



STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.

DISTRICT COURT  
SIXTH DIVISION

Vernon S. Lawrence	:	
	:	A.A. No. 2016 – 047
v.	:	(C.A. No. T16-0002)
	:	(15-001-527691)
State of Rhode Island	:	
(RITT Appeals Panel)	:	

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** In this case, Mr. Vernon S. Lawrence urges that an appeals panel of the Rhode Island Traffic Tribunal (RITT) erred when it affirmed a trial magistrate’s verdict adjudicating him guilty of a civil traffic violation — “Overtaking of the left,” in violation of Gen. Laws 1956 § 31-15-4. 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 Gen. Laws 1956 § 8-8-8.1. After a review of the entire record certified to this Court, I conclude that the decision rendered by the appeals panel in this case should be AFFIRMED; I so recommend.

I  
FACTS AND TRAVEL OF THE CASE

A

**The Incident**

On September 30, 2015, at approximately 12:04 p.m., Trooper Brendon Palmer of the Rhode Island State Police was on routine patrol duty on Diamond Hill Road when he was dispatched to a motor vehicle accident on Widow Street in the Town of Exeter, involving two vehicles: a black Honda and a white Freightliner fuel delivery truck.<sup>1</sup> Upon arrival, the trooper noticed damage to the Honda, which was Mr. Lawrence's vehicle, on its "right rear quarter."<sup>2</sup> Trooper Palmer then spoke to both drivers.<sup>3</sup> From these conversations he concluded that Mr. Lawrence had unlawfully passed the Freightliner on the left, causing the accident.<sup>4</sup> As a result, Appellant was cited for violating Gen. Laws 1956 § 31-15-4.

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<sup>1</sup> See Decision of Appeals Panel, at 1, citing Trial Transcript, at 1. Mr. Lawrence described the other vehicle in his testimony. Trial Transcript, at 4.

<sup>2</sup> Id.

<sup>3</sup> See Decision of Appeals Panel, at 1, citing Trial Transcript, at 3. Answering a question posed by the trial magistrate, Trooper Palmer testified that Mr. Lawrence told him that the collision occurred in the course of passing the other vehicle. Trial Transcript, at 3.

<sup>4</sup> See Decision of Appeals Panel, at 1-2, citing Trial Transcript, at 3.

**B**  
**The Trial**

Mr. Lawrence entered a plea of not guilty at his arraignment and the case proceeded to trial, before Chief Magistrate Guglietta of the RITT, on January 19, 2016.<sup>5</sup> At trial, during his direct testimony, Trooper Palmer testified in conformity with the foregoing narrative.<sup>6</sup>

When asked by the trial magistrate to describe the damage to the Appellant's vehicle, the trooper responded that "... the right rear taillight was damaged and there was a large dent in the right fend[er] ...."<sup>7</sup> Trooper Palmer also presented the Court with a photograph of the damage.<sup>8</sup>

Mr. Lawrence also testified at trial. He stated that he did pass the Freightliner, which was traveling slowly, on the left; but, he claimed he did so safely.<sup>9</sup> He asserted that the Freightliner rear-ended him three-quarters of a mile beyond the point where he had safely re-entered the right lane.<sup>10</sup> In essence, he

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<sup>5</sup> See Trial Transcript, at 1 (at page 31 of the electronic record this case).

<sup>6</sup> See Trial Transcript, at 1-3

<sup>7</sup> See Decision of Appeals Panel, at 2, citing Trial Transcript, at 3.

<sup>8</sup> See Decision of Appeals Panel, at 2, citing Trial Transcript, at 6-7.

<sup>9</sup> See Decision of Appeals Panel, at 2, citing Trial Transcript, at 3-5.

