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Thomas G. Saylor

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*Justice Thomas G. Saylor**

PREFACE

This article was conceived and written prior to the untimely passing of former Chief Justice Ralph Cappy. The topic is a dialogue and debate that the Chief and I conducted over the years. I chose the subject matter because I thought it conveyed some insight into our relationship, the dynamics of the Court, and significant aspects of the discretionary review process at the Supreme Court level. Had I commenced this effort as a memorial, I likely would have selected a different subject. Nevertheless, I have determined to leave the article as originally written, as I would like to imagine that Ralph would have truly enjoyed revisiting our discussion in a law review format, then calling to remind me, with perfect politeness and good humor, why I was wrong then and remain wrong now. Thus, this article is my modest tribute to my colleague and friend, whose wise counsel I sorely miss.

One of former Chief Justice Ralph J. Cappy's legacies arising from his service on the Pennsylvania Supreme Court is a clearer framework for appellate review. While a jurist, he consistently reinforced his strong belief that standards governing the review process should be carefully observed and adhered to in judicial decision making. He also often expressed his perspective that, ideally, each of the Court's opinions should be written in terms accessible to lawyers and laypersons alike.

Upon being invited to contribute to an issue of *Duquesne Law Review* dedicated to the former Chief Justice, I initially set out to chronicle some of his achievements in clarifying governing review principles.[1] On reflection, however, and consistent with a law-

* Justice, Pennsylvania Supreme Court

1. *See, e.g.*, Morrison v. Dep't of Pub. Welfare, 646 A.2d 565, 570 (Pa. 1994) (Cappy, J.) (differentiating between the concepts of *standard* and *scope* of appellate review).

review format, I selected a narrower subject to probe—a principle which, in relevant part, remains unsettled in its application. Adding some interest, it is a matter as to which Justice Cappy and I respectfully disagreed in the multiple instances in which it surfaced throughout the nearly ten years in which we served together on the Court. My intent is to detail the competing positions, framing a significant part of the discussion in terms of the role, power, and authority of the Pennsylvania Supreme Court.

My subject is one that has been shorthanded as the "right-for-any-reason" doctrine—the principle that an appellate court may sustain a valid judgment or order of a trial or lower appellate court for any valid reason appearing as of record.[2] This general tenet flows from a recognition that it is the judgment or order itself that is the subject of appellate review, rather than any particular reason or argument advanced by the court or prevailing party.[3] The precept may be applied even though the reason for sustaining the judgment was not raised in the trial court, relied on by that court in reaching its decision, or brought to the attention of the appellate courts.[4]

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2. Pennsylvania decisions frequently cited for the principle include: McAdoo Borough v. Pa. Labor Relations Bd., 485 A.2d 761, 764 n.5 (Pa. 1984); Commonwealth v. Shaw, 431 A.2d 897, 899 n.1 (Pa. 1981); E.J. McAleer & Co. v. Iceland Prods., Inc., 381 A.2d 441, 443 n.4 (Pa. 1977); Commonwealth v. Marks, 275 A.2d 81 (Pa. 1971); Hader v. Coplay Cement Mfg. Co., 189 A.2d 271, 274 (Pa. 1963) (quoting Thomas v. Mann, 28 Pa. 520, 522 (1857)); and Sherwood v. Elgart, 117 A.2d 899, 901 (Pa. 1955). Among the more recent Pennsylvania cases in which the doctrine is referenced are: Pa. Dep't of Banking v. NCAS of Del., LLC, 948 A.2d 752, 761-62 (Pa. 2008); Commonwealth v. Moore, 937 A.2d 1062, 1073 (Pa. 2007); Wilson v. Plumstead Twp. Zoning Hearing Bd., 936 A.2d 1061, 1065 & n.3 (Pa. 2007); Commonwealth v. Parker, 919 A.2d 943, 948 (Pa. 2007); and Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa., 923 A.2d 389, 401 (Pa. 2007). The present discussion is limited to the appellate review of judgments and orders arising in judicial proceedings. *Compare, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 88, 95 (1943) (applying the converse rule in appellate review of orders of administrative agencies, i.e., that federal courts will not affirm agency decisions based upon reasoning not considered by the agency).

