

**IN THE SUPREME COURT
STATE OF ARIZONA**

ROBIN ROEBUCK,

Plaintiff/ Appellant/ Respondent,

v.

MAYO CLINIC, et al.

Defendants/ Appellees/ Petitioners.

Supreme Court No.

Court of Appeals

Division One No.

1 CA-CV 22-0508

Maricopa County

Superior Court

No. CV2021-090429

PETITION FOR REVIEW

Rita J. Bustos (Bar No. 025956)

Vincent J. Montell (Bar No. 014236)

Samantha Butler (Bar No. 024883)

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

8800 East Raintree Drive, Suite 100

Scottsdale, Arizona 85260

Telephone: (602) 954-5605

Facsimile: (602) 954-5606

rbustos@qpwbllaw.com

vmontell@qpwbllaw.com

samantha.butler@qpwbllaw.com

Attorneys for Defendants/Appellees/Petitioners

INTRODUCTION

COVID-19 was an unprecedented global crisis. The early days of the pandemic were filled with uncertainty, especially for front-line healthcare workers providing emergency medical treatment to COVID patients without knowing how the virus may affect them and their families. Experts from public health authorities issued continuously evolving recommendations, guidance, and advice based on the science of the moment. Despite aggressive efforts by our government and healthcare community to limit the spread, healthcare providers and healthcare facilities, such as Mayo Clinic Arizona, experienced disproportionate hardship.

Recognizing the uncertainty of the virus and the challenges faced by healthcare providers, the Arizona Legislature enacted A.R.S. § 12-516 to protect those who protect us by extending limited immunity from lawsuits to healthcare providers relating to their efforts to treat and prevent the spread of COVID-19. This limited immunity recognized the uncertainties associated with treatment and prevention of COVID-19 to ensure health care providers were not subject to fortuitous lawsuits that hinder and discourage their critical and ongoing work, unless they are grossly

negligent. The court of appeals usurped that critical limited immunity by holding that A.R.S. § 12-516 is unconstitutional under the anti-abrogation clause. This holding is based on a fundamental misunderstanding of Arizona tort law, specifically that gross negligence is a tort separate and distinct from ordinary negligence. It is not. Holding that a duly enacted statute is unconstitutional based on flawed reasoning and misunderstanding of Arizona precedent is more than enough reason for this Court to grant review.

Further should the court's reasoning stand, it would call into question numerous other Arizona "Good Samaritan" statutes which provide limited immunity to healthcare providers and others who offer services in emergency situations. These services may not otherwise be provided without limited immunity. That these various statutes are now in jeopardy is another important reason to grant review.

Finally, the court of appeals holding that Mayo was not entitled to immunity under the Public Readiness and Emergency Preparedness Act ("PREP Act") was clear error based on a misunderstanding of how covered countermeasures apply. This offers another reason to grant review.

FACTS MATERIAL TO THE ISSUES PRESENTED FOR REVIEW

This is a medical malpractice case which Plaintiff Robin Roebuck brought against Mayo Clinic Arizona, Mayo Clinic Hospital, Nicole Secrest, N.P. and Robert Scott, M.D. Plaintiff alleges that Defendants negligently performed an arterial blood gas (“ABG”) test while he was being treated for COVID-19 at Mayo in April of 2020, which allegedly led to complications, including compartment syndrome, which necessitated emergency surgery. [ROA 14, ¶¶ 11 & 12.] Defendants moved for summary judgment based on the limited immunity provided under A.R.S. § 12-516 and the PREP Act. [ROA 27 (Motion), ROA 31 (Response), ROA 35 (Reply).] The trial court found that Plaintiff’s claims were not barred by the PREP Act but granted Defendants motion via A.R.S. § 12-516. [ROA 43.]

Plaintiff appealed arguing in part that A.R.S. § 12-516 was unconstitutional under Article 18, § 6 of the Arizona Constitution, the anti-abrogation clause.¹ Without oral argument, the court of appeals held A.R.S. § 12-516 unconstitutional. [Slip Op., ¶¶ 27 & 29.] They further held the

¹ Plaintiff did not provide the Notice of Claim of Unconstitutionality under A.R.S. § 12-1841.

PREP Act did not apply to Plaintiff's claims because the ABG was not a covered countermeasure. [*Id.* at ¶ 36.]

ISSUES PRESENTED FOR REVIEW

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

2. Did the court of appeals err in holding that the PREP Act did not bar Plaintiff's state law claims?

REASONS REVIEW SHOULD BE GRANTED

1. Review and relief are necessary to confirm that A.R.S. § 12-516 – a duly enacted statute meant to protect healthcare providers from fortuitous suits during an unprecedented global pandemic – does not violate the anti-abrogation clause and is constitutional. The court of appeals Opinion otherwise was based on flawed reasoning and inadequate analysis of Arizona precedent regarding anti-abrogation.

a. Article 18, § 6 of the Arizona Constitution provides that “[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation” The clause applies to “common law actions for negligence, intentional tort, strict liability, defamation and other actions in tort which trace origins

to the common law.” *Cronin v. Sheldon*, 195 Ariz. 531, 538-39, ¶ 35 (1999); see also *Torres, Et. Al. v. JAI Dining*, __ Ariz. __, CV-22-0142-PR, ¶ 13 (2023) (“[t]he clause generally protects from abrogation a wide swath of actions for which recovery was possible in 1912, such as negligence actions, intentional torts, and product liability claims.”). While the legislature cannot eviscerate common law torts, it can lawfully regulate them. *Duncan v. Scottsdale Med. Imaging, LTD.*, 205 Ariz. 306, 313, ¶ 29 (2003).

