

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

ALYCIA LANE : SEPTEMBER TERM, 2008
:
vs. :
:
CBS BROADCASTING, INC., et al. : NO. 3425

DOCKETED

JUL 26 2016

**N. ERICKSON
DAY FORWARD**

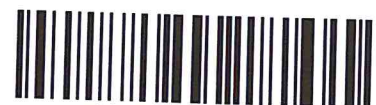
OPINION

Defendant CBS Broadcasting has filed an “Emergency Application for the Exercise of King’s Bench Powers and Extraordinary Jurisdiction.” Because the filing raises conjecture about the integrity of the proceedings of the Court of Common Pleas of Philadelphia of Philadelphia Court, this Court feels compelled to file a brief explanatory opinion for the Justices of the Supreme Court of Pennsylvania.

Since 1991, when the Court of Common Pleas of the First Judicial District began to address the denial of the right to trial guaranteed by Article I Section 13 of the Pennsylvania Constitution¹ by initiating the Day Backward program and in 1995 the Day Forward Program, trial assignments have been made through a judicial team process. Each judicial team has a Team Leader who administers all motions and case management until the case is assigned for trial to a judicial team member.

Since 1995, team leaders have had responsibility for all major jury cases filed in their assigned year. Accordingly, Judge Bernstein has responsibility for all major jury cases filed in the year 2013, and, pursuant to longstanding policy, in 2016, the final year of the 2013 caseload

¹ See *Matoes v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980).



also all cases filed before 2013, which are still pending or have been returned for trial after appeal.

Accordingly, when the Superior Court overruled the Order granting Defendant's Summary Judgment and returned the case for trial in Philadelphia County the case was routinely assigned to Judge Mark I. Bernstein as Team Leader.

From a review of the dockets it appeared that the case was ready for trial. Accordingly, as a courtesy to distinguished and able counsel, the Court requested counsel agree upon a trial date. When this proved unavailing the Court scheduled the case for trial on May 13, 2016.

Counsel for all parties appear to believe, despite no rule authorizing this conduct, that correspondence to the Court raising both procedural and substantive issues is proper as long as opposing counsel is copied on the letter. Accordingly, this Court was deluged with correspondence explaining countless reasons why the selected date was impossible and detailing procedural and substantive issues that in the opinion of counsel should properly be addressed prior to trial. The Court determined that a *Frye* motion had been previously filed and never ruled upon. Accordingly, this Court scheduled a *Frye* hearing for April 6, 2016.

Upon receiving correspondence explaining why the April 6, 2016 date for the *Frye* hearing was impossible, the Court, by his secretary, advised counsel that the *Frye* hearing would be rescheduled to the previously scheduled May 13, 2016, trial date if only if counsel would agree upon a trial date². Subsequent thereto the Court was advised that counsel had agreed upon October 21, 2016, as a date all counsel, parties, and witnesses could be available for trial. Accordingly, the Court rescheduled the *Frye* hearing for May 13, 2016, and scheduled trial on the agreed upon October 21, 2016, date.

² The Court knew that all counsel were available because despite numerous letters explaining why trial could not go forward on May 13, 2016, none had cited counsel unavailability.

While it had not yet been made public, after 29 years Judge Bernstein had decided to retire from active service on the bench in October, 2016. A copy of the letter sent by Judge Bernstein to his colleagues is attached hereto. Obviously, since counsel could not agree on a date prior to October, Judge Bernstein could not be the trial Judge.

A Team Leader should not make unnecessary evidentiary rulings which could bind the hands of a trial Judge. Accordingly, since another Judge would necessarily preside at trial it became inappropriate for Judge Bernstein to preside over a *Frye* hearing.

At the time Judge Bernstein concluded that he could not be the trial Judge the 2013 trial team judges were of Judge Robert Coleman, Judge Angelo Foglietta, Judge Karen Shreeves-Johns, and Judge Frederica Massiah-Jackson. Since Judge Coleman would return to a Criminal Court assignment he was unavailable. It was determined that former President Judge Frederica Massiah-Jackson with over thirty years of experience on the bench including experience as a Civil Team Leader, was the appropriate Judge to try this high profile, intensely litigated case. There is nothing mysterious or unusual about a Team Leader assigning a case to a team member well in advance of trial. This is how the Court has successfully operated since 1991, and reduced a 27,000 case backlog and 6 year delay to trial to a totally current inventory 95% of which is resolved within 2 years of initiation. There is nothing mysterious, suspect, questionable or even unusual in this procedure. Because of Judge Bernstein's retirement and unavailability to try cases in October other individual assignments have been made such as a 24 plaintiff Greyhound bus accident to Judge Angelo Foglietta and the high profile Salvation Army Building Collapse to Judge Teresa Sarmina. Any implication impugning the integrity of judicial assignments in the First Judicial District is grossly misplaced.

