[J-83-2018]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CHRISTOPHER G. YANAKOS, SUSAN KAY YANAKOS AND WILLIAM RONALD YANAKOS, HER HUSBAND,	:	No. 10 WAP 2018
	:	Application for Reargument
Appellants	:	
v.	:	
UPMC, UNIVERSITY OF PITTSBURGH PHYSICIANS, AMADEO MARCOS, M.D. AND THOMAS SHAW-STIFFEL, M.D.,	:	
Appellees	:	

DISSENTING STATEMENT

JUSTICE WECHT

There are several problems with this Court's decision in *Yanakos v. UPMC*, 218 A.3d 1214 (Pa. 2019). To name just a few, the Court ignored precedent, misinterpreted the Remedies Clause of the Pennsylvania Constitution,[1] and incorrectly adopted (and then misapplied) the intermediate scrutiny test.[2]

If those were the only deficiencies in the *Yanakos* decision, I would nonetheless join in denying reargument. After all, our Rules of Appellate Procedure make clear that reargument is not warranted every time an appeal has been wrongly decided. Reargument is justified only when there are "compelling reasons" for such an extraordinary remedy, like, for example, when the Court has overlooked or

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1 PA. CONST. art. 1, § 11.

2 *See Yanakos*, 218 A.3d at 1244-46 (Wecht, J., dissenting).

misapprehended a fact that would have been material to the outcome of the case. Pa.R.A.P. 2543.

That is what happened here.

I.

The Appellants in this medical malpractice case—Christopher, Susan, and William Yanakos—sued UPMC and two of its physicians, claiming that those Appellees/defendants negligently allowed Christopher to donate a portion of his liver to his mother, Susan, even though he suffered from the same genetic disease that had damaged Susan's liver in the first place. According to the Yanakoses, the defendants failed to inform them that Christopher had tested positive for the genetic disease prior to the transplant. In their suit, the Yanakoses claimed that they did not discover the defendants' error until eleven years after the transplant surgery, when additional testing revealed that Susan still had the disease, which the transplant should have eliminated.

The defendants sought judgment on the pleadings, arguing that the Yanakoses' claims were barred by the seven-year statute of repose[3] codified in the Medical Care Availability and Reduction of Error Act ("MCARE Act"). *See* 40 P.S. § 1303.513(a) (providing that "no cause of action asserting a medical professional liability claim may be commenced after seven years from the date of the alleged tort or breach of contract"). In response, the Yanakoses argued that the MCARE Act's statute of repose—which does

[3] Statutes of repose place a temporal boundary on the right to bring a civil action. Unlike statutes of limitations, which begin to run only after a cause of action has accrued, a statute of repose's time limit is measured from the date of the defendant's last culpable act or omission, regardless of when the injury occurred or was discovered. This means that a statute of repose, unlike a statute of limitations, may bar a plaintiff's suit before his or her cause of action even arises. *Vargo v. Koppers Co., Eng'g & Constr. Div.*, 715 A.2d 423, 425 (Pa. 1998).

not apply to cases involving foreign objects retained in a patient's body[4]—is unconstitutional given its "arbitrary and random classification of exempted claims." Mem. in Opposition to Judgment on the Pleadings, 8/22/2016, at 3. In other words, the Yanakoses claimed that the statute of repose was unconstitutional because it denies a remedy (after seven years) to some plaintiffs, while allowing others, like those injured by retained foreign objects, to litigate their claims. *Id.* at 11 (arguing that the statute of repose "creates an arbitrary and capricious distinction by which certain adult citizen plaintiffs would be denied any access to any remedy in court"); *see id.* at 7 ("The plaintiffs concede that if the [statute of repose] provided that no adult individual could commence a cause of action whatsoever after seven years, the statute would be constitutional." (emphasis in original)). The trial court rejected this argument and entered judgment on the pleadings.

On appeal to the Superior Court, the Yanakoses again argued that the MCARE Act's statue of repose is unconstitutional because it creates an arbitrary distinction between classes of similarly situated plaintiffs. *See* the Yanakoses' Superior Court Brief at 44 (arguing that "the Legislature crafted [the foreign-object] exception in an arbitrary and capricious manner—protecting the rights of 'foreign object' plaintiffs, but excluding others who are similarly situated vis-à-vis the purpose of the exception"). Like the trial court, the Superior Court rejected the Yanakoses' contention that the General Assembly acted arbitrarily when it exempted foreign-object cases from the seven year statute of repose. The Superior Court explained that:

> In the instance where a foreign object is left in a patient, it is conceivable that commencing an action may take more time than the seven years generally allotted. The foreign object exception recognizes and clearly defines a group of patients where negligence is implied *res ipsa loquitur*, and the passage of time does little to diminish the evidence underlying the claim. Although [the Yanakoses] align themselves with patients in the

[4] 40 P.S. § 1303.513(b) ("If the injury is or was caused by a foreign object unintentionally left in the individual's body, the limitation in subjection (a) shall not apply.").

> foreign object classification, the same observation of the durability of evidence cannot be made in other delayed discovery cases. Specifically, in foreign object cases, the evidence of the negligence is nestled within the victim until eventual discovery, whereas, in other varieties of delayed discovery cases, the passage of time can erode the credibility of eye-witness testimony, causal relationships, and the availability of documentation.

Yanakos v. UPMC, 2017 WL 3168991, at *6 (Pa. Super. 2017) (footnote omitted).

II.

