Trial Judges Can Call for Second Bite at 1925(b) Apple

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By Amaris Elliott-Engel
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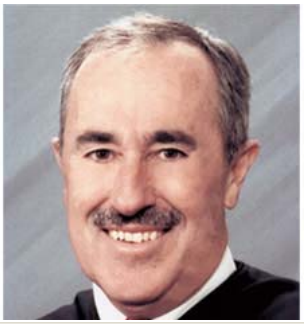
Trial judges have the authority to order second appeal issue statements when the first statements are unclear, the state Supreme Court ruled Friday.

The high court's decision overturned a bright-line rule announced by the Superior Court in 2007 forbidding trial judges from ordering attorneys to file new 1925(b) statements.



Pennsylvania Supreme Court Justice J. Michael Eakin

The Superior Court panel of Judges Correale F. Stevens, John T. Bender and Senior Judge John T. J. Kelly Jr. was concerned that there would be inconsistent results in cases because some trial judges would order new statements while other trial judges would find that confusing, unwieldy appeal issue statements should result in the waiver of appellate rights.

Supreme Court Justice J. Michael Eakin, writing for a unanimous court in *Tucker v. R.M. Tours* , said allowing trial judges to order new statements helps trial judges fulfill their job responsibility of writing opinions explaining their rulings to the state's appellate courts.

Under Pennsylvania Rule of Appellate Procedure 1925(a), trial judges must write opinions explaining their decisions that are appealed by litigants. They may order appellants to write statements spelling out their appellate arguments. The 1925 (b) statements are supposed to help trial judges write their explanatory opinions to appellate judges.

"Whether a statement is sufficiently clear and concise ... may be curable," Eakin said. "The flaw is not necessarily fatal, and trial courts act properly within their discretion if they choose to order clarification of a timely filed statement."

Pennsylvania attorneys, when preparing statements of their clients' grounds for appeal, are often caught between the requirement of conciseness in the statements and the duty to preserve all of their clients' issues for appeal.

The Supreme Court's *Tucker* decision permits trial judges to order a second 1925(b) statement, but appellants may not add issues not raised in the original statement, Eakin said.

The Supreme Court did not disturb the Superior Court panel's finding in this case that the appellants' first 1925(b) statement was so long it breached the appellants' duty of good faith and that the second 1925(b) statement was so long it should result in the waiver of appellate rights.

The *Tucker* appellants' original 1925(b) statement was 16 pages with 76 paragraphs and attached exhibits, *The Legal* previously reported. The second 1925(b) statement was eight pages long with 34 paragraphs and attached exhibits. Philadelphia Common Pleas Judge Jacqueline F. Allen had ordered a second 1925(b) statement and found that the second statement was so unwieldy that the *Tucker* plaintiffs' appellate rights should be waived.

The Supreme Court doesn't appear to be disturbing the right of trial courts to write 1925(a) opinions advocating for the waiver of appellate rights if 1925(b) statements are confusing and prolix to trial judges. The court also seems to be sending a signal that prolix statements violate attorneys' duty to act in good faith in the courtroom.

The court's decision acknowledged the confusion surrounding Rule 1925(b) statements, but some appellate lawyers said confusion will linger about Rule 1925(b).

After the Superior Court panel in *Tucker* announced the now-discarded bright-line rule, a plurality of the Supreme Court in *Eiser v. Brown & Williamson Tobacco Corp.* ruled that lower courts should not dismiss appeals because of the number of issues raised in 1925(b) statements of matters unless attorneys submit the statements in bad faith.

Chief Justice Ronald D. Castille wrote in his dissent in *Eiser* that Rule 1925(b) permits flexibility, so a trial judge faced with a prolix statement of matters can issue a supplemental Rule 1925(b) order for appellants to fix their statement.

"The conflict between the Superior Court's announcement and *Eiser* does nothing to help the confusion," Eakin wrote.

Howard Bashman, a Willow Grove, Pa., solo practitioner with an appellate practice and an appellate columnist for *The*

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Legal , noted Castille's dissent was adopted by all of the justices. The Supreme Court might be signaling that trial judges who advocate appeals be thrown out because of insufficient statements will be more likely to be upheld if they allow litigants a second statement, Bashman said.

Robert L. Byer, chairman of Duane Morris' appellate litigation practice group and a former Commonwealth Court judge, said Rule 1925(b) will remain a bit of a waiver trap because trial judges retain the discretion to conclude the first statement, much less a second statement, is so incoherent that the appeal should be deemed waived.

Trial judges are inappropriately thrust into the role of advocates when they make the call that appeals should be waived because of the insufficiencies of 1925(b) statements, Byer argued. It should be up to the appellee to make such a motion, he said.

"This is still becoming a cottage industry for appellate litigation," Byer said.

Byer said trial judges should not have to write 1925(a) decisions in every case, just in cases that the trial judges have exercised their discretion and have not already explained their reasons for their decisions.

Andrew J. Gallogly of Margolis Edelstein, an attorney for appellee Apple Vacations, took the position in oral argument that there is a bright-line rule that prohibits judges from spontaneously asking an attorney to file a second statement of matters when the first one is unsatisfactory.

While Gallogly lost in *Tucker* , he said the rule announced by the court is not a bad rule and it gives trial judges an opportunity to try to make something intelligible out of "horrible" 1925(b) statements.

But attorneys must still take advantage of the opportunity to cure their 1925(b) statement of matters to avoid waiver of their clients' appellate rights, he said. John J. O'Brien III of O'Brien & O'Brien Associates in Wynnewood, Pa., and the attorney for appellants Louis and Jacqueline Tucker, did not take that opportunity, Gallogly said.

O'Brien said he was disappointed by the decision, and he didn't think his second statement had been too long. He said attorneys are still caught in a waiver trap regarding their 1925(b) statements.

"The court has not clarified the issues of 1925," O'Brien said.

O'Brien and Sean V. Kemether, of Kelly Grimes Pietrangelo & Vakil in Media, Pa., an attorney for appellee Leisure Travel and Tours Co., both argued in the case that trial judges do have the authority to seek a second statement of matters.

Kemether said he expects the Supreme Court to allow trial judges to exercise their discretion and request supplemental 1925(b) statements. While this procedure will result in fairer outcomes, the bar will still have uncertainty in the future about 1925(b) statements, Kemether predicted.

(Copies of the eight-page opinion in Tucker v. R.M. Tours, *PICS No. 09-1387, are available from* The Legal Intelligencer. *Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m.)* •

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