disposition and entering judgment as to all only when that time arrives.'"[31] The Supreme Court explained that "[t]he delay of the entry of judgment allows this Court to avoid the unnecessarily tedious and inefficient task of 'having to keep relearning the facts of a case on successive appeals.'"[32]

4. Speedy Resolution of Disputes

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expressed a preference for the speedy resolution of disputes and, on occasion, has seen fit to comment on the length of time particular matters have been pending. Implicit in the Supreme Court's decisions is a directive that practitioners move their cases along.

In two decisions this term, the Supreme Court commented on the length of time cases had been pending in Superior Court. In **Paolino v. Ferreira**, the Supreme Court paused to note that "[i]t does not escape our notice that the complaint in this case was filed in November, 2006, but that the matter was not reached for trial until June, 2012."[33] **In Rohena v. Providence**, the Supreme Court expressed concern about the length of time between the commencement of the action in 2006 and the defendant's motion for summary judgment in 2014, noting "[w]e have not been presented with any explanation for the delay between the filing of this suit and the motion for summary judgment."[34]

The Supreme Court's recent observations are consistent with the frustration the Court has expressed over the years with respect to seemingly endless cases. For example, on one occasion, the Supreme Court observed that it appeared that a case had "taken on a life of its own; we can perceive no sufficient reason why this particular litigation did not come to an end long ago. We see real similarities between this case and the fictional case of **Jarndyce v. Jarndyce**, which Charles Dickens so memorably and mordantly satirized in *Bleak House*."[35]

5. Failure to Develop Arguments in Brief

Similar to the cautionary messages that the Supreme Court often sends to trial lawyers about the importance of the raise-or-waive rule, the Supreme Court also often pauses to remind appellate practitioners of the importance of developing legal arguments in their briefing. Under the Court's jurisprudence, "[e]ven when a party has properly preserved its alleged error of law in the lower court, a failure to raise and develop it in its briefs constitutes a waiver of that issue on appeal and in proceedings on remand."[36]

Article I, Rule 16(a) of the Supreme Court Rules of Civil Procedure codifies this common law doctrine, providing "[e]rrors not claimed, questions not raised and points not made ordinarily will be treated as waived and not consid-

ered by the court." In recent decisions, the Supreme Court has reminded litigants that it "expect[s] if not 'demand[s] that the briefs before [it] will contain all the arguments that the parties wish [it] to consider.'"[37] Accordingly, in two decisions this term, the Supreme Court concluded that issues that had been raised by a party as issues for appellate review but not meaningfully discussed in the party's brief had been waived.[38]

Similarly, last term, the Supreme Court concluded in two cases that parties' cursory reference to an issue on appeal resulted in a waiver.[39] **In Nuzzo v. Nuzzo Campion Stone Enterprises Inc.**, for example, the plaintiff spent "a total of four short sentences" asserting an issue related to his counterclaim on appeal.[40] The Court noted that the plaintiff "completely fail[ed] to direct [the Court] to what he consider[ed] to be erroneous in the trial justice's findings[.]"[41] Because the plaintiff failed to direct the Court's "attention with specificity to any error[,]" the Court determined that the plaintiff "waived" any argument related to his counterclaim on appeal.[42]

Conclusion

The Rhode Island Supreme Court's commentary provides a window into the Court's preferences and expectations for trial and appellate practice. Much can be gleaned from a close examination of the Court's decisions and, in particular, the footnotes that shed light on the Court's views. If one thing is clear, the Supreme Court wants practitioners to know the matters that trouble it and to heed its words of caution. It is up to us, as practitioners, to seek out those messages and apply them in practice.

