COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LEO E. STRINE, JR.
VICE CHANCELLOR

New Castle County Courthouse
Wilmington, Delaware 19801

Submitted: August 21, 2006
Decided: August 30, 2006

John H. Benge, Jr.
Sussex Correctional Institution
P. O. Box 500
Georgetown, DE 19947

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Re: John H. Benge, Jr. v. Oak Grove Motor Court, Inc., A Delaware Corporation; Donna Kay Lovett Benge, individually and as Trustee; Paul DeWitt Lovett, III; and James Marsh Lovett
C.A. No. 1837-N

Dear Parties and Counsel:

Plaintiff John H. Benge, Jr. has sued his ex-wife, defendant Donna Kay Lovett Benge ("Lovett"), and various other defendants, asserting causes of action relating to the division of marital property upon the couple's divorce. On February 7, 2006, I issued an order dismissing this case without prejudice for lack of subject matter jurisdiction, subject to Benge's right to have the case transferred to the Family Court pursuant to 10 *Del. C.* § 1902.

Instead of moving to transfer the case to the Family Court, Benge appealed the order of dismissal. Notably, Benge did not make any attempt to comply with Supreme Court Rule 42 (governing the procedures for obtaining interlocutory appellate review), nor did he file a bond or otherwise move to stay the trial court proceedings. The Supreme Court nonetheless

heard the appeal (presumably because Benge's adversaries failed to move to dismiss the appeal for lack of subject matter jurisdiction). On June 21, 2006, the Supreme Court issued its mandate affirming this court's determination that Benge had filed suit in the wrong court. Fifty-five days later, Benge filed a motion to transfer his case to the Family Court. Lovett claims the motion was not timely filed and thus should be denied.

Section 1902 of Title 10 requires a plaintiff to file a motion to transfer "within 60 days after the order denying jurisdiction in the first court becomes final." Benge filed his motion more than 60 days after this court's February 7, 2006 order, but within 60 days of the Supreme Court's mandate. The issue presented is whether the 60-day clock was tolled pending the outcome of the appeal.

The parties have provided me with little useful input, and there is little Delaware authority, on whether § 1902's 60-day clock is tolled pending the appeal of a decision to dismiss a case for lack of subject matter jurisdiction but without prejudice to the plaintiff's right transfer the case pursuant to § 1902. That is not altogether surprising because an order of dismissal without prejudice for lack of subject matter jurisdiction, allowing transfer of a case under § 1902, is *not* a final judgment that is appealable as a matter of right because it is not a final ruling on the merits of the case.[1] Thus, appeals like these are rare, and Benge should have been required to comply with Supreme Court Rule 42 to have the appeal heard.

In cases when the Supreme Court has refused to hear appeals like Benge's for failure to comply with the required procedures, the Supreme Court has held that the time for filing

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[1] *Plant v. State ex. rel. Frank Sims*, 801 A.2d 11, 11 (Del. 2002); *Whitney v. State Farm Mutual Auto Ins. Co.*, 510 A.2d 491, 491 (Del. 1986).

the motion to transfer expires 60 days after the issuance of the trial court's dismissal order, and that the clock is not tolled during the pendency of the appellate proceedings.[2] The question then is whether the fact that the Supreme Court actually heard and decided the merits of Benge's argument that this court made an erroneous decision about its subject matter jurisdiction changes things. I believe that it does.

Section 24, Article IV of the Delaware Constitution provides that in general, an appeal shall not operate to stay the proceedings in the court below without the filing of an appropriate bond. This would suggest that the 60-day clock was not tolled pending the outcome of Benge's appeal. Benge did not post any bond, and therefore the appeal would not act to stay the trial court proceedings in the Court of Chancery.

