NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RANDALL A. CASTELLANI AND JOSEPH J. CORCORAN Appellants v. THE SCRANTON TIMES, L.P. AND JENNIFER L. HENN Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 907 MDA 2012

Appeal from the Order Entered August 19, 2011
In the Court of Common Pleas of Lackawanna County
Civil Division at No(s): 2005 CV 69

BEFORE: BOWES, J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.: **FILED MARCH 11, 2014**

Appellants, Randall A. Castellani and Joseph J. Corcoran ("Commissioners"), appeal from the order entered in the Lackawanna County Court of Common Pleas, in this defamation case, which denied their pretrial motion to admit two judicial Opinions at trial as evidence of actual malice.[1] We affirm.

The relevant facts and procedural history of this case are as follows. Mr. Castellani and Mr. Corcoran are former Commissioners of Lackawanna County and members of the Lackawanna County Prison Board. In 2003, the

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[1] This matter is before this Court on remand from the Pennsylvania Supreme Court.

state Attorney General's Office began an investigation into alleged corruption at the Lackawanna County Prison. The criminal investigation progressed to a statewide grand jury. The Commissioners each testified before the grand jury on December 2, 2003.

The prison scandal was news in the Lackawanna County area. Appellees, the Scranton Times, L.P. and Jennifer L. Henn (collectively "newspaper"), on January 12, 2004, published articles in the morning and evening editions (collectively "January 12, 2004 article") reporting on the Commissioners' grand jury testimony. The story was headlined "Dems Stonewall" and cited a "confidential source" close to the investigation who described the Commissioners' testimony as "vague," "less than candid," and "evasive." The story quoted the source as saying the grand jurors believed the Commissioners were "less than cooperative" and the jurors were so irritated with the Commissioners that the jurors were "ready to throw both of them out." (***See*** Jennifer L. Hein, *Dems Stonewall*, Jan. 12, 2004; R.R. at 0014.)

Senior Judge Isaac S. Garb was the supervising judge of the grand jury at that time. On January 29, 2004, the Commissioners filed a petition for sanctions with Judge Garb in connection with the newspaper's disclosure of the secret grand jury proceedings. The petition was discharged on the ground that the Commissioners lacked standing to request a proceeding to determine whether unauthorized information had been revealed by persons

sworn to secrecy. A second petition was filed for relief in the form of sanctions against the Attorney General or his agents. The matter was continued pending an ongoing investigation by an independent special prosecutor whom Judge Garb had appointed to examine whether any person bound by grand jury secrecy laws had improperly leaked information. The independent special prosecutor presented his report to Judge Garb in the summer of 2004 ("Report"). The Report has not been disclosed. Judge Garb reviewed the Report and the transcripts from the Commissioners' testimony before issuing a memorandum ("Garb Opinion").[2] In his written decision, Judge Garb referred to the Report, which found no breach by any agent of the Attorney General's Office. Judge Garb said he had reviewed the Report, and all the documents filed with it, including the testimony of the Commissioners, as well as the newspaper articles, and concurred that no leak came from any agent of the Attorney General's Office, which was the sole issue before the court at that time.

Judge Garb went on to express his personal belief that the newspaper reports were completely at variance with the transcript of the testimony of the Commissioners. (***See*** Garb Opinion, dated September 14, 2004, at 2; R.R. at 0023.) Judge Garb unequivocally concluded that none of the things

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[2] We recognize that Judge Garb's decision was in the form of a memorandum, but we will, for purposes of simplicity on appeal, refer to it as the "Garb Opinion."

reported in the newspaper truly happened. ***Id.*** Judge Garb surmised that any *bona fide* "leak" of information to the media would have reflected the testimony that actually had occurred at the grand jury proceedings. Given the disparity he saw between the actual testimony and the newspaper's article, Judge Garb queried whether the "source" of the reporter's information was in fact someone who was not really privy to the proceedings at all.

Following Judge Garb's opinion, the newspaper published articles on September 18, 2004 (collectively "September 18, 2004 article"), titled "Judge: Account of Testimony Was Incorrect" and subtitled "Castellani, Corcoran cooperative, he says the transcript shows." Citing accurate snippets from the opinion, the article ended with a quote from the newspaper's Managing Editor, Lawrence Beaupre, stating: "The newspaper's source has been contacted and says he absolutely stands by his account of the grand jury testimony." (***See*** David Singleton, *Judge: Account of Testimony Was Incorrect*, Sept. 18, 2004; R.R. at 0018.) The newspaper essentially ratified its January 12, 2004 account.

On December 11, 2004, counsel for the Commissioners sent a letter to the newspaper demanding a published, prominent retraction and apology to mitigate the alleged harm caused by the newspaper's January 12, 2004 and September 18, 2004 articles. The Commissioners then filed a complaint in defamation on January 7, 2005, against the newspaper, relating to the

January 12, 2004 article reporting on the Commissioners' grand jury testimony, along with a motion to compel disclosure of the "unnamed source" referred to in the articles published on January 12, 2004.[3] The Commissioners also instituted a second claim for defamation by writ of summons in 2005 under a different docket number,[4] with respect to the September 18, 2004 article summarizing the Garb Opinion and ratifying the January 12, 2004 article.

In 2005, both sides sought access to the grand jury transcripts as a means to support their respective positions in the defamation action. To that end, the parties filed motions with Judge Barry Feudale, who had succeeded Judge Garb as the supervising judge of the grand jury. The parties requested (1) release of Mr. Corcoran's grand jury testimony;[5] (2)

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[3] The trial court granted the Commissioners' motion to disclose the source, and the newspaper/reporter appealed. This Court reversed the order granting disclosure, and our Supreme Court affirmed the judgment of this Court stating that the Shield Law prohibited compelled disclosure of the identity of the confidential source. ***See Castellani v. The Scranton Times, L.P. et al.***, 916 A.2d 648 (Pa.Super. 2007), *affirmed*, 598 Pa. 283, 956 A.2d 937 (2008).

[4] The complaint associated with the 2005 writ of summons was not filed until March 15, 2010. The two defamation cases were eventually consolidated at the first docket number, upon the Commissioners' motion, by court order filed April 21, 2010.

[5] A member of the county prosecutor's office or the Attorney General's Office had already inadvertently released the transcript of Mr. Castellani's grand jury testimony.

access to grand jury participants; and (3) a copy of the Report by the independent special prosecutor.

Judge Feudale filed an opinion ("Feudale Opinion") that denied the requests, concluding grand jury secrecy trumped any need to obtain the information for use in private civil litigation. (***See*** Feudale Opinion, dated June 29, 2005; R.R. at 0025-0035.) With respect to the Commissioners' request for the Report of the independent special prosecutor, Judge Feudale stated emphatically that the request was unprecedented, as the investigatory process and Report fell within the ambit of grand jury secrecy, and the request for a copy of Mr. Corcoran's testimony was contrary to law, as that testimony is available only after the direct testimony of the witness at trial. Even if the inadvertent release of Mr. Castellani's testimony might arguably merit a similar release of Mr. Corcoran's testimony, the second release would nevertheless be premature and inappropriate, contrary to law, and not subject to waiver or compromise.

Judge Feudale then addressed what he expressly called a matter **collateral** to the motions before the court. Judge Feudale declared that the unnamed source and the newspaper had asserted and published alleged facts which they acknowledged were illegal to assert or publish, but then reaffirmed those facts while knowing they had no record to support the assertions. On the precise matters before the court, however, Judge Feudale refused to allow or approve any attempt to crack grand jury

secrecy, "no matter the circumstances or perceived equity of doing so; in contravention to the clear legislative and case law pronouncement that preclude such." (***Id.*** at 16; R.R. at 0040). Judge Feudale entered an order that: (1) denied the motions to release the grand jury transcript of Mr. Corcoran; (2) granted the motion to furnish to the newspaper a copy of the previously released transcript of Mr. Castellani's grand jury testimony; (3) denied the motion for release of the Report of the independent special prosecutor; (4) denied the motion for permission to interview the grand jurors or other persons in the grand jury room, the independent special prosecutor, and the grand jury judge; (5) denied the motion for copies of the transcripts of any discourse between the senior deputy attorney general and the grand jurors from 12/2/03 to 1/12/04. (***See*** Order, dated 6/29/05, at 1-2; R.R. at 0042-0043).

