Received 9/8/2020 6:48:12 PM Supreme Court Middle District

Filed 9/8/2020 6:48:00 PM Supreme Court Middle District
33 MAP 2019

IN THE SUPREME COURT OF PENNSYLVANIA

DOCKET NO. 33 MAP 2019

DANIEL BERG, INDIVIDUALLY AND AS THE EXECUTOR OF THE ESTATE OF SHARON BERG A/K/A SHERYL BERG,
Appellant

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, INC.,
Appellee

APPLICATION FOR REARGUMENT OR IN THE ALTERNATIVE FOR RECONSIDERATION OF PLAINTIFFS-APPELLANTS

On Appeal from the Order of the Superior Court dated June 5, 2018 at No. 713 MDA 2015, Reconsideration denied August 8, 2018, Vacating the Judgment of the Berks County Court of Common Pleas, Civil Division, in favor of Plaintiffs-Appellants, entered April 21, 2015 at No. 98-813 and Remanding for Entry of Judgment in Favor of Defendant-Appellee Nationwide Mutual Insurance Co., Inc.

Benjamin J. Mayerson
MAYERSON LAW, P.C.
1 North Sunnybrook Road
Pottstown, PA 19464
(610) 906-1966

Kenneth R. Behrend
BEHREND LAW Group, LLC
The Pittsburgher, Suite 1700
428 Forbes Avenue
Pittsburgh, PA 15219
(412) 391-4660

Counsel for Plaintiffs-Appellants Daniel Berg, individually and as Executor of the Estate of Sharon Berg a/k/a Sheryl Berg

TABLE OF CONTENTS

OPINIONS DELIVERED RELATING TO THE ORDER WITH RESPECT TO WHICH REARGUMENT IS SOUGHT

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS AND STATUTES:

Pursuant to Pa. R. App. P. 2542, Plaintiffs-Appellants ("Appellants" or the "Bergs"), respectfully request that this Court grant reargument and/or reconsideration of the *per curiam* order entered on August 25, 2020 (copy attached), dismissing the appeal of the Bergs, presumably leaving in place the June 5, 2018 Order of the Superior Court of Pennsylvania, vacating the $21,000,000 judgment entered April 21, 2015 against Nationwide by the Court of Common Pleas of Berks County. *See Berg v. Nationwide Mut. Ins. Co.,* 189 A.3d 1030, 1035 (Pa. Super. 2018) ("*Berg II*").

On November 21, 2019, six of the seven justices of this Court heard oral argument due to the recusal of Justice Donohue, who participated as a Superior Court Judge in *Berg v. Nationwide Mut. Ins. Co.*, 44 A.3d 1164 (Pa. Super. 2012) ("*Berg I*"). On August 25, 2020, this Court entered its *per curiam* order dismissing the appeal, filing both an Opinion in Support of Affirmance ("OISA") of the decision in *Berg II* by Chief Justice Saylor, joined by Justice Baer, and an Opinion in Support of Reversal ("OISR") of *Berg II* by Justice Wecht, joined by Justice Mundy.

APPLICATION FOR REARGUMENT

The issue presented here relates to the unique wording of the August 25, 2020 *per curiam* order dismissing this appeal. Succinctly stated: where allowance of appeal occurs on the votes of six Justices and the appeal is presented before six justices on the merits via oral argument and briefs, may fewer than four justices enter a *per curiam* order dismissing the appeal, where, as here, there is no indication that said dismissal is based upon a finding of a majority of the Justices who considered the appeal, that the appeal

was "improvidently granted," or that the dismissal resulted from the Court being equally or evenly divided?

Since the August 25, 2020 Order states that the Court was divided in a fashion preventing a "majority disposition," but does not state that the Court was evenly divided, and given that a quorum of the members of this Court considered this appeal in the first instance, a majority of those six Justices – four --were required to agree to the entry of an order dismissing this appeal as "improvidently granted," or the August 25, 2020 Order of dismissal "should be deemed a nullity in the first instance." *Dougherty v. Heller, 138 A.2d 611, 626 (Pa. 2016)*, at 626. *See also* 42 Pa. C.S. §326(c) (requiring a quorum in order to "…transact the business of the court …"); Pa. R. App. P. 3102(d)(1) (requiring any matter heard or considered by a quorum of this Court "…be determined by action of a majority of the judges who participated in the hearing or consideration of the matter …").

