STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Aysia Rivers	:	
	:	
v.	:	**A.A. No. 14 - 0019**
	:	
City of Providence	:	
(RITT Appeals Panel)	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings and Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings and Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

ORDERED, ADJUDGED AND DECREED

that the Findings and Recommendations of the Magistrate are adopted by reference as the decision of the Court and the decision of the Appeals Panel is AFFIRMED.

Entered as an Order of this Court at Providence on this 25th day of February, 2015.

By Order:

____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Aysia Rivers	:	
	:	**A.A. No. 2014 – 019**
v.	:	**(C.A. No. T13-0042)**
	:	**(07-409-101308)**
City of Providence	:	
(RITT Appellate Panel)	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this appeal, Ms. Aysia Rivers urges that the appeals panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed a magistrate's verdict adjudicating her guilty of a moving violation: "Overtaking on the right" in violation of Gen. Laws 1956 § 31-15-5. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9 and the applicable standard of review is found in subsection 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to

General Laws 1956 § 8-8-8.1. After a review of the entire record I find that — for the reasons explained below — the decision of the panel is not clearly erroneous and should be affirmed.

I
FACTS AND TRAVEL OF THE CASE

On December 3, 2012, Officer Michael Clary of the Providence Police Department cited Ms. Rivers for violating to comply with the statute that mandates the use of a seat belt a civil traffic violation. The proceedings of the trial, which was conducted on June 5, 2013, were described thusly in the appeals panel decision:

> At trial, the Officer testified that he responded to an accident at the intersection of Harris Avenue and Atwells Avenue on December 25, 2013 at approximately 8:04 pm. (Tr. at 2.) The accident had occurred just before the intersection at the Seven Eleven convenience store driveway. Id. The Officer explained that there were two vehicles involved in the accident, and he promptly identified the driver of each respective vehicle as David O'Connor (O'Connor) and Aysia Rivers (Rivers or Appellant). Id. In addition, the Officer testified that upon arriving at the scene, he observed that O'Connor's service truck was angled attempting to get into the driveway of Seven Eleven and that the front end of the Appellant's vehicle had made contact with the passenger side of O'Connor's truck. Id. Furthermore, the Officer described that this segment of Atwells Avenue is a one-way street, and the relevant segment of Harris Avenue is a two-way street. Id. The Officer also described his observations regarding the positioning of the two vehicles which led him to conclude that O'Connor was

> attempting to negotiate a right turn into Seven Eleven when Appellant's vehicle passed him on the right and collided with O'Connor's vehicle. Id.
>
> O'Connor testified he was driving down Harris Avenue in order to make a delivery at Seven Eleven. (Tr. at 8.) O'Connor indicated that he slowed down, checked his mirrors, put his directional signal on and noticed a vehicle behind him. Id. In addition, O'Connor testified that as he negotiated a right-hand turn into Seven Eleven, another vehicle collided with the passenger side of his truck. Id. O'Connor identified the Appellant as the driver of the vehicle that struck his truck. Id. The Appellant's sole testimony concerning the aforementioned violation of the motor vehicle code was "[h]e was already in the left lane, and I was already on the side of him, turning in. He asked me if I was alright, I told him no, I wasn't." (Tr. at 10.)[1]

The trial magistrate found the officer, who had not been qualified as an expert, to be a credible witness.[2] He also credited Mr. O'Connor's testimony concerning the accident, particularly the sequence of events of the accident, from his point of view.[3] But he did not find Ms. Rivers' testimony believable.[4] As a result, he found Ms. Rivers guilty of the citation.[5]

Aggrieved by this decision, Ms. Rivers filed an immediate appeal. On

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1 Decision of Appeals Panel, January 28, 2014, at 1-2.

2 Decision of Appeals Panel, January 28, 2014, at 2 citing Trial Transcript, at 12.

3 Decision of Appeals Panel, January 28, 2014, at 2-3 citing Trial Transcript, at 12-13.

4 Decision of Appeals Panel, January 28, 2014, at 3 citing Trial Transcript, at 13.

5 Id.

September 11, 2013 her appeal was heard by an RITT appellate panel composed of: Magistrate Goulart (Chair), Judge Parker, and Magistrate Noonan. In a decision dated January 28, 2014, the appeals panel affirmed the decision of the trial judge. In doing so, it rejected Appellant's three assertions of error.

