**IN THE COURT OF APPEALS**

**FOR THE STATE OF ARIZONA**

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Case No. 22-0508

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ROBIN ROEBUCK,

*Plaintiff-Appellant,*

v.

MAYO CLINIC OF ARIZONA, et al.

*Defendants-Appellees.*

On Appeal from the Maricopa County Superior Court
For the State of Arizona
Civil Action No. CV2021-090429
The Honorable Rodrick Coffey

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# APPELLANT'S OPENING BRIEF

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# TABLE OF CONTENTS

**Page**


TABLE OF CITATIONS ..... iii

INTRODUCTION .....1

STATEMENT OF THE CASE .....2

STATEMENT OF FACTS .....5

STATEMENT OF THE ISSUES .....7

ARGUMENT .....7

I. THE SUPERIOR COURT ERRED BY HOLDING APPELLANT'S CLAIM OF MEDICAL NEGLIGENCE WAS BARRED BY A.R.S. §12-516 BECAUSE THE STATUTE ALLEGEDLY PROVIDES IMMUNITY TO HEALTHCARE PROVIDERS.....7

A. Standard of Review .....8

B. There Are Genuine Issues of Material Fact Concerning the Purpose of the ABG Procedure ……..…..….. 9

C. A.R.S. § 12-516 Is Ambiguous and Does Not Provide Blanket Immunity to All Healthcare Providers as a Matter of Law.....11

II. THE ARIZONA CONSTITUTION PROTECTS THE RIGHT TO PURSUE TORT CLAIMS AND DISFAVORS INTERPRETING STATUTES SO AS TO DENY OR PREEMPT TORT CLAIMS ....14

III. THE EFFECTIVE DATE OF A.R.S. § 12-516 WAS AFTER APPELLANT FILED HIS COMPLAINT.....18

A. Standard of Review .....18

B. A.R.S. § 12-516 Does Not Apply Retroactively.....18

C. A.R.S. § 12-516 Did Not Become Effective Until After Appellant Filed His Complaint.....19

CONCLUSION .....21

CERTIFICATE OF COMPLIANCE .....22

CERTIFICATE OF SERVICE .....23

APPENDIX .....24

# TABLE OF CITATIONS

**Page(s)**

**Cases**

*Alabam's Freight Co. v. Hunt,*
29 Ariz. 419 (1926) .....15

*Arizona Downs v. Arizona Horsemen's Found.,*
130 Ariz. 550 (1981) .....15, 16

*Baker v. Stewart Title & Trust of Phoenix, Inc.,*
197 Ariz. 535 (App.2000) .....9

*Barrio v. San Manuel Div. Hosp. for Magma Copper Co.,*
143 Ariz. 101 (1984). .....16, 17

*Boswell v. Phoenix Newspapers, Inc.,*
152 Ariz. 9 (1986) .....14, 15

*Consolidated Arizona Smelting Co. v. Ujack,*
15 Ariz. 382 (1914) .....15

*Dunn v. Industrial Comm'n,*
177 Ariz. 190 (1994) .....16

*Hall v. A.N.R. Freight Sys.,*
149 Ariz. 130 (1986) .....18, 19

*Hayes v. Continental Ins. Co.,*
178 Ariz. 264 (1994) .....12, 15, 16

*Hazine v. Montgomery Elevator Co.,*
176 Ariz. 340 (1993)) .....14, 15

*In re Estate of Thelen,*
9 Ariz.App. 157 (1969) .....16

**Page(s)**

**Cases**

*Kenyon v. Hammer,*
142 Ariz. 69 (1984) .....15

*Landgraf v. USI Film Prods.,*
511 U.S. 244 (1994) .....18

*Mejak v. Granville,*
212 Ariz. 555 (2006) .....13

*Orme School v. Reeves,*
166 Ariz. 301 (1990) .....9, 11

*Petolicchio v. Santa Cruz County Fair & Rodeo Ass'n,*
177 Ariz. 256 (1994) .....16

*Phoenix Newspapers, Inc. v. Superior Court,*
155 Ariz.Adv.Rep. 11 (Ct.App.1993) .....16

*San Carlos Apache Tribe v. Superior Court,*
193 Ariz. 195 (1999) .....18

*Slayton v. Shumway,*
166 Ariz. 87 (1990) .....15

*State v. Aguilar,*
218 Ariz. 25 (App. 2008) .....18

*State v. Carver,*
227 Ariz. 438 (App. 2011) .....18

*State v. Griffin,*
203 Ariz. 574 (App. 2002) .....18

*State ex rel. Industrial Comm'n v. Pressley,*
74 Ariz. 412 (1952) .....15

**Page(s)**

**Cases**

*State v. Reynolds,*
170 Ariz. 233 (1992) .....12, 13

*State v. Sweet,*
143 Ariz. 266 (1985) .....13

*State v. Yslas,*
139 Ariz. 60 (1984) .....16

*Thompson v. Better–Bilt Aluminum Prod. Co., Inc.,*
171 Ariz. 550 (1992). .....9

*Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Loc. No. 395 Pension Tr. Fund*,
38 P.3d 12 (Ariz. 2002) .....8, 9, 10

