Judiciary

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Pharma Case Leads Historic High Court Arguments Session

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Old City Hall in Philadelphia
Photo: Ben Franske

Oral Arguments

The state Supreme Court is scheduled to come to Philadelphia next week for a historic arguments session. It will be the first in more than a century to be housed in Philadelphia's Old City Hall and the first in which television cameras will be officially allowed in the courtroom.

The justices are set to hear arguments in an eclectic mix of cases that could lead to significant changes in everything from paternity and aviation law to the way state agencies are classified.

The main event, however, could prove to be *Lance v. Wyeth* , a case thathas the potential to change the landscape of prescription drug liability in Pennsylvania.

Drug Design Defects

In *Lance* , the justices will get the chance to consider whether plaintiffs may sue pharmaceutical drug companies on theories that the companies were negligent in testing, marketing and designing their prescription drug products.

Currently, lawyers say that the only cognizable claims that plaintiffs can make in Pennsylvania are those that say drug manufacturers were negligent in failing to warn the plaintiffs' prescribers of the risks of using their products, or that drugmakers are strictly liable for manufacturing defects.

According to the allocatur grant, the justices are prepared to consider the validity of a claim for negligent design defect of a prescription drug.

Another issue in the case is whether Pennsylvania law should recognize a claim against drugmakers for alleged negligence in failing to test drugs for harmful side effects.

The case also presents the issue of whether state drug law would allow plaintiffs to sue on the theory that drugmakers can be negligent in marketing a drug and failing to withdraw the drug from the market if the federal Food and Drug Administration ultimately orders that drug be withdrawn because it is too dangerous.

A three-judge Superior Court panel held that plaintiffs can make a negligent design defect claim, but declined to impose upon drugmakers a common-law duty to recall drugs or to let plaintiffs pursue theories of a negligent failure

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to test or negligence in marketing.

Parking Authority's Authority

The high court will determine whether the Philadelphia Parking Authority is a "hybrid agency with a unique rulemaking procedure" in the consolidated cases *Germantown Cab Co. v. Philadelphia Parking Authority* and *Sawink Inc. v. Philadelphia Parking Authority* .

The justices granted allocatur in four consolidated cases of first impression in which the Commonwealth Court invalidated the PPA's regulatory scheme for taxicabs and limousines because the regulation was not promulgated in accordance with the Commonwealth Documents Law, which requires that an agency invite and consider written comments from the public regarding proposed regulations.

In each case, an en banc Commonwealth Court panel found the regulation unenforceable.

The Parking Authority has argued it is exempt from the Document Law because its local focus makes it unique among other state agencies and the General Assembly "must have intended it to be exempt from the rule-making procedures imposed upon other commonwealth agencies."

But the Superior Court said the Documents Law applied to "all agencies, past, present and future, regardless of their mission."

SEPTA's Sovereign Immunity?

The justices are also set to hear arguments in a case of first impression regarding whether SEPTA is immune from railroad workers' lawsuits filed in state court under federal law.

The appeal was granted in the consolidated cases of Marjorie Goldman, Edmund Wiza, Michael J. Maguire and Errol Davis, all of whom worked for the Southeastern Pennsylvania Transportation Authority's railroad division.

An en banc panel of the Commonwealth Court ruled in an August 2009 opinion in *Goldman v. SEPTA* and *Davis v. SEPTA* that sovereign immunity applies to SEPTA in state courts even when federal law is at issue.

In the 6-1 ruling, the court had to clarify whether SEPTA was an "arm of the state" protected by 11th Amendment immunity from liability under the Federal Employers' Liability Act.

In *Goldman* , the court pointed to SEPTA's "unique enabling statute" that expressly established it as a commonwealth party that enjoys state sovereign immunity and added that FELA claims are no exception.

In granting allocatur in the four cases, the Supreme Court accepted verbatim the three issues raised by the railroad workers on appeal, including whether SEPTA is immune from federal laws "stripping SEPTA employees of the rights and protections railroad employees have enjoyed for a century under" FELA.

MCARE Fund Transfers

The Supreme Court will also consider whether the state must transfer hundreds of millions from its general fund to the MCARE fund in order to cover abatements paid out to doctors to help ease their insurance premiums.

The arguments follow a 4-1 Commonwealth Court ruling that the state must transfer $808 million from the general fund to the MCARE fund, finding that the state illegally diverted the money from the MCARE Fund and from an account created specifically to provide money to the fund to cover the abatements.