First, it held that Appellant's claim that Officer Clary was allowed to give expert testimony was false; the Court expressly did not qualify the officer as an expert accident-reconstructionist.[6] Secondly, the panel held that the officer was properly permitted to give lay-opinion testimony about the accident even though he came upon the scene after it occurred.[7] Thirdly and finally, the appeals panel found that the trial magistrate did not err by finding the testimony of the officer to be credible.[8] It therefore affirmed the appellant's conviction for the passing-on-the-right violation.[9]

On February 4, 2014, Ms. Rivers filed a claim for judicial review by the Sixth Division District Court pursuant to Gen. Laws 1956 § 31-41.1-9. By

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6 Decision of Appeals Panel, January 28, 2014, at 4-5.

7 Decision of Appeals Panel, January 28, 2014, at 5-9.

8 Decision of Appeals Panel, January 28, 2014, at 9-10.

9 Id.

order dated April 22, 2014, the Court established a briefing schedule. However, since neither party has submitted a memorandum for the Court's review within the allotted period, I have proceeded to submit these "Findings and Recommendations" without further delay.

II
STANDARD OF REVIEW

The standard of review which this Court must employ is enumerated in Gen. Laws 1956 § 31-41.1.-9(d), which provides as follows:

> (d) Standard of review. The 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 prejudicial 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.

This standard is akin to the standard of review found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act (APA).

Under the APA standard, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[10] Thus, the Court will not substitute its judgment for that of the appeals panel as to the weight of the evidence on questions of fact.[11] And so, except in the case where the panel's decision is affected by error of law, the decision of the panel must be affirmed as long as it is supported by legally competent evidence.[12]

III
APPLICABLE LAW

A
The Charge

In the instant matter the Ms. Rivers appeals from a conviction for overtaking on the right, a civil traffic violation set forth in section 31-15-5 of the Rhode Island General Laws:

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[10] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

[11] See Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) citing Liberty Mutual Insurance Company v. Janes, 586 A.2d 536, 537 (R.I. 1991)(decision rendered during previous incarnation of the appeals panel during existence of Administrative Adjudication Division[AAD]).

[12] Link, 633 A.2d at 1348 citing Environmental Scientific Corporation v. Durfee, 621 A.2d 200, 208 (R.I. 1993).

> **31-15-5. Overtaking on the right. —** (a) The driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:
>
> (1) When the vehicle overtaken is making or about to make a left turn;
>
> (2) Upon a one-way street, or upon any roadway on which traffic is restricted to one direction of movement, where the roadway is free from obstructions and of sufficient width for two (2) or more lines of moving vehicles. Violations of this section are subject to fines enumerated in § 31-41.1-4.
>
> (b) The driver of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting the movement in safety. In no event shall the movement be made by driving off the pavement or main- traveled portion of the roadway.

B

Rule 701 of the Rules of Evidence — Lay Opinion

The central issue in this case is whether the citing officer, Patrolman Clary, was properly allowed to give his opinion as to the basic outlines of the accident. All parties agree that this issue is governed by Rule 701 of the Rhode Island Rules of Evidence. It provides —

> **Rule 701. Opinion Testimony by Lay Witnesses. –** If the witness is not testifying as an expert, the witness' testimony in the form of opinions is limited to those opinions which are (A) rationally based on the perception of the witness and (B) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

IV
ANALYSIS

As stated above, Ms. Rivers raised three issues in this appeal: (1) that the officer was improperly allowed to give expert-opinion testimony; (2) that the officer's testimony exceeded the bounds of lay-opinion; and (3) that the trial magistrate erred by crediting the testimony of the officer and Mr. O'Connor but not the testimony of Ms. Rivers. We shall address these arguments seriatim.

A
Expert Testimony

Appellant complains that the officer was allowed to give expert testimony in the field of accident reconstruction. However, it is clear that the trial magistrate did not accord the officer's testimony expert status.[13] Moreover, Officer Clary expressly stated that, in his mind, the opinion he gave, although a "professional" opinion (based on his experience and training), but it was not his "expert" opinion as an accident reconstructionist.[14] Therefore, we

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[13] Trial Transcript, at 7. The trial magistrate declined to accord the officer's testimony expert status, in light of his testimony that he had not been certified as an accident reconstructionist until April of 2013, five months after this collision. Trial Transcript, at 4, 7. But, he allowed the testimony as a lay opinion under Rule 701 of the Rules of Evidence. Trial Transcript, at 7.

