STATE OF RHODE ISLAND

RHODE ISLAND TRAFFIC TRIBUNAL

STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**C.A. No. M18-0015**
	:	**18402503227**
RICHARD AYBAR	**:**	**18402503226**

DECISION

PER CURIAM: Before this Panel on August 10, 2021—Administrative Magistrate Abbate (Chair), Magistrate Noonan, and Magistrate Kruse Weller, sitting—is the City of Cranston's appeal in the case of Richard Aybar, which has been remanded back to this Panel from the Sixth District Court for further proceedings. Only the City of Cranston appeared before the Panel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

I

Facts and Travel

The underlying incident of this matter occurred on May 13, 2018, when Officer Christopher LeClair (Officer LeClair) of the Cranston Police Department stopped and cited Richard Aybar (Mr. Aybar) for four civil traffic violations through two summonses. *See* Summons No. 18-402-503226; Summons No. 18-402-503227. The first summons, Summons No. 18-402-503226 (Summons 226), charged Mr. Aybar with violating the following three statutes: § 31-16-5 (Turn Signal Required), § 31-24-12 (Stop Lamps Required), § 31-22-22(g) (No Seat Belt – Operator). *See* Summons 226. The second summons, Summons No. 18-402-503227 (Summons 227), charged Mr. Aybar with violating just one statute § 31-22-24 (Interior Lighting During Police Stop). *See* Summons 227.

The reason the charges were separated into two separate summonses is that each summons has space for three violations on its page. *See* Summons 226; Summons 227. When there are more than three violations, an officer continues onto the next page, which creates a new summons. On both summonses, Officer LeClair listed the arraignment court dates as June 26, 2018, at 9:00 a.m. and the hearing location as the Cranston Municipal Court. *See id.* At his arraignment, Mr. Aybar pled not guilty to all charges. Subsequently, on September 20, 2018, Chief Judge Matthew Smith found Mr. Aybar guilty of violating all four of the statutes. Mr. Aybar timely filed an appeal of the judgment rendered against him for the single charge contained in Summons 227 only; Mr. Aybar did not list the three charges contained in Summons 226 on his Notice of Appeal. *See* Appellant's Notice of Appeal.

On October 1, 2018, the Rhode Island Traffic Tribunal (RITT) requested the original copy of Summons 227 and two copies of Mr. Aybar's trial recording from the Cranston Municipal Court. The RITT copied the Cranston Police Department and Mr. Aybar on this email request. On October 12, 2018, Cranston Municipal Court responded that the audio file for Mr. Aybar's trial was "irretrievable."

The RITT scheduled a hearing before the Appeals Panel for November 14, 2018. On October 25, 2018, the RITT sent notices to all parties of this appeals hearing. The City of Cranston (City) did not send a representative to the hearing, and only Mr. Aybar attended. On the day of the hearing, Mr. Aybar appeared at the RITT and asked a clerk if he could add in Summons 226 because he stated that he had mistakenly omitted the Summons. *See Appeals Panel Transcript*, Nov. 14, 2018.[1] The clerk responded that he could ask the Panel at his hearing. *See id.* At the

[1] At the hearing, the clerk stated "[h]e failed to write the other summons number down. I told him that I couldn't add it . . . that he could ask the panel." *Appeals Panel Transcript*, Nov. 14, 2018.

hearing, Administrative Magistrate Abbate told Mr. Aybar that the panel would dismiss the case because a preserved record of the entire trial is required, and Cranston Municipal Court did not provide a record of the transcript.[2] *See id*. Mr. Aybar then orally requested to add Summons 226 to his appeal because he said he had mistakenly omitted this summons. *Id.* The Panel permitted Mr. Aybar to amend his appeal to include the summons he stated he had mistakenly omitted, reasoning that the violations enumerated in Summons 226 occurred at the same time as the violation enumerated in Summons 227 and that "[t]hey were all charged together." *Id.* On November 27, 2018, for efficiency of justice, the Panel issued an Order, dismissing all charges against Mr. Aybar. *See* Order, Nov. 27, 2018.

