IN THE SUPREME COURT

OF THE STATE OF ARIZONA

ROBIN ROEBUCK, Plaintiff/Appellant/ Respondent, v. MAYO CLINIC, et al, Defendants/Appellees/ Petitioners.	Arizona Supreme Court No. CV-23-0262-PR Court of Appeals Division One No. 1 CA-CV 22-0508 Maricopa County Superior Court Case No. CV2021-090429

BRIEF OF *AMICUS CURIAE* ARIZONA CHAMBER FILED WITH THE WRITTEN CONSENT OF ALL PARTIES

Dated: December 19, 2023

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I. STATEMENT OF INTEREST OF AMICUS

The Arizona Chamber of Commerce and Industry ("the ACCI") is a non-profit organization advocating for free-market public policies and working to ensure economic growth and prosperity for all Arizonans. Among other things, the ACCI provides the business community's perspective to policy makers at the Arizona Legislature.

The COVID pandemic presented a once-in-a-generation challenge from both the public health and economic perspectives. Throughout the pandemic, businesses across all industries and frontline health care workers maintained their operations, responding directly to the COVID crisis. Unfortunately, those on the health care frontline who served Arizona and its communities during the pandemic faced extraordinary legal uncertainty. The ACCI championed Senate Bill 1377 in 2021 to provide reasonable liability protections for responsible actors who worked tirelessly under oppressive circumstances to assist the State with its pandemic response, while preserving reasonable recourse against bad actors.

II. SUMMARY OF ARGUMENT

A.R.S. § 12-516 establishes a good faith/gross negligence standard of care for some medical malpractice claims arising in the context of a public health emergency. The court of appeals concluded the statutory standard "left no reasonable alternative" for a claimant to pursue a claim for "ordinary negligence," and thus violated the anti-abrogation clause of article 18 of the Arizona Constitution. *Roebuck v. Mayo Clinic*, 536 P.3d 289, 296 (Ariz. Ct. App. 2023)

In addition to the arguments presented in Mayo Clinic's Petition, this Court should accept review for the following reasons: The court of appeals erroneously applied the reasonable person standard ("ordinary negligence") to its reasonable alternative analysis. Statehood-era medical malpractice did not carry the fixed and objective reasonable person standard of care. Instead, common law medical malpractice used variable and arbitrary contextual standards of care. The statutory good faith/gross negligence pandemic standard of care is a contextual standard of care akin to and consistent with other contextual standards of care recognized in

statehood era medical malpractice and therefore does not offend the anti-abrogation clause.

Second, A.R.S. § 12-516 does not offer pandemic immunity to all health care providers. Instead, it offers some immunity for treatment provided in support of the State and its response to the emergency. The legislature has the constitutional authority, undiminished by the anti-abrogation clause, to determine the scope of the State's sovereign immunity. §12-516 is thus a grant of derivative sovereign immunity to health care providers for treatment provided at the direction of the State.

Finally, notwithstanding this Court's recent disavowal of *Boswell* and *Hazine* dicta, confusion remains in the wake of those cases. This Court should accept review of this case to further clarify the rule expressed in *Torres,* and should hold that the anti-abrogation clause protects only such rights or rules that were clearly established in Arizona law at the time of statehood. *Torres v. Jai Dining Servs. (Phoenix), Inc.*, 536 P.3d 790 (Ariz. 2023); *Boswell v. Phx. Newspapers*, 152 Ariz. 1, 730 P.2d 178 (Ct. App. 1985); *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 861 P.2d 625 (1993).

III. MEDICAL MALPRACTICE STANDARD OF CARE

The court of appeals concluded that "the statute bars all claims for ordinary negligence arising out of the provision of COVID-related medical treatment," and therefore didn't leave a "reasonable alternative" for claims protected by the anti-abrogation clause. *Roebuck,* 536 P.3d at 295. But common law malpractice did not carry an "ordinary negligence" standard of care, and the court of appeals was comparing apples to oranges.

Like jurisdiction, the word "negligence" is "a word of many, too many, meanings." *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 510 (2006) (quotation marks omitted). It can refer generally to the negligence cause of action, or more specifically to the standard of care within the breach element of the negligence cause of action, or to any of the modified usages described in two-plus pages of Black's Law Dictionary. *Negligence*, Black's Law Dictionary (11th ed. 2019). The court of appeals' use of "ordinary negligence" here, in light of context and the cited authority, refers to negligence as a standard of care, i.e., the reasonable person standard.

"Negligence" can also be conflated with any action with duty, breach, causation, and damages elements. This Court noted in *Torres* "[d]ram shop

actions are sui generis. Despite common elements of proof, they are not...simple negligence actions." *Torres,* 536 P.3d at 797. Medical malpractice actions are sui generis too. Notwithstanding the common use[1] of the term "medical negligence" to refer to a malpractice action, the standard of care in statehood-era[2] malpractice was fully dissociated from the reasonable person standard of negligence. Instead of the fixed and objective "reasonable person" standard, the malpractice standards of care were varied, arbitrary, and context-based. And depending on the context, the common law malpractice standards held practitioners to a far lower standard than that of the "reasonable person."

