

**IN THE SUPREME COURT**

**STATE OF ARIZONA**

David Francisco, DDS and Kimberley  
Francisco, husband and wife,

Plaintiffs/Appellants,

v.

Affiliated Urologists, Ltd., an Arizona  
Corporation; Kevin Art, M.D. and Jane  
Doe Art, husband and wife; Doe  
Entities I-X; and Roes I-X;

Defendants/Appellees.

No. CV-23-0152-PR

Court of Appeals, Division One

No. 1 CA-CV-21-0701

Maricopa County Superior Court

No. CV2020-010470

**RESPONSE TO SUPPLEMENTAL AMICUS BRIEF OF THE ARIZONA**

**ASSOCIATION FOR JUSTICE/ ARIZONA TRIAL LAWYERS**

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The AzAJ’s Supplemental Amicus brief asks this Court to consider the performance of a medical procedure without adequate informed consent a medical battery. That is to say, in the converse, that consent removes the typical elements of a battery. *See, e.g., Cathemer v. Hunter*, 27 Ariz.App. 780, 782-784 (App.1976). Everyone who has filed a brief in this appeal agrees that consent, in the medical setting, must be informed. That is to say:

[C]onsent is effectual if the consentor understands substantially the nature of the surgical procedure attempted and the probable results of the operation.... Lacking this, the operation is a battery unless some special exception applies.

*Id.* at 784 (citing *Shetter v. Rochelle*, 2 Ariz.App. 358, 370 (1965)). The only real dispute in this appeal is whether the scope of disclosure is to be governed by doctors or by the patients whom they serve.

Regardless of whether David’s cause of action is coined “negligent non-disclosure”<sup>1</sup> or “medical battery”<sup>2</sup> or even “medical negligence,”<sup>3</sup> the inquiry for this Court remains the same – *i.e.*, “Who gets to decide what David is told?” Both the Defendants and the Hospital Amicus vociferously argue that urologists have the final say on what they want to tell patients like David. However, such a rule “is inimical

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<sup>1</sup> As argued by David.

<sup>2</sup> As argued by the AzAJ Amicus.

<sup>3</sup> As argued by the Defendant and Hospital Amicus.

to the rationale and objectives of the informed consent doctrine.” *Arato v. Avedon*, 858 P.2d 598, 611 (Calif.1993).

The Defendants (and the Hospital Amicus) point to *Duncan v. Scottsdale Medical Imaging*, 205 Ariz. 306, 310, at ¶ 13 (2003). As pointed out in David’s previous appellate submissions, Paragraph 13 is *dicta*, given the holding in Paragraph 14 when applying the facts of that case. Further, Paragraph 13’s support is a footnote in *Hales v. Pittman*, 118 Ariz. 305 (1978). Both *Duncan* and the footnote in *Hales* cite *Cobbs v. Grant*, 502 P.2d 1 (Calif.1972). Inexplicably, both *Duncan* and *Hales* (and the Defendants and Hospital Amicus), overlook the key holding in *Cobbs* applicable to medical experts:

“Nor can we ignore the fact that to bind the disclosure obligation to medical usage is to arrogate the decision on revelation to the physician alone. Respect for the patient’s right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves.”

*Cobbs*, 502 P.2d at 10 (citing *Canterbury v. Spence*, 464 F.2d 772, 784 (D.C.1972)).  
*See also*, *Arato*, 858 P.2d at 611. (“We underline the limited and essentially subsidiary role of expert testimony in informed consent litigation.”))

If this Court wants to protect the patient’s personal autonomy and self-determination, then this Court can do so by finding in David’s favor regardless of how the issue is framed. If this Court decides that David’s case is one of “medical battery,” then it is not a medical negligence action as defined by A.R.S. § 12-561,

and no medical expert testimony is required by A.R.S. § 12-2603. If this Court decides that David's case is one of "negligent non-disclosure," then, similarly, no expert medical testimony is required. If this Court decides that this lawsuit is one implicating medical negligence, this is not a medical negligence case in which expert medical testimony is required for one of two reasons. First, the non-disclosure of which David complains is readily ascertainable by persons without advanced scientific or medical training. *See, e.g., Rodriguez v. Jackson*, 118 Ariz. 13, 17 (App.1977) ("Unless the conduct complained of is readily ascertainable by laymen, the standard of care must be established by medical testimony."); *and see, Kalar v. MacCollum*, 17 Ariz.App. 176, 178 (1972).<sup>4</sup> Alternately, since the non-disclosure should be viewed from the patient's perspective, no medical expert can give that perspective.<sup>5</sup> Allowing the urologists to decide what David should be told regarding the FDA's pharmacological concerns about Cipro would, simply put, be bad public policy antithetical to basic human rights and the regard for personal freedom at the base of our country's founding.

A further discussion on the necessity of expert witnesses is warranted at this point. Both Defendants and the Hospital Amicus argue that this case is without merit

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<sup>4</sup> This is what the Court of Appeals decided, on the narrow set of facts presented in this case.

<sup>5</sup> *See*, Opening Brief at pp. 13-14, 18-25; *and* Reply Brief at pp. 6-11; *and* AAJ Amicus Brief to the Court of Appeals at pp. 7-10, 12-14.

because David could not find a US-based urologist to support his allegations. David has amassed and produced substantial evidence that pharmacologists, chemists, and professionals with a higher degree of pharmacological training than urologists would have wanted him warned as to the greatly increased risks he had for tendon rupture if he ingested Cipro. Similarly, David has amassed substantial evidence that urologists from around the Western World also follow the FDA's warnings. There is no rational or logical reason why these pharmacological experts – and the other urologists around the world who heed the warnings – should be deemed to carry no weight. Rather, urologists (and other specialized medical practitioners) should be encouraged to make use of the education provided from those with greater levels of knowledge in pharmacology than they. Otherwise, a whole calling may be unduly lagging in the adoption of new practices based on modern science and developments. *See, The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.1932).

If a small group of urologists is permitted to determine the information that should be disclosed to their patients, then (1) patients lose autonomy as to what happens to their bodies, and (2) there is no incentive to keep abreast of the latest science from the most qualified scientists in the field of pharmacology.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of March, 2024.

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