

## Pennsylvania MCARE's Statute of Repose Declared Unconstitutional

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In *Yanakos v. UPMC*, the Pennsylvania Supreme Court, in a 4-3 decision, struck down the seven-year statute of repose in the Medical Care Availability and Reduction of Error (MCARE) Act as unconstitutional. MCARE's statute of repose, in essence, limited the application of the discovery rule to seven years. The statute worked by permitting an alleged malpractice victim who discovered an injury and its cause within seven years to file a lawsuit; however, after seven years, the statute of repose barred the patient's action. Prior to this decision, the only exceptions to the seven-year limitation were for minors and someone who suffered injuries caused by a foreign body unintentionally left behind. Now, there is no absolute time limitation on the discovery rule.

The court reasoned that the MCARE's statute of repose conflicted with the "Open Courts" provision in the Pennsylvania Constitution, which guarantees that "all courts shall be open; and every man for any injury done to him in his lands, goods, person or reputation shall remedy due course of law." Because the statute potentially impaired this "important" constitutional right, it had to pass the intermediate scrutiny standard. Under this standard, a statute must be "substantially related to achieving an important governmental interest." Ultimately, following a lengthy analysis, which is summarized below, the court held that MCARE's statute of repose did not pass this constitutional standard. As a result, there is no longer a statute of repose barring medical malpractice claims in Pennsylvania, leaving no outer limits on application of the discovery rule.

In the underlying case, the plaintiffs filed a medical malpractice case against UPMC and two physicians in 2015, stemming from medical care that was provided in 2003. At that time, the plaintiff-patient needed a liver transplant due to a protein deficiency caused by a genetic condition. In response, her son volunteered to donate a lobe of his liver for the transplant procedure. Thereafter, he underwent testing to determine if he was a suitable donor. As part of the screening process, he was tested to see if he had the same genetic condition as his mother, which would make him an ineligible donor. The plaintiff alleged that he did, in fact, have the condition but he was never informed of the results. Eleven years after the transplant procedure using the son's lobe, testing revealed the mother still had the condition that an otherwise effective transplant would have resolved. This triggered review of the child's prior lab studies and the suit at issue.

In response to the plaintiffs' complaint, the defendants claimed the action was time barred under MCARE'S statute of repose. The trial court agreed, noting that it was bound by the plain language of the Act. The plaintiff appealed to the Superior Court, arguing the statute was unconstitutional because it violated the Pennsylvania Constitution's guarantee of open access to the courts. Therefore, the defendants had to demonstrate the statute was "substantially or closely related to important governmental interest." The Superior Court accepted the defendants' argument and affirmed the trial court's decision. The plaintiffs elected to appeal to the Pennsylvania Supreme Court, where they reiterated their position that the statute was unconstitutional. The court ultimately agreed.

While the Supreme Court recognized that the Pennsylvania General Assembly had a legitimate purpose in enacting the statute of repose, namely, to control the rising costs of medical malpractice premiums by providing actuarial certainty to insurers in setting rates, it did not meet its burden in demonstrating how the law itself was substantially related to the stated purpose. The court found there was no evidence in the legislative history to show how the General Assembly determined the seven-year statute of repose would provide actuarial certainty. The court noted the legislature never defined the scope of the perceived problem by citing statistics on how many medical malpractice cases were filed seven years after an occurrence. Further, the legislature did not establish how the statute of

repose would affect premiums. Given the dearth of empirical evidence, the court concluded the statute did not pass the intermediate scrutiny standard because it was not substantially related to the legislature's stated goal (i.e., controlling malpractice premiums by providing actuarial predictability to insurers).

Now, medical professionals and their insurers face potential exposure for claims long after treatment is rendered. The General Assembly, of course, could revisit the legislation and attempt to marshal the statistical evidence needed to show how the statute reduces insurance premiums by providing actuarial certainty with a date certain that claims will be time barred. For now, though, it remains to be seen what impact the loss of this affirmative defense will have on medical professional liability insurance premiums and, by extension, the overall cost of healthcare in Pennsylvania.

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