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By David W. Ruoff

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*State v. Andre Rivera*, No. 2010-130, decided on June 28, 2011, is a case involving Rivera's improvident participation in an armed home invasion that resulted in a murder. Rivera and four other like-minded men plotted to rob a known drug dealer. They agreed to bring a Mac 11 submachine gun with them to help convince the drug dealer to turn over his drugs and money. They knew their target also had a gun, which he kept in a safe in his house. The gaggle of five men drove to the victim's house where they confronted him. One of the co-defendants (the one with the submachine gun) confronted the victim (who was armed) and shot him. Rivera, meanwhile, was in a downstairs bedroom rummaging through a dresser. Upon hearing the shot, the co-defendants all fled in their car.

Rivera was indicted for, among other things, reckless second degree murder under the theory that he was an "accomplice-in-conduct." Under normal circumstances, the state must allege and prove that the accomplice acted with the purpose to promote or facilitate the commission of the underlying offense, but the indictment failed to contain that allegation. Rivera moved to dismiss the indictment by arguing that, in essence, the state had to prove that he specifically intended for the victim's death to occur. He relied heavily – too heavily – on a 1984 case that would have directly applied to him in 1984. *State v. Etzweiler*, 125 NH 57 (1984), interpreted an older version of the accomplice statute (RSA 628:8, IV) that supported Rivera's argument. The hint here is "older version."

The Court correctly pointed out that – arguably in response to *Etzweiler* – the legislature amended the accomplice statute by removing the requirement that it must be proven that an accomplice must act to promote or facilitate the commission of the underlying offense. Instead, to address cases like Rivera's, the statute only required that the prosecution prove that he acted with same mental state as the underlying offense (recklessly, not purposely) as long as "the result was a reasonably foreseeable consequence of the conduct." In this case,

the Court had little trouble finding that a gunfight with the resulting death was a reasonably foreseeable consequence of an armed home invasion even if Rivera did not directly participate in the *actus reus* of the murder.

In *State v. Ryan Laplaca*, No. 2010-042, decided June 28, 2011, the last sentence of the opinion completely deflates the main holding in the case. The Court found that the trial court violated Laplaca's due process rights by summarily imposing a suspended sentence without affording Laplaca the opportunity to be heard at an evidentiary hearing. The seed of the due process violation was planted when Laplaca admitted that he had violated the terms of his probation on an underlying felony. As a result of the violation, the trial court sentenced him to the state prison, but suspended the sentence on the condition that he complete the Grafton County Drug Court Sentencing Program. A specific provision of the sentencing order stated that the defendant waived "any and all" rights to a hearing on any potential claims that he had violated the terms of the Program or that he had been terminated from it. Borrowing a phrase from Monopoly, if Laplaca was terminated from the Program, he would go directly to jail (no passing Go, no collecting \$200).

Laplaca was terminated from the program six months later and the prosecution moved to summarily impose the full suspended sentence. The trial court granted the motion and imposed the full suspended sentence. On appeal, the Court found that this procedure, or lack of procedure, violated the defendant's right to due process. The State – taking a cue from the trial court's order – argued that the defendant had waived his right to a hearing. The logical (and fatal) extension of this argument, though, is that the defendant waived his right to due process (to be treated fairly).

In its analysis, the Court found that the defendant had a legally protected interest, a liberty interest, that triggered the fundamental requirements of due process. The Court reaffirmed the well-settled, bedrock procedures that must be followed when the State seeks to incarcerate a defendant by moving to impose a suspended sentence: 1) written notice; 2) disclosure of the evidence; 3) opportunity to be heard in person and offer evidence; 4) right to confront evidence; 5)

right to counsel. In this case, it appears from the record that three out of five steps were missed. The Court found that Laplaca could not have prospectively entered a knowing and intelligent waiver of his right to a hearing to contest allegations of misconduct months before he knew what the allegations were. Having found the defendant's due process right violated, the Court reversed the trial court's order.