*Wringer v. United States,*
790 F.Supp. 210 (D.Ariz.1992) .....16

*Zamora v. Reinstein,*
185 Ariz. 272 (1996). .....13

**Statutes**

Ariz. Rev. Stat. § 12-2101 .....5

Ariz. Rev. Stat. § 12-515 .....19, 20

Ariz. Rev. Stat. § 12-516 .....1, 4-7, 10-12, 14-20

**Rules**

42 U.S.C. § 247 .....3, 4

Ariz. R. Civ. P. 56 .....11

**Page(s)**

## Other Authorities

Ariz. Const. art. 4, § 3 .....19

Ariz. Const. art. 18, § 6 .....1, 7, 14

Senate Bill 1377 .....1, 6, 13-15, 19-20

# INTRODUCTION

This is a medical negligence case that was adjudicated not on the merits of the case but on the Court's interpretation of a newly enacted statute. Governor Ducey signed Senate Bill 1377 on April 5, 2021, thus enacting A.R.S. § 12-516, which provided healthcare professionals and institutions immunity for injuries or deaths that occurred in response to treatment of COVID-19, unless a plaintiff can prove gross negligence. The statute was made retroactive to March 10, 2020.

In granting Appellees' motion for summary judgment based on the application of A.R.S. § 12-516, the Court's interpretation of the statute was overly broad. Reasoning that A.R.S. § 12-516 extends to any healthcare provided to a patient who has been diagnosed with COVID-19, regardless of whether the healthcare treatment that is the subject of the medical negligence action was done exclusively for the treatment of COVID-19, the Court held that Appellant's claim was barred by the statute. In so reaching, the Court created precedence that healthcare providers can claim immunity when their potentially negligent acts, even for the treatment of non-COVID conditions, are coupled with treatment for COVID-19. Generally, the effect of the Court's ruling is to sidestep the anti-abrogation clause of the Arizona Constitution, which provides that "[t]he right of action to recover damages for injuries shall never be abrogated." Ariz. Const. art. 18, § 6. More specifically, the Court's ruling denied Appellant the opportunity to litigate his case on its merits.

## STATEMENT OF THE CASE

Appellant Robin Roebuck ("Appellant") presented to Mayo Clinic in Phoenix, Arizona on April 20, 2020, complaining of cough, fever, and diarrhea. (R.14 ¶ 10.) Because Appellant had previously undergone a heart and kidney transplant at Mayo Clinic in April 2017, and because Appellant suffered from chronic heart and kidney conditions notwithstanding his prior transplants, he was admitted to Mayo Clinic. (R.14 ¶ 2.) After admission, Appellant was diagnosed with COVID-19, chronic renal disease, valvular heart disease, and metabolic acidosis. (R.33 ¶¶ 2, 3.) On April 23, 2020, Dr. Hasan Ashraf, a physician on Appellant's heart transplant team, ordered an echocardiogram to assess Appellant's valvular heart disease, the results of which indicated that Appellant had reduced right ventricular function and a possible echogenicity in the right atrium. (R.14 ¶ 11.) Because the echocardiogram showed decreased heart function, Dr. Ashraf ordered that Appellant undergo an arterial blood gas ("ABG") procedure. (R.14 ¶ 11.)

On April 24, 2020, Nicole Secrest, a registered nurse working for Mayo Clinic and under the direction of cardiologist Dr. Robert Scott, performed the ABG procedure on Appellant, which required the drawing of blood from Appellant's right arm. (R.14 ¶ 11.) On April 25, 2020, Appellant developed complications from the ABG procedure, including severe swelling and pain in his right arm, and numbness and tingling in his fingertips. (R.14 ¶ 12.) Appellant was diagnosed with

compartment syndrome (a serious condition in which blood leaks into muscular tissue causing the pressure in the muscles to dramatically increase) and was scheduled for emergency surgery. (R.33 ¶ 8.)

On April 26, 2020, Dr. Anthony Smith, a general surgeon, performed emergency surgery on Appellant in order to save his right arm. (R.14 ¶ 13.) On May 1, 2020, a skin graft was harvested from Appellant's right leg and grafted onto Appellant's right forearm and right hand. (R.14 ¶ 14.)

