[J-1-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

MILLER ELECTRIC COMPANY	:	No. 26 WAP 2004
	:	
v.	:	Appeal from the Order of Superior Court
	:	entered August 25, 2003 at No. 1420
TATE DEWEESE AND JUST-MARK, INC.	:	WDA 2002 quashing the appeal from the
	:	Order of the Court of Common Pleas of
	:	Allegheny County, entered July 10, 2002
v.	:	at No. AR 95-4332.
	:	
BIRMINGHAM BISTRO, INC.	:	
	:	
APPEAL OF:	:	
BIRMINGHAM BISTRO, INC.	:	ARGUED: March 7, 2005

DISSENTING OPINION

MR. JUSTICE BAER **DECIDED: OCTOBER 17, 2006**

The majority today, in reversing the Superior Court, promulgates a new rule of law that will allow the pursuit of inconsistent, piecemeal litigation within the appellate courts of the Commonwealth. Because of the procedural and public policy problems such a rule presents, and for the reasons outlined below, I respectfully dissent.

Just-Mark, Inc., a general contractor, hired Miller Electric Company (Garnishor), to perform electrical work on a construction site owned by Tate DeWeese. At the completion of construction, Just-Mark owed a balance of $14,371.53 to Garnishor. Garnishor subsequently filed a breach of contract action against Just-Mark, naming DeWeese, the owner of the property, as a co-defendant. After many failed attempts to

serve the complaint on DeWeese, Garnishor obtained permission from the trial court to serve DeWeese at the office of JTD-Grandview, Inc., of which DeWeese was president. DeWeese failed to respond to the complaint and the court entered default judgment on November 21, 1995, in the amount of $15,177.17.

Over approximately the next six years, Garnishor unsuccessfully attempted to execute on the judgment against DeWeese. In 2001, Garnishor initiated garnishment proceedings against Birmingham Bistro, Inc. (Garnishee), a restaurant of which DeWeese was sole shareholder and president. Garnishor asserted that property owned by Garnishee could be attached to satisfy the judgment against DeWeese. After a non-jury trial, the Court of Common Pleas of Allegheny County entered a verdict against Garnishor and in favor of Garnishee on February 14, 2002. The next day, Garnishee filed a motion for counsel fees under 42 Pa.C.S. § 2503(3), which entitles a garnishee "who is found to have in his possession or control no indebtedness due to or other property of the debtor" to an award of reasonable counsel fees.

On February 26, 2002, Garnishor filed a motion for post-trial relief. The trial court, however, did not dispose of the motion within 120 days, allowing Garnishee to praecipe for final judgment pursuant to Pa.R.C.P. 227.4(1)(b).[1] On June 27, 2002,

---

[1] Rule 227.4(1)(b) provides that the prothonotary shall, upon praecipe of a party,

> (1) enter judgment upon the verdict of a jury or the decision of a judge following a trial without a jury, if
>
> (b) one or more timely post-trial motions are filed and the court does not enter an order disposing of all motions within one hundred twenty days after the filing of the first motion. A judgment entered pursuant to this subparagraph shall be final as to all parties and all issues and shall not be subject to reconsideration.

Pa.R.C.P. 227.4(1)(b) (emphasis added).

Garnishee filed such praecipe and the prothonotary entered judgment in favor of Garnishee and against Garnishor later that day.

Believing Garnishee's February 15, 2002 motion for counsel fees to be outstanding, notwithstanding the entry of judgment upon Garnishee's praecipe, the trial court entered an order denying the motion on July 10, 2002. Garnishee appealed from that order on August 8, 2002, more than thirty days after it had requested and been granted final judgment, but within thirty days of the denial of its motion for fees. Garnishor moved to quash the appeal as untimely, arguing that Garnishee should have filed the appeal within thirty days of the entry of final judgment pursuant to its praecipe on June 27, 2002, which would have required Garnishee to file his appeal on or before July 27, 2002. See Pa.R.A.P. 903(a) (providing that a notice of appeal must be filed within thirty days after the entry of the order from which the appeal is taken). The Superior Court granted Garnishor's motion and quashed the appeal, concluding that the final judgment entered on June 27, 2002, was the final appealable order in the case, and thus that Garnishee's August 8, 2002 appeal was untimely. Miller Electric Co. v. DeWeese, 1420 WDA 2002 at 7 (Pa. Super. Aug. 25, 2003) (unpublished memorandum).