<sup>10</sup> See Decision of Appeals Panel, at 2, citing Trial Transcript, at 3-5. According

argued that his passing of the Freightliner and the accident were independent incidents.<sup>11</sup>

During his testimony, Mr. Lawrence entered his operator report as an exhibit; in that report he indicated that the Freightliner slammed on his brakes and hit the rear of his vehicle.<sup>12</sup>

The trial magistrate then rendered his oral verdict. He found the officer's testimony to be credible.<sup>13</sup> He then found that the accident (which caused the damage to Appellant's vehicle) happened while (or just after) Mr. Lawrence passed the Freightliner.<sup>14</sup> The magistrate also noted that the accident report supported this rendition of events.<sup>15</sup> Accordingly, he found that Mr. Lawrence's vehicle did not safely pass the Freightliner.<sup>16</sup> And so, he found Mr. Lawrence

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to Mr. Lawrence, the collision was not triggered by a stop sign or another traffic control device. Trial Transcript, at 5.

<sup>11</sup> See Decision of Appeals Panel, at 2, citing Trial Transcript, at 6. When Mr. Lawrence reiterated this assertion later in his testimony, the trooper specifically denied that Appellant had told him that at the scene. Trial Transcript, at 8-9.

<sup>12</sup> See Decision of Appeals Panel, at 2, citing Trial Transcript, at 8.

<sup>13</sup> See Decision of Appeals Panel, at 2, citing Trial Transcript, at 10.

<sup>14</sup> See Decision of Appeals Panel, at 2, citing Trial Transcript, at 10.

<sup>15</sup> See Decision of Appeals Panel, at 3, citing Trial Transcript, at 11.

<sup>16</sup> See Decision of Appeals Panel, at 3, citing Trial Transcript, at 11.

guilty of the violation — Overtaking on the Left — and imposed an \$85 fine.<sup>17</sup>

## C

### The Appeal

Aggrieved by this decision, Mr. Lawrence filed a timely appeal, which, on March 9, 2016, was heard by an RITT appeals panel composed of: Magistrate Goulart (Chair), Administrative Magistrate DiSandro, and Judge Almeida. In a decision dated March 30, 2016, the appeals panel rejected each of Mr. Lawrence's arguments and affirmed the decision of the trial judge.

## 1

### The Admission of Hearsay Evidence

The appeals panel rejected Mr. Lawrence's argument that the trial magistrate committed reversible error by admitting testimony, over his objection, from Trooper Palmer regarding the Freightliner driver's recollection of the accident.<sup>18</sup> The panel began its analysis on this point by emphasizing that an out-of-court statement is not considered hearsay unless it is offered for the truth of the matter asserted.<sup>19</sup> Following up on this principle, the panel declared

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<sup>17</sup> See Decision of Appeals Panel, at 3. See also Trial Transcript, at 9-12. Costs were also assessed. Id.

<sup>18</sup> See Decision of Appeals Panel, at 4-5.

<sup>19</sup> See Decision of Appeals Panel, at 5 (citing Rhode Island Rule of Evidence

that if a statement is admitted for a reason other than its truth, it is unnecessary to invoke an exception to the ban on hearsay evidence.<sup>20</sup> The panel then noted that the trial magistrate admitted that testimony not for its truth, but for a limited purpose: "... to merely get this officer to the scene to establish the facts for this case."<sup>21</sup> Finally, the appeals panel stated that, even if the trial magistrate erred in admitting the testimony, any such error was harmless because there is no evidence in the record that he relied on the testimony in making his ruling.<sup>22</sup>

## 2

### **Sufficiency of the Evidence**

Mr. Lawrence also argued that — in the absence of the hearsay evidence described ante under heading 1 — there was insufficient evidence to prove the charge of unlawfully overtaking on the left to the standard of clear and convincing evidence.<sup>23</sup> This argument was also overruled by the appeals panel,

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801(c) and State v. Gomes, 764 A.2d 124, 131 (R.I. 2001).

<sup>20</sup> See Decision of Appeals Panel, at 5 (citing State v. Crow, 871 A.2d 930, 936 (R.I. 2005)).

