**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**TRIAL DIVISION – CIVIL**

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| HAYLEY FREILICH,<br><br>Plaintiff,<br><br>v.<br><br>SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,<br><br>Defendant. | : | CIVIL ACTION<br><br>No. 180600401<br><br>Control Nos. 21111457<br>21111633 |

**MEMORANDUM OPINION**

I. INTRODUCTION

Presently before the court is Plaintiff Hailey Freilich's Motion for Delay Damages in the amount of $892,979.45 on the Stipulated Jury Verdict amount of $7 million dollars in this matter and Defendant SEPTA's Motion to Mold the Verdict in accordance with the Statutory "cap" on damages in actions brought against governmental entities under the Pennsylvania Tort Claims Act, 42 Pa. C.S.A. §8553(b). SEPTA opposes Delay Damages on the ground that six weeks after Plaintiff filed the Complaint, SEPTA offered Plaintiff the full amount of the $250,000 statutory cap that SEPTA asserted that she was entitled to recover against it. Even assuming no offer to settle, SEPTA would oppose the delay damages because such damages are subject to its Motion to mold the verdict. Plaintiff Freilich opposes the molding of the verdict, not because the motion lacks a legal basis but because she asserts that the cap violates or constrains her fundamental Constitutional rights so severely as to nullify her rights, making the application of the cap to her case unconstitutional. Plaintiff's arguments are grounded principally upon the possibility

Pennsylvania Supreme Court may viate the application of the cap as applied to the facts of this action relying on , *inter alia*, that then Justice, now Chief Justice, Baer recognized as dicta in *Zauflik v. Pennsbury School District*, 629 Pa. 1, 64, 104 A.3d 1096, 1134 (2014) that a "properly developed record" might "establish that the statutory damages cap constitutes an onerous procedural barrier to the jury trial right in violation of Article I, Section 6" of the Pennsylvania Constitution. As an example of such a barrier, the concurrence in *Zauflick* cites *Application of Smith*, 112 A.2d 625 (Pa. 1955), where a statute and local rule of court required that claims under a certain dollar amount proceed through compulsory arbitration, the cost of which, in the form the required payment to appeal from the compulsory proceeding was payment of the arbitrators' fee, exceeded the amount of the recovery sought. Thus, Plaintiff invites the court to determine here whether the record before this trial court evinces the type of procedural barrier that, in Plaintiff's view under the concurrence and argued majority of justices who at one time or another have agreed with the argument, compels this court to now declare Supreme Court precedent as to the cap inapplicable and reach a substantive ruling by this court that the imposition of the cap in this case "unconstitutional."

Plaintiff has compelling facts on her side, now subject to a stipulated verdict—through no fault of her own, a SEPTA driver, who immediately admitted fault, caused her a catastrophic injuries, with lifelong pain and suffering and with a life-altering permanent loss of her foot, extensive medical bills and projected overwhelming and extensive future medical costs. The parties stipulated that a jury verdict in this case was $7 million dollars, which verdict this court entered into the record. For purposes of this case before the Court, that number would be the indisputably a full and fair award and deference to a full presumed full and fair consideration of the Jury and of all the factors otherwise recoverable as a matter of law,

In opposition to SEPTA's Motion for Post-Trial Relief to Mold the Verdict, Plaintiff presented hundreds of pages of records reflecting medical and insurance liens on any recovery she might obtain. Plaintiff also outlines in their brief the amounts that were expended to prepare the case for trial and this resulting verdict, which amounts were set forth by counsel at the oral argument on the record. (A copy of the transcript of the argument is attached to this Opinion). Defendant SEPTA did not dispute that Plaintiff incurred these costs; we will consider them as accurate.

The court is mindful of the profound economic inequity of the recovery provided under the application of the limitations of Tort Claims Act to the recovery Plaintiff might similarly have against a private Plaintiff against a non-governmental tort feasor , a harsh reductive calculation that is plainly untethered to the undisputed catastrophic injuries to Plaintiff. However, regretfully, as the Supreme Court majority noted in *Zauflik*:

> Successful plaintiffs are often limited in their ability to recover the full amount of a jury's award for many different reasons—a defendant may simply be judgment-proof, for example—but this practical reality has nothing to do with the plaintiff's right to seek to have the merits of her cause determined by a jury, rather than some other process.

629 Pa. at 62, 104 A.3d at 1132. The question presented in Plaintiff's opposition to the Defendant's Motion to Mold the Verdict is positioned as whether the facts in the record here in this matter are so unique as to distinguish Pennsylvania Supreme Court precedent addressing the statutory cap and to permit this court to make decision abrogating existing constitutional decisions of the appellate courts as a matter of law in this particular case addressing the motions before it.

II. Plaintiff's Challenge to the Cap as a Basis to Mold the Verdict

Plaintiff contends that she has substantively met all the factual and legal challenges posed in Chief Justice Baer's concurrence in *Zauflik* by outlining the undisputed substantial costs of

bringing this matter to a successful verdict and demonstrating the resulting negative recovery that would be available to her under the application of the cap after the incursion of those costs (presumed by the verdict to be reasonable) and the health care cost liens attached to any recovery. Procedurally, *Zauflik* differs from this case insofar as the expenditures in question arose from pre-trial preparation and the trial before a jury on damages of this undisputed facts of Plaintiffs claims. In addition, the record in *Zauflik* contained evidence that the defendant maintained available substantial commercial liability insurance coverage (albeit not for motor vehicle accidents), which Plaintiff argued the defendant could obtain ultimately *in futuro* to address the payment of damages to accident victims. The record as to the availability of commercial healthcare insurance and the potential dire impact to governmental entities of uncapped verdicts was not fully developed nor easily addressed in the context of an adversarial proceeding. ("Whether the statements in the briefs of twenty-eight interested amici are factually correct, they are a cautionary tale that this constitutional challenge implicates core public policy questions, concerning both the propriety and the amount of a statutory damages cap, that the political branches are better positioned to weigh and balance." 629 Pa. at 45, 104 A.3d at 1122).

