

# COUNTERPOINT

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## CONGRESS REDEFINES THE SCOPE OF DISABILITY RIGHTS UNDER THE ADA

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In September 2008, while most of America was focused on the contentious presidential election, Congress quietly passed, and President Bush signed into law, the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”), which are effective January 1, 2009. Without substantially altering the fundamental concepts of the Americans with Disability Act of 1990 (“ADA”), Congress decisively enlarged the rights provided by the ADA via a few simple additions and changes to key terminology. These changes will impact employers and businesses as the law was broadened to cover individuals and impairments previously excluded from the ADA’s ambit, which will likely result

in more costs and litigation. Although the amendments are not so substantial that employers will have to substantially change established discrimination policies, they must understand that some protections previously afforded by the courts have now been removed.

### Prelude To The Amendments

The motivation behind enactment of the ADAAA stems from two landmark decisions by the United States Supreme Court and their progeny that narrowed the definition of “disability” beyond what Congress deemed to be the original intent of the ADA when it was passed in 1990. “Disability,” as defined by the

ADA, means a “(1) physical or mental impairment that substantially limits one or more major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.” 42 U.S.C. § 12102. In *Sutton v. United Air Lines*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), the U.S. Supreme Court interpreted what it thought Congress intended by that short, yet deceptively complex definition.

The Court in *Sutton* was faced with the issue of whether an individual with poor

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## THE SUPERIOR COURT CARVES OUT WAIVER EXCEPTION TO THE ATTORNEY/CLIENT PRIVILEGE

By Wesley R. Payne, Esquire, White and Williams LLP, Philadelphia PA

A long standing general rule of practice has been that an attorney could not waive the attorney/client privilege without the actual consent of the client. The rationale underlying the perception is that the attorney/client privilege belongs to the client, not the attorney. However, the Superior Court in the case of *The Law Offices of Douglas T. Harris v. The Philadelphia Waterfront Partners*, 957 A. 2d 1223 (Pa. Super. 2008), held plaintiffs implicitly waived on appeal any arguments related to the attorney/client privilege when plaintiffs’ attorneys agreed to produce the client’s computers at the trial court level without affirmatively invoking the privilege before the trial court.

At the trial court level defense counsel moved to enforce discovery of plaintiffs’ computer system and plaintiffs’ counsel failed to object to the discovery and to assert the attorney/client privilege in

opposition to defendant’s motion. At a subsequent hearing, counsel agreed to produce his client’s computers once again without affirmatively asserting the

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**Superior Court**

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attorney/client privilege. The pertinent soliloquy with the court at the hearing was as follows:

The Court: Okay. Counsel, did you agree to an Order to produce things ten days after August 27th?

Appellants' Counsel: Your Honor, I believe [co-counsel] did.

The Court: Has it been complied with?

Counsel: I believe so, except for, as you said, the hardware, which were the two computers, .... We would produce it, but for the **possibility** that there is attorney/client privileged information on the hard drive. **(Emphasis added).**

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The Court: Well, they have a right to the information, so how-what Order do you w[a]nt me to enter to enforce the Order that you agreed upon August 27th?

Counsel: Right. We can produce the computers.

The Court: You can?

Counsel: We can.

The Court: Okay. When do you want the computers, [Harris's counsel]?

Harris' Counsel: Within five days.

The Court: Within five days.

Appellants' Counsel: That's fine with me.

The Court: Motion is granted. . . Plaintiffs are directed to produce all e-mails and other documents from the computers of plaintiffs Scott Blow and Patrick Hanley within ten days.

Id. at p.1226-27. Subsequently, the second discovery order was appealed to the Superior Court. For the first time on appeal the issue of the attorney/client privilege was affirmatively raised as a reason why the computer hard drives should not be produced.

The Superior Court began its analysis with a review of Pennsylvania Rule of Appellate Procedure 302. The rule requires that any issue for appeal to the Superior Court be preserved at the trial court level. The Superior Court noted as follows:

As a general proposition, in order to preserve a claim of error for appellate review, the party must make a specific objection to the alleged error before the trial court in a timely fashion and at the appropriate stage of the proceedings. . . . Failure to raise such an objection results in waiver of the underlying issue.