3. *See Hader*, 189 A.2d at 274-75 (quoting *Thomas*, 28 Pa. at 522) (stating that "[t]he only error upon the record is a wrong reason for a right judgment; but as we review not reasons but judgments, we find nothing here to correct"); *see also Marks*, 275 A.2d at 83. Other jurisdictions applying the practice have stressed the presumption of correctness with which the judgment of the trial court is clothed. *See, e.g.*, Cohen v. Mohawk, Inc., 137 So. 2d 222, 225 (Fla. 1962). From this perspective, it may be said that the precept derives from the same doctrinal roots as does the principle that testimony on appeal must be considered in the light most favorable to a verdict-winner. *Accord* First Union Nat'l Bank v. Turney, 839 So. 2d 774, 777 (Fla. Dist. Ct. App. 2003) (citing *Cohen*, 137 So. 2d at 225).

4. *See McAdoo Borough*, 485 A.2d at 764 n.5; *E.J. McAleer*, 381 A.2d at 443 n.4; *Hader*, 189 A.2d at 274; *Sherwood*, 117 A.2d at 901. The right-for-any-reason doctrine is sometimes couched in mandatory terms, *see, e.g.*, Commonwealth v. Hernandez, 935 A.2d 1275, 1290 n.3 (Pa. 2007), but more often the doctrine appears in discretionary terms, *see, e.g., NCAS of Del.*, 948 A.2d at 761-62. I prefer the latter, in light of the prudential character of the tenet. *See infra* note 10.

The practice of affirming a verdict or order for any valid reason appearing as of record is accepted not only in Pennsylvania but also very commonly in other jurisdictions as well.[5] Most colorfully, in Florida and Georgia, it is sometimes referred to as the "tipsy coachman" rule, deriving from this poetic verse:

> The pupil of impulse, it forc'd him along
> His conduct still right, with his argument wrong;
> Still aiming at honor, yet fearing to roam,
> The coachman was tipsy, the chariot drove home;[6]

The following is a hypothetical example entailing application of the right-for-any-reason principle: A judge presiding over a criminal trial admits material hearsay evidence in the form of an extrajudicial statement by the defendant over his timely objection. The court overrules the objection, opining that the "excited utterance" exception to the hearsay rule applies, because the statement is related to a startling event.[7] The defendant suffers an adverse verdict and appeals, and the hearsay ruling is defended by the Commonwealth (now the appellee) on the basis indicated by the trial court. The appellate court agrees the ruling was incorrect, because substantial time (say several days) had passed between the startling event and the declaration, thus allowing too much opportunity for reflection and potential fabrication to satisfy the concerns of the hearsay rule.[8] Nevertheless, the appellate court observes that the declarant was an adverse party, and, therefore, his statement qualified as an admission of a party-opponent, another hearsay exception.[9] There being no reasonable dispute concerning admissibility on this ground, albeit different from that selected by the trial court, the appellate court may affirm the

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5. *See, e.g.*, Helvering v. Gowran, 302 U.S. 238, 245 (1937); Cmty. Redevelopment Agency v. Abrams, 543 P.2d 905, 921 (Cal. 1975) (quoting Davey v. S. Pac. Co., 48 P. 117, 118 (Cal. 1897) ("No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason.")). *See generally* 5 AM. JUR. 2d *Appellate Review* § 775 (2008).

6. Lee v. Porter, 63 Ga. 345, 1879 WL 2526, at *2 (Ga. 1879) (quoting OLIVER GOLDSMITH, RETALIATION: A POEM INCLUDING EPITAPHS ON THE MOST DISTINGUISHED WITS OF THIS METROPOLIS 8-9 (printed for G. Kearsly, London 1447)).

