IN THE SUPREME COURT
STATE OF ARIZONA

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

DEFENDANTS/APPELLEES/PETITIONERS' SUPPPLEMENTAL BRIEF IN SUPPORT OF PETTION FOR REVIEW

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Pursuant to this Court's permission, Petitioners hereby provide this supplemental brief in support of Issue 1 – Did the court of appeals err in finding A.R.S. § 12-516 violates the anti-abrogation clause of the Arizona Constitution? Petitioners will not re-hash the arguments advanced in the Petition and the various Amicus Briefs in support of the Petition – which present well-supported and thorough analyzes – but instead have focused on responding to Plaintiff's arguments in opposition to the Petition and other briefs.

I. A.R.S. § 12-516 DOES NOT ABROGATE PLAINTIFF'S RIGHT TO BRING AN ACTION FOR NEGLIGENCE.

Plaintiff argues that A.R.S. § 12-516 abrogates his right to "seek redress" because it does not leave him any "reasonable alternative to bring his claim." [PR Resp., pgs. 7 – 8; *see also* Resp. to HSAA Amicus Brief, pgs. 5 – 6.] At the same time, Plaintiff claims that the analysis presented by Petitioners – and Amici in support of Petitioners – regarding whether "ordinary" negligence is a right of action separate from "gross" negligence was an "unnecessary exercise." [PR Resp., pg. 8.] But that analysis goes to the heart of the issue: What is Plaintiff's right of action? According to the Court of Appeals and Plaintiff, his right of action is for "ordinary"

negligence such that A.R.S. § 12-516's mandate to prove gross negligence is an unconstitutional abrogation of his right to bring an action for ordinary negligence. But that is clearly incorrect. As thoroughly analyzed by Petitioners and several Amici, ordinary negligence and gross negligence are not separate rights of actions, they are "points along the continuum of one right of action:" Negligence. [AMA et al. Amicus Brief, pg. 7.] As Plaintiff's right of action is for negligence and A.R.S. § 12-516 does not bar his right to bring an action for negligence, the statute does not offend the anti-abrogation clause. Instead, A.R.S. § 12-516 is a permissible regulation of the negligence right of action. *See e.g. Francisco v. Affiliated Urologists Ltd.*, -- Ariz. --, 553 P.3d 867, 876, ¶ 39 (2024). This argument is well developed in the Petition and various amicus briefs, which Petitioners hereby incorporate by reference, and there can be no other conclusion but to find that A.R.S. § 12-516 is not unconstitutional abrogation of the right to bring an action for negligence.

Plaintiff believes that the question is not whether ordinary negligence is a right of action separate from gross negligence, but instead, the questions are "(1) *how* can a plaintiff establish gross negligence in a medical malpractice action, and (2) does increasing the burden of proof to gross

negligence truly 'enable' a plaintiff to bring an action in negligence." [Resp. to HSAA Amicus Brief, pg. 8.] Plaintiff concludes that gross negligence can never be established for medical malpractice because the "heighted burden of proof requires a medical expert to opine on the mental state of defendant, arguably well outside a medical expert's qualifications or capabilities and thus inviting a *Daubert* challenge." [*Id.*, at pg. 10] (*citing Daubert v. Merril Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This conclusion is based on a fundamental misinterpretation of the standard of proof required for gross negligence and medical malpractice and what evidence may be presented in support of those claims.

A party is grossly or wantonly negligent if he acts or fails to act "when he knows or has 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." *Walls v. Arizona Dept. of Pub. Safety*, 170 Ariz. 591, 595 (App. 1991). Gross negligence involves a risk of harm that is "substantially in excess of that necessary to make the conduct negligent." *Townsend v. Whatton*, 21 Ariz.App. 566, 560 (App. 1974). While gross negligence may be proven by facts showing a "conscious disregard of a risk," the defendant's

consciousness of the grossly negligent conduct is not necessary, as evidence of recklessness may suffice. *Noriega v. Town of Miami*, 243 Ariz. 320, 328 (App. 2017). Importantly, "whether gross negligence occurred is a question of fact for a jury to determine." *Id*. at 329.