On December 5, 2018, the City filed a Notice of Appeal regarding Summons 226. *See* Notice of Appeal. As grounds for its appeal, the City stated Summons 226 was not properly before the Panel for consideration because Mr. Aybar had not timely filed an appeal for Summons 226. *Id.* Additionally, the City noted that the RITT had never specifically requested an audio transcript of Summons 226 and that the Appeals Panel had no authority to allow Mr. Aybar to orally amend his appeal to include Summons 226. *Id.*

After an unsuccessful settlement conference, the District Court set a briefing schedule. *City of Cranston v. State of Rhode Island* (RITT Appeals Panel) (Richard Aybar), A.A. No. 2018-183, 7 (6th Dist. Mar. 25, 2020). The State submitted a brief, defending the Panel's decision. *Id.* The City also submitted a brief, seeking reversal of the Panel's dismissal of Summons 226. *Id.* As an exhibit of the City's brief, the City submitted a transcript of the Panel's November 14

[2] "Without that transcript, that is a requirement under our rules that the record has to be preserved record, a recorded record of the entire trial. And if we do not have that record, if they cannot provide that in this case here, we will issue a written decision that the matter will be dismissed." *See Appeals Panel Transcript*, Nov. 14, 2018.

hearing. *Appellant City of Cranston's Brief in Support of* Appeal, Ex. 1. However, this transcript was inaccurate and omitted relevant portions of the discussion.[3] *See id.*; *Appeals Panel Transcript*, Nov. 14, 2018. The District Court considered this transcript in its review.[4] *See* A.A. No. 2018-183, 5.

On March 25, 2020, the District Court issued a written decision vacating the Appeals Panel's dismissal of Mr. Aybar's charges and remanding the case to the RITT. *Id.* at 20. The District Court found that the Panel was incorrect in concluding that there was no audio available for the trial of Summons 226, and in its decision the District Court noted that:

> "the Panel may have assumed that both citations (226 and 227) had been tried jointly—as they could have been under Rule 9 of the RITT Rules of Procedure. And so, when the Municipal Court reported that the audio of 227 was unavailable, the Panel may well have assumed that the statement applied to both summonses." *Id.* at 17.

The District Court remanded the case for proper inquiry to be made on the availability of the audio record of the trial and on the Panel's authority to grant Mr. Aybar's amendment. *Id.* at 18. The District Court requested that the Panel answer four preliminary questions in regard to its authority: "[t]he panel must also decide, preliminarily, [1] whether Notices of Appeal may be amended (at all), [2] whether the motion could be heard in the absence of notice, [3] whether it could be made orally, and [4] whether it is barred by expiration of the appeal period." *Id.* at 19.

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[3] Among other omissions and mistakes, the transcript that the City submitted completely omitted Magistrate Kruse Weller's relevant statements "[t]his summons, they are all at the same time" and "[t]hey were all charged together." *Appeals Panel Transcript*, Nov. 14, 2018; *Appellant City of Cranston's Brief in Support of* Appeal, Ex. 1. The transcript also omitted the word "recording" of the RITT's clerk's statement "[t]hey're all the same recording." *Id.*

[4] We know that the District Court considered this transcript because in its decision, the court states that "[the proceeding's] typed transcript is contained on one page" and the corrected transcript continues onto a second page. A.A. No. 2018-183, 5; *see Appeals Panel Transcript*, Nov. 14, 2018.

On April 20, 2021, the RITT asked the City and the Attorney General for memoranda to support their arguments on remand. On May 10, the Attorney General submitted a responsive memorandum to Administrative Magistrate Abbate. On May 14, 2021, the City submitted a memorandum to Administrative Magistrate Abbate. In that memorandum, Attorney Christopher Orton, for the City, responded to Administrative Magistrate Abbate's request for a recording of the trial for Summons 226 and 227 with the following statement: "I have been informed and believe that based upon a technical error in the Cranston Municipal Court's recording system, there are no audio files for the trial of summons 226 or the trial of summons 227." On August 10, 2021, the Appeals Panel held another hearing, which only the city solicitor attended. This court will now inquire into the questions that the District Court presented in its decision. *Id.* at 17-19.