Separately complicating matters, this Court has previously noted that when it is evenly divided, the result is the entry of "…a final *per curiam* order affirming the lower court's judgment—an action which maintains the *status quo* of the matter prior to the filing of the appeal in this Court." *Sprague v. Cortes*, 150 A.3d 17, 21 (Pa. 2016) (Baer, J., Opinion in Support of Affirmance). *Id.* at 17 ("PER CURIAM: **AND NOW,** this 25th day of October, 2016, … The Court being equally divided, the Order of the Commonwealth Court is **AFFIRMED**." (Bold in original; underlining added). *See also Mineo v. Tancini*, 536 A.2d 1323, 1323 (Pa. 1988) (same); *Baehr Bros. v. Com.*, 426 A.2d

1086 (Pa. 1981) (same). In the present case, the Order of dismissal does not state: (1) that this Court was evenly or equally divided; nor (2) that the Order of the Superior Court in *Berg II* is affirmed. *Id.*

The Order of dismissal, the OISA, and OISR do have one thing in common, namely, each confirms that a majority disposition could not be attained and is silent about whether the Court is evenly or equally split. *Id.* Moreover, while it is well established that if the majority of the judges of an appellate court believe that the judgment of the lower court should be affirmed but are unable to agree upon the grounds therefor, the appellate court should do no more than enter a formal judgment of affirmance,[1] yet in this case, this Court did not enter a formal (or any) judgment of affirmance of the Order of the Superior Court in *Berg II*, leaving unanswered even the most basic question raised by the August 25, 2020 Order: did four of the six Justices who heard the Bergs' appeal agree that the June 5, 2018 Order of the Superior Court should be affirmed, but simply were unable to agree upon the grounds for said affirmance? Nevertheless, should this Court not be inclined to reach this question, for the reasons that follow, this Court should still grant the Application for Reconsideration and remand this case to the Superior Court for resolution of any remaining appellate

[1] *See Richey v. York Cty. Nat. Bank*, 15 A.2d 737, 738 (Pa. Super. 1940); 17 Standard Pennsylvania Practice 2d § 92:43 ("Affirmance where court is equally divided or unable to agree."). *See also* 42 Pa. C.S. § 102 defining "Appellate Court" to include the Supreme Court of Pennsylvania.

issues or with instructions for that court to remand the case to the Trial Court for a new trial before a different trial judge.

APPLICATION FOR RECONSIDERATION

Pa. R. App. P. 102 defines "Reargument" to include reconsideration. The Bergs respectfully request reconsideration and amendment of this Court's August 25, 2020 Order to allow the Superior Court to address Nationwide's claims of bias of the trial judge and whether those bias claims, if substantiated, require that the parties be granted a new trial before an impartial tribunal as opposed to having the Superior Court, an intermediate, error-correcting court, simply overturn the Trial Judge's decision in whole and nullify the Trial Court's verdict in the name of vindicating Nationwide's due process rights to a fair trial, while simultaneously trampling the identical rights of the Bergs. In the final analysis, entry of JNOV by the Superior Court, a court of error correction, is not the proper remedy to a finding of judicial bias because it violates the verdict winner's due process right *to a trial*, any trial, before an impartial tribunal.

> It is axiomatic that, "there are two bases upon which a judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." *Moure v. Raeuchle*, 529 Pa. 394, 604 A.2d 1003, 1007 (Pa. 1992) (citations omitted). To uphold JNOV on the first basis, we must review the record and conclude "that even with all the factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with **the second [we] review the evidentiary record and [conclude] that the evidence was such that a verdict for the movant was beyond peradventure."**

Id. See Rohm & Haas Co. v. Cont'l Cas. Co., 781 A.2d 1172, 1176 (Pa. 2001) (emphasis added). *See also Nelson v. Airco*, 107 A.3d 146, 155 (Pa. Super. 2014) (en banc)[2].

During pre-trial proceedings both parties agreed to use the record from the prior trial in lieu of calling those witnesses to testify again. OISR at 12 and OISA at 4-5. The courts of this Commonwealth have long held that where a second judge makes credibility findings and renders a verdict in a non-jury trial based upon transcribed testimony, those credibility findings are to be given the same weight as if the witnesses testified in-person, so long as the parties agree that the second judge may render a decision on the transcripts. In the face of such an agreement to proceed, a subsequent post-verdict objection by the verdict loser to the credibility findings of the second judge is waived. *See Croyle v. Dellape*, 832 A.2d 466 (Pa. Super. 2003). *See also Brown v. Halpern*, 202 A.3d 687 (Pa. Super. 2019); *Hyman v. Borock*, 235 A.2d 621, 622 (Pa. Super. 1967). The issue should thus be whether Judge Sprecher's findings must be set aside because of a perceived bias against Nationwide and not because Judge Sprecher read transcripts.

"The Fourteenth Amendment prohibits a state from 'depriv[ing] any person of life, liberty, or property, without due process of law.' U.S. Const. amend. XIV, § 1." *See Wallace v. Powell*, No. 3:09-cv-286, 2012 U.S. Dist. LEXIS 91886, at *49 (M.D. Pa. July

[2]In the case *sub judice*, Judge Fitzgerald, assigned to the first 3-judge panel, disagreed with Judge Stabile's disposition of the case. *See* May 1, 2017, *per curiam* Order. Judge Stevens, assigned to the new panel, also disagreed with Judge Stabile. *See Berg II,* 189 A.3d at 1065 (Stevens, J., dissenting). It is thus clear JNOV was improper because reasonable minds disagreed.

