

[J-84-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

FRANK J. LAIRD, TRUSTEE UNDER : No. 15 WAP 2005
THE TRUST AGREEMENT OF :
FEBRUARY 24, 1988 AND VERON C. : Appeal from the Order of the Superior
KEESEY, JR., INDIVIDUALLY AND ON : Court entered February 20, 2004 at No.
BEHALF OF A CLASS OF THE : 2057 WDA 2002, affirming the Judgment
MINORITY SHAREHOLDERS OF THE : of the Court of Common Pleas of
CLEARFIELD & MAHONING RAILROAD : Clearfield County entered October 8, 2002
COMPANY, A PENNSYLVANIA : at No. 98-51-CD.
CORPORATION AND DERIVATIVELY, :
ON BEHALF OF THE CLEARFIELD & :
MAHONING RAILROAD COMPANY :

Appellants

v.

THE CLEARFIELD & MAHONING :
RAILWAY COMPANY, A :
PENNSYLVANIA CORPORATION, :
BUFFALO, ROCHESTER & :
PITTSBURGH RAILWAY COMPANY, A :
PENNSYLVANIA CORPORATION, :
BUFFALO & PITTSBURGH RAILROAD, :
INC., A PENNSYLVANIA :
CORPORATION, CSX :
TRANSPORTATION, INC., A VIRGINIA :
CORPORATION, R.J. CORMAN :
RAILWAY COMPANY/PENNSYLVANIA :
LINES, INC., A PENNSYLVANIA :
CORPORATION, RICHARD J. CORMAN, :
AND CONSOLIDATED RAIL :
CORPORATION AND DAVID R. IRVIN, :

Appellees

DISSENTING OPINION

This appeal came to us on a grant of allocatur limited to the following question:

Whether the trial court's order rendering judgment "upon agreement and stipulation of the parties," with damages "as limited by previous rulings of this Court" and in the context of the trial court's on-the-record contemplation of "an order that would preserve any and all rights [Petitioners] have for appellate review on any prior proceedings in this case" had the effect of foreclosing Petitioners' appeal rights relative to such prior proceedings and/or rulings?

Because I do not believe that the majority sufficiently explores the legal issues underlying this question and sets forth a test unsupported by prevailing jurisprudence, I dissent.

Appellants, the minority shareholders of Appellee Clearfield & Mahoning Railroad Company ("C&M"), brought a shareholder's derivative suit against C&M, its successors and principals, Richard Corman ("Corman") and David Irwin ("Irwin"), contending that the majority shareholders of C&M wrongfully withheld dividends. The suit raised claims for breach of contract, breach of fiduciary duty, tortious interference with contractual relations, and conspiracy to defraud. The trial court dismissed the claims for conspiracy to defraud and tortious interference on preliminary objections. Later, the court granted summary judgment on the claim for breach of fiduciary duty and dismissed Corman and Irwin from the suit. This left only one remaining claim, breach of contract, and only the railroad defendants. The court also limited damages as to the contract claim to those arising after January 1, 1997, the effective date of the dividend freeze, plus accrued interest.

On the day scheduled for trial, the remaining parties had a pre-trial conference with the trial judge expressing their intention to enter a stipulation as to the contract claim so as to obviate the need for trial and facilitate Appellants' immediate appeal of the prior interlocutory orders. In the negotiations fashioning the stipulation the trial court told the parties:

I think you can fashion a stipulation or an order whereby that, for purposes of settlement only, you are not contesting or are stipulating to a breach of contract with the reservation that if Plaintiffs are successful on appeal and the matter is remanded for trial before a court, then you are not precluded from, at that time, raising the issue of whether, in fact, a breach of contract occurred.

N.T. 6/24/02 at 23. The parties subsequently entered into said stipulation whereby C&M admitted to breach of contract and the corresponding damages. On October 15, 2002, the trial court entered judgment on the stipulation.¹

Appellants took an appeal to the Superior Court raising six issues, challenging: 1) the trial court's appointment of a special committee to assess the viability of Appellants' derivative claims; 2) the trial court's dismissal on preliminary objections of their claims for tortious interference and conspiracy to defraud, and its subsequent refusal to allow amendments to their complaint; 3) the trial court's entry of summary judgment in favor of Appellees Corman and Irvin on three counts of the complaint; and 4) the trial court's refusal to permit them to recover the "fair value" of their shares in C&M, limiting their recovery to a single dividend payment. Appellants' other two issues demanded entry of judgment in their favor "on the whole record" and sought to have the case remanded to a different trial judge. Laird v. Clearfield and Mahoning Railway Company, 846 A.2d 118, 121 (Pa.Super. 2004).

