[J-45-2017] [MO: Mundy, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ERIE INSURANCE EXCHANGE	:	No. 124 MAP 2016
	:	
	:	Appeal from the Order of the Superior
v.	:	Court dated May 27, 2016 at No. 1119
	:	EDA 2015 which Affirmed the Order of
	:	the Court of Common Pleas of
MICHAEL BRISTOL AND RCC, INC.	:	Montgomery County, Civil Division,
	:	dated March 20, 2015 at No. 2013-
	:	12947.
APPEAL OF: MICHAEL BRISTOL	:	
	:	ARGUED: May 10, 2017

DISSENTING OPINION

JUSTICE WECHT **DECIDED: November 22, 2017**

As I explained in my May 24, 2017 Dissenting Statement,[1] the issue of when the statute of limitations begins to run on an uninsured motorist claim is not properly before this Court. Nevertheless, the learned Majority—apparently eager to overturn more than thirty years of Superior Court precedent[2]—allows Michael Bristol to challenge the exact legal principle that he conceded in the lower courts. Unlike the Majority, I refuse to endorse Bristol's choose-your-own-adventure litigation strategy. Accordingly, I respectfully dissent.

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[1] *See Erie Ins. Exch. v. Bristol*, 160 A.3d 123, 125 (Pa. 2017) (Wecht, J., dissenting).

[2] In an appropriate case, I have no objection whatsoever to this Court reversing this body of precedent, which traces back to the Superior Court's decision in *Boyle v. State Farm Mut. Auto. Ins. Co.*, 456 A.2d 156 (Pa. Super. 1983). This is not an appropriate case.

Before the trial court, Bristol never argued that the four-year statute of limitations governing uninsured motorist claims begins to run only when an insurer explicitly rejects the insured's claim. In opposition to Erie's motion for summary judgment, Bristol argued that Erie "should be estopped from asserting the statute of limitations as a defense" because: (1) Bristol notified Erie that he intended to pursue an uninsured motorist claim *"within four years of the date of the accident*;" and (2) Erie agreed to proceed to arbitration and then appointed an arbitrator. *See* Bristol's Answer to Erie's Motion for Summary Judgment at 4, 9 (emphasis added).[3] In other words, Bristol waived the issue that the Majority resurrects and resolves on the merits. *See* Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

In fact, Bristol conceded that the applicable limitations period commenced on the date of the alleged vehicle accident. *See* Answer to Erie's Motion for Summary Judgment, 10/10/2014, at 2 ¶22 (admitting that the limitations period in this case commenced on July 22, 2005). Bristol argued that Erie waived the statute of limitations defense because it agreed to arbitrate Bristol's claim. *Id.* at 8 ("Because Erie agreed to arbitrate [Bristol's] claim and selected an arbitrator, Erie has waived any claim that this matter is barred by the statute of limitations.").

Similarly, Bristol's Superior Court brief contained no argument regarding when the four-year statute of limitations commenced. Instead, Bristol maintained that the parties' actions effectively *tolled* the statute of limitations such that "filing a Complaint against Erie would have been meaningless surplusage." Bristol's Superior Court Brief at 18.

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[3] *See also* Notes of Testimony, 3/11/2015, at 14 (counsel for Bristol conceding that Bristol would have been required to file a petition to compel arbitration if Erie had not appointed an arbitrator).

Because Bristol never argued that the statute of limitations in his case did not commence on the date that he was injured, it makes sense that this Court's December 29, 2016 Order granting Bristol's Petition for Allowance of Appeal focused upon whether "extra-judicial actions," such as an informal demand for arbitration or the appointment of arbitrators, can "toll the statute of limitations." Order, 439 MAL 2016 (Dec. 29, 2016). According to the Majority, however, that phrasing inadvertently "*constrained consideration* of" the commencement issue. Maj. Op. at 2 n.2 (emphasis added). Indeed. In an extraordinary attempt to fix this "mistake" after oral argument, the Court (over my dissent) issued an order amending our original *allocatur* grant, this time adopting the issue statement exactly as Bristol framed it in his Petition for Allowance of Appeal. *See Erie Ins. Exch. v. Bristol*, 160 A.3d 123 (Pa. 2017).

Ironically, the issue that Bristol presented in his Petition for Allowance of Appeal—much like the arguments Bristol made in the courts below—has absolutely nothing to do with the commencement of the applicable statute of limitations.[4] Rather,

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[4] In its revised order, the Court accepted review of the following issue, taken directly from Bristol's Petition for Allowance of Appeal:

> By affirming its Opinion in *Hopkins v. Erie Insurance Co.*, 65 A.3d 452 (Pa. Super. 2013), and ruling that:
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> > (1) a claimant seeking uninsured or underinsured motorist benefits must file a Complaint or a Petition to Compel Arbitration if the claim does not resolve within four years of the date of the underlying accident, and,
> >
> > (2) a claimant must file a Complaint or Petition to Compel Arbitration, contrary to the plain language of the Arbitration Act of 1927, 42 Pa.C.S. § 7304(a), which requires a claimant to file a Complaint or Petition only when "an opposing party refuse[s] to arbitrate,"
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> did the Superior Court create a new rule that is contrary to prior decisions of this Court and inconsistent with the plain language of the Arbitration Act?

