SUPREME COURT
STATE OF ARIZONA

ROBIN ROEBUCK, Plaintiff/Appellant/Respondent, v. MAYO CLINIC; MAYO CLINIC ARIZONA; MAYO CLINIC HOSPITAL; NICOLE SECREST; and ROBERT SCOTT, Defendants/Appellees/Petitioners.	**Case No. CV-23-0262-PR** Arizona Court of Appeals Case No. 1 CA-CV 22-0508 Maricopa County Superior Court Case No. CV 2021-090429 (Hon. Rodrick J. Coffey) **SUPPLEMENTAL AMICUS CURIAE BRIEF OF ARIZONA ASSOCIATION FOR JUSTICE/ARIZONA TRIAL LAWYERS ASSOCIATION**

David L. Abney, Esq. (009001)
AHWATUKEE LEGAL OFFICE, P.C.
Post Office Box 50351
Phoenix, Arizona 85076
(480) 734-8652
abneymaturin@aol.com
Counsel for Amicus Curiae Arizona Association for Justice/Arizona Trial Lawyers Association

Table of Contents

	Page
Table of Citations	x
Legal Argument	x
1. The issue, the anti-abrogation clause, and the statute violating it.	x
2. The underlying issue is whether the pre-Arizona statehood cause of action for medical malpractice was an ordinary negligence cause of action.	x
3. An Arizona statute that would operate to annul, repeal, abolish, cancel, or do away with the ordinary negligence aspect of a medical-malpractice case would abrogate the medical-malpractice cause of action.	x
Conclusion	x
Certificate of Compliance	x
Certificate of Service	x

Table of Citations

Cases

	Page
Cross v. Guthery, 2 Root 90 (Conn. App. 1794)	x
Fields v. Elected Officials' Retirement Plan, 234 Ariz. 214 (2014)	x
Matthews v. Industrial Comm'n, 254 Ariz. 157 (2022)	x
Planned Parenthood Arizona, Inc. v. Mayes, 257 Ariz. 110 (2024)	x
Stratton v. Swanlond, Y.B. Hill. 48 Edw. III, folio. 6, pl. 11 (1375)	x
Torres v. JAI Dining Services (Phoenix), 245 Ariz. 212 (2023)	x

Statutes and Constitutional Clauses

Ariz. Const. art. 18, § 6	x
A.R.S. § 12-516	x

Other Authorities

John H. Baker & Stroud Francis Charles Milsom, *Sources of English Legal History: Private Law to 1750* (1986)	x
Cary B. Chapman, Stratton v. Swanlond*: The Fourteenth Century Ancestor of the Law of Malpractice*, 45(4) Pharos 20 (Fall 1982)	x
Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 Wis. L. Rev. 1193 (1992)	x

Legal Argument

1. The issue, the anti-abrogation clause, and the statute violating it.

In its September 10, 2024 Minute Letter, this Court granted review only as to Issue 1, which the October 19, 2023 Petition for Review stated as:

> "Did the court of appeals err in finding A.R.S. § 12-516 violates the anti-abrogation clause of the Arizona Constitution?"

In relevant part, the Arizona Constitution's anti-abrogation clause provides:

> The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

Ariz. Const. art. 18, § 6.

Robin Roebuck alleged his healthcare providers had committed medical malpractice by negligently performing a diagnostic test for assessing and treating him for COVID-19. Roebuck claimed the defendants were negligent, not that they were grossly negligent. But the defendants claimed that, in a COVID-19-related case, under A.R.S. § 12-516—which was enacted in 2021—the patient has no right to recover for ordinary negligence but must allege and prove gross negligence. *Opinion* at ¶¶ 1, 5-7, 9, 13-14.

The trial court granted partial summary judgment for the defense, accepting the defendants' argument that Roebuck's claims had to be dismissed because he had failed to allege the defendants committed gross negligence.

The Court of Appeals, however, held that A.R.S. § 12-516 violated the anti-

abrogation clause because it abolished Roebuck's medical-malpractice cause of action. *Opinion* ¶ 24. The actual outcome at the superior court was abrogation. After all, the superior court granted a summary judgment ending Roebuck's case under A.R.S. § 12-516 because he had not alleged the defendants had committed gross negligence.

2. The underlying issue is whether the pre-Arizona statehood cause of action for medical malpractice was an ordinary negligence cause of action.

"The anti-abrogation clause only prohibits abrogation of rights of action that existed at statehood or that are based in rights of action existing at statehood." *Torres v. JAI Dining Services (Phoenix)*, 245 Ariz. 212, 216 ¶ 13 (2023).