3, 2012).[3] "'The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.'" *Id.* at *49-*50 *quoting Marshall v. Jerrico*, 446 U.S. 238, 242, (1980). "Indeed, 'it is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Id. citing Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, (2009) *quoting In re Murchison*, 349 U.S. 133, 136, (1955).

Apart from the Constitution of the United States' due process guarantee to a trial before an impartial and disinterested tribunal, this Court in opining upon the guarantees of the Constitution of Pennsylvania stated:

> The Pennsylvania Constitution directs that the courts shall provide remedies "by due course of law, and right and justice [are to be] administered without sale, denial or delay." PA. CONST. art. I, § 11. Article V empowers this Court with "general supervisory and administrative authority over all the courts and justices of the peace …." PA. CONST. art V, § 10(a). This Court previously has recognized that even the "appearance of impropriety is sufficient justification for the grant of new proceedings before another judge . . . . A jurist's impartiality is called into question whenever there are factors or circumstances that may reasonably question the jurist's impartiality in the matter." *In Interest of McFall*, 533 Pa. 24, 617 A.2d 707, 712-13 (Pa. 1992). The *McFall* Court further explained that, "[a] tribunal is either fair or unfair. There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings. A trial judge should not only avoid impropriety but must also avoid the appearance of impropriety." *Id.* at 714. Notably, in *McFall*, this Court stressed that it was not relying "on the United States Constitution or federal case law," *id.* at 714 n.6, in enforcing these precepts. Similarly, we made clear that the award of new proceedings in *McFall* was not predicated on a finding of a

[3] The case of *Wallace v. Powell* is more colloquially known as the "Kids-for-Cash" case, the allegations of which included a criminal conspiracy related to the construction of juvenile detention facilities, and subsequent detainment of juveniles in these facilities, orchestrated by two former Luzerne County Court of Common Pleas judges, Michael Conahan and Mark Ciavarella, who allegedly received millions of dollars in exchange for their orchestration of the said conspiracy. *Id.*

> due process violation. *Id.* at 712. *McFall* proceeded as an exercise of this Court's inherent constitutional powers governing judicial administration. *See* PA. CONST. art V, § 10(a).

Joseph v. Scranton Times L.P., 987 A.2d 633, 634-35 (Pa. 2009)[4]. The *Joseph* Court went on to state that: "It bears repeating: a jurist is either fair or unfair; there are no acceptable gradations." *Id.* at 636. Prior to the discovery of the criminal conspiracy which infected former Judge Ciavarella's impartiality, the *Joseph* case went to trial before Judge Ciavarella sitting without a jury. At the conclusion of the trial Judge Ciavarella entered a verdict in favor of Plaintiffs and against Defendants in the total amount of $3,500,000. *Id.* Despite finding that Ciavarella and Conahan's criminal conspiracy infected the trial with the appearance of impropriety, this Court did not endorse the remedy of simply vacating the verdict for plaintiffs and granting a JNOV on behalf of defendants. Instead this Court, ordered a new trial despite the fact that the plaintiffs' counsel in that case was well aware of the impropriety that had infected the tribunal. Accordingly, even in the face of perhaps the worst case of judicial scandal in this Commonwealth, this Court did not endorse a wholesale reversal of the then convicted trial judge's verdict to the benefit of the defendants. It ordered a new trial. *Id.* at 636-637.

In the OISA, Chief Justice Saylor determined that deference need not be given to the trial court's findings in this case because the trial judge was a substitute judge performing a cold record review, the trial judge's memorandum decision itself raised

[4] The *Joseph* case was a separate case arising out of the alleged criminal conspiracy between former Luzerne County Court of Common Pleas Judges Conahan and Ciavarella. *Id.*

the specter of "colorable" bias against Nationwide, *see* OISA at 4 n.3, and the claim of bias remains "unresolved" and "highly relevant" to the trial judge's handling of the Bergs' accusations that Nationwide concealed portions of the claim file during litigation. *Id.* at 21. Nevertheless, Chief Justice Saylor also identified the "bias concern" and articulated his preference to remand the case on that basis. *See* OISA at 23. ("In summary, I wouldn't undertake to review the level of deference owing to a factfinder while a colorable challenge to his impartiality remains extant."); *see also* 2 ("I conclude that, at minimum, the case should be remanded to the Superior Court to resolve this challenge before unlimited deference would be conferred, even to supported findings.") Additionally, the OISA, acknowledges that there exist "good reasons to accord a fair amount of deference, on appellate review, to a trial court's cold-record factual determinations[,]" (Id. at 5; n.4), but unfortunately, concludes that these "good reasons" do not apply here because, "there remains an outstanding and colorable challenge to the trial judge's neutrality." *Id.*