“The legislature may regulate the cause of action for negligence so long as it leaves a claimant reasonable alternatives or choices which will enable him or her to bring the action. It may not, under the guise of ‘regulation,’ so affect the fundamental right to sue for damages as to effectively deprive the claimant of the ability to bring the action.” *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 106 (1984). A regulation that makes it more difficult to obtain relief is not necessarily unconstitutional. See, e.g., *Franklin v. Clemett*, 240 Ariz. 587, 595 (App. 2017) (holding that a statute does not effectively abrogate a claim by making it more difficult for the claimant to obtain a recovery); *State Farm Ins. Co. v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, 229, ¶¶ 35-37 (2007) (rejecting argument that A.R.S. § 12-2506, which abolished joint and several liability

in strict products liability cases, violates Article 18, § 6); *Governale v. Lieberman*, 226 Ariz. 443, 447-48 (App. 2011) (statute limiting potential expert witnesses a plaintiff may use did not effectively abrogate plaintiff's right of recovery).

The cause of action in this case is medical malpractice, which is under the umbrella of negligence and existed in the common law, so is protected by the anti-abrogation clause. *Governale v. Lieberman*, 226 Ariz. 443, 447, ¶ 8 (App. 2011). Petitioners and the court of appeals agree on this point. We also agree with the above cited precedent regarding abrogation vs. regulation. Where the disagreement lies and the court of appeals erred, however, is their holding that A.R.S. § 12-516 abrogates rather than regulates Plaintiff's claim.

b. A.R.S. § 12-516 regulates causes of action for negligence, it does not abrogate them. The fundamental flaw in the court of appeals reasoning was the essential premise 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.] While the court of appeals did not explicitly hold they are distinct torts, instead that they are "distinct

theories of liability,” that conclusion is the only way the court’s reasoning stands. [*Id.*] Specifically, the anti-abrogation clause was “not enacted to protect particular doctrines, theories or ‘causes of action.’” The text of the constitution protects a broader concept—‘the *right of action* to recover damages for injuries.’” *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 344 (1993) (quoting *Bryant v. Continental Conveyor & Equip. Co.*, 156 Ariz. 193, 198 (1988) (Feldman, V.C.J., dissenting)). In other words, abrogation of theories of liability or doctrines does not offend the anti-abrogation clause; it is only abrogation of distinct rights of action – torts – that is unconstitutional. The legislature may otherwise regulate distinct torts, even restricting theories of liability, without offending the clause. *See, e.g. Lindsay v. Cave Creek Outfitters, L.L.C.*, 207 Ariz. 487 (App. 2003) (holding that A.R.S. § 12-553, which requires proof of gross negligence for injuries related to riding horses, was not unconstitutional).

The court’s premise that ordinary negligence and gross negligence are distinct torts is solely based on one sentence: “Gross negligence differs from ordinary negligence in quality and not degree.” *Walls v. Arizona Dep’t of Pub. Safety*, 170 Ariz. 591, 595 (App. 1991). This comes from the court of appeals opinion in *Kemp v. Pinal County*, 13 Ariz. App. 121, 124 (App. 1970), who said:

“Gross or wanton or willful misconduct is different from ordinary negligence in quality and not degree.” This idea that the difference between ordinary and gross negligence is of “quality” and not “degree” has never been analyzed and/or explained by this Court or the court of appeals. It certainly has never stood for the proposition that ordinary negligence and gross negligence are separate and distinct torts. In fact, this Court – after the *Kemp* decision – specifically held that they are not. In *DeElena v. S. Pac. Co.*, 121 Ariz. 563, 566 (1979), this Court rejected the argument that “wanton misconduct is a tort wholly separate from negligence,” instead holding that “wanton misconduct is aggravated negligence.” This Court further held that the “rules by which liability for wanton misconduct is determined are the same as those by which liability for simple negligence is decided.” *Id.* at 567; *see also Taylor v. Boston Sci. Corp.*, 2020 U.S. Dist. LEXIS 140781 (D. Ariz. 2020) (“In Arizona, aggravated negligence is not a tort wholly separate from negligence.”). While a plaintiff must prove that a person’s negligent act was done with knowledge of or reason to know “facts which would lead a reasonable person to realize that his conduct not only creates an unreasonable risk of bodily harm to others but also involves a high probability that substantial harm will result,” to prove gross negligence, it

is still under the umbrella of “negligence.” *Walls v. Arizona Dept. of Pub. Safety*, 170 Ariz. 591, 595 (App. 1991).

The court of appeals cites *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340 (1993) and *Rubino v. De Fretias*, 638 F. Supp. 182 (D. Ariz. 1986) to underlie that the anti-abrogation clause “does not permit the legislature to wholly extinguish a particular type of claim available at common law, even if alternative causes of action remain available to injured claimants.” [Slip Op. ¶ 25.] While the proposition may be correct, because ordinary negligence and gross negligence are not distinct torts, preclusion of ordinary negligence under A.R.S. § 12-516 does not offend anti-abrogation. In fact, a review of *Hazine* and *Rubino* supports the proposition that ordinary and gross negligence are not distinct torts.

In *Hazine*, plaintiff Hazine was injured on an escalator and sued under strict product liability and negligence. 176 Ariz. at 341. At that time, A.R.S. § 12-551 provided that a strict product liability action could only be commenced within 12-years of when the offending product was first sold. *Id.* Because the injury occurred after this period, defendant moved for summary judgment on the strict liability claim. *Id.* Hazine argued that A.R.S. § 12-551 was unconstitutional under the anti-abrogation clause. *Id.* at

341 – 342. This Court agreed, holding that the statute effectively precluded strict product liability claims because it barred the action even before it existed. *Id.* at 343. In so holding, this Court implicitly found that strict product liability and negligence are separate torts. *Id.* at 342. This makes complete sense. A strict products liability claim “does not rest on traditional concepts of fault” and a “strict products liability plaintiff does not have to prove the defendant was negligent.” *State Farm Ins. Co. v. Premier Manufactured Sys., Inc.*, 213 Ariz. 419, 422, ¶ 8 (Ariz. 2006). “Strict products liability developed because other theories of recovery proved inadequate to protect injured users and consumers.” *Hazine*, 176 Ariz. at 343. This reasoning does not hold true to gross vs. ordinary negligence. These are not separate torts with different elements. Both ordinary negligence and gross negligence require proof of the same underlying elements – duty, breach, causation, damages – with gross negligence simply requiring a higher degree of probability that substantial harm will result.