On July 7, 2005, the newspaper reported on the Feudale Opinion. In an article titled "Judge Won't 'Crack the Vault' of Grand Jury Secrecy," the newspaper described how Judge Feudale denied the motions for release of undisclosed grand jury materials. The article stated Judge Feudale had criticized the newspaper's reporting and, like Judge Garb, found the transcripts of the grand jury proceedings were at odds with the accounts contained in the newspaper's previous articles. The article also reported on the underlying defamation lawsuit to explain why the parties were seeking grand jury materials. Specifically, the article read as follows:

> Mr. Castellani and Mr. Corcoran claim they were defamed in Jan. 12, 2004 article published by the [newspaper] describing their testimony before the grand jury as vague and evasive. The article cited to an anonymous source close to the investigation. The former commissioners claim the story is false. The newspaper stands by its report.

(Michael McNarney, *Judge Won't "Crack the Vault" of Grand Jury Secrecy*, July 7, 2005; R.R. 0020). The article also contained a quote from Managing Editor Beaupre, who stated: "This is a very disappointing decision in that both sides have been denied the opportunity to obtain information that is relevant to the case…. We remain confident that, at the end of the day, our reporting will be vindicated." ***Id.***

After appellate review (regarding disclosure/nondisclosure of the newspaper's confidential source) concluded in 2008, the case returned to the trial court, where the parties engaged in discovery with abundant associated motions and other filings. In September 2010, the parties filed motions for summary judgment. In the newspaper's motion, it argued it was entitled to summary judgment on the defamation claim related to the January 12, 2004 article because: (1) the article containing statements as to the grand jury's reaction to the Commissioners' testimony was not capable of defamatory meaning; the statements were simply hyperbole which cannot support the claim asserted; (2) the article involved matters of public concern and the Commissioners bore the burden of proving falsity, a burden they cannot meet; (3) the Commissioners were public officials at all relevant times, and

must prove the newspaper's actual malice by clear and convincing evidence. The newspaper further asserted its right to summary judgment on the September 18, 2004 article because: (1) the article containing a summary of Judge Garb's opinion when read objectively is incapable of defamatory meaning; (2) the Commissioners cannot prove falsity; the article is privileged as a fair report of Judge Garb's opinion, which the Commissioners concede; (3) even if the newspaper is not entitled to summary judgment as to all claims, it is at least entitled to summary judgment on the punitive damages claims because the Commissioners cannot prove both actual malice and common law malice. (***See*** Newspaper's Motion for Summary Judgment, filed 9/29/10, at 8-10.)

In the Commissioners' cross-motion for partial summary judgment, they argued they were entitled to summary judgment on the issue of falsity of the newspaper's articles, because: (1) those participants in the grand jury who were present and permitted to disclose matters which occurred before the grand jury have unfailingly and unquestionably testified that the article was false; Mr. Corcoran testified at deposition that he had fully cooperated with the proceedings, no one claimed to the contrary, and after the proceedings, the senior attorney general was very polite and thanked him, without a hint of upset or rancor; (2) Mr. Castellani testified at his deposition that, after the January 12, 2004 article, he was devastated and shocked by the content of the article, his entire family was upset and questioned his

credibility, he had been very relaxed before the grand jury and sensed no animosity from anyone involved in the proceedings, and he verified the falsity of the publications; (3) the Commissioners' counsel for the grand jury hearing testified at his deposition as to the absolute falsity of the "accusations" in the January 12, 2004 article that the Commissioners had been less than candid and uncooperative before the grand jury, they did not respond with vague or evasive answers or repeatedly claim they did not know or remember; based on the grand jurors' verbal and non-verbal language, there was no sense of irritation, exasperation, hostility, animosity, or ill feelings toward the Commissioners;[6] (4) Judge Garb had said in his opinion that the articles were completely at variance with the grand jury transcript; (5) on September 18, 2004, the newspaper, while ostensibly reporting on Judge Garb's opinion, ultimately republished and ratified the

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[6] To the extent the Commissioners' motion was based on the oral testimony of their own witnesses and their grand jury counsel's testimony, see ***Borough of Nanty-Glo v. American Surety Co. of New York***, 309 Pa. 236, 163 A. 523 (1932) and Pa.R.C.P. 1035.2 *Note* (stating: "Oral testimony alone, either through testimonial affidavits or depositions, of the moving party or the moving party's witnesses, even if uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact"). ***See also Weaver v. Lancaster Newspapers, Inc.***, 592 Pa. 458, 472, 926 A.2d 899, 907 (2007) (reiterating "oral testimony or testimonial affidavits of the moving party or his witnesses, even if uncontroverted, will not afford sufficient basis for the entry of summary judgment, because the credibility of the testimony is still a matter for the jury"; also stating proof of actual malice in defamation cases calls defendant's state of mind into question and "does not readily lend itself to summary disposition").

same statements contained in the January 12, 2004 article; (6) later, Judge Feudale concurred with Judge Garb's belief that the articles falsely reported the events which occurred before the grand jury. (***See*** Commissioners' Motion for Summary Judgment, filed 9/30/10, at 4-10.)

During the course of briefing and responding to their respective motions for summary judgment, the Commissioners also raised the independent evidentiary value of the Garb Opinion, and then later the Feudale Opinion, as "adjudications" subject to judicial notice admissible under Pa.R.E. 201, to prove both falsity and actual malice.

On the other hand, the newspaper steadfastly asserted, *inter alia*, that the clear purpose of the Garb investigation had nothing to do with whether the January 12, 2004 article was false; the investigation was limited solely to whether there had been an unauthorized disclosure of secret information. So, anything Judge Garb said about falsity was gratuitous *dicta*, hearsay, an improper subject for judicial notice, and irrelevant to either falsity or actual malice. The newspaper took the position that the Commissioners were confusing the concepts of authenticity/relevance with admissibility. Because the Garb Opinion (and by implication the Feudale Opinion) was third-party hearsay, without exception, the Opinions could not be used to prove the articles were false. At oral argument on the competing summary judgment motions, the court ordered separate briefing on the question of admissibility of the Garb and Feudale Opinions.

On March 4, 2011, the trial court denied both sides' motions for summary judgment, expressly without considering the Garb and Feudale Opinions or their purported admissibility. In its order, the court set forth the law applicable to the issues before it. As to the newspaper's motion, the court concluded material issues of fact existed regarding (1) whether the subject articles were capable of defamatory meaning; (2) whether there had ever been a "source" or, if there were a "source," the "source" made no such statements; (3) whether the newspaper had abused the fair report privilege in the September 18, 2004 article, when it reported on Judge Garb's opinion but reiterated the challenged statements from the January 12, 2004 article (which could form the basis for forfeiture of the privilege); (4) whether the dispute over the existence of a "source" and the challenged statements of the "source" as fabricated defeated summary relief on punitive damages. As to the Commissioners' motion, the court concluded grand jury counsel's notes were sufficient to create a factual issue on falsity.

On June 8, 2011, the trial court separately addressed the alleged admissibility of the Garb and Feudale Opinions, based on the arguments presented to it at the time. The trial court reasoned:

> [T]he purpose of judicial notice is to promote judicial economy and expediency by precluding the necessity of proving facts that cannot be seriously disputed and are either generally or universally known. The invocation of this evidentiary rule, in essence, precludes or compromises a party's effort in introducing contrary evidence.

> Although courts are free to take judicial notice of the existence or filing of an order, courts should not be permitted to take judicial notice of the truth of hearsay statements in the decision. Thus, facts adjudicated in another case, unless undisputed, generally fall outside the boundaries of Rule 201(b). These facts do not meet the test of indisputability, they are not the subject of common knowledge, and are not derived from an unimpeachable source. In the case at bar, it is evident that Judge Garb relied, in whole or in part, upon the Special Prosecutor's report, which is obviously hearsay once removed.
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> The "adjudicated facts" in Judge Garb's Memorandum are facts which are dependent upon the Special Prosecutor's report. This Court cannot say these adjudicated facts are not subject to reasonable dispute within the meaning of Rule 201(b). Judge Garb's findings were not the type of self-evident truth that no reasonable person can question. The same holds true for Judge Feudale's Opinion and Order.
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> Notwithstanding the above analysis, the news article of September 18, 2004, is a "game-changing event" but only with regard to its contents. This news article republished the alleged defamatory statements, [Judge] Garb's findings as noted herein, and further articulated [newspaper's] reliance on the disputed source, in the face of those judicial findings. It is evident to this [c]ourt at this particular juncture that this article can constitute a separate cause of action and is relevant to the issues of malice and punitive damages. Although standing alone, Judge Garb's adjudicated findings are hearsay, and not appropriate to be judicially noticed, once published by [newspaper] in the context as noted herein, the subject portions of Judge Garb's Memorandum appears to this [c]ourt to be relevant, probative and admissible for other purposes.
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> Conversely, and considering how this evidentiary issue was postured before this [c]ourt, the subject portions of Judge Feudale's Opinion are hearsay. Accordingly, and within the context of this Decision, Judge Feudale's subject findings remain inadmissible.

