IN THE SUPREME COURT OF ARIZONA

FOR THE STATE OF ARIZONA

Arizona Supreme Court Case No. CV-23-0262-PR

Arizona Court of Appeals, Division One Case No. 1 CA-CV 22-0508

Maricopa County Superior Court Case No. CV2021-090429

ROBIN ROEBUCK,

Plaintiff-Appellant,

v.

MAYO CLINIC OF ARIZONA, et al.

Defendants-Appellees.

APPELLANT'S RESPONSE TO BRIEF OF AMICUS CURIAE HEALTH SYSTEM ALLIANCE OF ARIZONA

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I. REASONS REVIEW SHOULD BE DENIED

A. Amici Misstate Public Policy Interests Presented by COVID-19

Amici argue that medical providers were "subjecting themselves to liability" because of the challenges presented by COVID-19, e.g., shortage of hospital beds and equipment for patients, difficulty in staffing facilities, and no defined treatments. (Am. Brief, at pp. 5-6, citing EO2020-27). Amici further argue that in order to attenuate the strain from these logistical issues, Governor Ducey appropriately issued EO2020-27 and the legislature enacted A.R.S. § 12-516 in order to "maximize participation of medical providers." *Id.* This reasoning is flawed. Amici erroneously suggest that the logistical strains caused by COVID-19 created liability for medical providers. It did not. Well before COVID-19 occurred, medical providers were subject to professional liability for acts of negligence. This liability arises not from the logistical strains or physical demands that occur in the course of providing medical treatment to patients, even during a pandemic, but from the concept of medical providers undertaking a professional duty of care, the breach of which duty may be considered negligent.

Nor is Amici's argument that the qualified immunity extended by A.R.S. § 12-516 "incentivizes" medical professionals to provide care availing. This argument suggests that medical providers would withhold care unless they received qualified

immunity. It can hardly be imagined that medical providers in Arizona would refuse to treat patients, regardless of whether COVID-19 was a primary or secondary diagnosis, unless they were granted qualified immunity. Indeed, amici acknowledge that medical providers were already providing medical care to patients diagnosed with COVID-19 well before the legislature enacted A.R.S. § 12-516. (Am. Brief, at p. 5.) Thus, A.R.S. § 12-516 was not a precondition to medical professionals providing medical care. It is mere conjecture by amici that if another public health crisis should occur medical providers will refuse to provide care unless qualified immunity is extended to them. In so speculating, amici conflate two very distinct issues: the provision of necessary medical services to patients as opposed to the provision of such services in a negligent manner. The former speaks to a professional duty undertaken by those in the medical profession; the latter speaks to a breach of that duty, i.e., acting below the standard of care. Amici would have the Court adopt the position that medical providers will abandon their professional duty unless insulated from lawsuits, setting the bar so high for persons harmed by negligent medical care that carrying the burden of proof and thus obtaining redress is far out of reach. Such an imbalance in the fiduciary relationship between provider and patient would strain notions of what constitutes good public policy and overlook the societal interests of the general public in favor of those who serve those interests in the medical sector.

B. Invalidating A.R.S. § 12-516 Will Not Invalidate Other Qualified Immunity Statutes

Amici cite several existing statutes that provide qualified immunity to medical providers and makes the unwarranted leap that invalidating A.R.S. § 12-516 because it runs afoul of the anti-abrogation clause may result in these statutes being invalid. (Am. Brief, at p. 8.) The statutes cited by amici speak to situational events linked to where medical services are provided (nonprofit clinics, the scene of an emergency, or emergency rooms) and who is providing them (students, providers of gratuitous medical care). None of these 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 with the connectedness between COVID-19 and other pre-existing medical conditions, as was the case with Plaintiff Robin Roebuck.

It is well documented in the medical literature that the treatment of COVID-19 often occurs in conjunction with the concurrent treatment of other medical conditions or co-morbidities, as was the case with Plaintiff. At the time of his admission to Mayo Clinic in April 2020 for very medical conditions, one of which was COVID-19, Plaintiff had a chronic heart condition that was unrelated to and which pre-existed his diagnosis of COVID-19. Specifically, Plaintiff had undergone both a heart and kidney transplant at Mayo Clinic in 2017 due to chronic diseases from which he suffered. It was concern over these pre-existing heart and kidney conditions that led medical providers, including a member of Plaintiff's heart

transplant team, to order tests in April 2020, one of which (the Arterial Blood Gas or ABG procedure) severely injured Plaintiff and required emergency surgery to save his arm. (Pl. Appellate Rep. Br., at p. 4.) It is noteworthy that the ABG procedure that injured Plaintiff in April 2020 was also performed in 2017 in conjunction with Plaintiff's heart and kidney transplant. *Id.* In other words, the ABG procedure was *not* done uniquely for purposes of treating COVID-19 as the procedure existed long before the pandemic occurred and was used to treat conditions unrelated to COVID-19.