The conclusions of the OISA, and of the Superior Court Majority Opinion,[5] demonstrate that the deference ordinarily afforded the findings of a trial court judge was not afforded to Judge Sprecher because of a colorable claim of judicial bias. *Id.* at

[5] While the Superior Court Majority Opinion does not explicitly state that judicial bias formed the basis of its decision to grant JNOV, it is evident that this was a factor, since the Superior Court spent four pages of its Opinion criticizing the language of potential bias contained in Judge Sprecher's Opinion. *See, e.g.*, *Berg II*, 189 A.3d at 1057-1061.

5; n.4. Strikingly, rather than simply ordering a new trial before a different trial judge or remanding this matter to the Superior Court for its determination regarding Nationwide's bias claim, some putative majority of this Court agreed that the dismissal and tacit affirmance of the Superior Court's entry of JNOV in favor of Nationwide was proper based upon a finding of actual or perceived bias on the part of the trial judge. This finding is in the face of cases like *Joseph* and *McFall* where this Court has previously held that the proper remedy for a finding of the mere appearance of judicial bias by a trial judge sitting as a fact finder was a new trial, not, as here, simply meting out "frontier justice" by taking away a verdict entered by a trial court and rather than award a new trial, simply find in favor of the opposing party, on the merits.

In addition to the OISA's preference for remand to the Superior Court, the OISR also stated the same preference for "consideration of Nationwide's outstanding appellate issues." *Id.* at 2. *Accord Snyder Brothers, Inc. v. Pa. Public Utility Comm'n*, 203 A.3d 964 (Pa. 2019) (*Per curiam* Order granting Application for Reconsideration of Appellee and remanding matter to the Commonwealth Court to address outstanding appellate issues). Thus, it appears that a majority of the Justices before whom this case was presented (the proponents of the OISA and OISR) agreed, albeit for different reasons, that remand to the Superior Court was appropriate. *See* OISA at 2; 23 and OISR at 2; 59-60.

Despite this facial agreement by four of the members of this Court (a quorum), the reasons for remand are apparently different. Notwithstanding the result here, the

de facto affirmance of the judgment of the Superior Court without an Order of this Court specifically so stating, does not assist in ensuring the protection of this Court from either the appearance of impropriety or the erosion of public confidence in the judiciary. *See League of Women Voters of Pa. v. Commonwealth*, 179 A.3d 1080, 1092 (Pa. 2018) (Wecht, J., single Justice Opinion denying Application for Recusal) *citing Commonwealth v. Tharp*, 830 A.2d 519, 534 (Pa. 2003). To the contrary, it appears at once as some form of "rough" or "frontier justice," and the type of disposition-driven ruling normally eschewed by the Superior Court itself. *See In re M.P.*, 204 A.3d 976, 986 (Pa. Super. 2019) ("We note that this ruling, like all of our rulings, may not be disposition-driven.").

Despite the Bergs' lack of actual or constructive knowledge of the newly identified claim of judicial bias by Nationwide, it is the Bergs who will nevertheless suffer an irretrievable loss of their due process rights if this Court's August 25, 2020 Order remains unchanged.

CONCLUSION

For all of the foregoing reasons, this Court should grant this application for reargument and/or grant reconsideration and amend the August 25, 2020 *per curiam* Order such that this matter is remanded to the Superior Court to: (1) address any of the outstanding appellate issues; or (2) with instructions to remand the case to the trial court for a new trial before different and impartial judge.

Respectfully submitted,

Dated: September 8, 2020

Kenneth R. Behrend
BEHREND LAW GROUP, LLC
The Pittsburgher, Suite 1700
428 Forbes Avenue
Pittsburgh, PA 15219
(412) 780-6519

/s/ Benjamin J. Mayerson

Benjamin J. Mayerson
MAYERSON LAW, PC
1 North Sunnybrook Road
Pottstown, PA 19464
(610)906-1966

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This petition complies with the type-volume limitations of Pa. R. App. P. 2135(a)(1) because this brief contains 2,985 words excluding the parts exempted by Pa. R. App. P. 2135(b).

This petition complies with the typeface and the type style requirements of Pa. R. App. P. 124(a)(4) and 2135(c) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

Respectfully submitted,

Dated: September 8, 2020

/s/ Benjamin J. Mayerson

Benjamin J. Mayerson
MAYERSON LAW, PC
1 North Sunnybrook Road
Pottstown, PA 19464
(610)906-1966

CERTIFICATION OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

Dated: September 8, 2020

/s/ Benjamin J. Mayerson

Benjamin J. Mayerson
MAYERSON LAW, PC
1 North Sunnybrook Road
Pottstown, PA 19464
(610)906-1966