<sup>21</sup> See Decision of Appeals Panel, at 5 (citing Trial Transcript, at 2 and Crow, ante, 871 A.2d at 936-37).

<sup>22</sup> See Decision of Appeals Panel, at 5 (citing Trial Transcript, at 9-12).

<sup>23</sup> See Decision of Appeals Panel, at 5-6 (citing R.I. Traffic Tribunal Rule of Procedure 17(a) for the applicable standard of proof).

which found that the trial magistrate's verdict was not clearly erroneous.<sup>24</sup>

The panel began its analysis on this issue by noting that the prosecution's burden of proof may be satisfied by circumstantial as well as direct evidence.<sup>25</sup> Accordingly, the panel reasoned, a percipient witness need not be presented in every prosecution under this section.<sup>26</sup> And, in the instant case, the trial magistrate had before him (1) the photograph depicting the angle and placement of the damage to Mr. Lawrence's vehicle,<sup>27</sup> (2) the report submitted by the Freightliner's driver — which was placed into evidence by Mr. Lawrence — which indicated that the Appellant caused the accident when he was transitioning back into the right lane after passing the Freightliner,<sup>28</sup> and (3) the trooper's credible testimony.<sup>29</sup>

Based on these items of evidence, and after acknowledging its limited

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<sup>24</sup> See Decision of Appeals Panel, at 5-6.

<sup>25</sup> See Decision of Appeals Panel, at 6 (citing State v. Brown, 97 R.I. 95, 99, 196 A.2d 138, 141 (1963) and State v. Kozukonis, 71 R.I. 456, 462, 46 A.2d 865, 868 (1946)).

<sup>26</sup> See Decision of Appeals Panel, at 6.

<sup>27</sup> See Decision of Appeals Panel, at 6 (citing Trial Transcript, at 6-8, 10).

<sup>28</sup> See Decision of Appeals Panel, at 6 (citing Trial Transcript, at 11). This document was received into evidence as Defendant's Exhibit No. 1. Trial Transcript, at 8.

<sup>29</sup> See Decision of Appeals Panel, at 6 (citing Trial Transcript, at 11).



authority to review questions of credibility and the weight to be accorded the evidence by the trier of fact, the appeals panel concluded that the record contained sufficient evidence upon which to base the trial magistrate's verdict of guilty.<sup>30</sup>

### 3

#### **Admission of the Photograph of Mr. Lawrence's Vehicle**

At trial, the trooper showed the trial magistrate a photograph of Mr. Lawrence's vehicle.<sup>31</sup> Appellant objected on two grounds: first, that the trooper did not have a photo of the Freightliner, and second, that the photo "biases" his testimony.<sup>32</sup> But, before the panel he urged that this action was improper because: (1) the photograph was not entered as an exhibit, (2) he was not afforded an opportunity to view the photograph (during the trial), and (3) it was not relevant.<sup>33</sup>

The appeals panel responded to these new arguments by invoking the raise or waive rule, which applies when "the introduction of evidence is

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<sup>30</sup> See Decision of Appeals Panel, at 6 (citing Link v. State, 633 A.2d 1345, 1348 (R.I. 1993)).

<sup>31</sup> See Decision of Appeals Panel, at 7.

<sup>32</sup> See Decision of Appeals Panel, at 7 (citing Trial Transcript, at 7).