In *Rubino*, the District Court of Arizona, applying Arizona law, held the medical malpractice act in effect at that time was unconstitutional because it precluded claims for common law battery. *Rubino*, 638 F. Supp.

at 185 – 186 (D. Ariz. 1986). The Court found that battery and negligence were distinct torts:

[Battery and negligence] preserve distinct societal interest[s] in the physician-patient relationship. The battery theory sustains a patient's right of self-determination; the negligence theory recognizes a physician's obligation to provide reasonable disclosure of the available choices with respect to the proposed procedures and the dangers inherently and potentially involved in each. A patient's right of self-determination may be violated, even though his health is significantly improved. Thus the law of battery does not require the patient be physically damaged In limiting actions against medical health providers to medical malpractice actions and prohibiting an action based upon assault and battery, the legislature has not merely regulated the right to sue but abrogated the patient's basic common law right to enforce his right of self-determination, in violation of Article 2, Section 31 and Article 18, Section 6 of the Arizona Constitution.

Id. at 185 (internal citations omitted).

Again, finding that battery and negligence are distinct torts makes sense. Battery is an intentional tort, subject to different elements than negligence, including that battery does not require proof of damages. *Duncan*, 205 Ariz. at 314, ¶ 33. Further, “whether an action is founded in battery or negligence is not merely a matter of evidence and procedure. The theory of liability may very well determine what injury has resulted from the wrong committed.” *Rubino*, 638 F. Supp. at 185. The same does not hold true for ordinary and gross negligence. The injury is the same regardless of

whether its ordinary or gross negligence. It is simply a matter of evidence relating to the tortfeasor's level of breach.

Because gross negligence and ordinary negligence are not separate torts, the legislature's regulation of negligence actions under A.R.S. § 12-516 is not unconstitutional. A.R.S. § 12-516 does not prevent a plaintiff from asserting a civil action for negligence in appropriate circumstances, including instances of failure to act, willful misconduct, or gross negligence. Because the statute does not abrogate any viable right of action to recover damages, it does not violate Article 18, § 6.

2. Review is necessary because if the court of appeals reasoning stands, numerous other duly enacted statutes providing limited immunity in the form of a more stringent burden on plaintiffs must be deemed unconstitutional. A.R.S. § 12-516 is only the latest in a series of Arizona's "Good Samaritan" statutes. Indeed, as noted by Governor Ducey in Executive Order 2020-27: "Arizona has a history of providing protections to healthcare providers, emergency medical technicians and emergency workers who act in good faith in emergency situations through Good Samaritan laws such as A.R.S. § 32-1471, in order to encourage their participation in emergency situations." Executive Order 2020-27, The "Good Samaritan" Order. Most of

these statutes do exactly what A.R.S § 12-516 does – require proof of gross negligence by clear and convincing evidence for a plaintiff to maintain a claim in specific situations. The court of appeals holding that the legislature can never regulate negligence puts all these statutes in jeopardy, including, but not limited to:²

- **A.R.S. § 32-1471:** Any health care provider licensed or certified to practice as such in this state or elsewhere . . . or any other person who renders emergency care at a public gathering or at the scene of an emergency occurrence gratuitously and in good faith shall not be liable for any civil or other damages as the result of any act or omission by such person rendering the emergency care, or as the result of any act or failure to act to provide or arrange for further medical treatment or care for the injured persons, unless such person, while rendering such

² Other statutes provide similar protections to those who act in good faith or without malice or gross negligence in a variety of situations. *See, e.g.*, A.R.S. §§ 13-3620(F) (person reporting suspected nonaccidental injury to child as required by section immune from liability in absence of malice); 14-5651(E), (F) (person who in good faith provides information on private fiduciary's misconduct is not subject to civil liability; private fiduciary advisory board and staff immune from civil liability for good faith conduct); 23-1361(C), (D) (employer who in good faith provides information requested by prospective employer about reason for employee termination is immune from civil liability; good faith presumed unless former employer acted with actual malice or intent to mislead); 36-916(A) (not liable for good faith donation of “apparently wholesome food item” or nonfood grocery product to charitable or nonprofit organization, or any other person, absent intentional misconduct or gross negligence); 41-621(J) (state officer, agent or employee not personally liable for injury resulting from act or omission in official capacity if exercise of discretion done in good faith).

emergency care, is guilty of gross negligence.

- **A.R.S. § 12-571:** A health professional as defined in section 32-3201 or a health professional who meets the requirements of section 32-3217 and who provides medical, optometric or dental treatment, care or screening within the scope of the health professional's certificate or license at a nonprofit clinic where neither the professional nor the nonprofit clinic receives compensation for any treatment, care or screening provided at the nonprofit clinic **is not liable in a medical malpractice action, unless the health professional was grossly negligent.**
- **A.R.S. § 12-564:** A student who is in an educational or training program of a certified, accredited or state approved postsecondary institution that prepares students for licensing as a health care provider is not liable in a medical malpractice action for injury that occurs during or as a result of care that is provided while the student is in the program and under the supervision of a licensed health care provider **unless gross negligence is established by clear and convincing evidence.**

The power of the legislature to provide protections to healthcare providers and other citizens willing to help in an emergency - like an unprecedented global pandemic - should not be stifled by the judiciary based on flawed reasoning and a fundamental misunderstanding of the anti-abrogation clause.

