IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Docket No. 32 MAP 2021

LINDA REIBENSTEIN, as the Administratrix of
the ESTATE OF MARY ANN WHITMAN, Deceased,
v.
CHARLES BARAX, M.D., and MERCY HOSPITAL, SCRANTON

LINDA REIBENSTEIN, as the Administratrix of
the ESTATE OF MARY ANN WHITMAN, Deceased,
v.
PATRICK D. CONABOY, M.D.,
and COGNETTI & CONABOY FAMILY PRACTICE, P.C.

Appeal of: PATRICK D. CONABOY, M.D.,
and COGNETTI & CONABOY FAMILY PRACTICE, P.C.

BRIEF OF *AMICI CURIAE*, THE PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM, THE AMERICAN MEDICAL ASSOCIATION, THE PENNSYLVANIA MEDICAL SOCIETY, THE PENNSYLVANIA ORTHOPAEDIC SOCIETY, THE PENNSYLVANIA CHAPTER OF THE AMERICAN COLLEGE OF PHYSICIANS, AND THE PENNSYLVANIA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS

Appeal from the Order of the Superior Court of Pennsylvania at Docket No. 1624 MDA 2019, dated July 30, 2020, reconsideration denied October 5, 2020, vacating and remanding the Order of Court of the Court of Common Pleas of Lackawanna County at Docket No. 2016-01716, dated August 29, 2019

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Together, *Amici Curiae* represent virtually all physicians practicing in the Commonwealth of Pennsylvania. Herein, they speak out in one voice, in opposition to the immense, unsupported, and disingenuous expansion of healthcare provider liability exposure unleashed by the Opinion of the Superior Court of Pennsylvania below, which must be reversed.

Amicus Curiae, **the Pennsylvania Coalition for Civil Justice Reform ("PCCJR"),** is a statewide, nonpartisan alliance of organizations and individuals representing businesses, professional and trade associations, health care providers, nonprofit entities, taxpayers, and other perspectives. The coalition is dedicated to bringing fairness to litigants by elevating awareness of civil justice issues and advocating for reform."

Amicus Curiae, **the American Medical Association ("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 physicians, residents and medical students in the U.S. are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes.

AMA members practice in every medical specialty area and in every state, including Pennsylvania.

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

Amicus Curiae, **the Pennsylvania Orthopaedic Society ("PaOrtho"),** is a non-profit organization founded in 1956 and represents over 1,200 orthopaedic surgeons, residents, and fellows practicing throughout the Commonwealth of Pennsylvania. The organization's Mission is "to enhance our members' ability to provide the highest quality musculoskeletal care." Its Vision is to "be the primary organization that promotes quality musculoskeletal health for the citizens of Pennsylvania."

Amicus Curiae, **the Pennsylvania Chapter of the American Academy of Pediatrics ("PA-AAP"),** is a not-for-profit organization affiliated with the American Academy of Pediatrics. Founded in 1930, the AAP is comprised of more than 67,000 pediatricians. The PA Chapter has more than 2,300 member pediatricians and pediatric specialists practicing in the Commonwealth of

Pennsylvania. The organization's Mission is "to attain optimal physical, mental, and social health and well-being for all infants, children, adolescents and young adults."

Amicus Curiae, **the Pennsylvania Chapter of the American College of Physicians ("PA-ACP"),** a not-for-profit organization, is the Commonwealth of Pennsylvania's largest medical specialty organization, affiliated with the American College of Physicians. Founded in 1915, the ACP has 159,000 members including 7,650 Pennsylvania members – internal medicine physicians practicing general internal medicine and its related subspecialties. The organization's Mission is to "enhance the quality and effectiveness of health care, secure and maintain the best patient care and the highest standards of medical practice."

Amici Curiae all have a special interest in the outcome of this case and have significant concerns regarding how it will substantially and negatively affect their respective memberships. *Amici Curiae* are all recognized as credible sources of information and data to decision makers in Harrisburg and throughout the Commonwealth of Pennsylvania, including the General Assembly, the Governor's Office, state regulatory agencies, and beyond.

No person or entity other than those identified above, their members, or their counsel paid in whole or in part for the preparation of this brief or authored this brief in whole or in part.