Plaintiff argues "raising the burden of proof from ordinary negligence to gross negligence places plaintiff and the retained expert in the untenable position of having to prove that a defendant medical provider acted with a 'conscious disregard of a risk.'" [Resp. to HSAA Amicus Brief, pg. 9.] First, as noted, a plaintiff does not have to prove that a provider consciously disregarded a risk to prove gross negligence; they can prove it with evidence of recklessness, including behavior that would lead a "reasonable person" to realize that they have created an unreasonable risk of bodily harm that is substantially likely to occur. *Walls*, 170 Ariz. at 595. Further, and more importantly, a medical expert is not permitted to opine as to whether a provider's actions/inactions constitute gross negligence because such conclusions invade the province of the jury. *Jamas v. Krpan*, 116 Ariz. 216, 217 (App. 1977). In *Jamas*, the trial court struck expert testimony that the defendant doctor's actions constituted gross negligence. *Id.* The Court of Appeals affirmed, holding:

> Although a jury may not be competent to determine medical malpractice without the aid of expert testimony that the physician had deviated from the accepted standard of care, it does not necessarily follow that the jury, having been informed of community standards, is incompetent to judge the nature or gravity of the deviation; i. e., whether it was simple negligence or reckless disregard of the safety of the patient.

Id.

Clearly then, proving gross negligence does not require any expert testimony or other evidence specifically concerning a defendant provider's state of mind. As such, Plaintiff's concern that requiring proof of gross negligence in a medical malpractice case would leave "plaintiff and the expert with the . . . impossible task of divining what the defendant was thinking when the act or omission occurred" is completely unfounded.

Plaintiff's argument also ignores those medical negligence cases where expert testimony is not required to prove a breach of the standard of care. "Negligence on the part of a physician **must** be established by expert medical testimony **unless** the negligence is so grossly apparent that a layman would have no difficulty in recognizing it." *Riedisser v. Nelson*, 111 Ariz. 542, 543 (1975) (emphasis added); *Francisco*, 553 P.3d at 873, ¶¶ 25-26. This Court's very recent decision, *Francisco*, confirmed this exception, detailing several cases where expert testimony was not required because they involved

situations where the violation of the standard of care was so egregious as to be "'within the comprehension and common knowledge of laymen to understand and judge it.'" 553 P.3d at 873-874, ¶¶ 26-27 (citing several grossly apparent cases which typically involve surgeons leaving foreign objects inside a patient, including: *Tiller v. Von Pohle*, 72 Ariz. 11, 15 (1951); *Revels v. Pohle*, 101 Ariz. 208, 210-11, 418 (1966); and *Landgraff v. Wagner*, 26 Ariz. App. 49, 52 (1976)). While negligence that is "grossly apparent" is not the same as "gross negligence," it is undoubtedly possible for a plaintiff to prove gross negligence in such egregious cases absent the ability to read a defendant doctor's mind.

While Plaintiff claims A.R.S. § 12-516 abrogates negligence claims in general, his argument is actually that A.R.S. § 12-516 prevents **him** from proving **his** claim because the facts and circumstances of **his** case do not rise to the level of gross negligence. A.R.S. § 12-516 requires proof of "willful misconduct or gross negligence" to maintain a negligence right of action against a healthcare provider for injuries "alleged to be caused by the [provider's] action or omission while providing health care services in support the State's response to the State of Emergency . . .." If the claimant does not have the requisite evidence, he can still file the claim, but like all

litigants who fail to prove their claim, he will be unsuccessful. Indeed, Plaintiff had the opportunity here to amend his Complaint to add facts supporting a claim of willful misconduct or gross negligence if "such claims can satisfy the requirements of Rule 11 of the Arizona Rules of Civil Procedure." [ROA 43, pg. 6.] Plaintiff did not amend his Complaint, seemingly acknowledging that he could not ethically do so. This is not unconstitutional abrogation. This is the statute doing its job to ensure that health care providers are not subject to fortuitous lawsuits that may hinder and discourage their critical work during a global pandemic.