3. Review is necessary to rectify the court of appeals decision the PREP Act does not apply to Plaintiff's state law claims because the ABG was not a covered countermeasure. The court of appeals correctly held that the

PREP Act provides immunity to Mayo because (1) PREP Act immunity is a defense that can be applied by the state court; and (2) Mayo is a “covered person.” [Slip Op., ¶¶ 31 - 34.] Where they erred is finding that Mayo is not immune in this case because the ABG procedure is not a covered countermeasure. This holding is based on a fundamental misunderstanding of the PREP Act and the covered countermeasure requirement. PREP Act immunity is broad, extending not just to injuries directly caused by the use of a covered countermeasure but also to any claim “relating to” the administration to or use by an individual of a covered countermeasure. 42 U.S.C. § 247d-6d(b)(1). Moreover, the immunity applies to any claim “that has a causal relationship with the administration to or use by an individual of a covered countermeasure.” *Id.* § 247d-6d(a)(2)(B).

A “covered countermeasure” as “any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom, or any device used in the administration of any such product, and all components and constituent materials of any such product,” provided such countermeasure fits into at least one of the categories set forth under the PREP Act: “qualified

pandemic or epidemic products;” “drugs,” “biological products,” and “devices” authorized for emergency use under the FDC Act; and “respiratory protective devices.” 42 U.S.C.A. § 247d-6d(i)(1); 85 Fed. Reg. at 15202.

In this case, the court of appeals held that because the ABG procedure was not listed in the Declaration, it was not a covered countermeasure. [Slip Op., ¶ 36.] However, the ABG procedure was simply a diagnostic test utilized to assess the sufficiency of Plaintiff’s respiratory status to provide him with tocilizumab, a monoclonal antibody used to treat COVID 19. It was the tocilizumab that was the covered countermeasure and the ABG stick was used in its administration. Tocilizumab (Acterna) is specifically approved by the FDA to treat COVID 19.³ As, such, it cannot be disputed that it is a covered countermeasure.

³ “Actemra (Tocilizumab) is approved for the treatment of COVID-19 in hospitalized adults who are receiving systemic corticosteroids and require supplemental oxygen, non-invasive or invasive mechanical ventilation, or extracorporeal membrane oxygenation (ECMO).”
<https://www.fda.gov/drugs/emergency-preparedness-drugs/coronavirus-covid-19-drugs>

CONCLUSION

For the foregoing reasons, Petitioners respectfully requests this Court grant review and relief.

RESPECTFULLY SUBMITTED this 19th day of October, 2023.

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

By /s/ Rita J. Bustos

Rita J. Bustos

Vincent J. Montell

Samantha Butler

8800 East Raintree Drive, Suite 100

Scottsdale, Arizona 85260

Attorneys for

Defendants/Appellees/Petitioners

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ROBIN ROEBUCK, *Plaintiff/Appellant*,

v.

MAYO CLINIC, et al., *Defendants/Appellees*.

No. 1 CA-CV 22-0508
FILED 9-19-2023

Appeal from the Superior Court in Maricopa County
No. CV2021-090429
The Honorable Rodrick J. Coffey, Judge

REVERSED AND REMANDED

COUNSEL

Law Office of Robert M. Gregory, P.C., Gilbert
By Robert M. Gregory
Counsel for Plaintiff/Appellant

Quintairos, Prieto, Wood & Boyer, P.A., Scottsdale
By Vincent J. Montell, Rita J. Bustos, Samantha L. Butler
Counsel for Defendants/Appellees

OPINION

Presiding Judge Maria Elena Cruz delivered the opinion of the Court, in which Judge James B. Morse Jr. and Judge Daniel J. Kiley joined.

ROEBUCK v. MAYO CLINIC, et al.
Opinion of the Court

C R U Z, Judge:

¶1 Robin Roebuck appeals the superior court’s grant of summary judgment to Mayo Clinic, Mayo Clinic Arizona, Nicole Secrest, N.P., and Robert Scott, M.D. (collectively, “the Mayo Clinic defendants”). Because Arizona Revised Statutes (“A.R.S.”) section 12-516 does away with a patient’s right to recover damages for ordinary negligence we hold that it violates the anti-abrogation clause of the Arizona Constitution. Accordingly, we reverse and remand.

FACTUAL AND PROCEDURAL HISTORY

¶2 Roebuck had a heart transplant in 1993, and a second heart transplant and kidney transplant at Mayo Clinic in 2017. Thereafter, Mayo Clinic provided Roebuck’s follow-up care. Roebuck was healthy until he contracted COVID-19 in 2020.

¶3 Roebuck was hospitalized on April 20, 2020, at Mayo Clinic after presenting with COVID-19 symptoms. Because he had previously received a heart transplant, Roebuck was placed under the care of Mayo Clinic’s congestive heart failure team, standard Mayo Clinic procedure for admitted heart transplant patients regardless of the reason for their admission.

¶4 On April 23, 2020, a chest x-ray revealed Roebuck had developed pneumonia, and he had to be given supplemental oxygen. That same day, Dr. Hasan Ashraf, a cardiologist, ordered an echocardiogram to assess Roebuck’s heart. The echocardiogram confirmed that Roebuck’s heart was “doing pretty well” and that he was not having primary cardiac issues or signs of rejection. In light of Roebuck’s positive COVID-19 test and the results of the echocardiogram, his doctors “proceeded with regards to the management of COVID” rather than “any cardiac kind of management.”