<sup>33</sup> See Decision of Appeals Panel, at 7.

objected to for a specific reason, other grounds for objection are waived and may not be raised for the first time on appeal.”<sup>34</sup> Noting that, at trial, Appellant objected only on the grounds that it favored the opposing party and that there was no corresponding photo of the Freightliner,<sup>35</sup> the appeals panel deemed Mr. Lawrence’s appellate arguments relating to relevance and the lack of foundation not to have been preserved at trial.<sup>36</sup> It therefore declined to consider them.<sup>37</sup>

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<sup>34</sup> See Decision of Appeals Panel, at 7 (citing State v. Bettencourt, 723 A.2d 1101, 1107 (R.I. 1999)(quoting State v. Neri, 593 A.2d 953, 956 (R.I. 1991)(internal quotation marks omitted))). The Court added that, in order to be considered on appeal, a trial objection must be “... sufficiently focused so as to call the trial justice’s attention to the basis for said objection ...” Decision of Appeals Panel, at 7 (citing Bettencourt, 723 A.2d at 1107 (quoting State v. Toole, 640 A.2d 965, 972-73 (R.I. 1991))).

<sup>35</sup> See Decision of Appeals Panel, at 7 (citing Trial Transcript, at 7).

<sup>36</sup> See Decision of Appeals Panel, at 7.

<sup>37</sup> Id. As it concluded its consideration of this argument, the appeals panel made two observations — (1) that the photograph likely was relevant, since the trial magistrate used it to determine the point of contact between the two vehicles, Decision of Appeals Panel, at 7-8, n.1 (citing Bettencourt, ante 723 A.2d at 1108 and Trial Transcript, at 6-8, 10), and (2) that Mr. Lawrence was given an opportunity to view the photograph before trial. See Decision of Appeals Panel, at 7-8, n.1 (citing Trial Transcript, at 6-7).

### The Trial Magistrate's Questions

The fourth issue addressed by the appeals panel was Mr. Lawrence's allegation that the trial magistrate deviated from his proper role as a neutral fact-finder by facilitating the testimony of the trooper.<sup>38</sup>

The appeals panel, which rejected this assertion of error,<sup>39</sup> began its analysis by noting that, by asking questions, a judge does not become an advocate, so long as the judge does so in a "meticulous, impartial manner."<sup>40</sup> In fact, a trial judge has the discretion to elicit testimony that will clarify any confusion caused by a prior examination.<sup>41</sup> The appeals panel stated that, in its estimation, the trial magistrate posed questions — to both Mr. Lawrence and Trooper Palmer — in an even-handed manner, merely to clarify their

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<sup>38</sup> See Decision of Appeals Panel, at 8, citing Appellant's Notice of Appeal, at 2.

<sup>39</sup> See Decision of Appeals Panel, at 8-9.

<sup>40</sup> See Decision of Appeals Panel, at 8 (citing State v. LaRoche, 683 A.2d 989, 1001 (R.I. 1996)(citing State v. McKenna, 512 A.2d 113 (R.I. 1986) and R.I. Rule of Evidence 614(b)).

<sup>41</sup> See Decision of Appeals Panel, at 8 (citing State v. Figueras, 644 A.2d 291, 293 (R.I. 1996)(citing State v. Giordano, 440 A.2d 742, 745 (R.I. 1982)) and State v. Jimenez, 882 A.2d 549, 554 n.8 (R.I. 2005)).

testimony.<sup>42</sup> Accordingly, it found no error in the trial magistrate's questioning of the witnesses in this case.<sup>43</sup>

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### **The Appeals Panel's Conclusions**

Based on its evaluation of the Appellant's four arguments, the appeals panel found that the substantial rights of Mr. Lawrence had not been violated; accordingly, the trial magistrate's verdict was affirmed.<sup>44</sup>

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### **The Appeal to the District Court**

Finally, Mr. Lawrence filed a further appeal to the Sixth Division District Court pursuant to Gen. Laws 1956 § 31-41.1-9. A conference was conducted and a briefing schedule set.

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<sup>42</sup> See Decision of Appeals Panel, at 8-9 (citing examples of the questions the trial magistrate posed on pages 2, 3, 5, and 6 of the Trial Transcript).

<sup>43</sup> See Decision of Appeals Panel, at 9.

<sup>44</sup> See Decision of Appeals Panel, at 10.

**E**  
**The Positions of the Parties**

Memoranda have been received from the Appellant, Mr. Lawrence, and the Appellee, the State of Rhode Island.