Appellant has significant cosmetic scarring on his right arm and hand and suffers from chronic decreased strength and diminished use of his right hand and arm. (R.14 ¶¶ 15-16.)

Plaintiff filed a lawsuit in Arizona state court on January 29, 2021, alleging that Mayo Clinic and Mayo Clinic Arizona (collectively, "Mayo Clinic"), Nicole Secrest, and Dr. Robert Scott (collectively, "Appellees") engaged in actions constituting medical negligence. (R.1.) On May 27, 2021, Appellant filed a First Amended Complaint. (R.14.)

On March 23, 2021, Appellees filed a Notice of Removal with Arizona District Court in which they argued that Appellant's lawsuit under Arizona law was preempted by the Public Readiness and Emergency Preparedness Act (the "PREP Act"), 42 U.S.C. § 247d-6d, 247d-6e (West 2020). (R.9.) After removal to District

Court, Appellees filed a Motion to Dismiss pursuant to the PREP Act. Appellant filed a Motion to Remand the case to state court.

On May 10, 2021, after considering the briefing by the parties on the motion to dismiss and Appellant's motion to remand the case to state court, the District Court denied Appellee's motion to dismiss and granted Appellant's motion and remanded the case to state court.

On June 15, 2021, Appellees filed a motion to dismiss Appellant's First Amended Complaint alleging that Appellant's medical negligence claim was barred by A.R.S. § 12-516 and the PREP Act. (R.9.)

On July 22, 2021, the Court denied Appellees' motion to dismiss. (R.23.)

After the parties conducted discovery (per Order of Superior Court Judge Rodrick Coffey) for the limited scope of determining the purpose of the ABG procedure, Appellees filed a motion for summary judgment, alleging that Appellant's medical negligence claim was barred by A.R.S. § 12-516 and the PREP Act. (R.27.) On April 27, 2022, the Superior Court issued an Order granting Appellees' Motion for Summary Judgment as to A.R.S. § 12-516 and dismissing Appellant's First Amended Complaint, while holding that Appellant's state law claims were not barred by the PREP Act. (R.43.)

In the Order granting summary judgment and dismissing Appellant's First Amended Complaint, Judge Coffey held that because the ABG procedure "was

performed at least in part as a result of Plaintiff's COVID-19 diagnosis" and because, per A.R.S. § 12-516, the ABG procedure was done "while providing health care services in support of this state's response to the state of emergency declared by the governor", Appellant's claim was barred by A.R.S. § 12-516. (R.43, at pp. 4, 6.) Judge Coffey further reasoned that "[n]othing in the statute expressly requires that a treatment be performed exclusively as a measure for treating COVID-19 and the Court will not infer such a requirement." (R.43, at p. 4.) Judge Coffey also held that because A.R.S. § 12-516 applied retroactively to acts or omissions that occurred on or after March 11, 2020, Appellant's claims were within the purview of the statute. (R.43, at p. 5.)

The Arizona Court of Appeals has appellate jurisdiction over this matter pursuant to A.R.S. § 12-2101.

## STATEMENT OF FACTS

Dr. Ashraf, a member of Appellant's heart transplant team when he was admitted to Mayo Clinic on April 20, 2020, testified at his deposition that one of the reasons he ordered an echocardiogram on Appellant was to "determine the function of the heart at baseline." (R.33, Exh. 5, at 22:13-23:20.) Dr. Ashraf further testified that his care for Appellant was not limited to treating COVID-19 but to serve as the primary caretaker for "all of his conditions", inclusive of evaluating Appellant's prior heart and kidney transplant, end-stage renal disease, and chronic diabetes.

(R.33, Exh. 5, at 20:14-21:3, 37:5-17.) Because the results of the echocardiogram revealed that Appellant had reduced right ventricular function and a possible echogenicity in the right atrium (heart conditions that are unrelated to COVID-19), Dr. Ashraf ordered that Appellant undergo an ABG procedure. (R.14 ¶ 11.) Dr. Ashraf acknowledged that the ABG procedure he ordered was the same ABG procedure that Appellant had undergone in April 2017 at the time of his heart and kidney transplant, and that the ABG procedure in 2017 was not ordered to treat COVID-19. (R.33, Exh. 5, at 50:7-51:7.)