The underlying issue is therefore whether a cause of action for non-gross-negligence medical malpractice existed before Arizona became a State on February 14, 1912. Unfortunately, the Arizona Territorial Supreme Court filed no opinions dealing with medical malpractice. But before Arizona became a state, Arizona plaintiffs had pursued non-gross-negligence medical-malpractice causes of action in the territorial county courts.

In 1902, one of the territorial-era non-gross-negligence, medical-malpractice cases was a matter of public interest, as evidenced by an article in the Arizona Territory's leading newspaper:

> Mrs. Rebecca Salari yesterday filed a damage suit against a physician of this city [Dr. W.C. Robbins], alleging malpractice and a

> general want of information about her case. She said that in March of last year, when she was sick, she called him in and after a diagnosis of her case he began to treat her for a fibroid tumor, which existed only in his imagination, and kept it up until in July of the same year, when events occurred which would have enlightened even the layman. There were subsequent evils for which she asks the unusual sum of $7,375.

Allegation of Misinformation, Ariz. Republican 6 (April 3, 1902).

Two years later, Salari decided to dismiss the lawsuit against Dr. W.C. Robbins's estate, possibly because the doctor had died in 1902, a few months after Slaari sued him. After all, bringing a tort lawsuit against an estate is often hard for a number of reasons, not the least of which are difficulty of proof and sympathy for the wrongdoer's survivors. Ariz. Republican 1 (Oct. 2, 1904).

In any event, well before Arizona became a Territory in 1863, common-law courts in America and the United Kingdom had recognized a common-law cause of action for medical malpractice without requiring allegations or proof of gross negligence. The date of the first reported common-law medical malpractice case is 1375. *In Stratton v. Swanlond*, a well-respected surgeon, Dr. John Swanlond, tried to surgically repair Agnes Stratton's crushed hand. Y.B. Hill. 48 Edw. III, folio. 6, pl. 11 (1375), as cited in John H. Baker & Stroud Francis Charles Milsom, *Sources of English Legal History: Private Law to 1750* 360 (1986). *See also* Cary B. Chapman, Stratton v. Swanlond*: The Fourteenth Century Ancestor of the Law of Malpractice*, 45(4) Pharos 20 (Fall 1982).

When her hand failed to improve within several weeks, Stratton consulted with another surgeon, who told her that Dr. Swanlond had treated her improperly. After her hand became seriously deformed, Stratton sued Dr. Swanlond. Although the lawsuit was eventually dismissed on a pleading technicality, commentary in the judge's opinion became the basis for future medical-malpractice cases.

The opinion reasoned by analogy that: "If a smith undertakes to cure my horse, and the horse is harmed by his negligence or failure to cure in a reasonable time, it is just that he should be liable." *Id*. *Stratton* showed that negligently undertaking to do something and doing it incorrectly or in a way causing harm to another, is actionable. Nothing in *Stratton* suggested that gross negligence was needed to pursue a claim for medical malpractice.

The first medical-malpractice case in the American law reports is *Cross v. Guthery*, 2 Root 90 (Conn. App. 1794). In that case, Cross visited Dr. Guthery for breast pain. After diagnosing a tumor, Dr. Guthery performed a radical mastectomy. Three hours later, Cross died. Her husband sued the doctor for 1,000 pounds. He alleged Dr. Guthrey had performed the "operation in the most unskillful, ignorant, and cruel manner, contrary to all the well-known rules and principles of practice in such cases." *Id*. The jury awarded the widower 40 pounds in damages for loss of his wife's services, company, and consortium.

Research confirms that "medical malpractice actions were from their earliest

origins no different from ordinary negligence suits." Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 Wis. L. Rev. 1193, 1196 (1992).

3. An Arizona statute that would operate to annul, repeal, abolish, cancel, or do away with the ordinary negligence aspect of a medical-malpractice case would abrogate the medical-malpractice cause of action.

Any Arizona statute that would require a plaintiff to allege and prove more than ordinary negligence in an Arizona medical-malpractice case would violate the Arizona anti-abrogation clause, which guarantees that: "The right of action to recover damages for injuries shall never be abrogated." Ariz. Const. art. 18, § 6.

When considering statutory or constitutional text, the judicial "examination of original public meaning starts with dictionary definitions from the time the provision was adopted." *Matthews v. Industrial Comm'n*, 254 Ariz. 157, 163 ¶ 33 (2022).