ENDNOTES

1 ***Rohena v. Providence***, *No. 2016-128-Appeal, 2017 R.I. LEXIS 29 (R.I. Mar. 2, 2017);* ***Paolino v. Ferreira***, *No. 2014-334-Appeal, No. 2014-335-Appeal, 2017 R.I. LEXIS 20, at *33-34 (R.I. Feb. 16, 2017);* ***In re Kyeshon J.***, *No. 2015-230-Appeal, No. 2016-161-Appeal, 2017 R.I. LEXIS 19 (R.I. Feb. 14, 2017);* ***Bates-Bridgmon v. Heong's Mkt., Inc.***, *152 A.3d 1137 (R.I. 2017);* ***Cote v. Aiello***, *148 A.3d 537, 549-50 (R.I. 2016).*

2 ***Rohena***, *2017 R.I. LEXIS 29;* ***In re Kyeshon J.***, *2017 R.I. LEXIS 19;* ***Bates-Bridgmon***, *152 A.3d 1137.*

3 ***Lemerise v. Commerce Ins. Co.***, *137 A.3d 696 (R.I. 2016);* ***Free and Clear Co. v. Narragansett Bay Comm'n***, *131 A.3d 1102 (R.I. 2016);* ***In re Estate Ross***, *131 A.3d 158 (R.I. 2016);* ***DePasquale v. Cwiek***, *129 A.3d 72 (R.I. 2016);* ***Behroozi v. Kirshenbaum***, *128 A.3d 869 (R.I. 2016);* ***Joachim***

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v. Straight Line Prods., LLC, 138 A.3d 746 (R.I. 2016); **Ribeiro v. R.I. Eye Inst.**, 138 A.3d 761 (R.I. 2016).

4 **O'Connor v. Newport Hosp.**, 111 A.3d 317 (R.I. 2015); **Renewable Res., Inc. v. Town of Westerly**, 110 A.3d 1166 (R.I. 2015); **Ferris Ave. Realty, LLC v. Huhtamaki, Inc.**, 110 A.3d 267 (R.I. 2015); **Laplante v. R.I. Hosp.**, 110 A.3d 261 (R.I. 2015); **Thornley v. Cmty. College of R.I.**, 107 A.3d 296 (R.I. 2014); **Pawtucket Redevelopment Agency v. Brown**, 106 A.3d 893 (R.I. 2014); **Berman v. Sitrin**, 101 A.3d 1251 (R.I. 2014).

5 **In re Kyeshon J.**, 2017 R.I. LEXIS 19 at *9 (quoting **In re Shy C.**, 126 A.3d 433, 434, 435 (R.I. 2015)).

6 **Laplante**, 110 A.3d at 267 (quoting **State v. Bido**, 941 A.2d 822, 829 (R.I. 2008)).

7 **Rohena**, 2017 R.I. LEXIS 29 at *5-6 (concluding that an issue that was not raised in plaintiff's objection to defendant's motion for summary judgment was not preserved for appeal).

8 **O'Connor**, 111 A.3d at 327 (quoting **Robideau v. Cosentino**, 47 A.3d 338, 341 (R.I. 2012) (mem.)); accord **In re Kyeshon J.**, 2017 R.I. LEXIS 19 at *9.

9 **Thornley**, 107 A.3d at 302.

10 **Paolino**, 2017 R.I. LEXIS 20 at *33.

11 **Id.** (citing **Mead v. Papa Razzi**, 899 A.2d 437, 445 (R.I. 2006)).

12 **Id.** (quoting **Manning v. Redevelopment Agency of Newport**, 238 A.2d 378, 382 (R.I. 1968)).

13 **Ferris Ave. Realty, LLC**, 110 A.3d at 285.

14 **Id.** (quoting **Botelho v. Caster's, Inc.**, 970 A.2d 541, 548 (R.I. 2009)); accord **Bates-Bridgmon**, 152 A.3d at 1145.

15 **Bates-Bridgmon**, 152 A.3d at 1145.

16 **Id.**; **Free and Clear Co.**, 131 A.3d at 1110; **Ferris Ave. Realty, LLC**, 110 A.3d at 285-86; **Berman**, 101 A.3d at 1266-67.

17 **Bates-Bridgmon**, 152 A.3d at 1145.

18 **Id.**

19 **Id.**

20 **Id.**

21 **Free and Clear Co.**, 131 A.3d at 1110; **Ferris Ave. Realty, LLC**, 110 A.3d at 285-86; **Berman**, 101 A.3d at 1266-67.