ARGUMENT

"Cause of death." When reading the phrase, the first words that likely come to mind are cancer, stroke, heart attack, and other terrible life-ending conditions and events that none of us ever want to face. The Superior Court's Opinion, on the other hand, held that "cause of death" means "conduct the plaintiff alleges led to the decedent's death." Reibenstein v. Barax, 236 A.3d 1162, 1166 (Pa. Super. 2020), *reargument denied* (Oct. 6, 2020). It took an unambiguous medical term of art and redefined it with invented legalese. It took a law that was carefully negotiated and passed on an overwhelmingly bipartisan basis,[1] repealed it, and unilaterally installed a new law in its place. And it did so in a total vacuum of support in either legislative history or legal precedent. This must be undone.

The phrase "cause of death" is a medical term of art. It is universally understood to reference an individual's medical cause of death, *i.e.,* the specific injury or disease that leads to death. It is clearly defined as such in both Black's Law Dictionary and in medical dictionaries. The Superior Court's unsupported conclusion that "cause of death" is somehow ambiguous is especially shocking in

[1] The bipartisan nature of the Medical Care Availability and Reduction of Error Act ("MCARE Act"), 40 P.S. § 1303.101, *et seq.*, is remarkable and emblematic of just how serious the medical malpractice crisis was in our Commonwealth in the early 2000s. The final version of the bill passed both the Senate and the House of Representatives by votes of 49-0 and 196-1, respectively, on March 13, 2002.

light of how common the phrase is across the U.S. with regard to its usage on death certificates. It is used every day by physicians, coroners, and medical examiners. The phrase is carefully shaped by World Health Organization guidelines and is explicitly defined and explained in numerous publications issued by the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention. "Cause of death" is a clear, precise, and unambiguous term.

Should the Superior Court's Opinion be affirmed, there is tremendous cause for concern amongst Pennsylvania physicians. With the seven-year statute of repose set forth in Section 513 already having been declared unconstitutional, *see* Yanakos v. UPMC, 218 A.3d 1214, 1223 (Pa. 2019), *reargument denied*, 224 A.3d 1255 (Pa. 2020), the Superior Court's Opinion opens the floodgates even further by broadening application of the equitable tolling provision of Section 513. With regard to stale claims, this will put medical malpractice insurance carriers in an even worse position than they were in during the medical malpractice liability crisis of the early 2000s, unquestionably resulting in an increased number of liability claims that could be brought and a corresponding rise in the cost of insuring those claims. ***This is not grandstanding or fearmongering: this is history repeating itself, to the great detriment of the cost and availability of healthcare to the citizens of our Commonwealth.***

The Superior Court's Opinion must be reversed.

I. THE SUPERIOR COURT ERRED IN DETERMINING THAT THE PHRASE "CAUSE OF DEATH" IN SECTION 513 OF THE MCARE ACT IS AMBIGUOUS.

Section 513 of the MCARE Act sets forth a two-year statute of limitations with an equitable tolling provision for medical professional liability claims brought under Pennsylvania's wrongful death and survival acts. Specifically, it states: "If the claim is brought under 42 Pa.C.S. § 8301 (relating to death action) or 8302 (relating to survival action), the action must be commenced within two years after the death ***in the absence of affirmative misrepresentation or fraudulent concealment of the cause of death.***" 40 P.S. § 1303.513(d) (emphasis added). This provision is the crux of this appeal.

The Superior Court questioned whether the phrase "cause of death" set forth in Section 513 "means the immediate, medical cause of death, such as is ordinarily listed on the decedent's death certificate, or includes conduct leading to the decedent's death but that is not the immediate, medical cause of the death." Reibenstein, 236 A.3d at 1165. Ultimately, the Superior Court held that "cause of death" means "conduct the plaintiff alleges led to the decedent's death." Id. at 1166. As demonstrated below, the analysis of the Superior Court's Opinion was flawed, unsupported, and incomplete, thereby necessitating its reversal.

