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## CIVIL PRACTICE

### Alive and Well

#### Assumption of risk doctrine remains a valid defense

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In a July 31, 2006, *Pennsylvania Law Weekly* article headlined "Dead or Alive? The assumption of risk doctrine in Pennsylvania," 29 PLW 860, I reviewed the status of the assumption of risk doctrine in its various forms and concluded that doctrine, although not clearly delineated at times, remained a valid defense in Pennsylvania civil litigation matters.

The 2006 article noted that the doctrine can essentially be divided into two categories. The assumption of risk doctrine in its primary and strict sense applies where a plaintiff fully understands a specific risk of injury but nevertheless voluntarily chooses to encounter it under circumstances that manifest a willingness to accept the risk.

In contrast, the assumption of risk doctrine in its secondary sense is synonymous with the concept of contributory negligence and is defined as a failure to exercise reasonable care for one's own safety.

Pennsylvania cases, such as *Vargus v. Pitman Manufacturing Co.*, 510 F.Supp. 116 (E.D.Pa. 1981), analyzing this dichotomy have noted that, where the conduct of the plaintiff leading to the accident is close in time and space to the accident, the principles of assumption of the risk and contributory negligence tend to overlap. In those circumstances, it appears that comparative negligence principles should be applied rather than the assumption of risk doctrine as there may not have been time for the plaintiff to have made a deliberate and voluntary decision to face a known and obvious danger.

As such, the *Vargus* court held that, while the assumption of risk doctrine in its secondary sense should be considered to be merged into the definition of contributory negligence, the assumption of risk defense, in its primary and strict sense should be viewed as having survived as a separate and distinct defense that can still serve as a complete bar to a personal injury claim.

### The Doctrine Reaffirmed

Two recent decisions handed down by the same panel of judges in the Commonwealth Court confirm that the assumption of risk doctrine remains alive and well in Pennsylvania. Although the decisions do not specifically refer to the primary and strict sense of the doctrine, it appears that the defense was applied with that concept in mind to bar the plaintiff's causes of action.

In *Cochrane v. Kopko*, 2009 WL 1531646, PICS Case No. 09-0956 (Pa. Commw. June 3, 2009), Judges Mary Hannah Leavitt, Johnny Butler and Jim Flaherty of the Commonwealth Court recognized the continuing validity of the assumption of the risk doctrine in Pennsylvania by affirming a trial court's decision that a county did not breach any duty of care to a prison inmate injured in his cell.

In so ruling, the appellate court noted that finding that the inmate assumed the risk of injury from a known and avoidable danger is simply another way of expressing the lack of any duty on the part of the possessor of land to protect an invitee against such dangers.

Concisely, in *Cochrane*, the court found that an inmate assumed the risk of his own injuries when he allegedly tried to slide open his malfunctioning cell door from his top bunk bed as opposed to getting down off the bed and to the floor first and attempting to open the door from that safe position. As noted in the court's opinion, the inmate left himself open to "the mercy of gravity" and fell off his top bunk and, on the way down, hit the sink in the cell and also struck the cell door, allegedly resulting in personal injuries to the inmate.

Apparently, the inmate had chosen not to come down off the bed because that process involved putting a foot down on a sink, sliding down and putting his other foot on the sink, stepping down onto the toilet, and then finally hopping to the floor.

In the separate case of *Vinikoor v. Pedal Pennsylvania Inc.*, PICS Case No. 09-0948 2009 WL 1544267, (Pa. Commw. June 4, 2009), the same panel of Commonwealth Court Judges again confirmed that the assumption of risk doctrine remains a viable defense in Pennsylvania with its decision that a participant in a bike tour assumed the risks inherent in biking on highways.

In *Vinikoor*, the defendant bike tour organizer had created a route and provided a map to the cyclists in which certain caution areas were noted. The map did not note a caution at the intersection where the front tire of the plaintiff's bike caught a groove and caused the Plaintiff to crash and be injured.

The court found that the plaintiff knew, or should have known that falling and encountering defective road conditions were part of the risks of cycling on roadways and, therefore, the plaintiff was found to assume the risks associated with that activity.

The court also noted that the no-duty rule under the assumption of risk doctrine provides that a defendant owes no duty to warn, protect or insure against risks that are common, frequent, expected, or a known part of the activity at issue.

As such, the Commonwealth Court affirmed the entry of summary judgment in favor of the bike tour operator for these reasons as well as other reasons noted in the opinion.

These two recent Commonwealth Court opinions confirm that the assumption of risk defense remains valid under Pennsylvania law, at least in the strict and primary sense of the doctrine, to serve as a complete bar to a plaintiff's cause of action where a plaintiff voluntarily and purposefully chooses to encounter a known risk of harm and is injured as a result. Even with these two opinions however, clarification, confirmation, and guidance from the Pennsylvania Supreme Court as to the status of the assumption of risk doctrine in this jurisdiction would still be a welcomed development in Pennsylvania jurisprudence.

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