NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RAINTREE HOMES, INC. AND CHAPEL CREEK MORTGAGE BANKER, INC.

v.

MATT BIRKBECK AND POCONO RECORD, A DIVISION OF OTTAWAY NEWSPAPERS OF PENNSYLVANIA, L.P.

RAINTREE HOMES, INC., CHAPEL CREEK MORTGAGE BANKER, INC., AND GENE P. PERCUDANI

V.

MATT BIRKBECK AND OTTAWAY NEWSPAPERS OF PENNSYLVANIA, L.P., A/K/A OTTAWAY NEWSPAPERS, INC.

APPEAL OF: RAINTREE HOMES, INC. AND GENE P. PERCUDANI

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2643 EDA 2011

Appeal from the Order Entered September 8, 2011
In the Court of Common Pleas of Monroe County
Civil Division at No(s): 3651 CV 2001 * 2358 CV 2002

BEFORE: STEVENS, P.J.**, LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J. **FILED AUGUST 07, 2013**

Raintree Homes, Inc. ("Raintree") appeals from the order denying its post-trial motion for relief in a defamation action against the Pocono Record,

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* Retired Senior Judge assigned to the Superior Court.
** This decision was reached prior to July 30, 2013, with President Judge Stevens' participation.

a daily newspaper published in print and online in Stroudsburg, Monroe County, and Matt Birkbeck (collectively, "the Pocono Record"). After our review, we affirm on the opinion by the Honorable Peter J. O'Brien.

On April 8, 9, and 10, 2001, the Pocono Record published a series of articles written by Matt Birkbeck discussing the high rate of mortgage foreclosures in Monroe County. Specifically, the articles reported that Raintree, owned by Gene P. Percudani, sold houses to poor credit customers and charged prices based on artificially inflated appraisals. These appraisals were most often done by Chapel Creek Mortgage Banker, Inc. ("Chapel Creek"), a mortgage company also owned by Percudani. The newspaper published additional articles by Birkbeck discussing the mortgage foreclosures in the area on April 12, 13, 18, 24, and 27 of 2011. Raintree advertised primarily in Pennsylvania, New York and New Jersey, targeting first-time homebuyers.

Raintree and Chapel Creek filed suit against The Pocono Record on May 16, 2001. The case was assigned to Judge Lavelle in 2002, who granted in part and denied in part preliminary objections filed by the Pocono Record, excluding certain articles from evidence, in both print and those online. Shortly after, the Attorney General commenced a civil action against Raintree based on its sales and marketing practices. In response, Judge Lavelle issued a stay of proceedings on May 23, 2002. The issue was resolved, and Percudani signed a Consent Decree with the Attorney General.

The stay was lifted in 2008, and the matter was assigned to Judge Peter J. O'Brien.

During discovery, Raintree timely served The Pocono Record with 348 document requests and 80 requests for depositions, well beyond the twenty-five allowed by the court. The Pocono Record responded with a request for an extension. Instead of a response, Raintree filed a Motion to Compel. The motion was denied as a sanction for previous discovery abuses by Raintree, which further included failure to deliver requested documents, destruction of documents, and requests for superfluous and excessive interrogatories.[1] After discovery, The Pocono Record moved for summary judgment on the claims by Percudani, which the court granted.

During trial, The Pocono Record used as evidence a CBS documentary that had aired on July 15, 2002. Raintree moved to exclude it as evidence, but the court denied that request. The court further denied motions by Raintree to admit into evidence depositions from previous trials[2] and online postings by dissatisfied customers.

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[1] Pennsylvania Rule of Civil Procedure 4005(c) allows a judge to limit the number of interrogatories "as justice so requires." Here, the limit was twenty-five, while the plaintiff served eighty, and included items the court found to be excessive and irrelevant.

[2] ***Lester et al. v. Percudani, et al.***, (No. 3: CV 01-1182, M.D. Pa.) and ***Acre et al. v. Spaner et al.***, (No. 3: CV 04-832, M.D. Pa.).

After an eight-day trial, the jury rendered a unanimous verdict in favor of The Pocono Record, having found that Raintree Homes, Chapel Creek,[3] and Percudani failed to prove by a preponderance of the evidence that the articles at issue were defamatory with respect to Raintree. The jury issued a verdict for defendants on October 21, 2010. Raintree subsequently filed a Motion for Post-Trial Relief, which was denied. Raintree then filed a timely appeal on October 4, 2011, followed by a Concise Statement of Errors on October 21, 2011. Raintree raises eleven issues on appeal:

> 1. Whether the trial court erred and abused its discretion in granting the demurrer to the amended complaint dismissing from the case with prejudice counts related to certain articles about Raintree;
>
> 2. Whether the trial court erred and abused its discretion in not permitting the articles from issue one to be admitted into evidence, based upon its ruling on the demurrer dismissing the articles, since the articles were relevant and had evidentiary value;
>
> 3. Whether the trial court erred and abused its discretion in granting the demurrer to the amended complaint dismissing from the case with prejudice additional articles;
>
> 4. Whether the trial court erred and abused its discretion in not permitting articles to be admitted into evidence, based upon its ruling on the demurrer dismissing the articles in issue three, since the articles were relevant and have evidentiary value;
>
> 5. Whether the trial court erred and abused its discretion in denying the appellants' motions to compel answers to interrogatories, request for production, and depositions of witnesses that they were not entitled to responses because they

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[3] Chapel Creek later joined in a motion by the defendants for an involuntary nonsuit, dismissing it from the case. N.T., 10/14/2010, at 204.

were served out of time, since the requests and notices were timely served and had not been responded to;

6. Whether the trial court erred as a matter of law and abused its discretion in determining that the appellants, for purposes of this action, were limited purpose public figures thereby requiring the appellants to prove that the defendants acted with malice;