**1**  
**Appellant's Position**

On May 19, 2016, Mr. Lawrence filed a four-page memorandum alleging that the appeals panel erred in a number of ways.

But before the Appellant addressed the four issues which the panel discussed in its opinion (outlined ante, in subsection I-C), he pointed out another issue which he had raised below but which the panel failed to discuss: that the trial magistrate failed to require the trooper to answer a question he had posed — how, putting aside the statement of the other driver, could he come to the conclusion he had given to the court previously in his testimony.<sup>45</sup> This allegation having been set out, Mr. Lawrence proceeded to attack the issues which the appeals panel had discussed.

First, Mr. Lawrence argues that the trial magistrate erred in permitting the trooper to testify regarding what the other driver had told him regarding

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<sup>45</sup> See Appellant's Memorandum of Law, at 2 (citing Trial Transcript, at 3).

the circumstances of the accident, which he asserts was hearsay not within a recognized exception.<sup>46</sup>

Second, Appellant urges that the evidence presented at trial was insufficient to prove the charge to the applicable standard of proof — clear and convincing evidence.<sup>47</sup> The core of this argument is Mr. Lawrence’s belief that the charge of overtaking on the left cannot be proven in the absence of first-hand testimony, particularly in the face of his own testimony that the accident occurred after he had returned to the right-hand lane.<sup>48</sup> Appellant cites a number of unpublished decisions previously decided by the RITT appeals panel which, he maintains, support this position.<sup>49</sup> He concludes this argument by enumerating a number of alternative, innocent scenarios pursuant to which this accident may have occurred.<sup>50</sup>

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<sup>46</sup> See Appellant’s Memorandum of Law, at 2. He maintained that he properly objected to the testimony, though he provides no citation to the transcript. Id.

<sup>47</sup> See Appellant’s Memorandum of Law, at 2-3 (citing Traffic Tribunal Rule of Procedure 17).

<sup>48</sup> See Appellant’s Memorandum of Law, at 2-3.

<sup>49</sup> See Appellant’s Memorandum of Law, at 3. Unfortunately, Mr. Lawrence has not provided these decisions to this Court for its review.

<sup>50</sup> See Appellant’s Memorandum of Law, at 3.

Thirdly, Mr. Lawrence alleges that the trial magistrate committed error by viewing a photograph on the trooper's cellular phone — without admitting it as an exhibit.<sup>51</sup> He urges this was error because he did not have an opportunity to view the photograph during trial and because the officer did not have any photographs of the other vehicle. In sum, he accuses the trial magistrate of facilitating the testimony of the trooper, in violation of his role as a fact-finder in a non-jury trial.<sup>52</sup>

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**Appellee's Position**

In a six-page memorandum filed on May 31, 2016<sup>53</sup> the State has responded to Mr. Lawrence's arguments.

First, the State reminds us that the statement of the Freightliner's operator was admitted for a limited purpose.<sup>54</sup> Additionally, it points out that the testimony in question,

After speaking to both operators they both stated that the Defendant at a point had passed the other vehicle on the left hand

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<sup>51</sup> See Appellant's Memorandum of Law, at 3.

<sup>52</sup> See Appellant's Memorandum of Law, at 3-4.

<sup>53</sup> See Appellee's Memorandum of Law, *passim*.

