

[J-124-2001]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

DAVID AND KRISTI GERROW, H/W,	:	No. 5 EAP 2001
	:	
Appellees	:	Appeal from the Order of the Superior
	:	Court entered on July 13, 2000, at No.
	:	2788 EDA 1999, reversing the Order of
v.	:	the Court of Common Pleas of
	:	Philadelphia County, entered on February
	:	19, 1999, at No. 667 April Term, 1997
JOHN ROYLE & SONS, AND SHINCOR	:	
SILICONES, INC.,	:	756 A.2d 697 (Pa. Super. 2000)
	:	
APPEAL OF: SHINCOR SILICONES,	:	ARGUED: OCTOBER 16, 2001
INC.	:	
	:	
	:	
	:	

CONCURRING AND DISSENTING OPINION

MR. JUSTICE CAPPY

DECIDED: December 31, 2002

I agree with the majority that under Pa.R.Civ.P. 1035.3(b), Appellees were allowed to supplement the record by appending expert reports to their response to Appellant's motion for summary judgment, and that the coordinate jurisdiction rule was not relevant to Judge Abramson's decision on summary judgment. However, I believe that the majority's interpretation of Pa.R.C.P. 1035.3(b) and its application to the facts in this case are incorrect insofar as they fail to give effect to the terms of Pa.R.C.P. 1035.3(c). Moreover, I believe that the majority's present analysis of the coordinate jurisdiction rule does not comport with the analysis this Court has previously set forth and followed.

This appeal requires us to construe a Rule of Civil Procedure. The Rules themselves provide several principles of construction. First and foremost, is the principle

that the object of all interpretation and construction of the Rules is to ascertain and effectuate this Court's intention. Pa.R.C.P. 127(a). Another principle is that every Rule is to be construed, if possible, to give effect to all of its provisions. Pa.R.C.P. 127(b). A third principle is that when the words of a Rule are not explicit, the court's intention may be ascertained by considering, among other matters, the object to be attained by the Rule's promulgation and the consequences of a particular interpretation. Pa.R.C.P. 127(c).

With these principles in mind, and turning to the Rule at hand, I note that subsection (b) of Pa.C.P. 1035.3, which states that a party who opposes a summary judgment motion may supplement the record, is followed by subsection (c) of Pa.R.C.P. 1035.3, which provides that: "The court may rule upon the motion for judgment or permit affidavits to be obtained, depositions to be taken or other discovery to be had or make such other order as is just." Pa.R.Civ.P. 1035.3(c). Clearly, Rule 1035.3(c) offers the trial court certain discretionary latitude when dealing with these matters.

When I read and apply these subsections of Pa.R.C.P. 1035.3 together, I conclude that after Appellees filed their response to Appellant's motion for summary judgment, in which they supplemented the record with expert reports under Pa.R.C.P. 1035.3(b), Judge Abramson should have considered his options under Pa.R.C.P. 1035.3(c). In my view, pursuant to the authority that Pa.R.C.P. 1035.3(c) gives to the trial courts to "make such other order as is just", Judge Abramson could have considered whether he would allow the expert reports to have any bearing on his decision to grant or deny Appellant's motion for summary judgment. In arriving at this determination, among the facts that Judge Abramson would have had before him was that the reports were secured in violation of Judge

O'Keefe's case management order and Judge O'Keefe's decision to deny an extension of the discovery deadline.¹

Moreover, given the aims of Pa.R.C.P. 1035.3(b) and (c), and the consequences of the majority's interpretation, I am persuaded that this sequence of procedure reflects this Court's intention. Both Pa.R.C.P. 1035.3(b) and (c) insure that the party who opposes a motion for summary judgment has ample opportunity to engage in further discovery and place on the record any additional evidence which supports his position. Thus, they reflect our concern that a motion for summary judgment not be precipitously granted. At the same time, however, an interpretation of Pa.R.C.P. 1035.3(b) that does not give effect to the trial court's authority under Pa.R.C.P.1035.3(c) to evaluate the manner by which a party secured the evidence with which he supplemented the record and reject it in the appropriate circumstances, can lead to the result that appears to be present here--an end-run around a case management order, a trial court's denial of a petition for extraordinary relief, and the requirements of Philadelphia's case management process, which has served to control Philadelphia's crowded court dockets.

Thus, like the majority, I would affirm the Superior Court's order which reversed the trial court's entry of summary judgment. I would, however, remand this case to the trial court, directing it to consider whether it should exercise the discretion that Pa.R.C.P. 1035.3(c) gives it to enter an order which it deems just in regard to Appellant's motion for summary judgment and Appellees' response thereto.

¹ Where a trial court concludes that the supplementation of the record amounts to a discovery violation, in deciding whether it will consider the supplementing material on summary judgment, I believe that the trial court should use the test that we have concluded governs such matters, and balance the facts and circumstances presented to determine the prejudice to each party. See Miller v. Brass Rail Tavern Inc., 664 A.2d 525, 532 n.5 (Pa. 1995) (citing Feingold v. SEPTA, 517 A.2d 1270, 1273 (Pa. 1986)).

With respect to the coordinate jurisdiction doctrine question this appeal raises, I do not agree with that portion of the majority's analysis which relies on one of the doctrine's exceptions to reach its conclusion that Judge Abramson was not necessarily precluded from considering Appellees' expert reports in light of Judge O'Keefe's prior rulings. Instead, I believe that under our prior teaching, the rule does not apply in the first place and that the rule's exceptions have no relevance.

In Goldey v. Trustees of the Univ. of Pennsylvania, 675 A.2d 264 (Pa. 1997), defendants filed a second motion for summary judgment based on a release, just prior to the scheduled start of trial. Several months before, however, defendants' first motion for summary judgment based on the release had been denied by another judge sitting in the same case in the same court. We were called upon to explain the coordinate jurisdiction rule. We stated:

Where the motions differ in kind, as preliminary objections differ from motions for judgment on the pleadings, which differ from motions for summary judgment, a judge ruling on a later motion is not precluded from granting relief although another judge has denied an earlier motion. However, a later motion should not be entertained or granted when a motion of the same kind has been previously been denied, unless intervening changes in the facts or the law clearly warrant a new look at the question.

Id. at 267 (emphasis in original).

I understand Goldey to mean that if a judge has a motion before him which differs from a motion that another judge has previously decided, he need not concern himself with the coordinate jurisdiction doctrine. If, however, the later motion does not differ from one already determined, then the doctrine applies to preclude him from considering the matter, unless certain exceptional circumstances allow him to depart from the rule. That is to say, the rule's exceptions--an intervening change in the controlling law or a substantial change in the facts or evidence giving rise to the dispute or a prior holding that is clearly erroneous

and would create a manifest injustice if followed, Commonwealth v. Starr, 664 A.2d 1326, 1332 (Pa. 1995)--arise only if the rule comes into play.

Here, Judge O'Keefe issued a case management order and decided whether to grant a petition for extraordinary relief and extend the time of discovery. Judge Abramson was presented with a motion for summary judgment. In my view, as the motions before the two judges differed, the coordinate jurisdiction rule was not even triggered. Thus, I would simply conclude that the rule did not apply in this case. I, therefore, see no need to consider any of the rule's exceptions.

Mr. Justice Castille and Madame Justice Newman join this concurring and dissenting opinion.