[14] Trial Transcript, at 4. He said he formed his opinion from the position of the

need not tarry on this issue further. Appellant's related argument — that the testimony the officer was allowed to give exceeded the limits established for lay opinion testimony — shall be considered next, in part IV-B of this opinion.

B

Lay Opinion Testimony

1

The Trial Record

The testimony which Ms. Rivers argues was admitted improperly as lay-opinion testimony was set forth thusly in the decision of the appeals panel —

> At trial, the Officer testified that he observed that there were two vehicles involved in the accident. (Tr. at 2.) He testified that O'Connor's service truck was angled attempting to get into the driveway of Seven Eleven and that the front end of Appellant's vehicle had made contact with the side of O'Connor's truck. Id. The Officer also stated that his observations regarding the positioning of the two vehicles led him to conclude that O'Connor was attempting to negotiate a right turn into Seven Eleven when Rivers' vehicle passed him on the right and collided with O'Connor's vehicle. Id.[15]

The forgoing is indeed a fair summary of the officer's testimony, which he gave

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vehicles and the statements of the operators. Trial Transcript, at 3. He did not take the readings and do the calculations he would have done if acting as such. Trial Transcript, at 4.

[15] Decision of Appeals Panel, January 28, 2014, at 5.

in narrative form (there being no prosecuting attorney present for the trial).[16]

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[16] Officer Clary began his testimony by reporting that when he responded to the scene of the accident, at the intersection of Harris Avenue and Atwells Avenue, Ms. Rivers and her infant son were still in the car, unable to exit due to collision damage. Trial Transcript, at 2. Pertinent to the lay opinion issue, he then stated —

> … Basically, what I observed when I arrived was that Mr. O'Connor's vehicle which is a truck, service truck was partially angle (sic) attempting to getting into the driveway of the Seven Eleven and vehicle number two, Ms. River's vehicle was operated by Ms. Rivers, was into the, front end of the vehicle was into the side of the truck and which kept the door shut, so we have to wait for fire department to actually let them out of the vehicle.

Trial Transcript, at 2. The trial magistrate then asked Officer Clary to draw the position of the vehicles. As he was doing so, he stated —

> This is Atwells, this is the intersection that I was talking about, this is Harris, this is two ways, this is one way, two ways traffic, but here is only one way, so twenty yards before the intersection of Atwells you have; Harris Ave. has a lane, but right here is just straight, so driveway to the Seven Eleven, driveway, so, he stop to turn right negotiating his turn as vehicle number two is traveling and goes around him to pass at which time their vehicle came into collision; both vehicles were when the accident happen. So the way the accident happened, I was able to see, to see, you know, the vehicles were positioned. Also to put on the record I am an accident reconstructionist.

Trial Transcript, at 2. This last statement — of his qualifications — triggered an objection from counsel for the defense, who urged that the proper predicate for Officer Clary to be certified as an expert had not been laid. Id.

Now, there is certainly no issue raised by the officer's testimony regarding what he saw at the scene of the accident after his arrival.[17] Appellant's concern, as expressed to the panel, is with the fact that the officer was allowed to state the conclusion he drew regarding the circumstances of the accident — i.e., that the accident occurred as Mr. O'Connor was pulling into the Seven Eleven and Ms. Rivers was passing on the right. He urges this is opinion testimony which should not have been allowed from a witness who has not been accorded expert status.

2

The Panel's Decision On the Issue of Lay-Opinion Testimony

The appeals panel began its analysis of this issue by noting that, under Rule 701 of our Rhode Island Rules of Evidence, the ability of a non-expert witness to provide opinion testimony "… is limited to those opinions which are (A) rationally based on the perception of the witness and (B) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."[18] The panel then observed that the distinction between expert-opinion

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[17] See R.I. Rules of Evidence 602.

[18] See Decision of Appeals Panel, at 6 quoting R.I. Rules of Evidence 701.

testimony and lay-opinion testimony is not easily defined.[19] And, the appeals panel acknowledged that police officers routinely offer both expert and lay opinion testimony.[20]

Turning to Rhode Island jurisprudence, the appeals panel observed that — like the border between expert and lay opinion evidence — the demarcation between fact and opinion testimony is also difficult to draw.[21] This is particularly true in the area of lay opinion.[22] The appeals panel declared that the Rhode Island rule appears to be that a lay opinion is admissible where (1) the factual premises of a particular lay opinion are incapable of being reproduced, (2) though they can be understood, when described, by an average person, and (3) the nexus between the facts and the conclusions to be drawn cannot be estimated by that same average person.[23]

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[19] See Decision of Appeals Panel, at 6-7 quoting United States v. Colon-Osorio, 360 F.3d 48, 52-53 (1st Cir. 2004).