(Trial Court Opinion, filed June 8, 2011, at 7-9).[7]

The Commissioners moved for reconsideration of the June 8, 2011 order; alternatively they requested certification of the order for immediate interlocutory review. In a motion filed on July 15, 2011, the newspaper opposed the Commissioners' motion and moved to bar admission at trial of the Garb Opinion and the Feudale Opinion (and any documents referring to the Opinions), averring additional grounds for exclusion, seeking bifurcation of the trials of the two actions, and requesting exclusion (from the trial concerning the January 12, 2004 article) of any use of the Garb Opinion, the September 18, 2004 article, the Feudale Opinion, the July 7, 2005 article, and any documents, testimony, or argument referencing or discussing those documents, pursuant to Pa.R.E. 403. If the court denied separate trials, the newspaper sought in the alternative to bifurcate the issue of falsity of the January 12, 2004 article from the remaining issues at a single trial and to preclude any use of the Garb Opinion, the September 18, 2004 article, the Feudale Opinion, or other documents reflecting those judicial statements during the trial on falsity related to the January 12, 2004 article. The

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[7] In a later order dated April 11, 2012, the court concluded the newspaper's July 7, 2005 article was admissible as evidence of actual malice. The trial court, however, refrained from deciding whether to admit the excerpts of the Feudale Opinion, which the newspaper had reprinted in its July 7, 2005 article. The April 11, 2012 order is not part of this appeal, but it is relevant to the factual background of this case. The newspaper has filed a companion appeal docketed at No. 1145 MDA 2012 (J-A03022-13).

newspaper argued bifurcation in either form would serve to minimize any unfair prejudice inherent in the Opinions and related documents by insuring that the jury would not consider the judges' hearsay statements at least as to falsity. The newspaper voiced its concern that the jury would resolve the issue of falsity based on "incompetent evidence" if allowed to consider the Garb Opinion and the Feudale Opinion, both of which relied on evidence that cannot be a part of the evidence at trial, including the independent special prosecutor's Report and the transcript of Mr. Corcoran's grand jury testimony, and derived their conclusions from data inaccessible to the parties. The newspaper noted that neither judge had interviewed the grand jurors about their reactions to the Commissioners' grand jury testimony, and a cold reading of the transcript could not be an accurate representation of the grand jurors' reaction to the Commissioners' testimony. Mr. Corcoran's counsel's own notes from the grand jury proceedings indicated some evasion by his client. Moreover, distinguishing ***Weaver*** on its facts, the newspaper argued whatever token probative value the Opinions might have would be far outweighed by the severe danger of unfair prejudice on the issue of actual malice and punitive damages as well. (***See*** Newspaper's Motion/Memorandum to Exclude/Bifurcation, filed 7/15/11; R.R. at 0314-0342.)

In response, the Commissioners characterized the Garb and Feudale Opinions as "the sum of information available from grand jury sources

relating to the existence or non-existence of the source claimed by [the newspaper]." (***See*** Commissioners' Opposition to Newspaper's Motion to Exclude/Bifurcation, filed 8/5/11, at 4; R.R. at 0371-0393.) The Commissioners argued the Garb Opinion was known to the newspaper and the subject of the newspaper's September 18, 2004 article. Suggesting the identity of the newspaper's "source," the Commissioners insisted the Garb Opinion is "crucial" evidence of the newspaper's actual malice in publishing the September 18, 2004 article as well as evidence of the newspaper's actual malice in publishing the January 12, 2004 article. The Commissioners maintained the Garb and Feudale Opinions are of "substantial" probative value while the danger of unfair prejudice is minimal, grossly overstated by the newspaper, and can be dealt with by a limiting jury instruction. The Commissioners reiterated the "unquestionable" admissibility of these Opinions pursuant to ***Weaver***, which said any competent evidence can be used to show actual malice in the defamation context. Using ***Weaver***, the Commissioners analogize the defamation complaint filed by the plaintiff in ***Weaver*** to the Garb and Feudale Opinions as putting the newspaper on "actual notice" of falsity of its articles. The Commissioners submitted they would be severely prejudiced if the Garb Opinion were excluded at trial. (***See id.*** at 8-25; R.R. at 0378-0395.)

On August 19, 2011, the court, *inter alia*, denied the Commissioners' motion for partial reconsideration but agreed to certify its June 8, 2011

order for immediate appeal. The Commissioners filed a petition for permission to appeal the June 8, 2011 order with this Court, which this Court denied. Our Supreme Court granted the Commissioners' petition and remanded the matter to this Court for review of the following issue:

> WHETHER THE TRIAL COURT ERRED IN FINDING THAT JUDGE GARB'S MEMORANDUM ISSUED ON SEPTEMBER 14, 2004 AND JUDGE FEUDALE'S OPINION ISSUED ON JUNE 29, 2005 WERE NOT ADMISSIBLE.

Castellani v. The Scranton Times, L.P., 615 Pa. 174, 41 A.3d 1285 (2012) (amending upon reconsideration Supreme Court's prior order that had limited remand to review of trial court's order on admissibility of subject Opinions under Pa.R.E. 201 (judicial notice)). The parties submitted briefs to this Court addressing the broader issue on remand.[8]

"[W]hether evidence is admissible is a determination that rests within the sound discretion of the trial court and will not be reversed on appeal absent a showing that the court clearly abused its discretion." ***Fisher v. Central Cab Co.***, 945 A.2d 215, 218 (Pa.Super. 2008).

> The term discretion imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but

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[8] The Commissioners' statement of question presented on appeal is identical to the issue the Supreme Court remanded for review.

> where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Schmalz v. Manufacturers & Traders Trust Co., 67 A.3d 800, 802-803 (Pa.Super. 2013).

> Where the discretion exercised by the trial court is challenged on appeal, the party bringing the challenge bears a heavy burden.
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> > When the court has come to a conclusion by the exercise of its discretion, the party complaining of it on appeal has a heavy burden; it is not sufficient to persuade the appellate court that it might have reached a different conclusion if, in the first place, charged with the duty imposed on the court below; it is necessary to go further and show an abuse of the discretionary power. …
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> > We emphasize that an abuse of discretion may not be found merely because the appellate court might have reached a different conclusion, but requires a showing of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous.

Paden v. Baker Concrete Const., Inc., 540 Pa. 409, 412, 658 A.2d 341, 343 (1995) (internal citations and quotation marks omitted). "To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." ***Ettinger v. Triangle-Pacific Corp.***, 799 A.2d 95, 110 (Pa.Super. 2002), *appeal denied,* 572 Pa. 742, 815 A.2d 1042 (2003). As to questions of law that arise in this context, however, our standard of review is *de novo* and our scope of review

is plenary. ***Weaver, supra*** at 465, 926 A.2d at 903.

The Commissioners argue the Garb and Feudale Opinions provide critical evidence that the newspaper published both the January 12, 2004 and the September 18, 2004 articles with actual malice or in reckless disregard for the truth or falsity of the statements in those articles. The Commissioners assert the newspaper acquired Judge Garb's decision after the first newspaper article and before the second newspaper article, which put the newspaper on notice that the veracity of the January 12, 2004 article had been called into question. Despite Judge Garb's decision, the newspaper republished its initial story in a September 18, 2004 article, supposedly reporting on Judge Garb's statement that the newspaper's reports "are completely at variance with" the transcript of the grand jury proceedings. Characterizing Judge Garb's decision as a "Judicial finding," the Commissioners contend the newspaper had strong reasons to question the account of its alleged confidential "source." Later, when Judge Feudale issued an opinion, he concurred with Judge Garb's "finding" and confirmed the newspaper's mischaracterization of the Commissioners' grand jury testimony. Disregarding what the Commissioners again refer to as a "Judicial finding," the newspaper republished its original account of their testimony. The Commissioners submit the Garb and Feudale Opinions are evidence of the newspaper's "state of mind," the documents are non-hearsay because they are being offered not for their truth but for

independent significance. The Commissioners complain the trial court did not address the admissibility of these "Judicial" documents to establish the newspaper's "state of mind." Instead, the trial court held the documents were inadmissible under Pa.R.E. 201 and related principles of judicial notice.