The Superior Court stated that before it could address any of the issues raised by Appellants, it was required to decide whether its very ability to review them was affected by the terms of the stipulated order entered in lieu of trial. Laird, 846 A.2d at 121. The court

¹ On July 3, 2002 the Appellants filed a Motion for Post Trial Relief Pursuant to Pa.R.C.P. No. 227.1 seeking relief from the various orders entered in the course of the litigation, including the June 24, 2002 consent order. The trial court denied the Motion stating, *inter alia*, that no trial took place and the issues raised in the Motion do not fall within the scope of Rule 227.1. While ultimately not relevant for the determination of this case, the Superior Court affirmed the trial court's denial of the post trial motions, holding that the entry of the consent decree did not constitute a 'trial' from which such motions may arise. Laird v. Clearfield and Mahoning Railway Company, 846 A.2d 118, 122 (Pa.Super. 2004).

construed the judgment entered upon the stipulation of the parties as a consent decree.² It then stated that, while Appellants were operating under the premise that the consent order allows them to proceed as though a trial had occurred, such was not the case. Id. at 123. Rather, the parties must be bound by the limitations of the consent order. The court held that review of each of the six issues raised by Appellants was forestalled by the consent order. Id. As such, it was unable to reach the merits of Appellants' claims.

The majority did not find it necessary to explore the Superior Court's determination that the stipulated order constitutes a consent decree from which no appeal may be taken. Instead, the majority merely sets forth a new *sui generis* rule permitting such orders to be appealed when the agreement contemplates appellate review and the issues being appealed are not the ones disposed of by the order. Majority Slip Opinion at 5-6. I believe that this approach skirts the issue of our grant of allocatur and ignores the key question of this case: whether a consent decree can serve as the final order from which a party may appeal prior orders of the trial court. This Court has addressed this issue in general terms and the Superior Court, the courts of our sister states, as well as federal courts, have done so specifically, holding that a consent decree cannot give rise to an appeal. As I agree with this approach, I believe that this Court should affirmatively adopt the rule that a consent decree between the parties cannot give rise to an appeal, even of collateral issues and affirm the holding of the Superior Court.

In Lower Frederick Twp v. Clemmer, 543 A.2d 502, 510 (Pa. 1988), we explained that "[a] consent decree is not a legal determination by the court of the matters in controversy but is merely an agreement between the parties - a contract binding the parties to the terms thereof." Further, Black's Law Dictionary 411 (6th ed. 1991) states in regards

² Throughout this opinion, as well as those cited herein, reference is made to consent *decrees* and consent *orders*. The two terms are synonymous and are used interchangeably. Black's Law Dictionary 336 (7th ed. abridged 2000).

to a consent decree that “it is not properly a judicial sentence, but is in the nature of a solemn contract or agreement, made under the sanction of the court, and in effect an admission by them that the decree is a just determination of their rights upon the real facts of the case, if such facts had been proven.” In light of the above definitions, the stipulated order between the parties is clearly a consent decree. Rather than an adjudication by the court, the order merely sanctioned agreement of the parties regarding liability and damages for the breach of contract claim. See Consent Order, dated 6/24/02. As the order in question is clearly a consent order, it is necessary to examine the relevant law in determining whether such a decree might give rise to an appeal.

While this Court has not expressly addressed this specific issue, in Brown v. Commonwealth of Pennsylvania Department of Health, 434 A.2d 1179 (Pa. 1981), we outlined the general principles underlying this question. There, we wrote, “[o]rdinarily, a party who consents to, or acquiesces in, a judgment or order cannot appeal therefrom.” Brown, 434 A.2d at 1181. Further, the Superior Court specifically addressed whether an appeal may be taken from a consent decree in Sarsfield v. Sarsfield, 380 A.2d 899 (Pa.Super. 1977).

In Sarsfield, appellee wife brought an action against appellant husband alleging non-compliance with their separation agreement and seeking an order of enforcement. Appellant filed preliminary objections challenging the equity jurisdiction of the court, which were overruled. The parties subsequently settled their disputes and entered into a consent order which was entered by the court. Appellant then appealed claiming that the court had erred in dismissing his preliminary objections. The Superior Court specifically stated that the threshold of the case was that the appeal arose from a consent order. Sarsfield, 380 A.2d at 900. The Court held that “[a] decree entered by consent of the parties is so conclusive that it will be reviewed only on a showing that an objecting party’s consent was obtained by fraud or that it was based upon a mutual mistake.” Id. at 901. Further, the

proper avenue for such challenge is not an appeal, but rather “[a]ny move to modify or abrogate the consent order must be initiated in the court below.” Id.³ See also M.N.C. Corporation v. Mount Lebanon Medical Center, Inc., 483 A.2d 490, 492 (Pa.Super. 1984), (recognizing, in dicta, that a party may not appeal from a consent decree because he consented to the order, citing Brown, 434 A.2d at 1181).