Plaintiff further points to the recent concurrence of Chief Justice Baer in *Grove v. Port Authority of Allegheny County*, 655 Pa. 535, 218 A.3d 877, (2019), noting the legislative failure to rectify the concerns expressed in *Zauflik* as to the potential that the Supreme Court might be faced with a case in which a plaintiff might "establish that the statutory caps place an onerous burden on his or her right to a jury trial, [whereupon] this Court may be compelled to strike the cap, which could leave the Commonwealth or the local governments exposed to full liability if, and until, new legislation is passed." 218 A.3d at 892. Three justices joined in this concurrence.

Additionally, Plaintiff notes that Justice Todd previously joined in Chief Justice Baer's concurrence in *Zauflik*, inferring that a court majority favors her position.

Plaintiff outlines in their Argument without substantive objection by Defendant the tremendous costs for expert services, medical records and trial technology in the brief (*Id.* at p. 3 and on the record at the hearing), which costs are asserted to "burden plaintiff's ability to present an issue to a jury" as they represent an "onerous condition" which, along with counsel's fee, "make the jury trial right practically unavailable." *Zauflik* concurrence, 104 A.3d at 1134 *citing Application of Smith,* 112 A.2d 625 (Pa. 1955).

III. ANALYSIS

Plaintiff's constitutional challenge asserts that the specific factual record here that demonstrates the requisite "onerous condition" contemplated in *Application of Smith.* However, the cases in which the Court actually invalidated a provision on this basis all involved procedural impediments precluding the bringing of a case to a jury. *Application of Smith* involved a compulsory arbitration scheme that required payment of a substantial fee to perfect an appeal to a jury trial. In *Matos v. Thompson*, 491 PA. 385, 421 A.2d 190 (1980) the Supreme Court determined that an arbitration process for medical malpractice claim initially upheld as constitutional was fraught was so many interminable delays as to become unconstitutional in practice. More recently, in *Yanakos v. UPMC*, 655 Pa. 615, 218 A.3d 1214 (2019), the Supreme Court considered the validity of a statute of repose in medical malpractice cases that operated as a bar to suit after seven years, which exempted claims beyond seven years brought against medical device manufacturers. Plaintiffs in *Yanakos* challenged the provision under the remedies clause of the PA Constitution in Article 1, section 11. The Court consensus inherent in plurality is that the right to a remedy in a suit against a **private individual** involved at least an

important, if not fundamental, right, the denial of which in the one situation did not meet the law's purported justification under an intermediate scrutiny analysis (required in the case of a important right). However, the Court went out of its way to distinguish lawsuits against the Commonwealth or government entities, where the remedies clause did not confer a fundamental right. The Court's analysis informs the inquiry here. Although the Plaintiff did not advance a right to jury trial argument, it is clear that the limitation in the statute of repose was a procedural impediment to obtaining a jury trial, not a post-verdict cap on damages.

The Supreme Court in *Zauflik* specifically considered and rejected at the time the argument that the cap unconstitutionally impaired the right to a jury trial guaranteed by the Pennsylvania Constitution in Article 1, section 6, the principal argument that Plaintiff makes here. The Court held: "The damages cap does not present a condition or restriction on appellant's right to have a jury hear her case; rather, the burden lies in the limited amount of recovery allowed, and that is obviously not the same thing." 629 Pa. at 62, 104 A.2d at 1132. Then Justice Baer "join[ed] the finely crafted majority opinion in its entirety." *Id.* at 64, 104 A.2d at 1134. The subsequent decision in *Grove* does not alter this holding in any way—*Grove* did not involve a challenge to the constitutionality of the cap, but rather whether the trial court properly charged the jury on Plaintiff's contributory negligence. While the verdict, even considering the reduction for Plaintiff's negligence exceeded the cap, the question before the Court was propriety of granting the defendant a new trial based upon an insufficient jury instruction. The cap issue was neither briefed nor argued by the parties. This court cannot resolve the issue and facts specifically before it on the basis of a case in which the claims made here which were not before the Supreme Court, even in the face of Chief Justice Baer's concurrence and express serious concerns about legislative inaction. Moreover, the Chief Justice

and the Court, regrettably, has not provided specific guidance to this trial court as to what constitutes a "properly constructed" record or a "fully developed challenge."[1]

This court cannot wade into the debate about whether the disposition of Plaintiff's constitutional challenge is more conclusively a matter for the court or the legislature. As a trial court charged simply with the resolution of the facts before it in accordance with existing law under principles of *stare decisis*, this court can only discern the law and precedent applicable to the legal issues in front of it apply them and adjudicate the matter accordingly. At this stage, despite the number of well-reasoned concurrences, the Supreme Court in *Zauflik* has resolved every Constitutional challenge raised herein against the Plaintiff's position, in a case involving remarkably similar claims of catastrophic injuries and drastic reduction of the verdict to conform to the limitations of the cap.

The court agrees that the record demonstrates that the imposition of the cap to this plaintiff in light of her catastrophic injuries is profoundly unfair if not unconscionable as applied here. However, unfairness does not necessarily equate as a matter of law with an unconstitutional exercise of legislative power or an impediment to the right to try the case to a jury.

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[1] Chief Justice Baer recognized the possibility of plaintiffs incurring prohibitively discouraging costs, based on thirteen years as a trial judge, that counsel in a complex litigation might be required incur to "retain multiple liability and damages experts who are, in turn, mandated to develop their theories to a reasonable degree of certainty, provide detailed expert reports, sit for depositions, and often provide live testimony at the cost of tens of thousands of dollars." The Chief Justice does not guide us on how a governmental defendant's "concession" to liability at the outset of the litigation alters this landscape or how this general notion of the cost of litigation three decades into the twenty-first century justifies a trial court engaging in policy considerations underlying the Constitutionally authorized limitation on governmental immunity adopted in the Tort Claims Act.