But the Court was not done. In a beguiling last paragraph, the Court mentions that this case is limited to a scenario where the trial court imposes a "full suspended sentence of incarceration" and left "for another day" the question of whether a prospective waiver of a right to hearing might survive a constitutional attack if a lesser sanction is imposed. This suggests that Laplaca's prospective waiver *would* have been knowing and intelligently made if the trial court had only imposed one year of incarceration, or six months, or 30 days. This directly undermines the core logic of the Court's reasoning: a person cannot make a knowing and intelligent waiver of his or her right to contest allegations without knowing what those allegations are (no mention of potential sanctions...). Creating a nexus between the severity of the punishment imposed and whether the defendant made a knowing and intelligent *prospective* waiver of a constitutional right is not legally sound. Thus *Laplaca* fails to provide any meaningful guidance to trial courts on this issue.

*Appeal of Harold French*, No. 2010-535, decided June 30, 2011, is an appeal from the Board of Auctioneers. French, an auctioneer, decided to attend the auction of a painting in Portsmouth. The reserve on the painting was set by the owner at \$10,000. Before the auction, the auctioneer (an apparent colleague of French's) asked French to place a bid on the painting if the bids did not rise to the reserve level. French agreed, but neither of them notified the seller of this arrangement. Now, I don't know much about auctions, but this strikes me as a bad idea. When French's bid of \$9,500 was the highest one, the owner waived the reserve and accepted the bid. French refused to buy the painting because he placed the bid without any intent on buying the item, and litigation ensued. French said he was bidding to protect the reserve and make sure that the painting sold above it. The painting's owner did not see it that way. After filing a complaint with Board of Auctioneers, the Board found that French engaged in collusive bidding and sanctioned him.

On appeal, French argued that the Board mistakenly relied on an 1851 case, more recently discussed in *Stormy Weathers Inc. v. FDIC*, 834 F.Supp 519 (DNH 1993). Those cases actually distinguished a scenario in which an apparently collusive bid is an acceptable practice to prevent "sacrifice of the property [being auctioned] at an unreasonably low price." In those scenarios -- involving the sale of a home at foreclosure auction -- a known agent of the owner was allowed to place a bid on the property. French argued that those cases supported his position because he placed a single bid for the purpose of protecting the reserve. The Court was quick to point out the obvious: French was not the owner, did not have the consent of the owner, and no one other than the auctioneer knew French was bidding without the intent of purchasing the painting.

*Phyllis Buatti v. Alicia Prentice*, No. 2010-765, decided June 30,

2011, is a landlord-tenant case. Both parties appeared *pro se* before the Supreme Court. Buatti, the plaintiff-landlord, sued her tenant (Prentice) for back rent and served her with a Notice to Quit that premises. After a trial, the district court (ahem...circuit court) found that the defendant was delinquent in rent but that it could not determine the amount in arrears. Nevertheless, the court ordered the defendant be evicted for non-payment of rent. The defendant-tenant appealed and won, sort of.

On appeal, the Court noted that it was limited in its review to legal issues only because the defendant had not provided the Court with a copy of the transcript of the hearing below. In fact, it appears that the record on appeal was comprised solely of the pleadings in the trial court (demand for rent and notice to quit) and the circuit court's order. Notwithstanding the paucity of the record, the Court reversed. As the Court noted, under RSA 540, the burden is on the landlord to demonstrate that its demand for rent is not greater than the arrearage. Thus, if the circuit court could not determine that amount of the arrearage, the order of eviction had to be vacated as the landlord could not prove its demand for rent did not exceed it. RSA 540 contains an implied right/remedy for tenants that fall behind in their rent. Under the statute, such tenants have a right to avoid eviction by payment of the arrearage (plus \$15), but the burden is on the landlord to demonstrate the amount of the arrearage. The Court reasoned that the trial court is required to make a finding of specific amount of arrearage before it can order an eviction; a tenant must know how much it must pay in order to avoid the eviction.

In order to assist the trial court on remand, the Court said that if the trial court could determine that "some amount certain was due... it should so find." Having been unable to find an amount after the first trial, it is not clear how the trial court will be able to do so upon remand. However, if it can and the amount is greater than or equal to the amount on the demand for rent, then the trial court can find for the landlord.