¶5 The next day, Dr. Ashraf ordered an arterial blood gas (“ABG”) test. The test, which is drawn from a patient’s radial artery, measures the oxygen in the patient’s arterial blood and provides doctors with more accurate information than a pulse oximeter. Dr. Ashraf ordered the ABG test because Roebuck had COVID-19 and was “becoming progressively hypoxic,” and because he was suffering from metabolic acidosis as a result of his diarrhea from COVID-19. In addition, Dr. Ashraf had consulted with Mayo Clinic’s infectious disease doctors who were considering giving Roebuck a monoclonal antibody, tocilizumab, to treat

ROEBUCK v. MAYO CLINIC, et al.
Opinion of the Court

his COVID-19, and ABG test results would provide necessary “additional information that would . . . support giving the tocilizumab.” The results of the ABG test revealed that Roebuck had very low oxygen content in his blood, warranting treatment with tocilizumab, which he was given shortly thereafter.

¶6 The next day, Roebuck developed complications from the ABG test, was diagnosed with compartment syndrome, and underwent emergency surgery on his right hand, forearm, and wrist. Roebuck was left with diminished strength and use of his right hand and arm and significant scarring.

¶7 In January 2021, Roebuck filed a medical negligence suit against the Mayo Clinic defendants alleging the ABG test was negligently performed. He did not allege the Mayo Clinic defendants were grossly negligent. In March 2021, the Mayo Clinic defendants removed the action to the United States District Court for the District of Arizona, asserting federal question jurisdiction under 28 U.S.C. § 1331 based on their immunity defense under the Public Readiness and Emergency Preparedness (“PREP”) Act, 42 U.S.C. §§ 247d-6d, 247d-6e. Roebuck moved to remand to state court. The district court remanded to the superior court after finding the case did not raise a federal question because it did not involve a state law claim arising under federal law or a state law claim completely preempted by a federal statute.

¶8 In May 2021, Roebuck filed an amended complaint and additionally alleged that Dr. Ashraf had ordered the ABG test to evaluate his heart disease. The Mayo Clinic defendants moved to dismiss the complaint, and the superior court denied the motion. The court ordered that the scope of discovery would “initially” be limited “to the issues of the purpose of the [ABG] blood draw.”

¶9 The parties deposed Roebuck, Dr. Ashraf, and Mayo Clinic doctor Robert Scott, M.D. The Mayo Clinic defendants moved for summary judgment, and after briefing and oral argument, the superior court granted the motion. Although it dismissed Roebuck’s claims, the court expressly stated that Roebuck was “not barred from filing an amended complaint asserting willful conduct or gross negligence [if] such claims can satisfy the requirements of Rule 11 of the Arizona Rules of Civil Procedure.” Roebuck did not file an amended complaint.

ROEBUCK v. MAYO CLINIC, et al.
Opinion of the Court

¶10 After the court entered partial final judgment under Ariz. R. Civ. P. 54(b), Roebuck timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), -2101(A)(1).

DISCUSSION

¶11 We review a grant of summary judgment *de novo*, viewing the evidence and reasonable inferences in the light most favorable to Roebuck as the non-moving party. See *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Loc. No. 395 Pension Tr. Fund*, 201 Ariz. 474, 482, ¶ 13 (2002). “Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.” *Id.* at ¶ 14 (citing Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990)). We review *de novo* the superior court’s interpretation of statutes and constitutional issues. *Hohokam Irrigation & Drainage Dist. v. Ariz. Pub. Serv. Co.*, 204 Ariz. 394, 397, ¶ 5 (2003). “Legislation . . . is entitled to a strong presumption of constitutionality, and we construe a statute to give it, if possible, a reasonable and lawful meaning.” *Governale v. Lieberman*, 226 Ariz. 443, 447, ¶ 7 (App. 2011). “[C]onstitutional provisions are interpreted in view of the history behind the enactment, the purpose sought to be accomplished by its enactment and the evil sought to be remedied.” *Ruth v. Indus. Comm’n*, 107 Ariz. 572, 575 (1971).

I. No Issues of Material Fact

¶12 Roebuck first argues there was a genuine issue of material fact about the purpose of the ABG procedure that should have precluded summary judgment. We disagree. The deposition testimony of Drs. Ashraf and Scott unequivocally established that the ABG test was performed to assess and treat Roebuck for COVID-19. Although Roebuck complains of a purported “incongruity” in Dr. Ashraf’s explanation of the reason for the ABG test, we find no such incongruity. The fact that Roebuck had undergone an ABG test in 2017 for non-COVID-19 related reasons does not negate the uncontroverted testimony of Drs. Ashraf and Scott that Dr. Ashraf ordered the ABG test in 2020 as part of Roebuck’s treatment for COVID-19.

II. Ambiguity

¶13 Roebuck next argues A.R.S. § 12-516 is ambiguous. “If a statute’s language is clear and unambiguous, we apply it without resorting to other methods of statutory interpretation. Ambiguity exists if there is uncertainty about the meaning or interpretation of a statute’s terms.” *Hayes*

ROEBUCK v. MAYO CLINIC, et al.
Opinion of the Court

v. Cont'l Ins. Co., 178 Ariz. 264, 268 (1994) (citations omitted). The statute provides, in relevant part:

- A. If the governor declares a state of emergency for a public health pandemic¹ pursuant to title 26, chapter 2, a health care professional or health care institution that acts in good faith is not liable for damages in any civil action for an injury or death that is alleged to be caused by the health professional's or health care institution's action or omission while providing health care services in support of this state's response to the state of emergency declared by the governor unless it is proven by clear and convincing evidence that the health professional or health care institution failed to act or acted and the failure to act or action was due to that health professional's or health care institution's wilful misconduct or gross negligence.
- B. Subsection A of this section applies to any action or omission that is alleged to have occurred during a person's screening, assessment, diagnosis or treatment and that is related to the public health pandemic that is the subject of the state of emergency
-
- E. This section applies to all claims that are filed before or after September 29, 2021 for an act or omission by a person that occurred on or after March 11, 2020 and that relates to a public health pandemic that is the subject of the state of emergency declared by the governor.