"In determining commonly accepted meanings, we may refer to established and widely used dictionaries." *Planned Parenthood Arizona, Inc. v. Mayes*, 257 Ariz. 110, 115 ¶ 16 (2024) (citations and internal quotation marks omitted). "To determine the ordinary meaning of a term, we commonly refer to established and widely used dictionaries." *Fields v. Elected Officials' Retirement Plan*, 234 Ariz. 214, 219 ¶ 20 (2014).

A review of 29 established, respected, authoritative, and widely used English

language dictionaries that would have been available to the framers and adopters of the Arizona Constitution from 1910 through 1912 confirm that the original public and ordinary meaning of "abrogate" in that era was to annul, repeal, abolish, cancel, or do away with:

1900

- "To annul; to repeal, as a law, either by formally abolishing it, or by passing another act which supersedes the first." Robert Hunter, ed.-in-chief, 1 *The American Dictionary and Cyclopedia* 33 (1900).

1901

- "To annul, to repeal as a law, either by finally abolishing it, or by passing another act which supersedes the first." 1 *The Imperial Encyclopaedic Dictionary* 30 (1901).
- To "annul by an authoritative act; to repeal." William Mack & Howard P. Nash, eds., 1 *Cyclopedia of Law and Proc.* 198 (1901).

1902

- "To repeal; to annul; to abolish." C.M. Stevans, *Webster's Common Sense Dictionary* 8 (1902).

1903

- To "repeal a law." Andrew Findlater, ed., *Chambers's Etymological Dictionary of the English Language* 2 (1903).
- "To annul [or] to repeal." James Henry Murray, ed., *A Companion Dictionary of the English Language* 172 (3rd ed. 1903).

1904

- "To annul; to repeal as a law, either by formally abolishing it, or by passing another act which supersedes the first." J.A. Hill, 6 *The*

Anglo-American Encyclopedia and Dictionary 30 (1904).

1905

- "To repeal; to abolish." *The Modern School and Office Dictionary of the English Language* 10 (1905).

1906

- "To annul, to repeal as a law, either by finally abolishing it, or by passing another act which supersedes the first." Charles Morris & Robert Hunter eds., 1 *The Modern World Dictionary of the English Language* 33 (1906).

1907

- To "annul by authoritative act or late enactment; abolish; repeal." James C. Fernald & Francis A. March, *Student's Edition of a Standard Dictionary of the English Language* 3 (1907).
- "To annul by an authoritative act: to abolish by the authority of the maker or his successor; to repeal;—applied to the repeal of laws, decrees, ordinances, the abolition of customs, etc." W.T. Harris, ed.-in-chief, *Webster's International Dictionary of the English Language* 6 (1907).

1908

- To "annul by authoritative act; abolish; repeal; as, to *abrogate* a rule or custom." Isaac K. Funk, ed.-in-chief, 1 *A Standard Dictionary of the English Language* 8 (1908).
- To "abolish, annul, or repeal by authority." *Webster's New Illustrated Dictionary of the English Language* 2 (1908).
- "To set aside or appeal. To annul. To abolish." Charles E. Chadman, *A Concise Legal Dictionary* 3 (1908).

1909

- "To revoke, annul, or repeal by authoritative act of the maker or his successor—applied to laws, decrees, etc." *Webster's Collegiate*

Dictionary 4 (1909).

- To "annul by an authoritative act; to repeal; to make void." A.M. Williams, ed., *The Graphic English Dictionary* 4 (1909).

1910

- To "annul by an authoritative act; to abolish; revoke; repeal." Dorsey Gardner, *Webster's Practical Dictionary* 2 (1910).
- "To repeal; to abolish; to cancel." Joseph E. Worcester, *Worcester's Academic Dictionary of the English Language* 48 (1910).
- "To do away with; annul; abolish; repeal." James C. Fernald, ed., *The Concise Standard Dictionary of the English Language* 2 (1910).
- To "annul, repeal, or destroy." Henry C. Black, *A Law Dictionary* 9 (2nd ed. 1910).