But, in *Wilmington Trust Co. v. Schneider,*[3] the Supreme Court made clear that any interpretation of § 1902 must keep in mind its broad remedial purposes — to facilitate transfer between courts and to protect litigants from having their claims time-barred by a mistake about the court in which their claims could be filed. The last line of § 1902 states, "[t]his section shall be liberally construed to permit and facilitate the transfers of proceedings between the courts of this state in the interests of justice." *Schneider* therefore held that the 60-day time limit could be tolled under appropriate circumstances.[4]

In *Schneider*, this court ordered the plaintiff's case dismissed for lack of subject matter jurisdiction, subject to the plaintiff's right to transfer under § 1902. The defendant immediately appealed this court's dismissal order, and attacked the plaintiff's right to

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[2] *See Nicholson v. Redman*, 622 A.2d 1096, 1096 (Del. 1993).
[3] 342 A.2d. 240, 242 (Del. 1975).
[4] *Id*.

transfer. The plaintiff responded to the appeal, but, as a result of the appeal, did not move to have the case transferred within 60 days after this court's order. After the 60-day clock expired, the defendant moved to dismiss, claiming that any future motion to transfer would not be timely. Keeping in mind the legislative policy declared in § 1902, the Supreme Court held that the plaintiff should not be barred from transferring the case because of his failure to timely perfect a transfer pending appeal when the appeal involved his opponent's active attack on his right to undertake the transfer at all. "We are convinced," said the Court, "the equities lie with the plaintiff."[5]

Here, had Lovett cited to *Schneider*, one could imagine her arguing that, in contrast to *Schneider*, the equities do not lie with Benge. First, Benge's filing of this case in the Court of Chancery could be seen as an end run around the obvious conclusion that this case belongs, if anywhere, in the Family Court. Further, Benge himself initiated the appeal in question here, and should have, but did not comply with the appropriate procedures for obtaining interlocutory review. Finally, the appeal itself was found by the Supreme Court to be without merit. Accordingly, there is some weight to the argument that Benge should not now be heard to claim that his procedurally flawed and substantively meritless appeal tolled the 60-day window within which he was required to file his motion to transfer.

But that does not strike me as the appropriate resolution of the unusual situation now before me. Frankly, the (perhaps inertial) decision of the Supreme Court to hear the appeal about where the case belongs must be given weight in making the key timeliness inquiry

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[5] *Id*.

required by the language of §1902: Did Benge move to transfer within 60 days of the date my order "bec[ame] final?"

In addressing this question, it is useful to bear in mind that § 1902 was enacted to assist plaintiffs who file in the wrong court, and to help them navigate the sometimes obscure jurisdictional boundaries of our judicial system. Section 1902 was not intended to make it any more difficult to obtain appellate review of a finding of lack of jurisdiction.

Most importantly, when a plaintiff is successful in obtaining appellate review of an order dismissing a case for lack of subject matter jurisdiction but without prejudice to the plaintiff's right to transfer under § 1902, tolling the 60-day clock pending the outcome of the appeal better comports with § 1902's statutory language. The statute requires the plaintiff to file a motion to transfer within 60 days after the court's dismissal order "becomes final." The issue is not, as Lovett frames it, whether the order was a "final order." Such a dismissal order is not considered a final order for purposes of the right to appeal.[6]

That § 1902 refers to the date the order "becomes final" instead of the date the dismissal order is issued must mean that it contemplates something other than the mere issuance of the dismissal order. The statute is best read then as using the word "final" as referring to the last decisive statement on the matter.[7] If the plaintiff is successful in obtaining interlocutory review of the order, it can hardly be said that the order has become

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[6] In *Whitney*, 510 A.2d at 491, the Supreme Court made plain that § 1902 cannot be read as referring to final orders. In that case, the Court stated that "[t]he Superior Court's order transferring jurisdiction to the Court of Chancery is, by its terms, interlocutory in nature because it is not a final ruling on the merits of the underlying controversy." Therefore, if the issue is framed as whether the trial court's order is a "final order," the absurd result obtains that a motion to transfer under §1902 will always be timely no matter when it is filed.

[7] *Schneider*, 342 A.2d at 241 (10 *Del. C.* § 1902 contemplates "finality and decisiveness").

final in that sense because it is susceptible to reversal on appeal. The decision does not "become final" until the appeal is resolved.[8]

A recent decision by the United States Court of Appeals for the Third Circuit presents an analogous situation. In *United States v. Wall*,[9] the Third Circuit interpreted a statute requiring that a habeas petition by a criminal defendant be filed within one year after the affirmance of his conviction on appeal becomes final. The Third Circuit held that the one-year clock was tolled pending resolution of the criminal defendant's motion for re-hearing en banc even though the motion for re-hearing en banc was not timely filed. The Third Circuit pointed out that, because it had agreed to consider the untimely motion, its earlier affirmance of the defendant's conviction lacked the requisite finality because the court en banc might still have modified the judgment and altered the defendant's rights. As the Third Circuit put it, "[o]nce we gave [the defendant] permission to file his petition out of time and he filed it, our judgment could not be considered final until we denied his petition."[10]