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 even if **this** Plaintiff may not be able to recover for **his** claims. Because the statute does not abrogate any viable right of action to recover damages, it does not violate Article 18, § 6.

II. A.R.S. § 12-516 IS LIKE OTHER STATUTES THAT PROVIDE LIMITED IMMUNITY IN EMERGENCY AND OTHER SPECIFIC SITUATIONS AND THE COURT OF APPEALS DECISION CALLS ALL THOSE INTO QUESTION.

As agued in the Petition and various Amicus Briefs in support of the Petition – incorporated herein by this reference – A.R.S § 12-516 is only the latest in a series of Arizona's "Good Samaritan" statutes, which are all in jeopardy of being declared unconstitutional should the court of appeals reasoning stand.[1] Plaintiff argues this concern is invalid because none of the other "statutes deal with the treatment of a specific disease like COVID-19, or with the nature of medical care associated with the treatment of COVID-19, or the connectedness between COVID-19 and other pre-existing medical conditions, as was the case with Plaintiff Robin Roebuck." [Resp. to HSAA Amicus Brief, pg. 3.] This argument misconstrues A.R.S. § 12-516 which is not limited to COVID-19 or the treatment of any specific disease, even if **this** case is related to COVID-19. Specifically, A.R.S. § 12-516(A) provides:

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[1] This includes its sister statute, A.R.S. § 12-515, which protects "a person or provider that acts in good faith to protect a customer, student, tenant, volunteer, patient, guest or neighbor or the public from injury from the public health pandemic."

> If the governor declares a state of emergency for a public health pandemic pursuant to title 26, chapter 2, a health 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.

"State of emergency" is defined as:

> [T]he duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons or property within the state caused by air pollution, fire, flood or floodwater, storm, epidemic, riot, earthquake or other causes, except those resulting in a state of war emergency, which are or are likely to be beyond the control of the services, personnel, equipment and facilities of any single county, city or town, and which require the combined efforts of the state and the political subdivision.

A.R.S. § 26-301(15).

Clearly, A.R.S. § 12-516 is not solely related to the treatment of COVID-19 or any other specific disease. Instead, it protects health care providers during a limited period – a declared state of emergency for a public health pandemic – for a limited purpose – providing health care services in support of the state's response to the state of emergency. This limited purpose immunity is the like the other "Good Samaritan" statutes cited in the Petition

and Amicus Briefs, which provide limited immunity to certain individuals in emergencies or emergency settings. *See e.g.*, A.R.S. §§ 12-572(A), 12-573(A), and 32-1471.

Further, even if A.R.S. § 12-516 was not like the other statutes – even though it is – these statutes are still in jeopardy if the court of appeals reasoning stands because the issue is not about whether the statutes are similar, the issue is whether the holding that "gross" negligence and "ordinary" negligence are distinct rights of action, makes these statutes per se unconstitutional as violative of the anti-abrogation clause. The holding clearly invalidates these other statutes. For example, A.R.S. § 12-571 mandates proof of gross negligence for a medical malpractice action against a health professional who provides treatment at a nonprofit clinic. As such, in the words of the court of appeals here, 12-571 "bars all claims for ordinary negligence arising out of the provision of" medical treatment provided at a nonprofit clinic and since the "availability of relief for gross negligence is not a reasonable alternative to a claim for ordinary negligence" it must be unconstitutional per the anti-abrogation clause. [Slip. Op. ¶¶ 24 – 26, 29.] These statutes which provide protections to healthcare providers and other citizens willing to help in emergencies or provide gratuitous treatment to

underserved populations should not be stifled based on flawed reasoning and a fundamental misunderstanding of tort law and the anti-abrogation clause.

CONCLUSION

For the foregoing reasons and those stated in the Petition and various Amicus Briefs in support of the Petition, Petitioners respectfully request this Court vacate the court of appeals' decision and reinstate the trial court's grant of summary judgment dismissing Plaintiff's complaint.

DATED this 30th day of September, 2024.

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