7. Whether the trial court erred as a matter of law and abused its discretion in denying the appellants' motion to allow the use of deposition testimony of Maureen Perih and Gerard Powell, which depositions were taken in the cases of ***Lester et al. v. Percudani, et al.,*** and ***Acre at al. v. Spaner et al.***;

8. Whether the trial court erred as a matter of law and abused its discretion in allowing the defendants to cross-examine Gene Percudani regarding the contents of the consent decree entered into with the Office of the Attorney General, since the agreement was a promise in settlement and, therefore, inadmissible;

9. Whether the trial court erred as a matter of law and abused its discretion in allowing the defendants to introduce into evidence and display to the jury over the objection of the appellants the video of the CBS News segment about the sales activities of Raintree, since the video was hearsay and could not be confronted, lacked relevancy and was extremely prejudicial;

10. Whether the trial court erred as a matter of law and abused its discretion in refusing to allow the appellants to introduce into evidence correspondence from customers of Raintree terminating their contracts and the blogs on the Pocono Record website as a result of the said articles, since same were relevant and admissible, pursuant to the state of mind exception to the hearsay rule; and

11. Whether the trial court erred as a matter of law and abused its discretion in granting the defendants' motion for summary judgment in the second action against the appellant, Gene Percudani.

"The standard for review . . . is whether the trial court palpably and clearly abused its discretion or committed an error of law which controlled the outcome of the case." ***Coker v. S.M. Flickinger Co.***, 645 A.2d 1181

(Pa. 1993). When considering a motion for a new trial, the court must determine, first, if a mistake occurred, and second, whether the mistake created sufficient harm to require a new trial. ***Harman ex rel. Harman v. Borah***, 756 A.2d 1116 (Pa. 2000).

In a defamation case, the plaintiff bears the burden of proving that the speech was defamatory in nature toward the plaintiff. 42 Pa.C.S. § 8343. However, the defendant has a complete defense if the speech is either proven true, or privileged. ***American Future Systems, Inc. v. Better Business Bureau***, 923 A.2d 389, 393 (Pa. 2007); ***Hepps v. Philadelphia Newspapers***, 485 A.2d 374, 378 (Pa. 1984). If the plaintiff is a public figure or the speech at issue pertained to a matter of public concern, the plaintiff must prove both that the statements made were inherently false and that they were printed with "actual malice" rather than simply negligence. ***See New York Times v. Sullivan,*** 376 U.S. 254, 282 (1964); ***Am. Future Sys., Inc.***, 923 A.2d at 398. Speech is made with "actual malice" if the statement is made with knowledge that it was false or with reckless disregard of whether it was false or not. ***Sullivan,*** 376 U.S. at 280.

Following trial in this case, the jury found that the statements in the articles were not inherently false and issued a unanimous verdict in favor of the Pocono Record.

We have reviewed the transcripts, the briefs, the relevant law, and we find that Judge O'Brien's opinion thoroughly, comprehensively and correctly disposes of Raintree's claims. Accordingly, we affirm based on the opinion of

the trial court. The parties are directed to attach a copy of that opinion in the event of further proceedings in this matter.

Order affirmed.

Judgment Entered.

Prothonotary

Date: 8/7/2013

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

RAINTREE HOMES, INC.,	: NO. 3651 CIVIL 2001 : NO. 2358 CIVIL 2002
Plaintiff	:
vs.	:
MATT BIRKBECK and POCONO RECORD,	:
Defendants	: MOTION FOR POST-TRIAL RELIEF

OPINION

Plaintiffs commenced this defamation action in 2001, alleging that a series of articles written by Defendant Matt Birkbeck and published by the Defendant Pocono Record falsely reported that the Plaintiffs sold houses to poor credit customers and charged prices based on artificially inflated appraisals. In 2002, the Judge assigned to the case granted in part and denied in part Preliminary Objections by the Defendants. On May 23, 2002, the same Judge issued a stay of proceedings as a consequence of the Attorney General filing a civil consumer fraud action against the Plaintiffs based on their sales and marketing practices. In 2008, this matter was assigned to the undersigned and the stay of proceedings was lifted. Following an eight day trial, which included testimony from 26 witnesses and more than 100 exhibit member jury rendered a unanimous verdict on October 21, 2010 in favor of Defendant Specifically, the jury found that the Plaintiffs had failed to prove by a preponderance of

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Trial court op.

evidence that the articles written by Defendant Matt Birkbeck and published by the Defendant Pocono Record were defamatory with respect to Plaintiff Raintree Homes, Inc. Plaintiffs have now filed a Motion for Post-Trial Relief which, following submission of briefs and oral argument on August 4, 2011, is now ripe for disposition.

DISCUSSION

Pursuant to Pennsylvania Rule of Civil Procedure 227.1, after trial and upon written motion for post-trial relief filed by any party, the trial court may order a new trial as to all or any of the issues raised, direct the entry of judgment in favor of any party, affirm, modify, or change the decision, or enter any other appropriate order. Pa. R. Civ. P. 227.1(a)(1)-(5). The judge considering post-trial motions pursuant to this Rule may order a new trial if he concludes that a factual or legal mistake was made at trial and that, under the particular circumstances of the case, the mistake forms a sufficient basis to order a new trial. Morrison v. Dept. of Public Welfare, 538 Pa. 122, 646 A.2d 565 (1994). The purpose of Rule 227.1 is "to provide the trial court the first opportunity to review and reconsider its earlier rulings and correct its own errors." Chalkey v. Roush, 757 A.2d 972, 975 (Pa. Super. 2000) [*quoting* Soderberg v. Weisel, 687 A.2d 839, 845 (Pa. Super. 1997)]. Rule 227.1(b) also requires that the party requesting post-trial relief raised the issue at or before trial, and that the party's motion specify the grounds for post-trial relief. Pa. R. Civ. P. 227.1(b)(1), (2).

