Appellate Law

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The Appellate Safety Valve: When Courts of Last Resort Decide To Overrule Precedent Sua Sponte

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Upon Further Review

As certain justices serving on the U.S. Supreme Court have observed, that court is not final because it is infallible. Rather, that court is infallible because it is final. But any claim that courts of last resort are infallible is of course not entirely correct, because courts of last resort retain the ability to overrule their own precedents as necessary and appropriate.

Late last month, the Pennsylvania Supreme Court issued a decision addressing whether a court of last resort may appropriately decide to overrule one of its own earlier decisions even in the absence of any request from the parties to the lawsuit to overrule existing precedent. Whether courts of last resort are acting properly when they decide to overturn precedent sua sponte is a controversial topic that has garnered attention from academics writing in law reviews.

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The case in which the state Supreme Court decided to address this question, by means of an opinion issued on Sept. 29, is captioned *Freed v. Geisinger Medical Center* . Notably, the approach to the issue of sua sponte overruling that Pennsylvania's highest court took in the *Freed* case is reminiscent of the saying "shoot first and ask questions later."

Initially, in a ruling that issued in June 2009, the Supreme Court decided the merits of the *Freed* case and, in the course of doing so, decided on its own, rather than at the request of any of the parties, to overrule an earlier state Supreme Court ruling that otherwise would have controlled the outcome in *Freed* . Thereafter, at the request of the party that had lost on the merits, the state Supreme Court granted reargument to address whether sua sponte overrulings are appropriate, first, as a general matter and, second, whether the sua sponte overruling that occurred in *Freed* was appropriate under the facts and circumstances of that case.

The question presented on the merits in *Freed* was whether a nurse may testify in a negligence action that a breach of the nursing standard of care caused a plaintiff's resulting medical condition. In ruling that a nurse may indeed give such testimony if he or she satisfies the generally applicable rules for giving expert testimony in a malpractice case, the state Supreme Court found it necessary to overrule that court's earlier decision from 1997 in *Flanagan v. Labe* . And, as explained above, Pennsylvania's highest court decided to overrule *Flanagan* notwithstanding that none of the parties in the *Freed* case had asked that *Flanagan* be overruled.

The state Supreme Court's recent opinion following reargument in *Freed* recognizes several important principles. First, and of little surprise, the majority opinion on reargument expressly recognizes that appellate courts of last resort may properly decide on their own motion — meaning in the absence of any request from a party — to overrule existing precedent. In so ruling, Pennsylvania's highest court recognized that appellate courts of last resort are not infallible, and decisions that may have seemed correct when issued will sometimes be shown as incorrect

based on subsequent events. In that regard, it is notable that the only justice who remains on the Pennsylvania Supreme Court from 1997 joined in both the *Flanagan* decision when it issued and in the court's 2009 decision in *Freed* , holding that *Flanagan* should be overruled.

Of perhaps even greater importance to attorneys who litigate appeals, last month's ruling of the state Supreme Court on reargument in *Freed* recognized that a court of last resort should seek input from the parties before deciding, on its own motion, to overrule precedent whose validity none of the parties were challenging. In other words, in the future, when the state Supreme Court is considering whether to sua sponte overturn one of its earlier rulings, that court will first seek supplemental briefs from the parties on that question before deciding to jettison precedent.

One of the reasons why sua sponte overrulings are necessary, according to the majority opinion on reargument in *Freed* , is that litigants and their lawyers are often reluctant to call for the overruling of unfavorable precedents. Instead, those litigants and their lawyers try to distinguish away any such unfavorable precedents, regardless of how persuasive such distinctions may seem. Perhaps Pennsylvania's highest court would like to see more frontal assaults to existing precedent, which might then reduce the frequency with which the court would have to consider overruling precedent on its own motion.

Readers keeping score at home (pardon the baseball reference) may wish to note that the state Supreme Court's decision last month on reargument in *Freed* was a 3–2 ruling, with two justices not participating. Thus, fewer than a majority of all seven justices now serving on the state Supreme Court joined in the majority opinion on reargument in *Freed* . Nevertheless, the majority opinion on reargument in *Freed* will continue to constitute precedent in Pennsylvania, at least until some later iteration of the Pennsylvania Supreme Court decides that it should be overruled. •

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