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FAST FIVE

RHODE ISLAND APPELLATE PRACTICE

Welcome to the Fast Five on Rhode Island Appellate Practice, which provides five periodic updates on Rhode Island appellate law and pointers for practice before the Rhode Island Supreme Court.

(1) PETITION FOR CERTIORARI GRANTED TO REVIEW DENIAL OF MOTION TO DISMISS

The Rhode Island Supreme Court generally has expressed great reluctance to review on certiorari interlocutory decisions, such as the denial of a motion to dismiss. However, this term, in Huntley v. State, No. 2011-397-M.P., the Rhode Island Supreme Court granted the State of Rhode Island's petition for writ of certiorari and directed the parties to address two discrete issues - application of the doctrine of res judicata and the relation-back doctrine. In doing so, the Supreme Court noted that "'[g]enerally, we decline to review on certiorari interlocutory decisions such as the denial of a motion to dismiss or the denial of a motion for summary judgment.'" *Id*. at 5 (quoting *Imperial Casualty and Indemnity Co. v. Bellini*, 746 A.2d 130, 132 (R.I. 2000)). Although it offered no explanation for its deviation from that general position, after granting the petition for writ of certiorari, the Court held that the hearing justice erred in failing to dismiss the plaintiff's case on the basis of res judicata. Accordingly, the Court quashed the judgment of the Superior Court and remanded the case.

The *Huntley* decision represents the rare occasion when the Supreme Court will review the propriety of the Superior Court's denial of a motion to dismiss. On those occasions when the

Supreme Court undertakes such review by certiorari, the Court will "apply . . . the same standard as that applied in reviewing the grant of such a motion." *Id*. at 5-6. Thus, the Court will "'affirm the denial of [defendant's] motion to dismiss if [defendants have] failed to show that [plaintiff] would not be entitled to relief under any set of facts that could be proven in support of [his or her] claim.'" *Id*. (quoting *Imperial Casualty and Indemnity Co.*, 746 A.2d at 132).

(2) FAILURE TO ORDER TRANSCRIPT NOT FATAL TO APPEAL

Article I, Rule 10(b)(1) of the Supreme Court Rules of Appellate Procedure requires that "[w]ithin twenty (20) days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary for inclusion in the record." In In re Estate of Glenn E. Griggs, No. 2012-19-Appeal, the appellants had indicated on their notices of appeal that they would order a transcript, but they never did so, nor did they inform the Court that they would proceed without a transcript. Based on those failures, the appellee filed a motion to dismiss the appeal. *Id*. at 4.

The Supreme Court addressed the appellee's motion at the outset of its decision on the merits of appellant's appeal. In so doing, the Supreme Court explained "it is the responsibility of an appellant who fails to order a transcript after indicating that he or she would do so, to inform the Court that he or she will not order a transcript." *Id*. at 5. Nevertheless, the Court denied the appellee's motion, holding that "[w]hile it is regrettable that appellants did not inform the court that they had decided not to order a transcript, that failure does not prevent us from reaching the merits in this particular case." *Id*. In so holding, the Supreme Court concluded that the appeals concerned a question of law that appeared sufficiently on the Superior Court record. *Id*.

(3) FAILURE TO ORDER TRANSCRIPT FATAL TO APPEAL

The Supreme Court has consistently reminded parties that the failure to order a transcript of the proceedings below is "risky business." *See Sentas v. Sentas*, 911 A.2d 266, 270 (R.I. 2006); *Bergquist v. Cesario*, 844 A.2d 100, 105 (R.I. 2004). It is well settled that the Court "ordinarily will not decide matters . . . unless there has . . . been transmitted . . . so much of the record of the tribunal below as may be necessary to enable us to pass on the question at issue." *Savoy Realty Corp. v. LPL, Inc.*, 401 A.2d 61, 61 (R.I. 1979). Nevertheless, cases continue to reach the Supreme Court without transcripts.

In Vogel v. Catala, 2012-177-Appeal, the appellant proceeded without ordering a transcript. At oral argument, in response to the Court's inquiry, appellant's counsel informed the Court that he had ordered the transcript on appeal. *Id.* at 2 n.1. However, on his notice of appeal, appellant affirmatively indicated that he would not be ordering a copy of the transcript. *Id.*

On appeal, the appellant argued that the trial justice erred in finding that the appellee was a credible witness and in failing to find that a contract at issue was void as a loan for betting. *Id.* at 4. However, without a transcript of the trial below, the Supreme Court was unable to review the trial justice's factual findings. *Id.* at 5. Indeed, without the transcript, the Court could only speculate as to the testimony adduced at trial, which it declined to do. *Id.* at 5-6. Thus, the appellant's failure to order the transcript was fatal to his appeal. *Id.* at 6.

Justice Robinson dissented on the ground that there was sufficient evidence in the record for the Court to conclude that appellee, by virtue of his own judicial admissions, was statutorily barred from recovering because the contract was void. *Id.* at 6.

(4) SUPREME COURT ADHERES TO DOCTRINE OF CONSTITUTIONAL AVOIDANCE

In State v. R.I. Brotherhood of Correctional Officers, No. 2011-99-Appeal, the Rhode Island Supreme Court reaffirmed the well-settled doctrine of constitutional avoidance, which holds that the Court shall not decide constitutional issues unless it is absolutely necessary to do so. Consistent with the doctrine, the Court refrained from deciding whether a state statute violates the principle of separation of powers and decided the case on other grounds. *Id.* at 11 n.9.

(5) DID YOU KNOW?

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