The Commissioners further encourage this Court to reject any anticipated argument the newspaper might have that the two Opinions at issue should be excluded on the ground of unfair prejudice or possible jury confusion. The Commissioners suggest the trial court can instruct the jury to consider the documents only in deciding actual malice but not for falsity. Based on the Supreme Court's previous decision barring disclosure of the "confidential source," the Commissioners insist they are unable to determine what if anything the source said about the Commissioners' testimony. Likewise, the Commissioners emphasize their deposition inquiries directed to members of the Attorney General's office have been met with refusals to answer on the ground of grand jury secrecy. With ordinary evidentiary avenues unavailable, the Commissioners submit the Garb and Feudale Opinions are central to the Commissioners' effort to establish that the newspaper published its articles with reckless disregard for their truth or falsity.

Contrary to the newspaper's position, the Commissioners argue that the exclusion of these Opinions would unduly prejudice the Commissioners' ability to prove a critical element of their case. Without the full or complete

copies of the Garb and Feudale Opinions, the Commissioners claim they cannot show the jury what sections of those Opinions the newspaper had omitted from its articles, which in turn bears directly on the newspaper's subjective state of mind. The Commissioners maintain both "judicial documents" are non-hearsay evidence which is admissible to allow a fact-finder to decide the newspaper's state of mind when it published the January 12, 2004 and the September 18, 2004 articles. The Commissioners conclude this Court should reverse the trial court's decision to exclude the Garb and Feudale Opinions and permit the Commissioners to introduce both Opinions at trial in their entirety as proof of the newspaper's actual malice.

In response, the newspaper argues the Commissioners must prove as an initial matter that the newspaper's January 12, 2004 article (describing the grand jurors' reaction to the Commissioners' testimony) was in fact false. The newspaper claims the Commissioners want to present evidence through the use of outright *dicta* in Judge Garb's and Judge Feudale's Opinions to patch a hole in their case. The newspaper reasons the judges gratuitously offered their personal views on falsity in non-adversarial proceedings where the falsity of the January 12, 2004 article was not at issue. When the Commissioners characterize these remarks as "Judicial findings," the newspaper claims the Commissioners completely misrepresent the nature and context of the judges' commentaries. At the trial level, the Commissioners argued the Garb and Feudale Opinions were admissible

evidence of falsity and urged the trial court to take judicial notice of the Opinions as "adjudications," pursuant to evidentiary Rule 201 (governing judicial notice of adjudicative facts). The newspaper claims that the court rejected the Commissioners' judicial notice argument, holding the remarks were *dicta* and an inappropriate subject for judicial notice under Rule 201 as well. Having rejected the Commissioners' primary argument on judicial notice, the court deemed the judges' remarks inadmissible hearsay on the issue of falsity. The newspaper claims the Commissioners have abandoned the judicial notice argument on appeal and, to enlarge the scope of the issue on remand, now argue the Opinions are non-hearsay evidence of the newspaper's state of mind and admissible at trial to prove actual malice per ***Weaver***. The newspaper avers the trial court was not asked to and did not rule on the admissibility of the Opinions under the non-hearsay state-of-mind concept or under the state-of-mind exception to the hearsay rule to prove actual malice because the Commissioners failed to make that argument until this appeal. The newspaper claims the Commissioners argued in their motion for summary judgment that the Opinions were proof the articles were false. In their subsequent memorandum to the court devoted to admissibility of the Opinions, the Commissioners asserted the Opinions were not hearsay because they contained no statements from third parties. The newspaper maintains the Commissioners claimed the Opinions were admissible as proof of actual malice under ***Weaver***, but without

mention of or any argument on the state-of-mind exception to the hearsay rule, which is why the trial court did not do a ***Weaver*** analysis. The newspaper concludes the Commissioners cannot now argue on appeal the admissibility of the Opinions as non-hearsay, state-of-mind evidence of the newspaper's actual malice, because they failed to raise that argument before the trial court, and the argument should be deemed waived.

Moreover, the newspaper asserts the after-the-fact Opinions at issue do not constitute evidence of the newspaper's state of mind because judicial *dicta* commenting on the falsity of the January 12, 2004 article, authored long after the publication of the article, by someone not associated with the newspaper or the present conflict, is irrelevant and non-probative of the newspaper's state of mind when either article was written. The newspaper attacks as *dicta* the commentaries contained in the Opinions and the timing of the Opinions as written long after the January 12, 2004 article was published.

Additionally, for the Opinions to have any bearing on the newspaper's actual malice or reckless disregard for the truth or falsity of the January 12, 2004 article, the newspaper submits the content of the Opinions must be accepted as true. The newspaper asserts ***Weaver*** does not support admission of the Opinions as evidence of actual malice because the judges' beliefs on falsity presented in *dicta* in their written decisions were rendered on issues not before the courts and based on unknown and untested

evidence no party has been permitted to access. Instead, the Opinions are gratuitous expressions of the judges' personal beliefs, which hold no evidentiary value. The newspaper states the Commissioners' argument that the Opinions are relevant to prove actual malice related to the September 18, 2004 article likewise fails. The newspaper reasons that if we reverse, we should then remand to give the trial court an opportunity to consider alternative reasons for exclusion of the Opinions under Pa.R.E. 403 as unduly prejudicial or to consider bifurcation of the issue of falsity as to the January 12, 2004 article so the jury does not hear evidence that two judges have already decided the article was false. The newspaper summarizes that the judicial *dicta*, based on unknown and inaccessible information at no time subjected to the adversarial process, cannot be relevant or probative of the newspaper's actual malice unless accepted for the truth of the matter asserted. On the other hand, exposing a jury to this evidence would constitute undue prejudice and quite likely lead the jury to make a decision on improper grounds. The newspaper concludes the Opinions are inadmissible on numerous grounds, and the trial court properly excluded them as evidence at trial.

On the issue of waiver, the Commissioners state in their reply brief that they did indeed raise, in their supplemental brief on admissibility, the adequacy of the Garb and Feudale Opinions as proof of the newspaper's actual malice. Specifically, the Commissioners claim they argued Judge

Garb's Opinion was admissible as material, relevant, and probative on both the falsity of the January 12, 2004 article and the newspaper's actual malice when it republished the original facts in the September 18, 2004 article. The Commissioners insist they argued under ***Weaver*** that Judge Garb's "judicial finding" called into doubt the truth of the January 12, 2004 article and constituted significant evidence of the newspaper's actual malice in publishing that original article. The Commissioners further claim that, in their motion for partial reconsideration or certification for interlocutory appeal, they plainly contended both the Garb and Feudale Opinions were admissible under ***Weaver*** as non-hearsay evidence of the newspaper's actual malice. The Commissioners conclude the newspaper's waiver argument misstates the record and lacks merit.

The Commissioners further urge this Court to reject the newspaper's concern for undue prejudice arising from admission of the Garb and Feudale Opinions at trial. The Commissioners submit they will not rely on the Opinions to prove the January 12, 2004 and September 18, 2004 articles were false, because they have other evidence of falsity, including their own testimony, the testimony of their grand jury counsel, and the transcript of Mr. Castellani's grand jury testimony; any suggestion that the Opinions are the Commissioners' only proof of falsity is incorrect. Finally, with regard to the newspaper's concern for undue prejudice, the Commissioners maintain a curative instruction will suffice to abate any prejudice resulting from

admission of the Opinions, particularly where the trial court will allow the jury to hear those portions of the Garb Opinion which the newspaper had quoted in its September 18, 2004 article. The Commissioners assure us that the trial court can instruct the jury to consider the Garb and Feudale Opinions solely to determine the newspaper's state of mind at the time of publication, which in turn goes to the newspaper's actual malice in publishing both the January 12, 2004 and the September 18, 2004 articles. For the following reasons, we reject the Commissioners' positions and agree with most of the newspaper's contentions.

Initially, "[T]o preserve an issue for appellate review, a party must make a timely and specific objection at the appropriate stage of the proceedings…." ***Thompson v. Thompson***, 963 A.2d 474, 475 (Pa.Super. 2008). Significantly:

> In this jurisdiction…one must object to errors, improprieties or irregularities at the earliest possible stage of the adjudicatory process to afford the jurist hearing the case the first occasion to remedy the wrong and possibly avoid an unnecessary appeal to complain of the matter.

