

[J-9-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 31 WAP 2003
: :
Appellee : Appeal from the Order of the Superior
: Court entered December 16, 2002, at No.
: 1368 WDA 2001, quashing the appeal
v. : from the Order of the Court of Common
: Pleas of Allegheny County entered
: August 8, 2001, at No. CC200100571.
: :
DAVID R. KENNEDY, : :
: :
Appellant : ARGUED: March 1, 2004

CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: JUNE 21, 2005

I join the majority opinion. My only comment is that I held the narrower view of the collateral order doctrine, still followed in most jurisdictions, which would generally deem remedies available on appellate review after the entry of a final order disposing of all parties and claims adequate to redress errant intrusions on privileges belonging to a party litigant. See PAUL R. RICE, 2 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES §11.34 (2d ed. 2004) (“Courts have consistently held that disclosure orders are neither too important nor too independent of the cause of action itself to justify immediate appellate consideration.”); accord Commonwealth v. Dennis, ___ Pa. ___, ___, 859 A.2d 1270, 1281 (2004) (Cappy, C.J., dissenting, joined by Nigro, J. and Saylor, J.).¹

¹ I realize that in its seminal decision in Ben v. Schwartz, 556 Pa. 475, 729 A.2d 547 (1999), this Court cited to the federal decision in In re Ford Motor Company, 110 F.3d (continued . . .)

My rationale was that the dilution of the previously existing limiting principles would open appellate review as of right to a fairly broad class of discovery or production orders, and the resultant increase in piecemeal and fragmentary review would impose too substantial a burden on the orderly administration of justice. Accord, e.g., Boughton, 10 F.3d at 748-49. I also believed that Pennsylvania's established procedure for seeking permissive interlocutory review, see Pa.R.A.P. 1311-1323, served as an adequate safeguard against the possibility of substantial harm resulting from interim decisions falling outside the narrow class of collateral orders.

Nevertheless, I regard the majority's present opinion as a faithful application of the prevailing opinion in Dennis, ___ Pa. at ___, 859 A.2d at 1270. Moreover, I agree with the sentiment of the United States Supreme Court that, for the sake of predictability and coherence, the collateral order doctrine should be applied on a category-wide basis. See, e.g., Cunningham v. Hamilton County, 527 U.S. 198, 206, 119 S. Ct. 1915, 1921 (1999) (“[W]e have consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral.”).

(...continued)

954 (3d Cir. 1997), which took a substantially broader view of the collateral order doctrine relative to privilege issues. Still, I previously had read Ben v. Schwartz as centered on the facts before the Court -- involving the assertion of privilege applicable to third parties to the underlying litigation -- and not as a wholesale adoption of the Third Circuit's approach. Indeed, read against its facts, Ben v. Schwartz is consistent with the widely held view that claimed intrusions on core privileges pertaining to non-parties are excepted from strict finality requirements. See Church of Scientology v. United States, 506 U.S. 9, 18 n.11, 113 S. Ct. 447, 452 n.11 (1992) (citing Perlman v. United States, 247 U.S. 7, 38 S. Ct. 417 (1918)). The substantially broader Ford Motor Company approach to the collateral order doctrine relative to assertions of privilege by party litigants, however, is not as widely accepted. See, e.g., United States v. Billmyer, 57 F.3d 31, 35 (1st Cir. 1995) (reflecting the traditional position of non-appealability); Boughton v. Cotter Corp., 10 F.3d 746, 748-49 (10th Cir. 1993) (same). But see United States v. Phillip Morris Inc., 314 F.3d 612, 618-21 (D.C. Cir. 2003) (following Ford Motor Company).

For these reasons, I believe that the instant appeal is properly before the Court pursuant to the collateral order doctrine. I am also fully in line with the majority's merits analysis as concerns the privilege issue.