7. PA.R.E. 803(2).

8. *See generally* Commonwealth v. Pronkoskie, 383 A.2d 858, 860 (Pa. 1978) (plurality) (explaining the foundation for the excited utterance exception).

9. *See* PA.R.A.P. 803(25).

judgment and obviate the inefficiency, burden, and expense associated with a retrial.[10]

The right-for-any-reason doctrine generally functions in a relatively straightforward manner from the perspective of courts sitting in their original appellate jurisdiction.[11] As a corollary, it is sometimes stated that an appellee has no issue-preservation obligations.[12] A difficulty in the application, however, arises when an intermediate appellate court reverses a trial court's judgment or order, and a subsequent appeal is allowed by the Supreme Court.[13] In such scenarios, the former appellee is forced into the position of an appellant. Nevertheless, as the right-for-any-reason doctrine is generally framed, at least at first blush, it would seem that the Supreme Court possesses the same authority to sustain the trial court's judgment or order as does the intermediate appellate court.[14] In light of the parties' role reversal, however, the applica-

10. In such a straightforward example, arguably, the appellate court should affirm without hesitation. *See, e.g.*, Commonwealth v. Edwards, 903 A.2d 1139, 1157-59 (Pa. 2006) (reflecting an application of the right-for-any-reason doctrine in a similar scenario). However, the right-for-any-reason doctrine should not be applied rotely. Rather, in light of the prudential character of the principle, the reviewing court must exercise care in its application to ensure fundamental fairness. *Accord* State v. Wilson, 962 P.2d 636, 639 (N.M. 1998) (explaining that fairness concerns temper the right-for-any-reason precept). For example, in Bearoff v. Bearoff Bros., Inc., 327 A.2d 72 (Pa. 1974), the Court declined to consider an alternative rationale (laches) raised by the appellee because material facts were unresolved. *See id.* at 76 ("[W]here disputed facts must be resolved appellate courts should refrain from assuming the role of a fact-finder in an attempt to sustain the action of the court below."); *accord Chenery Corp.*, 318 U.S. at 88 ("[W]here the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury.").

11. In Pennsylvania, the intermediate appellate courts serve this function for most cases. *See* 42 PA. CONS. STAT. §§ 742, 762, 763 (delineating the appellate jurisdiction of the Pennsylvania Superior and Commonwealth Courts). The Supreme Court, however, also sits as a court of original appellate jurisdiction in various matters, such as direct appeals from matters arising in the Commonwealth Court's original jurisdiction, *see* 42 PA. CONS. STAT. § 723, and capital direct appeals, *see* 42 PA. CONS. STAT. § 9711.

12. *Cf.* Commonwealth v. Katze, 658 A.2d 345, 349 (Pa. 1995) (opinion divided on other grounds) (citing *Sherwood*, 117 A.2d at 901) ("There is a general rule that issues not raised in the lower court may not be addressed on appeal; however this rule is applicable only to appellants.").

13. *See* 42 PA. CONS. STAT. § 724 (delineating the Supreme Court's discretionary review jurisdiction).

14. *See, e.g.*, *E.J. McAleer*, 381 A.2d at 443 n.4 ("We may, of course, affirm the decision of *the trial court* if the result is correct on any ground . . . .") (emphasis added); *Katze*, 658 A.2d at 349 ("The Commonwealth, as the [verdict winner and] non-moving party *before the trial court* in the instant matter, had no obligation to preserve issues at the post-trial stage in the appeal process.") (emphasis added). The following are examples of federal and state high court decisions also maintaining the focus on upholding the decision of the trial court: *Helvering*, 302 U.S. at 245-46; Nat'l Tax Funding, L.P. v. Harpagon Co., LLC, 586 S.E.2d 235, 240 (Ga. 2003) ("[E]ven though *the trial court's* ruling was based upon an insufficient analysis, it was nonetheless correct and is hereby affirmed under the 'right for any reason' rule.") (emphasis added); Maralex Res., Inc. v. Gilbreath, 76 P.3d 626, 631 (N.M. 2003)

tion of the right-for-any-reason principle, particularly when invoked by the Supreme Court *sua sponte*, comes squarely into conflict with the general principle that the appellant must raise and preserve all issues on appeal.[15]

This background information frames the matter about which Ralph and I respectfully differed for many years—the Supreme Court's authority to sustain a valid judgment or order on grounds not relied upon by one who is an appellant before the Court, but who also was the verdict winner.