Id. at 476. ***See generally*** Pa.R.A.P. 302 (providing: "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal").

> Issue preservation and presentation requirements are enforced in our system of justice for principled reasons, …, as they facilitate the open, deliberate, and consistent application of governing substantive legal principles from the foundation of a case through its conclusion on appellate review. Loose shifting of positions after the entry

> of judgments by those challenging them disrupts the stability and predictability of the process, fostering the potential for unfairness. As well, there are substantial interests at stake on both sides of medical malpractice actions.
>
> Moreover, the professional handling of civil actions is essential to the administration of justice. … Similarly, we would be remiss to disregard requirements of issue preservation and presentation to alleviate consequences which may flow from attorneys' failure to remain abreast of the areas of law in which they practice.

Anderson v. McAfoos, ___ Pa. ___, ___, 57 A.3d 1141, 1149-50 (2012). Where, however, a waiver argument is not encompassed in the grant of review, we do not need to reach it. ***Vicari v. Spiegel***, 605 Pa. 381, 397-98, 989 A.2d 1277, 1286-87 (2010) (Concurring Opinion by Chief Justice Castille).

Instantly, the Commissioners began, in their memorandum of law regarding admissibility of the Garb Opinion as early as December 20, 2010, to argue ***Weaver*** in relation to the newspaper's actual malice and state of mind in publishing the offending articles. The Commissioners discussed the admissibility of the Garb Opinion on the issue of falsity of the January 12, 2004 article and the newspaper's actual malice in publishing it. The Commissioners also took the position that the Garb Opinion was not hearsay because Judge Garb did not recite in his opinion any testimony or statements from any third parties. (***See*** Commissioners' Memorandum of Law Regarding Admissibility of Judicial Opinion with Respect to the Publications of January 12, 2004, filed 12/20/10, at 5-9; R.R. at 0217-

0215.) On June 8, 2011, the trial court denied the Commissioners' effort to admit the Garb and Feudale Opinions, ruling the Opinions were inadmissible hearsay and improper subjects for judicial notice, except for the portions of the Garb Opinion quoted in the newspaper's September 18, 2004 article.

In their motion for partial reconsideration of the trial court's June 8, 2011 decision, the Commissioners expanded their argument on the admission of the Garb Opinion as relevant to the issue of the newspaper's actual malice **and** the issue of punitive damages. The Commissioners also extended those arguments to include the Feudale Opinion. (***See*** Commissioners' Motion for Partial Reconsideration of Court's Memorandum and Order of June 8, 2011 or in the Alternative, for Certification for Appellate Review, filed 6/20/11, at 1-10; R.R. at 0263-0272.) The thrust of the Commissioners' argument under ***Weaver*** was that the two Opinions put the newspaper on notice of the potential falsity of the January 12, 2004 and September 18, 2004 articles and are evidence of the newspaper's "constitutional and common law malice with respect to the January [12], 2004 article." (***See id.***)

In its opposition to reconsideration, the newspaper initially noted the Commissioners' motion for reconsideration did not question the trial court's decision to reject the judicial notice argument or challenge the court's conclusion that the Opinions constituted inadmissible hearsay if offered to establish the falsity of the January 12, 2004 article. The newspaper

highlighted the Commissioners' segue to the Garb and Feudale Opinions as admissible for a non-hearsay purpose—to show actual malice, a matter the court's previous decision had not squarely addressed. The newspaper summarized the Commissioners' position as asking the court to admit the Opinions under ***Weaver*** to prove the newspaper's actual malice. The newspaper maintained the Garb and Feudale Opinions are not "verifiable" or certain for purposes of falsity. The newspaper reasoned the Garb Opinion cannot be used to show falsity, so it cannot be used to show the newspaper's subjective awareness of any falsity of its articles. The newspaper concluded the purported "findings" of falsity in either the Garb Opinion or the Feudale Opinion remain in dispute, the Opinions are inadmissible to resolve that dispute, and are not competent evidence or probative of whether the newspaper acted in reckless disregard of the truth. The newspaper further raised the danger of unfair prejudice and stated its intent to move to bar all references to the Garb and Feudale Opinions at trial to eliminate that danger. If deemed admissible, the newspaper would seek bifurcation of claims at trial.

We agree with the newspaper that the Commissioners did not raise a state-of-mind exception to the hearsay rule in their motions. Nevertheless, the Commissioners did build their argument on ***Weaver*** and its potential impact on the question of admissibility of the Garb and Feudale Opinions to prove the newspaper's state of mind in publishing the articles. Therefore,

the Commissioners' alleged waiver of claims now raised on appeal is not so clear as to be dispositive of the case. In light of our Supreme Court's broad directive, without expression of why the Court enlarged the issue on remand, we refrain from resting our decision solely on waiver. Accordingly, we reject the newspaper's waiver position and review the case on its merits. ***See Vicari, supra***.

In Pennsylvania, the Uniform Single Publication Act outlines the basics of a defamation action. ***See*** 42 Pa.C.S.A. §§ 8341-8345. Section 8343 provides:

> **§ 8343. Burden of Proof**
>
> **(a) Burden of plaintiff.—**In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:
>
> (1) The defamatory character of the communication.
>
> (2) Its publication by the defendant.
>
> (3) Its application to the plaintiff.
>
> (4) The understanding by the recipient of its defamatory meaning.
>
> (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
>
> (6) Special harm resulting to the plaintiff from its publication.
>
> (7) Abuse of a conditionally privileged occasion.
>
> **(b) Burden of defendant.—**In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

> (1) The truth of the defamatory communication.
>
> (2) The privileged character of the occasion on which it was published.
>
> (3) The character of the subject matter of defamatory comment as of public concern.

42 Pa.C.S.A. § 8343. In a public-figure defamation cause of action, "[c]aselaw prescribes additional elements that arise in relation to the character of the statement, the role of the defendant as a media outlet, and the role of the plaintiff as a public official or public figure." ***Lewis v. Philadelphia Newspapers, Inc.***, 833 A.2d 185, 191 (Pa.Super. 2003), *appeal denied*, 577 Pa. 690, 844 A.2d 553 (2004). These additional concerns exist primarily because speech on matters of public concern "is at the heart of the First Amendment's protection." ***Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,*** 472 U.S. 749, 759, 105 S.Ct. 2939, 2945, 86 L.Ed.2d 593, 602 (1984). A public figure plaintiff who files a defamation suit against a media defendant regarding statements touching upon a matter of public concern must prove: (1) the allegedly defamatory statements were, in fact, false and (2) the media defendant acted with actual malice. ***Philadelphia Newspapers, Inc. v. Hepps,*** 475 U.S. 767, 774-78, 106 S.Ct. 1558, 1562-65, 89 L.Ed.2d 783, 791-93 (1986); ***New York Times Co. v. Sullivan,*** 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686, 706 (1964). A statement is made with "actual malice" if it is made "with knowledge that [the statement] was false or with reckless disregard of

whether it was false…." ***Id.*** "Actual malice is a fault standard, predicated on the need to protect the public discourse under the First Amendment from the chill that might be fostered by less vigilant limitations on defamation actions brought by public officials." ***Lewis, supra*** at 191.

> [T]he stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.
>
> Thus, the actual malice standard, by design, assures that public debate will not suffer for lack of "imaginative expression" or "rhetorical hyperbole" which has traditionally added much to the discourse of this Nation. [T]he First Amendment requires that we protect some falsehood in order to protect speech that matters.

Id. (internal citations and most quotation marks omitted). The ***Lewis*** Court continued:

> Thus, the "actual malice" standard is a constitutionally mandated safeguard and, as such, must be proven by clear and convincing evidence, the highest standard of proof for civil claims. Moreover, evidence adduced is not adjudged by an objective standard; rather, "actual malice" must be proven applying a **subjective** standard by evidence that **the defendant in fact entertained serious doubts as to the truth of his publication**. This determination may not be left in the realm of the factfinder:
>
> > The question whether the evidence in the record in a

> defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice".
>
> We have recognized accordingly that the question of "actual malice" is not purely one of fact, but rather may be described as one of "ultimate fact," a "hybrid of evidential fact on the one hand and conclusion of law on the other."
>
> Application of these concepts is more difficult than its recitation. "[E]rroneous statement is inevitable in free debate, and…must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive." To minimize judicial intrusion into this "breathing space," our courts have tended to measure actionable conduct by what the defendant did, as opposed to what it refrained from doing or might have done but omitted to do. Thus, while "actual malice" may be shown by circumstantial evidence of events surrounding the publication of the offending statement, that evidence must tend to establish fabrication, or at least that the publisher had "obvious reasons to doubt the veracity of the informant or the veracity of his reports."

