

[J-1-2025] [MO: Todd, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

HAYLEY FREILICH,	: No. 10 EAP 2024
	:
Appellant	: Appeal from the Order of the
	: Commonwealth Court entered on
	: July 6, 2023, at No. 327 CD 2022,
v.	: affirming the Order of the Court of
	: Common Pleas of Philadelphia
	: County, Civil Division, entered on
SOUTHEASTERN PENNSYLVANIA	: March 28, 2022, at No.
TRANSPORTATION AUTHORITY,	: 180600401.
	:
Appellee	: ARGUED: March 4, 2025

CONCURRING OPINION

JUSTICE DOUGHERTY

DECIDED: October 1, 2026

On the one hand, the majority faithfully applies our existing precedents, including *Smith v. City of Philadelphia*, 516 A.2d 306 (Pa. 1986), and *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096 (Pa. 2014), to “conclude the damages cap contained in Section 8528(b) [of the Sovereign Immunity Act¹] does not violate Section 6 or Section 11 of Article I of our Constitution,^[2] even on an as-applied basis where the practical effect of that damages cap would leave a plaintiff with no recovery.” Majority Opinion at 32; see

¹ See 42 Pa.C.S. §8528(b) (“Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed \$250,000 in favor of any plaintiff or \$1,000,000 in the aggregate.”).

² See PA. CONST. art. I, §6 (“Trial by jury shall be as heretofore, and the right thereof remain inviolate.”); PA. CONST. art. I, §11 (“All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.”).

id. at 21 (“The logic of *Zauflik* applies equally to [an] as-applied challenge.”); *id.* at 29 (*Smith*’s “logic” is “controlling here”). Meanwhile, the dissent makes a compelling case for “overrul[ing] *Smith* and hold[ing] Section 8528’s cap on damages unconstitutional.” Dissenting Opinion at 5; see *id.* at 39 (“a proper constitutional analysis of Section 11 and Section 18^[3] departs from the conclusions reached by the *Smith* Court”); *id.* at 43 (“stare decisis weighs in favor of discarding *Smith*”).⁴

Although it is a very close call for me, I am constrained to agree with the majority. I continue to hew to the view that, as a matter of judicial restraint, appellate courts should be especially hesitant to “overrule prior precedent *sua sponte*, without any request by or

³ See PA. CONST. art. III, §18 (“The General Assembly may enact laws requiring the payment by employers, or employers and employes jointly, of reasonable compensation for injuries to employes arising in the course of their employment, and for occupational diseases of employes, whether or not such injuries or diseases result in death, and regardless of fault of employer or employe, and fixing the basis of ascertainment of such compensation and the maximum and minimum limits thereof, and providing special or general remedies for the collection thereof; but **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**, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted.”) (emphasis added).

⁴ More specifically, after conducting a plain-text analysis of our state charter, the dissent concludes:

[T]he General Assembly is not permitted to set limits on recovery against the Commonwealth where it has otherwise waived sovereign immunity. Under Section 11, the General Assembly may determine the cases in which claims can be brought against the Commonwealth, the courts that hear such cases, and the procedure for bringing such claims. Limits on recovery do not fall within this authorization. Moreover, Section 18 independently and specifically prohibits statutes limiting damages for injury to person or property. The General Assembly’s control over suits against the Commonwealth under Section 11 is broad, but where sovereign immunity is waived, legislation limiting recovery in suits against the Commonwealth for personal injury is beyond the powers enumerated in Section 11 and specifically prohibited by Section 18.

Dissenting Opinion at 39.

advocacy from the parties.” *Commonwealth v. Mason*, 247 A.3d 1070, 1083 n.1 (Pa. 2021) (Dougherty, J., concurring). Not only does “*sua sponte* consideration of issues deprive[] counsel of the opportunity to brief and argue the issues[,]” it also deprives this Court “of the benefit of counsel’s advocacy.” *Pa. State Police v. Am. Civil Liberties Union of Pa.*, 300 A.3d 386, 395 (Pa. 2023), *quoting Wiegand v. Wiegand*, 337 A.2d 256, 257 (Pa. 1975). “In other words, it ‘disturbs the process of orderly judicial decision-making.’” *Id.*, *quoting Johnson v. Lansdale Borough*, 146 A.3d 696, 709 (Pa. 2016). Of course, “there is no absolute jurisprudential bar to this Court’s *sua sponte* reconsideration of precedent[,]” *Freed v. Geisinger Med. Ctr.*, 5 A.3d 212, 215 (Pa. 2010), and on “rare occasions . . . our Court [has] appropriately reconsidered precedent *sua sponte*.” Majority Opinion at 34. But I ultimately agree with the majority that this should not be “one of those cases.” *Id.* Freilich made a strategic decision to raise narrow, as-applied constitutional challenges for purposes of this litigation, and she expressly disclaims the argument that we should overrule any precedents or deem the damages cap facially unconstitutional.⁵ Under these circumstances, I am compelled to agree with the majority that it would be “unfair” for this Court to retroactively convert on our own motion Freilich’s claims into “a facial challenge to Section 8528 without advocacy from [her], the Attorney General, and SEPTA.” *Id.* at 36.

⁵ See, e.g., Freilich’s Brief at 16 (“Ms. Freilich asserts an as-applied challenge, seeking limited relief.”); *id.* at 19 (“Ms. Freilich does not seek a ruling that the liability cap is categorically unconstitutional. . . . [S]he has only framed a challenge to the liability cap based on the particular circumstances of her case[.]”); *id.* at 43 (“Ms. Freilich’s challenge is not to the concept of a liability cap.”); *id.* at 44 (“Given the as-applied nature of the argument presented, this Court has latitude to decide in Ms. Freilich’s favor without declaring the cap to be unconstitutional as a general matter.”); *id.* at 62 (“Ms. Freilich recognizes that damages against the sovereign survive facial challenge under *Zauflik* and *Smith*” and she “does not seek abrogation of either decision or argue with the concept that the sovereign has a right to impose liability caps as a general proposition.”).

For that reason, I am unable to join the dissent. However, if the General Assembly continues to neglect “the grossly inadequate recovery currently permitted in the small percentage of personal injury cases involving catastrophic injury,” Concurring Opinion at 3 (Todd, C.J.), and a litigant properly presents the issue in a future case, I believe the Court should confront the forceful arguments presented by the dissent that *Smith* must be overruled because it was wrongly decided as a matter of state constitutional law. The legislature’s continued stasis on the subject may well result in a change in the law through judicial means in a case where the issue is properly joined.

Justice Mundy joins this concurring opinion.