*Winecellar Farm Inc., v. Leona Hibbard*, No. 2010-275, decided July 21, 2011, involves a property and lease dispute at a buffalo farm in Durham. Plaintiffs and defendants owned adjacent farms, and the defendants are heirs of the family that owned the Bedard Farm for generations. The plaintiffs bought an adjacent farm in 1992 and befriended the elderly Bedards. The Bedards were a brother and sister that had lived on the farm their entire lives. Within a few years, the plaintiffs expressed an interest in leasing or buying the Bedards' farm. The parties then entered into an agreement that allowed the plaintiffs to use certain fields on the Bedard Farm to cultivate and harvest hay to support the plaintiff's buffalo farm. The so-called "haying agreement" contained a provision that provided that the lease remained in effect "in perpetuity." The parties also entered into an agreement that allowed the plaintiffs to pasture buffalo on two of the Bedard Farm fields. Throughout the 1996-2006 time period, the plaintiffs repeatedly offered to buy the Bedard Farm or, in the alternative, acquire a right of "first refusal." However, the Bedards never signed any of the proposed agreements. Regardless, the plaintiffs continued to invest in their buffalo farm which relied heavily on the "haying" and "pasture"

agreements. They were, forgive the pun, betting the farm that the Bedards would eventually sell their farmlands to them.

Everything fell apart when the Bedards both died within six months of each other. Neither of the Bedards had children and their estate(s) passed to their nieces and nephews. The plaintiffs initiated the litigation by filing a petition to enjoin their eviction from the land. Also, they sought specific performance for purchase of the land, arguing they were entitled to specific performance because they had a number of oral commitments from the Bedards that they would have the first opportunity to purchase the farmlands. They also argued that the “in perpetuity” provision of their haying agreement was fully enforceable. After a bench trial, the trial court denied the plaintiff’s request for an injunction but ordered that the plaintiffs had the right of first refusal to purchase the farmlands they had leased from the Bedards. Both parties appealed.

On appeal, the plaintiffs essentially lost. The Court found that the perpetual nature of the haying agreement amounted to an unreasonable restraint on the alienation of real property. The “unreasonable restraint on alienation” doctrine is an ancient common law doctrine. The Court reaffirmed the well-developed balancing test for the application of this particular rule of law. Traditionally, the justification for enforcement of a particular restraint is balance against the actual and practical effect on alienation. In this case, the Court found that the perpetual lease to allow for haying essentially made the Bedard Farm completely unalienable, and yet provided the plaintiffs with a substantial benefit at very little cost.

The Court went on to find that the partial specific performance awarded by the trial court was done in error. The Court found that that trial court in reaching its decision misapplied the law of part performance. Part performance is typically an exception to a statute of frauds defense. In this case, the plaintiffs argued that the statute of frauds should not preclude their option to purchase the Bedard Farm because they had “partly performed” on the agreement by making payments and investing significant amounts of money in preparing the fields for pasturing animals. The trial court found that the “part performance” exception to a statute of frauds claim did not apply, yet awarded the plaintiffs the right to purchase the fields they had leased as restitution for losses incurred. The Supreme Court dealt with this ruling quickly: if the part performance exception does not apply, then no enforceable agreement exists to purchase the land. The Court found that the trial court erred in awarding the plaintiffs the opportunity to purchase the improved lands as restitution. The Court pointed out that the plaintiffs may be entitled to monetary relief and remanded the case for consideration of that issue.

There were a number of obvious atmospheric factors at play in this case: the Bedards were very elderly when the plaintiffs began a fairly aggressive campaign to solicit a written commitment for a right of first refusal. Less than a month after the first Bedard passed away, the plaintiffs prevailed upon his elderly sister (the remaining Bedard) to sign an agreement to sell the land. The person who witnessed her sign the agreement didn’t actually see her sign it. . . . he “witnessed” it hours later and never saw her do it. Lastly, the Bedards refused to sign numer-

ous written “memorandums of understanding” and yet the plaintiffs continued with their plans as though they had a fully executed option to buy the lands. So, in reading the opinion, one comes away with the feeling that both the trial court and Supreme Court perceived that there was a certain element of “coming to the harm” that undermined the plaintiff’s claims.