The Official Note to Rule 227.1(c) expressly states that "[a] motion for post-trial relief may not be filed to order disposing of preliminary objections, motions for judgment on the pleadings or for summary judgment, motions relating to discovery or other proceedings which do

not require a trial." Pa. R. Civ. P. 227.1(c), Official Note. Our Superior Court has recognized this limitation and explained, "[l]ogically, post-trial motions may not be filed to orders disposing of pre-trial motions (*i.e.*, orders disposing of preliminary objections, motions for summary judgment, motions relating to discovery) . . . ." Bostick v. Schall's Brakes and Repairs, Inc., 725 A.2d 1232, 1236 (Pa. Super. 1999).

When considering a motion for new trial, the trial court must follow a two-step process. First, the court must determine whether one or more mistakes were made at trial; if the trial court concludes that a mistake occurred, it must then determine whether the mistake provides a sufficient basis for granting a new trial. Dennis v. Southeastern Pa. Transp. Auth., 833 A.2d 348 (Pa. Cmwlth. 2003); Harman ex rel. Harman v. Borah, 562 Pa. 455, 756 A.2d 1116 (2000). The second part of this framework "recognizes that the so-called 'harmless error doctrine' underlies every decision to grant or deny a new trial; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the alleged mistake." Smith v. Southeastern Pa. Transp. Auth., 913 A.2d 338, 342 (Pa. Cmwlth. 2006).

To prevail on a motion for new trial based on the trial court's evidentiary rulings, the moving party must show that the rulings in question were erroneous and harmful to the complaining party. Yacoub v. Lehigh Valley Med. Assoc., P.C., 805 A.2d 579 (Pa. Super. 2002). Similarly, an erroneous jury instruction will provide the basis for a new trial if the instruction is fundamentally in error and may have been responsible for the trial verdict. O'Brien v. Martin, 638 A.2d 247 (Pa. Super. 1994).

Although the Plaintiffs listed numerous allegations of error in their Motion for Post-Trial Relief and in their brief, all but three evidentiary issues were conceded at the time of

oral argument. Nevertheless, for ease of appellate review, we will address the procedural and substantive deficiencies of all of the alleged allegations of error, either listed in Plaintiffs' Motion or in Plaintiffs' brief in support of their Motion. We will first address the allegations of error Plaintiffs conceded at oral argument and then consider the evidentiary rulings emphasized by Plaintiffs' counsel at argument.

Plaintiffs' First and Third Allegations of Error

Plaintiffs' first allegation of error, conceded at oral argument, is that the trial court erred when it sustained Defendants' Preliminary Objections to Plaintiffs' defamation claims arising from certain articles published in the Pocono Record. Specifically, Plaintiff alleges that Judge Lavelle erred when he sustained Defendants' Preliminary Objections, by Order of March 12, 2002, regarding articles published on April 8, 12, 13, 18, 24, and 27, 2001 because "the statements contained therein allegedly relating to Plaintiffs are not capable of a defamatory meaning." *See* Judge Lavelle Order, March 12, 2002.

As per Rule 227.1, noted above, a party may not file a motion for post-trial relief contesting preliminary objections. Plaintiffs' counsel conceded as much at oral argument. Even if we consider the merits of Plaintiffs' position, however, we reiterate that these articles were properly excluded from Plaintiffs' defamation suit against Defendants. The United States Supreme Court has explained that a defamation claim is "constitutionally defective" if the allegedly defamatory statements are not "of and concerning" the plaintiffs who brought the claim. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 288 (1964). Our Legislature has incorporated this mandate as a statutory element of a plaintiff's defamation case. *See* 42 Pa. C.S. § 8343(a)(3), (5). In determining whether the "of and concerning" requirement has been

satisfied, "[it] is not enough that plaintiff understands the communication to be about him." Zerpol Corp. v. DMP Corp., 561 F.Supp. 404, 410 (E.D. Pa. 1983). Rather, the relevant inquiry is "whether the defamatory material was capable of being reasonably understood as intended to refer to the complainant," an issue the trial court must initially decide. Harris by Harris v. Easton Pub. Co., 483 A.2d 1377, 1385 (Pa. Super. 1984).

A review of the articles in question show that these articles were plainly incapable of defamatory meaning towards Plaintiffs. Only two of these articles mention Plaintiffs at all, and both only briefly in connection with home sales in Monroe County. Additionally, the articles at issue are about distinct topics other than Plaintiffs—they discuss the number of people who have contacted the Pocono Record since the original series was published, local legislators' responses to concerned constituents, and FBI investigations of alleged real estate fraud. While Plaintiffs claim that these articles, read in conjunction with earlier articles in the Pocono Record, could cause a reader to reasonably conclude that Plaintiffs were selling homes at inflated prices using inflated appraisals, we recognize that Plaintiffs' alleged "innuendo must be warranted, justified and supported by the publication." Thomas Merton Ctr. v. Rockwell Int'l Corp., 497 Pa. 460, 467, 442 A.2d 213, 217 (1981). After a thorough review of these articles, we do not agree that Plaintiffs' alleged innuendo is warranted or supported by the publications.

Furthermore, we note that the Court correctly ruled that the editorial published by the Pocono Record on April 8, 2001 was not actionable because it did not mention Plaintiffs and it offered the newspaper's opinion that law enforcement officials and business professionals should investigate the highly questionable practices described in the editorial. This editorial

represented classic opinion protected by both the Pennsylvania and U.S. Constitutions. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); Neish v. Beaver Newspapers, Inc., 581 A.2d 619 (Pa. Super. 1990). Furthermore, since the jury did not find the articles published by the Defendants which specifically discussed the Plaintiffs' business practices to be defamatory, the articles not admitted would have surely fallen short as well.