Although I agree that this case presents what the Majority calls "a procedural conundrum," the Majority's response can only foster confusion, backlog, and piecemeal litigation throughout the appellate courts of the Commonwealth. This hampers our unerring and well-documented efforts to avoid these obstacles to finality and expedient resolution of controversies. See Kowenhoven v. County of Allegheny, 901 A.2d 1003 (Pa. 2006); Vaccone v. Syken, 899 A.2d 1103, 1107 (Pa. 2006); Commonwealth v. Failor, 770 A.2d 310, 314 (Pa. 2001); Penna. Ass'n of Rural and Small Schs. v. Casey, 613 A.2d 1198, 1199 (Pa. 1992); Wall v. Wall, 534 A.2d 465, 467 (Pa. 1987); Stevenson

v. General Motors Corp., 521 A.2d 413, 417 (Pa. 1987); Fried v. Fried, 501 A.2d 211, 215 (Pa. 1985); Pincus v. Mut. Assurance Co., 321 A.2d 906, 909 (Pa. 1974); White v. Young, 186 A.2d 919, 921-22 (Pa. 1963); Commonwealth v. Moon, 117 A.2d 96, 104 (Pa. 1955); see also Gallagher v. Pennsylvania Liquor Control Bd., 883 A.2d 550, 561 n.2 (Pa. 2005) (Baer, J, dissenting) ("Piecemeal litigation is not to be encouraged.").

The Majority declares that, when a garnishee obtains a favorable verdict, and is denied counsel fees, the garnishee may appeal within thirty days of the date of denial of counsel fees, even when final judgment has been entered and the appeal period has run in the underlying case. This holding, however, directly contradicts the plain language of Pa.R.C.P. 227.4(1)(b).[2] The text of the rule is clear that when a party voluntarily praecipes for judgment after the running of 120 days from the filing of the first motion, that judgment "shall be final as to all parties and all issues and shall not be subject to reconsideration." Id. (emphasis added). In short, as this Court has aptly observed, a "case is ready in its entirety for the appellate process [once judgment has been taken]." Armbruster v. Horowitz, 813 A.2d 698, 702 n.3 (Pa. 2002) (emphasis added). The Majority's disregard of the plain meaning of Rule 227.4(1)(b) violates Pa.R.C.P. 127(b), which provides that in interpreting a civil rule, its plain meaning is not to be disregarded under the pretext of pursuing its spirit.

Moreover, the Majority's rule creates the possibility of a party reducing a verdict to judgment pursuant to the first clause of Rule 227.4(1)(b), while pending motions from the same underlying litigation remain undecided. In effect, this will allow any pending motion for fees to remain undecided for an indefinite amount of time after the entry of final judgment, potentially prejudicing movant, respondent, and the court system by permitting the unnecessary and costly protraction of litigation. I suggest that this opens

---

[2] See supra n.1 for the text of Rule 227.4(1)(b).

Pandora's Box as to any motion for taxable fees pursuant to § 2503, and perhaps as to any other filing that is not considered a "post-trial motion."[3]

Even more troublesome is the prospect that two final, appealable orders from the same underlying litigation, separately appealed and reviewed by two different panels of an intermediate appellate court, could be decided in a manner that generates two irreconcilable and mutually exclusive holdings. The Majority's holding would allow one panel of the Superior Court to vacate a final judgment while a separate panel reversed the denial of counsel fees, creating a situation where fees are granted to the party that loses on the merits, a facially untenable outcome.

