The Burger Court Opinion Writing Database

Firestone Tire & Rubber Co. v. Risjord

449 U.S. 368 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 7, 1981

RE: 79-1420 - Firestone Tire & Rubber Co. v. Risjord

MEMORANDUM TO THE CONFERENCE:

I agree with Bill Rehnquist's analysis and request he show me as joining his separate opinion.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 4, 1980

RE: No. 79-1420 Firestone Tire & Rubber Co. v. Risjord

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 4, 1980

Re: 79-1420 - Firestone Tire & Rubber Co. v. Risjord

Dear Thurgood,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

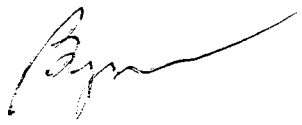
December 4, 1980

Re: 79-1420 - Firestone Tire & Rubber Co. v. Risjord

Dear Thurgood,

With the following reservation, I join your opinion. The reservation is that I am unconvinced that the inherent or fundamental nature of the issue should be an independent and separate criterion for identifying an appealable order under Cohen. When the other necessary factors are shown, that the issue has substantial bearing on the outcome should be enough. Hence, I disagree with the paragraph of the circulating draft beginning at the bottom of page 7 and ending on page 8.

Sincerely,



Mr. Justice Marshall

Copies to the Conference

pp 1, 4, 5, 9, 11

3 DEC 1980

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1420

Firestone Tire & Rubber Company, Petitioner, *v.* John C. Risjord. } On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[January —, 1981]

JUSICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a party may take an appeal, pursuant to 28 U. S. C. § 1291,[1] from a district court order denying a motion to disqualify counsel for the opposing party. The United States Court of Appeals for the Eighth Circuit held that such orders are not appealable, but made its decision prospective only and therefore reached the merits of the challenged order. We hold that orders denying motions to disqualify counsel are not appealable final decisions under § 1291, and we therefore vacate the judgment of the Court of Appeals and remand with instructions that the appeal be dismissed for lack of jurisdiction.

I

Respondent is lead counsel for the plaintiffs in four product liability suits seeking damages from petitioner and other manufacturers of multipiece tire truck rims for injuries caused by alleged defects in their products.[2] The complaints charge

[1] 28 U. S. C. § 1291 provides, in relevant part: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where direct review may be had in the Supreme Court."

[2] Pursuant to 28 U. S. C. § 1407, the Judicial Panel on Multidistrict Litigation has ordered these and other suits against multipiece truck tire

PP. 1, 4, 5, 7, 9, 10

9 DEC 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1420

Firestone Tire & Rubber Company, Petitioner, *v.* John C. Risjord. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[January —, 1981]

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a party may take an appeal, pursuant to 28 U. S. C. § 1291,[1] from a district court order denying a motion to disqualify counsel for the opposing party in a civil case. The United States Court of Appeals for the Eighth Circuit held that such orders are not appealable, but made its decision prospective only and therefore reached the merits of the challenged order. We hold that orders denying motions to disqualify counsel are not appealable final decisions under § 1291, and we therefore vacate the judgment of the Court of Appeals and remand with instructions that the appeal be dismissed for lack of jurisdiction.

I

Respondent is lead counsel for the plaintiffs in four product liability suits seeking damages from petitioner and other manufacturers of multipiece truck tire rims for injuries caused by alleged defects in their products.[2] The complaints charge

[1] 28 U. S. C. § 1291 provides, in relevant part: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where direct review may be had in the Supreme Court."

[2] Pursuant to 28 U. S. C. § 1407, the Judicial Panel on Multidistrict Litigation has ordered these and other suits against multipiece truck tire

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 11, 1980

Re: No. 79-1420 - Firestone Tire & Rubber Company v. Risjord

Dear Bill:

I am not inclined to make the changes that you have suggested because I do not really believe that any logical inconsistency is present. If an order loses its "finality" for purposes of analysis under § 1291 simply because the trial court has the power to reconsider it, then probably no order is truly "final." For example, courts generally permit appeal of orders denying motions for access to grand jury records, even though the grand jury has not finished its sitting and criminal charges that it might bring are not fully disposed of. And yet plainly, the party seeking access can, should it develop new information, seek reconsideration of the denial. Similarly, in Cohen itself, as in our cases on double jeopardy and the right to bail, the party that chose to appeal always had the option of seeking reconsideration in the trial court. The existence of this option did not foreclose a judicial finding that the order was "final" within the meaning of § 1291.

In my judgment, the availability of reconsideration bears solely on the question whether the challenged order is effectively unreviewable on appeal following final judgment. When this Court has found an order effectively unreviewable absent immediate appeal, the trial court's

grant of a motion for reconsideration after more facts developed simply would not have cured the harm complained of. Here, the grant of such a motion could give virtually complete relief.

Consequently, I see no necessity for the changes that you suggest.

Sincerely,

T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 13, 1981

MEMORANDUM TO THE CONFERENCE

Cases held for No. 79-1420 - Firestone Tire & Rubber Co. v. Risjord

Two cases have been held pending our decision in Firestone.

McAlpin v. Armstrong, No. 80-431.