The debate opened in 1998, at the outset of my first term as a Justice, in a criminal case called *Sholcosky*.[16] I authored a dissent grounded on a substantive legal principle that was not raised or briefed by the appellant (the Commonwealth), which had prevailed at trial yet suffered a reversal in the intermediate appellate court.[17] In doing so, I invoked the right-for-any-reason doctrine. At the time, I was quite familiar with the application of this principle from the perspective of a jurist sitting on an intermediate appellate court, since I had served as a Superior Court judge for four years prior to my election to the Supreme Court. I was not as cognizant, however, of all the considerations pertaining to the perspective of a discretionary review court, and then-Justice Cappy quickly broadened my viewpoint.[18] In *Sholcosky*, he found my sub-

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("[A]n appellate court 'will affirm *the district court* if it is right for any reason . . . .'") (citation omitted) (emphasis added); State v. Canez, 42 P.3d 564, 582 (Ariz. 2002) ("[W]e are obliged to uphold *the trial court's* ruling if legally correct for any reason . . . .") (emphasis added); *In re* C.W., 562 N.W.2d 903, 906 (S.D. 1997); Warren v. State, 862 S.W.2d 222, 225 (Ark. 1993); Robeson v. State, 403 A.2d 1221, 1223 (Md. 1979) ("[W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm.").

15. *See* PA.R.A.P. 302 (reflecting the general rule that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal"); Commonwealth v. Mimms, 385 A.2d 334, 335 n.5 (Pa. 1978) (articulating the "well-established and jurisprudentially sound rule that a court should not *sua sponte* raise an issue not properly placed before it by the litigants").

16. Commonwealth v. Sholcosky, 719 A.2d 1039 (Pa. 1998) (plurality).

17. There were several intertwined legal issues before the Court in *Sholcosky*, but a central debate concerned the use of a prior inconsistent statement, in the form of a report of a defense expert, as substantive evidence pursuant to Commonwealth v. Brady, 507 A.2d 66 (Pa. 1986). The lead opinion declined to consider whether *Brady* extended to opinion (as opposed to fact-bound) evidence because both parties agreed that it did. *See Sholcosky*, 719 A.2d at 1042 n.1. My position was that *Brady* does not extend to opinion evidence, and that the Court had the ability to consider *Brady*'s reach in the case pursuant to the right-for-any-reason doctrine. *See id.* at 1047 (Saylor, J., dissenting).

18. At the time, Ralph had been a member of the Supreme Court for nearly ten years, and therefore was integrally familiar with its ways of operations. Of course, he also maintained a wider perspective arising from his prior years in practice and sitting as a trial judge on the Court of Common Pleas of Allegheny County.

stantive rationale meritorious, but, nevertheless, he concurred in the result obtained under the lead opinion because he did not agree with my application of the right-for-any-reason principle.[19]

This opinion, and our respective positions, opened a period of dialogue and debate between our chambers,[20] which continued throughout the better part of a decade.[21]

For my part in our dialogue, I tended to emphasize the economy concerns, particularly in terms of the interests of the trial courts, which I felt would be impeded by requiring strict adherence to principles of issue presentation and preservation of judgment winners. In this regard, I was troubled by a substantial expenditure of public resources to accommodate a retrial in a case in which it was entirely apparent that the verdict rendered by the fact finder was valid, but in which the verdict winner nevertheless failed to delineate all salient supporting reasons on subsequent appeal. Further, I noted that the express framing of the right-for-any-reason doctrine traditionally has been in terms of upholding the judgment of the fact-finding tribunal,[22] and not necessarily as an intermediate appellate court. I also reasoned that the Supreme Court should have discretion to effectuate substantial justice in at least the same manner as an intermediate appellate court. Thus, I maintained that the Court should confirm its authority to look down on the entire record, determine where the proceedings went awry, and uphold the judgment of the fact finder in appropriate circumstances.