Plaintiff's actuarial expert ably demonstrates the equivalence of the cap amount (of $250,000) in today's dollars ($897,600), a number that SEPTA does not dispute. As compelling as the Plaintiff's arguments are here and recognizing the inflationary diminution of the effect of soaring healthcare expenses, especially in light of Plaintiff's catastrophic injuries, this trial court is not a legislative or policy-making body and cannot substitute its judgment for that of the legislature or controlling law. In *Yanakos*, Chief Justice Baer joined in the dissent of Justice Wecht (also joined by Justice Saylor) in which he noted: "it is not this Court's role to upend duly enacted legislation simply because we might sometimes deem it imperfect or unwise" and rejects the notion that "Article I, Section 11 of the Pennsylvania Constitution, ... provides that every person who suffers an injury 'shall have remedy by due course of law[.]'" 218 A.3d at 1238. Fundamentally, the Court is bound by the structures in the analysis of the Supreme Court majority in *Zauflik* as to the validity of the damages cap (as stated in part earlier in this opinion):

> The damages cap does not present a condition or restriction on appellant's right to have a jury hear her case; rather, the burden lies in the limited amount of recovery allowed, and that is obviously not the same thing. Successful plaintiffs are often limited in their ability to recover the full amount of a jury's award for many different reasons—a defendant may simply be judgment-proof, for example—but this practical reality has nothing to do with the plaintiff's right to seek to have the merits of her cause determined by a jury, rather than some other process. This Court has struck down onerous procedural barriers to the exercise of the jury trial right, but that is quite a different matter from a substantive limit on the damages ultimately recovered—following a full-blown jury trial. *See, e.g.*, *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980) (statutory arbitration scheme first upheld in *Parker* later determined to cause lengthy delays which present onerous conditions and restrictions which impose oppressive burden on that right). 629 Pa. at 61-62, 104 A.3d at 1132.

*Zauflik* considered virtually every one of the arguments that Plaintiff makes here. The court does not find the facts in the sufficient to release this court from the precedential weight of *Zauflik*.

On this record, this trial court has a prescribed role, a role that does not permit it, however heart wrenching or compelling a circumstance, to engage in judicially "coloring outside the lines," criticizing the law-making body, engaging in political philosophic disagreements, applying new judicial standards of review or usurping the proper exercise of the ultimate responsibilities of the appellate courts. For those reasons and following applicable precedent, the court must follow the applicable legislative restrictions and mold the verdict in accordance with SEPTA's Motion for Post-Trial Relief. Plaintiff's Motion for Delay Damages would lead to an unenforceable recovery in excess of the cap. The court will enter an order granting SEPTA's Motion to Mold the Verdict and Denying Plaintiff's Motion for Delay Damages.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

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|---|---|---|
| HAYLEY FREILICH, | : | JUNE TERM, 2018 |
| Plaintiff, | : | |
| v. | : | NO. 00401 |
| SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, | : | |
| Defendant. | : | |

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Courtroom 643
City Hall
Philadelphia, Pennsylvania

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Friday, February 11, 2022

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MOTION

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BEFORE: THE HONORABLE JAMES C. CRUMLISH, III, J.

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Adrian Dale Baule, RMR, CRR, CSR
Official Court Reporter

APPEARANCES:

KLINE & SPECTER, P.C.
BY: CHARLES L. BECKER, ESQ.
THOMAS R. KLINE, ESQ.
RUXANDRA M. LAIDACKER, ESQ.
1525 Locust Street, 19th Floor
Philadelphia, PA 19102
(215)772-1000

Attorneys for the Plaintiff

DUANE MORRIS LLP
BY: ROBERT M. PALUMBOS, ESQ.
30 South 17th Street
Philadelphia, PA 19103-4196
(215)979-1111

OFFIT KURMAN
BY: MARK E. GOTTLIEB, ESQ.
Ten Penn Center
1801 Market Street, Suite 2300
Philadelphia, PA 19103
(267)338-1300

Attorneys for the Defendant

(Whereupon, the following proceedings were held in open court, and all parties present and participating were wearing masks pursuant to First Judicial District of Pennsylvania protocol.)

THE COURT: Good afternoon, everyone. I apologize. We ran a little longer than I had hoped for our voir dire this morning. But again, I appreciate your patience.

So I'll deputize someone to be the card manager for the court reporter so he has everything necessary.

And we are here in the matter of Hayley Freilich, F-R-E-I-L-I-C-H, Plaintiff, versus SEPTA, better known as Southeastern Pennsylvania Transportation Authority, and it is case No. 180600040 [sic] on Defendant's post-trial motion.

And who will rise for the defendants?

MR. PALUMBOS: Your Honor, Robert Palumbos on behalf of SEPTA.

THE COURT: If you don't mind, I -- you can be seated --

MR. PALUMBOS: Okay.

THE COURT: -- during your presentation as it will give you a better mic opportunity for the court reporter. So thank you very much.

So, Counsel, we're here on oral argument. The matter is before me as fully briefed. I've reviewed the briefed material as well as the exhibits. And, as you know, I took the stipulated verdict some time ago.

So with that, you may present your argument.

MR. PALUMBOS: Thank you, Your Honor.

I'll keep the argument brief today because I believe that the motion is fairly straightforward.

First of all, I don't believe there's any dispute between the parties that the damages cap is applicable in this case under 42 Pa.C.S. § 8528. The question is whether the damages cap is constitutional.

And, respectfully, Your Honor, I think we all understand where that issue is ultimately going, and the plaintiff's counsel have made clear and attempted to put that issue in this case before the Supreme Court and, I think, made it

clear that that is ultimately where it's going. And so whether the Supreme Court will hear that issue is -- is a question for another day.

For today, the law is clear, and the cap is constitutional. It's mandatory and constitutional. And the Supreme Court has already rejected all of the arguments that the plaintiff have -- made in this case, in particular, in the *Zauflik* decision from 2014.

In addition, as we noted in our reply brief in support of the motion to mold, the General Assembly has taken up this issue and is studying the damages cap just as the Supreme Court asked it to do in *Zauflik* and then again in 2019 in the *Grove* case. So there's legislative action pending, legislative study pending, and there's no need and no cause for this Court to take any judicial action that is outside of current precedent in the current statute.