II

Standard of Review

If a party is aggrieved by a final written judgment or order of this Panel, the party may appeal therefrom to the Sixth Division of the District Court. The District Court reviews appeals of the RITT Panel's decisions pursuant to § 31-41.1-9(d):

> "[t]he judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the appeals panel, or may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the appeals panel's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the appeals panel;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Further, our Supreme Court has held that reviews by an appeals panel are "confined to a reading of the record." *Link*, 633 A.2d at 1348.

III

Analysis

Upon remand, the District Court requested that the Panel further inquire on two matters: (1) the availability of the trial audio record and (2) the Appeals Panel's authority to grant Mr. Aybar's request to add Summons No. 226. A.A. No. 2018-183, 17-19. The Panel will address both matters below. Additionally, although the analysis of this decision did not require a critique of the traffic court, the Panel would nonetheless like to address the issues that led to a sequence of misunderstandings.

A

The "Substantive Error" - Availability of the Trial Audio Record for Summons 226

The City argued to the District Court that the Panel made a substantive error by finding that the audio record was unavailable. *Id.* at 7. The District Court remanded this matter to the RITT for "a proper inquiry to be made on the availability of the audio record of [the] trial." *Id.* at 17.

After additional inquiry, this Panel can confirm that the trial audio record for Summons 226 is unavailable. Attorney Orton made the following statement in the City's May 14, 2021 memorandum to Administrative Magistrate Abbate, "I have been informed and believe that based upon a technical error in the Cranston Municipal Court's recording system, there are no audio files for the trial of summons 226 or the trial of summons 227." This statement confirms that the City itself has concluded that the audio recording for the trial of Summons 226 is unavailable.

The Panel had come to this conclusion, that the audio recording of Summons 226 was unavailable, on the hearing date, as evidenced by the RITT clerk pointing out that there was not a recording of either Summons 226 or Summons 227. As such, the Panel was surprised to read in the District Court's opinion that "there [was] no factual basis upon which to conclude that there was no audio recording available for the trial of 226." The very next line of the District Court's opinion states one of many reasons that the Panel concluded there was no audio recording available for the trial of Summons 226:

> "the Panel may have assumed that both citations (226 and 227) had been tried jointly—as they could have been under Rule 9 of the RITT Rules of Procedure. And so, when the Municipal Court reported that the audio of [Summons] 227 was unavailable, the Panel may well have assumed that the statement applied to both summonses." *Id.* at 17.

The Panel had numerous reasons to believe that Summons 226 and Summons 227 were tried together. The four charges contained in the two summonses emerged from the same incident, which occurred on May 13, 2018. The arraignment court dates and times for both summonses were also the exact same (June 26, 2018 at 9:00 a.m.). Further, after Mr. Aybar pled not guilty, Chief Judge Matthew Smith heard all charges on the same day (September 20, 2018). As the District Court mentioned, Rule 9 of the RITT Rules of Procedure, permits the trial judge to join summonses for trial. *Id.* With all of these facts before it, the Panel naturally concluded that the four related charges were all jointly tried.

The November 14, 2018 hearing also contributed to the Panel's belief that the two summonses were heard at a joint trial. At that hearing, Mr. Aybar stated "[i]t's four, tickets. It's in two pages, two summonses[,]" indicating to the Panel that there were additional charges for the same incident that were just listed on a separate page. *See Appeals Panel Transcript*, Nov. 14, 2018. Magistrate Kruse Weller also made the following remarks: "[t]his summons, they are all at

the same time" and "[t]hey were all charged together[.]". *Id.* An RITT clerk also said that the summonses were "all the same recording." Unfortunately, the City of Cranston did not attend the hearing, where it could have clarified if the two summonses had been tried separately. *See id.* However, these statements show that the Panel was certainly under the impression that Summons 226 and Summons 227 were tried jointly.

