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2012-05-31 12:00:00 AM

Judge Suggests Review of Damages Cap's Constitutionality

A Bucks County judge has suggested that the constitutionality of a \$500,000 statutory cap on damages owed by Pennsylvania governmental entities be reviewed in a potential test case.

When plaintiffs' counsel [Tom Kline](#), of Kline & Specter in Philadelphia, took the case of Zauflik v. Pennsbury School District, Kline said he viewed the case as a vehicle to challenge the \$500,000 cap under the Political Subdivision Tort Claims Act for damages recoverable against local governmental agencies.

In December, 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 her school district. She was 17 at the time of the accident in January 2007.

Bucks County Common Pleas Judge Robert J. Mellon said he was constrained by Pennsylvania Supreme Court precedent to mold the verdict so that Zauflik would only be awarded \$500,000 to be shared with other plaintiffs who also were injured by the bus.

While the state Supreme Court said that the cap did not violate several constitutional provisions in the 1986 case of Smith v. City of Philadelphia, the Supreme Court has not yet considered the equal-protection theory that Kline & Specter is advancing on Zauflik's behalf that the statutory cap violates Article I, Section 26 of the state constitution, Mellon said.

That constitutional provision says that "neither the commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

The school district "chose to run its own private busing company by hiring bus drivers, purchasing and maintaining vehicles, and planning bus routes," Mellon said. "Pennsbury School District's admitted negligent acts that caused Zauflik's catastrophic injuries stemmed directly from its transportation activities. Thus, had Zauflik been injured in another school district that chose to outsource its transportation to a private bus company, Zauflik would likely be able to recover the full amount of compensation to which the jury found she was entitled as a result of her injuries."

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," Mellon said, citing Smith.

"A very experienced and highly regarded and long-serving member of the Pennsylvania judiciary essentially dissents from his own opinion," Kline said.

Among other arguments, Zauflik's counsel also said that the statute violates the state constitutional right to open courts and a "remedy by due course of law," the "anti-cap language of Article III, Section 18" of the state constitution, the state constitutional right to a jury trial and the judicial power set out in the state constitution, according to the opinion.

Kline said Zauflik's case can be distinguished from Smith because providing a busing service is not a core municipal function.

The judge also issued \$5,000 in sanctions payable to Kline & Specter and against the school district because the school district did not disclose a \$10 million excess insurance policy, according to an order last week.

Just as immunity for hospitals and other charities has been abandoned, Kline said that sovereign immunity is a doctrine that should also be abandoned.

While Kline said he is hopeful that the General Assembly might change the cap, the plaintiffs attorney said changing the cap now wouldn't help Zauflik retroactively so action in the appellate courts is necessary to give her the recovery Kline said his client deserves.

The jury awarded \$338,580.49 for past medical expenses, \$2,597,682.90 for future medical expenses and \$11.1 million for past and future pain and suffering, according to the judge's opinion.

Defense attorney David S. Cohen of Mintzer Sarowitz Zeris Ledva & Meyers did not respond to a request for comment.

Zauflik was run over after she was waiting for a school bus ride home on Jan. 12, 2007, when bus driver John McCleary put his foot on the wrong pedal, The Legal previously reported.

The school district stipulated to liability right before openings to the jury, The Legal previously reported.