IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

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10 WAP 2018

CHRISTOPHER G. YANAKOS, SUSAN KAY YANAKOS, and
WILLIAM RONALD YANAKOS, her husband,
Appellants,

v.

UPMC, UNIVERSITY OF PITTSBURGH PHYSICIANS,
AMADEO MARCOS, M.D. AND THOMAS SHAW-STIFFEL, M.D.,

Appellees.

BRIEF *AMICUS CURIAE* OF THE AMERICAN MEDICAL ASSOCIATION AND THE PENNSYLVANIA MEDICAL SOCIETY IN SUPPORT OF APPELLEES' APPLICATION FOR REARGUMENT

Appeal on Allowance from the July 26, 2017, Memorandum of the Superior Court, 1331 W.D.A. 2016, affirming the August 29, 2016, Order of the Court of Common Pleas of Allegheny County, Civil Division, GD-15-022333 (Della Vecchia, J.) granting summary judgment in favor of Appellees

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pursuant to Pa.R.A.P. 531(a), *Amicus Curiae*, the American Medical Association ("AMA") and the Pennsylvania Medical Society ("PAMED"), file this Amicus Brief in support of joint Application for Reargument filed by UPMC and University of Pittsburgh Physicians and Amadeo Marcos, M.D. and Thomas Shaw-Stiffel, M.D.

Amicus Curiae, the AMA, is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy-making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including Pennsylvania.

Amicus Curiae, PAMED, is a Pennsylvania non-profit corporation that represents physicians of all specialties and is the Commonwealth's largest physician organization. PAMED regularly participates as an *amicus curiae* before this Court in cases raising important health care issues, including issues that have the potential to adversely affect the rights of physicians and the quality of medical care.

The AMA and PAMED are appearing on their own behalves and as representatives of the Litigation Center.

The Litigation Center is a coalition among the AMA and the medical societies from each state (and from the District of Columbia). The purpose of the Litigation Center is to concentrate the resources of its members and represent the interests of organized medicine in the courts.

The AMA and PAMED submit that they are appropriate *amici* under Rule 531 of the Pennsylvania Rules of Appellate Procedure. *Amici* urge this Honorable Court to consider seriously the legal and policy considerations advanced in this Brief *Amicus Curiae*, which compel the conclusion that this Court grant Defendants/Appellees' request for reargument.

II. INTRODUCTION

Amici respectfully ask this Court to reconsider and vacate the Majority Court's decision to strike MCARE's statute of repose.

Respectfully, *Amici* submit that the Majority failed to fully appreciate the critical governmental interests that MCARE's statute of repose has served over the past two decades. Enacted in 2002, the MCARE Act helped reverse a serious medical malpractice crisis in this Commonwealth.[1] With input from both physicians and trial lawyers, the General Assembly sought to balance the health and safety of patients against an ever-rising tide of health care costs and the need for affordable insurance coverage. It did so by reducing costs, limiting the number of frivolous claims and controlling the amount of unfunded liability.

The seven-year statute of repose is an important component to this legislative scheme. It provides a firm "end date" to health care providers' liability which allows providers, insurers and the MCARE Fund to measure and calculate ongoing exposure with some degree of certainty. A firm "end date" increases the availability of health care services as well as the quality of patient care by attracting competent medical students and health care providers to the Commonwealth. A firm "end date" reflects a legislative judgment that cases founded on stale evidence can result in a

[1] The 2002 crisis was not unique. The flight of malpractice insurers in the early 1970s led to the creation of the Medical Professional Liability Catastrophe Loss Fund (CAT Fund), in 1976. The MCARE Fund replaced the Cat Fund.

miscarriage of justice for defendants, and assists the court system by reducing the overall number of filed and prosecuted claims.

The Majority's decision to strike the statute of repose from the MCARE Act eliminates the certainty provided by this "end date" and dramatically changes the landscape in which actuaries calculate risk. Without a statute of repose, the scope of potential risk expands exponentially, and health care providers will be required to procure additional malpractice insurance, at greatly increased expense which will inevitably be passed along to the general public. Because memories fade and documents will be lost, open-ended liability will result in more complicated and protracted litigation which, in turn, will increase the burden on our court system. Moreover, competent health care providers and medical students faced with the prospect of open-ended liability – that may follow them throughout their entire careers – will certainly think twice about practicing health care in Pennsylvania. The quality of health care will be diminished.