A. The meaning of "cause of death" is unmistakably plain, obvious, and unambiguous.

Pursuant to Pennsylvania's Statutory Construction Act, "the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. § 1921(a). As this Honorable Court observed just three years ago, "It is well settled that the best indication of the General Assembly's intent may be found in a statute's plain language." Cagey v. Commonwealth, 179 A.3d 458, 462–63 (Pa. 2018) (*citing* 1 Pa.C.S. § 1921(b)). "Thus, 'when the language of a statute is plain and unambiguous and conveys a clear and definite meaning,' we must give the statute this plain and obvious meaning." Id. (*citing* Mohamed v. Commonwealth Dep't of Transp., 40 A.3d 1186, 1194 (Pa. 2012)). "A statute is ambiguous when there are at least two reasonable interpretations of the text under review." Warrantech Consumer Prod. Servs., Inc. v. Reliance Ins. Co. in Liquidation, 96 A.3d 346, 354–55 (Pa. 2014) (*citing* Delaware Cnty. v. First Union Corp., 992 A.2d 112, 118 (Pa. 2010)).

As such, the initial inquiry in evaluating application of Section 513's equitable tolling provision is whether the meaning of "cause of death" is plain and obvious. Unmistakably, it is.

The phrase "cause of death" is not specifically defined within either Section 513's definitions section, *see* 40 P.S. § 1303.513(f), or within the MCARE Act's definitions section, *see* 40 P.S. § 1303.503. This is likely because it is universally

understood to reference an individual's ***medical*** cause of death, *i.e.*, the specific injury or disease that leads to death. Quite simply, it is a term of art.

This Honorable Court has explained that "the common and approved meaning of a word may be ascertained from an examination of its dictionary definition." Bruno v. Erie Ins. Co., 106 A.3d 48, 75 (Pa. 2014). Black's Law Dictionary defines "cause of death" as: "The happening, occurrence, or condition that makes a person die; the injury, disease, or medical complication that results directly in someone's demise." *Cause of Death*, BLACK'S LAW DICTIONARY (11th ed. 2019). The phrase is also defined in Dorland's Illustrated Medical Dictionary, widely regarded as one of the most comprehensive and highly-respected medical dictionaries in publication today. It defines "cause of death" as being "the injury or disease responsible for a death." *Cause of Death*, DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (30th ed. 2003). These definitions lend no support to the Superior Court's redefinition of "cause of death" to mean "conduct the plaintiff alleges led to the decedent's death."

In surveying usage of the phrase "cause of death" in other Pennsylvania statutes, ***the General Assembly itself has actively distinguished between "cause of death" as a medical term of art and concepts of legal causation.*** In Pennsylvania's county codes, the General Assembly set forth very specific processes for coroner inquests. These specify that a coroner's duty at an inquest is to first "ascertain the cause of death" and – secondly – to determine whether any person other than the

deceased "was criminally responsible by act or neglect." *See* 16 P.S. § 1219-B (County Code); and 16 P.S. § 4237(b) (Second Class County Code). This is a clear acknowledgement that the well-understood, plain meaning of "cause of death" is medical in nature.

Any analysis of the plain meaning of "cause of death" must necessarily include an examination of its most ubiquitous usage: on death certificates. Documentation of "cause of death" comprises a significant portion of the U.S. Standard Certificate of Death form, which is used in all 50 states. *See* U.S. Standard Cert. of Death, Rev. 11/2003, https://www.cdc.gov/nchs/data/dvs/death11-03final-acc.pdf. "The death certificate is the source for State and national mortality statistics and is used to determine which medical conditions receive research and development funding, to set public health goals, and to measure health status at local, State, national, and international levels." U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, *MEDICAL EXAMINERS' AND CORONERS' HANDBOOK ON DEATH REGISTRATION AND FETAL DEATH REPORTING*, at Pg. 2 (2003 Revision), https://www.cdc.gov/nchs/data/misc/hb_me.pdf (hereinafter referred to as the "CDC Coroners' Handbook").

The U.S. Government provides formal guidance to medical examiners and coroners on how to complete death certificates. Id. The CDC Coroners' Handbook explicitly defines "cause of death" as being: "(a) the disease or injury that initiated

the train of morbid events leading directly to death, or (b) the circumstances of the accident or violence that produced the fatal injury." Id. at 11. It provides several examples that illustrate proper description of "cause of death" on a death certificate:

> If an organ system failure (such as congestive heart failure, hepatic failure, renal failure, or respiratory failure) is listed as a cause of death, always report its etiology on the line(s) beneath it (for example, renal failure due to Type I diabetes mellitus or renal failure due to ethylene glycol poisoning).
>
> When indicating neoplasms as a cause of death, include the following: a) primary site or that the primary site is unknown, b) benign or malignant, c) cell type or that the cell type is unknown, d) grade of neoplasm, and e) part or lobe of organ affected (for example, a primary well-differentiated squamous cell carcinoma, lung, left upper lobe).
>
> For each fatal injury (for example, stab wound of chest or gunshot wound) or poisoning, always report the trauma (for example, transection of subclavian vein or perforation of heart or pulmonary hemorrhage), and impairment of function (for example, air embolism or cardiac tamponade) that contributed to death.