[20] See Decision of Appeals Panel, at 6 quoting United States v. Avala-Pizarro, 407 F.3d 25, 28 (1st Cir. 2005).

[21] See Decision of Appeals Panel, at 7 citing State v. Fogarty, 433 A.2d 972, 974-75 (R.I. 1981) quoting 7 Wigmore, Evidence, §§ 1917-1919 at 1-17 (Chadbourn rev. 1978).

[22] See Decision of Appeals Panel, at 7 citing State v. Luyte, 109 R.I. 490, 494, 287 A.2d 634, 637 (R.I. 1972).

[23] See Decision of Appeals Panel, at 7 citing Luyte, 109 R.I. at 494-95, 287 A.2d

Applying these principles, the appeals panel found that the testimony offered by the officer in this case, satisfied these parameters and those established in Rule 701.[24] And so, after quoting a number of cases from our sister states in which testimony of officers as to the cause of accidents was found properly admitted, the appeals panel found the admission of the officer's opinion testimony did not constitute error.[25]

3

Rhode Island Law Regarding Lay-Opinion Testimony

I would generally associate myself with the approach of the panel on the question of lay-opinion and with its conclusion — that the trial magistrate did not err by allowing Officer Clary's opinion testimony regarding the circumstances of the accident. Nevertheless, I do believe it is important to note that the Rhode Island cases cited by the appeals panel were all tried prior to the promulgation of the Rhode Island Rules of Evidence, and were adjudicated under the common law principles of evidence. And so, we must ask —Are

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at 637-38 and Glennon v. Great Atlantic & Pacific Tea Company, 87 R.I. 454, 457, 143 A.2d 282, 284 (1958) citing Fontaine v. Follett, 51 R.I. 413, 417, 155 A. 363, 364 (1931).

[24] Decision of Appeals Panel, January 28, 2014, at 8.

[25] Decision of Appeals Panel, January 28, 2014, at 8-9.

these cases vital, or should they be disregarded as superseded by the rule? And if these cases do survive, what is the relationship (the balance or interplay) between the rule and our case law? We commence our resolution of this question by unfolding the Rhode Island case-law in somewhat greater depth.

In State v. Fogarty (R.I. 1981) the Court considered whether relatives of the defendant were properly barred from expressing opinions that the defendant was intoxicated. After labeling the Court's jurisprudence in this area as "unsettled," the Court noted the approach taken in Federal Rule of Evidence 701.[26] But the Court did not adopt the language of the federal rule judicially; instead, it declared that —

> …the better and more progressive rule is to allow the short-hand rendition of such external appearances as intoxication by lay witnesses as long as the witness has had an opportunity to observe the person and to give the concrete details on which the inference or description is founded.[27]

And so, while it declined to overrule the trial judge's refusal to admit the lay-opinion testimony based on its prior, "unsettled," law, the Court opined that

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[26] See Fogarty, 433 A.2d at 975-76. Federal Rule of Evidence 701 was the model for our Rule 701.

[27] See Fogarty, 433 A.2d at 975-76 citing McCormick's Handbook of the Law of Evidence, § 11 at 25-26 (2d ed. Cleary 1972).

the "better interpretation" would have admitted the lay-opinion evidence regarding intoxication.[28] Its pronouncement in Fogarty was repeated by the Court seven years later in State v. Bruskie (1988).[29]

But it was not until four years after Bruskie, in State v. Gomes (1992),[30] that the Court first faced this issue under Rule 701. The Court declared that the requirements of the Rule are "buttressed" by the prerequisites set out in Fogarty that the lay witness rendering the opinion made personal observations of the subject of the opinion and furnished the Court with concrete factual details;[31] because it found the defense had not provided the latter, it found no error in the decision of the trial judge to strike (from a deposition being admitted) a question and answer in which the deponent had expressed an opinion regarding the intoxication, vel non, of another witness.[32] Clearly, the Court's teaching is that the provisions of Rule 701 and the Fogarty

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28 See Fogarty, 433 A.2d at 976.

29 See State v. Bruskie, 536 A.2d 522, 524 (R.I. 1988). In Bruskie, a drunk-driving prosecution, the Court affirmed the trial judge's ruling admitting the testimony of two police officers that the defendant was, in their opinions, intoxicated. Id.

