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The Legal Intelligencer
February 12, 2013



Commonwealth Court Asked to Overturn Statutory Damage Cap

As an attorney attacked the constitutionality of the \$500,000 statutory cap on damages owed by Pennsylvania governmental entities Monday, one of the appellate judges on the panel said that the attack on the cap also is an attack on having sovereign immunity from lawsuits.

Commonwealth Court President Judge Dan Pellegrini said that under the theory advanced by **Tom Kline**, of Kline & Specter, that not only would the cap on damages under the Political Subdivision Tort Claims Act be gone but sovereign immunity would be gone.

Separately, Judge Renée Cohn Jubelirer asked if "no cap is ever permitted."

Kline said that was so, but he also said that he did not think the court had to go there in order to find for his client.

Senior Judge Rochelle S. Friedman also was on the panel.

In December 2011, Ashley Zauflik was awarded a \$14 million verdict in the Bucks County Court of Common Pleas for the loss of her leg and other injuries after being run over by a bus owned and operated by Pennsbury School District. She was 17 at the time of the accident in January 2007.

"The law should be done a case at time," Kline said. "Let's worry about Ashley Zauflik today."

If the cap is found unconstitutional, legislators can undertake hearings and figure out how to redo it, Kline said.

If Kline is successful in his challenge, the General Assembly is likely to reinstate a total ban on governmental liability, said the school district's attorney, Stephen A. Cozen of Cozen O'Connor.

"Everyone in the future is going to be completely and totally out of luck," Cozen said.

Pellegrini, who worked as a municipal solicitor earlier in his career, said that the state Supreme Court in 1973's *Ayala v. Philadelphia Board of Public Education* got rid of judicially-created immunity for governmental entities, but that it left it up to the General Assembly to decide if there should be statutory-based immunity for governmental entities.

"Gradually, state by state, they all brought the caps back," Pellegrini said, but the problem is that no states revisited the level of their caps once they were put in place.

When Bucks County Court of Common Pleas Judge Robert J. Mellon molded the verdict to \$500,000, he said in

his opinion that the cap should be revisited by the Supreme Court because an injured person's right to full recovery for a tort is not outweighed by the public interest in preserving the "public treasury ... against the possibility of unusually large recoveries in tort cases."

Zauflik's counsel are fighting against several prior Supreme Court rulings upholding the cap on the grounds that the cap violates the federal and state constitutional rights to equal protection; the federal constitutional right to due process; Article III, Section 18 of the state constitution, which states that, other than for workers' compensation cases, "in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property"; the right to open courts under Article I, Section 11 of the state constitution; the right to jury trial under Article I, Section 6 of the state constitution; and as impermissible intrusion upon the judicial power to set remittitur of jury awards under Article V, Section 1 of the state constitution.

Cozen said that the issue of the cap is better left to the General Assembly because the courts have already vetted the constitutionality of the cap over six times over 30 years.

Those cases include the state Supreme Court's decisions in 1981's *Carroll v. County of York* and 1986's *Smith v. City of Philadelphia*.

Kline pointed out that the constitutional challenges on the bases of the right to jury trial and judicial power have not been presented in prior cases and that the prior Supreme Court precedents came out of highly divided courts.

Cozen said that a cap does not deprive litigants of the right to have a jury hear their claims

Paul C. Madden of Buchanan Ingersoll & Rooney, arguing for transit agencies that filed an amicus brief, argued that the judicial power to remittitur was only developed in the 1800s and it is not an inherent power of the courts.

In another argument, Cozen said that "unfairness is not a constitutional test" and that it is whether the cap legislation passed by the General Assembly to "protect the public treasury and to protect them from unknown and undesirable tort awards" is rationally related to that goal.

There were 72 claimants suing over a gas explosion in the Smith case, and the court still found the cap was constitutional, Cozen said at the very last moment in arguments that ran well out of the allotted time limits.

In another argument, Kline said that Zauflik would only get 3.5 percent of the compensation a jury of her Bucks County peers thought was appropriate, and that Zauflik has to share that with several other students who were injured, as well as cover the price of her attorney fees and litigation costs.

Zauflik also is challenging the propriety of the trial judge awarding \$5,000 as the sanction for the belated disclosure of a \$10 million excess insurance policy.

Kline argued that such a small sanction was an invitation to all lawyers and litigants not to disclose their insurance policies, while defense counsel said there was no evidence of willfulness or bad faith in the failure to disclose.

Co-counsel for Zauflik are David J. Caputo and Charles L. Becker of Kline & Specter and William Goldman of the Law Offices of William Goldman.

Co-counsel for the school district are Thomas G. Wilkinson Jr. and Sara Anderson Frey of Cozen O'Connor.

Co-counsel for Pennsylvania Public Transportation Association, Southeastern Pennsylvania Transportation Authority, Port Authority of Allegheny County and the Pennsylvania Turnpike Commission were Robert S. Hawkins and Robert J. Fitzgerald of Buchanan Ingersoll.

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