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PENNSYLVANIA COURTS CONTINUE TO GRAPPLE WITH THE RULE REQUIRING AN APPELLANT TO IDENTIFY THE ISSUES INTENDED TO BE RAISED ON APPEAL

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In order to address what the Pennsylvania Supreme Court has acknowledged is a confusing area of the law – the number of issues to raise on appeal - the Court revised Pennsylvania Rule of Appellate Procedure 1925 in May 2007 (amendments effective July 25, 2007). The court also tackled issues surrounding Rule 1925 in December 2007 in *Eiser v. Brown & Williamson Tobacco Corp.,* 938 A.2d 417 (Pa. 2007) (plurality). To "clarify the confusion and quell the consternation" related to Pa. R. App. P. 1925(b) waiver issues, the court instructed lower courts that rather than focus on the number of issues raised, courts should consider whether the issues were raised in good faith.

Unfortunately, because a variety of circumstances impact the good faith inquiry, the revision to Rule 1925(b), as interpreted in *Eiser,* raises practically as many questions as it answers. Thus, despite the recent revision to Rule 1925(b) and the Court's attempt to clarify the rule and restrict the circumstances where waiver is found, confusion remains and courts continue to find waiver.

CIRCUMSTANCES AFFECTING GOOD FAITH

The primary question raised by Eiser is: how will courts determine whether issues are raised in good faith? The Eiser court identified several factors that impact the analysis of good faith: 1) complexity of the issues; 2) the amount of time the appellant has to file its 1925(b) statement; and 3) the direction in the revised rule that instructs appellants to include only those rulings they intend to pursue on appeal. As the Court noted, where a case involves multiple defendants and a multitude of trial court rulings, identifying a greater number of issues is more reasonable. On the other hand, where a case is relatively straightforward, like a simple breach of contract case, the number of issues identified should not be as great.

Discussing the time factor, the Court indicated that where the trial court limits the amount of time for filing the Rule 1925(b) statement, a greater number of issues may be reasonable because the appellant has not had sufficient time to research and clarify issues for appeal. Time constraints, however, are less likely to justify a large number of issues under the present version of Rule 1925(b) because the rule now allows "at least" 21 days to file the statement. This time period is longer than the 14 day time period allowed under the old rule, and the time period may be extended. Thus, parties who need additional time to clarify issues for appeal should, consistent with the requirement to act in good faith, request additional time.

Under the revised version of Rule 1925, the analysis of good faith also involves consideration of the requirement in Rule 1925(b)(4)(i) that appellants include only those rulings the appellant intends to challenge on appeal. While the revised language of Rule 1925 does not set forth a numerical limitation, it does require that the appellant intend, in good faith, to pursue the issues identified in the Rule 1925(b) statement on appeal.

Implicit in the requirement that the appellant include only those issues which it intends to pursue on appeal is a requirement that the appellant consider the limitations set forth in Pa. R. App. P. 2116(a), which limits the length of the Statement of Questions Involved section of an appellant's brief. Fortunately for appellants, however, the Supreme Court recently extended the page limit for the Statement of Questions Involved section of briefs from one page to two pages. This extension should decrease the risk that appellants will evidence a lack of good faith by identifying more issues than can be included within the Statement of Questions Involved section.

A court's good faith analysis should also be guided by the Supreme Court's statement signaling that a finding of waiver should be considered a rare occurrence, rather than commonplace. Although lower courts are not required to make a factual finding of bad faith *per se*, the court's admonition is instructive with respect to its intent to limit the application of the waiver rule. Thus, even where the presentation of a case is relatively straightforward, suggesting fewer issues on appeal, courts should only find waiver based on a lack of good faith in the "rare case" where they find that the number of issues raised is motivated by an effort to overwhelm the court system, forcing judges to throw up their hands in frustration. Finding waiver where there is a clear attempt to overwhelm the court is, as the court noted, consistent with the dictates of revised Rule 1925(b)(4), which provides that lower courts may find waiver where a Rule 1925(b) statement contains frivolous and redundant issues.

THE APPLICATION OF REVISED RULE 1925(B) AFTER *EISER*

The Superior Court applied the rationale from *Eiser* in *Jiricko v. Geico Ins. Company*, 947 A.2d 206 (Pa. Super. 2008). In *Jiricko*, a *pro se* appellant with a history of excessive filings and

continued on page 2

Pennsylvania Courts Continue to Grapple

continued from page 1

refusals to cooperate with court orders filed a "lengthy" five-page Rule 1925(b) statement. The Superior Court, initially analyzing the old version of Rule 1925(b), held that the appellant had waived all issues on appeal because the "statement [was] an incoherent, confusing, redundant, defamatory rant accusing Geico's attorney and the trial judge of conspiring to deprive [the a]ppellant of his constitutional rights." The statement, moreover, was "but another example" of the appellant's breach of the duty of good faith and fair dealing with the court system. Although the court decided the issue under the prior version of Rule 1925(b), it noted, in reliance on *Eiser*, that the result would be the same under section 1925(b)(4)(iv) of the revised rule because the appellant's statement was redundant, confusing and, at times, incoherent.