Id at p.1229-1230. Accordingly, the Superior Court addressed the issues of whether the attorney/client privilege could be waived by counsel's negligently failing to preserve the issue below; and if the attorney's negligent acts constituted an implicit waiver by the client.

The Superior Court was not persuaded that counsel preserved the issue of the attorney/client privilege by merely stating in open court that the computers were initially withheld because of a "possibility" that there may be attorney/client information on the computer hard drives. The Superior Court relied on the facts that counsel never objected to producing the computers, agreed to an order to produce the computers, subsequently at an open hearing, after alluding to the possibility of attorney client material being on the hard drive of the computers, agreed to a second order to produce the computers and never raised the issue of the attorney/client privilege in any subsequent submissions to the trial court.

To complete its analysis the Superior Court also examined the long history of the attorney/client privilege. The court noted that the attorney/client privilege, although codified in the statute, is deeply rooted in the common law. The court acknowledged that "at, common law, it was generally recognized that the attorney/client privilege belonged to the client, not the attorney." 8 Wigmor, *Evidence*, § 2327 (McNaughton rev. 1961)." Id. at 1230. However, the Superior Court noted that also under the common law an attorney acts as his client's authorized agent; and a client who fails to claim a privilege either himself or through another, waives the privilege. *Fid. Deposit Cl. v. McCulloch*, 168 F.R.D. 516, 523 (E.D. Pa. 1966); *Matt Malesky by Chronister v. Corporation Life Insurance Company*, 165 Pa. Commonwealth 72, 646 A.2d 1,4 (1994), citing in turn 8 Wigmor, *Evidence* § 232 (McNaughton rev. 1961).

The Superior Court reasoned that, in all the cases on which the appellants/plaintiffs relied, the parties advocating for their privilege actually invoked the privilege before the lower court. The Superior Court stated that counsel in this matter negligently did not assert the privilege; and as a result, his clients implicitly waived the privilege. The Superior Court stated as follows:

There is little theoretical justification for ignoring the negligent conduct of counsel relative to the preservation of the client's privilege claims. If the concern is with the perceived unfairness in holding the client responsible for the negligent actions of its agents, this would lead to the absurd result of precluding waiver in the corporate context because the corporate client, as a legal fiction, can only act through its agents. To distinguish between attorney-agents and other types of agents is perverse because it holds the individual who knows the law and is charged with the responsibility of attending to the legal interest of the client to a lesser standard of conduct. Paul R. Rice, *Attorney-Client Privilege in the United States*, § 9:73, at 9-261 (1993)

Id at p. 1231-1232.

Further, the Superior Court reasoned that by allowing a party to raise the attorney/client privilege for the first time on appeal would lead to unfair and inconsistent results. The Superior Court noted as follows:

Allowing a litigant who fails to invoke and/or assert the attorney-client privilege before the trial court to then raise the privilege for the first time on appeal not only works an injustice to the court system itself, it also would provide litigants with a built-in mechanism for rigging the judicial process in hopes of wearing down the opposition.

Id. at p.1232. Finally, the Superior Court held:

We find no support in the law for the notion that a client cannot implicitly waive the attorney-client privilege on appeal through his counsel's failure to raise the issue before the trial court. Based on the foregoing considerations, **we hold, subject to our Supreme**

**Court's inherent authority to carve out exceptions to the waiver doctrine, see *Freeman, supra* at 402, that, under Rule 302(a), a client implicitly waives the attorney-client privilege when his attorney fails to invoke and/or assert the privilege before the trial court, only to then raise the issue for the first time on appeal. (Emphasis added).**

Accordingly, the Superior Court pursuant to the inherent authority of the court to carve out exceptions to the waiver doctrine determined that the privilege was waived by the attorney's negligence. As a result of the attorney's negligence, the client implicitly through its authorized attorney/agent waived the privilege at the trial court level and the client was precluded from raising the issue on appeal.

However, Judge Bowes filed a dissenting opinion in which she noted: "... because the attorney/client privilege belongs to

the client, only the client can waive its protection." *Id.* at p. 1236. Judge Bowes also stated:

there is no pertinent legal authority for the majority position that an attorney who has not consulted with his client can perceptively waive the attorney/client privilege by agreement to produce certain items from discovery when the attorney knows or has reason to believe that those items contain privileged information.