We should note that the District Court was unable to consider the above statements made at the November 14 appeals hearing in its review because the hearing transcript that the City of Cranston submitted in its brief to the District Court was incomplete. *See Appellate City of Cranston's Brief in Support of Appeal*, Ex. 1. The transcript that the City of Cranston submitted entirely omitted Magistrate Kruse Weller's statements. *Id.* The transcript also left out the "recording" portion of the RITT's clerk's statement. *Id.* We know that the District Court considered this transcript because, in its decision, the court states that "[the proceeding's] typed transcript is contained on one page" and the corrected transcript continues onto a second page. A.A. No. 2018-183, 5; *see Appeals Panel Transcript*, Nov. 14, 2018. We cannot speculate as to how this missing information may have impacted the District Court's decision.

For the aforementioned reasons, the Panel concluded that there was a joint trial for Summons 226 and Summons 227, so when the Municipal Court reported that the audio of Summons 227 was "irretrievable" and the RITT clerk stated "They're all the same recording[,]" we rightfully assumed that the statement applied to both summonses. The District Court correctly pointed out that: "[h]ad 226 and 227 been tried together, . . . the instant case would stand on an entirely different footing. In that situation, the omission of 226 from the Notice of Appeal form might well have been viewed as nothing more than a clerical error on Mr. Aybar's part." A.A. No. 2018-183, 16 n. 13. The appeals panel, with the impression that Summons 226 and 227 had been

tried together, viewed the case in exactly this way, believing that the omission of Summons 226 was nothing more than a harmless clerical error by a *pro se* litigant.

Under the impression that there was no audio recording for the hearing(s) and in the interest of judicial efficiency, the Panel granted the appeal and dismissed the charges against Mr. Aybar by way of an order rather than a final decision.

We would like to point out that as the recordings ultimately were not available, the Panel would have dismissed the appeal even if Mr. Aybar had originally included Summons 226 and the court had specifically requested the audio recording of Summons 226. Traffic Tribunal Rule 21(e) requires that an appellant submit a "transcript necessary for the determination of the appeal" and Rule 21(h) states that "[i]n no event shall an appeal be heard by the appeals panel without the presentation of a transcript of the testimony of the hearing or trial by the appellant or by the submission of a stipulated statement of proceedings as required by this section. If the parties are unable to agree by stipulation as to a statement of the proceedings, the matter shall be remanded to conduct a new proceeding." Under these rules, the Panel is able to dismiss Mr. Aybar's appeal.[5] In addition, the City of Cranston's response as to the audio recording for Summons 226 would have been the same as its response for Summons 227, that the audio recording was "irretrievable."

In conclusion, the Panel finds that there is no audio recording available regarding Summons 226. We had initially concluded that the audio recording was unavailable without confirmation of such. If the City had sent a representative to attend the hearing, the City could have clarified at that time that both trials were held on the same day. Additionally, if the City had submitted a

[5] Rule 21(h) does provide that when there is no record available the parties can "agree by stipulation as to a statement of the proceedings." However, there was no stipulation here and the City did not even attend the appeals hearing.

proper transcript in its brief, the District Court would have recognized that the Panel certainly had the impression the summonses were jointly tried.

B

The "Procedural Error" - The Appeals Panel's Authority to Grant Mr. Aybar's Request to Add Summons 226

The City also argued to the District Court that the Panel had committed a procedural error by allowing Mr. Aybar to amend his appeal to include Summons 226. A.A. No. 2018-183, 7. The District Court remanded the case to the Panel for a finding to be made on the Panel's authority to permit the amendment. *Id.* at 18-19. In order to determine whether the Panel had authority, the District Court directed that the Panel should decide four preliminary questions, including: "[1] whether Notices of Appeal may be amended (at all), [2] whether the motion could be heard in the absence of notice, [3] whether it could be made orally, and [4] whether it is barred by the expiration of the appeal period." *Id.* at 19. These preliminary questions are addressed below.