In *Pennsylvania Medical Society v. Department of Public Welfare* , the court rejected the department's argument that it didn't need to transfer the millions of dollars collected in the Health Care Provider Retention Account to MCARE because MCARE has been able to fulfill its obligations to pay claims and expenses. The court said that while the fund has met its current obligations, prospective obligations are in jeopardy because the fund hasn't been fully funded.

In its separate but related opinion in *Hospital & Healthsystem Association of Pennsylvania v. Pennsylvania Department of Insurance* , which is listed as a consolidated matter before the justices next week, the Commonwealth Court ruled that $100 million in funds the state took from the MCARE Fund in October 2009 and redistributed to the general fund to help fill budget gaps was done illegally.

Open Records Review

The justices will also determine the Commonwealth Court's standard of review when considering final determinations of the Pennsylvania Office of Open Records.

The court granted allocatur in *Bowling v. Office of Open Records* to hear arguments on whether the Commonwealth Court's review should be limited to the record of the OOR in such cases.

The Commonwealth Court, in an apparent case of first impression, said it has the authority to employ the much broader de novo standard of review and the justices are now poised to determine whether that ruling clashes with the statutory process set forth in the state's Right-to-Know Law.

In *Bowling* , the respondent, the Pennsylvania Emergency Management Agency, argued that the court's standard of review is the traditional, three-pronged appellate standard of review for administrative agency determinations: whether the record supports the findings of fact, whether errors of law were committed or whether constitutional rights were violated.

The Commonwealth Court said that while it was reviewing the appeal in its appellate jurisdiction, not its original jurisdiction, the court was functioning as a trial court in such cases and must subject such cases to independent review.

Peititioner Brian Bowling, who writes for the *Pittsburgh Tribune-Review* , made a Right-to-Know request to PEMA for records of all invoices and contracts for first responder equipment and services purchased with federal Department of Homeland Security grant funding for fiscal years 2005-08.

PEMA redacted information about the recipients' names as well as information pertaining to one of its programs.

The Commonwealth Court said it may employ the broadest scope of review when hearing an appeal from a decision made by an OOR hearing officer and that the RTKL does not expressly restrain a court from reviewing other material besides the record on appeal designated by the law, which includes the request for public records, the agency's response, the hearing transcript and any final determination written by the appeals officer.

Paternity and Responsibility

The high court will also mull the question of who should be held legally responsible for a child — a man who has been holding out as a child's father, or the putative biological father. In a challenge to the common-law doctrine, paternity by estoppel, the justices will decide whether a man who holds out a child as his own, despite the child's true paternity, is permitted to deny fatherly responsibility. The Superior Court said in *K.E.M. v. P.C.S.* that he is not.

Under the doctrine, the child's mother also is not allowed to seek child support from a man who she claims is the child's true biological father.

The Superior Court decided 2-1 in a non-precedential decision that the alleged biological father was estopped from paying child support to the mother because she and her now-estranged husband held out a 4-year-old boy as their son.

The case could be a foundation for the high court to change the common law to accommodate changes in technology.

At least one current Supreme Court justice has held the view that Pennsylvania common law is outdated for not allowing the introduction of DNA blood tests when there are paternity disputes.

In *Vargo v. Schwartz* , one of his final decisions before leaving the Superior Court, Justice Seamus P. McCaffery asked in an extended footnote stretching over two pages that "Pennsylvania law is outdated on the issue of DNA evidence in paternity disputes, and should be modified to acknowledge the scientific reality that, in virtually all cases, it is now possible to establish to nearly absolute certainty whether a putative father is indeed the biological father of a child."

Aviation Liability

In *Moyer v. Teledyne Continental Motors Inc* , the justices will hear arguments as to whether aircraft manufacturers' service bulletins trigger an exception to the 18-year statute of repose set forth by General Aviation Revitalization Act of 1994. A unanimous en banc Superior Court panel ruled service bulletins were not an exception to the statute of repose because they are issued too frequently and would ruin the act's intent.

The court dismissed the appellant's argument to have service bulletins treated in the same manner as instruction manuals. Instruction manuals, the court said, may be defective for failing to supply "critical information," but the same cannot be said for service bulletins.

The decision came after Charles and Donna Moyer filed claims of negligence, breach of warranty and strict liability against the manufacturer of an airplane engine, a company that removed a damaged engine part and a company that repaired the damaged part after their parents were killed in a 2003 crash.

In *Moyer* , the crankcase of the Moyers' parents' plane had required welding. Though the person who performed the repairs followed the manufacturer's instructions, the Moyers alleged that the instructions, which were modified in 1990, were improper.

But the Superior Court affirmed the trial court, which had written that "it was not the service bulletin that failed but the crankcase."

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