The Yanakoses then petitioned for *allocatur*, arguing, once again, that the MCARE Act's statute of repose is unconstitutional because it arbitrarily deprives them "and similarly situated medical malpractice patients of any right to redress, *while preserving access to the courts for similarly situated patients.*" Petition for Allowance of Appeal, 8/24/2017, at 22 (emphasis added). We granted *allocatur*, limiting our review to the following question, as framed by the Yanakoses themselves: "Does the MCARE Statute of Repose violate the Open Courts guarantees of the Pennsylvania Constitution, Article I, §11, *where it arbitrarily and capriciously deprives some patients of any access to courts, but permits actions by similarly situated patients?*" Per Curiam Order, 3/28/2018, at 1 (emphasis added).

Once more before this Court, the Yanakoses claimed that the statute of repose is unconstitutional because the Act's foreign-object exception "makes arbitrary distinctions that protect some classes of malpractice victims but leaves similarly situated victims without any legal recourse." Brief for the Yanakoses at 29. Yet, at that point, the appeal took on a life of its own. Or, more properly, this Court breathed a new life into it. What began as a dispute about whether the legislature's exemption of foreign-object cases was arbitrary and unconstitutional was suddenly afforded a judicial resurrection as an appeal about "whether the seven-year statute of repose is substantially related to controlling the

cost of medical malpractice premium rates"[5]—something that the Yanakoses had never argued and the lower courts had never considered.

Proceeding from this new premise, the lead opinion then went on to blame UPMC for failing to present "evidence" showing that MCARE's seven-year repose period (as opposed to a shorter or longer period) "has any substantial relationship to the legislative goal of controlling malpractice insurance costs." *Yanakos*, 218 A.3d at 1226.[6] In other words, the Court held that UMPC and its physicians, in order to satisfy a standard that they didn't know about, should have rebutted an argument that the Yanakoses never made, by building a record of economic "evidence" the parties had never litigated—and all this despite the fact that the case had never proceeded beyond the pleading stage. It should come as no surprise that UPMC asks this Court to revisit its "gravely flawed analysis." Application for Reargument at 12.

The Court's lead opinion also criticized UPMC and its physicians for failing "in their current briefing" to "suggest the seven-year repose period has any substantial relationship to the legislative goal of controlling malpractice insurance costs." *Yanakos*, 218 A.3d at 1226. Of course the Appellees made no such "suggest[ion]." Why would an appellee ever brief a subject that is not before the Court, that the appellants themselves conceded, and that is intuitive and obvious? *See Yanakos*, 218 A.3d at 1244-45 (Wecht, J., dissenting) ("One 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

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5 *Yanakos*, 218 A.3d at 1225.

6 I refer to the "lead opinion" because, while a majority of the Court voted for reversal, there was no majority for the rationale. Justice Donohue, who supplied the fourth vote in support of reversal, authored a concurring and dissenting opinion in which she explained that, unlike the lead opinion, she would have applied strict scrutiny to the Yanakoses' Article I, Section 11 claim. *See Yanakos*, 218 A.3d at 1227 (Donohue, J., concurring and dissenting).

own costs, which will decrease when fewer aged claims are filed."). The lead opinion's only explanation was to insist cryptically that the parties' decision to "narrowly focus on the foreign objects exception" (the very issue that we had granted *allocatur* to resolve) was somehow, after all, not "the proper focus." *Id.*

III.

In their Joint Application for Reargument, UPMC and its physicians correctly note that, "[b]y grounding its decision on arguments never made—and, in fact, contrary to the concessions of plaintiffs—the Court" never afforded the Appellees an opportunity to establish the statute's "constitutionality on these unforeseeable grounds." Application for Reargument at 10. And that was not all. After wading into the issue without briefing or argument, the lead opinion misapprehended at least two key facts.

First, the sole legislative rationale underlying the MCARE Act's statute of repose was not, as the lead opinion assumed, "to control medical malpractice premium rates by providing actuarial certainty." *Yanakos*, 218 A.3d at 1225. Instead, the General Assembly had many overlapping objectives, including: (1) protecting defendants from an indeterminate threat of liability; (2) avoiding litigation that is likely to involve missing documents, faded memories, and unavailable witnesses; and (3) discouraging plaintiffs from sleeping on their rights or bringing stale claims. *See* Joint Application for Reargument at 11. In other words, the intent of the law was simply "to create a more predictable and stable insurance market for health care providers." *Id.* at 12. It was never intended or expected to guarantee "actuarial certainty," *Yanakos*, 218 A.3d at 1225, which seems a bit of a chimera in any event.

Second, while the lead opinion proceeded to declare, *sua sponte*, that the General Assembly's choice of a seven year repose period was arbitrary, that opinion was starkly unaware that the seven year period correlates with Pennsylvania regulations regarding

the preservation of medical records. *See* 28 PA. CODE § 563.6; 49 PA. CODE § 16.95. This fact alone lends considerable support to the notion that the MCARE Act's statute of repose, far from being "arbitrary," was crafted to bar, among other things, claims that are especially difficult (and expensive) to litigate. While no one expects this Court to possess an encyclopedic knowledge of medical-record retention regulations, the lead opinion's decision to embark on an exploratory journey through a topic beyond the scope of our *allocatur* grant created the risk that it would overlook something like this.

Put simply, this is not an ordinary request for reargument. All too often, a losing litigant will file an application for reargument that simply restates the points that this Court already considered and rejected when it rendered its decision. This is not one of those applications. The filings before us illustrate that the decision in *Yanakos* was not just incorrect, but was confused as well. Confused about the law. Confused about procedure. Confused about insurance. Confused about the question presented. The petitioners—joined by the American Medical Association, the National Federation of Independent Business, the Pennsylvania Medical Society, the Majority Caucuses of the House and Senate, and a great many others—have asked this Court to remedy that confusion.

Reargument is a fail-safe. It gives an appellate court the opportunity to admit that it made a mistake.[7] This Court should have taken advantage of that opportunity today.

I respectfully dissent.

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[7] There is no shame in confessing error. *See Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late.").