Though applied contextually, the core of the medical malpractice standard of care was the professional custom rule as stated in *Hathorn v. Richmond*, 48 Vt. 557 (1876). A doctor is "bound to have and to exercise....such skill as doctors ... ordinarily have and exercise in like cases."

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[1] See, e.g., Roebuck, 536 P.3d 289

[2] This Court in *Torres* indicated a right is protected if "a plaintiff alleging the *same harm* could have recovered damages against the *same type of defendant*." In order to determine the contours of the right, i.e. the standard of care implicated in "the same harm," we need to review the statehood era malpractice standards. *Torres,* 536 P.3d at 796. As discussed below in Section V, Arizona had no clearly established medical malpractice law at the time of statehood, and so the references here are to the common law of other states.

Id. at 558-559. The *Hathorn* professional custom rule was "entrenched," and "much cited at the end of the nineteenth century and at the beginning of the twentieth." Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, Wis. L. Rev. 1193, 1225 (1992)[3].

Unlike the reasonable person standard, which "provides sufficient flexibility, and leeway, to permit due allowance to be made . . . for *all of the particular circumstances* of the case which may reasonably affect the conduct required," the professional custom standard asks only of custom. *Nunez v. Prof'l Transit Mgmt. of Tucson, Inc.*, 229 Ariz. 117, 122, 271 P.3d 1104, 1109 (2012)(citations omitted)(emphasis added); Silver, *supra* at 1214.

The gulf between the negligence standard and the professional custom standard was described well by Professor Silver in his above cited criticism of the statehood-era medical malpractice standard of care.

> Although in negligence law generally, evidence of conformity to custom is relevant and admissible, medical malpractice supposedly is governed by a different rule: "[I]n medical malpractice cases failure to establish non-conformity is fatal to

[3] Silver notes that the "entrenched" *Hathorn* formulation was most likely an accident, but one that exacerbated the separation from simple negligence because it applied custom to the exercise of skill.

> the plaintiff, and the defendant who establishes conformity is entitled to a directed verdict."
>
> With professional custom as the standard, the nation's physicians may lawfully adopt and follow practices that are patently negligent and unreasonable under the standard of ordinary care to which all others are held. The medical community is answerable not for want of care but for want of conformity.

Silver, *supra* at 1214.

The fact that "all of the particular circumstances of the case" had no role in the medical malpractice standard of care was made clear by this Court in its first substantive medical malpractice case (which did not appear until more than a decade after statehood; see Section V, below).

> In other words, a physician is held to that care and skill which was exercised generally by physicians of ordinary care and skill in his and similar communities. The physician is *not chargeable* with negligence for failure to use *his best* skill and ability if he uses the care and skill which is exercised generally by physicians of ordinary care and skill in similar communities [citing cases].

Butler v. Rule, 29 Ariz. 405, 418, 242 P. 436, 440 (1926)(emphasis added).

Courts adapted the "professional custom" framework to different contexts prevalent in the late 19th century. These contextual adjustments drove the medical malpractice standard of care even further away from the

reasonable person standard. Geography was one context. The famous, by now infamous, locality rule, held doctors to the customary standard of other doctors in their community, or, as *Hathorn* put it, "in the same general neighborhood." *Hathorn*, 48 Vt. at 559. Thus at common law, doctors in a neighborhood or region brimming with incompetence could regularly engage in irremediable "reasonable person" negligence, or even gross negligence.

Area of practice was another context with a special standard of care. As *Hathorn* put it, providers "in the same general lines of practice" were evaluated in reference to themselves. *Id.* Allopathic providers would be held to the custom other allopaths. And the various other "doctors," would be held only to the standards of their own tradition, no matter how injurious their treatments might have been.

In one 1904 case, a woman was almost killed by appendicitis after following the treatment recommendations of a "Christian Science healer." The court observed

> And in cases involving the liability of medical practitioners, courts have held that "if there are distinct and differing schools of practice, as allopathic or old school, homeopathic Thompsonian, hyropathic or water cure, and a physician of one of those schools is called in, his treatment is to be tested by the

> general doctrines of his school, and not by those of other schools."

Spead v. Tomlinson, 73 N.H. 46, 51, 59 A. 376, 378 (1904)(citations omitted). Tomlinson was arguably negligent, grossly negligent, or worse, even then. But the question was never asked.

Another important contextual standard of care was the rule governing uncertainty as to professional custom (within a practice area). The "respectable minority" rule said that if a medical practice was rejected by most, but accepted by some, compliance with the minority custom was sufficient to meet the standard of care.