1. Amendments Generally

The first preliminary question the District Court asks the Panel to determine is "[w]hether Notices of Appeal may be amended (at all)." *Id.*

Prior to answering the District Court's first question, we should note that we believed at the time and continue to believe that the addition of Summons 226 was the correction of a clerical mistake and not an amendment to a notice of appeal. Rule 19 of the RITT Rules of Procedure says "[c]lerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party after such notice, if any, as the court orders." Traffic Trib. R.P., Rule 19. The District Court pointed out that: "[h]ad 226 and 227 been tried together, . . . the instant case would stand on an entirely different footing. In that situation, the omission of 226 from the Notice

of Appeal form might well have been viewed as nothing more than a clerical error on Mr. Aybar's part." A.A. No. 2018-183, 16 n. 13. This indicates that the District Court would have viewed this as a clerical error if it had known that the two summonses had been tried together. Our Supreme Court has held that reviews by an appeals panel are "confined to a reading of the record." *Link*, 633 A.2d at 1348. While we will not reiterate our previous discussion, we would like to point out that there was nothing in the record to indicate that the two summonses were tried separately.[6] Without the new evidence submitted by the City in the form of an incomplete transcript, the District Court may have likely concluded that Summons 226 and 227 were tried together and viewed Mr. Aybar's omission of Summons 226 as a simple clerical error. *See* A.A. No. 2018-183, 16 n. 13. Rule 19 empowered the Panel to correct Mr. Aybar's mistake by permitting him to bring a motion to correct his appeal. *See* Traffic Trib. R.P., Rule 19.

In addition to Rule 19, the Panel also has broad powers under Rule 20, which provides that "[t]he court may, upon motion or its own initiative, relieve a party from a judgment or order for . . . (a) Mistake, inadvertence, surprise, or excusable neglect; . . . (f) Any other reason justifying from the operation of the judgment, or order, including that relief is warranted in the interests of justice." Traffic Trib. R.P., Rule 20. As such, the Panel had the broad authority to permit Mr. Aybar to add a summons number to his appeal, which he stated that he had accidentally omitted.

Lastly, § 31-41.1-8(e) provides that "[a]ny person desiring to file an appeal from an adverse determination pursuant to this section shall do so in a form and manner provided by the clerk of the traffic tribunal." Traffic Tribunal Procedural Rule 21 also provides that "[a]n appeal may be claimed by . . . procedures established by the Chief Magistrate." As a result of § 31-41.1-8(e) and

[6] Albeit there was no recording from the trial(s) and the City of Cranston could not have raised this point on the record at the appeals hearing because it failed to send a representative to the hearing.

Rule 21, RITT has the discretion to decide in what form it will consider appeals. This indicates that the Panel was empowered to permit an appeal of the additional summons in the form of an amendment to the original appeal.

2. Notice

The second question the District Court asked of the Panel is "whether the motion [to amend or appeal] could be heard in the absence of notice."

It is important to note that the City of Cranston was not without notice of this amendment. "Implied notice has been defined as a factual inference of the possession of knowledge, inferred from the availability of a means of acquiring such knowledge . . ." *Hardy v. Zoning Bd. of Review of Town of Coventry*, 113 R.I. 375, 381 (1974). Further, "[c]onstructive notice has been interpreted as both 'record notice' and all notice that is inferred as a matter of law." *In re Barnacle*, 623 A.2d 445, 447 (1993).

On October 25, 2018, the RITT sent the City of Cranston actual notice of the hearing for Summons 227. Although the City did not have actual notice that Summons 226 would be a part of the hearing, the City should have known that Summons 226 could be addressed because it was tried on the same day as Summons 227 and the facts were all relevant and intermingled since they arose out of the same incident. However, despite having received actual notice, the City of Cranston did not attend the hearing for Summons 227. As such, it is difficult for the City to insinuate that if they had received notice that the Panel would also consider Summons 226, the City would have actually attended the hearing. There was nothing unique or different about the charges in Summons 226 that could have changed the City's decision whether or not to attend the hearing. If the City had sent a representative to the hearing, it would have known about Mr. Aybar's motion and had an opportunity to object to it. As such, the City possessed the means of

acquiring knowledge that Summons 226 would be before the Panel, so notice should be implied as a matter of law and the City's failure to attend should be deemed as waiver of the issue. *See Hardy*, 113 R.I. at 381; *In re Barnacle*, 623 A.2d at 447.

