Appellate Lineup: Looking Back at Recent Pennsylvania Cases of Note and Forward to Those on Deck

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Litigation Legal Perspective

(by **Joseph Schaeffer** and **Michael Libuser**)

Major League Baseball's Opening Day is symbolic: for a short while, every one of the 30 teams has a chance at the World Series and every one of the 26 players on those teams' active rosters has a chance at emerging as a superstar. Over 162 games and thousands of at-bats, however, the winning teams and superstars separate themselves from the rest of the pack. Most of those games and at-bats will be remembered only by the participants, but a special few will live on in memory.

Litigation is not much different. Of the thousands of decisions issued each year by Pennsylvania's appellate courts, most are relevant only to the parties to the dispute. A handful, though, have far broader consequences—whether by announcing a new legal principle or applying an existing legal principle in a novel manner. In this *Legal Perspective*, we highlight several recent decisions and a few that appear on the horizon.

Balls or Strikes? Reviewing the Pennsylvania Appellate Courts' Recent Decisions

***Sullivan v. Werner Co.*, 306 A.3d 846 (Pa. 2023)**

Sullivan left undisturbed the longstanding prohibition on the admission of industry or government standards evidence in strict products liability cases. The defendant, a scaffold manufacturer, attempted to avoid liability in a design defect claim, in part by showing its compliance with OSHA and other standards. In a split decision, three of the six Pennsylvania Supreme Court Justices who presided over the appeal rejected that defense. *Sullivan* was unexpected. The Court adopted the prohibition on compliance evidence in the 1980s, in *Lewis v. Coffing Hoist*, based on an even earlier decision, *Azzarello v. Black Bros. Co.*, in which the Court barred consideration of negligence concepts in the strict liability context. But because the Court overruled *Azzarello* in 2014, in *Tincher v. Omega Flex, Inc.*, courts and commentators expected the Court to overrule *Lewis*. The Court did the opposite but, given the lack of a majority opinion, could revisit the issue.

***KEM Resources, LP v. Deer Park Lumber, Inc.*, No. 10 MAP 2023, — A.3d —- (Pa. 2024)**

In February, the Pennsylvania Supreme Court held that accounting claims under 68 P.S. § 101, governing the rights of a co-tenant not in possession to its share of rents, are subject to a six-year statute of limitations. Deer Park's predecessor-in-interest leased out thousands of acres of land for oil and gas development, receiving $12.6 million up front. After KEM's own predecessors-in-interest established a 50 percent stake in the same oil and gas interests, KEM sought an accounting from Deer Park of its share of monies received under the lease. The appeal resulted in two important holdings. First, the Pennsylvania Supreme Court reaffirmed that a party need not plead a statute if the allegations bring the case within the statutory scope. Second, the Court held that, absent a specific statute of limitations for a statutory accounting claim, Pennsylvania's catch-all, six-year statute of limitations applies. Though providing welcome certainty, this decision provides co-tenants additional time to seek an accounting while also expanding the potential scope of liability.

Batter Up! Cases of Note before the Pennsylvania Supreme Court

***Santiago v. Philly Trampoline Park, LLC*, 291 A.3d 1213 (Pa. Super. 2023), *appeal granted*, No. 29 EAL 2023, 2023 WL 5947576 (Pa. 2023)**

Parents routinely sign agreements waiving liability for injuries to their children. But those agreements may have limited force, it turns out. This case involved children injured at Sky Zone trampoline parks. Before entering the parks, one parent of each of the injured children waived the parks' liability and agreed to arbitrate any disputes outside of court. Although the agreements stated they were binding on the parents' spouses and children, the Pennsylvania Superior Court held that the parents who signed the agreements bound neither their spouses nor their children. An affirmance in this case would solidify a sea change for potential liability of companies that provide risk-inherent services, particularly in the digital age of waivers. If the spouses and children can sue for injuries in court, the waivers are arguably meaningless.

***Halpern v. Ricoh U.S.A., Inc.*, 299 A.3d 1023 (Pa. Super. 2023), *appeal granted*, No. 263 EAL 2023, 2024 WL 804876 (Pa. Feb. 27, 2024)**

The Pennsylvania Supreme Court is poised to consider whether manufacturers who fail to disclose latent defects in their products violate the prohibition on "fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding" in the Unfair Trade Practices and Consumer Protection Law (UTPCPL). The Pennsylvania Superior Court has long held that the prohibition on "fraudulent or deceptive conduct" does not impose an affirmative obligation on manufacturers to disclose latent defects, going back to the 2001 decision in *Romeo v. Pittsburgh Associates.* The Superior Court reaffirmed *Romeo* in *Halpern*, concluding that there is no UTPCPL failure-to-disclose liability absent some underlying duty. If the Pennsylvania Supreme Court disagrees, manufacturers will face a much broader scope of liability. Caught up in this issue is whether public advisories of defects, such as recalls, would be enough, or if manufacturers will need to provide proof of actual notice to each consumer.

***Ungarean v. CNA*, 286 A.3d 353 (Pa. Super. 2022), *appeal granted*, 2023 WL 4530116 (Pa. 2023), and *MacMiles, LLC v. Erie Ins. Exchange*, 286 A.3d 331 (Pa. Super. 2022), *appeal granted*, 2023 WL 4528617 (Pa. 2023)**

These related appeals ask the Pennsylvania Supreme Court to decide whether business interruption insurance policies extend to losses incurred due to governmental closure orders and limits on business activities during the COVID-19 pandemic. The policies covered "direct physical loss of or damage to property," which the Pennsylvania Superior Court interpreted, somewhat inconsistently, to apply (1) only where there is tangible property damage or injury (*MacMiles*) *and* (2) even without any tangible property damage or injury (*Ungarean*). These cases are difficult to reconcile—particularly because they were decided by the same judges on the same day. How the Pennsylvania Supreme Court resolves this matter likely will determine whether the Commonwealth is an outlier jurisdiction recognizing coverage for COVID-19 business interruption claims or joins the majority in finding that such coverage is unavailable.

***Freilich v. SEPTA*, No. 327 CD 2022, 2023 WL 4370703, 302 A.3d 1261 (Table) (Pa. Commw. July 6, 2023), *appeal granted*, No. 245 EAL 2023, 2024 WL 1044586 (Pa. 2024)**

This appeal involves a challenge to the statutory cap on damages recoverable against the Commonwealth. Freilich was injured when a Southeastern Pennsylvania Transportation Authority (SEPTA) bus ran over her foot, and SEPTA conceded liability. But while the parties stipulated to a $7 million jury verdict, the cap reduced Freilich's nominal recovery to $250,000. After deductions, including for attorneys' fees, the net award fell to zero. Freilich argued the cap violated her state constitutional rights to a jury trial and a remedy. The Commonwealth Court disagreed, but one judge urged the Pennsylvania Supreme Court to revisit the issue and suspend the cap until the General Assembly increases it. Notably, the parties will address the issue whether, if the cap is unconstitutional, the entire statute under which the Commonwealth partially waived its sovereign immunity is also unconstitutional. This appeal could expand governmental liability and reflects the Pennsylvania Supreme Court's trend of considering requests to overrule relatively recent precedents.

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