Roebuck argues subsections A and B of the statute are ambiguous because “[i]t is unclear if this language suggests that any medical care rendered during a pandemic extends immunity to the healthcare provider, or does the medical care in question have to be exclusively done in treatment of a pandemic-related condition, or does immunity arise when the assessment, diagnosis or treatment is via a medical procedure that was developed specifically for the pandemic-related condition?”

¹ Governor Ducey declared a state of emergency regarding the COVID-19 pandemic on March 11, 2020, and terminated the state of emergency on March 30, 2022.

ROEBUCK v. MAYO CLINIC, et al.
Opinion of the Court

¶14 We disagree. The language in subsection A stating “while providing health care services in support of this state’s response to the state of emergency declared by the governor,” is clear and unambiguous, as is the language in subsection B stating that the statute applies “to any action or omission that is alleged to have occurred during a person’s screening, assessment, diagnosis or treatment and that is related to the public health pandemic that is the subject of the state of emergency.” Section 12-516 unequivocally shields health care providers from ordinary negligence claims relating to their provision of pandemic-related medical treatment.

III. Retroactivity

¶15 Roebuck argues that § 12-516 was not in effect in April 2020 when he was treated by Mayo Clinic defendants. “No statute is retroactive unless expressly declared therein.” A.R.S. § 1-244. Roebuck filed suit in January 2021, for alleged acts of negligence occurring in April 2020. The legislature expressly made § 12-516 retroactive when it enacted the law in September 2021. The statute states that it applies “to all claims that are filed before or after September 29, 2021 for an act or omission by a person that occurred on or after March 11, 2020” A.R.S. § 12-516(E).

¶16 For the first time on appeal, Roebuck argues § 12-516 disturbed his “vested substantive rights” by retroactively increasing the burden of proof after he filed his complaint. “[L]egal theories must be presented timely to the trial court so that the court may have an opportunity to address all issues on their merits. If the argument is not raised below so as to allow the trial court such an opportunity, it is waived on appeal.” *Cont’l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, 386, ¶ 12 (App. 2011) (citation omitted). By not making his argument about vested substantive rights below, Roebuck has waived this argument.

IV. Anti-Abrogation Clause

¶17 Roebuck next argues the superior court erred by finding the Mayo Clinic defendants immune from liability under A.R.S. § 12-516 because the statute violates the anti-abrogation clause of the Arizona Constitution.

¶18 Article 18, Section 6 of the Arizona Constitution, the “anti-abrogation” clause, states that “[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation” The anti-abrogation clause protects a plaintiff’s right of access to the courts and prohibits the “abrogation of all common law actions for negligence, intentional torts, strict liability,

ROEBUCK v. MAYO CLINIC, et al.
Opinion of the Court

defamation, and other actions in tort which trace origins to the common law.” *Cronin v. Sheldon*, 195 Ariz. 531, 538-39, ¶ 35 (1999). “Because a medical malpractice action has its origins in the common law, it is protected by [the anti-abrogation] clause.” *Governale*, 226 Ariz. at 447, ¶ 8 (citation omitted).

¶19 The legislature may regulate negligence and other common law causes of action without offending the anti-abrogation clause. *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 104 (1984); see also *Nunez v. Pro. Transit Mgmt. of Tucson, Inc.*, 229 Ariz. 117, 122-23, ¶ 25 (2012) (“We have repeatedly noted that the legislature is entitled to regulate common law tort actions, as long as a claimant is left a reasonable possibility of obtaining legal redress.”) (citations and internal quotation marks omitted). “We apply the reasonable election test to distinguish between regulation and abrogation.” *Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 313, ¶ 29 (2003) (citations and internal quotation marks omitted). The legislature must “leave[] a claimant reasonable alternatives or choices which . . . enable [the claimant] to bring the action.” *Barrio*, 143 Ariz. at 106. “It may not, under the guise of regulation, so affect the fundamental right to sue for damages as to effectively deprive the claimant of the ability to bring the action.” *Duncan*, 205 Ariz. at 313, ¶ 30 (citations and internal quotation marks omitted).

¶20 “[T]he abrogation clause is implicated when the right of action is ‘completely abolished.’” *Barrio*, 143 Ariz. at 106 (quoting *Ruth*, 107 Ariz. at 575). A statute does not abrogate a claim merely by making it more difficult for a claimant to obtain a recovery. *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, 225, 229, ¶¶ 14, 34-37 (2007) (rejecting argument that A.R.S. § 12-2506, which abolished joint and several liability in strict products liability cases violates Article 18, Section 6); *Governale*, 226 Ariz. at 447-48, ¶¶ 8-11 (statute limiting potential expert witnesses a plaintiff may use “does not abolish the right to bring a medical malpractice action and thus is not an abrogation”).

¶21 The superior court found that § 12-516 did not abrogate Roebuck’s cause of action because it does not bar his right to recover damages, but instead requires him to prove a “higher evidentiary standard in order to prevail by requiring that he prove by clear and convincing evidence that [Mayo Clinic defendants] acted with willful misconduct or gross negligence.”

