

**IN THE SUPREME COURT
STATE OF ARIZONA**

ROBIN ROEBUCK,

Plaintiff/ Appellant/ Respondent,

v.

MAYO CLINIC, et al.

Defendants/ Appellees/ Petitioners.

No. CV-23-0262-PR

Court of Appeals
Division One

No. 1 CA-CV 22-0508

Maricopa County Superior Court

No. CV2021-090429

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

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INTRODUCTION

Amicus Curaie The Arizona Association for Justice/Arizona Trial Lawyers Association (collectively referred to as "AAJ") submitted a brief purportedly in support of denying the Petition for Review and upholding the court of appeals Opinion in this case. However, AAJ does not provide this Court with any reason to deny the Petition. In fact, AAJ's arguments support granting the Petition by showing that the constitutionality of A.R.S. § 12-516 is an issue of statewide importance. AAJ's arguments do not, however, provide any valid reason for this Court to uphold the court of appeals Opinion.

I. Plaintiff waived any argument that A.R.S. § 12-516 and/or Senate Bill 1377 impaired his vested rights; Amicus cannot reprise this issue for him.

AAJ improperly attempts to raise a waived argument by claiming that Senate Bill 1377 (A.R.S. § 12-516) retroactively impairs Plaintiff's vested rights.¹ While Plaintiff argued in the trial court that A.R.S. § 12-516 was not

¹ Importantly, while Senate Bill 1377 and A.R.S. § 12-516 were introduced/enacted after Plaintiff filed his lawsuit, Executive Order 2020-27, The "Good Samaritan Order," upon which the senate bill and statute are based and which provides the same limited immunity, went into effect on April 9, 2020. This was prior to Plaintiff's treatment at Mayo. Defendants'

in effect in April of 2020 when he was treated at Mayo, he did not argue that the statute violated his vested substantive rights until the appeal. [Slip. Op. ¶ 16.] The trial court and the court of appeals correctly found that the “legislature expressly made § 12-516 retroactive” and that it applied to Plaintiff’s claims. [*Id.*] see also A.R.S. § 1-244. The court of appeals further correctly held that Plaintiff waived any argument regarding the alleged impairment of his vested substantive rights by not raising it in the trial court. [*Id.*] see also *Cont’l Lighting & Contracting, Inc. v. Premier Grading & Util., LLC*, 227 Ariz. 382, 386, ¶ 12 (App. 2011) (holding that legal theories not raised in the trial court are waived on appeal). AAJ cannot reprise this waived argument and it should be ignored by this Court. See *Legacy Foundation Action Fund v. Citizens Clean Elections Commission*, 254 Ariz. 485, 493, ¶ 28 (2023) (noting that the Court “ordinarily does not address arguments raised solely by amicus.”).

motion for summary judgment and previous motion to dismiss were based on the limited immunity provided in the Good Samaritan Order, Senate Bill 1377 and A.R.S. § 12-516. [AB, pgs. 5 & 26.] As such, any argument that the immunity provided in the Good Samaritan Order, senate bill and statute impaired Plaintiff’s vested substantive right is moot because even if it were a substantive right, it could not possibly have vested prior to his treatment at Mayo. See generally *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130 (1986).

II. A.R.S. § 12-516 does not violate anti-abrogation.

AAJ agrees with the court of appeals that A.R.S. § 12-516 violates anti-abrogation because it allegedly eliminates claims for ordinary negligence. AAJ does not add anything of importance to this argument such that any response is required beyond what was presented and analyzed in the Petition and the various amicus briefs in support of the Petition. AAJ goes further, however, by claiming that simply raising the burden of proof to clear and convincing evidence violates anti-abrogation. This argument is in clear contravention to Arizona precedent. It is clearly established that the legislature has the power to set burdens of proof as a matter of law and statutes that so set this burden do not offend the anti-abrogation clause. *See Seisinger v. Sibel*, 220 Ariz. 85, 93 (2009); *Governale v. Lieberman*, 226 Ariz. 443, 447 (App. 2011) (holding that A.R.S. § 12-2604 “merely establishes a particular burden of proof” and, thus, did not violate the anti-abrogation clause).

The court of appeals understood this clearly established precedent, noting that if A.R.S. § 12-516 “did nothing more than raise the burden of proof . . . to ‘clear and convincing evidence, we would agree that the statute does not offend the anti-abrogation clause.” [Slip Op. ¶ 23.] That is why

they fashioned a new, but fundamentally flawed, argument that gross negligence and ordinary negligence are separate and distinct torts, such that the preclusion of ordinary negligence to a discrete set of claimants, for a discrete period of time, for discrete issues, is abrogation and not regulation. [Slip. Op. ¶ 24.] AAJ's attempt to reestablish Arizona precedent is unavailing and should not be considered by this Court.

III. Amicus improperly argues issues not raised below.

Finally, AAJ attempts to inject alleged constitutional issues into this case that were not presented in the trial court or court of appeals. This Court will not “ordinarily consider issues not raised in the trial court or the court of appeals.” *Jimenez v. Sears Roebuck and Co.*, 183 Ariz. 399, 406 n. 9. The rare exception is in cases where the unraised constitutional issues are fundamental, “affect an entire body of legislation,” and have not been decided in other cases. *Id.* This is not one of those rare cases because the constitutional issues raised by AAJ have already been decided in other cases. Whether a statute which regulates negligence by imposing a higher standard of proof violates equal protection or the ban against special laws was analyzed and decided by the court of appeals in *Governale v. Liberman*. The court of appeals decided that A.R.S. § 12-2604 – which imposes a higher

burden of proof in medical malpractice cases in the form of requiring a qualified expert – did not violate equal protection or the ban against special laws. 226 Ariz. at 448 – 451. By merely regulating negligence actions, A.R.S. § 12-516 is similar to A.R.S. § 12-2604 and the analysis employed by the court of appeals in *Governale* applies with equal force here. This court should not consider these issues not raised below and which have already been decided in other cases.

AAJ further argues that Senate Bill 1377/A.R.S. § 12-516 is unintelligible. However, AAJ conflates the “unintelligibility doctrine” with ambiguity, which was already argued and correctly decided by the trial court and court of appeals. A statute that has ambiguous language or undefined terms may be invalid because it is ambiguous. *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 268 (1994). A statute that is unintelligible is so incomplete and unfinished that it is impossible to enforce. *State ex rel. Brnovich v. City of Tucson*, 249 Ariz. 239, 247 ¶ 35 (2020). Here, AAJ argues that the terms “good faith” and “reasonable policies” are undefined, but does not maintain that the statute is incomplete or unfinished or show how the statute is impossible to enforce. This is an ambiguity argument. The trial court and court of appeals have already analyzed the ambiguity issue

and found A.R.S. § 12-516 unambiguous. [Slip Op. ¶¶ 13 - 14.] This Court should not reconsider that analysis and decision.

In any case, should this Court accept the Petition and determine that any of AAJ's constitutional arguments deserve further analysis, it should allow the parties to provide supplemental briefs specific to those issues.

CONCLUSION

AAJ's Brief does not support denying the Petition for Review or upholding the court of appeals Opinion. For the foregoing reasons, and those stated in the Petition, Petitioners respectfully request the Court to vacate the court of appeals Opinion and order the trial court's summary judgment ruling reinstated.

RESPECTFULLY SUBMITTED this 22nd day of January, 2024.

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