Id. at 14-15. The CDC provides this same guidance to physicians in a separate handbook. U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, *PHYSICIANS' HANDBOOK ON MEDICAL CERTIFICATION OF DEATH* (2003 Revision), at 9-10, 12, https://www.cdc.gov/nchs/data/misc/hb_cod.pdf (hereinafter referred to as the "CDC Physicians' Handbook").

The CDC also maintains a form to assist medical examiners and coroners in completing the "cause of death" section of death certificates, which similarly focuses

exclusively on medical conditions and their etiology. U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, *INSTRUCTIONS FOR COMPLETING THE CAUSE-OF-DEATH SECTION OF THE DEATH CERTIFICATE* (Form 04-0377, August 2004), https://www.cdc.gov/nchs/data/dvs/blue_form.pdf (hereinafter referred to as the "CDC Cause of Death Form").

It is utterly impossible to reconcile the CDC's detailed explanations of the phrase "cause of death," which is used every day by physicians, coroners, and medical examiners across the U.S., with the Superior Court's invented usage of the same term. The Superior Court's Opinion holds that "cause of death" instead means "conduct the plaintiff alleges led to the decedent's death." Reibenstein, 236 A.3d at 1166. ***To take an unambiguous medical term of art and redefine it in such a manner, with no support in either legislative history or precedent, is absurd.[2] Imagine a coroner describing this patient's cause of death as having been "failure to properly treat abdominal aortic aneurysm" or "physician negligence." The***

[2] A well-established principle of statutory construction in Pennsylvania is that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. § 1922(1); *see also* Unemployment Comp. Bd. of Rev. v. Tickle, 339 A.2d 864, 869 (Pa. Cmwlth. 1975) (holding that "it would be both absurd and unreasonable to conclude that the Legislature intended the exact same phrase to have two distinct meanings in the same section of a statute.").

absurdity arises from the obvious denotation and connotation of "cause of death" as identifying medical etiology, not legal fault. In fact, the patient's Death Certificate in this case listed aortic aneurysm as the cause of death. (R. 15a-16a, 194a). The CDC's consistent and well-defined usage of "cause of death," across multiple publications, unquestionably supports that the plain meaning of "cause of death" is a precise medical term.

"Cause of death" is not only commonly understood to be a medical term across the country, but it is also a recognized term of art across the world. Both the CDC Coroners' Handbook and the CDC Physicians' Handbook explain that the "cause of death" section on the U.S. Standard Certificate of Death "follows guidelines recommended by the World Health Organization" for standardization of vital statistics data worldwide. *See* CDC Coroners' Handbook at Pg. 11; *see also* CDC Physicians' Handbook at Pg. 9.

The pervasive usage of "cause of death" as a medical term of art across the U.S. is so established and engrained that its use in Section 513 is unquestionably "plain and unambiguous." As a result, Section 513 must be given its plain and obvious meaning. Cagey, 179 A.3d at 462-63. In fact, when a phrase has reached such a universal level of meaning, the burden to overcome it should be higher than merely showing that an alternative usage is a "reasonable interpretation." Warrantech, 96 A.3d at 354–55. Rather, ***when a term is so widely understood that***

the U.S. Government issues publications to formally standardize its usage on official government records, as is the case here, a party seeking to assert a different usage should be required to affirmatively prove that the General Assembly did not intend to employ the standard usage.

B. If the General Assembly had intended to introduce concepts of legal causation into Section 513, there are many more precise terms that it could have used, but instead chose not to use.

As described above, "the best indication of the General Assembly's intent may be found in a statute's plain language." Cagey, 179 A.3d at 462–63. Perhaps a corollary to this axiom should be that the second-best indication of the General Assembly's intent may be found in what is ***absent*** from a statute's plain language. In other words, if the General Assembly really intended to introduce concepts of legal causation into Section 513, why did it not explicitly do so with clearer terms?