On the other side, Ralph stressed the burden allocated to litigants to identify and frame the issues upon which review was sought, as well as the Supreme Court's role in Pennsylvania's judicial system. On the first of these points, he drew strong support from the provisions of our Rules of Appellate Procedure allocating issue preservation and presentation burdens to appellants, as well

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19. *See id.* at 1045 (Cappy, J., concurring).

20. *See, e.g.*, Commonwealth v. DiNicola, 866 A.2d 329, 346-47 n.7 (Pa. 2005) (Saylor, J., concurring) ("[T]he focus of the right-for-any-reason doctrine in Pennsylvania is on upholding the judgment of the fact-finding tribunal, not that of the intermediate appellate court."); Hutchison *ex rel.* Hutchison v. Luddy, 742 A.2d 1052, 1064 (Pa. 1999) (Cappy, J., concurring) ("While an appellate court may affirm the decision of the court below on an alternative basis, I do not believe that it is jurisprudentially sound for a reviewing court to inject new theories of recovery into the proceedings at the appellate stage, especially when those theories were never brought to the attention of the jury.") (citation omitted).

21. Two of our clerks, John Witherow and Jeffrey Bauman, remain in the service of the Court, and I appreciate their past and present contributions to the underlying intellectual exchange and this article.

22. *See supra* note 14.

as the case law enforcing such obligations.[23] Moving to the second point, Ralph recognized the adage that appellate courts review judgments, not reasons, but he observed that this proposition is somewhat incongruous with the operations of a discretionary-review court selecting legal issues for review.[24] Further, the former Chief Justice expressed great concern with courts deciding issues *sua sponte*, in the absence of developed arguments from the parties.[25] He also cautioned that, where the parties are not aware of the significance of an issue at trial, they might not develop an adequate record upon which to decide the unanticipated issue.[26]

Ralph readily acknowledged that the right-for-any-reason rule often has been framed in terms of the original judgment or order. He observed, however, that in application at the Supreme Court level, the precept had largely been confined to situations in which the Court was sitting in a direct-review capacity,[27] or affirming the order of an intermediate appellate court based upon an alternate rationale.[28] Ralph perceived a lack of precision in the way the rule had been expressed, which he attributed to the fact that the scenario in debate simply was not at issue in most of the right-for-any-reason decisions. Ultimately, he maintained that the more jurisprudentially sound approach would be to allow an appellate court to *affirm* a decision by the lower court on any basis, but to allow an appellate court to *reverse* the intermediate appellate court only on grounds raised, briefed, or argued by the appellant.

It has always seemed to me that some of former Chief Justice Cappy's points, when viewed independently, would vitiate any sort

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23. *See supra* note 15.

24. *See* PA.R.A.P. 1114 (comment) (delineating criteria relevant to the selection of cases for discretionary review); Internal Operating Procedures of the Supreme Court § 5 (same).

25. *See* Wiegand v. Wiegand, 337 A.2d 256, 257 (Pa. 1975) (observing that "*sua sponte* determinations raise many of the considerations that led this Court to require without exception that issues presented on appeal be properly preserved for appellate review by timely objection in the trial court.") (citing Dilliplaine v. Lehigh Valley Trust Co., 322 A.2d 114 (Pa. 1974), and Commonwealth v. Clair, 326 A.2d 272 (Pa. 1974)); *see also* Pa. Dep't of Transp., Bureau of Driver Licensing v. Boros, 620 A.2d 1139, 1143 (Pa. 1993).

26. *See* Phillips Home Furnishings, Inc. v. Cont'l Bank, 354 A.2d 542, 544 (Pa. 1976); *see also supra* note 10.