So with that, Your Honor, I don't want to belabor the point. I think it is straightforward. Our reply brief lays out our position and case law. I'd be happy to take Your Honor's questions on this, though, to the extent Your Honor has any.

THE COURT: Thank you. And just a

couple of questions as to SEPTA.

Umm, how was it that number, the $250,000 cap, was calculated?

MR. PALUMBOS: That was calculated by the General Assembly.

THE COURT: Not -- not who --

MR. PALUMBOS: Who --

THE COURT: -- how. It seems like a magic number to me. I'm just wondering how it got there.

MR. PALUMBOS: Well, Your Honor, I would refer the Court to the legislative report from 1978 where the Court -- where the General Assembly came up with that number. I can't, to be honest, provide a detailed explanation of the legislature -- legislative intent other than that was the number that the General Assembly determined --

THE COURT: That I got. I just --

MR. PALUMBOS: -- is the balance.

THE COURT: -- wanted to know the rational basis for it, frankly, how it got there.

MR. PALUMBOS: That was the balance that the General Assembly struck as a policy matter between what would provide compensation to plaintiffs without unduly burdening the public fisc.

THE COURT: I understood the -- that rationale, but I've never been able to see how that calculus that got to that magic number. And forgive me for calling it that. I'm just curious.

We're in agreement that the plaintiff has put forward a calculation of the $250,000 cap rounded up to the present value of dollars from the history of this. Is there a dispute of Mr. Hopkins's calculation of the present value of $843,201, I believe?

MR. PALUMBOS: SEPTA has not disputed that calculation, Your Honor.

THE COURT: Okay.

And then my last question. One of the drivers of the plaintiff's argument as to the unconstitutionality of the act as applied to this particular case is that the -- there's an existence of, I assume, commercial insurance liens, at a minimum. There may be other forms of liens that are asserted.

Is there any calculation considered in the cap as to the increase of medical costs over the same life span that Mr. Hopkins calculated as health care and the value of health care and the expense of health care as manifested in a lien has

increased, I'm guessing, exponentially? But does SEPTA have some understanding of what that cost rise has been that may affect the recoverability in this matter?

MR. PALUMBOS: Yes, Your Honor. That's not -- that's not something that SEPTA has in the record or is prepared to offer today.

But what I would say is that's precisely the type of question and the type of calculation that is under study by the General Assembly today. And there's a report that, under legislation, is due to be produced in April of this year by the General Assembly's Legislative and Budget Committee. And that's exactly the kind of question that the General Assembly, as a policy matter, is considering at the Supreme Court's direction and -- and with the Supreme Court's instruction that it's an appropriate consideration for the General Assembly, not an appropriate consideration --

THE COURT: So this was Mr. Justice Baer's -- Mr. Chief Justice Baer's concurrence.

MR. PALUMBOS: Yes, Your Honor.

THE COURT: When did he manifest the question that he put to those who defend the cap of

when that was going to be done? Not if it was going to be done; when.

So it hasn't been done since Mr. Justice Baer --

MR. PALUMBOS: Right.

THE COURT: -- indicated that had to be done. Otherwise, they would reconsider the constitutionality of the cap, as I understand his concurrence.

MR. PALUMBOS: So just to be clear, there are two concurrences. One is from 2014 *Zauflik* and then in *Grove* in 2019. After the *Grove* opinion, the General Assembly has taken this issue up for study and --

THE COURT: And that could take forever or it could be tomorrow. I don't know.

MR. PALUMBOS: That's right.

THE COURT: All right? So I'm just --

MR. PALUMBOS: Yup.

THE COURT: At least Mr. Justice Baer's concurrence caught my eye, and he said you better address this, or the cap may be considered by his Court unconstitutional. Did I get that wrong?

MR. PALUMBOS: No. I think that he

is -- he was telegraphing to the General Assembly concern about the cap and certainly saying that the Court would consider the constitutionality of the cap if the General Assembly didn't act. The General Assembly is acting. So the General Assembly is --

Now, is it moving as quickly as the Court would like? I have no idea.

THE COURT: I don't presume on the other branches of government. I do not.

MR. PALUMBOS: Yes.

THE COURT: All right? So I understand you don't know. And I just --

MR. PALUMBOS: But I can tell you there's a report that, by legislation, is due in two months. It's on these issues.

And -- and currently, under current statute and case law, there's no question that the cap applies. So until such time as the Supreme Court does take up the case and does rule differently, trial courts are still bound by existing precedent to apply --

THE COURT: You certainly don't have to remind me what the law is or what my obligations --

MR. PALUMBOS: Thank you.

THE COURT: -- as a trial judge are.

MR. PALUMBOS: Thank you, Your Honor.

THE COURT: So I understand your argument.

Plaintiff, I apologize that I've asked questions maybe a little bit beyond your brief. But if they can be addressed and should be addressed, if you don't believe that's appropriate for the argument you're making, I stand not pridefully before you.

MR. BECKER: Judge Crumlish, thank you for the opportunity to be here. I'm Charles Becker here for -- for the plaintiff. Along with me is Tom Kline and Andra Laidacker, also of Kline & Specter.

And if you don't mind, what I'd like to do is talk a little bit about some of these issues and continue this conversation. And I think Mr. Kline may also, if that --

THE COURT: Absolutely.

MR. BECKER: -- is agreeable to Your Honor, have some thoughts that he would offer as well with the proviso that we won't tread on each other's toes too much.

So I wanted to start with the issue

of legislative action with the -- the notion that the -- well, with the fact that the Pennsylvania senate has appointed a sovereign immunity task force to consider issues around the legislation and, at some point this year, to issue a report, and then maybe something will happen.

And, first of all, to the point that you made earlier, legislative bodies issue reports all the time that -- or they don't issue reports -- and whether a report is issued or not has -- doesn't mean anything in terms of whether a bill is introduced, and, Lord knows, the fact that a bill is introduced doesn't mean that a bill is passed.