Senate Bill 1377, the adoption of which resulted in the enactment of A.R.S. § 12-516, was never intended to eliminate all legitimate claims for medical negligence. Arizona State Senator Vince Leach, who was the lead sponsor of SB 1377, said one of its primary purposes was to protect heath care providers from "frivolous lawsuits." (R.19, at p. 6.) Neither Senator Leach, SB1377, nor A.R.S. § 12-516 provide any clarifying language as to what constitutes a frivolous lawsuit. Moreover, Appellees have never argued in this matter that Appellant's lawsuit is frivolous, nor could they argue such in good faith given the severity of injuries suffered by Appellant from the ABG procedure. (R.14 ¶¶ 15-16.)

## STATEMENT OF ISSUES PRESENTED

I. Whether the superior court erred in holding that Appellant's claim for medical negligence was barred by A.R.S. § 12-516.

II. Whether A.R.S. § 12-516 is violative of Article 18, Section 6 of the Arizona Constitution.

III. Whether A.R.S. § 12-516 was effective on April 24, 2020, at the time of the alleged medical negligence.

## ARGUMENT

### I. THE SUPERIOR COURT ERRED BY HOLDING APPELLANT'S CLAIM OF MEDICAL NEGLIGENCE WAS BARRED BY A.R.S. § 12-516 BECAUSE THE STATUTE ALLEGEDLY PROVIDES IMMUNITY TO HEALTHCARE PROVIDERS

In what is a matter of first impression in Arizona, the Superior Court interpreted A.R.S. § 12-516 so broadly as to effectively preclude any claims for medical negligence if any portion of treatment rendered to a patient is allegedly done for the purpose of treating COVID-19. This holding creates a dangerous precedence that incentivizes medical providers to use a diagnosis of COVID-19 as a legal shield, effectively insulating them from liability, even if a patient is harmed by medical care that is not or only partially related to the treatment of COVID-19.

Here, it is undisputed that the ABG procedure is a diagnostic procedure that is used to evaluate patients for conditions wholly unrelated to the treatment of

COVID-19. This is readily apparent from the testimony of Dr. Ashraf, who acknowledged that the ABG procedure was administered to Appellant in 2017 for purposes of evaluating Appellant's heart and kidney condition incidental to the heart and kidney transplant performed at that time. Indeed, COVID-19 did not exist in 2017. (R.33, Exh. 5, at 50:7-51:7.) Moreover, it is undisputed that Dr. Ashraf ordered the ABG procedure *only after* the echocardiogram results showed Appellant had decreased heart function. (R.14 ¶ 11.)

Appellees hearken instead to the deposition testimony of Dr. Scott that the ABG procedure was ordered to treat Appellant's COVID-19. In so doing, Appellees ignore the medical records establishing that it was because of the echocardiogram results that Dr. Ashraf ordered the ABG procedure. Indeed, the ABG procedure was conducted on April 24, 2020, one day after the echocardiogram results became available. At a minimum, the medical records and Dr. Ashraf's testimony create a genuine dispute of a material fact, and it was improper for the Superior Court to deny Appellant the opportunity to have his medical negligence claim submitted to the jury for a trial on the merits of the claim.

**A. Standard of Review**

The court reviews *de novo* a grant of summary judgment, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion, and the inferences must be construed in favor of that party. *Wells Fargo*

*Bank v. Arizona Laborers, Teamsters and Cement Masons Loc. No. 395 Pension Tr. Fund*, 38 P.3d 12, 20 (Ariz. 2002), *as corrected* (Apr. 9, 2002), citing *Thompson v. Better–Bilt Aluminum Prod. Co., Inc.,* 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992).

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. Ariz. R. Civ. P. Rule 56(c); *Orme School v. Reeves,* 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Thus, summary judgment should have been granted on Appellees' motion only if the facts produced in support of Appellant's opposition to the motion "have so little probative value [given the quantum of evidence required] ... that reasonable people could not agree with the conclusion advanced" by Appellant. *Wells Fargo Bank,* 38 P.3d at 20, citing *Baker v. Stewart Title & Trust of Phoenix, Inc.,* 197 Ariz. 535, 540, 5 P.3d 249, 254 ¶ 15 (App.2000) (quoting *Orme School,* 166 Ariz. at 309, 802 P.2d at 1008).

### B. There Are Genuine Issues of Material Fact Concerning the Purpose of the ABG Procedure

In granting Appellees' motion for summary judgment, the Superior Court understood and acknowledged that the medical care provided to Appellant was for various medical conditions: "The testimony of Drs. Ashraf and Scott demonstrates that Defendants provided medical care for Plaintiff for multiple different reasons, including COVID-19." (R.43, at p. 4.) Relying on Dr. Ashraf's testimony that the "main reason" he ordered the ABG procedure was to measure the oxygen content of

Appellant's blood, the Court concluded that "the ABG procedure was performed at least in part as a result of Plaintiff's COVID-19 diagnosis." (R.43, at pp. 3-4.)