Plaintiffs' third allegation of error claims that the Court erred when it sustained Defendants' Preliminary Objections with respect to certain internet publications. As noted above, post-trial motions are not the proper vehicle for challenging decisions on preliminary objections. These publications were also not "of and concerning" Plaintiffs and the articles did not defame Plaintiffs. And Plaintiffs were not prejudiced by the dismissal of these articles from the case in light of the jury's verdict which concluded that the same allegedly defamatory statements in different articles were not materially false.

Plaintiffs' Second and Fourth Allegations of Error

Plaintiffs' second allegation of error, conceded at oral argument, is that the trial court erred when it did not allow Plaintiffs to introduce the articles mentioned above at trial. These articles were previously ruled inadmissible when defamation claims based on the articles were dismissed, by Judge Lavelle's March 12, 2002 Order, on Preliminary Objections. Courts in Pennsylvania have long recognized the law of the case doctrine, which "refers to family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the

earlier phases of the matter." Com. v. King, 999 A.2d 598, 600 (Pa. Super. 2010) (internal quotations omitted). Based on this doctrine, we were prohibited from disturbing Judge Lavelle's ruling that the articles in question were not actionable. By the same token, these publications were not relevant to the claims Plaintiffs actually presented and would have unnecessarily confused and misled the jury.

Furthermore, we note that the jury indicated, on a specific jury form, that the articles presented at trial were not defamatory because they had not been proven materially false. The jury did not consider Question No. 2 on the verdict form, whether the articles were published with "actual malice," because their deliberations were complete when they determined that the statements were not materially false. Plaintiffs' only reason for offering these articles into evidence was that the articles were relevant to the actual malice inquiry because the Pocono Record published the articles *after* Plaintiffs requested a retraction. The jury never reached the question of whether Defendants published the offending articles with actual malice, therefore, the exclusion of such evidence was irrelevant. In Boyle v. Indep. Lift Truck, Inc., 607 Pa. 311, 6 A.3d 492 (2010) the Court held when the jury answers in the negative to the first question on a verdict sheet, any issues pertaining to the resolution of the second issue cannot be prejudicial.

Plaintiffs' Fifth Allegation of Error

Plaintiffs allege that the Court erred when it denied Plaintiffs' Motion to Compel responses to requests for production of documents and the deposition of certain witnesses. Specifically, Plaintiffs argue that the Court erred when it denied their Motion to Compel responses to Plaintiffs' document request of February 18, 2010 and to Compel four depositions.

At argument, Plaintiffs conceded that post-trial motions are not the proper method for challenging "motions relating to discovery." *See* Pa .R.C.P. 227.1(c), Official Note.

Plaintiffs' allegation is also without substantive merit as our ruling on Plaintiffs' Motion to Compel was a wholly appropriate sanction for Plaintiffs' repeated transgressions in the discovery process. Defendant Pocono Record served interrogatories and document requests on Plaintiffs in October of 2009, and Plaintiffs were ordered to produce all responsive documents by March 5, 2010. Plaintiffs then admitted that the "vast majority" of Plaintiffs' records had been destroyed or discarded, and stated that Plaintiffs would produce the requested documents by March 24. That date was moved back to April 1, at which time counsel for Defendants spent only an hour reviewing Plaintiffs' partial production of documents before Plaintiffs' owner, Gene P. Percudani, forced Defendants' counsel from the room.

At around the same time, Plaintiffs served 348 document requests on Defendants; Defendants sent a letter to Plaintiffs' counsel seeking an extension to respond to the requests, but Plaintiffs instead filed a Motion to Compel less than thirty days after serving the requests without ever responding to Defendants' letter. Shortly thereafter, Plaintiffs served four notices of deposition—on Matt Birkbeck, Chris Mele, Attorney Michael Berry, and Kim de Bourbon. Defendants objected to these notices and sent Plaintiffs' counsel a letter stating as much. Plaintiffs' counsel responded by saying he would file a motion to compel, which he did on March 18, 2010. The Motion to Compel did not seek to compel Ms. de Bourbon's deposition, however.

On May 5, 2010, we denied Plaintiffs' Motion to Compel in part and granted the Motion in part, ordering only that Defendant Birkbeck be deposed. We also ordered Plaintiffs to

fully comply with the Court's February 3, 2010 Order to produce documents and discovery responses within ten days and scheduled a hearing for May 25 to determine whether Plaintiffs should be sanctioned for discovery abuses. Plaintiffs subsequently filed a motion asking the Court to reconsider its ruling on the Motion to Compel. In the interim, Plaintiffs produced only a fraction of the documents requested by Defendants.

On May 25, the Court held a hearing on Defendants' Motion for Discovery Sanctions. At the hearing, Percudani, Plaintiffs' owner, admitted that he personally destroyed most of Defendants' documents, and kept only the documents that "would help [him] in [his] case against the Pocono Record." Notes of Testimony, May 25, 2010, Sanctions Hearing, at 57, 66. Following the hearing, we denied Plaintiffs' Motion for Reconsideration and concluded that Plaintiffs had repeatedly violated the express provisions of the discovery procedures provided in the Pennsylvania Rules. *See* Order of May 25, 2010.

Courts in Pennsylvania recognize that the "imposition of [discovery] sanctions is vested in the sound discretion of the trial court." *See* Schweikert v. St. Luke's Hosp. of Bethlehem, Pa., 886 A.2d 265 (Pa. Super. 2005). Furthermore, Rule 4019(c)(5) states that the court may make any "order with regard to the failure to make discovery as is just." Pa. R. Civ. P. 4019(c)(5). With this standard in mind, our denial of Plaintiffs' Motion to Compel was an appropriate sanction for Plaintiffs' repeated offenses during the discovery period.