For example, if the General Assembly had intended the result that the Superior Court's Opinion provided 19 years later, then why was the equitable tolling provision of Section 513 not designed to be triggered by a defendant's concealment of the "factual cause of death," the "legal cause of death," "potential wrongdoing," "potential negligence," or any other number of phrases that would have introduced legal causation, but conflicted less with "cause of death," an already-established and more limited medical term of art? The presumption must be that, because the General Assembly did not employ other terms that would have been more clear, it

did not intend to use those meanings. This is yet another indication that the Superior Court's interpretation missed the mark.

C. The Superior Court erred in deeming Appellee's argument to be a "reasonable interpretation" of the phrase "cause of death."

Inexplicably, in its analysis, the Superior Court's Opinion did not cite to ***any*** definition of "cause of death" whatsoever, pointing instead only to the absence of a statutory definition. Reibenstein, 236 A.3d at 1165. In fact, in determining that the phrase "cause of death" is ambiguous, the Superior Court's Opinion did not cite to any authority whatsoever, did not examine the common usage of the phrase "cause of death," did not look to any other statutes or regulations that use the phrase, or even examine a simple dictionary definition. Rather, the Superior Court's Opinion simply recited Appellee's argument and accepted it outright.

Additionally, the Superior Court's Opinion examined the legislative intent behind Section 513 in determining whether the phrase "cause of death" is ambiguous. Id. This was a premature analysis. "[O]nly when the words of a statute are ambiguous should a reviewing court seek to ascertain the intent of the General Assembly through considerations of the various factors found in Section 1921(c)." *See, e.g.,* Lancaster Cty. v. PLRB, 124 A.3d 1269, 1286–87 (Pa. 2015) (*citing* Lancaster Cty v. PLRB, 94 A.3d 979, 987 (Pa. 2014)).

II. EVEN IF THE PHRASE "CAUSE OF DEATH" WAS AMBIGUOUS – WHICH IT IS NOT – THE SUPERIOR COURT'S ATTEMPT TO ASCERTAIN AND EFFECTUATE THE GENERAL ASSEMBLY'S INTENT WAS WHOLLY INCOMPLETE.

Following its naked conclusion that the phrase "cause of death" is ambiguous, the Superior Court's Opinion dipped its toes into the MCARE Act's legislative history with a superficial analysis of the General Assembly's intent. Ultimately, the Superior Court's analysis concluded that, because "the General Assembly included the equitable tolling provision to protect patients who have pursued their rights, … wrongful death and survival actions may involve situations where the patient's interest in fair compensation outweighs the interest in limiting medical malpractice insurance costs." Reibenstein, 236 A.3d at 1166.

Essentially, the Superior Court's analysis holds that, if an ambiguity resides in an exception to a general rule, *i.e.,* the equitable tolling provision's exception to the two-year statute of limitations set forth within Section 513, then the ambiguity must be resolved in favor of the exception. There is no such rule of statutory interpretation, nor should there be. Rather, if an ambiguity exists, the General Assembly has provided a clear framework for ascertaining its intent:

> (c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:
>
> (1) The occasion and necessity for the statute.

(2) The circumstances under which it was enacted.

(3) The mischief to be remedied.

(4) The object to be attained.

(5) The former law, if any, including other statutes upon the same or similar subjects.

(6) The consequences of a particular interpretation.

(7) The contemporaneous legislative history.

(8) Legislative and administrative interpretations of such statute.

1 Pa.C.S. § 1921(c). If the Superior Court's Opinion had properly applied these factors, then it would have reached a different and more fair conclusion.

A. The Superior Court's analysis cherry-picked its discussion of the legislative purpose of the MCARE Act, resulting in an incomplete, distorted, and misleading analysis.

Section 502 of the MCARE Act sets forth the declaration of policy for its chapter governing medical professional liability, as follows:

> The General Assembly finds and declares that it is the purpose of this chapter to ensure a fair legal process and reasonable compensation for persons injured due to medical negligence in this Commonwealth. **Ensuring the future availability of and access to quality health care is a fundamental responsibility that the General Assembly must fulfill as a promise to our children, our parents and our grandparents.**