The testimony on which the Court relied contradicts testimony Dr. Ashraf gave elsewhere, i.e., that because the results of the echocardiogram showed Appellant had reduced right ventricular function and a possible echogenicity in the right atrium, he ordered Appellant undergo the ABG procedure. (R.33, Exh. 5, at 22:13-23:20.) Rather than explore this incongruity in testimony – a genuine issue of material fact – the Court holds as a matter of law that A.R.S. § 12-516 does not "expressly require[] that a treatment be performed exclusively as a measure for treating COVID-19 and the Court *will not infer* such a requirement." (R.43, at p. 4.)(emphasis added.) In effect, the Court infers that one aspect of Dr. Ashraf's testimony is superseded by other testimony he gave on which the Court ultimately relied, and further infers that A.R.S. § 12-516 can be interpreted to mean that any treatment provided to a person which may also encompass treatment for COVID-19 invokes the immunity language of the statute.

Setting aside well-established law that inferences are to be drawn in the favor of the party opposing a motion for summary judgment, Appellant disagrees that the language of A.R.S. § 12-516 justifies the Court's holding as a matter of law. *Wells Fargo Bank*, 38 P.3d at 20; *see also, infra,* at Section I.C. Regardless, in construing the Superior Court's grant of summary judgment, the Court of Appeals need not

even reach the issue of statutory interpretation, as there is a genuine issue of material fact, i.e., what was the purpose of the ABG procedure, that precludes summary judgment. Indeed, summary judgment is appropriate only if no genuine issues of material fact exist. Ariz. R. Civ. P. Rule 56(c); *Orme School v. Reeves,* 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). For this reason alone, it was improper for the Superior Court to grant Appellees' motion for summary judgment.

### C. A.R.S. § 12-516 is Ambiguous and Does Not Provide Blanket Immunity to All Healthcare Providers as a Matter of Law

A.R.S. § 12-516 provides:

> A. 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 willful misconduct or gross negligence.

In interpreting A.R.S. § 12-516, Judge Coffey reasoned that "[n]othing in the statute expressly requires that a treatment be performed exclusively as a measure for treating COVID-19 and the Court will not infer such a requirement." Thus, the Court held, "[a]s long as treatment or assessment is performed and it is related to the public

health pandemic, A.R.S. § 12-516 is applicable even if that assessment or treatment would also address other maladies." (R.43, at p. 4.)

A.R.S. § 12-516 does not provide any guidance on the meaning of the language: …"while providing health care services in support of this state's response to the state of emergency declared by the governor." Nor does the statute specifically indicate that a treatment be performed exclusively as a measure for treating COVID-19. Of course, the opposite is also true: the statute is silent on whether a treatment must be done exclusively to treat COVID-19 for immunity to attach. Given the uncertainty about the meaning of this language, the statute is ambiguous. Moreover, the statute provides for immunity where assessment, diagnosis or treatment occurs *that is related to the public health pandemic.* A.R.S. § 12-516(A)(emphasis added.) It 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?

The Arizona Supreme Court has instructed that if a statute's language is clear and unambiguous, the Court will apply the statute without resorting to other methods of statutory interpretation. *Hayes v. Continental Ins. Co.,* 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994), citing *State v. Reynolds,* 170 Ariz. 233, 234, 823 P.2d 681,

682 (1992). Ambiguity in the language of a statute exists if there is uncertainty about the meaning or interpretation of a statute's terms. *Id.,* citing *State v. Sweet,* 143 Ariz. 266, 269, 693 P.2d 921, 924 (1985). Where ambiguity exists, courts will engage in statutory interpretation to determine the legislative intent. *Sweet,* 143 Ariz. at 268, 693 P.2d at 923.

Unfortunately, the Court did not appear to engage in any review or evaluation of the legislative intent of SB 1377. *Sweet,* 143 Ariz. at 268, 693 P.2d at 923; *see also Mejak v. Granville,* 212 Ariz. 555, 557, 136 P.3d 874, 876 (2006)(when construing a statute, the Court's primary goal is to ascertain and give effect to legislative intent). When a statute's language is not clear, the Court determines "legislative intent by reading the statute as a whole, giving meaningful operation to all of its provisions, and by considering factors such as the statutes' context, subject matter, historical background, effects and consequences, and spirit and purpose." *Zamora v. Reinstein,* 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996).