Id. at 192 (internal citations and most quotation marks omitted). Thus, the concept of "actual malice" is complex; absent more, mere falsity of the statement is generally insufficient to establish actual malice. ***Curran v. Philadelphia Newspapers, Inc.***, 546 A.2d 639, 642 (Pa.Super. 1988), *appeal denied*, 522 Pa. 576, 559 A.2d 37 (1989). "[I]ll will and a desire to do harm are not alone sufficient to show malice." ***Id.*** Likewise,

> The term "reckless disregard" is not amenable to one infallible definition. It is a term which is understood by

> considering a variety of factors in the context of an actual case. Such factors may be whether the author published a statement in the face of verifiable denials, …and without further investigation or corroboration, where allegations were clearly serious enough to warrant some attempt at substantiation. Likewise, evidence of unexplained distortion or the absence of any factual basis to support an accusation may be considered in determining whether the record is sufficient to support a finding of "actual malice." ***See also Frisk v. News Company,*** 523 A.2d 347 ([Pa.Super.] 1986) ([stating] clear departures from acceptable journalistic procedures, including the lack of adequate prepublication investigation; the use of wholly speculative accusations and accusatory inferences; and the failure to utilize or employ effective editorial review, were sufficient to support finding of reckless disregard for the falsity of the information).

Id. In short,

> [F]or purposes of establishing that a defendant acted with reckless disregard for the truth, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. However, it is important to note that immunity from defamation liability is not guaranteed merely because a defendant protests that he published in good faith. Actual malice can be shown when the publisher's allegations are so inherently improbable that only a reckless [person] would have put them in circulation, or where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Weaver, supra at 466, 926 A.2d at 903. The inquiry ***Weaver*** addressed was what evidence can be entertained to prove actual malice. ***Id.*** at 469, 926 A.2d at 905. The specific issue before the ***Weaver*** Court was "whether the republication of a statement, after the defendant receives a complaint alleging that the statement is defamatory, is relevant to the presence of

actual malice in the initial publication." ***Id.*** at 461, 926 A.2d at 900. In looking for proof of the publisher's subjective mental state at the time he first published his statement, ***Weaver*** says the jury can consider as relevant the fact that the publisher republished the statement after the plaintiff filed a lawsuit against the publisher; republication, after the lawsuit put the publisher on notice that his accusation might be false, makes it more probable that the publisher knew the statement was false or acted with reckless disregard to the truth at the time of the initial publication. ***Id.*** at 469, 926 A.2d at 905. The ***Weaver*** Court reasoned as follows:

> To support this conclusion we may look to the Restatement (Second) of Torts § 580A, cmt. d (2006) for guidance. The Restatement instructs…[r]epublication of a statement after the defendant has been notified that **the plaintiff contends** that it is false and defamatory may be treated as evidence of reckless disregard. In this case, [publisher] received notice that his allegations were potentially false when [plaintiff] filed his lawsuit and brought to [publisher's] attention that [plaintiff] had not in fact been arraigned on sexual molestation charges. This notice would make any republication of the statement relevant to an inquiry of actual malice at the time of initial publication because it tends to indicate a disregard for the truth that may have been present at the time of initial publication. The Restatement also discusses the effect of the [publisher's] refusal to retract a statement after it has been demonstrated to him to be both false and defamatory stating, "Under certain circumstances evidence to this effect might be relevant in showing recklessness at the time the statement was published." ***Id.*** The Restatement further recognizes that a state might constitutionally treat a deliberate refusal to retract a clearly false defamatory statement as meeting the knowledge-or-reckless-disregard standard, even though the conduct occurred subsequent to the publication. Restatement (Second) of Torts § 580A, cmt. d (2006). …

> Republications, retractions and refusals to retract are similar in that they are subsequent acts used to demonstrate a previous state of mind. … [T]he United States Supreme Court has held…:
>
> > The existence of actual malice may be shown in many ways. As a general rule, any **competent** evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, including threats, prior or *subsequent* defamations, *subsequent* statements of the defendant, circumstances indicating the existence of rivalry, ill will, or hostility between the parties, facts tending to show a reckless disregard of the plaintiff's rights, and, in an action against a newspaper, custom and usage with respect to the treatment of news items of the nature of the one under consideration. The plaintiff may show that the defendant had drawn a pistol at the time he uttered the words complained of; that defendant had tried to kiss and embrace plaintiff just prior to the defamatory publication; or that defendant had failed to make a proper investigation before publication of the statement in question. On cross-examination the defendant may be questioned as to his intent in making the publication.
>
> This list makes it clear that subsequent acts can be relevant to the determination of previous states of mind, so certainly our holding in [***O'Donnell v. Philadelphia Record Co.***, 356 Pa. 307, 51 A.2d 775 (1947)] was correct; a subsequent act of republication after a defendant is put on notice by a lawsuit that alleges defamation is relevant to a determination of actual malice in the initial publication.

Id. at 470-71, 926 A.2d at 905-906 (2007) (most internal citations omitted) (some emphasis added). As a result of this reasoning, our Supreme Court reversed the judgment of this Court (affirming the trial court's decision to

dismiss the plaintiff's case on summary judgment) and remanded the case to the trial court for further proceedings. ***Id.*** at 474, 926 A.2d at 908.

"The basic requisite for the admission of any evidence is that it be both competent and relevant. Evidence is competent if it is material to the issues to be determined at trial, and relevant if it tends to prove or disprove a material fact in issue." ***Moroney v. General Motors Corp.***, 850 A.2d 629 (Pa.Super. 2004), *appeal denied*, 580 Pa. 714, 862 A.2d 1256 (2004). The Pennsylvania Rules of Evidence provide:

> **Rule 401. Definition of "relevant evidence"**
>
> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Pa.R.E. 401. Rule 402 states:

> **Rule 402. General Admissibility of Relevant Evidence**
>
> All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible.
>
> *Comment*: Pa.R.E. 402 differs from F.R.E. 402. The Federal Rule specifically enumerates the various sources of federal rule-making power. Pa.R.E. 402 substitutes the phrase "by law."
>
> Pa.R.E. 402 states a fundamental concept of the law of evidence. Relevant evidence is admissible; evidence that is not relevant is not admissible. This concept is modified by the exceptions clause of the rule, which states another fundamental principle of evidentiary law−relevant evidence may be excluded by operation of

> constitutional law, by statute, by these rules, by other rules promulgated by the Supreme Court or by rules of evidence created by case law.
>
> * * *

Pa.R.E. 402. In other words, evidence that might be relevant to an issue in a particular case can still be incompetent and inadmissible because one or more established rules of evidence preclude admission. ***Id.*** ***See also Commonwealth v. Paddy***, 569 Pa. 47, 70-71, 800 A.2d 294, 308 (2002) (stating: "Evidence that is relevant may nevertheless be inadmissible if it violates a rule of competency, such as the hearsay rule"). Pennsylvania Rule of Evidence 801[9] defines hearsay as follows:

> **Rule 801. Definitions**
>
> The following definitions apply under this article:
>
> **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> **(b) Declarant.** A "declarant" is a person who makes a statement.
>
> **(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> * * *

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[9] On January 17, 2013, the legislature rescinded this applicable version of Rule 801. The current version of Rule 801 went into effect on March 18, 2013. For our purposes, the rule is essentially the same.

Pa.R.E. 801. Generally, hearsay is inadmissible. Pa.R.E. 802. Rule 803 provides exceptions to the hearsay rule, in pertinent part as follows:

> **Rule 803. Hearsay exceptions; availability of declarant immaterial**
>
> The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> **(3) Then existing mental, emotional, or physical condition.** A statement of the **declarant's** then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. A statement of memory or belief offered to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant's will.