The Majority's rationale for striking down this provision — that the legislature did not cite empirical evidence to justify *one component* of a multifaceted legislative scheme — is not based on any recognized jurisprudence. *Amici* are unaware of any occasion where this Court has demanded such empirical evidence or placed such substantial weight on Pennsylvania legislative history. In effect, this Court imposed a novel burden on parties that have no control over the legislative

history to find a record that never before has been required and that either is inaccessible to Defendants or does not exist. The Court thus created an impossible burden for Defendants who could not have anticipated, much less addressed, this Court's reasoning in striking the statute of repose from the MCARE statute.

This Court should grant reargument and vacate its decision.

III. ARGUMENT

A. The Majority Applied Intermediate Scrutiny but Relied upon 14th Amendment Cases that Do Not Support that Standard.

Without citing any applicable authority, the Majority applied the intermediate scrutiny standard. But as the Dissent points out: "Unable to marshal any precedent to support today's holding applying intermediate scrutiny, the lead Opinion invokes *James v. Southeastern Pennsylvania Transportation Authority*, 477 A.2d 1302 (Pa. 1984) and *Smith v. City of Philadelphia*, 516 A.2d 306 (Pa. 1986), neither of which are Remedies Clause decisions. Rather, *Smith* and *James* involved Fourteenth Amendment Equal Protection Clause challenges, which is why it is unsurprising that those Courts applied intermediate scrutiny."

This Court should reconsider its decision for this reason alone.

B. The Majority Failed to Recognize the Important Governmental Interests the Statute of Repose Serves.

1. The Statute of Repose Reduces Health Care Costs.

This Court previously recognized the MCARE Act as an important piece of social legislation, enacted to abate a malpractice insurance exigency serious enough to require legislative intervention, and specifically designed (among other things) to ensure that Pennsylvania citizens have access to the care they need by incentivizing health care professionals to stay in Pennsylvania, or move to Pennsylvania, and fulfill those needs. *Hosp. & Healthsystem Ass'n of Pa. v. Com.*, 621 Pa. 260, 285–86, 77 A.3d 587, 603 (2013).

To that end, the MCARE Act was generally designed to improve medical care in Pennsylvania by providing coverage for patients injured during the course of medical services and reducing the number of claims for which there is no coverage. The Act assists patients by requiring health care providers to annually pay into a special fund to ensure reasonable compensation for persons injured due to medical negligence and functions as an excess insurer by providing a secondary layer of coverage up to $500,000 per claim. The Act also assists patients by punishing providers who do not comply by requiring the MCARE Fund to report noncompliant health care providers to appropriate licensing boards for license suspension or revocation.

The Act also assists providers by requiring plaintiffs to obtain a certificate of merit and expert testimony from appropriately qualified physicians. Pa.R.C.P. 1042.3; 40 P.S. §1303.512. It also cuts off exposure for most medical malpractice claim at seven years. 40 P.S. §1303.513(a).

That the Act's provision cutting off claims at seven years has served to reduce overall litigation and, as a direct result, health care costs, is obvious. Indeed, as the Dissent recognized, the relationship between reduced exposure and reduced premiums is a basic principle of economics. *See* Dissent Slip Op. at 13 ("[o]ne need not be an expert in the economics of the insurance industry to understand that the cost of insurance coverage corresponds generally with the insurer's own costs, which will decrease when fewer aged claims are filed."). This is because the rates providers pay for malpractice insurance and MCARE's coverage are set based on actuarial calculations of risk. From 2002 forward, those calculations have taken into account the 7-year statute of repose. Once the statute of repose is removed, premiums will have to be recalculated, and increased, to address existing and future exposures from the remote past. Serious instability in the medical insurance marketplace will follow.

As the Dissent also noted, Plaintiffs/Appellants themselves did not dispute the fact that the statute of repose had a direct effect on the number of aged suits and the cost of health care. *Id.,* at 11 ("The Yanakoses do not dispute that the General Assembly imposed the seven-year statute of repose to preclude the filing of aged

lawsuits, which increase the cost of medical professional liability insurance in the Commonwealth, which, in turn, increases the overall cost of health care services.").