This petition arises from a private securities fraud action. Approximately two years after the suit was filed, petitioners, who are defendants in the action, moved to disqualify the law firm then representing the plaintiffs on the ground that a partner in the firm had formerly been involved in a parallel federal investigation of petitioners. When the trial court declined to disqualify the firm, petitioners appealed to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1291. A panel of that court held that the trial court had erred. The Second Circuit then reheard the case en banc, overruled its prior decisions and held that orders denying disqualification motions were not appealable under § 1291. Nevertheless, in order to clarify the law of the Circuit, the court made its decision prospective only and affirmed on the merits the order of the District Court refusing to disqualify counsel for the plaintiffs.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 11, 1980

Re: No. 79-1420 - Firestone Tire & Rubber v. Risjord

Dear Thurgood:

Please join me in your recirculation of 9 December.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 5, 1980

79-1420 Firestone Tire & Rubber Co. v. Risjord

Dear Thurgood:

I join your opinion, but do suggest that we reserve - as requested by the SG - the question of appealability under §1291 in a criminal case. A footnote along the following lines - perhaps added to fn. 8 on page 4 - would reserve the issue:

> "Neither do we express any view on whether an order denying a motion to disqualify counsel in a criminal case would be appealable under §1291."

Sincerely,

L. Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 8, 1980

Re: No. 79-1420 Firestone Tire & Rubber Company v. Risjord

Dear Thurgood:

I think you have written a good opinion in this case, and anticipate joining it. I have one problem with it which it seems to me you could accommodate without any change in the major thrust of the opinion, though of course you will know that better than I.

On page 7, you say:

> "An order denying a disqualification motion meets the first part of the 'collateral order' test. It 'conclusively determine[s] the disputed question'".

At page 11 of the opinion, in the first paragraph of footnote 13, the opinion states:

> "If additional facts in support of the motion develop in the course of the litigation, the moving party might ask the trial court to reconsider its decision."

It seems to me that these two quotes are not entirely consistent, and that the logical resolution of the inconsistency would be to say that an order denying a disqualification motion does not meet the first part of the "collateral order" test. If further evidence may be adduced during the course of the trial which could persuade the trial judge to reverse himself and grant the motion to disqualify, it would seem to me that the order denying a motion to disqualify does not "conclusively determine the disputed question".

I realize that one could break this down into daily, indeed hourly, segments of the trial, and judge finality at the close of each segment, but this is not what our cases have done before, and I don't think it makes much sense as a matter of judicial administration.

I can be relatively easily satisfied on this somewhat minor problem: Would you be willing to change the language on page 7 to which I have previously referred to something like "We may assume without deciding that an order denying a disqualification motion meets the first part of the 'collateral order' test, because it 'conclusively determine[s] the disputed question' and allows challenged counsel to continue his representation"? If so, I will be happy to join.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: DEC 12 1980

Recirculated: _____

No. 79-1420 Firestone Tire & Rubber Co. v. Risjord

JUSTICE REHNQUIST, concurring.

I agree with the result in this case and the analysis of the Court so far as it concerns the question whether an order denying disqualification of counsel is "effectively unreviewable on appeal from the final judgment." The Court's answer to this question is dispositive on the appealability issue. Since it is completely unnecessary to do so, however, I would not state, as the Court does, ante, at 7:

> "An order denying a disqualification motion meets the first part of the 'collateral order' test. It 'conclusively determines the disputed question,' because the only issue is whether challenged counsel will be permitted to continue his representation."

In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), Mr. Justice Jackson stressed that the order before the

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

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1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1420

Firestone Tire & Rubber Company, Petitioner, *v.* John C. Risjord. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[January —, 1981]

JUSTICE REHNQUIST, concurring.

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> "An order denying a disqualification motion meets the first part of the 'collateral order' test. It 'conclusively determines the disputed question,' because the only issue is whether challenged counsel will be permitted to continue his representation."

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), Mr. Justice Jackson stressed that the order before the Court was "a final dispositon of a claimed right" and specifically distinguished a case in which the matter was "subject to reconsideration from time to time." *Id.*, at 546–547. Just recently in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), we held that an order denying class certification was not appealable under the collateral order doctrine, in part because such an order is "subject to revision in the District Court." *Id.*, at 469. The possibility that a district judge would reconsider his determination was highly significant in *United States* v. *MacDonald*, 435 U. S. 850, 858–859 (1978),

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

p. 1

From: Mr. Justice Rehnquist

Circulated: _____

2nd DRAFT

Recirculated: JAN 8 1981

SUPREME COURT OF THE UNITED STATES

No. 79-1420

Firestone Tire & Rubber Company, Petitioner, *v.* John C. Risjord.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[January —, 1981]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring.

I agree with the result in this case and the analysis of the Court so far as it concerns the question whether an order denying disqualification of counsel is "effectively unreviewable on appeal from the final judgment." The Court's answer to this question is dispositive on the appealability issue. Since it is completely unnecessary to do so, however, I would not state, as the Court does, *ante*, at 7:

> "An order denying a disqualification motion meets the first part of the 'collateral order' test. It 'conclusively determines the disputed question,' because the only issue is whether challenged counsel will be permitted to continue his representation."

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 4, 1980

Re: 79-1420 - Firestone Tire & Rubber
v. Risjord

Dear Thurgood:

Please join me.

Respectfully,

John

Mr. Justice Marshall

Copies to the Conference