Pa.R.E. 803 (some emphasis added).[10] The rule makes eminently clear that this exception applies when the **declarant's** state of mind is at issue in the case. ***Schmalz, supra*** at 804-805. ***See also Commonwealth v. Levanduski***, 907 A.2d 3, 16 (Pa.Super. 2006) (*en banc*), *appeal denied*, 591 Pa. 711, 919 A.2d 955 (2007), *certiorari denied*, 552 U.S. 823, 128 S.Ct. 166, 169 L.Ed.2d 33 (2007) (stating exception applies only if declarant's state of mind is at issue; where declarant's state of mind is not

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[10] On January 17, 2013, the legislature rescinded this applicable version of Rules 802 and 803. The current versions of those rules went into effect on March 18, 2013. Rule 802 was again amended by Supreme Court Order, dated 2/19/14, effective 4/1/14. For our purposes, the rules are essentially the same.

facet in case, declarant's statement is immaterial and irrelevant to prosecution's case).

Nevertheless, an out-of-court statement is not hearsay if offered solely to prove its effect on the state of mind of the hearer, and not for the truth of the matter asserted in the statement. ***Commonwealth v. Busanet***, ___ Pa. ___, ___, 54 A.3d 35, 68 (2012) (illustrating admissibility of statement when used solely to demonstrate defendant's reaction to statement, *i.e.*, motive to kill, regardless of truth of statement); ***Gunter v. Constitution State Service Co.***, 638 A.2d 233, 299-300 (Pa.Super. 1994), *appeal denied*, 539 Pa. 678, 652 A.2d 1324 (1994) (stating hearsay rule does not apply when out-of-court statements are not being offered for truth of matter contained in statement; statement is non-hearsay when testimonial value is effect that statement had on listeners). ***See also Schmalz, supra*** at 803 n.3 (noting statement introduced to show its effect on listener is not hearsay); ***Commonwealth v. Phillips***, 879 A.2d 1260 (Pa.Super. 2005) (affirming admission of out-of-court statement made to narcotics agent so narcotics agent could explain his course of investigation and how narcotics agent was able to identify defendant's voice); ***American Future Systems v. Better Business Bureau of Eastern Pennsylvania***, 872 A.2d 1202, 1213 (Pa.Super. 2005), *affirmed*, 592 Pa. 66, 923 A.2d 389 (2007), *certiorari denied*, 552 U.S. 1076, 128 S.Ct. 806, 169 L.Ed.2d 606 (2007) (stating: "Testimony as to an out of court statement, written or oral, is not

hearsay if offered to prove, not that the content of the statement was true, but that the statement was made. The hearsay rule does not apply to all statements made to or overheard by a witness, but only those statements which are offered as proof of the truth of what is said. Thus, a witness may testify to a statement made to him when one of the issues involved is whether or not the statement was, in fact, made"); ***Refuse Management Systems, Inc. v. Consolidated Recycling and Transfer Systems, Inc.***, 671 A.2d 1140, 1148 (Pa.Super. 1996) (stating "out-of-court statement, however, is not hearsay when it is introduced merely for the purpose of establishing that the statement was made"); ***Wasserman v. Fifth & Reed Hosp.***, 660 A.2d 600, 608 (Pa.Super. 1995) (affirming permissive use at trial of statement made to testifying witness to show effect that statement had on witness).

On the other hand, if the jurors have to believe the text of the statement to understand what the statement is offered to prove, the statement is hearsay and any limiting instruction would be fruitless. ***See Commonwealth v. King***, 959 A.2d 405, 412 (Pa.Super. 2008) (citing ***Levanduski, supra*** for this proposition).

In a related vein, another example of a proposed admission violating a rule of competency is found in Rule 403, which limits the admission of relevant evidence in the following manner:

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 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.

Pa.R.E. 403.[11] In this balancing test of probative value and undue prejudicial effect, the question is whether the provocative or potentially misleading nature of the challenged evidence substantially outweighs its probative value. ***Mahan v. Am-Gard, Inc.***, 841 A.2d 1052, 1057 (Pa.Super. 2003), *appeal denied*, 579 Pa. 712, 858 A.2d 110 (2004). Generally, for purposes of this test, "prejudice means an undue tendency to suggest a decision on an improper basis. The erroneous admission of harmful or prejudicial evidence constitutes reversible error." ***Braun v. Target Corp.***, 983 A.2d 752, 760 (Pa.Super. 2009), *appeal denied*, 604 Pa. 701, 987 A.2d 158 (2009). ***See also Smith v. Morrison***, 47 A.3d 131, 137 (Pa.Super. 2012), *appeal denied*, ___ Pa. ___, 57 A.3d 71 (2012) (reiterating: "Unfair prejudice supporting exclusion of relevant evidence means a tendency to suggest decision on an improper basis or divert the jury's attention away from its duty of weighing the evidence impartially").

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[11] This rule was rescinded and replaced effective March 18, 2013. The Rule now says: "Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons—The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403. For our purposes the rule is essentially the same.

In the instant case, the Commissioners sued the newspaper for defamation related to articles the newspaper had published on January 12, 2004 and September 18, 2004. The newspaper is a media defendant. The articles were about the Commissioners' testimony before a grand jury empaneled to investigate a prison scandal in Lackawanna County. The Commissioners are all-purpose public figures, and their testimony touched on matters of public concern. No party disputes these classifications and all agree that the "falsity" and "actual malice" standards apply to this defamation action. The present appeal is before us because the Commissioners want to introduce the Garb and Feudale Opinions in their entirety as separate documents at trial, to prove the newspaper's "actual malice" in publishing both the January 12, 2004 and September 18, 2004 articles. Stated more fully, the Commissioners want to use the entire Opinions to show the newspaper had "notice" its reporting had been called into doubt and the act of publishing the September 18, 2004 article constituted "actual malice" with regard to publication of the September 18, 2004 article as well as the January 12, 2004 article. The trial court concluded the Garb and Feudale Opinions were inadmissible hearsay but allowed the Commissioners to introduce those portions of the Garb Opinion which the newspaper had reprinted in its September 18, 2004 article.[12]

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[12] The Commissioners' motion to admit the Garb and Feudale Opinions
(Footnote Continued Next Page)

I. RELEVANCE OF THE GARB OPINION AND FEUDALE OPINIONS ON THE ISSUE OF NOTICE AND/OR ACTUAL MALICE UNDER THE *WEAVER* CASE:

We cannot agree with the Commissioners' contention that the Garb and Feudale Opinions are admissible separate documents under ***Weaver*** as non-hearsay, state-of-mind evidence of the newspaper's "actual malice" for the following reasons. Initially, we observe the Garb Opinion was generated after Judge Garb launched an impartial investigation, conducted by an independent special prosecutor, to examine whether any person bound by grand jury secrecy had improperly leaked information about the grand jury proceedings. The independent special prosecutor authored a Report. Judge Garb reviewed the Report and the transcripts from the Commissioners' testimony before issuing his Opinion. In his written decision, Judge Garb referred to the Report, which found no breach by any agent of the Attorney General's Office. Judge Garb said he had reviewed the Report, and all the documents filed with it, including the transcripts of the Commissioners' grand jury testimony, as well as the newspaper articles, and concurred that

(Footnote Continued) ———————————

primarily addressed the Opinions as relevant to establish "falsity" and appropriate subjects for judicial notice of "falsity." As the primary issue presented, the trial court's opinion addressed the subject of judicial notice in significant detail. The Commissioners' later argument asked the court to admit the Opinions to prove "actual malice" per ***Weaver***. The court did not provide reasoning on the "actual malice" issue, likely because it was an alternative argument and not the primary focus of the Commissioners' motion at that time.

no leak had come from any agent of the Attorney General's Office, **which was the sole issue before the court at that time**.

But then, Judge Garb offered his personal belief that the January 12, 2004 article was completely at variance with the transcripts of the Commissioners' grand jury testimony. (***See*** Garb Opinion, dated September 14, 2004, at 2; R.R. at 0023.) Given the disparity he saw between the transcripts of the Commissioners' testimony and the newspaper's article, Judge Garb queried whether the "source" of the reporter's information was in fact someone who was not really privy to the proceedings at all. The Garb Opinion was released just before the September 18, 2004 article. Neither the Report nor the transcripts of the grand jury proceedings were disclosed. The newspaper had no way to "verify" Judge Garb's personal view, expressed as gratuitous *dicta* in his Opinion.[13] Compare this scenario to the facts in ***Weaver***, where the **plaintiff** instituted a defamation action against the author after the first publication and before the second publication, informing the author that the author's facts were false, as tested against public record. The ***Weaver*** Court said the plaintiff's defamation claims put the author on notice that his initial statements concerning the plaintiff were false or had been made with reckless disregard to falsity. The author's post-

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[13] We are not talking about verifying the authenticity of the Garb Opinion itself. Instead, we question how the newspaper could verify the content of the Opinion.

complaint republication of the same facts was relevant to the inquiry of the author's actual malice in issuing the original article. The ***Weaver*** Court said, "And evidence shows that [the author] republished a statement accusing Weaver of having been arraigned on charges of sexual molestation, after the lawsuit filed against [the author] put him on notice that his grave accusation might be false, does inform the jury's inquiry by making it more probable that [the author] either knew the information was false or that he acted recklessly with regard to the truth at the time of the initial publication." ***See id.*** at 470, 926 A.2d at 905.