Erie Ins. Exch. v. Bristol, 160 A.3d 123 (Pa. 2017) (*per curiam*).

the issue that Bristol raised (and that the Majority retroactively granted review) concerns the Superior Court's conclusion that, pursuant to *Hopkins v. Erie Insurance Co.*, 65 A.3d 452 (Pa. Super. 2013), Bristol was required to file a petition to compel arbitration in order to *toll* the statute of limitations. *See* Superior Court Opinion at 6 ("[A]s this Court held in *Hopkins*, to toll the running of the statute of limitations, an insured is required to file, in a court, a 'petition to appoint arbitrators [or] to compel arbitration.'"); *id.* at 10 ("First, under the precedent established in *Hopkins*, [Bristol's] extrajudicial demand for arbitration did not commence his action and it did not toll the four-year statute of limitations.").

Perhaps that is why this Court, after adopting Bristol's own issue statement *verbatim*, ventured that it "*understands* this issue to encompass a determination of the time at which a cause of action accrues—thereby triggering the commencement of the statutory period for bringing a claim—in the specific context of an insurance contract containing a mandatory arbitration provision." *Erie Ins. Exch. v. Bristol*, 160 A.3d 123 (*per curiam*) (emphasis added). Needless to say, I do not share this creative "understanding," *see id.* at 125-27 (Wecht, J., dissenting). Even if I did, the Court's revised issue statement cannot change the fact that Bristol failed to preserve the commencement issue in the lower courts. *In re J.M.*, 726 A.2d 1041, 1051 n.15 (Pa. 1999) (holding that issues not raised before the trial or Superior Court are not preserved for appellate review); *see United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").

For whatever reason, and to my puzzlement, today's Majority is willing to overlook the many procedural defects in this case, even though this Court has

considered those same defects to be inexcusable in numerous other appeals.[5] Although the Majority does not tell us why Bristol's case warrants such special indulgences,[6] what is clear is that the time has come for this Court—either by rule or by decision—to commit to clear standards for determining whether a particular case warrants departure from our ordinary issue preservation doctrines. Absent such standards, the unpreserved issues that the Court regularly declines to consider will continue to be indistinguishable from those that we idiosyncratically agree to resolve. In

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[5] *See, e.g., Commonwealth v. Sanchez*, 82 A.3d 943, 969 (Pa. 2013) (finding that a capital defendant waived his claim that trial court failed to "life qualify" prospective capital jurors); *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885, 896 (Pa. 2013) (explaining that issues not raised in a motion for declaratory judgment are waived); *Brayman Const. Corp. v. Com., Dept. of Transp.*, 13 A.3d 925, 932 (Pa. 2011) (holding that appellant waived challenge to plaintiff's standing where it conceded same in the Commonwealth Court); *In re Farnese*, 17 A.3d 357, 368 (Pa. 2011) (explaining that issues raised for the first time on appeal are waived); *Oliver v. City of Pittsburgh*, 11 A.3d 960, 964-65 (Pa. 2011) (holding that any issues not raised before the intermediate appellate court were); *Cash Am. Net of Nev., LLC v. Com., Dept. of Banking*, 8 A.3d 282, 298 (Pa. 2010) (same); *Commonwealth v. Wholaver*, 989 A.2d 883, 893 (Pa. 2010) (holding that capital defendant waived issue regarding prosecutor's penalty-phase rhetoric where trial counsel objected to those remarks on different grounds).

[6] Judging by our case law, the reason is not that it would have been futile for Bristol to raise the argument earlier, since both the trial and Superior Courts were bound by *Boyle*. *See Schmidt v. Boardman Co.*, 11 A.3d 924, 942 (Pa. 2011) (holding that in such circumstances the litigant should "acknowledg[e] the binding nature of the prevailing precedent but merely indicat[e] that it wishes to preserve a challenge for review on later appeal"). Nor is it because the issue that Bristol preserved is broad enough to encompass the issue that the Majority resolves. *See Commonwealth v. Bradley*, 834 A.2d 1127, 1135 (Pa. 2003) (appellant who argued generally at sentencing that he was not subject to the Sentencing Code's "three strikes" provision waived the more specific "recidivist philosophy-based argument" that he raised on appeal). Nor is it material that Erie does not object to Bristol's attempt to argue a waived issue. *See Commonwealth v. Triplett*, 381 A.2d 877, 881 n.10 (Pa. 1977); *accord Newman Dev. Grp. of Pottstown, LLC v. Genuardi's Family Markets, Inc.*, 52 A.3d 1233, 1246 (Pa. 2012) ("[W]e have a strong interest in the preservation of consistency and predictability in the operation of our appellate process, and issue preservation rules play an important role in that process." (internal citation omitted)).

my view, such arbitrary and selective enforcement of our Rules of Appellate Procedure is ill-advised.