*Petition of Stuart Dedopoulos*, No. 2010-478, decided July 21, 2011, is noteworthy because those of us that have busy litigation practices have stood in Stu’s shoes. Attorney Dedopoulos was scheduled to be in two courts at once: at that Strafford County Superior Court and the Rockingham County Superior Court. Both hearings were for final pretrial conferences in criminal cases. Nine days prior to the hearings, Attorney Dedopoulos filed a motion to continue the hearing in the Rockingham County case because his other hearing in Strafford was going to address a contested motion. He explained his scheduling problem in the motion.

Attorney Dedopoulos called the clerk’s office at the Rockingham County Superior Court on two separate days leading up to the hearing to ascertain the status of his request for a continuance. He left messages both times and never received a return call from the Court. Hearing nothing from the court clerk’s office, Attorney Dedopoulos coordinated with opposing counsel to inform the trial court the reason for his absence. At the final pretrial conference, the trial court denied the motion to continue and fined Attorney Dedopoulos \$100 for “failing to appear without ruling [sic] on the motion [to continue].” Good grief.

The Supreme Court found that imposing a fine under these circumstances was an unsustainable exercise of discretion. The Court acknowledged that trial courts have broad discretion in whether to grant or deny a requested continuance. However, the Court also “admonish[ed] the justices of the trial courts that in the future, when they are exercising their sound discretion . . . they should make every effort to accommodate the reasonable scheduling requests of attorneys.” The Court went on to find that Attorney Dedopoulos was diligent in trying to resolve his scheduling conflict and that there was no negligence on his part. What else could he have done? The troubling corollary to the Courts’ opinion is that it appears to hold that whether to assess a fine against an attorney is purely discretionary. Conspicuously absent from the opinion is any discussion about the factors a trial court should or must consider before assessing a fine against an attorney.

*Dana Chatman v. James Brady*, No. 2010-707, decided September 15, 2011, is a negligence case brought by a work-release inmate at the Strafford County House of Corrections against the Lee Country Fair. Chapman was serving a sentence for a felony conviction. As part of his sentence, he was released to an administrative home confinement program (ACH). As a requirement of this program he was required to wear an electronic monitoring anklet. In order to pay for the anklet, the ACH program required him to work. He was assigned to work at the defendant Lee Country Fair, loading tables and chairs onto a trailer. The trailer was parked on soft, uneven ground. After the plaintiff loaded the trailer, the owner of the truck (Brady) went to hook the trailer up to the truck’s hitch. At some point the trailer became unstable and one

of the welds on the trailer failed, causing it to fall on the plaintiff's leg. He sued Lee Country Fair and Brady for negligence.

The defendants responded by filing a motion to dismiss. They argued that because the plaintiff was performing "uncompensated public service" through the defendants, that they were immune from suit under RSA 651:70. RSA 651:70 which grants statutory immunity to a "person or organizations who utilizes the services of any person performing uncompensated public service". Thus, argued defense counsel, since the plaintiff was an offender in the ACH program and he was performing uncompensated public service, he could not sue. The trial court agreed. The Supreme Court did not.

In reversing the lower court, the Supreme Court had to analyze the meaning of the statutory phrase "uncompensated public service." This phrase is not defined in the statute. So the Court looked to the other provisions and subdivisions of RSA 651:70 to determine how the phrase is limited or defined. It concluded that uncompensated public service is limited to a type of release (from incarceration) that is ordered by a governmental entity that has the statutory authority to order it. In New Hampshire, there are three entities that can order it: the sentencing court, the commissioner of the department of corrections (through the prison); or the parole board.

Turning its attention to Chatman's case, the Court noted that his "service" for the defendant was as a result of his participation in the ACH program to which he was sentenced. However, he was not sentenced to perform uncompensated public service by the sentencing court. Also, since he was in the ACH program, the commissioner of the department of corrections could not order him to perform such service because he was in a county correctional facility. Lastly, he was not on parole. In light of these statutory limitations, the Court found that he was not performing uncompensated public service as defined, therefore, the statutory immunity did not apply.