In their application the defendant further claims that the actions of former President Judge Frederica Massiah-Jackson subsequent to this assignment for trial were somehow improper as violative of the coordinate judge rule. Initially, it must be noted that the coordinate judge rule applies to substantive and not to procedural rulings.³ It is beyond question that the trial Judge controls all aspects of the procedural manner and order of trial.⁴ *Frye* motions in particular are controlled by the trial Judge. There is no substantive or procedural right to a pretrial ruling on a *Frye* motion. Pennsylvania Rules of Civil Procedure 207.1 which governs all *Frye* Motions at (a) (3) specifically reads:

“...The Court shall initially review the Motion to determine if, in the interest of justice, the matter should be addressed prior to trial. The Court without further proceedings, may determine that any issue of expert testimony be deferred upon trial...”⁵

Indeed a *Frye* motion does not have to be raised prior to trial⁶ and may be raised during trial or, if properly preserved, even in post-trial motions.

Another compelling reason why Motions in Limine should be ruled upon, and particularly *Frye* motions, by the trial Judge is that the Coordinate Judge Rule is inapplicable to Post Verdict motions. Where required, the Post Verdict Motion Judge may overrule any prior ruling in the case whether rendered by that Judge or any other judge.⁷

Accordingly, there is no due process violation or any other impropriety in Judge Massiah-Jackson making the determination that objections to evidence in the nature of a *Frye* motion should subsequently be ruled upon and therefore canceling the previously scheduled hearing.

³ *Riccio v. American Republic Ins. Co.*, 550 Pa. 254, 705 A.2d 422 (1997).

⁴ See *Com. Ex rel. Amoroso v. Amoroso*, 212 Pa. Super. 94, 239 A.2d 878 (1968); Pennsylvania Rules of Evidence 611.

⁵ At Pa. R. Civ. P. 207.1a(4) the rule provides that no response is even required until the Court has reviewed the motions.

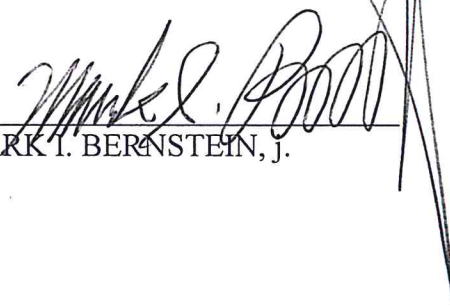
⁶ See Pa. R. Civ. P. 207.1 (b).

⁷ *Riccio v. American Republic Ins. Co.*, 550 Pa. 254, 705 A.2d 422 (1997).

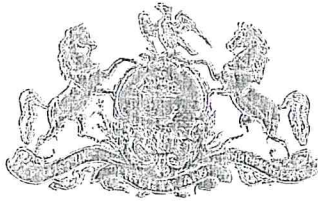
Pursuant to Article V Section 10 of the Constitution of Pennsylvania the Supreme Court has supervisory and administrative authority over the First Judicial District and therefore, when the integrity of the normal operating procedures of the First Judicial District are called into question the Supreme Court is entitled to an explanation. It is hoped that this opinion makes clear that the usual and proper processes of the First Judicial District which have been successfully employed since 1991 were properly applied in this case.

BY THE COURT

7/26/16
DATE



MARK I. BERNSTEIN, J.



FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS
JUDICIAL CHAMBERS

MARK I. BERNSTEIN
JUDGE

Judge Jacqueline Allen
Administrative Judge
516 City Hall
Philadelphia, PA 19107

June 28, 2016

530 CITY HALL
PHILADELPHIA, PA 19107
(215) 686-7335

Dear Judge Allen,

Over twenty-nine years ago I took the same oath of office you did to become a judge. I hope you appreciate as much as I having the opportunity to bring some measure of justice to our citizens. When I became a judge, our court was at the rock bottom of respectability. Thirteen judges had been removed from office due to the "roofers' scandal".

As we "younger" judges began to make noise and raise questions, a top court administrator, schooled in the old ways, came to me and asked me: "Mark, what do you want?" He expected a request for a nicer courtroom, a fancier chambers or a new rug. My unexpected response, a request he was not equipped to accomplish, was: "A court system I can be proud of." I am now very proud that our court has achieved a well-earned reputation for excellence. The National Center for State Courts has described our court as among the best in the country.

It is my intention to resign my Judicial Commission in October 2016 when the 2013 major jury program will be virtually completed.

Although retiring as a Judge, I have no intention of leaving our legal community. I will do mediations and arbitrations, write "Trials of a Common Pleas Judge", continue making annual revisions to my evidence book, teach at the Thomas R. Kline School of Law, work with the Standard Jury Instruction Committee and, as asked, to teach CLEs and present at the State Conference of Trial Judges. I also intend to become more involved with the American Board of Trial Advocates, supporting the jury trial system and standing up and speaking out for wrongly accused judges.

The Midrash, Jewish interpretations, tells this story:

"When Rabbi Ammi's hour to die came, he wept bitterly.

His nephew asked him: "Why do you weep? Is there any Torah you have not learned and taught? Is there any kindness you have not practiced? And you never accepted public office or sat in judgment on another."

The Rabbi replied: "That is why I weep. I was given the ability to extend justice but never carried it out."

I know we will all continue to appreciate our sacred obligation and honor to sincerely "extend justice" to the fullest extent of our ability.

Very truly yours,

MARK I. BERNSTEIN, J.