Plaintiffs' requests for two noticed depositions—for Michael Berry and Chris Mele—were baseless. Plaintiff asserted it was entitled to depose Attorney Berry, Defendants' counsel of record, because he verified portions of Defendants' New Matter. But this verification

was withdrawn on March 9, 2009. Additionally, Chris Mele was named editor of the Pocono Record in March of 2010, nearly nine years after this suit was filed; moreover, he did not work for the newspaper before then and had no knowledge pertinent to Plaintiffs' underlying claims. Plaintiffs never actually moved to depose Kim de Bourbon, the newspaper editor at the time the articles were published, so we were not presented with a request to compel her deposition. Furthermore, Plaintiffs *did* depose Defendant Birkbeck for two days before trial.

Plaintiffs' Sixth Allegation of Error

Plaintiffs, in their sixth allegation of error, argue that the Court erred when it granted Defendants' Motion for Summary Judgment against Gene P. Percudani, thereby dismissing Mr. Percudani as a defendant in the case. Again, as noted above, the Pennsylvania Rules of Civil Procedure clearly state that a party cannot file a motion for post-trial relief to argue that a summary judgment ruling was incorrect. *See* Pa. R. Civ. P. 227.1(c), Official Note. Plaintiffs conceded at hearing that this argument was not properly before the Court in a post-trial motion.

Even so, we affirm our ruling dismissing Mr. Percudani as a plaintiff in this action because the articles presented at trial were not "of and concerning" Mr. Percudani, personally, and did not defame him. Many of the articles did not mention Mr. Percudani at all and, as we observed in our Opinion of August 19, 2010, several other articles simply "make brief mention that Percudani is president of Raintree and refused to offer a comment. No statements of misconduct are attributed to him." *See* August 19, 2010, Opinion and Order. While Plaintiffs continue to argue that the articles also defamed Mr. Percudani because he was the chief officer of companies mentioned in the allegedly defamatory articles, courts throughout the country have

repeatedly rejected this type of extension of a defamation claim. *See e.g.*, Jankovic v. Int'l Crisis Group, 494 F.3d 1080, 1089 (D.C. Cir. 2007) (statements which refer to an organization do not implicate its members); McBride v. Crowell-Collier Publishing Co., 196 F.2d 187, 189 (5th Cir. 1952) (plaintiff cannot state defamation claim based on defamatory article about company which notes plaintiff is sole owner of the company, because "nothing in th[e] reference makes any accusation or charge of any kind against him").

We found it interesting in this proceeding that Gene P. Percudani was not named as a Plaintiff in the original Complaint filed in this proceeding at No. 3651 Civil 2001. The second Complaint filed at No. 2358 Civil 2002[1] merely alleged that the republication of the articles on the Defendant's website constituted a further basis for relief and included Gene P. Percudani as a Plaintiff. At the time of oral argument on the motion for summary judgment, we inquired of counsel of why this change was made. He candidly said that he had no explanation for the addition of the individual Plaintiff. Similarly, we found that there was no purpose to the addition of the individual Plaintiff in these proceedings.

Plaintiffs' Seventh Allegation of Error

In their seventh allegation of error, Plaintiffs claim the Court erred when it determined, by Opinion and Order of August 19, 2010, that Plaintiffs were "limited purpose public figures" thereby placing the burden on Plaintiffs to prove that Defendants published the articles in question with "actual malice." Plaintiffs did not pursue this issue at argument.

[1] The actions were consolidated by agreement of counsel.

As we have repeatedly noted, the jury never reached the issue of actual malice during their deliberations because they found that Plaintiffs had not proven that the articles were defamatory. Since the jury was not required to deliberate on the question of whether Defendants published the articles in question with actual malice, Plaintiffs' allegations of error are irrelevant. *See* Boyle, 6 A.3d at 496-97.

The Court's decision that Plaintiffs were public figures was plainly correct. Our Supreme Court has instructed that a corporation, like Plaintiffs, can become a public figure based on "a controversy . . . created by a plaintiff's own activities, particularly with respect to widespread public solicitation and advertisements." Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa., 592 Pa. 66, 87, 923 A.2d 389, 401-02 (2007). In that case, the Supreme Court explained that extensive advertising and promotional conduct, for the purpose of soliciting customers, renders a corporation a "limited purpose public figure" for purposes of defamation claims based on reports that focused on the corporation's business practices. Id. The Court stated that a company is a limited purpose public figure where there is a "direct relationship between the promotional message and the subsequent defamation." Id. at 89, 403 (citation omitted).

We defer to our earlier Order, of August 19, 2010, for our findings with respect to Plaintiffs' advertising and promotional methods, and how those practices transformed Plaintiffs into limited purpose public figures:

> In the instant case, Plaintiffs' marketing techniques were designed to garner public attention. Plaintiff [at the time] Percudani's testimony admits that their commercials were marketed to New Jersey, New York, and Pennsylvania, and 'received as far south as Puerto Rico and as far [n]orth as Vermont. Plaintiffs spent millions of dollars in promotion of their business through an extensive print,

> radio, and television campaign. We therefore [] find [that] Plaintiffs voluntarily thrust themselves into public discussion. The articles giving rise to the instant lawsuit report on Plaintiffs' marketing tactics. As such we find that a subject-matter nexus exists. As the vast financial resources expended in the marketing campaign gave Plaintiffs widespread radio, print, and television publicity, we find that Plaintiffs possessed greater access to channels of effective communication than the average private citizen.

Opinion and Order of August 19, 2010, at 9-10 (internal citations omitted). Plaintiffs clearly targeted customers in Monroe County with their promotional materials and there was a "direct relationship" between Plaintiffs' promotional message and the allegedly defamatory articles. We properly determined that Plaintiffs were limited purpose public figures for the purposes of their defamation action, and decline to order a new trial on this basis.

