

A P P E L L A T E

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RECENT SUPERIOR COURT DECISION PROVIDES IMPORTANT LESSONS ON APPELLATE PRACTICE IN CASES REMOVED TO FEDERAL COURT

By *Christian D. Sheehan*

The Pennsylvania Superior Court's recent decision in *Kurns v. Soo Line Railroad*, 2013 Pa. Super. LEXIS 1657 (July 17, 2013), highlights the difficult task that litigants can face in simultaneously navigating the state and federal appellate processes in a case that has been removed to federal court. In *Kurns*, the Court held that the appellant had waived her right to challenge in Superior Court a state trial court's summary judgment decision issued prior to removal by failing to appeal that decision to the Third Circuit after the case was removed.

The *Kurns* Case

The case features a complicated procedural history. In 2007, a former railroad employee filed suit against Soo Line Railroad and several other defendants in the Philadelphia Court of Common Pleas, seeking damages for injuries sustained as a result of exposure to asbestos. In May 2008, the trial court granted summary judgment to Soo Line.

Shortly after that entry of summary judgment, one of the remaining defendants removed the case to a federal District Court. The plaintiff then did two things: (1) she filed a notice of appeal to the Superior Court from the summary judgment order, and (2) she filed a motion asking the District Court to reconsider the state court's summary judgment ruling. The District Court did not act on the plaintiff's motion for reconsideration, but stated in a related order involving other parties that it lacked jurisdiction. Much later, the Superior Court quashed the plaintiff's appeal of the state trial court's summary judgment order, holding that removal of the case to federal court stripped the Superior Court of jurisdiction.

The case proceeded in the District Court as to the remaining defendants, and in February 2009, the District Court granted summary judgment to those defendants. The plaintiff filed a notice of appeal to the Third Circuit from that final judgment, but did not include in her appeal any challenge to the state court's decision granting summary judg-

ment to Soo Line or the District Court's failure to act on her motion to reconsider that ruling. (At this time, the Superior Court had not yet entered its order quashing the appeal of the order granting summary judgment to Soo Line.)

In 2010, the Third Circuit affirmed the District Court's grant of summary judgment to the remaining defendants, and that decision was, in turn, affirmed by the U.S. Supreme Court. Following the Supreme Court's decision, the District Court returned the record to the state trial court, explaining that the case had been disposed of in federal court.

At this point, the plaintiff again tried to obtain appellate review of the Soo Line summary judgment order by filing a new notice of appeal to the Superior Court from the state trial court's May 2008 order granting summary judgment to Soo Line. In its July 17, 2013, decision, the Superior Court disposed of that appeal by affirming on grounds of waiver. Relying on federal law, the Court held that removal of the case to the federal District Court transformed the state trial court's summary judgment order into an order of the District Court. Therefore, the plaintiff was required to seek review of that order in the Third Circuit. Because the plaintiff failed to do so, she was barred from challenging the summary judgment order in a subsequent appeal to the Superior Court.

Lessons for Practitioners

Kurns provides some important lessons on appellate practice.

First, when devising your appellate strategy in a case that has been removed to federal court, be mindful of both federal and state rules of appellate practice, and make sure you take whatever steps are necessary to preserve your rights in both forums. As *Kurns* illustrates, a failure to appeal in one forum can result in waiver of your right to pursue an appeal in the other forum. Accordingly, the safest course is to ap-

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peal to both the state appellate court and the federal court of appeals and let those courts sort out any jurisdictional tangles. Regardless of which system has jurisdiction over your claims, you will have preserved your rights.

Second, be sure to appeal all orders from both systems relating to the decision you wish to challenge. In *Kurns*, that would have meant appealing to the Third Circuit both the state court summary judgment order and the District Court's implicit denial of the plaintiff's motion for reconsideration.

Third, do not assume that you can rely on the statements of a trial court in determining whether an order is appealable or to which court it should be appealed. In *Kurns*, the plaintiff argued that her failure to appeal to the Third Circuit was justified because the District Court said it lacked jurisdiction over a related motion. The Superior Court flatly rejected this argument, reasoning that appellate courts are the final arbiters on such questions, and failure to pursue an issue to the appellate court may result in waiver. ♦

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For more information about Schnader's Appellate Practice Group or to speak with a member of the Firm, please contact:

*Carl A. Solano, Chair
215-751-2202
csolano@schnader.com*

*Christian D. Sheehan
215-751-2143
csheehan@schnader.com*

www.schnader.com
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