<sup>54</sup> See Appellee's Memorandum of Law, at 3-4 (citing Trial Transcript, at 2).

side. And when the vehicle entered, and when the Mr. Lawrence's vehicle crossed back into the right-hand lane. That's when the collision occurred.

not only contained a summary of the other driver's statement to the trooper, but also Mr. Lawrence's.<sup>55</sup> Moreover, the State notes that Mr. Lawrence did not object when the trooper also testified — “I guess both stated that once the vehicle had crossed back into the right-hand lane is when the accident occurred.”<sup>56</sup> The State concludes its discussion of this issue by arguing that, even if the trial magistrate erred in admitting the testimony, any such error was harmless because (1) the trial magistrate did not rely upon the testimony in his verdict and (2) Mr. Lawrence presented an exhibit which also included the Freightliner operator's version of the collision.<sup>57</sup>

The State commences its discussion of Mr. Lawrence's second argument — i.e., that the charge was not proven to the standard of clear and convincing evidence — by noting that the appeals panel made a specific finding that the

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<sup>55</sup> See Appellee's Memorandum of Law, at 4 (citing Trial Transcript, at 1-2). The State implies, but does not state, that the portion of the testimony reflecting Mr. Lawrence's testimony was clearly admissible as non-hearsay, being the statement of a part-opponent. See R.I. Rule of Evidence 801(d)(2)(A).

<sup>56</sup> See Appellee's Memorandum of Law, at 4 (citing Trial Transcript, at 2).

<sup>57</sup> See Appellee's Memorandum of Law, at 4 (citing Trial Transcript, at 8).



evidence was sufficient to find that Mr. Lawrence unsafely overtook the Freightliner on the left.<sup>58</sup> It also responded to his claim that the trial magistrate failed to make sufficient findings of fact by reminding this Court that the trial magistrate made a specific finding that he did not believe Mr. Lawrence's testimony that the collision occurred three-quarters of a mile after he returned to the right-hand lane.<sup>59</sup> The State concludes its discussion by noting the strictures which have been placed upon both appeals panel's review and the District Court's review on the factual determinations made by a trier-of-fact in the Traffic Tribunal.<sup>60</sup>

Regarding Appellant's third assignment of error, the admission of the photograph, the State urges us to take the same approach adopted by the appeals panel — which was to find that Mr. Lawrence failed to properly preserve this issue at trial; as a result, it urges that we too should not consider it on this second-level appeal.<sup>61</sup> The State also reminds us that Mr. Lawrence saw

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<sup>58</sup> See Appellee's Memorandum of Law, at 4-5 (citing Decision of Appeals Panel, at 6).

<sup>59</sup> See Appellee's Memorandum of Law, at 4-5 (citing Trial Transcript, at 10, 11).

<sup>60</sup> See Appellee's Memorandum of Law, at 5 (citing Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) and Gen. Laws 1956 § 31-41.1-9(d)).

<sup>61</sup> See Appellee's Memorandum of Law, at 5-6 (citing State v. Neri, 593 A.2d

the photograph before trial and that he did not move for discovery in this case.<sup>62</sup>

Finally, the State urges that Appellant's fourth assertion of error, that the trial magistrate improperly questioned the witnesses, must also fail because Rule 614 of the Rhode Island Rules of Evidence permits such questioning by the Court.<sup>63</sup>

## 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 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;

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953 (R.I. 1991) and Decision of Appeals Panel, at 7) and Gen. Laws 1956 § 31-41.1-9(d)).

<sup>62</sup> See Appellee's Memorandum of Law, at 6 (citing Trial Transcript, at 6-7).

<sup>63</sup> See Appellee's Memorandum of Law, at 6.

- (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.’”<sup>64</sup> 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.<sup>65</sup> And so, except in cases where the panel’s decisions are affected by error of law, decisions of the panel must be affirmed as long as they are supported by legally competent evidence.<sup>66</sup>

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<sup>64</sup> 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)).

<sup>65</sup> See Link v. State, 633 A.2d 1345, 1348 (R.I. 1993)(citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)(decision rendered during the existence of Administrative Adjudication Division[AAD])).

<sup>66</sup> Link, 633 A.2d at 1348 (citing Environmental Scientific Corporation v. Durfee, 621 A.2d 200, 208 (R.I. 1993)).

