[J-22-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

LOIS EISER, ADMINISTRATRIX OF THE ESTATE OF WILLIAM M. EISER AND LOIS EISER, INDIVIDUALLY,	:	No. 39 EAP 2006
Appellants	:	Appeal from the Memorandum and Order of the Superior Court at No. 191 EDA 2004 dated January 19, 2006 (reargument denied March 29, 2006) which affirmed the Judgment of the Court of Common Pleas of Philadelphia County, Civil Division entered January 8, 2004 at No. 4367 March Term, 1999.
v.	:	
BROWN & WILLIAMSON TOBACCO CORPORATION AND THE TOBACCO INSTITUTE,	:	ARGUED: May 16, 2007
Appellees	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: December 28, 2007**

I join Mr. Justice Eakin's Dissenting Opinion. I write separately in dissent because I respectfully take issue with certain of the plurality's broad pronouncements and because my view on the appropriate response to situations like the one *sub judice* differs greatly from the approach taken by the plurality.

Preliminarily, I note that the plurality poses the issue on appeal as being whether appellants waived "their right to appellate review" by raising a quantity of issues significant to impair meaningful appellate review. Slip Op. at 2, 18, 21. Although this Court framed the issue in that manner in our limited grant of allocatur, the Superior Court did not determine that appellants waived their right to appellate review; instead, the panel's ruling was issue-specific. Thus, the panel reviewed the two claims it found were susceptible to

meaningful review and deemed waived the six claims where review was impaired by the absence of a helpful explanation in the trial court's opinion. (The deficiency in the trial court opinion was a consequence of the prolix Pa.R.A.P. 1925(b) Statement of Matters Complained of on Appeal filed by appellants.) In short, appellants were afforded appellate review, but that review was restricted. This case, therefore, is not like Kanter v. Epstein, 866 A.2d 394 (Pa. Super. 2004), alloc. denied, 880 A.2d 1239 (Pa. 2005), cert. denied, 546 U.S. 1092 (2006), where all appellate review was deemed waived due to a Rule 1925(b) abuse.[1]

Turning to the merits of the procedural issue posed, I have difficulty with the following broad statements and "findings" in the plurality opinion: (1) its finding that appellants' counsel "took his marching orders" from the Rule 1925(b) case law; (2) its finding that it was "eminently reasonable" for counsel to file the prolix statement in this case; (3) its suggesting that the trial court was dilatory in responding to the lengthy statement; (4) its broad holding that "the number of issues raised in a Rule 1925(b) statement does not, without more, provide a basis upon which to deny appellate review where an appeal otherwise complies with the mandates of appellate practice"; and (5) its stating that the ultimate test for waiver under Rule 1925(b) depends upon the appellant's good faith. Slip Op. at 15-17. This Court, like the Superior Court, is not a court of record with fact-finding capacity or function. Therefore, I can perceive no reason gleaned from the

[1] The plurality rightly rejects appellant's invitation to render a gratuitous holding that Kanter should not have been retroactively applied to the matter sub judice because the Rule 1925(b) statement in this case was filed before the Kanter decision. I would note, however, that the fact that the Superior Court lacks the power to promulgate general rules of procedure does not mean that it lacks the power to adopt internal procedures intended to standardize its approach to recurring questions, such as disputes under Rule 1925(b), and to make those procedures prospective. Thus, for example, in cases where a panel considers that a Rule 1925(b) violation may warrant a finding that appellate review of some or all claims should be denied, the court could adopt an intermediate step such as a rule to show cause, allowing the appellant to explain and perhaps to amend his pleadings.

record why counsel in this case filed the prolix Rule 1925(b) statement. I also do not know that it was "eminently reasonable" to burden the trial judge with scores of claims and sub-claims in a Rule 1925(b) statement, when appellants obviously could not pursue that laundry list in their appellate brief (and in fact appellants pursued "only" eight claims). Further, I believe that appellants share much of the responsibility for the delay in the trial court's preparation of its opinion. Opinion writing is but one of many duties facing trial courts, and a litigant who burdens a trial court with scores of claims should expect that the opinion will take time to prepare and cannot be a priority over other waiting litigants. I also part ways with the plurality's general observations because it seems clear to me that the plain language of Rule 1925(b) permits holding, in an appropriate case, that the number of issues raised is so abusive as to warrant a trial judge in deeming all appellate claims to be waived, and the Rule permits the appellate court to respect that finding. And finally, since we lack fact-finding capacity, I fail to see how a good faith standard is workable. Indeed, the five points made by the plurality with which I take issue are matters which the trial judge is best suited to address in the first instance. I suspect that the trial judge might disagree with the plurality's assessment of good faith.[2]

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[2] The plurality finds good faith only via the back-door: *i.e.*, it infers good faith from the fact that "the trial court did not find that Appellants acted in bad faith." Slip Op. at 4. Since the non-textual "good faith" standard manufactured by the plurality did not exist until today, there is no basis for such an inference. Proper application of the plurality's standard would require a remand.

