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**SUPREME COURT**
**STATE OF ARIZONA**

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| DAVID FRANCISCO and KIMBERLY FRANCISCO, husband and wife,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>AFFILIATED UROLOGISTS, LTD., an Arizona corporation; KEVIN ART, M.D. and JAND DOE ART, husband and wife,<br><br>Defendants/Appellees. | **Case No. CV-23-0152-PR**<br><br>Arizona Court of Appeals<br>Case No. 1 CA-CV 21-0701<br><br>**SUPPLEMENTAL AMICUS CURIAE BRIEF OF THE ARIZONA ASSOCIATION FOR JUSTICE/ARIZONA TRIAL LAWYERS ASSOCIATION** |

## Introduction

In accordance with this Court's January 29, 2024 Order authorizing the filing of this brief, Amicus Curiae Arizona Association for Justice/Arizona Trial Lawyers Association files its supplemental amicus curiae brief.

## Legal Argument

### 1. Because this was a medical-battery case, no preliminary expert affidavit was needed.

The Arizona Medical Malpractice Act broadly defines a medical malpractice action or medical malpractice cause of action as "an action for injury or death

against a licensed health care provider based upon such provider's alleged negligence, misconduct, errors or omissions, or breach of contract in the rendering of health care, medical services, nursing services or other health-related services or for the rendering of such health care, medical services, nursing services or other health-related services, without express or implied consent including an action based upon the alleged negligence, misconduct, errors or omissions or breach of contract in collecting, processing or distributing whole human blood, blood components, plasma, blood fractions or blood derivatives." A.R.S. § 12-561(2).

The superior court required a preliminary expert-opinion affidavit under A.R.S. § 12-2602 before the Franciscos could pursue their claim against healthcare providers for failure to secure informed consent before administering a dangerous medication. *Mem. Dec.* ¶ 5. The Franciscos argued their lack-of-informed consent claim was not a medical-malpractice claim. *Mem. Dec.* ¶ 6.

**2. If a healthcare provider performs a procedure without first obtaining the patient's informed consent, the healthcare provider has committed a battery. Touching a patient, including administering medication or a drug to a patient, without first obtaining informed consent is a battery.**

The Court of Appeals held that a lack-of-informed-consent claim is a negligence action. *Mem. Dec.* ¶ 7. It also held that the lack "of expert testimony on the custom of the medical profession did not mandate dismissal" in light of the FDS directive requiring doctors to advise patience of all risks associated with prescribed medications, *Mem. Dec.* ¶ 12.

The result is good. It preserves an apparently meritorious cause of action. But the notion that a lack-of-informed-consent claim is a negligence claim is not consistent with the common law. Administration of a powerful medication without informed consent is an intentional tort, namely, a common-law battery.

Any unconsented physical contact, including the administration or injection of a dangerous drug, violates a patient's "right to bodily integrity" and is thus a battery. *Shuler v. Garrett*, 743 F.3d 170, 175 (6th Cir. 2014). A medication administration without informed consent is a procedure and a species of physical touching sufficient to support a medical battery claim. *Id*. at 175-76.

That is the common-law rule in many jurisdictions. *See*, *e.g.*, *Severance v. Howe*, 997 N.W.2d 99, 106 ¶ 20 (N.D. 2023) (A doctor may perform an operation skillfully but will be liable for a battery if the patient did not consent.); *Wentz v. Emory Healthcare, Inc.*, 859 S.E.2d 527, 529 (Ga. App. 2021) (An unconsented medical touching constitutes the intentional tort of battery); *Wood v. Rutherford*, 201 A.3d 1025, 1035-36 (Conn. App. 2019) (A battery claim against a healthcare provider can arise from an absence of informed consent from the patient.); *Texas Tech University Health Services Center-El Paso v. Bustillos*, 556 S.W.2d 394, 403 (Tex. App. 2018) ("Under Texas common law, a physician who provides treatment without consent commits a battery."); *Mink v. University of Chicago*, 460 F.Supp. 713, 718 (N.D. Ill. 1978) ("We find the administration of a drug without the

patient's knowledge comports with the meaning of offensive contact."); *People v. Marquardt*, 364 P.3d 499, 503 ¶ 11 (Colo. 2016) ("A physician who treats a patient without the patient's consent commits a battery and is liable for damages.").

That is the rule in Arizona. "A health care provider commits common law battery when a medical procedure is performed on a patient without that patient's consent." *Bailey–Null v. ValueOptions*, 221 Ariz. 63, 70 ¶ 20 (App. 2009). *See also Desert Palm Surgical Group, P.L.C. v. Petta*, 236 Ariz. 568, 586 ¶ 57 (App. 2015) (A claim that a doctor has failed to operate within the limits of a patient's consent may be pursued as a battery action); *Duncan v. Scottsdale Medical Imaging, Ltd.*, 205 Ariz. 306, 309 ¶ 9 (2003) ("The law is well established that a health care provider commits a common law battery on a patient if a medical procedure is performed without the patient's consent.").

In *Hales v. Pittman*, 118 Ariz. 305, 310 (1978), this Court held that, if a healthcare provider performs a medical procedure without the patient's consent, the healthcare provider has committed a battery. Consent can only occur in the medical-treatment context when the healthcare provider has given the patient "sufficient information to allow an informed decision to be made." *Id*. at 309.

That is, consent can only be regarded as consent adequate to serve as a defense to a battery claim when it is informed consent. Imposition of a medical procedure, such as the administration of a medication that will enter the patient's

body, is a battery when the consent is not informed. *Id*. at 309-10.

The common-law principle that a healthcare provider's failure to obtain informed consent before providing healthcare to a patient is a battery is one that existed even before Arizona became a state. In the often-cited case of *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905), for instance, a patient hired a doctor to operate on her right ear. When he operated on her left ear without her consent, the Minnesota Supreme Court held that, if the operation was not authorized by the patient's express or implied consent, it would constitute an assault and battery.

In a 1905 appeal involving a healthcare provider who was accused of committing assault and battery on a patient for performing an unconsented medical procedure, the Illinois Appellate Court explained that the right to inviolability of the person "is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skillful or eminent, who has been asked to examine, diagnose, advise and prescribe (which are at least necessary first steps in treatment and care), to violate without permission the bodily integrity of his patient by a major or capital operation, placing him under anesthetics for that purpose, and operating on him without his consent or knowledge." *Pratt v. Davis*, 118 Ill. App. 161, 166 (1905).

## Conclusion

Under the common law, a "lack-of-informed-consent claim sounds in battery

rather than negligence." *Brady v. Urbas*, 111 A.3d 1155, 1158 n. 2 (Pa. 2015). "Lack of informed consent is the legal equivalent to no consent." *Gouse v. Cassel*, 615 A.2d 331, 334 (Pa. 1992).

In 1914, Justice Benjamin Nathan Cardozo (1870-1938) famously declared that: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914) (citing *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905) and *Pratt v. Davis*, 79 N.E. 562 (Ill. 1906)).

The Arizona Court of Appeals erred when it concluded that administrating a dangerous medication to a patient without getting the patient's informed consent is negligence. It is not. It is a battery—an intentional tort that the common law recognizes today and that it recognized before Arizona became a state.

**DATED** this 16th day of February, 2024.

**AHWATUKEE LEGAL OFFICE, P.C.**

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**Certificate of Compliance**

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) contains 1,484 words (by computer count); and

(3) averages less than 280 words per page, including footnotes and quotations.

## Certificate of Service

On this date, the above-signing lawyer electronically filed this document with the Clerk of the Arizona Supreme Court and electronically delivered it to:

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