### III ANALYSIS

#### A

#### Hearsay Evidence

The panel was correct that the trial magistrate received the testimony in question — the Freightliner operator’s version of the collision, as given to Trooper Palmer — for a limited purpose, not for its truth. And there is no indication, from his ruling, that the trial magistrate deviated from this path. As a result, the trooper’s testimony summarizing what the Freightliner told him is not hearsay as defined in Rule 801(c) of the Rhode Island Rules of Evidence.<sup>67</sup> Therefore, there is no need for the admission of this testimony to be justified under an exception to the hearsay rule.<sup>68</sup> For these reasons, Mr. Lawrence’s argument (that the trial magistrate wrongly admitted the testimony of Trooper Palmer regarding what the truck driver told him) must fail.<sup>69</sup>

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<sup>67</sup> State v. Crow, 871 A.2d 930, 936 (R.I. 2005)(citing Rule of Evidence 801(c) and State v. Gomes, 764 A.2d 124, 131 (R.I. 2001)).

<sup>68</sup> Crow, ante, 871 A.2d at 936 (citing In re Jean Marie W., 559 A.2d 625, 629 (R.I. 1989), State v. Grayhurst, 852 A.2d 491, 504-05 (R.I. 2004), and Wells v. Uvex Winter Optical, Inc., 635 A.2d 1188, 1193 (R.I. 1994)).

<sup>69</sup> Although I need not reach the issue, I shall also state that I am persuaded by the State’s argument that any error in the admission of this testimony must be deemed harmless in light of the fact that Mr. Lawrence presented an exhibit containing the truck driver’s version of the collision. See Appellee’s Memorandum

**B**  
**Sufficiency of the Evidence**

I believe this argument must also fail. As the appeals panel rightly pointed out, the trial magistrate had before him three key items of evidence: (1) the report submitted by the Freightliner's driver — placed into evidence by Mr. Lawrence — which indicated that the Appellant caused the accident when he was transitioning back into the right lane after passing the Freightliner,<sup>70</sup> (2) the trooper's credible testimony, including his testimony that Mr. Lawrence told him the accident occurred when he was returning to the right lane,<sup>71</sup> and (3) the photograph depicting the angle and placement of the damage to Mr. Lawrence's vehicle.<sup>72</sup> In my estimation, this evidence was sufficient to prove the instant charge to the standard of clear and convincing evidence.

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of Law, at 3-4, and Trial Transcript, at 8, 11. See also Defendant's Exhibit No. 1. Moreover, we may note that this document was received into evidence without restrictions (unlike the trooper's testimony repeating the truck driver's statements).

<sup>70</sup> See Decision of Appeals Panel, at 6 (citing Trial Transcript, at 11). This document was received into evidence as Defendant's Exhibit No. 1. Trial Transcript, at 8. It may be viewed on page 51 of the electronic record attached to this case.

<sup>71</sup> See Decision of Appeals Panel, at 6 (citing Trial Transcript, at 11).

<sup>72</sup> See Decision of Appeals Panel, at 6 (citing Trial Transcript, at 6-8, 10).

## C

### Admission of the Photograph

At trial, Mr. Lawrence objected to the trial magistrate viewing the photograph (on the officer's cellular phone) of the damage to his vehicle on the grounds that the trooper did not have a corresponding photo of the truck and it biased his testimony.<sup>73</sup> But, before the appeals panel, he urged that this action was also improper based on a lack of relevance and because of procedural failures.<sup>74</sup> The appeals panel declined to consider these newly formed objections, based on his failure to raise them at trial.<sup>75</sup> I believe the analysis of the appeals panel on this point was sound and supported by Rhode Island evidentiary law.

This issue is rooted in Rhode Island Rule of Evidence 103,<sup>76</sup> entitled “Rulings on Evidence,” which is the abode of Rhode Island’s “raise or waive

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<sup>73</sup> See Decision of Appeals Panel, at 7 (citing Trial Transcript, at 7). At trial, Mr. Lawrence specified that he felt his own testimony was being “biased,” not that of the trooper. Trial Transcript, at 7.