The inability of a consent order to give rise to an appeal stems from the long-standing jurisprudential principle that a party must be aggrieved in order to lodge an appeal. Pennsylvania Rule of Appellate Procedure 501 states: “Except where the right to appeal is enlarged by statute, any party who is *aggrieved* by an appealable order... may appeal therefrom.” Pa.R.A.P. 501 (emphasis added). This Court has held that only an aggrieved party can appeal from an order entered by the lower court. Commonwealth v. Polo, 759 A.2d 372, 373 n.1 (Pa. 2000); In re Elliott’s Estate, 131 A.2d 357, 358 (Pa. 1957). On this note, we have held that a party prevailing in the lower court is not aggrieved and therefore may not bring an appeal. See e.g., United Parcel Service, Inc. v. Pennsylvania Public Utility Commission, 830 A.2d 941 (Pa. 2003). By natural extension a party who consents to, or acquiesces in, an order is not aggrieved and cannot bring an appeal. See Brown, *supra*.

The majority of our sister courts addressing this issue have held that a party may not appeal from a consent order. Further, sister courts have held that even an express reservation by the parties of a right to appeal from a consent order will not confer jurisdiction upon the appellate court. For example, in Globe American Casualty Company v. Chung, 589 A.2d 956, 957 (Md. 1991), the Maryland Supreme Court refused to entertain

³ The Superior Court majority then went on to address the issue of jurisdiction because “the nature of the case suggests the possibility of future hearings and orders.” Sarsfield, 380 A.2d at 901. This discussion is, however, merely dicta, as the court had recognized that a consent order is not appealable. Apparently recognizing this, the concurring opinion of Judge Spaeth rests solely on the consent order. Id.

an appeal from a grant of partial summary judgment entered before a consent decree was entered. It explained that “[i]t is well settled that a party may not appeal from a judgment to which he has consented.” Globe American, 589 A.2d at 958. Further, it stated that “where a party consents to judgment in a case, the party ordinarily may not appeal and obtain review of an earlier adverse ruling in that case.” Id. Likewise, in Amstar Corporation v. Southern Pacific Transport Company of Texas and Louisiana, 607 F.2d 1100 (5th Cir. 1979) the parties entered into a consent decree that specifically reserved the plaintiff’s right to appeal prior adverse rulings. The Court dismissed the appeal *per curiam* holding, “[a]lthough the consent judgment contained a recognition that the plaintiff wished to appeal the issue of the limitation of damages, the fact that both parties freely consented to the entry of a final judgment precludes appeal from it.” Id. In Rauda v. Oregon Roses, Inc., 986 P.2d 1157 (Or. 1999) the Supreme Court of Oregon explained the rationale barring all appeals, even of prior interlocutory orders, from a consent decree. It explained that a stipulated judgment does not become appealable simply because it contains words that purport to preserve one party’s right to appeal some interlocutory ruling by the trial court because, “[a]s with all judgments, a stipulated judgment merges the purported errors of law committed by the trial court in its interlocutory orders. Those purported orders are not reviewable if the judgment itself is not appealable.” Rauda, 986 A.2d at 1160.

The majority cites Keystone Builders v. Lincoln Savings and Loan Association, 360 A.2d 191 (Pa. 1976), for the proposition that a consent decree as to one issue will not constitute an adjudication of other issues not addressed therein, suggesting that such extraneous issues may be appealable. Majority Slip Opinion at 5 n.2. The reliance on Keystone as to this particular issue is misplaced, however, as the Court addressed only whether a consent decree as to one issue of a case will have a preclusive effect on other issues between the parties *in a second action*, not whether a party can raise an appeal from a consent decree as to collateral interlocutory orders. In Keystone, the plaintiff first

brought an action in equity asserting that the defendant was not remitting monies due under the contract at issue in accordance with the terms thereof and seeking an order requiring the defendant to comply with the payment procedure and pay damages. The parties then entered into a consent decree merely setting forth their agreement on the proper procedures for payment. Thereafter, the plaintiff commenced a second action at law seeking damages for the defendant's prior failure to follow payment procedures. The defendant asserted that the issue of damages was rendered *res judicata* by the prior consent order. This Court held that the consent decree did not bar the action for damages as "[t]he conduct of the parties and the court, and the language of the decree itself, indicates that they did not intend the decree to act as an adjudication of whether there was a breach of contract by [defendant] rendering it liable for unascertained damages." Keystone, 360 A.2d at 195. As such, Keystone addresses only the *res judicata* effects of a consent order addressing but one of several issues, not the appealability from the order of prior interlocutory orders. Thus, it is not relevant to our analysis in this case.