1911

- To "repeal." Thomas H. Russell, *Webster's Reliable Dictionary* 11 (1911).
- To "abolish, annul, or repeal by authority." Edward T. Roe & Charles Leonard-Stewart, *Webster's New Illustrated Dictionary* 30 (1911).
- "[T]o do away with; to abolish." *A Modern Dictionary of the English Language* 2 (1911).
- "To abolish summarily; annul by an authoritative act; repeal." William D. Whitney & Benjamin E. Smith, eds., 1 *The Century Dictionary: An Encyclopedic Lexicon of the English Language* 19 (1911).
- "To annul; to repeal as a law, whether by formally abolishing it, or by passing another act which supersedes the first." Robert Hunter, ed.-in-chief, 1 *The New American Encyclopedic Dictionary of the English Language* 30 (1911).
- "To annul by an authoritative act; to abolish by the authority of the maker or his successor; to repeal; — applied to the repeal of laws, decrees, ordinances." W.T. Harris, ed.-in-chief, *Webster's New International Dictionary of the English Language* 7 (1911).

1912

- "Repeal, cancel (law or custom)." H.W. Fowler & F.G. Fowler, eds., *The Concise Oxford Dictionary of Current English* 4 (1912).
- "Repeal; annul." *Laird & Lee's Webster's New Standard American Dictionary of the English Language* 4 (1912).
- To "abolish, annul, or repeal by authority." Harry T. Peck, ed.-in-chief, *New Websterian 1912 Dictionary* 4 (1912).

Any Arizona statute that would try to impose a more stringent standard of pleading and proof than ordinary negligence in a common-law medical-malpractice action would abrogate that common-law cause of action, because it would annul, repeal, abolish, cancel, or do away with it. The Court of Appeals' anti-abrogation-clause analysis was thus historically, semantically, and constitutionally reasonable.

DATED this 13th day of October, 2024.

AHWATUKEE LEGAL OFFICE, P.C.

/s/ David L. Abney, Esq.
David L. Abney
Counsel for Amicus Curiae

Certificate of Compliance

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) contains 1,952 words (by computer count); (3) averages less than 280 words per page, including footnotes and quotations; and (4) is less than 20 substantive pages long.

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:

- Robert M. Gregory, Esq., **LAW OFFICE OF ROBERT M. GREGORY, P.C.**, 1230

W. Windhaven Ave., Gilbert, AZ 85233, robert@gregorylawaz.com, (602) 373-0109, Attorneys for Plaintiff-Appellant-Respondent.

- Rita J. Bustos, Esq., Vincent J. Montell, Esq., and Samantha Butler, Esq., **QUINTAIROS, PRIETO, WOOD & BOYER, P.A.**, 8800 East Raintree Drive, Suite 100, Scottsdale, AZ 85260, (602) 954-5605, samantha.butler@qpwblaw.com, rbustos@qpwblaw.com, vmontell@qpwblaw.com, Attorneys for Defendants-Appellees-Petitioners.
- Eileen Dennis GilBride, Esq., **JONES, SKELTON & HOCHULI PLC**, 40 N. Central Avenue, Suite 2700, Phoenix, Arizona 85004, (602) 263-1700, egilbride@jshfirm.com, Attorneys for Amici Curiae American Medical Ass'n, Arizona Medical Ass'n, Phoenix Children's Hospital, HonorHealth, and Mutual Ins. Co. of Arizona.
- D. Andrew Gaona, Esq. and Austin C Yost, Esq., **COPPERSMITH BROCKELMAN PLC**, 2800 N. Central Avenue, Suite 1900, Phoenix, Arizona 85004, (602) 381-5486, agaona@cblawyers.com, ayost@cblawyers.com, Attys for Amicus Curiae Arizona Hospital and Healthcare Ass'n.
- Brett W. Johnson, Esq., Tracy A. Olson, Esq., Claudia E. Stedman, Esq., **SNELL & WILMER LLP**, One East Washington Street, Suite 2700, Phoenix, AZ 85004, bwjohnson@swlaw.com, tolson@swlaw.com, cstedman@swlaw.com, (602) 382-6312, Attorneys for Amicus Curiae Health System Alliance of Arizona.
- Joshua D. Bendor, Esq. and Hayleigh S. Crawford, Esq. **OFFICE OF THE ATTORNEY GENERAL**, 2005 North Central Avenue, Phoenix, AZ 85004, (602) 542-3333, joshua.bendor@azag.gov, hayleigh.crawford@azag.gov, Attorneys for Amicus Curiae State of Arizona.
- Michael G. Bailey, Esq., **ARIZONA CHAMBER OF COMMERCE AND INDUSTRY**, 100 North Seventh Avenue, No. 120, Phoenix, Arizona 85007, (602) 248-4430 mbailey@azchamber.com, Attorney for Arizona Chamber of Commerce and Industry.

/s/ David L. Abney, Esq.
David L. Abney