

[J-145-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

SOLEBURY TOWNSHIP : No. 80 MAP 2005
: :
: :
v. : :
: : Appeal from the Order of the
DEPARTMENT OF ENVIRONMENTAL : Commonwealth Court entered on
PROTECTION AND DEPARTMENT OF : December 8, 2004, at No. 824 CD 2004,
TRANSPORTATION : vacating and remanding the Order of the
: Environmental Hearing Board dated
: March 29, 2004 at Nos. 2002-320-K,
APPEAL OF: DEPARTMENT OF : 2002-323-K and 2003-012-K
TRANSPORTATION :
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BUCKINGHAM TOWNSHIP : No. 81 MAP 2005
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: :
v. : :
: : Appeal from the Order of the
DEPARTMENT OF ENVIRONMENTAL : Commonwealth Court entered on
PROTECTION AND DEPARTMENT OF : December 8, 2004 at No. 881 CD 2004,
TRANSPORTATION : vacating and remanding the order of the
: Environmental Hearing Board dated
: March 29, 2004 at nos. 2002-320-K, 2002-
APPEAL OF: DEPARTMENT OF : 323-K & 2003-012-K
TRANSPORTATION :
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SOLEBURY TOWNSHIP : No. 82 MAP 2005
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: :
v. : :
: : Appeal from the Order of the
DEPARTMENT OF ENVIRONMENTAL : Commonwealth Court entered on
PROTECTION AND DEPARTMENT OF : December 8, 2004 at No. 824 CD 2004,
TRANSPORTATION : vacating and remanding the Order of the
: Environmental Hearing Board dated
: March 29, 2004 at Nos. 2002-320-K,
APPEAL OF: DEPARTMENT OF : 2002-323-K & 2003-012-K
ENVIRONMENTAL PROTECTION :
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BUCKINGHAM TOWNSHIP : No. 83 MAP 2005
:
v. : Appeal from the Order of the
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DEPARTMENT OF ENVIRONMENTAL : Commonwealth Court entered on
PROTECTION AND DEPARTMENT OF : December 8, 2004 at No. 881 CD 2004,
TRANSPORTATION : vacating and remanding the Order of the
:
APPEAL OF: DEPARTMENT OF : Environmental Hearing Board dated
ENVIRONMENTAL PROTECTION : March 29, 2004 at Nos. 2002-320-K,
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: 2002-323-K, & 2003-012-K
:
: ARGUED: December 7, 2005

CONCURRING AND DISSENTING OPINION

MR. JUSTICE EAKIN

DECIDED: August 20, 2007

I respectfully dissent from Part II of the Majority Opinion.

In Part II, the majority concludes “the EHB’s application of the Kwalwasser criteria ... was too narrow in view of the broad language of [§] 307 and the public policy favoring liberal construction of fee-shifting provisions” Majority Slip Op., at 29-30. The majority does not reject the Kwalwasser test for a new one, but concludes “it is within the scope of the EHB’s prerogative to channel its discretion in awarding attorneys’ fees based upon considerations such as the Kwalwasser criteria when there has been no finding of bad faith or vexatious conduct.” Id., at 26. Under that conclusion, tribunals and courts may rely on Kwalwasser criteria, but appear authorized to use other unspecified criteria. This could lead to the application of different criteria to each case, which could lead to inconsistent case law and results.

Regarding the prevailing party prong of the Kwalwasser test, the majority, citing a dissenting opinion, states it agrees with the Commonwealth Court “that the practical relief sought by the Townships should be considered when characterizing them as prevailing parties for purposes of the Kwalwasser test. Accord Buckhannon Bd. and

Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598, 633 (2001) (Ginsburg, J., dissenting)” Id., at 28. The EHB’s conclusion the townships were not prevailing parties was in accordance with the majority opinion in Buckhannon:

Numerous federal statutes allow courts to award attorney’s fees and costs to the “prevailing party.” The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct. We hold that it does not.

Buckhannon, at 600. While the prevailing party prong under Kwalwasser is part of a court-made test as opposed to statutory text examined in Buckhannon, this appears to be a distinction without a difference, as the wording of the issue above mirrors the issue and circumstances here. While the Commonwealth Court noted the Costs Act defines “prevailing party” in a way that could lead to a favorable result for the townships, see 71 P.S. § 2032, the action here was for attorney’s fees under § 307. The townships brought a separate action for attorney’s fees under the Costs Act.

Ultimately, I cannot conclude the EHB erred when it applied the Kwalwasser criteria and implicitly followed an interpretation of the prevailing party prong in accordance with Buckhannon. I would reverse the Commonwealth Court’s decision and reinstate the EHB’s decision. This would leave the Kwalwasser test in place and the prevailing party prong would track Buckhannon’s holding. In all other respects, I join the majority.