So the *Zauflik* case was 2014. It was eight years ago that then Justice Baer indicated that the cap was too low and invited the legislature to reflect on that issue. Eight years we are here and there have been no changes. And we could be here eight years from now and there still could be no changes, whatever it is, that comes out of the sovereign immunity task force.

So that's an interesting development, and maybe something will happen, but none of it helps Hayley Freilich. None of it is germane to Hayley Freilich. And it is, if I may, with great

respect for my friend Mr. Palumbos, irrelevant to the consideration that is -- that is before you.

What is before you is a case that we respectfully suggest meets exactly the criteria that -- that Justice Baer joined by Justice Todd and Justice Stevens in the *Zauflik* case and then joined further by Justice Dougherty and Justice Donohue and Justice Mundy in the *Grove* case, all six of them -- five of them still on the court -- six justices total -- five of them still sitting on the court -- indicated in those concurrences would -- would violate the constitutional rights under Article 1 of the Pennsylvania Constitution.

And as you know from having read our brief and having read the *Grove* and the *Zauflik* decision, what Justice Baer said in his concurrence --

And let me just take a step back and remind you that in the *Zauflik* case, the plaintiff in that case and plaintiff's counsel in that case advanced a facial challenge to the liability cap in the Political Subdivision Tort Claims Act, as you know, the $500,000 cap that affects the city of Philadelphia or the School District of Philadelphia. Those -- there were a series of facial challenges to

that cap, and those facial challenges were rejected.

In the context of rejecting those facial challenges, Judge -- Justice Baer wrote the concurrence that is really the road map. It's the -- it's the path that we are -- that we are traveling and suggest that you also should travel in which he said that the liability cap may not be facially unconstitutional, but the economic realities of litigation are such that the cap in a case-specific setting, if there is a record that establishes in a case-specific setting, the liability cap can amount to a constitutional violation because the economic realities are such, the practicalities are such that neither the plaintiff, plaintiff -- plaintiff's counsel cannot advance the case to a jury trial. And so the right to a jury has been vitiated.

Indeed, the right to a remedy has been vitiated because the -- because the -- the cost of litigating, the fees, the whole -- just the complexity of modern catastrophic injury litigation -- and, certainly, this is a catastrophic injury case -- are such that it is simply impossible as a practical matter to get into a courtroom such as this.

And in suggesting that the damages cap could be unconstitutional in a case-specific, as-applied setting where a record has been developed to -- to -- to -- to lay that out --

THE COURT: I think Justice Baer said -- he suggested in the face of a fully developed record.

MR. BECKER: In a fully developed record. That's what he said. Then the -- then a constitutional violation may be shown in that case.

And, of course, he invited the legislature to think about this, and, of course, eight years later, the legislature maybe is thinking about it.

In 2019, five years after the *Zauflik* case, there is the *Grove* case where, again, Justice Baer says -- repeats these views that in a case-specific, as-applied setting where a properly developed record has been demonstrated to show that the economic realities, the practical realities of litigation are such that the Constitution has been violated, then we will not hesitate to do -- we won't hesitate to do that.

So the invitation has been extended by six justices of the Supreme Court -- five of them

still on the court today, five justices -- to invite a record.

And so here we are, Your Honor. Here we are. We are here with a record. Hayley Freilich hired Kline & Specter to advance her cause in this litigation with the understanding that what we would do is develop that record. And so we have taken --

And, of course, as my friend mentioned, we did file a King's Bench petition right at the outset asking the Supreme Court to consider the constitutionality of the cap, and the Supreme Court, in its -- in its -- in its wisdom, and as a matter of its case management considerations and whatever else the case may be, denied that petition. And so the litigation proceeded.

And so we advanced the litigation all the way, as you know, to the point of trial culminating in a $7 million stipulated verdict, an agreed-upon valuation of the case. And where the record then stands today --

And let me -- and if I may, I want to emphasize that we are not asking you to ignore Supreme Court precedent. We are not asking you to pretend it doesn't exist or to disagree with it. What we are asking you -- we are not asking you to

bushwhack and create a path.

What we are suggesting is that we have undertaken to create a record that allows you to walk the path that six justices of the Supreme Court have established before Your Honor in an as-applied, case-specific setting.

And those facts are that even in a -- even in a case where SEPTA has admitted liability, nevertheless, the cost of fully developing an appropriate record, including expert witnesses, to be able to put on a damages case is $75,000.

And then on top of that, if we were able to get a verdict exceeding $250,000 -- well, if -- if such that -- and if the cap were applied to the tune of $250,000, right, our -- our one-third fee would be roughly $83,000.

So if you take the one-third fee and the $75,000 in costs --

And let me point out that Justice Baer observed in his *Zauflik* dissent and in his -- excuse me -- his *Zauflik* concurrence and his *Grove* concurrence that a disproportionate relationship between cost and fee is a dimension of whether a case is viable from a trial standpoint.

And I will suggest to you that here,

there is nearly a one-to-one relationship of the cost of bringing the case to trial and the potential fee of the trial lawyer, which is a dimension of the practicalities that Justice Baer was referring to in his *Grove* --

I'm sorry?

MR. KLINE: Impracticalities.

MR. BECKER: -- impracticalities, impracticalities that Justice Baer --

THE COURT: I translated it as you spoke.

MR. BECKER: -- was referring to.

So what would -- what would be left for Hayley Freilich is roughly 85 to $90,000 in terms of her recovery.

This is a $7 million valuation. At the very most, under the cap, she could recover about three percent, three percent of -- of the agreed-upon value of her case. But after you take into account the attorney's fee and the cost of bringing the case to trial, what she's left with is about one percent, one percent of the agreed-upon valuation of the case.

But as they say in the commercials, But wait. There's more. Right? Because she

doesn't even get the one percent, because there is a -- there is -- to the point that you made earlier, there is a health care lien of $520,000, and that is an Aetna health care lien, and --

THE COURT: Inter alia. I think there's also long-term disability and --

MR. BECKER: There's also short and long-term disability to the tune of another $40,000.

THE COURT: So those are all accumulated --

MR. BECKER: All on top.