<sup>74</sup> See Decision of Appeals Panel, at 7.

<sup>75</sup> See Decision of Appeals Panel, at 7. And, before this Court, he assembles and reiterates all of the errors he enumerated below. Appellant’s Memorandum of Law, at 3.

<sup>76</sup> The pertinent portion of the rule — subsection (a) — is presented here:

rule,” which mandates that any issue not preserved by a specific objection at trial may not be considered on appeal.<sup>77</sup>

A secondary implication of the “raise or waive” rule is the principle that, if one or more objections to the admission of an item of evidence are properly preserved, “... other grounds for objection are waived and may not be raised for the first time on appeal.”<sup>78</sup> It is this corollary to the “raise or waive” rule which authorized the appeals panel to decline to consider Mr. Lawrence’s relevance and procedural attacks on the admission of the photograph. And, as we shall see, the objections which were raised by Appellant to the photograph have little merit — which undoubtedly why Mr. Lawrence attempted to supplement them before the appeals panel.

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**(a) Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) .... (Emphasis added).

<sup>77</sup> State v. Bettencourt, 723 A.2d 1101, 1107 (R.I. 1999)(citing State v. Toole, 640 A.2d 965, 972-73 (R.I. 1994)(citing State v. Warren, 624 A.2d 841, 842 (R.I. 1993))).

<sup>78</sup> Bettencourt, ante, 723 A.2d at 1107 (citing State v. Neri, 593 A.2d 953, 956 (R.I. 1991)).

His reference to bias seems to invoke the concept, addressed under Rhode Island Rule of Evidence 403, that evidence which may give rise to unfair prejudice should be excluded.<sup>79</sup> I see no such danger here. By all accounts, it was a simple photograph of damage to a vehicle — presented to a judicial officer, not to the members of a jury. The photograph did not unfairly bias Mr. Lawrence’s testimony, though it may have (implicitly) contradicted it. Unfair prejudice implies much more than mere negation.

Regarding Appellant’s other basis for objection to the photograph at trial, it may suffice to say that the admissibility of the photograph was not at all contingent on another (of the truck) also being presented. I know of no such rule in Rhode Island law and Mr. Lawrence has not drawn our attention to any such rule.

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<sup>79</sup> The rule is presented here in its entirety:

**Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.



## D

### Questioning by the Trial Magistrate

In my estimation, the trial magistrate did not stray from his proper role as a neutral fact-finder by posing questions to the witnesses.

Generally speaking, it is not improper for a trial judge to pose questions to witnesses. We know this because the practice is allowed by Rule 614 of the Rhode Island Rules of Evidence.<sup>80</sup> It has also been recognized in Rhode Island case law, not only in non-jury matters, like the instant case, but in jury trials as well — where great care must be taken so that the jury will not be unintentionally tainted by the court's actions.<sup>81</sup>

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<sup>80</sup> The rule is presented here in its entirety:

**Rule 614. Calling and Interrogation of Witnesses by the Court. (a) Calling by Court.** The court may, on its own motion or by suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

**(b) Interrogation by Court.** The court may interrogate witnesses, whether called by itself or by a party.

**(c) Objections.** Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

<sup>81</sup> See State v. Figueras, 644 A.2d 291, 293 (R.I. 1996)(citing State v. Evans, 618 A.2d 1283, 1284 (R.I. 1993), State v. McKenna, 512 A.2d 113, 116 (R.I. 1986), and State v. Giordano, 440 A.2d 742, 745 (R.I. 1982)).

Here, the trial magistrate conducted a trial with two witnesses: the citing officer and the defendant. Neither side was represented by counsel. I view the trial magistrate's questions as being simply those necessary to elicit the merest outline of the events and circumstances surrounding the collision in question, so that he could perform his duties as the fact-finder in a competent and intelligent manner.

#### IV CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appeals 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

January 30, 2017