22 **Berman**, 101 A.3d at 1266-67.

23 **Ferris Avenue Realty, LLC**, 110 A.3d at 285 (quoting **DiFranco v. Klein**, 657 A.2d 145, 147 (R.I. 1995)).

24 **Bellevue-Ochre Point Neighborhood Ass'n v. Preservation Soc'y of Newport Cnty.**, 151 A.3d 1223 (R.I. 2017); **OSJ of Providence, LLC v. Diene**, No. 2016-14-Appeal, 2017 R.I. LEXIS 22, at *5 n.5 (R.I. Feb. 24, 2017); **Loppi v. United Investors Life Ins. Co.**, 126 A.3d 458 (R.I. 2015); **Baker v. Mitchell**, 126 A.3d 482 (R.I. 2015) (mem.).

25 **Bellevue-Ochre Point Neighborhood Ass'n**, 151 A.3d 1223 (R.I. 2017); **OSJ of Providence, LLC**, 2017 R.I. LEXIS 22 at *5 n.5; **Bailey v. Saunders**, No. 2015-142-Appeal, 2017 R.I. LEXIS 4 (R.I. Jan. 6, 2017).

26 **Bailey**, 2017 R.I. LEXIS 4 at *1-3.

27 **Id.** at *2 (quoting 731 **Airport Associates, LP v. H & M Realty Associates, LLC**, 799 A.2d 279, 282 (R.I. 2002).

28 **Loppi**, 126 A.3d at 460.

29 **Id.** (quoting **Adams v. Christie's Inc.**, 880 A.2d 774, 778 (R.I. 2005)).

30 **Cathay Cathay, Inc. v. Vindalu, LLC**, 136 A.3d 1113, 1119 (R.I. 2016).

31 **Id.** at 1121 (quoting **Metro Properties, Inc. v. Nat'l Union Fire Ins. Co.**, 934 A.2d 204, 207 (R.I. 2007)).

32 **Cathay Cathay, Inc.**, 136 A.3d at 1121 (quoting **Astro-Med, Inc. v. R. Moroz, Ltd.**, 811 A.2d 1154, 1156 (R.I. 2002)).

33 **Paolino**, 2017 R.I. LEXIS 20 at *8 n.5.

34 **Rohena v. Providence**, 2017 R.I. LEXIS 29 at *2 n.2.

35 **Greensleeves, Inc. v. Smiley**, 942 A.2d 284, 294 n.19 (R.I. 2007); accord **Nardone v. Ritacco**, 936 A.2d 200, 202 (R.I. 2007) (noting that the case was "seemingly endless" and "reminiscent of the fictional chancery case of **Jarndyce and Jarndyce**, as described by Charles Dickens in the novel BLEAK HOUSE, because this case like that one, 'drones on'"); **Arena v. City of Providence**, 919 A.2d 379, 384 (R.I. 2007) (likening the case to the "chancery case of **Jarndyce and Jarndyce**, described by Charles Dickens in the novel BLEAK HOUSE, as it too 'drones on.'"

36 **McGarry v. Pielech**, 108 A.3d 998, 1005 (R.I. 2015).

37 **Id.** at 1004 (R.I. 2015) (quoting **Estate of Meller v. Adolf Meller Co.**, 554 A.2d 648, 654 (R.I. 1989)); **see also Renewable Res., Inc. v. Town of Westerly**, 110 A.3d 1166, 1173 (R.I. 2015).

38 **A. Salvati Masonry Inc. v. Andreozzi**, 151 A.3d 745 (R.I. 2017); **Bates-Bridgmon**, 152 A.3d at 1141 n.5.

39 **Nuzzo v. Nuzzo Campion Stone Enterprises, Inc.**, 137 A.3d 711 (R.I. 2016); **Gregoire v. Baird Properties, LLC**, 138 A.3d 182 (R.I. 2016).

40 **Nuzzo**, 137 A.3d at 717.

41 **Id.**

42 **Id.** ❖

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