40 P.S. § 1303.502 (emphasis added).

"Ensuring the availability of quality health care" may seem dire now, but at the time the MCARE Act was passed, our Commonwealth was in the midst of a genuine medical malpractice liability crisis that resulted in insurance premiums for physicians increasing by 40 percent in 2002 and 54 percent in 2003. *Evaluating State Approaches to the Medical Malpractice Crisis*, CSG HEALTH POLICY MONITOR, Vol. 9, No. 1 (2004); *see also* Donald J. Palmisano, *Health Care in Crisis: The Need for Medical Liability Reform*, 5 YALE J. HEALTH POL'Y L. & ETHICS, at 378 (2005), https://digitalcommons.law.yale.edu/yjhple/vol5/iss1/10 (citing increases in professional liability insurance for Pennsylvania between 2000 and 2003 from $37,556 to $134,335 for OB/GYNs – more than a 350% increase, from $33,684 to $108,038 for general surgeons – more than a 300% increase, and from $7,390 to $24,546 for internal medicine physicians – more than a 330% increase). The problem was so significant that the AMA, an *Amicus Curiae* herein, listed Pennsylvania as being in a state of crisis. Id.

Entire physician practice groups could not obtain medical malpractice liability insurance – at any cost – and were nearly forced to leave the Commonwealth as a result. *See* Michael J. Gratch, M.D., *Pa. Supreme Court, let's not go back to the medical liability crisis of 2 decades ago,* PennLive Patriot-News (Jan. 28, 2019), https://www.pennlive.com/opinion/2019/01/pa-supreme-court-lets-not-go-back-to-the-medical-liability-crisis-of-2-decades-ago-opinion.html.

A 2005 study showed that 42 percent of specialists had reduced or eliminated high-risk aspects of their practice due to the rising costs of malpractice insurance, with another 50 percent likely to do so within two years. Michelle M. Mello, *Effects of a Malpractice Crisis on Specialist Supply and Patient Access to Care*, ANNALS OF SURGERY, Volume 242, No. 5, at 621-628 (Nov. 2005). Due to passage of the MCARE Act, the medical malpractice crisis in Pennsylvania has largely stabilized, up until recently.

One of the most impactful provisions of the MCARE Act, when passed, was Section 513, its two-year statute of limitations, and its seven-year statute of repose. Medical malpractice liability insurers at the time were having to raise premiums because they lacked any reasonable degree of actuarial certainty. In other words, insurance carriers could not accurately predict exposure when there was, at the time, no limit on stale claims that survive the statute of limitations due to application of the discovery rule. At the time the MCARE Act was initially brought to the House of Representatives for a vote on January 29, 2002, Section 805-A of the proposed bill contained a "statute of limitations" that effectively amounted to a four-year statute of repose. H.B. 1802, 186th Leg., Printer's No. 3202, at 99 (Pa. Jan. 29, 2002). Representative R. Curtis Schroder responded to questions from Representative W. Curtis Thomas about this four-year statute of repose, as follows:

> Mr. THOMAS. … My third concern, Mr. Speaker, is, what was the rationale for limiting the 4-year statute of limitations to those who are 14 years and under? What was the public policy rationale for capping, recovery capping, using 4 years as opposed to 6 years as opposed to 10 years?
>
> Mr. SCHRODER. Well, right now, of course, there is a 2-year statute of limitations with a discovery rule, and the problem with that is, it is very difficult for any malpractice insurer to come up with accurate rates based upon any predictability, any stability or certainty, and part of our whole effort here is to provide the stability and the predictability that malpractice carriers will need and have told us that they will need to come back into the State of Pennsylvania and to help reduce this crisis.

H.B. 1802, House Journal, Jan. 29, 2002, at 116-17 (emphasis added).

Earlier, in response to questioning by Representative Lita I. Cohen, Representative Schroder stated:

> Mrs. COHEN. … I am concerned about the statute of limitations. I think that what this proposal does is take away the rights of some of our children. Why are we suddenly saying that minors who were injured by medical errors are entitled to less protection than minors who were injured in car accidents or in plane crashes or by defective products? The whole purpose of the minors' tolling statute is to make sure that the minor has at least 2 years after attaining the age of majority to act for himself or herself. Are we not taking that right away from the minor?
>
> * * *
>
> Mr. SCHRODER. There are some differences between the types of accidents that you are talking about, where you certainly know of the injury right away in a plane crash and automobile accident. It is not always that way with medical malpractice, and what we need to do is provide some stability and some predictability to the system if we are ever going to get the malpractice insurers who have left to come back into the marketplace here and to, you know, level this situation off.