THE COURT: -- against any recovery.

MR. BECKER: Absolutely.

And if you look -- and if you look -- and we've invited you to look at the language of the lien recovery provisions of that Aetna health care policy. What Aetna says, as a condition of providing insurance, of -- not just once, not twice, but about five different times, is every penny of that recovery belongs to Aetna. That's what they say. We have a -- you know, it's not important for me to read the language, but I'll read the language.

"Aetna has a first-priority lien on any recovery. The insured must pay as a first priority from any recovery any and

all amounts due as reimbursement for the full cost of all benefits."

So under the cap, she gets, at most, three percent of her recovery. After the attorney's fees and costs, she's left with one percent. But after you consider the lien issues here as to Aetna alone and also the health -- excuse me -- the -- the disability insurer, the reality is that what she's left with is nothing. And nothing is not a viable plan for Hayley Freilich. It's not a viable plan for counsel.

And we respectfully suggest that under the path that Justice Baer, Justice Todd, Justice Stevens, Justice Donohue, Justice Dougherty, and Justice Mundy have laid out in those two concurrences that in this case, in this case only, as applied on this record, we have -- there is a ripened constitutional violation. And we urge Your Honor to say that, to deny the motion to mold.

And let me point out that should you, as you should, in a narrow, focused, case-specific, record-specific matter deny the motion to mold and enter judgment on the agreed-upon value of this case, what that will trigger, if I may make a point of appellate procedure, is a right of appeal, a

direct right of appeal in the defendant to appeal -- a notice of appeal, not a petition, not a pretty please, a right of appeal direct to the Supreme Court of Pennsylvania which will allow this matter to be adjudicated before the Supreme Court. That is the way --

Whatever happens in the General Assembly eight years from now is something we can all read about in the news. But for Hayley Freilich today on this record, there is a constitutional violation as applied only to this case, and if you say so, it will allow the Supreme Court to adjudicate that matter for Hayley Freilich in this case.

And with that, let me refer to my friend, Mr. Kline, for anything he may also have to say.

THE COURT: And while I still have you --

Mr. Kline, give me a moment.

MR. KLINE: Sure.

THE COURT: -- the argument about the taxpayers' exposure, I just have a question. It seems to be a fiction, because if there is no tort recovery, the taxpayers pay for the care of these

catastrophically injured people. So whether it's medicare or other social welfare sources, doesn't it just get distributed to a different taxpayer or --

MR. BECKER: It -- absolutely, Your Honor. And that is especially true, if I may, when you're talking about the Commonwealth. If we were talking about a school district, a school district that causes injury to a person, and the person then has -- is on medical assistance, it's the Commonwealth --

THE COURT: Right.

MR. BECKER: -- that is -- it's not that it's -- it may not be the school district, but it is the government in the form of the Commonwealth that is funding the medical care.

So that -- the -- and that point is even stronger here in terms of where the money is coming from when we're talking about the Commonwealth itself. Right? Because -- because the Commonwealth can either pay the tort liability up front for -- in this case per the agreed value of the claim, or the Commonwealth, not some other governmental entity, the Commonwealth itself will -- will find itself paying for this liability through another dimension of what it is that the

Commonwealth does.

And the observation that you make about -- about the fact that the government is going to pay for this either way is exactly on point. And let me suggest --

THE COURT: It's the same taxpayer, just with a different hat on.

MR. BECKER: Absolutely. It's a different agency.

THE COURT: Yeah. Okay.

MR. BECKER: But it is ultimately the Commonwealth, and it is ultimately the taxpayers.

THE COURT: So, Mr. Kline, I apologize. You can proceed.

MR. KLINE: And I'll be brief, Your Honor. Tom Kline also for the plaintiff.

I would start here. Justice Baer in the *Grove* case expressed -- he went out of his way to express his impatience with the legislature. In 2014, he called on the legislature in a dissent joined by Justice Todd, if I remember correctly, to -- to do something here. And the legislature did nothing, has done nothing, and it's 2022.

The legislature can't legislate a remedy for Hayley Freilich. What happened along the

way is that in *Grove*, the issue wasn't even ripe before the Court, and the Court went out of its way to address, once again, the -- the fact that -- that the cap was a very serious impediment to a -- to a recovery to a plaintiff and might be a constitutional violation.

Yes, there is existing, quote, precedent, but there are now five sitting justices of the Supreme Court, all of whom have said categorically and unequivocally that there could be, under a developed record, a constitutional deprivation.

We admit that in this case, we tried to shortcut it because we have been determined. I plead guilty to being determined on this issue.

THE COURT: Well, I'm going to tell you, Mr. Kline, you are advocating on behalf of a client, as is SEPTA. The Court takes no offense to legitimate redress of grievances. So I didn't really respond to that argument about coming back again.

MR. KLINE: Yeah. No. I appreciate that. We --

THE COURT: For all the parties, it's an honorable pursuit to do the best for your client,

so...

MR. KLINE: And we undertook this case in that spirit. This case could have gone to a lawyer, and the lawyer could have said, "You can't get a recovery, and you have to take the $250,000." And yes, we also would agree that since -- she would have gotten maybe a little bit more than the $90,000 after we invested all this money and costs. But we have a client who, like us, is -- was determined to see that her rights are adjudicated and that she gets a day in court.

The interesting thing -- a couple of interesting things developed along the way in this case. And no litigation is ever predictable, and this was certainly that kind of situation. One is that we couldn't get to the Supreme Court right away because we had the King's Bench petition. That, in our view, was a blessing in disguise, as it turned out, because the Court forced us to do what Justice Baer wanted us to do and other justices appeared to have wanted us to do, and we're actually acting, to some degree and extent, on their guidance, if you will. And so what we -- what we did was we got to develop a record.

As it turned out, this case -- and

again, we are looking for an unconstitutional determination here as applied to this case, not Your Honor saying, "I think something different, and I'm a trial court judge, and I don't believe that it's constitutional." That's not what we're doing. We're saying, based on the guidance of the existing justices of the Pennsylvania Supreme Court in two decided cases, that on this now fully developed record that we have established that she gets no recovery.

