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Commonwealth Court Upholds Governmental Damages Cap

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Of the Legal staff

The Commonwealth Court has upheld a \$500,000 statutory limit on damage awards against governmental entities, setting up the constitutional challenge for possible resolution by the state Supreme Court.

The panel decision effectively wipes out most of a \$14 million award reached by a Bucks County jury to plaintiff Ashley Zauflik for the loss of her leg and pelvic injuries after a school bus driver hit the accelerator instead of the brake, striking her while she was standing on the sidewalk. Zauflik, who had been standing with a group of students, was the most catastrophically injured when the bus jumped the curb.

But Zauflik's award was molded to conform with the \$500,000 statutory cap under the Political Subdivision Tort Claims Act on damages owed by governmental entities.

The Commonwealth Court ruled 2-1 against Zauflik. Judge Renee Cohn Jubelirer, writing for the majority, said the circumstances of the case are tragic but "we are constrained by the precedential case law that has previously upheld the constitutionality of the statutory

cap of the Tort Claims Act multiple times. It is the role of the General Assembly, not this court, to make the difficult policy decisions and enact them into law if such decisions receive the support of the necessary majority."

Judge Dan Pellegrini joined Jubelirer's opinion.

In dissent, Senior Judge Rochelle S. Friedman said that the cap may have infringed on Zauflik's constitutional right to juries in civil cases and that she would find the cap unconstitutional as it applies to Zauflik.

"This constitutional provision anticipates that a jury's award will not be hollow and that, in the event of a monetary award for a plaintiff, he or she will be entitled to receive the full benefit of the award," the dissent said. "Consistent with the inviolate right by jury is the inviolate right to receive the jury's award."

Zauflik's counsel, **Tom Kline** of Kline & Specter, argued that the cap violates the state constitution in several ways, including the provision guaranteeing open courts to Pennsylvania citizens; the provision against capping compensatory damages except for cases involving workers' compensation; the provision vesting judicial power in the Unified Judicial System, which

includes the power of remittitur; the provision guaranteeing the right to have one's case heard by a jury; and the state constitution's equal protection clause. The plaintiff also argued that the cap violated her federal Constitution rights to equal protection and due process.

Among other binding precedent, Jubelirer wrote, is *Carroll v. County of York*, in which the Supreme Court held that it was a rationally based legislative judgment to make political subdivisions immune from liability even though the plaintiff in that case was barred entirely from recovery for her son's suicide while in the custody of a county detention home.

In another case, Jubelirer wrote, the Supreme Court held in *Smith v. City of Philadelphia* that the General Assembly could enact limits on political subdivisions' tort liability despite the limitation it placed on recovery for a gas explosion that killed seven.

Jury actions can be limited, and the Supreme Court precedent "leads to the proposition that, because it is within the authority of the General Assembly to have established an exception to governmental immunity in the Tort Claims Act that permits Zauflik to bring this action ... that authority also encompasses the right to fur-

ther limit the exceptions to immunity, including the amount of damages recoverable," the majority said.

On the equal protection argument, Zauflik said the court should weigh whether the interests in the case should be rebalanced considering the district was able to purchase an excess insurance policy, Jubelirer said.

But while "the very tragic circumstances of this case weigh heavily on this court ... as an intermediate appellate court confronting significant and unwavering precedent, our role must be one of restraint," Jubelirer continued. "In sum, whether the existence of the excess policy or a different governmental interest could be a factor that changes the balance of interests in the constitutional analysis involved in this case is intriguing, and perhaps appealing, it is not within this court's purview."

Kline said his firm will seek a direct appeal to the Supreme Court. There is an issue of first impression regarding the separation of powers issue and Friedman "hits the nail on the head in her dissent" discussing a violation of the right of trial by jury, Kline said.

All three judges upheld the \$5,000 sanction awarded by Bucks County Court of Common Pleas Judge Robert J. Mellon because the school district did not disclose timely the existence of an excess insurance policy in the amount of \$10 million. Jubelirer said that the sanction was not an abuse of discretion and that the court could not sanction a political subdivision by ordering an express waiver of absolute governmental immunity.

"It's apparent from the language and content of all three opinions,

Judge Mellon, Judge Jubelirer joined by Judge Pellegrini as well as Judge Friedman's dissent, every judge who now reviewed this case is troubled by the cap," Kline said. "Judge Friedman has it right. I believe the cap is unconstitutional."

One of the school district's counsel, Thomas G. Wilkinson of Cozen O'Connor, said it is a "thorough and thoughtful opinion that is completely consistent with the previous Supreme Court precedents in this area."