> It has been the uniform holding of this court that where doctors of equal skill and learning, being in no way impeached or discredited, disagree in opinion upon a given state of facts, the courts cannot hold a defendant in a malpractice suit to the theory of the one to the exclusion of the other. This is the logic of *Brydges v. Cunningham*, 69 Wash. 8, 124 Pac. 131. It is enough if the treatment employed "have the approval of at least a respectable minority of the medical profession who recognized it as a proper method of treatment."

Dahl v. Wagner, 87 Wash. 492, 495, 151 P. 1079, 1080 (1915).

Consider now the context of a public health emergency and our recent global pandemic. There were countless schools of thought on treatment, and health care workers were run ragged in all conceivable

respects, including having little choice but to see the next patient in line, regardless of capacity. The legislature's adoption of the good faith/gross negligence standard for pandemics accords with the above contextual standards of care.

This Court has described the difference between negligence and gross negligence as follows:

> Defining terms such as negligence, gross negligence, and recklessness is, at best, inexact. As between negligence and gross negligence, negligence suggests "a failure to measure up to the conduct of a reasonable person." Gross negligence generally signifies "more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences."

Weatherford v. State, 206 Ariz. 529, 535 n.4, 81 P.3d 320, 326 (2003). Though the professional custom standard may once have been intended to approximate simple negligence,[4] the contextual adaptations in use at statehood rendered the standard *far* less stringent. If anything, the statutory gross negligence is stricter than some applications of common law malpractice standards of care.

[4]Silver, supra.

The statutory standard of care considers the context – taking into account *all of the circumstances* surrounding the delivery of healthcare during a pandemic – and says, in plain English, "in the midst of this extraordinary chaos, the only reasonable expectation we can have is that you do the best you can, but not anything really dumb." Or, in these once-in-a-lifetime circumstances, negligence and gross negligence are essentially merged, both as a matter of fact and as a reasonable standard of care.

IV. DERIVATIVE SOVEREIGN IMMUNITY

For the reasons above, the legislature could have fixed a gross negligence/good faith standard of care for all medical services delivered during a public health emergency. But it didn't extend this immunity to all cases. Instead, it created limited immunity for the class of health care providers who engaged in "providing health care services *in support of this state's response* to the state of emergency." A.R.S. § 12-516 (emphasis added). This grant is a derivative sovereign immunity that arises from the providers' services being given at the direction of and on behalf of the State.

Though not heretofore recognized by Arizona courts[5], derivative immunity is recognized in federal common law. *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940)("In that view, it is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016). Our legislature is constitutionally empowered to determine the scope of the State's sovereign immunity, and exercises that authority with priority over the anti-abrogation clause. *Clouse v. State*, 199 Ariz. 196, 199, 16 P.3d 757 (2001). *Clouse* also observed that the legislature has no control over private party immunity, and thus separation of powers issues might loom here. *Id.* "[S]eparation of powers, however, is not absolute, but rather provides necessary flexibility to government and permits some overlap among branches." *State v. Montes*, 226 Ariz. 194, 196, 245 P.3d 879, 881 (2011).

[5] A related immunity, the federal "government contractor defense" was raised but not addressed in one Arizona Court of Appeals case under the framing of "shared governmental immunity." *Lohse v. Faultner*, 176 Ariz. 253, 860 P.2d 1306 (Ct. App. 1992)

This extension of sovereign immunity is narrow. Unlike with a hypothetical broader immunity, e.g., to all government contractors, the State had no real choice here but to enlist private health care in its public health response. The covered private providers likewise had no discretion. Governmental orders required hospitals to, among other things, accept patients at the direction of the "Arizona Surge Line," and halt elective procedures. (Governor's Executive Orders 2020-10 and 2020-38).

V. MEDICAL MALPRACTICE WAS NOT CLEARLY ESTABLISHED AT STATEHOOD

In *Torres*, this Court affirmed that a cognizable right of action must have existed at statehood to implicate the anti-abrogation clause. *Torres*, 536 P.3d at 796 ("When deciding whether a specific right of action is 'based in' a right cognizable at the time of statehood, courts should consider whether a plaintiff alleging the same harm could have recovered damages against the same type of defendant at statehood."). The *Torres* rule generally covers the contours of a right of action, i.e., "same party" and "same type of defendant" address duty, and "same harm" addresses standard of care.

Here, though we can conclude *some* duty was owed from doctor to patient at statehood, Arizona had no clearly established law regarding the nature of the duty or the standard of care. In 1913 this Court referenced "malpractice" in *Kain v. Arizona Copper Co.*, with this and similar comments: "[i]t is therefore clear that it is not for personal injury or for malpractice, as contended by appellee, and consequently the limitation of one year, as provided in section 1, Act 16, Laws of Arizona of 1903, is inapplicable." 14 Ariz. 566, 570, 133 P. 412, 414 (1913). Though *Kain* was issued post-statehood, it seems to show that Arizona courts recognized some type of malpractice action at or around the time of statehood. But the first substantive Arizona appellate medical malpractice case did not come until 1926. *Butler,* 29 Ariz. 405. So what exactly does the anti-abrogation clause protect?