The lien holders get totally no recovery either. That, by the way, is wrong. We represent them indirectly, if you will.

THE COURT: Um-hmm.

MR. KLINE: But that's -- that's wrong.

And we can read. We've read the cases. We know this -- this area very well. And what we see here is a narrow, but legitimate, pathway for a trial judge to make a determination that, as applied, this is unconstitutional.

The one thing we know for certain here is that we have an agreement with SEPTA that this -- that the valuation of this claim is worth $7 million. I mean, that's a, as Phil Rizzuto used

to say, "holy cow" moment. Like, wow, you know? And then they say, well, let's wait for the legislature to decide whether we should someday, somehow, someplace -- if -- if the legislature can agree on what time of day it is -- make a determination that the cap would be changed or raised. And to what -- and to what avail for Hayley Freilich? None.

So we're saying -- and there's no other case like this in the Commonwealth, so we're not looking at -- at the floodgates opening and the -- and the skies falling. Which, by the way, having been a lawyer who lost the *Freilich* case and heard the arguments that day under the rotunda in the Capitol that the sky was going to fall if -- if the cap fell -- by the way, it hasn't fallen. The sky hasn't fallen in our neighboring states of New York and New Jersey and Ohio, as in states that actually border Pennsylvania. The sky hasn't fallen without caps.

But we're not even arguing for that. What we're saying is that in this case, this one sole case, this one sole client, that it should be declared unconstitutional.

I would -- I would admit that the

salutary effect of that of -- of a declaration would be it will get the immediate attention of the Supreme Court of necessity and by law. And so you will have -- you will be able to say to them what they have said to little practitioners as well as the judges like yourself who have to apply the law, that this is that case, and this is a pathway that you're given.

And we respectfully request that the Court follow our arguments and our pathway for Hayley Freilich to recover in this case an amount which SEPTA agrees is the legitimate value of the injury they caused to her, the lifelong injury of losing a foot, a nice, wonderful, pretty, young lady who -- who will suffer for that for the rest of her life.

And absent a remedy, she will be told, You have no remedy under Pennsylvania law. Too bad. That's the way the law was applied. And we respectfully believe that she, in this case, should be entitled to it, and you, Your Honor, are entitled to provide her that remedy and then have it reviewed directly by the Supreme Court.

Thank you.

THE COURT: And has the Commonwealth

Court recently weighed in on any of this, or are they not focused on this particular argument as to the cap?

MR. KLINE: This has not been recently addressed by the -- by the Commonwealth Court.

THE COURT: Okay.

MR. KLINE: The Supreme Court had the opportunity to review it collaterally, I might add, in the *Grove* case when Justice Baer literally says, Hey, this wasn't raised by the plaintiffs, but, like, I would have raised it, and so I'm raising it. And that's how it got back into the *Grove* case a second time, which, by the way, to our excitement, if I would add, added a few more Supreme Court justice voices. Justice Dougherty then weighed in, Justice Donahue weighed in, and Justice Mundy weighed in.

So that's how we get our count of five current justices have said that in an applied setting, the constitutionality of this -- of this act is up for grabs if a plaintiff can come into a courtroom in this Commonwealth and prove that -- that a plaintiff cannot get a recovery.

I would suggest, at the sake of

repetition, that one twenty-eighth of a recovery is no recovery at all. And with the lien here, it's literally, not figuratively, but literally no recovery at all.

THE COURT: Thank you, sir.

Did I open anything that you need to address before you address Mr. Kline or Mr. Becker's argument?

MR. PALUMBOS: No, Your Honor. If I could just respond briefly, I would.

THE COURT: Absolutely. I just wanted to make sure I didn't take you off track on my questions.

MR. PALUMBOS: No, Your Honor. Thank you.

So I'd like to address the question of whether the current law allows the Court today to apply and to declare the statute unconstitutional on an as-applied basis. And, in my view, it clearly does not allow for that.

So, first of all, as plaintiff's counsel has conceded, in the *Grove* decision where there was a concurrence on this issue, that the issue is not before the Court. There was no advocacy on the issue. It's undisputed that it was

dicta. Therefore, the concurrence, while what everyone might think about what it forbodes in the future, it is not binding law today, and it's not controlling today.

Similarly, the concurrence in the *Zauflik* opinion is not controlling. That is -- I mean, clearly, the concurring judges -- justices there said, This is an as-applied challenge that we, the Supreme Court, would consider in the future. But it was a unanimous majority decision on the right to a jury trial issue on Article 1, Section 6. And what the Court unanimously said in not distinguishing on an as-applied or facial attack, it said that that argument was obviously misdirected. It said, unanimously:

> "The damages cap does not present a condition or restriction on appellant's right to have a jury hear her case. Rather, the burden lies on the limited amount of recovery allowed, and that is obviously not the same thing. Successful plaintiffs are often limited in their ability to recover the full amount, but this practical reality has nothing to do with the plaintiff's right to seek to have

the merits of her cause determined by a jury rather than some other process."

That is the binding law today by a unanimous opinion of the Pennsylvania Supreme Court.

The arguments that plaintiff's counsel have raised can be heard by the Supreme Court based on this record, and the Court, based on its reasoning in -- in the concurrences, may take those arguments up, but that's for the Supreme Court to decide. The existing binding law is the majority opinion in *Zauflik* which rejects the argument even on an as-applied basis. And we'd ask Your Honor to apply that today.

THE COURT: Go ahead.

MR. PALUMBOS: Your Honor, please. If you...

THE COURT: Would you agree with Plaintiff's argument that as -- on this record that the plaintiff would recover literally a minus award if the cap is applied?

MR. PALUMBOS: I -- we have not disputed those facts, Your Honor.

What I do dispute is the -- is the next step, that that is an encumbrance on the right to jury trial, and my basis for that is the opinion

language that I just read. It's two different things. The right -- the substantive right to recovery -- the amount of recovery is one thing, and there's clearly a policy debate, a legislative issue, maybe even substantive questions under the Constitution that that -- that is entirely separate.

