

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

DAVID FRANCISCO, et al.,

Plaintiffs/ Appellants,

vs.

AFFILIATED UROLOGISTS LTD.,
et al.,

Defendants/ Appellees.

No. 1 CA-CV 21-0701

Maricopa County Superior Court
No. CV2020-010470

**RESPONSE TO AMICUS BRIEF OF
ARIZONA ASSOCIATION FOR JUSTICE/AZTLA**

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TABLE OF AUTHORITIES

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Cases

Osorio v. Brauner,
662 N.Y.S.2d 488 (App. Div. 1997)1

Perez v. Hu,
87 N.E.3d 1130 (Ind. App. 2017)1

Amicus has not provided the Court with any relevant information. Much of its brief focuses on causation, which is not an issue in this appeal. This appeal involves Plaintiffs' failure to adduce evidence of breach, not causation. For that reason, Amicus's first issue, "plaintiff must prove two kinds of causation" is irrelevant. [Brief, pp. 6-7.] Also irrelevant is Amicus's citation to cases holding that expert testimony is not necessary to establish "whether the patient would have chosen to undergo the treatment if he or she had known of the risk." [Brief, pp. 8-9, citing *Osorio v. Brauner*, 662 N.Y.S.2d 488, 489 (App. Div. 1997); and *Perez v. Hu*, 87 N.E.3d 1130, 1137 (Ind. App. 2017).]

Similarly incorrect is Amicus's causation argument: that "the important point in the present case is the avowal to the trial court that: if [the healthcare provider] had advised David [Francisco] of the potential complications, David would have opted for a different antibiotic. Whether Francisco would have opted for a different antibiotic is a question of fact requiring jury evaluation of the credibility and weight of Francisco's testimony." [Brief, pp. 16-17.] We are not concerned here with the issue of what Plaintiff would have done or an evaluation of his credibility. We are concerned with the legal standard for establishing alleged breach.

Amicus then extolls the virtues of giving patients “material information about proposed treatments from their healthcare providers.” [Brief, p. 7.] No doubt. But Amicus ignores the half dozen Arizona cases Defendant cited which establish that in Arizona, a plaintiff making an informed consent claim must both present expert testimony on what the standard of care required the physician to disclose, and comply with our preliminary affidavit statute. [AB, pp. 6, 10-11.] It is thus not helpful for Amicus to cite (a) articles and one New Jersey case that espouse a different standard [Brief, pp. 8, 10]; (b) general precepts that describe when expert testimony is appropriate in non-medical malpractice cases [Brief, pp. 11-12]; and (c) California cases, which also espouse a different standard than Arizona and describe what information a California physician should disclose. [Brief, pp. 12-14.]

Amicus also misstates the analysis in informed consent cases. The question for the jury is not simply to decide what a physician told and failed to tell the patient; whether there was an adverse result; and whether the patient would have refused the treatment; [Brief, pp. 17-19 (“no expert guidance is needed on what a healthcare provider discloses and fails to disclose and on what the patient said that he or she would have done if

armed with the material information”).] Amicus misses the critical point needing expert testimony: whether the risk at issue in this particular situation for this particular patient was great enough to require a reasonable physician in the defendant’s position to have mentioned it, so that failing to mention it fell below the standard required of reasonable physicians in the community.

Amicus finally errs in arguing that the learned intermediary doctrine helps his argument. [Brief, pp. 19-24.] It does not help him. The fact that a drug manufacturer can fulfill its duty to the patient by giving full and adequate warnings to the patient’s physician does not have anything to do with whether the patient needs expert testimony to prove the physician’s standard of care.

In fact if anything, Amicus’s argument makes *Defendant’s* point for why expert testimony is necessary in an informed consent case. Amicus notes that prescription drugs are so “complex and vary in effect, depending on the end user’s unique circumstances” that a “qualified intermediary like a prescribing physician [must] evaluate the patient’s condition and weigh the risks and benefits.” [Brief, p. 20. See also Brief, p. 21 (“it is physicians who make prescribing decisions on behalf of their patients”).] Exactly. That

is precisely why expert testimony is necessary: to establish whether the risk involved here with this patient and this drug under these circumstances was such that the patient should be/need not be advised of it.

Amicus then seems to turn about and argue that expert testimony *would be* necessary except if the “content of the information to be disclosed is imposed by a higher authority.” [Brief, p. 21.] In other words, apparently the argument is that if the drug has a “black box” warning, the physician *must* advise the patient of it or be deemed negligent as a matter of law. [Brief, pp. 21-22.] Amicus does not cite one authority for the idea, and Defendant could find none. Indeed, the notion is contrary to the learned intermediary doctrine, because again, that doctrine is based on the idea that the manufacturer, to fulfill its duty, needs only to give full and accurate information to the treating physician, for it is the treating physician who is best able to assess the risks and benefits to the patient in any given situation. Amicus’s suggestion—to hold physicians liable as a matter of law for not disclosing black box warnings—would remove the treating physician’s

expertise from the analysis entirely. This would remove the basis for having a learned intermediary doctrine at all.¹

In short, Amicus has not provided the Court with any useful information for deciding this case. Defendants/Appellees Affiliated Urologists, Ltd. and Dr. Art again respectfully request the Court to affirm the dismissal of Plaintiff's complaint.

RESPECTFULLY SUBMITTED this 24th day of May, 2022.

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¹ Amicus also errs in suggesting, without citation, that laypersons can interpret black box warnings without expert testimony. [Brief, p. 22.]

CERTIFICATE OF COMPLIANCE

1. This Certificate of Compliance concerns:

A brief, and is submitted under Rule 14(a)(4)

An accelerated brief, and is submitted under Rule 29(a)

A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)

A petition or cross-petition for review, a response to a petition or cross-petition for review, or a combined response and cross-petition, and is submitted under Rule 23(h).

An amicus curiae brief, and is submitted under Rule 16(b)(4)

2. The undersigned certifies that the attached brief, motion or petition uses type of at least 14 points, is double-spaced, and contains 1,323 words.

3. The document to which this Certificate is attached does not, or does exceed the word limit that is set by Rule 14, Rule 22, Rule 23, or Rule 29, as applicable.

/s/Eileen Dennis GilBride

CERTIFICATE OF SERVICE

Eileen Dennis GilBride, being first duly sworn, upon oath states that on the 24th day of May, 2022, she caused the original of the foregoing Response to Amicus Brief of the Arizona Association for Justice/ Arizona Trial Lawyers' Association to be electronically filed through AZTurboCourt and that she caused a copy of the foregoing to be e-mailed to the following:

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