In addition, the City's argument against the inclusion of Summons 226 should have been deemed moot under the Raise or Waive doctrine. In *Atryzek v. State*, the Rhode Island Supreme Court stated, "we have made it abundantly clear that 'a litigant cannot raise an objection or advance a new theory on appeal if it was not raised before the trial court.'" 197 A.3d 334, 337 (R.I. 2018) (quoting State v. Bido, 941 A.2d 658, 670-71 (R.I. 1981). The City failed to appear at the November 14 hearing where it could have made an objection to the Panel's decision to permit a consideration of Summons 226 *sua sponte*. Because the City had this opportunity, but failed to object on the record, the City waived its opportunity to raise any objection against the oral motion later on appeal. *See id.*

The Supreme Court has also held that a party may only use statements made on appeal to support lack-of-notice and excusable neglect claims. *See Wood v. Ford*, 525 A.2d 901, 903 (R.I.1987); *State v. Brown*, 106 R.I. 235, 238 (1969). Here, the City did not make any statements on appeal to support its lack of notice claim because the City did not attend the appeal. Further, the City did not provide any notice to this Panel or any reason for why it did not attend the hearing. As such, the City waived its opportunity to argue that it lacked notice of the inclusion of Summons 226.

In *Allstate Ins. Co. v. Lombardi*, the Rhode Island Supreme Court raised the question "[c]an a party obtain relief from a judgment . . . when its own unexcused negligence led to the judgment's entry in the first place?" 773 A.2d 864, 869, 865 (R.I. 2001). The *Allstate Ins. Co.* court held that a party could not argue it had not received notice and could not obtain relief from judgment merely

because the lower court may have committed legal error, partly reasoning that the insurer could have objected but failed to appear. *Id.* at 870-71. The Supreme Court has also held that parties can only get equitable relief when the party seeking the relief presents itself to the court with "clean hands." *See, e.g., Opie v. Clancy,* 27 R.I. 42, 50, 60 A. 635, 638 (1905) ("It must clearly appear to the court that it would be contrary to good conscience to allow the judgment to be enforced; in other words, a meritorious defense must be alleged and proved; and it must appear that the accident was unavoidable, or in no way attributable to the negligence of the party seeking equitable relief.") Here, had the City attended the appeals hearing, it would have had notice of the appeal of Summons 226 and had the opportunity to object to it. Therefore, the City did not have "clean hands" when it argued that it did not have notice, and the City was at least partially responsible for the alleged lack of notice of Mr. Aybar's appeal from Summons 226. As a result, the City's argument that it did not have notice fails.

3. Oral Amendments and Appeals

The third preliminary question the District Court asked the Panel to determine is "whether an appeal under § 31-41.1-8 can be taken, or amended, orally." A.A. No. 2018-183, 19.

Traffic Tribunal Procedural Rule 25 provides that a motion made before the court "shall be in writing unless the court permits it to be made orally." Traffic Trib. R.P., Rule 25. This rule explicitly gives the Panel the authority to permit oral motions and/or oral appeals. In addition, as mentioned previously, § 31-41.1-8(e) provides that "[a]ny person desiring to file an appeal from an adverse determination pursuant to this section shall do so in a form and manner provided by the clerk of the traffic tribunal." § 31-41.1-8(e). Traffic Tribunal Procedural Rule 21 also provides that "[a]n appeal may be claimed by . . . procedures established by the Chief Magistrate." Traffic Trib. R.P., Rule 21. As a result of these two rules, the Traffic Tribunal has discretion to decide in

what form it will consider appeals, meaning the Panel had the discretion to consider an oral motion for appeal. As stated earlier, the Panel has broad authority to hear an oral amendment or appeal for reason of "mistake." Traffic Trib. R.P., Rule 20. As such, the Traffic Tribunal is permitted to hear both oral appeals and oral amendments.

