

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2011

PHILADELPHIA, TUESDAY, MAY 6, 2014

An **ALM** Publication

Statutory Damages Cap Tops Supreme Court Arguments

BY MAX MITCHELL

Of the Legal staff

Oral Arguments

Kicking off an oral argument session packed with first-impression issues, the state Supreme Court justices are set to hear arguments about the constitutionality of a statutory damages cap that slashed an injured student's \$14 million verdict against the state to \$500,000.

During the first day of arguments, which are scheduled to take place today and tomorrow in Harrisburg, justices are set to hear whether the Political Subdivision Tort Claims Act unconstitutionally limits damages owed by government entities in *Zauflik v. Pennsbury School District*. The case is the first opportunity for the high court to address constitutional issues related to governmental immunity's damages cap, plaintiffs attorney **Thomas R. Kline** of Kline & Specter has told the Legal.

The plaintiff in the case, Ashley Zauflik, who lost her leg after being run over by a school bus, was awarded \$14 million by a jury. However, that amount was molded to \$500,000 due to the statutory cap.

Zauflik's arguments in the case are expected to focus on whether it is constitutional to reduce a jury verdict award by more than 96 percent solely because it was against a governmental entity and not a private institution, especially considering the school purchased \$11 million in liability insurance, paid for by taxpayers who include the plaintiff's parents.

Zauflik is further expected to argue that the liability cap violates her right to a jury trial, usurps the court's inherent power to rule on remittitur requests, violates the open courts provision of the Pennsylvania Constitution by denying Zauflik full redress of her injuries, and violates the state constitution's guarantee against liability limitations in matters outside of workers' compensation cases.

In July 2013, the Commonwealth Court, in a 2-1 decision, upheld the molding of the verdict to the statutory cap. Judge Renee Cohn Jubelirer, writing for the majority, said the circumstances of the case were 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."

In her dissenting opinion, Senior Judge Rochelle S. Friedman said 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.

Also included on the high court's argument list are a venue dispute between Pennsylvania and New Jersey, a suit involving whether insurance companies have to cover in-school autism care, and at least five cases that involve first-impression issues.

Long-Arm Statute

Can the definition of "employee" under the Workers' Compensation Act establish jurisdiction under the Pennsylvania Long-Arm Statute?

That question is expected to be the focus of the arguments before the court in *Shiavone v. Aveta*. The question concerns an issue of apparent first impression in a case that deals with whether a Pennsylvania court has jurisdiction over a New Jersey corporation that does not conduct business in Pennsylvania.

In April 2012, the state Superior Court used the Workers' Compen-

sation Act definition of employee and invoked the state's Long-Arm Statute to determine that a Pennsylvania man suing a third-party tortfeasor's New Jersey-based employer could bring his personal injury suit in Pennsylvania court.

According to court records, the accident occurred in Pennsylvania, while the man's employer conducted business exclusively in New Jersey.

The Superior Court's decision turned on the conclusion that a person who is driving directly home from work in a company car is acting within the scope of his employment if that person's employment contract has driving provisions.

The court noted that the Commonwealth Court's "coming-and-going" rule established that an employee is not acting in the scope of employment simply while commuting to and from work; however, the court further determined that the "employment contract" exception to the coming-and-going rule applied. While the employment contract exception is traditionally used in workers' compensation cases, when combined with Pennsylvania's Long-Arm Statute, the two provide a framework for questions of jurisdiction, the court said.

Autism Coverage

Tomorrow, the high court is expected to hear arguments in a case involving whether insurance companies in the state have to cover in-school autism care.

In *Burke v. Independence Blue Cross*, the justices granted allocatur focusing on the specific issue of whether the state General Assembly intended to deprive families with autistic children the right

to appeal insurance denials to court when insurance companies have the ability to appeal.

A Philadelphia trial judge ruled in July 2011 that, under Act 62, a private health insurer must cover an autistic child for services provided in his school. Just over a year later, however, the Superior Court reversed that decision, ruling the trial court didn't have jurisdiction to hear the case.

Habitability

In another issue of first impression, the high court is set to hear arguments over whether homebuyers who are not the original purchaser-users of a home may still bring implied warranty habitability claims against the builder if defects are discovered.

Arguments in *Conway v. The Cutler Group* are scheduled for tomorrow, and are expected to focus on whether the Superior Court incorrectly determined that the claims are reasonable.

In November 2012, the Superior Court reversed a Bucks County trial judge's ruling dismissing a complaint filed by homeowners Michael and Deborah Conway against defendant builder The Cutler Group.

Judge Sallie Updyke Mundy, writing for the court, said that because the implied warranty of habitability applies to "defects which would not be apparent to the ordinary purchaser as a result of a reasonable inspection," the question of whether the homeowner was the original purchaser is "immaterial."