Here, the Commissioners did not directly notify the newspaper that they contended the articles were false or even demand a retraction until December 2004, well after the September 18, 2004 article. Likewise, the Commissioners did not file their defamation complaint until January 2005, with respect to the January 12, 2004 article, and filed only a writ of summons in March 2005, with respect to the September 18, 2004 article. The defamation complaint relating to the September 18, 2004 article was not filed until March 15, 2010. The Garb Opinion arose out of another, non-adversarial matter and included personal commentary on an issue not then (but now) before the trial court in the present case. The content of the Opinion could not be tested because the documents on which it was based were secret. Nothing in the record indicates the newspaper had a copy of the transcript of Mr. Castellani's grand jury testimony until after June 2005,

so it had nothing to compare to the information from its "source." The Garb Opinion was largely grounded on another's Report and a reading of a cold record. Judge Garb did not compile the Report, interview the grand jurors, and had no personal knowledge of the jurors' reaction to the testimony. The Garb Opinion *dicta* was not an "adjudication" or a "judicial finding" in an adversarial proceeding that might carry the influence of "notice" in the legal sense. Unlike the complaint in ***Weaver***, the Garb Opinion could not be verified because it was based on undisclosed documents. The Garb Opinion was just the court's personal impression of someone else's personal impression of what happened at the grand jury proceedings. We conclude the Garb Opinion does not fall under the aegis of relevant direct or circumstantial evidence of the kind contemplated in ***Weaver*** that rises to the level of official "notice" sufficient to cause the newspaper to doubt its articles or to show the newspaper's "actual malice" with respect to the January 12, 2004 or the September 18, 2004 articles.

The Feudale Opinion was issued on June 29, 2005, long after the September 18, 2004 article. The parties had filed discovery motions with Judge Feudale, seeking access to grand jury materials. Judge Feudale first denied the parties the information with clear and concise legal reasoning on denying them access to secret grand jury documents for the purposes of civil litigation. The Feudale Opinion then continued with several pages of *dicta*, taking the newspaper to task for its reporting about the Commissioners'

performance before the grand jury. Judge Feudale's comments about the accuracy of the newspaper's reporting were irrelevant to the discovery issue before the court. In fact, the Feudale Opinion expressly stated its commentary was on a **collateral** matter. The remarks which followed were based largely on the content of the Garb Opinion and added a suggestion that one reporter be held in contempt. The central theme of the Feudale Opinion on the newspaper's reporting was his personal belief that the newspaper had published false information. Judge Feudale was especially angered by the newspaper's decision to publish the September 18, 2004 article after it had the Garb Opinion. Judge Feudale took the act of publishing the September 18, 2004 article as an offense against the authority of the court and expressed his personal opinion in no uncertain terms. We agree with the trial court that the Feudale Opinion is incompetent evidence of the newspaper's state of mind when it published either the September 18, 2004 or, by implication, the January 12, 2004 article. As such, the Feudale Opinion is inadmissible to prove "actual malice."

Significantly, the jurors would have to consider and accept the substance of the Garb Opinion and the Feudale Opinion to understand what the Opinions were being offered to prove. Thus, the Opinions would still be inadmissible hearsay and any limiting instruction would be fruitless. ***See Levanduski, supra***. Accordingly, we conclude the Garb and Feudale

Opinions are not relevant under ***Weaver*** and inadmissible as discrete documents at trial.

II. COMPETENCE OF THE GARB OPINION AND FEUDALE OPINIONS ON THE ISSUE OF NOTICE AND/OR ACTUAL MALICE IN THIS DEFAMATION CASE:

Assuming for the sake of argument that the Garb and Feudale Opinions were relevant under ***Weaver*** to the issue of notice and/or actual malice, our inquiry would not end there. We would still have to consider whether the Opinions, in their entirety as separate documents, are overly prejudicial under Pa.R.E. 403 and far outweigh any minimal probative value they might have.

Courts in other jurisdictions have recognized the dangers of unfair prejudice when a jury hears prior judicial findings on a critical issue of fact that the jury would otherwise decide. ***Nipper v. Snipes***, 7 F.3d 415, 418 (4th Cir. 1993) (reporting on sound judicial policy behind excluding judicial decisions in unrelated matters on unfair prejudice grounds because judicial judgments "present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice"; "A practical reason for denying [judgments] evidentiary effect is…the difficulty of weighing a judgment, considered as evidence, against whatever contrary evidence a party to the current suit might want to present. The difficulty must be especially great for a jury, which is apt to give exaggerated weight to a

judgment"). When another judge issues an opinion in a separate matter that comments on the issue the jury must decide in the present case, there is an acknowledged substantial risk that the jury will decide the issue on improper grounds. ***Fagin v. Kelly***, 184 F.3d 67, 80 (1st Cir. 1999). Therefore, courts have excluded prior judicial determinations on Rule 403 grounds due to the high risk of prejudice, jury confusion, and potential that the jury could reach a decision based on something other than the facts presented to them. ***State v. Donley***, 216 W.Va. 368, 378, 607 S.E.2d 474, 484 (W.Va. 2004) (stating: "To expose the jury to the inflammatory remarks and personal judgments stated by the family court judge, however, was tantamount to informing the jury that a judge in a related civil action had already evaluated the Appellant's character and had adjudged her capable of egregious acts toward her former husband involving the custody and visitation of their children. Because these remarks were expressed by a judicial officer and encompassed within an official document which the Appellant allegedly violated, the jury could have assigned considerable weight to the family court order's conclusions regarding the Appellant's character and propensity to engage in inappropriate divisive actions such as the very action she was accused of committing in the criminal case to which they were assigned as jurors").

In the instant case, the Garb Opinion came about as a result of an investigation launched into a potential breach of grand jury secrecy. The

newspaper was not a party to that investigation and had no access to the materials forming the basis of the Garb Opinion or the personal commentary contained in it on the quality of the newspaper's reporting practice. The Garb Opinion stated in stark terms his personal belief that the newspaper's January 12, 2004 article was false and unsupported by the transcripts from the grand jury hearings. The Garb Opinion implied that the newspaper had relied on unverified information in publishing its account of the Commissioners' grand jury testimony. The Feudale Opinion went even farther to express personal displeasure with the newspaper.

The Commissioners seek to introduce the entire text of both Opinions, ostensibly for the limited purpose of showing the newspaper had notice that the veracity of its reporting was in dispute. The Commissioners' proposal to use the Opinions for that narrow purpose cannot succeed because the jurors would still hear the full content of the Opinions as well as the speakers' status as judges. Moreover, as proof the newspaper had "notice" its reporting was under question, the Opinions leave the newspaper completely vulnerable and defenseless. Presenting the whole text of the Opinions would allow the jury to hear the judges' commentaries on falsity and reckless behavior, where falsity and the newspaper's state of mind are two crucial issues for the jury to resolve in this defamation case. Allowing the jury to hear the Opinions, even with a limiting instruction, would undoubtedly create a substantial risk that the jury would decide these issues on an improper

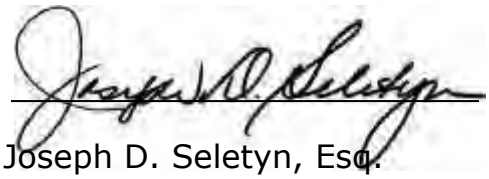
basis, simply because the commentaries came from judges. ***See Nipper, supra***. Based on the foregoing, we conclude the Garb Opinion and the Feudale Opinion are incompetent evidence as proof of notice and actual malice under the circumstances of this case. As a result, both Opinions are inadmissible in their entirety as separate documents at trial.

Order affirmed.

*JUDGE BOWES CONCURS IN THE RESULT.

**JUDGE OLSON CONCURS IN THE RESULT.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/11/2014