

A P P E L L A T E

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RECENT SUPERIOR COURT DECISION HIGHLIGHTS PERILS OF POST-TRIAL PRACTICE IN PENNSYLVANIA

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The Superior Court's recent decision in *Vietri v. Delaware Valley High School*, No. 648 EDA 2012 (March 22, 2013), brings into sharp focus the intricacies of Pennsylvania post-trial practice and the need to proceed cautiously in preserving appellate rights.

The case features a complicated procedural history, initially stemming from the plaintiff's incorrect filing of a post-trial motion after the trial court granted summary judgment in favor of the defendant. The plaintiff also filed a timely notice of appeal. By letter to the plaintiff's counsel, the Superior Court expressed concern over its jurisdiction, noting that the post-trial motion remained outstanding and that an appeal may not be taken until a valid post-trial motion has been decided. The letter did not address whether the post-trial motion had in fact been properly filed. The appellant's counsel failed to respond to the Superior Court's letter, and the Superior Court quashed the appeal.

Shortly thereafter, the trial court denied the pending post-trial motion and the plaintiff filed another notice of appeal one day later. The Superior Court again quashed the appeal, this time upon the defendant's petition arguing that the new notice of appeal was filed more than 30 days after the summary judgment order became final and therefore was untimely. The Superior Court's order specified that it quashed the appeal without prejudice to the plaintiff's right to seek relief *nunc pro tunc* in the trial court.

The plaintiff followed the Superior Court's advice and filed a petition to appeal *nunc pro tunc* in the trial court. The trial court denied the petition without opinion or explanation. The plaintiff then filed his third appeal to the Superior Court.

The Superior Court held that the trial court abused its discretion in denying the petition for appeal *nunc pro tunc*. The Superior Court first noted that the plaintiff erred by filing a post-trial motion to an order granting summary judgment. Accordingly, the post-trial motion was either a legal nullity or potentially could be construed as a motion for reconsideration, but in neither event would this filing

toll the time to appeal. The plaintiff did, however, file his original notice of appeal within 30 days of the final order entered by the trial court, and so the Superior Court admitted that it "arguably erred" by quashing the plaintiff's first appeal. The Superior Court corrected what it characterized as "a breakdown in this Court that interfered with Appellant's right to appeal" by directing the trial court to enter an order restoring the plaintiff's right to appeal *nunc pro tunc*.

As even this brief overview of the case's complicated procedural history shows, this case highlights several of the many possible pitfalls of Pennsylvania appellate practice:

- First, know when to file post-trial motions and when not to do so. This can be a difficult area. Post-trial motions can be necessary to preserve appellate rights, but the Supreme Court's recent decision in *Newman Development Group v. Genuardi's Family Markets, Inc.*, 52 A.3d 1233 (Pa. 2012), instructs that failure to file a post-trial motion should not result in waiver of a right to appeal unless the rules clearly require a post-trial filing. Lower courts have not always followed that guidance, however. Indeed, just this week, the Superior Court heard argument en banc in a case, *In re Estate of Smaling*, that may give rise to post-trial motion requirements arguably at odds with terms of the Orphans' Court Rules. In light of the understandable concern cases like *Smaling* can cause, parties often will do what the plaintiff did here: file a post-trial motion out of an abundance of caution. But here it was unnecessary; the law has been clear for some time that post-trial motions are not needed after entry of a summary judgment.
- Second, keep track of the 30-day appeal period. There is nothing wrong with filing a post-trial motion out of an abundance of caution, so long as the filer avoids complacency while the post-trial motion is pending. If a post-trial motion is improperly filed, the 30-day appeal period continues to run, and a notice of appeal must be filed within those 30 days or all appel-

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late rights are waived — even if the post-trial motion remains undecided. The plaintiff acted properly here in filing a notice of appeal despite the pendency of his post-trial motion.

- Third, vigilantly protect the appeal once it is filed, and, in particular, promptly respond to any questions from the Court about its validity. Here, the Superior Court wrote to the plaintiff’s lawyer to question whether the appeal was valid even though the post-trial motion was pending, but the lawyer did not respond to the Court. And when it received no response, the Court quashed the appeal.
- Fourth, immediately seek further review if the Court decides to quash the appeal. File a motion for rehearing that explains why the Court erred. If that fails, file a petition for allowance of appeal that asks the Supreme Court to review the order. Otherwise, the appeal is lost. And if the quashal order is entered more than 30 days after the final order from which the appeal was taken, there is little chance the appeal can be resurrected. For example, a second attempt to take an appeal may be met with a motion to quash on the ground that the second appeal is untimely, just as happened in this case.

Here, the plaintiff got lucky. Even though no petition for rehearing was filed regarding the original quashal order, the Court reviewed what happened, recognized that the first quashal order was erroneous, and set in motion a procedure by which the plaintiff could obtain relief through a motion to appeal *nunc pro tunc*. Such motions are sel-

dom granted, however, and this opinion illustrates that this case was an exception. Don’t expect to be as lucky as this plaintiff was. To avoid waiver of any appellate rights, it is critical to retain appellate counsel experienced in handling such procedural complexities. ♦

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