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[8] Of course it is true that the rule in a majority of jurisdictions is that pendency of an appeal does not affect the finality of a judgment for purposes of res judicata or collateral estoppel. *Restatement Second of Judgments* § 13, comment f; *see also In re Transocean Tender Offer Securities Litigation*, 427 F. Supp. 1211, 1216 (N.D. Ill. 1977) (suggesting that Delaware would follow the majority rule). But the *Restatement Second of Judgments* § 16, at comment b, suggests that in order to avoid the problem of inconsistent judgments that would arise if the judgment in the first case is overturned on appeal, it is prudent for a court to postpone deciding the res judicata or collateral estoppel issue until all appeals in the first case have been resolved. By analogy, in waiting to file his motion to transfer until after the Supreme Court had decided his appeal, Benge avoided the confusion that would otherwise have arisen had his appeal been successful. Benge's delay was understandable under the circumstances and he should not now be punished for it.

[9] __ F.3d __ (3d Cir. Aug 8, 2006); 2006 WL 2256768.

[10] *Wall*, __ F.3d at __; 2006 WL 2256768.

Here, even though Benge did not follow the proper procedures to seek interlocutory review of what is ordinarily a non-appealable order, this State's highest court accepted his appeal, and placed itself in the position of having the power to reverse my ruling and permit Benge to proceed with his case here. As a result, I cannot find that my earlier order was final in the sense of being the decisive ruling contemplated by § 1902. Indeed, given the Supreme Court's decision to rule on the merits of Benge's appeal, one infers that it believed that upon affirmance, Benge would have an opportunity to transfer the case within 60 days of its mandate.

Notably, in other cases where the Supreme Court has dismissed appeals like Benge's for failure to comply with Supreme Court Rule 42, and held that the 60-day clock continued to run from the date of the trial court's order, without being tolled, there was always at least some time left for the plaintiff to file his motion to transfer.[11] By contrast, if I hewed to that line here, Benge would have been time-barred to transfer to the Family Court 74 days before the Supreme Court even decided that this court's dismissal order was proper. That is, to preclude Benge's motion to transfer would mean that his right to transfer expired 74 days before, not 60 days after, this court's order became final — which was the date of the Supreme Court's mandate.[12]

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[11] See *Nicholson*, 622 A.2d at 1096 (plaintiff still had 13 days from the date of the Supreme Court order to transfer the case).

[12] This decision does not purport to address the question of when the 60-day period would begin to run under § 1902 when a party seeks an interlocutory appeal in the procedurally appropriate manner but is ultimately unsuccessful. Arguably, tolling the 60-day clock while the plaintiff seeks an interlocutory appeal can be seen as the more favorable rule because otherwise a litigant might be forced to choose between attempting to appeal the denial of jurisdiction or taking advantage of his right to transfer pursuant to § 1902. To seek review of the trial court's order without prejudicing his right to transfer, a litigant would have to (1) post a bond to stay the lower court proceedings (a

For the reasons stated above, because Benge's motion was filed within 60 days of the Supreme Court's mandate rendering this court's dismissal order final, it was timely under § 1902, and is hereby granted.

IT IS SO ORDERED.

Very truly yours,

/s/ Leo E. Strine, Jr.

Vice Chancellor

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seemingly useless requirement in a situation where the appeal itself acts as a de facto stay and there is no delay in the ability of a defendant to execute on a judgment), or (2) proceed to litigate in a court that he is trying to avoid going to in the first place, while pursuing an appeal to have the case remain in the original court of filing. In other words, the denial of some flexibility might be inefficient and have no countervailing fairness-creating utility. But that question should be left to another day when an answer is required. Until then, any party seeking review of a dismissal for lack of a subject matter jurisdiction is best advised to seek a stay pending the determination of whether interlocutory review will be granted. This decision only addresses when the 60-day clock runs in a situation when the Supreme Court has decided to review the merits of a trial court's determination that it lacked subject matter jurisdiction.