While the majority of courts that have addressed this issue hold that a party may not raise an appeal, even of prior interlocutory orders, from a consent decree, a minority, including the United States Court of Appeals for the Third Circuit, has carved out a limited exception. According to the exception, when "it is clear from the record that the parties stipulated to a consent judgment with the express understanding that the party against whom judgment was entered would appeal a contested issue decided by the [trial] court, there is no reason to hold the right to appeal waived." Keefe v. Prudential Property and Casualty Insurance Co., 203 F.2d 218, 223 (3d Cir. 2000). Thus, the exception will permit an appeal from a consent decree *only* in the case in which there is an express understanding that *the party against whom judgment is entered*, i.e. the party admitting liability, will appeal a prior order of the Court.

The facts of this case do not fall within the limited exception carved out by the minority of courts. Here, the language of the consent decree does not expressly reserve appellate rights for Appellees, the parties against whom the judgment was entered. Rather, the order merely reserves to them the right to reopen the issue of liability on the breach of contract claim should *the Appellants* prevail on an appeal. As such, the minority view does not apply here.

I believe that instead of adopting the novel and unsupported test of the majority opinion, a test that stands apart from the jurisprudence of our sister courts, this Court should apply the rule prevailing in the majority of courts addressing this issue, including our Superior Court, which bars appeal from a consent order. Our Rules of Appellate Procedure and the decisions of this Court require that a party be aggrieved in order to bring an appeal. A party who consents to an order is not aggrieved. Brown, 434 A.2d at 1181. Further, an appeal must stem from a final order of the lower court in which it used its judicial power to make a legal determination of the matters in controversy. As we have held, a consent decree is merely a contract between parties that is given judicial sanction. Lower Frederick Twp v. Clemmer, 543 A.2d 502 (Pa. 1988). It is not an adjudication. Thus, according to the very language of the Rules and case law of this Commonwealth, an appeal may not arise therefrom.⁴

I agree with the majority that the record in this case illustrates that the parties contemplated that an appeal would be permitted as to the pre-decree interlocutory orders,

⁴ I do not suggest that litigants are precluded from amicably settling the final remaining claim between them while preserving appellate review for prior interlocutory orders. On the contrary, our Rules permit a party to voluntarily discontinue a claim, Pa.R.C.P. No. 229, or obtain a voluntary nonsuit, Pa.R.C.P. No. 230. At this point, the last interlocutory order disposing of a claim will be the final order. Further, if appellate review results in the reinstatement of previously dismissed claims, the discontinued or nonsuited claims may be reinstated. Pa.R.C.P. No. 231.

and that the parties entered into the order with the express intention of creating an appealable final order. While I do not believe, as explained at length above, that we can disregard the law so as to effectuate their intent, the parties are not without remedy. If a party believes that it entered into a consent decree by fraud or mistake, the proper recourse is not a challenge on appeal, but rather a collateral action on the decree itself to challenge its validity. See Sabatine v. Commonwealth, 422 A.2d 210, 212 (Pa. 1982) (holding that a consent decree may be modified due to fraud, accident, or mistake) Sarsfield, 380 A.2d at 901 (holding that any move to modify or abrogate the consent order must be initiated in the court below), see also 16 Standard Pennsylvania Practice §85:114. Thus, while the parties chose the wrong procedural vehicle to effectuate their intentions, one that deprives this and any appellate court of jurisdiction to entertain the substantive issues raised, they are not deprived of the opportunity to rectify their mistake and enter into an arrangement that will conform with their intentions.

This position does not constitute, as does the position of the majority, the creation of a new legal test. Nor is it a departure from prevailing jurisprudential views applied by the different courts of this nation. Rather, it merely applies the general principles that we have enunciated to the specific issue of this case, as our Superior Court has already done. As such, I would affirm the holding of the Superior Court dismissing the appeal in this case.

Mr. Justice Castille joins this dissenting opinion.