Curiously, the Court pointed out that the current version of RSA 651:70 varies from version that was effective when the plaintiff was placed in the ACH program. The current version authorizes the superintendent of a *county* correctional facility to order uncompensated public service on the grounds of a city or municipality. The defendants did not argue that this recent amendment applied to them. Moreover, there was nothing in the record to indicate where the accident took

place, so, the Court declined to consider it.

*Aaron Boissy v. Ruth Chevion*, No. 2010-372, decided September 20, 2011, is a classic common law easement case. And it is ironic that one of the litigants was my Property Law professor in law school many years ago. The parties are abutters in Hopkinton. At issue were two easements that the respondent Chevion claims to have over the petitioner's land: the first was an easement to "pump water" across one of the petitioner's three lots to the respondent's lot; the second was an easement for a right of way across the petitioner's lot to an "ice pond" that no longer exists. The petitioners sought to resolve the dispute with a petition to quiet title. The trial court split the proverbial baby by finding that the easement to pump water was extinguished by "impossibility of purpose", whereas the second easement to access the non-existence ice pond endured. Both parties appealed.

Whether an easement may be extinguished by "impossibility of purpose" was undecided until the Court issued this opinion. This doctrine states that, in short, if a change has taken place since the creation of an easement (or any servitude) that makes it practically impossible to accomplish the purpose of the easement, a court may modify or extinguish the easement. In this case, the Court found that the original purpose of the easement – which predated Ms. Chevion's ownership by decades – was to allow her access to a specific well and to draw water from it. However, the well had been lost for over 40 years. According to the record, the well to which the respondent had an easement could not be located. The Court, applying it newly adopted doctrine, affirmed that the easement to access the lost well was extinguished. True, it is impossible to pump water from a well that cannot be found.

However, it is possible to visit an ice pond the does not exist. The second portion of the case dealt with the respondent's easement for a right-of-way to access an ice pond on the petitioner's land. The trial court found that there was one "marsh-like" body of water on the respondent's land that could no longer function as an ice pond. Nonetheless, the Court was convinced that that area was indeed the area referenced by the deeded right-of-way. The Court agreed with the lower court's assessment that "if [respondent] wants to go stand in a swamp, she can stand in a swamp." I can picture my property law professor – Ms. Chevion - standing in a swamp.

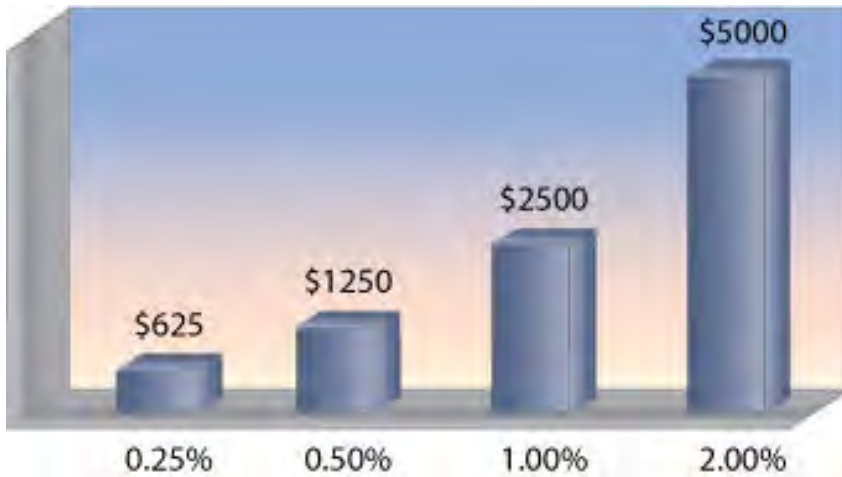


### About the Author

*David W. Ruoff is a partner in the firm of Howard & Ruoff in Manchester, and splits his practice between state/federal criminal defense and civil litigation. He was formerly an Assistant Attorney General, Assistant Rockingham County Attorney, and a staff attorney with the New Hampshire Public Defender. He regularly writes the Lex Loci column for the Bar Journal.*

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