30 See State v. Gomes, 604 A.2d 1249 (R.I. 1992).

31 See Gomes, 604 A.2d at 1258-59 citing Fogarty, 433 A.2d at 976.

32 See Gomes, 604 A.2d at 1259.

requirements obtain in the conjunctive —both must be satisfied.[33]

Now, the cases we have discussed to this point all relate to the admissibility of lay-opinion as to intoxication. Has Rule 701 been addressed with regard to other issues? Yes, it has.

Applying Rule 701, our Supreme Court has also approved testimony by a mother regarding her son's mental maturity level;[34] a teacher's testimony that, after an injury, her pupil's limp, his educational and behavioral performance, and his educational outlook all worsened;[35] the testimony of a defense witness (elicited on cross-examination by the State), as to the type of shoe that made the foot-prints he saw in his backyard;[36] a neighbor's testimony (in a trial for the murder of an infant) that he heard a sound "like a baby screech, when they got hit or they didn't get their own way[;]"[37] and testimony by a fire department lieutenant with emergency medical technician (EMT) training as to the time of

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[33] See Gomes, 604 A.2d at 1259. See also State v. Ceppi, 91 A.3d 320, 334-35 (R.I. 2014).

[34] See State v. Farley, 962 A.2d 748, 754-56 (R.I. 2009).

[35] See Kurczy v. St. Joseph's Veterans Association, Inc., 820 A.2d 929, 940-41 (R.I. 2003).

[36] See State v. Oliveira, 774 A.2d 893, 915-16 (R.I. 2001).

[37] See State v. Wilding, 740 A.2d 1235, 1241-43 (R.I. 1999).

death of the victim.[38]

And, in these cases, has the Supreme Court made the Fogarty elements a prerequisite to the admissibility of lay-opinion testimony? No, it has not. An illustrative case is State v. Bettencourt (1999), wherein the Court considered the admissibility of lay opinion on a related issue — highway speed.[39] During the trial in a prosecution for driving to endanger, death resulting, the presiding judge permitted three civilian witnesses to estimate the speed at which the defendant was travelling prior to the collision.[40] The Court began its analysis of this issue by quoting from Rule 701, after which it stated —

> Opinion testimony may be rendered when " 'the subject matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time, and the facts upon which the witness is called to express an opinion are such that [persons] in general are capable of comprehending.' " [41]

Then, the Court noted that it had previously held that where the exact speed is

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38 See State v. Mallett, 600 A.2d 273, 275-76 (R.I. 1991).

39 See State v. Bettencourt, 723 A.2d 1101 (R.I. 1999).

40 State v. Mallett, 600 A.2d 273, 275-76 (R.I. 1991). It must be understood that the victim was already dead when the witness arrived. Id. Mallett is apparently the first lay-opinion case decided under Rule 701.

41 Bettencourt, 723 A.2d at 1111 citing State v. Bowden, 473 A.2d 275, 280 (R.I. 1984) quoting State v. Luyte, 109 R.I. 490, 494, 287 A.2d 634, 637 (1937).

not in issue, one need not be an expert to express an opinion on the issue.[42] The only other prerequisite to admission of a lay opinion as to speed is that the witness had a sufficient opportunity (based on time and distance) to observe the vehicle so that his or her opinion may constitute more than a guess.[43] Applying these principles, the Court found no error in the admission of lay opinion on the issue of speed.[44]

And so, we see that the prerequisites to the admission of lay opinion regarding intoxication — specified in Fogarty — are not applied generally. To the contrary, it appears the quotation from Bettencourt will have general applicability.[45] And so it is those standards we will apply in this case.

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Discussion

The first question we must ask, pursuant to Rule 701, is whether the opinion presented by Officer Clary — i.e., that the collision occurred as the

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[42] Bettencourt, 723 A.2d at 1111 citing State v. Noble, 95 R.I. 263, 267, 186 A.2d 336, 339 (1962).

[43] Bettencourt, 723 A.2d at 1111 citing State v. Green, 77 N.C. App. 429, 335 S.E.2d 176, 177 (1962).

[44] Bettencourt, 723 A.2d at 1111.

