

# BENNETT, BRICKLIN & SALTZBURG LLC

**Subject:** Summary of Cases Reported in Pa. Law Weekly of August 24, 2009

**Date:** August 28, 2009

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## Negligence - Sports Injuries – No Duty Rule

Zeidman v. Fisher, Pa. Superior Court, opinion by Cleland, J., filed August 13, 2009 (2009 W.L. 2462563) (Pa. Super.).

The Superior Court reversed the lower court's entry of summary judgment for the defendant (per Manfredi, J.), holding that the issues of duty, negligence and comparative negligence were issues to be determined by the jury or finder of fact.

Plaintiff was playing in a golf outing and one of his partners was defendant Fisher. After plaintiff teed off, he drove forward to see whether the group in front was out of range of his golf partners, who hit longer balls. On his return, he reached a point about 75 to 100 yards from the tee box and Fisher, teeing off, duck-hooked his shot, striking plaintiff in the face. It was noted that plaintiff testified that he never signaled to the others that it was safe to tee off.

In reversing, the Superior Court panel noted that the lower court had invoked the assumption of risk doctrine and the closely related "no duty" rule in concluding that defendant was not guilty of negligence. The Superior Court panel stated the following which does not bode well for those arguing for the application of the "no duty" rule:

We acknowledge the continuing vitality of the assumption of risk doctrine remains in doubt . . . wherein the viability of the doctrine has been debated in an arena now occupied by comparative negligence. We also acknowledge the similarity and, at times, equivalency of the doctrine to the 'no duty' rules.

In reviewing the deposition testimony of the plaintiff, the Superior Court held that it raised an issue of material fact regarding the plaintiff's conscious recognition of risk such that the trial court was without basis in concluding plaintiff assumed the risk of injury. Further, when the court examined the propriety of summary judgment under the "no duty" rule, it reached the same conclusion. The opinion added: "Our Supreme Court has compared the 'no duty' rule with the assumption of risk doctrine." [Note: Compared possibly but not equated.]

The Superior Court acknowledged that Pennsylvania courts have applied the "no duty" rule to spectator injuries at sporting events. However, the Superior Court concluded that the plaintiff had presented evidence vitiating the predicate of the assumption of the risk and no duty rules that the risk of injury was one inherent or common, frequent, and expected in the game and therefore has raised

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a genuine issue of material fact as to whether defendant owed him a duty of care.

P.S. Defendant's application for oral argument was denied.

Mary Ellen has a copy of the opinion for your review.

### **Erasure of Court's Opinions**

Previously reported upon was a \$24 million verdict in the case of Klein v. Amtrak, in which Joe Roda represented two plaintiffs who sustained catastrophic electrical burns when coming in contact with wires over trains upon which they were trespassing. The verdicts included huge amounts for punitive damages. Defendants' post trial motions were denied by Judge Stengel and an appeal was filed with the Third Circuit.

Shortly after oral argument before the Third Circuit, the Third Circuit agreed to remand the case to the trial court which, in turn, agreed to vacate eight of its published opinions and to "direct" LEXUS and WestLaw to remove them from their data bases. I would add that these opinions were not only controversial but detrimental to defendants' positions on the issues of punitive damages and the duty owed to minor trespassers who are close to reaching their majorities.

JPF/mee