Due to the very limited discovery permitted in this matter, the parties were not allowed the opportunity to conduct additional discovery that could have shed important light on the factors relevant to the Court's interpretation of legislative intent. As to the purpose of the statute, Senator Vince Leach, who was the lead sponsor of SB 1377, did opine that one of its primary purposes was to protect heath care providers from "frivolous lawsuits." (R.19, at p. 6.) Given the permanence and

severity of Appellant's injuries, including significant cosmetic scarring and diminished function of his right arm and hand, Appellant adopts the position that Senator Leach and those who joined with him in passage of SB 1377 would not contemplate Appellant's injuries and subsequent lawsuit as "frivolous."

Because A.R.S. § 12-516 is ambiguous, it was improper for the Court to hold that the statute, as a matter of law, barred Appellant from pursuing his claim absent a showing of gross negligence.

## II. THE ARIZONA CONSTITUTION PROTECTS THE RIGHT TO PURSUE TORT CLAIMS AND DISFAVORS INTERPRETING STATUTES SO AS TO DENY OR PREEMPT TORT CLAIMS

The Arizona Constitution specifically protects common-law actions for damages from legislative or executive abrogation. *Hazine v. Montgomery Elevator Co.,* 176 Ariz. 340, 342, 861 P.2d 625, 627 (1993); *Boswell v. Phoenix Newspapers, Inc.,* 152 Ariz. 9, 730 P.2d 186 (1986), *cert. denied,* 481 U.S. 1029, 107 S.Ct. 1954, 95 L.Ed.2d 527 (1987):

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

Ariz. Const. art. 18, § 6.

As affirmed and reaffirmed by the Arizona Supreme Court for over one hundred years, the right to pursue common-law damage remedies is protected by constitutional text, has origins in the foundation and history of the state, and has been

jealously protected by the Arizona Supreme Court's jurisprudence from the first days of statehood. *See, e.g., Consolidated Arizona Smelting Co. v. Ujack,* 15 Ariz. 382, 139 P. 465 (1914); *Alabam's Freight Co. v. Hunt,* 29 Ariz. 419, 242 P. 658 (1926); *State ex rel. Industrial Comm'n v. Pressley,* 74 Ariz. 412, 250 P.2d 992 (1952); *Kenyon v. Hammer,* 142 Ariz. 69, 688 P.2d 961 (1984); *Boswell,* 152 Ariz. 9, 730 P.2d 186; *Hazine,* 176 Ariz. 340, 861 P.2d 625.[1]

Thus, even in situations in which the legislature can constitutionally abrogate, preempt, or deny common-law rights – which was neither the intention nor purpose of SB 1377 and A.R.S. § 12-516 – given the importance of those concepts in Arizona history and jurisprudence, the Arizona Supreme Court noted that "we are reluctant to interpret a statute in favor of denial or preemption of tort claims—even those that are not or may not be constitutionally protected—if there is any reasonable doubt about the legislature's intent." *Hayes,* 178 Ariz. at 272, 872 P.2d at 676. Moreover, even if the cause of action is not protected by the constitution (which is not the case here), several factors must be considered, including: first, if possible, the Arizona Supreme Court construes statutes to avoid rendering them unconstitutional. *Slayton v. Shumway,* 166 Ariz. 87, 92, 800 P.2d 590, 595 (1990); *Arizona Downs v. Arizona*

[1] *See also* THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, 152, 548 (John S. Goff, ed. 1991)(discussing application of the Arizona constitutional anti-abrogation provisions to common law injuries); John D. Leshy, THE ARIZONA STATE CONSTITUTION 310-13 (1993)(discussing the history of Ariz. Const. art. 18, § 6).

*Horsemen's Found.,* 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981); *Phoenix Newspapers, Inc. v. Superior Court,* 1993 WL 537923, 155 Ariz.Adv.Rep. 11 (Ct.App.1993); second, if possible, the Arizona Supreme Court construes statutes to avoid unnecessary resolution of constitutional issues; *see Petolicchio v. Santa Cruz County Fair & Rodeo Ass'n,* 177 Ariz. 256, 259, 866 P.2d 1342, 1345 (1994); *Dunn v. Industrial Comm'n,* 177 Ariz. 190, 196, 866 P.2d 858, 864 (1994); *State v. Yslas,* 139 Ariz. 60, 63, 676 P.2d 1118, 1121 (1984); and third, courts endeavor to avoid overbroad statutory interpretations that afford unintended immunity in derogation of common-law rights of action. *Hayes,* 178 Ariz. at 272, 872 P.2d at 676, citing *Wringer v. United States,* 790 F.Supp. 210, 213 (D.Ariz.1992), *aff'd,* 10 F.3d 809 (9th Cir.1993); *In re Estate of Thelen,* 9 Ariz.App. 157, 160–61, 450 P.2d 123, 126–27 (1969). Ultimately, 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." *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.,* 143 Ariz. 101, 106, 692 P.2d 280, 285 (1984).