As a general matter concerning "good faith," I would not be so naïve as to overlook the fact that a prolix Rule 1925(b) statement may be filed by a disgruntled appellant merely to overburden or "punish" the trial judge who, after all, ruled against the appellant. Today's plurality decision, which would require the indulgence of Rule 1925(b) statements raising unlimited numbers of claims, encourages trial judges not to waste their time addressing **any** claims in such cases, but instead to await the determination of the appellate court -- once the appellant responsibly limits his issues in appellate briefing -- concerning which claims to address. This regime subverts the very efficiency for which the Rule was designed. (continued…)

Ultimately, I dissent because the waiver issue here was a natural result of appellants' own Rule 1925(b) conduct, and appellants took no action to protect their interests. Rule 1925(b) permits flexibility. A trial judge faced with a "concise" statement which in fact encompasses sixty-plus issues and sub-issues (with more issues implicated by a reference to the appellant's post-verdict motions and eighty-three page brief in support), and knowing that the appellant cannot possibility pursue the vast majority of those claims on appeal without leave of the appellate court, could issue a supplemental Rule 1925 order, or a rule to show cause, to correct the prolixity. By the same token, an appellant faced with such an order -- or faced with a trial court opinion finding prolixity-based waiver -- could seek reconsideration to justify the laundry list or, more responsibly, to amend its statement and whittle the claims down -- just as appellants whittled away claims here in preparing their Superior Court brief. Or, the appellant could request the appellate court to remand the matter for an opinion addressing the select issues the appellant ultimately decided to pursue.[3] An appellate court faced with claims in a brief that were not

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(…continued)
Perhaps we should return to the more time-consuming, but substantive and issue-winnowing, regime that existed when trial court opinions were filed as the final stage of the post-verdict motion process. A trial judge can more easily manage these types of pleadings, and an appellant is less likely to be abusive, when the case remains squarely within the trial judge's jurisdiction.

[3] The plurality seems to be impressed by appellants' complaint that the trial court did not *sua sponte* direct appellants to file a "more concise" statement before finding waiver. Although the trial court has this power, nothing in the Rules obliges it to so act. Moreover, why is the trial court's failure to direct an amendment more significant than appellants' failure to request leave to cure the prolix statement? In this regard, we should not lose sight of the significance that the trial court's opinion, finding waiver, was filed the very day after appellants secured an order from the Superior Court directing the trial court to file its opinion and the record forthwith. Perhaps appellants should have been as vigilant concerning their own lapses as they were concerning the perceived lapse by the trial court.

addressed in the lower court opinion because of Rule 1925(b) prolixity, rather than finding the bulk of the clams waived, has the power to remand the case for a supplemental opinion limited to the few claims the appellant actually decided to pursue on appeal. In this case, appellants took no remedial action in the face of the trial court's perfectly reasonable finding that the number of claims raised impaired its ability to file a timely and comprehensive opinion. Based upon the plain language of Rule 1925, a finding of waiver by the appellate court in such circumstances is not an abuse of discretion.

The plurality overlooks appellants' lapses. Ultimately, the plurality decision (1) would permit the filing of prolix statements as of right, without leave or explanation; (2) would absolve appellants of any duty to seek to modify Rule 1925(b) pleadings or to take any remedial action once faced with a suggestion of waiver; and (3) would require the appellate court to entertain all claims so listed, if pursued in appellate briefing, even when the trial court did not address them. This "solution" is not suggested by the text of the Rule. The solution rewards litigants who primarily have themselves to blame for their dilemmas. And the solution overlooks the dilemma our busy trial judges face when prolix Rule 1925(b) statements are filed, without requesting leave to ignore the "concise" requirement. Why should a trial judge have to write to sixty claims when the appellant in fact will pursue only eight claims on appeal?

Under Rule 1925(b), the power to find issue-specific waiver in a case such as this is vested in the discretion of the appellate court. I agree with appellees that the discrepancy between the number of issues appellants listed in their Rule 1925(b) statement, and the number of claims actually pursued in their appellate brief, supports the panel's findings that certain claims were waived. Moreover, appellants, who took no action to protect their appeal rights even after being apprised that the trial judge announced that the prolix statement impaired its ability to write a comprehensive opinion, have not shown an abuse of discretion in the panel's decision.

I respectfully dissent.