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Pa. Justices Evenly Split on Waiver of Risk in Drowned Triathlete Case

The Pennsylvania Supreme Court has reached an impasse on the issue of whether a waiver prevents the widow of a man who died competing in a triathlon from suing, effectively upholding a lower court's ruling that she was barred from filing a lawsuit.

By P.J. D'Annunzio | June 20, 2019



Philadelphia. Photo: Shutterstock

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<http://www.pacourts.us/assets/opinions/Supreme/out/J-14-2018edca%20-%2010403226366886699.pdf?cb=1>).

The state's justices could not reach a consensus in *Valentino v. Philadelphia Triathlon*, specifically on the question of whether "a waiver of liability form, executed solely by the decedent, and stating the signer assumes all risks of participation in a triathlon, also binds his heirs, thereby precluding them from bringing a wrongful death action."

Justice David Wecht did not participate in the case, which resulted in a 3-3 split.

In 2016, an en banc Superior Court panel found (<http://www.thelegalintelligencer.com/id=1202772592166>) that the waiver did in fact bind the man's heirs, and prevented his widow from suing. That decision differed from a ruling a three-judge panel of the Superior Court made in 2015, which said the surviving spouse, who did not sign the waiver, was not bound by the release.

Superior Court Judge Judith Ference Olson wrote the majority opinion for the more-recent en banc panel. In her ruling, she said the triathlete's decision to transfer liability to himself by signing the waiver eliminated any possibility of tortious conduct on the part of the defendant.

"Appellant does not dispute that the liability waiver constituted an express assumption of the risk by Mr. [Derek] Valentino. This confirms that appellee owed no legal duty to Mr. Valentino and, therefore, appellee cannot be found to be negligent," Olson said. "It follows, then, that the waiver agreement not only defeated the negligence claims asserted in the context of appellant's survival action, but also the negligence claims asserted in the context of appellant's wrongful death action."

The plaintiffs argued a case captioned *Pisano v. Extendicare Homes* stood for the principle that a waiver did not extinguish third-party rights. But Olson said the *Pisano* court was concerned only with civil procedure and venue.

According to court records, the Philadelphia Triathlon consisted of a half-mile swim, a 15.7-mile bicycle race and a 3.1-mile run. As part of the registration, each participant needed to pay a fee and sign a waiver and release form. Derek Valentino registered for

the event in January 2010.

Valentino, court records said, entered the water for the swimming portion of the event at 8:30 a.m. June 26, 2010, but he did not complete the race, and his body was found in the Schuylkill River the following day.

Michele Valentino, acting as the administrator of Derek Valentino's estate, filed suit asserting wrongful death and survival claims.

The trial court initially sustained some preliminary objections and struck all references to gross negligence, recklessness and punitive damages, finding the allegations showed only ordinary negligence. After some discovery was completed, Philadelphia Triathlon LLC moved for summary judgment, and the court dismissed the plaintiff's claims.

Craig Falcone of Sacchetta & Falcone in Media represents the plaintiff. Falcone did not return a call seeking comment on the Supreme Court's split.

Spector Gadon Rosen Vinci attorney Heather Eichenbaum, who represented the Philadelphia Triathlon, said, "Interestingly enough, one thing that been lost in the seven years that the case has been pending is that my client had substantive factual, defenses that had never been addressed because of the waiver issue."

Eichenbaum said the defendant went "above and beyond" in making sure participants were safe.

"Obviously it was a tragic accident. But it came out in discovery that Mr. Valentino had never trained for the event in open water. He swam laps in the local YMCA pool," she said.

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