H.B. 1802, House Journal, Jan. 29, 2002, at 106-07 (emphasis added).

Representative Schroder's observation that medical malpractice insurance carriers lacked stability and certainty in predicting costs, in conjunction with his objective of providing stability and predictability, supports that the General Assembly's goal in enacting Section 513 was, first and foremost, to provide medical malpractice insurance carriers with improved actuarial certainty.

Just under two years ago, in Yanakos v. UPMC, 218 A.3d 1214, 1223 (Pa. 2019), *reargument denied*, 224 A.3d 1255 (Pa. 2020), this Honorable Court heard a constitutional challenge to the seven-year statute of repose set forth in Section 513. Although the lead Opinion acknowledged that "the governmental interest in controlling the rising costs of medical malpractice insurance premiums and of medical care is important[,]" it held the seven-year statute of repose to be unconstitutional. Id. at 1223, 1227. As a result, medical malpractice insurance carriers have now been transported back more than 20 years in terms of being able to calculate actuarial certainty: there is no cap whatsoever on claims that escape the two-year statute of limitations through application of the discovery rule.

With no statute of repose, and with the equitable tolling provision of Section 513 considerably expanded, the number of liability claims brought will unquestionably rise, resulting in a corresponding rise in the cost of insuring those claims. ***This is not grandstanding or fearmongering: this is history repeating***

itself, to the great detriment of the cost and availability of healthcare to the citizens of our Commonwealth.

The Superior Court's holding in this case is nothing short of audacious. It has taken a clear and unambiguous medical term of art, declared it to be ambiguous, and then rewrote – quite literally – a duly-enacted law of this Commonwealth: "Accordingly, we hold that 'affirmative misrepresentation or fraudulent concealment of the cause of death' means affirmative misrepresentations about or fraudulent concealment of conduct the plaintiff alleges led to the decedent's death." Reibenstein, 236 A.3d at 1166. This is a complete usurpation of the role of our legislative branch, carried out with absolutely no support in the MCARE Act's legislative history, a cherry-picking of the MCARE Act's legislative purpose, and a total dearth of relevant case law. It must be reversed.

CONCLUSION

For all of the foregoing reasons, *Amici Curiae*, the Pennsylvania Coalition for Civil Justice Reform, the American Medical Association, the Pennsylvania Medical Society, the Pennsylvania Orthopaedic Society, the Pennsylvania Chapter of the American Academy of Pediatrics, and the Pennsylvania Chapter of the American College of Physicians respectfully request that this Honorable Court **REVERSE** the Order of the Superior Court of Pennsylvania at Docket No. 1624 MDA 2019, dated July 30, 2020, and reinstate the Order of Court of the Court of Common Pleas of Lackawanna County at Docket No. 2016-01716, dated August 29, 2019.

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CERTIFICATION OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(d), I hereby certify that this Brief of *Amici Curiae* complies with the word count limits of Pennsylvania Rules of Appellate Procedure 531(b)(3).

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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PROOF OF SERVICE

Pursuant to Pennsylvania Rule of Appellate Procedure 121(d), I hereby certify that two (2) copies of this Brief of *Amici Curiae* were served upon the following counsel of record via U.S. Mail, first class, postage pre-paid, on this 14th day of July, 2021.

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IN THE SUPREME COURT OF PENNSYLVANIA

Linda Reibenstein, as the Administratrix of the Estate of Mary Ann Whitman, Deceased v. Charles Barax, M.D.; and Mercy Hospital, Scranton	:	32 MAP 2021
Linda Reibenstein, as the Administratrix of the Estate of Mary Ann Whitman, Deceased v. Patrick D. Conaboy, M.D.; and Cognetti & Conaboy Family Practice, P.C. Appeal of: Patrick D. Conaboy, M.D. ; and Cognetti & Conaboy Family Practice, P.C.	:	

PROOF OF SERVICE

I hereby certify that this 14th day of July, 2021, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

IN THE SUPREME COURT OF PENNSYLVANIA

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(Continued)

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IN THE SUPREME COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF PENNSYLVANIA

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	Amicus Curiae The Pennsylvania Chapter of the American College of Physicians
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	Amicus Curiae The Pennsylvania Medical Society
	Amicus Curiae The Pennsylvania Orthopaedic Society