Indeed, in ruling that an action for counsel fees lies entirely outside of the ambit of the case from which it derives for purposes of finality, the Majority not only runs roughshod over the plain language of Rule 227.4(1)(b), it also disserves the spirit of the rule. This Court, precisely to avoid the quandaries outlined above, has repeatedly ruled against the use of piecemeal litigation. Just this year, this Court reiterated in a unanimous opinion that "the very purpose of the finality rule . . . is to avoid piecemeal litigation." Vaccone, 899 A.2d at 1107 (emphasis added). In Wall, 534 A.2d at 467, we wrote that "a policy which allows piecemeal appeals from a single case serves only to increase the cost of litigation, and favors the party with the greater resources, who can

---

[3] Notably, the Majority simply accepts Garnishee's contention that a motion for counsel fees is not, by definition, a "post-trial motion" which must be decided or deemed denied after 120 days in accordance with by Rule 227.4(1)(b). Although Garnishee argues ably on this matter, and appears to acknowledge that the question is unsettled, the Majority treats the novel question with a simple statement of agreement and no discussion of moment.

Whether a motion for counsel fees is or is not itself a post-trial motion need not be resolved in this case, because the plain language of Rule 227.4(1)(b), when activated by a trial court's failure to dispose of post-trial motions within 120 days after the filing of the first motion, plainly indicates that the consequence of entry of judgment is final as to all parties and all issues.

strategically delay the action at the expense of the indigent party." Indeed, it is beyond dispute that this Court "abhors [the] piecemeal determinations and the consequent protractions of litigation." Fried, 501 A.2d at 215 (internal quotation marks and citations omitted).[4]

It seems particularly reasonable to apply this rule to this case, since Garnishee, the prevailing party at trial and the proponent of the ancillary motion in question, affirmatively sought to reduce the verdict to judgment prior to the court's disposition of the ancillary motion. In this case, there was no pressing need for Garnishee to praecipe for judgment on the first day after the deemed denial of Garnishor's post-trial motions. See Hughes v. Smith, 531 A.2d 1152, 1154-55 (Pa. Super. 1987) (upholding an entry of judgment seven years after a verdict had been entered onto the record). Garnishee was well aware that its motion for counsel fees was still pending and had the option of waiting until the trial court ruled on that motion before filing the praecipe for judgment.

---

[4] I acknowledge that the law of Pennsylvania appears unsettled as to generally when a motion for counsel fees should be filed. Cf. Novy v. Novy, 188 A. 328 (Pa. 1936); Shevchik v. Zwergel, 8 Pa. D. & C.4th 66 (CCP Westmoreland 1990). Herein, I suggest that it should be before final judgment is entered to permit an appeal from the counsel fee request to proceed as one with all other appealable issues in a case. However, I recognize that it would also be defensible to adopt a process by which all applications for counsel fees are filed after the underlying case is fully and finally adjudicated. This would at least avoid inconsistent results and permit the court deciding counsel fees to have the benefit of a complete record.

Nevertheless, I believe the process articulated herein remains preferable because of its inherent efficiency. To adopt a system where counsel fees follow absolute finality of the underlying litigation could double the time and substantially increase the hours counsel and the courts spend on a case, to their and the litigants' detriment. I note that the Majority adopts neither system, and instead appears to impose on Pennsylvania the worst of all worlds; allowing for the potentiality of substantially simultaneous separate appeals in the same case, with the real possibility of inconsistent and unjust results, not to mention the likelihood of substantial delay.

Today's ruling not only permits motions to remain undecided for months or even years on end, but invites the possibility of two panels of an intermediate appellate court reaching two contradictory and mutually exclusive decisions regarding the same case. Conversely, the plain language of Rule 227.4(1)(b) offers a far more logical and legally sustainable solution, in providing that when a party praecipes for judgment after the deemed denial of post-trial motions, the judgment entered is final as to all parties, all issues, and is ready in its entirety for the appellate process. Thus, all appeals and cross-appeals would be entertained by one appellate tribunal at one time, and Pandora's Box would remain closed. Accordingly, I respectfully dissent.