Plaintiffs' Ninth Allegation of Error

Plaintiffs argue, in their ninth allegation of error, that the Court erred when we refused to allow Plaintiff Chapel Creek Mortgage Banker to withdraw from prosecution of the suit on the eve of trial. Plaintiffs conceded this issue at argument.

First, we note that Plaintiffs never filed a motion for discontinuance as required by Rule 229(a) of the Pennsylvania Rules of Civil Procedure. Upon conclusion of the Plaintiffs' case, the Defendants moved for a nonsuit with respect to all Plaintiffs. Notes of Testimony, October 14, 2010, at 198 (hereinafter "N.T., 10/14/10, at ____"). Following the Defendants' motion, the Plaintiffs also moved for a voluntary nonsuit against Chapel Creek Mortgage Banker. N.T., 10/14/10, at 204. This Court granted a nonsuit with respect to Chapel Creek Mortgage Banker, Inc. upon the conclusion of the Plaintiffs' case. N.T., 10/14/10, at 205. Since Plaintiffs introduced articles about Chapel Creek and presented testimony concerning Chapel

Creek's role in the Plaintiffs' business structure, we fail to see any harm in allowing such evidence.

Plaintiffs' Tenth Allegation of Error

In their tenth allegation of error, Plaintiffs argue that they are entitled to a new trial because the Court erred when it permitted Defendants to cross-examine Gene Percudani regarding a Consent Decree into which he had entered. The Decree resolved certain claims against Mr. Percudani and Dominick Stranieri, an appraiser who often provided appraisals for Raintree properties. Again, Plaintiffs did not pursue this issue at argument.

Prior to trial, we Ordered that "the Consent Decree will not be allowed as affirmative evidence on behalf of the Defendants," but we also stated "that inquiry concerning the Consent Decrees may, or may not, be permitted on cross-examination." Order of September, 23, 2010, ¶ 3. At trial, Plaintiffs opened the door to questioning about the Consent Decree and waived any argument that follow-up questioning was improper. For one, Mr. Percudani testified on direct examination that "we [Plaintiffs and Percudani] settled with the Attorney General." N.T., 10/8/10, at 16. He also stated on direct examination that he believed the Pocono Record defamed Raintree because the reports that Raintree had engaged in "illegal maneuvers" were "false." *See e.g.*, N.T., 10/6/10, at 45. ("We didn't do any kind of maneuvering that was illegal . . . "). In the Consent Decree, however, Plaintiffs admitted that they committed illegal acts.

Defense counsel cross-examined Mr. Percudani about his testimony that Plaintiff Raintree had not used "illegal maneuvers" and Mr. Percudani testified he was "not sure" whether incorporation of certain provisions in Raintree's contracts with customers were "illegal acts." *See* N.T., 10/8/10, at 15-17. Counsel then showed Mr. Percudani the Consent Decree to refresh

his recollection about whether those practices were illegal, in accordance with Pennsylvania Rule of Evidence 612(a) ("A witness may use a writing . . . to refresh memory for the purpose of testifying."). We permitted defense counsel to impeach Mr. Percudani's testimony that Raintree did not engage in "illegal maneuvers" based on statements Plaintiffs made in the Consent Decree, but the Decree itself was not admitted as evidence or shown to the jury. Under similar facts, our Superior Court has held that the trial court did not err or abuse its discretion when the court allowed a party to use statements made in the course of compromise to impeach a witness, without divulging the compromise itself. *See* Hammel v. Christian, 610 A.2d 979, 982-83 (Pa. Super. 1992).

Plaintiffs' Twelfth Allegation of Error

Plaintiffs' next allegation of error claims that the Court erred when it refused to admit correspondence from customers and comments on Raintree's website into evidence at trial. Plaintiffs did not pursue this issue at argument. Plaintiffs also declined to specify how this ground for a new trial was asserted in pre-trial proceedings or at trial; Rule 227.1(b)(2), noted above, states that grounds for post-trial relief are waived if the party seeking relief fails to assert how the grounds were asserted at or before trial. *See* Pa. R. Civ. P. 227.1(b)(2); *see also* Hall v. Jackson, 788 A.2d 390, 400 (Pa. Super. 2001). Plaintiffs now argue that this evidence was admissible under the "state-of-mind" exception to the hearsay rule from Section 803(3) of the Pennsylvania Rules of Evidence.

Both categories of evidence at issue—customer correspondence and Internet postings—are classic examples of hearsay. *See* Pa. R.E. 801. Plaintiffs, in their brief, admit that they sought to use this evidence to prove "that the publication in question exposed the Plaintiffs

to public contempt and ridicule." Plaintiffs needed to prove, therefore, that the out-of-court declarants read the particular articles that formed the basis for Plaintiffs' claims and took some sort of adverse action *because* of the specific statements Plaintiffs claimed were false and defamatory. Plaintiffs could only prove this point by offering the records for the truth of the matter asserted therein. And Plaintiffs miss the mark when they argue that these correspondences are admissible under the state-of-mind exception. The states of mind of the authors of these letters and postings were not at issue in the case. The fact that these customers cancelled their contracts and took other adverse actions *was* an issue in the case; but evidence of those actions in these forms was inadmissible because Plaintiffs sought to prove the truth of the matter asserted in the correspondences, namely that the authors took the adverse actions about which they wrote.

Counsel contends in his brief that this evidence would have buttressed Plaintiffs' damage claims. However, the jury did not consider Plaintiffs' damages because it first found that the articles in question were not defamatory. Defendants never disputed the fact that the articles published in the Pocono Record could cause some customers to cancel contracts with Plaintiffs. Plaintiffs actually presented numerous witnesses who testified regarding the drop in Plaintiffs' business and alleged damages to Plaintiffs' reputation in light of the articles in the Pocono Record (Carolyn Nebbia, Anthony Nebbia, Patricia Lilly, e.g.). *See* N.T., 10/7/10, at 25-27, 29, 144-45, 208, 253; N.T., 10/14/10, at 140-42.