Unlike for other actions well-settled at statehood, the question is challenging for medical malpractice which, as a concept of American common law, remained nascent at statehood. "There were twenty seven malpractice suits in the United States between 1794 and 1861 that were adjudicated as appeals...and thus available for review." Robert J. Flemma, *Medical Malpractice: A Dilemma in the Search for Justice*, 68 Marquette L.R.

237, 240 (1985). By 1890 another 113 cases were on the appellate books, and then another 485 were recorded by 1920. Kenneth De Ville, *Medical Malpractice in Nineteenth-Century America*, p. 20 (1990).

Should Arizona protect the "gross carelessness" standard of care expressed in *Bowman v. Woods*? 1 Greene 441, 443 (Iowa 1848)("he will use an ordinary degree of care and skill in medical operations, and he is *unquestionably liable for gross carelessness or unskillfulness* in the management of his patients")(emphasis added). "Gross carelessness" wasn't referenced in Section III, above, as it didn't appear in many (if any) additional appellate opinions as a standard of care. But, as a matter of practice, "gross carelessness" was pled in medical malpractice cases at least into the 1930s.[6]

There was likewise confusion in the earliest American medical malpractice cases as to whether medical malpractice arose from tort or contract law.

> The early nineteenth-century doctor-patient relationship seemed to drift equivocally between the legal categories of contract and tort, which remained vague and unqualified until at least the middle of the century. As the notion of contract gained more acceptance in society and law, it played a more

[6] see, e.g., *Appell v. Ravenswood Hosp.*, 167 Ill. App. 187 (1912); *Sweat v. Foster*, 28 Ga. App. 360, 111 S.E. 66 (1922); *Wetzel v. Pius*, 78 Cal. App. 104 (Dist. Ct. App. 1926); *Kershaw v. Tilbury*, 214 Cal. 679, 8 P.2d 109 (1932)

> important role in defining the doctor-patient relationship and in influencing malpractice litigation.

De Ville, supra, at 223. With hindsight, we can see the tort view had largely prevailed by the 1860s. *Id*., at 245. But a handful of jurisdictions framed the standard in contract terms well into the next century.[7]

None of this is to say that Arizona might have followed the contract theory of medical malpractice or established a "gross carelessness" standard of care. Likely not. But speculative hindsight should not inform the domain of the anti-abrogation clause. The reasonable election test

[7] *Wohlert v. Seibert*, 23 Pa. Super. 213, 218 (1903)("The implied contract of a physician or surgeon is not to cure but to treat the case with reasonable diligence and skill"); *Bigney v. Fisher*, 26 R.I. 402, 403, 59 A. 72, 72 (1904)("The implied contract of a physician or surgeon is not to cure--to restore a fractured limb to its natural perfectness" [citation omitted] but to treat the case with that degree of diligence and skill which are ordinarily possessed by the average of the members of the profession in good standing, in similar localities, regard being always had to the state of the medical profession at the time. If more than this is expected, it must be expressly stipulated for."); *Champion v. Kieth*, 17 Okla. 204, 207, 87 P. 845, 846 (1906)("His contract as implied by law is that he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession; that he will use reasonable and ordinary care and diligence in the treatment of the case which he undertakes, and that he will use his best judgment in all cases of doubt as to the proper course of treatment."); *McGraw v. Kerr*, 23 Colo. App. 163, 167, 128 P. 870, 872 (1912)("In the absence of a special contract otherwise providing, a physician and surgeon employed to treat an injury, impliedly contracts that he possesses that reasonable degree of learning and skill ordinarily possessed by others of his profession").

requires "reasonable alternatives or choices" in legislative regulation of protected rights of action. *Duncan v. Scottsdale Med. Imaging, LTD.*, 205 Ariz. 306, 313, 70 P.3d 435, 442 (2003). But to assess an alternative, we must know the "to what." Here we don't.

"When in doubt, stay out" should be the rule in this circumstance. Rights of actions and/or their contours should be preserved only to the extent those contours were clearly expressed in Arizona law at the time of statehood. After all, the anti-abrogation clause was intended only to protect "a specific, [then] existing labor-related right of action," and we are here solely because this Court has concluded that "[s]tare decisis may support a broader scope for article 18, section 6 recognized by prior cases." *Torres,* 536 P.3d at 801-802 (Bolick, J. concurring). But stare decisis does not require this Court to fill in blanks.

VI CONCLUSION

This Court should accept review.

RESPECTFULLY submitted this 19th day of December, 2023.

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