¶22 To determine whether a statute impermissibly abrogates a claim of action we must perform a two-part analysis. *Duncan*, 205 Ariz. at

ROEBUCK v. MAYO CLINIC, et al.
Opinion of the Court

313, ¶ 28. First, we determine whether the cause of action at issue is one that is protected by Article 18, Section 6. *Id.* The anti-abrogation clause “prevents abrogation of all common law actions for negligence” *Cronin*, 195 Ariz. at 538, ¶ 35. Article 18, Section 6 of the Arizona Constitution protects the right to bring suits for negligence. Then, we must determine whether § 12-516 regulates a patient’s right to recover damages for ordinary negligence or completely does away with that right. *Duncan*, 205 Ariz. at 313, ¶ 29.

¶23 If § 12-516 did nothing more than raise the burden of proof for medical malpractice claimants from a “preponderance of the evidence” to “clear and convincing evidence,” we would agree that the statute does not offend the anti-abrogation clause. The legislature, after all, “is empowered to set burdens of proof,” *Seisinger v. Siebel*, 220 Ariz. 85, 93, ¶ 30 (2009), and the evidentiary standard necessary for a claimant to prevail may be raised without implicating Article 18, Section 6. *Cf. Nunez*, 229 Ariz. at 122-23, ¶¶ 24-25 (holding that abandoning doctrine imposing heightened standard of care on common carriers did not violate the anti-abrogation clause).

¶24 Section 12-516 does more, however, than simply raise plaintiffs’ burden of proof for COVID-related medical malpractice claims. Instead, the statute bars all claims for ordinary negligence arising out of the provision of COVID-related medical treatment. While “[t]he legislature may regulate the cause of action for negligence so long as it leaves” claimants “reasonable alternatives or choices” for bringing their claims, *Barrio*, 143 Ariz. at 106, § 12-516 leaves no such alternative available to those injured by the negligence of medical professionals in providing COVID-related treatment. Although the statute does not limit the right to assert a claim for gross negligence, the availability of relief for gross negligence is not a reasonable alternative to a claim for ordinary negligence. Ordinary negligence and gross negligence are, after all, distinct theories of liability. *Walls v. Ariz. Dep’t of Pub. Safety*, 170 Ariz. 591, 595 (App. 1991) (“Gross negligence differs from ordinary negligence in quality and not degree.”). A claim for gross negligence requires “a showing of gross, willful, or wanton conduct” that is not required of a plaintiff asserting a claim for ordinary negligence. *See Noriega v. Town of Miami*, 243 Ariz. 320, 326, ¶ 23 (App. 2017) (citations and internal quotation marks omitted). Section 12-516 thus denies relief to patients injured by negligence in the provision of COVID-related medical treatment who cannot make the additional showing required to establish gross negligence.

ROEBUCK v. MAYO CLINIC, et al.
Opinion of the Court

¶25 Article 18, Section 6 does not permit the legislature to wholly extinguish a particular type of claim available at common law even if alternative causes of action remain available to injured claimants. For example, in *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340 (1993), the plaintiff who suffered personal injuries while working on an escalator brought products liability and negligence claims against the manufacturer. *Id.* at 341. Because the plaintiff sustained the injury more than twelve years after the manufacturer sold the escalator, the manufacturer argued that the plaintiff's products liability claim was barred by the twelve-year statute of repose for products liability claims. *Id.* Our supreme court held that the statute of repose violated Article 18, Section 6 because it extinguished the plaintiff's products liability claim before he sustained the injury that gave rise to his claim. *Id.* at 342. In so holding, the *Hazine* court expressly found that "[t]he fact that the [plaintiff] could still sue on" alternative theories of "express warranty or negligence" did not render the statute of repose a permissible regulation rather than unconstitutional abrogation. *Id.* at 342-43. "[A] right to sue in negligence or express warranty," the *Hazine* court found, "is not a reasonable alternative to a products liability action." *Id.* at 343.

¶26 Similarly, in *Rubino v. De Fretias*, 638 F. Supp. 182, 185-86 (D. Ariz. 1986), the court held unconstitutional a statute abrogating the right of patients to sue doctors on an assault and battery theory. In so holding, the *Rubino* court rejected the argument that the statute constituted permissible regulation of claims arising out of medical treatment because it did not bar negligence-based claims, and so "merely limit[ed] the theories upon which" relief may be sought. *Id.* at 185. Because battery and negligence claims "constitute separate causes of action" that arise out of "distinct societal interest[s] in the physician-patient relationship," the court concluded, the preservation of negligence claims was not enough to render the abrogation of battery claims a "mere[] regulat[ion] [of] the right to sue." *Id.* at 185-86.

¶27 Pursuant to *Hazine* and consistent with *Rubino*, we find the fact that A.R.S. § 12-516 preserves claims for gross negligence insufficient to render the statute's absolute bar to ordinary negligence claims a permissible "regulation" of the right to sue for medical malpractice. Accordingly, we hold that A.R.S. § 12-516's prohibition on the assertion of ordinary negligence claims in providing COVID-related medical treatment constitutes an abrogation of a common law right of action in violation of Article 18, Section 6.

¶28 Our holding is consistent with cases finding unconstitutional statutes that raise "an absolute bar to recovery of damages by a particular

ROEBUCK v. MAYO CLINIC, et al.
Opinion of the Court

category of persons who otherwise could proceed with an action for damages.” *City of Tucson v. Fahringer*, 164 Ariz. 599, 603 (1990). For example, in *Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc.*, 186 Ariz. 97 (App. 1995), this Court held unconstitutional a statute absolving mental health providers of liability for injuries inflicted by patients on third parties unless the patient communicated to the mental health provider “an explicit threat” to a “clearly identified or identifiable victim.” *Id.* at 102, 105 (citation omitted). We found that, by allowing recovery only to plaintiffs who were targets of “explicit threat[s]” by mental health patients, the statute “effectively abolishe[d] a cause of action” otherwise available to other plaintiffs who did not “fit within the confines of the statute” but were still “subject to probable risk of the patient’s violent conduct.” *Id.* at 105 (citation omitted). Similarly, in *Young Through Young v. DFW Corp.*, 184 Ariz. 187 (App. 1995), *abrogated on other grounds as recognized by Torres v. JAI Dining Servs. (Phoenix), Inc.*, 253 Ariz. 66, 77, ¶ 37 (App. 2022), we held that a statute limiting dramshop liability to instances where alcohol was served to an “obviously intoxicated” patron violated Article 18, Section 6 by denying recovery to those who were injured by drivers who had been over-served but were not “obviously intoxicated.” *Id.* at 190.