*Id.* at p. 1236. Judge Bowes noted that the trial judge was also aware of the risk of the possibility of attorney/client information contained on the hard drives being compromised and 'conspicuously ignored the risk' in favor of expediting the discovery process. *Id.* Finally, Judge Bowes noted pursuant to *McGovern v. Hospital Services Association*, 785 A.2d, 1012 (Pa. Super. 2001), once the attorney/client privilege was implicated, the trial judge should have at least conducted an

*in camera* inspection prior to ruling on the discoverability of the information contained on the hard drives.

Notwithstanding Judge Bowes' dissenting opinion, it is clear that in recent years, the attorney/client privilege has come under attack, has seen some erosion and has been more narrowly construed by courts. This is especially true in the area of electronic discovery. With the judiciary's newly created waiver of the privilege by the alleged negligence of counsel, all counsel should take the necessary precaution to affirmatively assert the attorney/client privilege at the discovery stage, seek *in camera* review if the initial claim is denied by the trial court and actively preserve any alleged error of the trial court regarding the privilege in the parties 1925 statement or potentially face a malpractice action for waiving a client's privilege.



## SUPREME COURT LIMITS MUNICIPAL LIABILITY IN SIDEWALK CASES

*By Wayne Partenheimer, Esquire, Bennett, Bricklin & Saltzburg, LLP, Philadelphia PA*

A person injured due to a sidewalk defect adjacent to municipal property may be without a remedy based on a recent state Supreme Court ruling.

In *Reid v. City of Philadelphia*, 957 A.2d 232 (Pa. 2008), the Supreme Court held that the "real property exception" of the Political Subdivision Tort Claims Act, 42 Pa.C.S. §8542(b)(3) does not allow suit for damages caused by a defect in a sidewalk next to the agency's property. In making the ruling, the Court rejected the Commonwealth Court's interpretation of an earlier Supreme Court decision, *Walker v. Eleby*, 577 Pa. 104, 842 A.2d 389 (2004), as "tacitly" accepting the Commonwealth Court decision relied on by the trial judge, *Sherman v. City of Philadelphia*, 745 A.2d 95 (Pa. Cmwlth. 2000).

Justice Eakin wrote that the plain language of the Act "... does not apply to sidewalks, even those abutting local agency property," adding that it was not the role of the judiciary to legislate changes in the law. 957 A.2d at 236.

On March 7, 2003 Joseph Reid was

injured when he fell on ice and snow on the sidewalk along the 2200 block of Yelland Street by the 39<sup>th</sup> Police District station. Mr. Reid, his wife and three children were walking home from buying take-out food and turned onto Yelland Street on their way home. Because police district employees had parked their cars on the sidewalk, the Reids were forced to walk over ice and snow in a narrow space between the cars and a fence the City had erected. Mr. Reid fell, injuring his ankle.

After a bench trial, Judge Rau ruled for the plaintiff and found that the City had violated its own ordinance, Section 10-720, regarding property owners' responsibilities to clear sidewalks from ice and snow, and that the City negligently failed to clear the sidewalk. The City appealed.

The Pennsylvania Supreme Court abolished immunity for local agencies in *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973), *superseded by statute*, 53 P.S. §§ 5311.101-5311.803, presently 42 Pa.C.S.

§§8541-8564. Immunity was reinstated by the legislature with the passage of the Tort Claims Act in 1978. However, the Act provides certain exceptions to immunity.

The "real property exception," found at 42 Pa.C.S. §8542(b)(3), which was at issue in *Reid*, states that a local agency may be liable for "the care custody and control of real property in the possession of the local agency..." But, "as used in this paragraph, 'real property' shall not include: (iv) sidewalks." (Emphasis supplied.)

The Act also contains an exception for "the dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency," 42 Pa.C.S.A. §8542(b)(7)<sup>1</sup>, but the trial judge analyzed the case under the "real property exception," and it was this issue that was considered by the Supreme Court.

In *Sherman v. City of Philadelphia*, 745 A.2d 95 (Pa. Cmwlth. 2000), upon which the trial court relied in *Reid*, a

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