

**[J-73-2009]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

DAWN A. PYERITZ, ADMINISTRATRIX : No. 9 WAP 2009  
OF THE ESTATE OF DANIEL E. :  
PYERITZ, DECEASED, AND DAWN A. : Appeal from the Order of the  
PYERITZ, PARENT AND NATURAL : Commonwealth Court entered September  
GUARDIAN OF NICOLE L. PYERITZ, A : 15, 2008 at No. 1592 CD 2007, affirming  
MINOR, AND CHRISTOPHER E. : the Order of the Fayette County Court of  
PYERITZ, A MINOR, AND DAWN A. : Common Pleas entered July 20, 2007 at  
PYERITZ, AN INDIVIDUAL, IN HER OWN : No. GD 541 of 2005.  
RIGHT, :

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, :  
STATE POLICE DEPARTMENT OF THE :  
COMMONWEALTH OF PENNSYLVANIA, :  
COL. JEFFREY B. MILLER, :  
COMMISSIONER, PENNSYLVANIA :  
STATE POLICE, PENNSYLVANIA STATE :  
POLICE TROOPERS JAMES CUSTER :  
AND DANIEL EKIS, PENNSYLVANIA :  
STATE POLICE CORPORALS JAMES :  
CACCIMELIO AND ANDRE STEVENS :  
AND PENNSYLVANIA STATE POLICE :  
LIEUTENANT CHARLES DEPP, :

Appellees

: ARGUED: September 15, 2009

**CONCURRING OPINION**

**MR. JUSTICE EAKIN**

**DECIDED: NOVEMBER 23, 2011**

While I concur with the majority's decision to affirm the Superior Court, I do not believe the analysis of negligent spoliation of evidence effectively disposes of all the issues on which we granted allocatur, namely:

(1) Whether the personal property exception to state sovereign immunity, 42 Pa.C.S.A. § 8522(b)(3), applies only if the property in question causes the plaintiff's injuries, or does it suffice that plaintiff's injuries are caused by the Commonwealth's care, custody, or control of the property?

(2) Whether genuine issues of material fact exist which would preclude the entry of summary judgment?

(3) Whether the State Police breached an implied contract for bailment of evidence which was Petitioners' personal property, thus subjecting the State Police to liability if the evidence was subsequently negligently destroyed?

(4) Whether Pennsylvania recognizes, and if so whether Petitioners have alleged, a cause of action for negligent spoliation of evidence?

Pyeritz v. Pa. State Police, 969 A.2d 1183, 1184 (Pa. 2009) (per curiam).

The Commonwealth enjoys immunity from suit unless the injury in question lies within one of the exceptions provided by the legislature. Pa. Const. art. I, § 11; 42 Pa.C.S. §§ 8521-22. Appellant contends this suit is within the personal property exception, which provides the sovereign immunity defense may not be applied to claims for damages caused by:

**(3) Care, custody or control of personal property.**--The care, custody or control of personal property in the possession or control of Commonwealth parties, including Commonwealth-owned personal property and property of persons held by a Commonwealth agency, except that the sovereign immunity of the Commonwealth is retained as a bar to actions on claims arising out of Commonwealth agency activities involving the use of nuclear and other radioactive equipment, devices and materials.

42 Pa.C.S. § 8522(b)(3). The legislature's intent in enacting the Sovereign Immunity Act was to shield government from liability except as provided for in the statute itself, and we must apply a rule of strict construction in interpreting the exceptions. Jones v. Southeastern Pennsylvania Transportation Authority, 772 A.2d 435, 440 (Pa. 2001).

It is well established that the personal property exception only applies where the property itself causes the injury. See, e.g., Pennsylvania State Police v. Klimek, 839 A.2d 1173, 1175 (Pa. Cmwlth. 2003); Bufford v. Pennsylvania Department of Transportation, 670 A.2d 751, 753 (Pa. Cmwlth. 1996); Sugalski v. Commonwealth, 569 A.2d 1017, 1019 (Pa. Cmwlth. 1990); Nicholson v. M & S Detective Agency, Inc., 503 A.2d 1106, 1108 (Pa. Cmwlth. 1986). That is not what occurred in this case. While the belt may have been involved in decedent's death, the belt was not in the care and custody of the Commonwealth at that time. The instant suit alleged injury to potential economic recovery from the destruction of the belt fragments, not the injury resulting in the death of decedent. It was not the property itself, but rather the alleged mismanagement of the property that caused the injury complained of; thus, the personal property exception to sovereign immunity does not apply.

Appellant's bailment argument, which I believe is separate from the negligent spoliation theory, must also fail.

"A bailment is a delivery of personalty for the accomplishment of some purpose upon a contract, express or implied, that after the purpose has been fulfilled, it shall be redelivered to the person who delivered it, otherwise dealt with according to his directions or kept until he reclaims it." Therefore, a cause of action for breach of a bailment agreement arises if the bailor can establish that personalty has been delivered to the bailee, a demand for return of the bailed goods has been made, and the bailee has failed to return the personalty.

Price v. Brown, 680 A.2d 1149, 1151-52 (Pa. 1996) (citations omitted).

In this case, the bailment relationship could not be established because the trooper had no authority to bind the Commonwealth in contract.

[T]he Commonwealth or its subdivisions and instrumentalities cannot be estopped “by the acts of its agents and employees if those acts are outside the agent’s powers, in violation of positive law, or acts which require legislative or executive action.” As a result, “(p)ersons contracting with a governmental agency must, at their peril, know the extent of the power of its officers making the contract.”

Central Storage & Transfer Co. v. Kaplan, 410 A.2d 292, 294 (Pa. 1979) (citations omitted). The Commonwealth Court noted State Police disposition of property regulations did not authorize Trooper Ekis’ decision to retain the belt fragments, and actually forbade such an act. Pyeritz v. Pa. State Police, 956 A.2d 1075, 1082 n.2 (Pa. Cmwlth. 2008). The fact that Trooper Ekis had apparent authority to keep the evidence is not dispositive; he had no actual authority to obligate the State Police to keep the evidence for appellant. As such, appellant’s bailment claim fails.

Finally, there is no need to recognize a separate cause of action for negligent spoliation. Importantly, the issue on which we granted allocatur implies recognition of a general cause of action for negligent spoliation of evidence. Within the duty analysis for such a tort, the parties’ relationship, conduct utility, and the foreseeability of the risk would be unique for each situation. Thus, the question of whether to recognize a legal duty to preserve evidence must go beyond the parameters of the current factual scenario; not all spoliation of evidence claims involve evidence handled or mishandled by the government, which often has the luxury of claiming sovereign immunity. Rather, recognition of a separate claim for negligent spoliation of evidence would have a profound impact upon private parties, requiring them to protect and preserve items that may or may not be evidence in a future civil case. Our law generally refuses to impose civil liability for failing to act for another’s benefit. Consequently, there is no reason to

create a per se duty requiring third parties to anticipate future civil litigation, particularly when a sufficient remedy for such negligent actions is available through traditional bailment and negligence claims.

The personal property exception to sovereign immunity is inapplicable, Trooper Ekis had no authority to obligate the Commonwealth to preserve the evidence, and there is no need to create a separate cause of action for negligent spoliation of evidence. There being no dispute about the material facts, I agree the trial court did not err in granting summary judgment, and concur with the majority's decision to affirm the Superior Court.