¶29 A.R.S. § 12-516 bars claims for medical negligence by a subcategory of patients, *i.e.*, those whose medical treatment was COVID-related. Accordingly, we hold that denying recovery to a subcategory of medical negligence plaintiffs who would otherwise be entitled to assert a claim violates Article 18, Section 6 of the Arizona Constitution.

V. PREP Act

¶30 The Mayo Clinic defendants argue that Roebuck’s claims are also barred by the PREP Act, 42 U.S.C. §§ 247d-6d, 247d-6e. They contend that as covered persons administering a countermeasure to combat COVID-19, the Act provides them immunity from suit under federal and state law. *See* 42 U.S.C. § 247d-6d(a)(1). The Act states in relevant part:

[A] covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.

42 U.S.C. § 247d-6d(a)(1).

ROEBUCK v. MAYO CLINIC, et al.
Opinion of the Court

¶31 In disregarding the PREP Act as a basis to grant the Mayo Clinic defendants' motion for summary judgment, the superior court ruled that Roebuck's state law claims are not barred by the PREP Act. To reach this conclusion, the superior court relied on the district court's jurisdictional determination that "[t]he PREP Act does not satisfy the Ninth Circuit's complete preemption test because it does not completely replace state laws related to COVID-19 and does not provide a substitute cause of action for Mr. Roebuck's medical negligence claim." But the question of whether the Mayo Clinic defendants were entitled to remove the action to federal court, as permitted by one of the two exceptions to the well-pleaded complaint rule that the Ninth Circuit Court has articulated, is separate from the question of whether the PREP Act offers the Mayo Clinic defendants immunity from suit in state court. See *City of Oakland v. BP PLC*, 969 F.3d 895, 903-06 (9th Cir. 2020).

¶32 Federal courts have held that "preemption is a defense that does not present a federal question," meaning that the fact that a defendant may raise an immunity defense by way of federal preemption does not mean that a federal question is necessarily involved. *Shapnik v. Hebrew Home for the Aged at Riverdale*, 535 F. Supp. 3d 301, 320 (S.D.N.Y. 2021). Immunity as a defense can exist independently of whether there is a federal question that would allow the defendant to remove a case to federal court.

¶33 In determining whether a plaintiff's complaint raised a federal issue, the United States District Court for the Central District of California found that although the PREP Act was not an essential element of any of the plaintiff's state law claims, "nothing preclude[d] [d]efendants from raising PREP Act immunity defensively before a court of competent jurisdiction" *Hopman v. Sunrise Villa Culver City*, No. 2:21-cv-01054-RGK-JEM, 2021 WL 1529964, at *6 (C.D. Cal. Apr. 16, 2021). Notably, the United States District Court for the Western District of Texas recognized that "PREP Act immunity is a defense that must be pled in an answer or asserted in a motion to dismiss" *Perez v. Se. SNF LLC*, 533 F. Supp. 3d 430, 436 (W.D. Tex. 2021).

¶34 The PREP Act is primarily an immunity statute. *Mitchell v. Advanced HCS, LLC*, No. 4:21-cv-00155-P, 2021 WL 1247884, at *3 (N.D. Tex. Apr. 5, 2021). It provides immunity to "covered persons" engaged in the administration of "covered countermeasures." 42 U.S.C. § 247d-6d(b)(1). The Mayo Clinic defendants have asserted immunity under the Act. But, although the superior court determined the Mayo Clinic defendants fall within the Act's definition of a "covered person," it failed to decide whether the actions that resulted in injuries to Roebuck fall within the Act's

ROEBUCK v. MAYO CLINIC, et al.
Opinion of the Court

definition of “covered countermeasures.” Regardless of this omission, the record would not support such a finding.

¶35 While the Mayo Clinic defendants argue that “[a]ny diagnostic testing performed to assess, mitigate and treat the effects of COVID-19 during [Roebuck’s] hospitalization would necessarily be a covered countermeasure under the Prep Act,” the PREP Act requires more than that. According to the March 17, 2020 Declaration Under the Act, to qualify as a “covered countermeasure” under the Act, a countermeasure

must be a “qualified pandemic or epidemic product,” or a “security countermeasure,” as described immediately below; or a drug, biological product or device authorized for emergency use in accordance with Sections 564, 564A, or 564B of the FD&C Act.

Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198-01, 2020 WL 1245193 (F.R.) (March 17, 2020).

¶36 The ABG procedure at issue here is not a “qualified pandemic or epidemic product,” a “drug,” a “biological product,” or a “device.” Under the Act, a qualifying countermeasure must also be one for which a declaration under subsection (b) of the Act has been issued. *See* 42 U.S.C. § 247d-6d(b)(1). The Mayo Clinic defendants have not argued, and we have found no support for the proposition that a declaration with respect to the ABG procedure was ever issued under subsection (b) of the Act.

¶37 We affirm the superior court’s judgment that the PREP Act does not bar Roebuck’s state law claims.

CONCLUSION

¶38 For the foregoing reasons, we reverse the grant of summary judgment and remand to the superior court for further proceedings consistent with this decision.



AMY M. WOOD • Clerk of the Court
FILED: AA