[45] This statement was quoted in State v. Oliveira, 774 A.2d 893, 916 (R.I. 2001) and State v. Wilding, 740 A.2d 1235, 1242 (R.I. 1999).

commercial vehicle was turning into the Seven-Eleven store and Ms. Rivers' vehicle was passing it on the right — was "rationally based on the perception of the witness," and "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." In my view the opinion stated by the officer met both these principles. It was certainly rationally based; he explained that it was based on what he saw and what he was told.[46] And I believe it was helpful to the fact-finder's understanding of the officer's testimony and helpful to the Court's adjudication of the citation before it.

Secondly, we must inquire whether, as taken from Bettencourt, the facts and circumstances upon which Officer Clary based his opinion (1) cannot be reproduced precisely as it appeared to the witness at the time and (2) the facts upon which the officer based his opinion are undoubtedly such that people can understand. Certainly, the officer could not reposition the vehicles as he saw them at the scene and bring the whole package into the courtroom. And any fact-finder of reasonable intelligence would be able to understand the factors that went into that opinion, as he laid them out.

For these reasons, I believe the appeals panel committed no error when

[46] See Trial Transcript, at 4.

it affirmed the trial magistrate's ruling permitting Officer Clary to give his opinion as to the fundamental circumstances of the accident.

5

Harmless Error

For the reasons just outlined, I conclude the ruling of the appeals panel on this issue was correct. However, if it were found to be wrong on this point — i.e., the opinion should not have been admitted — I would nonetheless believe that the trial magistrate's verdict should be affirmed, for the following reasons.

First, as related above, the first time the officer testified that the collision occurred as Mr. O'Connor was pulling his truck into the Seven-Eleven there was no objection.[47]

Secondly, Officer Clary's testimony regarding the circumstances of the accident was merely cumulative to Mr. O'Connor's testimony that the collision took place as he was pulling into the Seven-Eleven.[48] In his decision, the trial

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[47] See Trial Transcript, at 2, quoted ante at 10 n. 16. When he repeated the statement a few moments later he did add that, at that moment of the accident, Ms. Rivers' vehicle was passing on the right. Id. But certainly that was only a slight addition of information.

[48] See Trial Transcript, at 8. And he added that he had slowed down, checked

magistrate specifically found him to be credible.[49]

Thirdly, the issue of whether Officer Clary was properly permitted to give lay-opinion testimony is, in a sense, superseded by a related issue — whether he was properly denied expert status.[50] He testified he was a certified accident reconstructionist.[51] As we previously noted, the trial magistrate disallowed his testimony because he was not an expert when the collision occurred in December of 2012.[52] While a witness giving a lay opinion must have been a percipient witness, there is no such requirement for expert witnesses.[53]

C

The Credibility Determination

Finally, Ms. Rivers urges that the trial magistrate made a fundamental

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his mirrors, and put on his directional. Id. The vehicle then struck his truck "at the step on the passenger side of the truck. Id.

49 See Trial Transcript, at 13.

50 It is certainly true that the City did not file a cross-appeal from this ruling. However, I do not believe this fact precludes a finding of harmless error based if he was inappropriately denied expert status.

51 See Trial Transcript, at 2-5.

52 See Trial Transcript, at 7.

53 Compare Rhode Island Rule of Evidence 701 with Rhode Island Rule of Evidence 703.

error in finding the testimony of Officer Clary and the testimony of Mr. O'Connor to have been credible, but the testimony of Ms. Rivers to be lacking in credibility.

However, when reviewing the factual determinations of the appellate panel, this Court's role is limited; indeed, it is doubly limited — our duty in this case is to decide whether the panel was "clearly erroneous" when it found the Chief Magistrate's adjudication of Ms. Rivers was not "clearly erroneous" — a limited review of a limited review.[54]

The facts found by the appeals panel, quoted ante at 2-3, are fully supported in the record certified by the RITT to the District Court. And so, because the testimony of the City's witnesses was sufficient, to satisfy its burden of proof, I find no reason to set aside the decision of the appeals panel.

[54] See Gen. Laws 1956 § 31-41.1-8(f) and Gen. Laws 1956 § 31-41.1-9(d), (the latter quoted ante in "Part II – Standard of Review," at 5). See also Link v. State, 633 A.2d 1345, 1348 (R.I. 1993)(opining, construing prior law — which was also "substantively identical" to the APA procedure — that the District Court' role was to review the trial record to determine if the decision was supported by competent evidence).

V
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel was made upon lawful procedure and was not affected by error of law. Gen. Laws 1956 § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Id. Accordingly, I recommend that the decision of the appeals panel be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

February 25, 2015