Plaintiffs' Thirteenth Allegation of Error

Plaintiffs also argue that the Court erred by failing to instruct the jury that Defendants were required to show they suffered prejudice before the jury could consider

Plaintiffs' destruction of evidence. Again, Plaintiffs did not pursue this issue at argument. At trial, we charged the jury on spoliation as follows:

> In evaluating the testimony presented by the Plaintiff, you may consider their admission that they have destroyed or discarded records, including their sales files, construction files and mortgage loan files during the course of this litigation. The Plaintiff has further admitted that they kept only those records that they determined were favorable to them.
>
> Where relevant evidence that would properly be part of a case was within the control of a party but that party has destroyed or discarded it, the jury may draw the inference that if that evidence had been preserved and presented at trial, it would have been unfavorable to that party

N.T., 10/21/10, at 141.

The court, not the jury, determines whether a party has been prejudiced by its opponent's destruction of documents, and that determination is made as part of the court's consideration of whether to impose sanctions for spoliation. *See* Creazzo v. Medtronic, Inc., 903 A.2d 24 (Pa. Super. 2006); Tenaglia v. Proctor & Gamble, Inc., 737 A.2d 306 (Pa. Super. 1999). Our Superior Court, in Pia v. Perrotti, affirmed the propriety of the trial court's jury instruction on spoliation which paralleled the instruction in this case and did not state that the defendant had to be prejudiced. Pia v. Perrotti, 718 A.2d 321, 324-25 (Pa. Super. 1998). Significantly, the standard Pennsylvania jury instructions regarding the permissible adverse inference drawn from spoliation of evidence does not include any language concerning prejudice. *See* Pa. SSJI (Civ.) 5.60, 5.70 (4th ed.) (Supp. 2010).

As the Superior Court has explained, the "trial court has broad discretion in phrasing jury instructions, and may choose its own wording as long as the law is clearly, adequately and accurately presented to the jury," and an erroneous charge provides grounds for a

new trial only "if the charge as a whole is inadequate, unclear, or has a tendency to mislead or confuse the jury rather than clarify a material issue." Vallone v. Crech, 820 A.2d 760, 764 (Pa. Super. 2003) (citation omitted). Here, Plaintiffs admitted at trial that they "destroyed or discarded" the "vast majority of the[ir] records," including their "sales files, construction files, [and] mortgage loan files." N.T., 10/7/10, at 295-96. We had broad discretion to fashion an appropriate sanction for Plaintiffs' spoliation of evidence and we instructed the jury that it could draw the adverse inference that the destroyed evidence would have been unfavorable to Plaintiffs. This action was taken as a consequence of our conclusions after the hearing on sanctions held May 25, 2010. *See* Order of May 25, 2010.

Plaintiffs' Eighth Allegation of Error

In Plaintiffs' eighth allegation of error, they argue that the trial court erred when it denied Plaintiffs' Motion to introduce the deposition testimony of Maureen Perih and Gerard Powell, taken in a different case, into evidence by Opinion and Order dated August 19, 2010. Ms. Perih and Mr. Powell were deposed in federal litigation, *Lester v. Percudani* and *Acre v. Spaner*, brought by people who purchased homes from Plaintiff Raintree and obtained financing from Plaintiff Chapel Creek. At argument on August 4, Plaintiffs maintained that this error justified post-trial relief in the form of a new trial.

Plaintiffs base their argument on the hearsay exception for former testimony, found in Rule 804(b)(1) of the Pennsylvania Rules of Evidence. This exception states:

> (b) **Hearsay Exceptions.** The following statements, as hereinafter defined are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Pa. R.E. 804(b). In other words, Plaintiffs' proffered deposition testimony would have been excepted from the ban on hearsay evidence if we found that the declarants were unavailable and that Defendants, or a predecessor in interest, had an adequate opportunity and similar motive to develop the deposition testimony by direct, cross, or redirect examination. In our Opinion and Order of August 19, 2010, however, we held that deposition testimony from a proceeding in which these Defendants were not parties, none of the parties to that litigation were Defendants' predecessors in interest, and counsel for Defendants did not take part was not admissible under the hearsay exception for former testimony in Rule 804(b)(1).

We affirm our prior decision to exclude the deposition testimony of Ms. Perih and Mr. Powell. First, all parties admit that Defendants were not a party to the federal actions for which these depositions were taken and had no opportunity to question Ms. Perih or Mr. Powell. The federal action dealt with RICO claims against Raintree, Chapel Creek, and Mr. Percudani, among others. The issues in that case were obviously distinct from the issues in the present matter and the plaintiffs in that case were not predecessors in interest to Defendants; furthermore, the plaintiffs in those cases did not have a similar motive in developing the testimony of Ms. Perih and Mr. Powell. *See* Bugosh v. Allen Refractories Co., 932 A.2d 901 (Pa. Super. 2007) (affirming decision to bar introduction of testimony because party in prior case

had no incentive to cross-examine witness concerning issues in present case); *see also* Beaumont v. ETL Services, Inc., 761 A.2d 166, 174 (Pa. Super. 2000) (purpose of "predecessor in interest" requirement "is that the party against whom the admission of the deposition is sought would be unfairly prejudiced if it did not have the opportunity to cross-examine the witness in order to protect its interests").

Finally, Plaintiffs have failed to allege any prejudice that resulted from the exclusion of the deposition testimony. *See* Donoughe v. Lincoln Elec. Co., 936 A.2d 52, 69 (Pa. Super. 2007) (declining to order a new trial where parties "failed to credibly show how they had been prejudiced by the trial court's evidentiary rulings). Therefore, we conclude this allegation of error is also without merit.