The Majority decision thus failed to appreciate the important governmental interests served by the MCARE Act, and its statute of repose and, in so doing, disregarded a "a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *Id.* (*quoting* 54 C.J.S., Limitations of Actions § 7, p. 24 (2010).

This Court should correct its error and vacate the Majority decision.

2. The Majority's Requirement of Empirical Evidence Is Not Supported by Pennsylvania Jurisprudence.

The Majority imposed on Defendants the onerous and illogical burden of proving that MCARE's statute of repose helps to reduce health care costs through empirical evidence contained within the legislative history — where, that requirement is not supported and where, in reality, evidence necessary to support this statutory provision lies in the performance of the MCARE statute over the past 17 years.

The Majority cited no jurisprudential basis for the requirement that Defendants adduce empirical evidence to support their governmental interest claim and *Amici* are aware of no such basis. Thus, *Amici* believe that the Majority's decision should be vacated for this reason as well.

Moreover, the Majority failed to consider the practical reality that empirical evidence in the legislative history (from 17 years ago), even if it were available, would not be as compelling as the publicly-available information reflected on MCARE's own website. As the information on MCARE's website establishes, malpractice insurance crises have occurred periodically in Pennsylvania and the MCARE Act was enacted in response to the crisis in 2002. Moreover, this information reveals that the complex balance struck by the legislature has been effective in satisfying all of the competing interests with a mechanism that covers close to a billion dollars of claims annually. In the period 2002 to 2018, MCARE made substantial progress in reducing the amount of unfunded claims – which have decreased by $678,000,000 in that time frame.[2] Over the last 10 years, the MCARE

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[2] One step taken in 2002 to reduce MCAREs unfunded liability was the change in the MCARE Act to place the responsibility for claims reported more than four (4) years from the incident back on the private insurers or self- insureds effective January 1, 2006. This "long tail" portion of the medical professional liability exposure had been the responsibility of a patient compensation fund in Pennsylvania since 1975.

This change, coupled with the limits being provided by private insurers increasing to $500,000 and the overall coverage limit going from $1.2 million to $1 million, has resulted in the MCARE unfunded liability projection trending downward. The annual actuarial study, prepared in 2018 by Deloitte Consulting LLP, concludes that an unfunded liability of $982 million exists as of December 31, 2017.

Below is a chart reflecting the projected unfunded liability over the last 10 years.

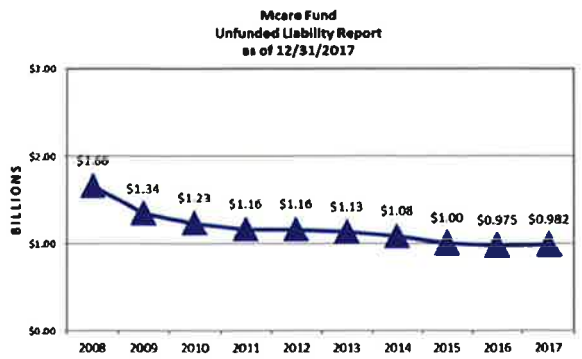
Chart 5: MCARE Projected Unfunded Liability over the last 10 years

V. MCARE Unfunded Liability

Fund alone has paid out almost $1.8 billion in funds collected from health care providers to defray malpractice claims.

MCARE's most recent 2018 Annual Report shows how the MCARE statute works to reduce health care costs by maximizing coverage for those injured by medical services, while reducing the number of uncovered claims. In 2018, MCARE provided $211 million in payments on claims totaling $777 million.

Thus, it is simply a truism that in the over 17 years since the MCARE statute was enacted, the liability exposure to the health care industry, the funds collected by MCARE from providers, the premiums charged by carriers, and the amount of unfunded claims, have been stabilized by the statute of repose – a material component of the total equation. The vast sums at stake and the very complexity of the mechanism strongly suggest that eliminating the statute of repose may cause the mechanism to fail, precipitating another malpractice insurance crisis.



Additional information on the Mcare Unfunded Liability can be found in Appendix D.

Thus, regardless of whether this Court applied a rational basis or intermediate level of scrutiny, it should have concluded, as did the Dissent, that MCARE's statute of repose served the goal of reducing the overall cost of health care.

