Rule 1925(b) Revisited (Again)

by Donald J. Martin

All is not well when procedure is in flux. In the Fall 2007 issue of this newsletter, I updated my Fall 2005 article, subtitled Concise is an Adjective, about Pennsylvania Rule of Appellate Procedure 1925(b). This rule was amended May 10, 2007, to give any trial court judge who wants clarification of the errors alleged on appeal the authority to order the party taking the appeal to file, as a part of the trial court record, "a concise statement of errors [formerly "matters"] complained of on appeal." The changes and uncertainty arise from the requirement of conciseness. Since I last wrote, the Supreme Court of Pennsylvania issued what could have been the definitive word – except that it was a plurality opinion, and two of the three justices who formed the plurality are no longer on the Court.

Before I get to that decision, I want to address *Ferris v. Harkins*, 940 A.2d 388 (Pa. Super. 2007), in which the appellant filed several statements of matters complained of under the pre-amendment Rule. The original statement attempted to incorporate a brief in support to be filed in the future. The Superior Court applied older decisions holding that the purported effort to reserve the right to file a supplemental statement is ineffective, but the late supplement does not undercut the timely one. The issues in the timely statement are preserved; the ones in the late document are not.

In *Eiser v. Brown & Williamson Tobacco Corporation*, --- Pa. ---, 938 A.2d 417 (2007), Justice Baldwin, joined by Justices Baer and Fitzgerald, held that raising an excessive quantity of issues – a 15-page, 24-issue statement of matters complained of – is not, in itself, a waiver of the right to appellate review; the court would also have to find the issues were raised in bad faith. *Eiser* at ---, 421. Justice Saylor filed a concurring opinion, Chief Justice Cappy concurred in the result, and Justices Castille and Eakin wrote dissents.

A three-judge Superior Court panel in *Jiricko v. Geico Insurance Company*, 2008 PA Super 63, --- A.2d --- (2008) found Eiser "persuasive" (*Jiricko*, p. 15, --- A. 2d at ---). So, for now at least, *Eiser* is binding on the Courts of Common Pleas. Given the changing personnel on the Supreme Court, I suspect I may have another article on this subject within a year.

The *Eiser* plurality addressed a perceived conflict between *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998), which held issues not clearly set forth in the statement are waived, and *Kanter v. Epstein*, 866 A.2d 394 (Pa. Super. 2004); *alloc. denied*, 584 Pa. 678, 880 A.2d 1239 (2005); *cert. denied*, 546 U.S. 1092 (2006), finding that an overly long statement waived all issues. Justice Baldwin's opinion did not disaffirm *Kanter;* rather, it found *Kanter* did not conflict with *Lord,* holding that a large number of issues raised is not in itself a basis to presume a waiver. In addition, the court must find that the appellant filed the lengthy statement in bad faith. This finding need not be based on evidence; it can arise from the course of the litigation.

The opinion noted the complexity of the matter before it, stemming from the conduct of the tobacco industry back to the 1950s: the case on appeal involved two plaintiffs and eleven defendants; took four years to get to trial; and involved pre-trial, at-trial, and post-trial rulings from four judges below. In addition, the parties filed a series of motions for summary judgment and over a dozen motions *in limine*. That the appellants raised only eight of the 24 issues in their brief was not, according to the plurality, by itself evidence of bad faith. The opinion recognized the need to raise issues to avoid waiver and that the trial court's opinion could have persuaded the appellant that an issue originally raised had little or no merit, leading to a decision not to pursue it before the appellate court.

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Justice (now Chief Justice) Castille dissented vigorously, asking why a trial judge should have to write about 60 claims when only eight would be pursued on appeal. He suggested the trial court could direct that the issues be narrowed, or the appellate court could remand for an opinion on the issues eventually raised in the brief.

I am not sure of the practicality of either solution.

I do not consider a change in personnel a reason to believe a decision by a majority of even one is doubtful precedent: *stare decisis* has to mean something. Since the *Eiser* decision, the Superior Court has reaffirmed that issues not raised in the Rule 1925(b) statement are waived. *Commonwealth v. Oliver*, 2008 PA Super 61, --- A.2d --- (2008). Given the changing decisions on this subject, however, I can only suggest you tune in later.

In *Jiricko, supra*, the Superior Court held that "the crux of the problem" with a five-page *pro se* statement of appeal was not its length. Rather, the court characterized the statement as "an incoherent, confusing, redundant, defamatory rant" (at p. 16, --- A. 2d at ---) that preserved no issues.

Try not to rant.

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