27. *See, e.g.*, Mazer v. Williams Bros. Co., 337 A.2d 559, 561-62 & n.6 (Pa. 1975); Commonwealth v. Allsup, 392 A.2d 1309, 1311 (Pa. 1978); *In re* Prynn's Estate, 315 A.2d 265, 267 & n.9 (Pa. 1974).

28. *See, e.g.*, *NCAS of Del.*, 948 A.2d at 761-62; *Wilson*, 936 A.2d at 1065; *Parker*, 919 A.2d at 951; *E.J. McAleer*, 381 A.2d at 443 & n.4; Gilbert v. Korvette, Inc., 327 A.2d 94, 96 & n.5 (Pa. 1974).

of right-for-any-reason rule.[29] For example, a strict prohibition of *sua sponte* treatment of issues would foreclose any independent review of the validity of a verdict, even in direct-review cases. Some of his other reasons (e.g., the focus on the scope of an allocatur grant, the disadvantages of proceeding in the absence of briefing) could be addressed via procedural measures, such as carefully tailored allocatur grant orders or supplemental briefing requests.[30] Nevertheless, when viewed collectively, Ralph's points form a strong core position centered on the appropriate position, role, and functioning of the Supreme Court in its discretionary review capacity.

To bring the previous example of a trial court's hearsay ruling full circle, suppose that the intermediate appellate court merely rejected that ruling and reversed the judgment of sentence on the basis that the defendant's declaration was not an excited utterance, but did not consider any alternative rationale for upholding the verdict.[31] The matter reaches the Supreme Court on discretionary review, in which the Commonwealth (now the appellant) still does not invoke the hearsay exception for adverse-party admissions. Whereas the intermediate appellate court clearly had the ability to uphold the verdict based on the alternative rationale, it presently remains unsettled whether the Supreme Court would have the ability to do so.

For my part, I still see benefits in maintaining a full measure of discretionary authority in the Supreme Court to reinstate the verdict. Particularly in light of Ralph's perspective, however, I understand that there are multiple hurdles, not the least of which is the legitimate disfavor associated with *sua sponte* review. Given such obstacles and the prudential character of the right-for-any-reason doctrine, even if the power is available to reverse an intermediate appellate court for reasons not invoked by the appellant, it may be that its exercise will be appropriate only in relatively rare instances. In the end, where such a high level of caution and prudence is necessary, the Court may decide (consistent with

29. Of course, if the former Chief were holding the pen presently, he might say that my own points are in tension with the appellate rules and the judicial restraint reflected in several of the Court's decisions. *See supra* notes 15 and 25.

30. *See, e.g.*, Am. Future Sys., 923 A.2d at 395 (reflecting the issuance of an order inviting supplemental briefing on a dispositive issue which was not addressed by the intermediate appellate court or pursued on appeal); Pantuso Motors, Inc. v. Corestates Bank, N.A., 798 A.2d 1277, 1280-81 (Pa. 2002).

31. *See supra* notes 7-9 and accompanying text.

Ralph's position) that it simply is not worth leaving the avenue open.

Regardless of the ultimate fate of the right-for-any-reason rule in our Court, my experience with former Chief Justice Cappy highlights another of his contributions, arising from his emphasis on openness and collegiality. The fact that our dialogue on this issue persisted for so many years discloses an inherent drawback of a seven-member Court—given the variety of perspectives in play, the Court sometimes appears to move at a glacial pace.[32] Ralph understood that progress must sometimes occur incrementally and, both before and after his ascension to Chief Justice of Pennsylvania, he strove to maintain an atmosphere most conducive to positive movement. His period of leadership was marked by free dialogue and a respect for differences, in furtherance of the institutional interests of the Court, as well as the interests of the public at large. Certainly, my own personal and judicial perspective has been enriched by the above (and many other) instances of discourse with my distinguished friend and former colleague.

32. Although the pace of judicial movement may be frustrating to judges and practitioners alike, the structure of our judicial system does serve as an inherent safeguard within the design of government.