THE COURT: Um-hmm.

MR. PALUMBOS: This is what the Supreme Court unanimously held in *Zauflik*, including Justice Baer, including Justice Todd, unanimously held that that is separate from the right to a jury trial.

THE COURT: And the last word to Plaintiff, and then I think I have some very well crafted briefs to contemplate in reaching a decision.

MR. BECKER: Well, Your Honor, I want to -- I want to agree with Mr. Palumbos. It's two different things. *Zauflik* was a -- *Zauflik* presented facial challenges to the -- to the liability cap.

In *Zauflik*, however, in that concurrence and, again, in the concurrence in *Grove*, Justice Baer and other justices said, facial challenges to the side, that's the one thing,

there's this other thing which is the as-applied challenge based on a fully developed record in a case-specific setting that shows that the economic and practical realities of litigation are such that the $250,000 statutory cap vitiates a constitutional right.

And under -- and so we're not in the one thing; we're in the other thing. It's the two different things. Right? You -- we are not asking you, and you would be constrained from saying, as a categorical matter, the liability cap is unconstitutional. But you are not constrained.

And, in fact, you have been invited by five sitting Supreme Court justices in the context of a developed record -- and we have here a developed record of a -- of a -- of a plaintiff who will get absolutely nothing, who -- and which -- which -- to say so, to say so, and to say that -- that in the case-specific, record-based setting of this case, that the liability cap, in fact, vitiates a constitutional right. We -- we've made that record. You've been invited in a path that has been laid out before you by five sitting justices. We urge you to walk down that path.

Send this thing -- send this matter

back to the Supreme Court. You know, that's fine. It's their -- this is their issue. Let's get it to the Supreme Court.

THE COURT: I'm not sure if I would be the person saying, I'm going to send you something. I appreciate what you're saying.

MR. BECKER: Well, let SEPTA send it. Right.

But in all events, we urge you to take up their invitation on this developed record and find that the liability cap violates the Constitution as applied to Hayley Freilich, and then -- and then we'll see where we go from there.

THE COURT: Anything?

MR. PALUMBOS: Judge Crumlish, may I just make one point about the factual record?

THE COURT: Sure.

MR. PALUMBOS: This will be very brief.

I just want to say that I think what the factual record that Plaintiffs have developed shows is the cost of recovering damages above the cap. And so their argument about the encumbrance on a right to a jury trial is that their right to a jury trial in which they can prove, for example,

$7 million in damages has been encumbered.

The cap in this case was actually exceedingly efficient at ensuring that the plaintiff received the full amount that she is owed today under law, that's $250,000, which was offered by SEPTA six weeks after Ms. Freilich filed suit.

So we can argue -- this, again, goes to the question of substantive rights to recover an amount versus procedural rights. Mrs. Hayley -- or Mrs. Freilich's procedural right to recover in this case a full amount to which she is owed was completely protected. Within six weeks of filing suit, she had that money offered to her. And -- and so this -- I think that shows the distinction between the substantive right of how much the plaintiff can recover and the right to a jury trial under Section 6.

The reason that's important, Your Honor, is because the plaintiffs are relying on Section 6, and they're saying that the Court can apply -- make an as-applied finding that Section 6 means this is unconstitutional. But it just is not a fit because what the argument actually is, is about the substantive right to -- of an amount to recover.

Thank you, Your Honor.

MR. BECKER: The constitutional right is not the right to get an offer; it's the right to a jury trial.

And the $250,000 that my friend is referring to is the equivalent in 1980, when this cap was established, of $77,000. That's -- that's -- that is the proposition that is being offered, that it was okay in 1980 for the General Assembly to say, We think that 75 -- $77,000 is the -- is the -- is the limit that a person can recover against the Commonwealth of Pennsylvania.

You made the point earlier that if you took that $250,000 and adjusted it by cost of living, the cap today would be roughly $850,000, $843,000 as Mr. Hopkins laid out in his affidavit.

So the numbers do matter. And what the numbers illustrate, when you look at the fixed amount of $250,000, the equivalent of $75,000 back in 1980, when you look at the $250,000 today, what the record shows is that you cannot get to a jury trial or -- or the right to a jury trial has been so onerously restricted as to -- as to amount to a constitutional violation on this record in this case.

The fact that there was an offer does not answer that -- does not answer that constitutional challenge as laid out by Justice Baer and five sitting justices of the Supreme Court of Pennsylvania.

THE COURT: Briefly, anything left for SEPTA?

MR. PALUMBOS: Not on this issue, Your Honor. Thank you.

THE COURT: Are there any new issues?

MR. PALUMBOS: Well, I don't know if Your Honor would like to hear argument on the motion for delay damages or to touch on that briefly or --

THE COURT: I understand the law, and I understand it's integral to the statutory cap --

MR. PALUMBOS: Yes, Your Honor.

THE COURT: -- exercise.

So, I mean, if you think it's -- will be helpful to me to better understand the law, I won't prevent you from arguing, but I don't think it's -- I don't think it's something, really, that I need this kind of argument. I'm not denigrating your presentation.

MR. PALUMBOS: Understood, Your Honor.

MR. KLINE: We're done. We thank you for your consideration.

THE COURT: Thank you so much for your excellent work. You've got a lot for me to think about and get right.

MR. KLINE: Thank you.

THE COURT: Thank you again.

MR. BECKER: Thank you, Your Honor.

THE COURT: Court is adjourned.

(Whereupon, court is adjourned at 3:55 p.m.)

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C E R T I F I C A T I O N

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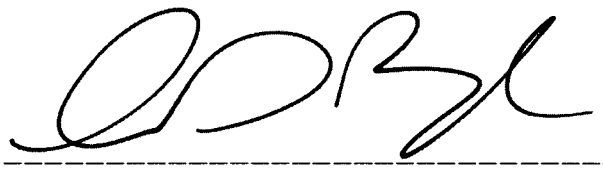
I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the hearing of the above cause, and that this copy is a correct transcript of the same.



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