The Superior Court also discussed good faith and redundancy in *Tucker v. R.M. Tours*, 939 A.2d 434 (Pa. Super. 2008). In that case, the appellants filed a 16-page, 76-paragraph rule 1925(b) statement, plus exhibits. The Superior Court held that the statement was an attempt to overwhelm the court, and contained a multitude of issues that the appellants did not intend to raise on appeal. Thus, the court found that the statement was not filed in good faith. Although *Tucker* was decided under the previous version of Rule 1925, the court noted that the appellants' statement would fail under the new rule as well because it did not meet the requirements of Rule 1925(b)(4)(iv). It failed to meet the requirements of Rule 1925(b)(4)(iv) not merely because of the number of issues raised but, in addition, it was redundant, lengthy and presented in a confusing manner.

While the *Tucker* court held that the result would have been the same under the new rule, the court did not indicate the parameters for its finding of good faith. In particular, the court made no mention of the time allowed for filing the Rule 1925(b) statement or how complex the issues were. The court noted, however, that the appellants' misconduct was "highlighted" by the fact that on appeal, they could not set forth their statement of questions presented within the one page limit set forth in Rule 2116(a). Thus, *Tucker* confirms that a court's analysis of good faith should include consideration of whether the number of issues raised, can be set forth in the Statement of Questions Involved.

In contrast to *Jiricko* and *Tucker*, the court in *LSI Title Agency, Inc. v. Evaluation Services, Inc*, 951 A.2d 384 (Pa. Super. 2008) did not find waiver despite finding that the appellant's 1925(b) statement, which was 22 paragraphs long, was not concise, and contained proscribed argument. Relying on *Eiser*, the Superior Court concluded that because the trial court failed to find that the appellant's 1925(b) statement lacked good faith, there was no waiver. Thus, while trial courts may have some discretion with respect to the factors they consider in analyzing whether the number of issues raised comports with good faith, trial courts must consider the issue of good faith if they intend to find waiver based upon a lack of conciseness in a Rule 1925(b) statement.

VAGUENESS CAN STILL RESULT IN WAIVER

Although the number of issues raised in a Rule 1925(b) statement may make it difficult for the trial court to prepare its Rule 1925 opinion, if the issues are raised in good faith, the difficulty faced by the court should not result in waiver. The same cannot be said, however, for issues set forth in vague terms, even if the vaguely asserted issues are raised in good faith. *Eiser* makes clear that the vagueness analysis set forth in *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998) remains viable. Thus, if an issue is stated in such vague terms that it is impossible for the trial court to identify and address the issue, the issue is waived. However, in light of the Superior Court's prior holdings in *Donoughe v. Lincoln Electric Co.*, 936 A.2d 52 (Pa. Super. 2007), and *Jarl Investments, L.P. v. Fleck*, 937 A.2d 1113 (Pa. Super. 2007), courts are not likely to find waiver on the basis of vagueness if they can strip the extra verbiage from the statement and identify the individual allegations of error.

One aspect of the vagueness analysis under the new rule may, however, require a different analysis. As the Superior Court recently noted in *Ferris v. Harkins*, 940 A.2d 388 (Pa. Super. 2008), under the old version of Rule 1925(b), the Superior Court had to examine the record and any trial court opinion or order to ensure that the basis for the ruling being appealed has been provided before concluding that an issue has been waived based upon vagueness. If the reasons for the court's decision did not appear in the record, making it impossible for the appellant to be sufficiently specific in formulating the questions for appeal, the court would not find waiver.

Under the new version of Rule 1925(b), however, there is a specific requirement that the appellant preface general statements with an explanation as to why the statement has only been stated in general terms. Based upon this new, specific requirement, which is set forth in Rule 1925(b)(vi), appellate courts should no longer conduct a *sua sponte* review of the record in order to analyze whether a lack of specificity in the trial court's order justifies an appellant's general statement. If the appellant does not indicate, as required, that a statement is in general terms because the appellant could not readily discern the basis for the judge's decision, the court should find waiver.

CONCLUSION

Although the recent revisions to Rule 1925(b) and the *Eiser* decision attempt to eliminate uncertainty experienced by appellants when contemplating how many issues to include in a Rule 1925(b) statement, there is still a great deal of uncertainty surrounding the issue. The uncertainty involves the elements good faith, and the fact that *Eiser* was only a plurality decision, with limited precedential value. Recent case law suggests, however, that courts will continue to find waiver. Thus, the Supreme Court's pronouncement that waiver should be found in only rare instances has not yet taken hold. Regardless of the number of issue raised, however, the issues must be clearly stated as vagueness remains a valid ground for waiver, and the revised version of Rule 1925(b) suggests that the Superior Court will no longer examine the record to attempt to determine if general statements are included due to an inability to discern the trial court's reasons. Even if appellants remain uncertain as to the number of issues to raise, issues raised should be stated with clarity, or the lack of clarity should be explained by referencing an inability to discern the basis for the trial court's decision.