

**[J-161-1998]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

ROBERT SMITH AND GAYLE RUSCH, : No. 94 W.D. Appeal Docket 1997  
: :  
: :  
v. : Appeal from the Order of the Court of  
: Common Pleas of Allegheny County,  
: Pennsylvania, Civil Division, at No. GD  
: 97-4011 dated October 28, 1997 and  
: entered October 29, 1997.  
MICHAEL F. COYNE, PROTHONOTARY :  
OF ALLEGHENY COUNTY, :  
PENNSYLVANIA, AND CARMEN :  
NOBILE, :  
: ARGUED: September 15, 1998  
: :  
APPEAL OF: LANDLORD SERVICE :  
BUREAU, INC. :  
: :  
: :  
: :

ROBERT SMITH AND GAYLE RUSCH, : No. 96 W.D. Appeal Docket 1997  
: :  
: :  
v. : Appeal from the Order of the Court of  
: Common Pleas of Allegheny County,  
: Pennsylvania, Civil Division, at No. GD  
: 97-4011 dated October 28, 1997 and  
: entered October 29, 1997.  
MICHAEL F. COYNE, PROTHONOTARY :  
OF ALLEGHENY COUNTY, :  
PENNSYLVANIA, AND CARMEN :  
NOBILE, :  
: ARGUED: September 15, 1998  
: :  
APPEAL OF: AMERICAN CONGRESS :  
OF REAL ESTATE, INC. :  
: :  
: :  
: :

ROBERT SMITH AND GAYLE RUSCH, : No. 97 W.D. Appeal Docket 1997  
: :  
: : Appeal from the Order of the Court of  
v. : Common Pleas of Allegheny County,  
: : Pennsylvania, Civil Division, at No. GD  
: : 97-4011 dated October 28, 1997 and  
MICHAEL F. COYNE, PROTHONOTARY : entered October 29, 1997.  
OF ALLEGHENY COUNTY, :  
PENNSYLVANIA, AND CARMEN :  
NOBILE, :  
: :  
: : ARGUED: September 15, 1998  
APPEAL OF: APARTMENT :  
ASSOCIATION OF METROPOLITAN :  
PITTSBURGH, APARTMENT :  
ASSOCIATION OF GREATER :  
PHILADELPHIA, HOUSING AUTHORITY :  
OF THE CITY OF PITTSBURGH AND :  
PITTSBURGH FACTORS :  
: :

**CONCURRING OPINION**

**MR. JUSTICE CAPPY**

**DECIDED: JANUARY 19, 1999**

I concur in the conclusion reached by the majority opinion that Pa.R.C.P.D.J. 1008B does not deprive indigent tenants of the right to trial by jury. I write separately as my analysis of this issue is distinct from that of the majority.<sup>1</sup>

Article I, Section 6 of the Pennsylvania Constitution secures the right to trial by jury in all classes of cases to which that right pertained at common law. Blum v. Merrell Dow Pharmaceuticals, 626 A.2d 537, 543 (Pa. 1993). While the form of the jury is to remain

---

<sup>1</sup> I join in that portion of the opinion which holds that Rule 1008B does not deny indigent tenants equal protection of the law.

inviolable, the Constitution “does not limit the power of the legislature to furnish modes of civil procedure in courts of justice.” *Id.* at 544. But see PA.CONST. Art. V, § 10(c).<sup>2</sup>

The only purpose of the constitutional provision is to secure the right of trial by jury before rights of person or property are *finally* determined. All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make that right practically unavailable.

Smith’s Case, 112 A.2d 625, 629 (Pa. 1955). Accord Haines v. Levin, 51 Pa. 412, 414-15 (1866)(“question is whether the conditions exacted are so onerous as to amount to a substantial denial of the right”). The commitment of initial jurisdiction in rent and possession disputes to the district justices has been upheld under Article I, Section 6 because it secures the right to a trial by jury prior to a final determination by providing for *de novo* appeal to the courts of common pleas. Haines v. Levin, *supra*, at 414.

As noted by the learned trial court, the test enunciated in the above-quoted passage from Smith’s Case is controlling here. The majority departs from this test in focusing upon the impact that a tenant’s right to trial by jury has upon the landlord’s interests. The comparative advantage to landlords of Rule 1008B over past procedures is plainly irrelevant to whether the rule effectively denies low income tenants the right to trial by jury.

In Smith’s Case this court struck down a local rule for cases subject to mandatory arbitration which required that a party aggrieved by an arbitration panel’s decision pay the arbitrators’ fees as a condition of appeal without the ability to recover the same as costs if successful. The court found that where the amount of the arbitrators’ fees was fixed without regard to the amount in controversy the condition operated as such a strong

---

<sup>2</sup> In truth, civil procedure in the courts is an area of jurisdiction for both this court and the legislature, and in this case we are concerned with rules promulgated by this court to supplant a legislative enactment which intruded upon the constitutional province of the judiciary.

deterrent to the taking of an appeal in cases involving petty or insubstantial sums as to deny the right to a jury trial in practice. 112 A.2d at 630.

Unlike the local rule invalidated in Smith's Case, Rule 1008B imposes no deterrent to the taking of an appeal, nor does Rule 1008B constitute a condition, restriction, or regulation of the ability of a defendant to obtain a jury trial upon appeal to the court of common pleas. An appeal must merely be filed within 10 days, without payment of any fee or satisfaction of any condition other than those of general applicability. The issuance of a supersedeas is all that the rule conditions or restricts.

Rule 1008B is a mechanism for adjusting the relative positions of the parties to the lease pending final adjudication of the right of occupancy in the premises. The right to trial by jury does not require the benefit of a supersedeas be available at all in cases of this sort. Haines v. Levin, *supra*, at 414. The stage of the proceedings at which a landlord can assume possession of the disputed property is relevant only to whether the proceedings comport with due process of law, *see Fuentes v. Shevin*, 407 U.S. 67 (1972), a constitutional construct of which the jury trial is but a component.

The execution of a judgment of possession while an appeal is pending does not finally determine the issue of the tenant's right to possession before it can be tried to a jury. Conditioning the issuance of a supersedeas upon posting security for the judgment does not directly impede an appeal, it merely denies the tenant the tactical advantage of an automatic supersedeas upon the filing of an appeal. The issue of whether the lease has expired by its express terms or through the tenant's breach of a material condition such as non-payment of rent remains a live controversy for the jury to consider. That a tenant would forego presenting his or her case to the jury once removed from the premises is not the measure of the constitutionality of the rule. A jury trial is ultimately available, and the jury is in no way prevented from fixing the parties' rights in the premises. If the jury finds in favor of the tenant, the hardships inflicted by the writ of possession can be taken account

of in the form of a damages award. Also, an erroneously evicted tenant's right of occupancy can still be vindicated through an ejectment action. See Soffer v. Beech, 409 A.2d 337 (Pa. 1979). While this remedy may be impractical in the particular circumstances, the jury is not prevented from compensating the tenant for increased housing costs by an award of damages.

Accordingly, for the reasons set forth herein, I concur in the decision of the majority that Rule 1008B does not deprive indigent tenants of the right to trial by jury.

Mr. Justice Nigro joins in this concurring opinion.