3. Physicians Have a Vested Interest in Both the Scheme and the Immunity Provided by the Statute of Repose.

The Majority's decision, if left to stand, will unfairly deprive physicians and other health care providers of the liability protection for which they already have paid and will dramatically undermine expectations they had with regard to the practice of medicine in Pennsylvania. Because coverage under MCARE is funded by annual premiums from health care providers, those providers whom *Amici* represent have a vested interest in this statute as currently crafted.

For almost two decades, Pennsylvania providers dutifully paid MCARE payments and insurance premiums based on the statutory system this Court has now struck down. Over the past 17 years, these providers developed a vested interest in a system that they believed would protect them against claims from a period more than seven years in the past, and would allow them to obtain liability coverage at or close to the same level of expense.

This decision pulled the rug out from under these health care providers and from the health care industry in general. In one fell swoop, the Majority eliminated a vested right to provide health care services within an established system of coverage and expense, significantly impaired their ability to attract other physicians

to practice and seriously hampered their ability to defend themselves in cases where they may have destroyed records based on record retention policies that were, in turn, based on the statute of repose.

Thus, in reviewing the existence of "property rights," the Majority should have considered that, in fact, it is the *physicians and their insurers* who had a vested interest in the limitation from suit as a result of this statute and whose property interests will be directly harmed by the decision. The Supreme Court of Minnesota has recognized the existence, and impairment of such a vested interest in the immunity granted pursuant to statutes of repose, in *In re Individual Bridge Litigation*, 806 N.W. 2d 820 (Minn. 2011), and *Weston v. McWilliams & Associates, Inc.*, 716 N.W. 2d 634 (Minn. 2006).[3] Addressing directly whether a right of immunity is such a "vested property right," the Minnesota Court applied its own precedent, stating: "we conclude that when the repose period expires, a statute of repose defense ripens into a protectable property right." *In re Individual Bridge Litigation*, at 831. The Court's conclusion rested on the premise that "the statute of repose defense is a substantive limit on a cause of action. It is a defense created and

[3] See also, *Chase Securities Corp. v. Donaldson*, 13. 325 U.S. 304 (1945); *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925)(finding that a statute of repose "operate[s] as a limitation on liability" and that the time limitation "constitute[s] part of the definition of a cause of action." Retroactively amending such a statute to revive a liability that had already been extinguished under prior law "would . . . deprive [the] defendant of its property without due process of law."

defined by statute that ripened into a fixed right upon expiration of the repose period." *Id.* Thus, the Court concluded, "a statute of repose defense is an expectancy that ripens into a protectable property right when the repose period expires and the cause of action can no longer accrue." *Id.* Conversely, the Minnesota Court held that there is no constitutional implication to a potential claimant if a cause of action is eliminated before it accrues. *Weston v. McWilliams & Associates, Inc.*, at 641.

The importance of the immunity granted to physicians by the statute of repose is demonstrated by the following example. Physicians see multiple patients per day, and hundreds of patients per year. General surgeons, for example, may perform 533 procedures per year; over a seven-year period, this means that the surgeon has the potential for 3731 cases against which he or she needs to insure. However, under the statute of repose with each passing year, 533 of these potential cases "come off of the rolls" and any claims that may have arisen therefrom are extinguished.[4] If this Court's decision stands, in the case of this surgeon, the number of cases giving rise to potential liability will expand exponentially – suddenly, the surgeon's exposure will arise from more than 500 times all of the years the surgeon has been in practice prior to November 2012.

[4] *See General surgery workloads and practice patterns in the United States, 2007 to 2009: a 10-year update from the American Board of Surgery,* https://www.ncbi.nlm.nih.gov/pubmed/21865949.

Thus, the Majority's decision, if not re-heard and reversed, will unfairly punish innocent physicians who reasonably and justifiably relied on a statutory scheme that had been in place for almost two decades. This Court should protect the health care providers' vested interest in the immunity they have been granted under this statutory scheme. It should grant this Application and vacate the Majority's decision.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, *Amicus Curiae*, respectfully request that this Court GRANT Defendants' Application for Reargument and REVERSE its earlier Court.

Respectfully submitted,

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