

**[J-223-1998]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

PENNSYLVANIA AFL-CIO, BY WILLIAM : Nos. 39, 40 and 46 M.D. Appeal Docket 1997  
GEORGE AND RICHARD BLOOMINGDALE, :  
TRUSTEES AD LITEM; AND PENNSYLVANIA : Appeal from the Order of the Commonwealth  
FEDERATION OF INJURED WORKERS, INC.; : Court, entered April 1, 1997, at No. 704 M.D. 1996  
AND PHILADELPHIA AREA PROJECT ON :  
OCCUPATIONAL SAFETY AND HEALTH, :  
: :  
Appellants at No. 39/97 : 691 A.2d 1023 (Pa. Cmwlth. 1997)  
v. :  
COMMONWEALTH OF PENNSYLVANIA AND :  
THOMAS RIDGE IN HIS OFFICIAL CAPACITY AS :  
GOVERNOR OF THE COMMONWEALTH OF :  
PENNSYLVANIA, AND JOHNNY J. BUTLER, IN :  
HIS OFFICIAL CAPACITY AS SECRETARY OF :  
LABOR AND INDUSTRY OF THE :  
COMMONWEALTH OF PENNSYLVANIA, :  
Appellees, :  
: :  
SENATORS F. JOSEPH LOEPER, GIBSON E. :  
ARMSTRONG, NOAH W. WENGER, ALBERT V. :  
BELAN, GERALD J. LAVALLE, RICHARD A. :  
KASUNIC AND CHRISTINE M. TARTAGLIONE, :  
Senate Labor and Industry Committee Democratic :  
Members, Intervenors :  
: :  
APPEAL OF: ALBERT V. BELAN, GERALD J. :  
LAVALLE, RICHARD A. KASUNIC AND :  
CHRISTINE M. TARTAGLIONE, Senate Labor :  
and Industry Committee Democratic Members, :  
Intervenors at No. 40/97 :  
: :  
APPEAL OF: SENATOR F. JOSEPH LOEPER, : ARGUED: NOVEMBER 16, 1998  
GIBSON E. ARMSTRONG AND NOAH W. :  
WENGER, Intervenors at 46/97 :

**CONCURRING OPINION**

**MR. JUSTICE CAPPY**

**DECIDED: August 30, 2000**

I join in the majority's holding that the Commonwealth Court correctly overruled appellees' preliminary objections with respect to the justiciability of appellants' constitutional claims, and that appellants waived their claims that Act 57 of 1996 violated Article III, Sections 1-4 of the Pennsylvania Constitution. I also agree with the majority's determination that appellants' Petition for Review fails to state a cause of action upon which relief can be granted under Article III, Section 5 of the Constitution. I do not agree, however, with the majority's conclusion that the Commonwealth Court erred in sustaining appellees' preliminary objections in the nature of a demurrer to that claim, and write separately to state what I believe to be the fundamental error in the majority's application of the standard to be used in deciding preliminary objections.

The test for ruling on preliminary objections in the nature of a demurrer is, as the majority points out, well-established. Preliminary objections may be sustained only in cases that are clear and free from doubt. Bower v. Bower, 611 A.2d 181,182 (Pa. 1992). In determining whether preliminary objections were properly sustained, an appellate court must determine whether it is clear from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish a right to relief. Firing v. Kephart, 353 A.2d 833, 834 (Pa. 1976). Majority opinion at 6.

Appellants alleged in their Petition that during the legislative process, Senate Bill 801 was amended by the Senate Committee on Rules and Executive Nominations, reported to the full Senate, and returned to the full House of Representatives after it had been both passed unanimously by the full Senate and amended and passed unanimously by the full House. Appellants claimed in Count I that this process was unconstitutional because Article III, Section 5 of the Constitution prohibits the originating chamber of a bill from amending it after it has been amended by the other chamber, and requires instead,

a straight "up-or-down vote" on the other chamber's amendments or an action by conference committee for reconciling differences between the two passed versions of the bill. The Commonwealth Court held to the contrary and granted appellees' preliminary objections to Count I, finding that Article III, Section 5 does not prohibit the originating chamber from amending its own bill once it has been amended by the other chamber and returned. Pennsylvania AFL-CIO v. Commonwealth, 691 A.2d 1023,1039 (Pa. Cmwlth. 1997). In its analysis, the court observed that no Pennsylvania court has interpreted Article III, Section 5, and recognized that the language in this particular constitutional provision is susceptible to more than one interpretation. Id. at 1038.

Taking note of these observations, the majority concludes that appellees did not meet their burden of demonstrating that the law interpreting Article III, Section 5 is clear and free from doubt, and that, therefore, the Commonwealth Court erred in sustaining their preliminary objections. Majority Opinion at 6-7, 13. At the same time, however, the majority accepts the Commonwealth Court's interpretation of Article III, Section 5 and its ultimate conclusion that appellants' claim in Count I fails to state a violation of the Constitution. Id. at 13.

I believe that the majority misapplies the standard to be used in deciding preliminary objections. The standard is not, as the majority suggests, whether the law under consideration is clear and free from doubt; it is whether it is clear and free from doubt that the well-pleaded facts fail to establish that the pleader has a right to the legal relief he seeks. We clarified this very point in Firing v. Kephart, in which the plaintiff, a justice of the peace who was mandatorily retired, filed a complaint against Commonwealth officials, alleging that under Article V, Section 16(b) of the Pennsylvania Constitution, he was entitled to a continuation of his pay. Defendants filed preliminary objections in the nature of a demurrer, which the Commonwealth Court sustained. On appeal, plaintiff argued that inasmuch as the Constitution itself is not completely clear and free from doubt on the issue,

the preliminary objections should not have been granted. Concluding that plaintiff's argument "misconceiv[ed] the function of preliminary objections in our jurisprudence", 353 A.2d at 834, this court affirmed the Commonwealth Court and stated:

The test [on preliminary objections] is not whether the applicable law is clear and free from doubt, but whether it is clear and free from doubt from the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief. The role of the court in ruling on preliminary objections in the nature of a demurrer is to determine whether or not the facts pleaded are legally sufficient to permit the action to continue. This is so whether the legal determination to be made is relatively simple or relatively difficult... There was no factual dispute in this case, only a dispute over the interpretation of the Constitution, and the ruling on appellees' preliminary objections was clearly the appropriate juncture for the Commonwealth Court to interpret the pertinent provisions of the Pennsylvania Constitution and determine the merits of appellant's claim. Our task on appeal is to determine whether the court's interpretation was correct.

Id. at 835 (citation omitted).

Likewise, in this case, the fact that the proper interpretation of Article III, Section 5 is less than straightforward does not mean that appellees' preliminary objections should not have been granted. Appellees met their burden, showing that the facts alleged in the Petition do not state a cause of action under Article III, Section 5 for which relief may be granted. In my view, therefore, the Commonwealth Court was correct to grant the preliminary objections, and I would affirm the court's decision in this regard. Accordingly, as to appellants' Article III, Section 5 claim, I concur only in the result.

Mr. Justice Saylor joins this Concurring Opinion.