4. Late Appeal

The final question the District Court asked the Panel to determine is "whether [the appeal of Summons 226] is barred by the expiration of the appeal period." A.A. No. 2018-183, 19.

According to § 31-41.1-8(d), "[n]o appeal shall be reviewed if it is filed more than ten (10) days after notice is given of the determination from which it was appealed, unless it is determined that failure to file was due to excusable neglect." Section 31-41.1-8(d). Although Mr. Aybar's appeal for Summons 226 would have occurred after the ten-day appeal period, the Panel was still able to permit the appeal because his failure to file was due to excusable neglect.

The Rhode Island Supreme Court has said that "[t]he existence of excusable neglect is a question of fact and must be established by evidence." *Pleasant Management, LLC*, 960 A.2d at 225 (quoting *Pari v. Pari*, 558 A.2d 632, 635 (R.I. 1989)). The court has also held that "[e]xcusable neglect that would qualify for relief from judgment is generally that course of conduct which a reasonably prudent person would take under similar circumstances." *Id. at* 222. Although there were two summonses, and the City now asserts that there were two separate trials held on the same day, it was reasonable for Mr. Aybar to believe that he only needed to file one appeal because both summonses arose out of the same incident. For the reasons stated earlier, this court was also under the impression that there was only one hearing for the incident. It therefore seems perfectly reasonable that a *pro se* litigant, unfamiliar with the legal process, could have had the

same impression as well and mistakenly included only one summons number on his notice of appeal.

Further, Traffic Tribunal Rule 24(b)(2) permits the Panel to enlarge the time period "[u]pon motion made after the expiration of the specified period . . . where failure to act was the result of excusable neglect." Traffic Trib. R.P., Rule 24(b)(2). Although a motion to enlarge the time period was not made explicitly, it was made implicitly by Mr. Aybar when he moved to include Summons 226 in his appeal. As this Panel has found that Mr. Aybar's failure to add Summons 226 to his initial appeal was the result of excusable neglect, pursuant to Rule 24(b)(2), the Panel was at the time empowered to extend the time period for Mr. Aybar's motion. Therefore, the addition of Summons 226 was not time-barred.

5. Clerical Mistake

Even if Mr. Aybar's omission of Summons 226 was not excusable neglect, it could certainly be considered a clerical mistake that the Panel had the ability to remedy. Again, Traffic Tribunal Procedural Rule 19 states that "[c]lerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court *at any time* on its own initiative or on the motion of any party after such notice, if any, as the court orders." Traffic Trib. R.P., Rule 19 (emphasis added). As such, Rule 19 permitted the Panel to correct Mr. Aybar's mistake of omitting Summons 226 from his original appeal on the day of the hearing.

Lastly, as noted in regard to the discussion of oral appeals and amendments, the City's arguments against the hearing of the late appeals and excusable neglect are moot under the previously discussed Raise or Waive Doctrine, as the proper time for the City to have raised these arguments was at the hearing, which it did not attend.

IV

Conclusion

Pursuant to G.L. 1956 § 31-41.1-8(f), "[t]he appeals panel may affirm the decision of the judge or magistrate, or it may remand the case for further proceedings." Sec. 31-41.1-8(f). After answering all of the District Court's questions, we confirm that the Panel had the authority to permit Mr. Aybar to include Summons 226 in his appeal.

While we originally dismissed these charges altogether in the interest of judicial efficiency, the mistakes and misunderstandings surrounding this case now warrant a remand to the municipal court to establish a proper record, ensuring that the municipal court's audio recording is working properly. Accordingly, we remand both Summons 226 and 227 to the Trial Judge for further proceedings in order to establish a record pursuant to Rule 21(h).

ENTERED:

_____
Administrative Magistrate Joseph A. Abbate (Chair)

_____
Magistrate William T. Noonan

_____
Magistrate Erika Kruse Weller

DATE: _____