In his ruling on Appellees' motion for summary judgment, Judge Coffey held that A.R.S. § 12-516 did not abrogate Appellant's right of action because he could claim and seek to present to the jury evidence of willful misconduct or gross negligence. (R.43, at pp. 4-5.) Yet, Appellant was limited by Judge Coffey to conducting discovery only for the very limited scope of determining the purpose of

the ABG procedure. Thus, Appellant has not been provided the opportunity to engage in thorough discovery that would inform him as to whether any of the defendants engaged in willful misconduct or gross negligence. Moreover, Appellant disagrees that the provision in A.R.S. § 12-516 permitting claims when willful misconduct or gross negligence is proven by clear and convincing evidence truly constitutes a "reasonable alternative or choice" that will enable him to bring his action. *Barrio,* 143 Ariz. at 106, 692 P.2d at 285. Such a burden of proof – which significantly heightens the burden of proof normally incumbent on plaintiffs in medical negligence actions – is neither reasonable nor practicable, effectively making medical negligence actions in cases involving COVID-19 untenable.

Judge Coffey's ruling (and previous order limiting discovery) denied Appellant of the opportunity to meet the heightened burden of proof provision in A.R.S. § 12-516, while holding that the statute fairly provided Appellant the opportunity to do so. If Appellant is to be held to the heightened burden of proof called for in the statute, then he should be given complete access to the discovery rules, without limitation on the scope of discovery. If, however, this Court deems the burden of proof in A.R.S. § 12-516 effectively prevents would-be plaintiffs from ever meeting their burden of proof, thus denying them of a legitimate and realistic opportunity to litigate their claim, then it follows that the statute abrogates the right of action. In either case, the order granting summary judgment should be vacated.

## III. THE EFFECTIVE DATE OF A.R.S. § 12-516 WAS AFTER APPELLANT FILED HIS COMPLAINT

### A. Standard of Review

The Court of Appeals reviews *de novo* issues involving interpretation, application, and retroactivity of statutes. *State v. Carver,* 227 Ariz. 438, 441, 258 P.3d 256, 259 (App. 2011).

### B. A.R.S. § 12-516 Does Not Apply Retroactively

A statute applies retroactively only when it "attaches new legal consequences to events completed before its enactment." *State v. Aguilar,* 218 Ariz. 25, 34, 178 P.3d 497, 506 (App. 2008). In determining whether a new statute is being applied retroactively, the inquiry is whether the "'legislation…disturb[s] vested substantive rights by retroactively changing the law that applies to completed events.'" *State v. Griffin,* 203 Ariz. 574, ¶ 16, 58 P.3d 516, ¶ 16 (App. 2002), *quoting San Carlos Apache Tribe v. Superior Court,* 193 Ariz. 195, 205, 972 P.2d 179, 189 (1999). As previously determined by the Arizona Supreme Court, a statute may not "attach[ ] new legal consequences to events completed before its enactment." *San Carlos,* 972 P.2d at 189, *citing Landgraf v. USI Film Prods.,* 511 U.S. 244, 270, 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229 (1994). In other words, legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events. *Hall v. A.N.R. Freight Sys.,* 149 Ariz. 130, 139, 717 P.2d 434, 443 (1986). A vested right "is actually assertable as a legal cause of action or defense or is so

substantially relied upon that retroactive divestiture would be manifestly unjust." *Id.* at 140, 717 P.2d at 444.

Here, the language of A.R.S. § 12-516 as interpreted by Judge Coffey certainly attaches new legal consequences to Appellant's medical negligence claim – elevating the normal burden of proof by a preponderance of evidence to the untenable burden of clear and convincing evidence – and profoundly disturbs Appellant's right to effectively litigate his claim by creating a burden of proof that does not normally apply to medical negligence actions. For this reason alone, it would be inappropriate for A.R.S. § 12-516 to be applied retroactively.

### C. A.R.S. § 12-516 Did Not Become Effective Until After Appellant Filed His Complaint

The Arizona Constitution provides that new bills do not become effective until 91 days after the close of the legislative session enacting the bill, the so-called "Effective Date." Ariz. Const. art. 4, § 3. Because the session for SB 1377 did not close until on or about June 26, 2021, the Effective Date for SB 1377 was not until September 29, 2021. [Appx. A.] Moreover, A.R.S. § 12-515(B) provides:

> "This Section applies to all *causes of action that are brought* ***after the effective date of this section*** for an act or omission by a person or provider that occurred on or after March 11, 2020 and before December 30, 2022 and that relates to a public health pandemic that is the subject of the state of emergency declared by the Governor.

A.R.S. § 12-515(B)(emphasis added.)