Plaintiffs' Eleventh Allegation of Error

Plaintiffs, in their eleventh allegation of error, claim that the Court erred when it permitted Defendants to play a CBS News Report, which originally aired on July 15, 2002, for the jury. At our hearing on August 4, Plaintiffs steadfastly argued that the Court proceeded in error when it permitted Defendants to present this evidence and that this error was not harmless.

Plaintiffs claim the report was impermissible hearsay evidence because the statements in the report are similar to the content of the newspaper articles at issue, and that personal opinions are not permissible forms of reputational evidence under Pennsylvania Rule of Evidence 803. Plaintiffs also allege that they suffered prejudice when the jury viewed the report because the segment included statements by the Pennsylvania Attorney General condemning Mr. Percudani and his business practices.

Defendants, on the other hand, claim that they displayed the CBS News Report to the jury in mitigation of Plaintiffs' alleged damages. Plaintiffs sought reputational and economic damages from the time the articles were published through 2007, while the CBS Report was broadcast in mid-2002. Defendants claim they were permitted to counter Plaintiffs' damages claim by showing that other intervening events, such as the CBS News Report that included disgruntled customers' testimonials, harmed Plaintiffs' reputations and lessened the damages attributable to Defendants themselves.

In this respect, Defendants claim that the CBS Report was not inadmissible hearsay because it was not offered for the truth of the statements therein—namely, allegations of Plaintiffs' misconduct. They argue that the Report was simply offered to establish that the Report was broadcast. Alternatively, Defendants cite to Pennsylvania Rule of Evidence 803(21), which provides that out of court statements showing "reputation of a person's character among associates or in the community" are excepted from the ban on hearsay testimony. *See* Pa. R.E. 803(21). They assert that all evidence of a plaintiff's reputation in the community after publication of the challenged statements is admissible in mitigation of any damages allegedly caused by the defendant's publication.

We agree with Defendants that the CBS News Report was properly shown to the jury. We determined at trial that Defendants sought to introduce the video to establish its existence—which would presumably weaken Plaintiffs' claims of economic and reputational damage. And we reiterate that the video was properly shown to the jury because its probative value rested with the fact that other entities, such as CBS, were investigating curious business practices in Monroe County and that Plaintiffs' reputation was not harmed solely by Defendants.

See Duffy v. Dept. of Transp., 694 A.2d 6, 9 (Pa. Cmwlth. 1997) ("if the out-of-court statement is offered not to prove the truth of the statement made by the out-of-court declarant, but instead to *prove that the statement was in fact made*, the out-of-court statement is not hearsay regardless of who made it or how it was reported to the witness") (emphasis added). For this reason, we affirm our early decision that the CBS News Report was not hearsay because it was not offered to prove the truth of the statements contained therein.

We also concluded that the CBS Report is admissible *as a hearsay exception* pursuant to Rule 803(21) and Pennsylvania case law, because the statements in the video pertain to Plaintiffs' claimed damages as a result of Defendants' publications. Defendants were permitted to rebut Plaintiffs' damages calculation by showing that independent factors harmed Plaintiffs' economic and reputational standing. *See* Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1079 (3d Cir. 1985) (holding that newspaper stories concerning plaintiff, other than publications at issue, were admissible "to mitigate the level of compensatory damages"); *see also* Corabi v. Curtis Publishing Co., 441 Pa. 432, 473, 273 A.2d 899, 920 (1971), *overruled on other grounds by* Dunlap v. Philadelphia Newspapers, Inc., 448 A.2d 6 (Pa. Super. 1982) ("in determining what injury has been done to the plaintiff's reputation, the jury may consider, inter alia, the character and previous general standing of the plaintiff in the community"). We also affirm our decision to permit Defendants to show the CBS Report to the jury on this basis.

Plaintiffs' argue that, even if the CBS Report was admissible evidence, it should not have been shown to the jury because its prejudicial value outweighed its probative worth. To support this allegation, Plaintiffs claim: that the Report mentioned the Pennsylvania Attorney

General's ongoing suit against Plaintiffs and Gene Percudani; they did not have an opportunity to confront the individuals appearing in the Report; and that the jury would feel that a piece on the CBS Evening News must be accurate.

We do not find Plaintiffs' allegations persuasive. First, the trial included a wealth of testimony and evidence concerning the Attorney General and various lawsuits filed against Plaintiffs. By that same token, the CBS Report echoed many of Plaintiffs' claims, such as their position that Raintree did not engage in illegal business practices and that Raintree's homes dropped in value due to "market conditions beyond the control of [Plaintiffs]." *See* N.T., 10/19/10, Exhibits 138, 139, CBS News Broadcast and Transcript of CBS News Broadcast. We also heard testimony from numerous disgruntled customers of Plaintiffs throughout the trial; the allegations in the CBS Report were not novel theories to the jury. *See* N.T., 10/19/10, at 69-96, 97-123 (testimony of Francisca Moya and Sheryl Duff).

Plaintiffs also claim that they were prejudiced because they did not confront the speakers in the Report. This argument fails for two reasons. For one, the CBS Report was not offered for the truth of the matters asserted therein; rather, it was presented as evidence of its existence. Plaintiffs' argument is off-base because the individuals in the Report would not have offered relevant testimony regarding the existence or non-existence of the Report. Second, Plaintiffs were free to subpoena the people who appeared in the Report and confront them at trial; they simply chose not to, even though they offered testimony and evidence, in rebuttal, that they claim contradicted what these individuals had said in the CBS Report. And finally, we are loath to consider Plaintiffs' allegation that the jury put too much credence in the Report simply

because it aired on the CBS Evening News. This accusation demeans the jury's capacity for fact-finding and implies that the jury could not properly consider the probative value of the evidence presented at trial.