Plaintiff filed suit on January 29, 2021, well before the Effective Date of SB 1377. Because Plaintiff filed suit *before* the Effective Date of SB 1377, A.R.S. § 12-516 does not apply to Plaintiff's action. Additionally, Governor Ducey issued Executive Order 2021-06 on March 24, 2021, in which he lifted the state of emergency that was a contingent provision of A.R.S. § 12-515(B).

In the Order granting summary judgment, Judge Coffey held that Section E of A.R.S. § 12-516 "specifically provides that it applies to act or omissions that occurred on or after March 11, 2020…" (R.43, at p. 5.) A.R.S. § 12-516(E) reads in entirety as follows:

> "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."

The language of A.R.S. § 12-516(E) stands in stark contrast to the language of its enabling statute, A.R.S. § 12-515(B). The resolution of this conflict requires, at a minimum, not only the interpretation of A.R.S. § 12-516(E), to which Judge Coffey's analysis was limited, but the concurrent interpretation of A.R.S. § 12-515(B). If this Court holds that A.R.S. § 12-515(B) controls the effective date of A.R.S. § 12-516, then the lower court's order granting Appellees' motion for summary judgment should be vacated. If, however, this Court should hold that Appellant's lawsuit is within the purview of A.R.S. § 12-516, Appellant reverts to

the prior argument that the statute cannot be applied retroactively without disturbing Appellant's substantive rights.

## CONCLUSION

For the foregoing reasons, the judgment of the Superior Court holding that Appellant's lawsuit is barred by A.R.S. § 12-516 and granting Appellees' motion for summary judgment should be vacated and the case remanded to the Superior Court for further proceedings.

## CERTIFICATE OF COMPLIANCE

Pursuant to the Arizona Rules of Civil Appellate Procedure, Rule 14, I certify that the attached Response uses the proportionately spaced type of 14 points or more, is double-spaced using a Times New Roman font and contains 6,271. words.

DATED this 11th day of January, 2023.

Respectfully submitted,

/s/ Robert Gregory

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## CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2023, I served the foregoing Brief of Plaintiffs-Appellants upon the following counsel by filing through the ECF system:

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# APPENDIX A

# Ariz. Rev. Stat. § 12-516

**A.** 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.

**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 or any action or omission that occurs in the course of providing a person with health care services and that is unrelated to the public health pandemic that is the subject of the state of emergency if the health professional's or health care institution's action or omission was in good faith support of this state's response to the state of emergency, including any of the following:

**1.** Delaying or canceling a procedure that the health professional determined in good faith was a nonurgent or elective dental, medical or surgical procedure.

**2.** Providing nursing care or procedures.

**3.** Altering a person's diagnosis or treatment in response to an order, directive or guideline that is issued by the federal government, this state or a local government.

**4.** An act or omission undertaken by a health professional or health care institution because of a lack of staffing, facilities, equipment, supplies or other resources that are attributable to the state of emergency and that render the health professional or health care institution unable to provide the level or manner of care to a person that otherwise would have been required in the absence of the state of emergency.

**C.** A health professional or health care institution is presumed to have acted in good faith if the health professional or health care institution relied on and reasonably

attempted to comply with applicable published guidance relating to the public health pandemic that was issued by a federal or state agency. This subsection does not prohibit a party from introducing any other evidence that proves the health professional or health care institution acted in good faith.

**D.** IN THE CASE OF A CLAIM AGAINST A NURSING CARE INSTITUTION OR RESIDENTIAL CARE INSTITUTION, WHERE THE CARE IN QUESTION DID NOT DIRECTLY RELATE TO THE PUBLIC HEALTH PANDEMIC, THE BURDEN IS ON THE FACILITY TO PROVE THAT THE ACT OR OMISSION WAS A DIRECT RESULT OF HAVING TO PROVIDE CARE TO PATIENTS NEEDING TREATMENT FOR THE PANDEMIC OR DUE TO LIMITATIONS IN EQUIPMENT, SUPPLIES OR STAFF CAUSED BY THE PANDEMIC.

**E.** This section applies to all claims that are filed before or after the effective date of this section 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.

**F.** This section does not apply to any claim that is subject to title 23, chapter 6.

**G.** For the purposes of this section:

**1.** "Health care institution" has the same meaning prescribed in section 36-401 and includes an ambulance service as defined in section 36-2201.

**2.** "health professional" has the same meaning prescribed in section 32-3201 and includes an ambulance attendant as defined in section 36-2201.

A.R.S. § 12-516

Added by L. 2021, ch. 179, s. 1, eff. 9/29/2021.
Ariz. Rev. Stat. § 12-516