Plaintiff's case underscores the reason why applying a broad brush of qualified immunity to any COVID-19 related medical care is not only problematic but inappropriate, for several reasons. First, it ignores the reality that medical care provided for COVID-19 can and often does occur while treating other medical conditions. Second, the concurrent treatment of COVID-19 and other pre-existing medical conditions, as was the case with Plaintiff, is not a "one off" situational event like those described by the statutes cited by amici; rather, the treatment of COVID-19 in conjunction with other co-morbidities necessarily involves a multidiscipline medical team treating many conditions using various medical procedures. Third, some of the procedures used to treat COVID-19 are interchangeably used to treat non-COVID conditions. Indeed, the ABG procedure that injured Plaintiff in April 2020 may have been used to address COVID-19 (as Defendants argued) but it was

also used to address Plaintiff's chronic heart and kidney condition. Courts should not have to parse when medical care is strictly related to treatment of COVID-19 as opposed to care for various medical conditions, and then certainly shouldn't be a different burden of proof when these lines are blurred.

Ultimately, A.R.S. § 12-516 is not the same as the statutes cited by amici. The fear that other statutes will be found invalid because A.R.S. § 12-516 is invalid is unwarranted.

C. A.R.S. § 12-516 Violates the Anti-Abrogation Clause

Amici attempt to distinguish between "right of action" and "cause of action", and argue that the Court of Appeals wrongly conflated the two. (Am. Brief, at pp. 11-12.) Amici go so far as to suggest that as long as a claimant has the right to bring a cause of action, regardless of whether there is any realistic opportunity to pursue that claim – amici describes this as a "claimant's ability to bring specific legal theories" – the anti-abrogation clause has not been offended. *Id.,* at p. 13. Such an argument truly offends traditional notions of due process and access to justice.

Amici's argument is similar to that advanced by Petitioners wherein they argued that "A.R.S. § 12-516 regulates causes of action for negligence, it does not abrogate them." (Pet. Br., at p. 6; Am. Br., at p. 14.) Amici acknowledge, as they must, that the legislature's authority to regulate a cause of action for negligence is qualified: it must leave "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 Manual Div. Hosp. for Magma Copper Co.,* 143 Ariz. 101, 106 (1984).

However, amici, like petitioners, never address or attempt to explain – perhaps because they cannot – how elevating Plaintiff's burden of proof from ordinary negligence (as is typical of medical negligence cases) to that of gross negligence leaves Plaintiff with a reasonable alternative to be able to bring his claim. Amici defer this critical component of the Arizona Constitution's anti-abrogation clause to be worked out in trial courts on a case-by-case basis, or for this Court to develop a bright line rule on how Plaintiff and other would-be litigants can still have a "reasonable alternative or choice" to bring their claim in cases invoking A.R.S. § 12-516 notwithstanding the qualified immunity granted by the statute.

The Court of Appeals correctly found that "the availability of relief for gross negligence is not a reasonable alternative to a claim for ordinary negligence." (Slip. Op., at p. 8.) The Court of Appeals further notes that "[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." *Id.,* citing *Noriega v. Town of Miami,* 243 Ariz. 320, 326, ¶ 23 (App. 2017)(citations and internal quotation marks

omitted). Legal scholars examining the gulf between ordinary negligence and gross negligence have concluded that the gulf is significant and vast:

> "[T]he difference between negligence and gross negligence is not in the degree or magnitude of inadvertence or carelessness; gross negligence is intentional wrongdoing or deliberate misconduct affecting the safety of others. An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that it is a breach of duty to others—i.e., a conscious disregard of the safety of others. What separates ordinary negligence from gross negligence is the defendant's state of mind."

Stuart M. Speiser et al., 3 American Law of Torts § 10:17 (March 2023).

Other sources define gross negligence as "[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another." BLACK'S LAW DICTIONARY 1134 (11th ed. 2019). Moreover, gross negligence also contemplates a greatly enhanced degree of culpability:

> Gross negligence "is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence."

Id.

Ultimately, the principle of leaving plaintiffs a viable opportunity to pursue negligence claims is firmly entrenched in Arizona case law and the Arizona

Constitution, which recognize the significance and irrevocability of Arizona's anti-abrogation clause, i.e., 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,* 143 Ariz. at 106, 692 P.2d at 285 (emphasis added.)

Thus, the real questions – ones that neither the petitioners nor amici address in any of their briefing – are twofold: (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. The first question is procedural in nature and speaks to the gathering of evidence, i.e., discovery tools, access to witnesses and information, and the burden of proof related to expert witness opinions. The second question addresses practicality and, more to the point, possibility, i.e., can a plaintiff ever truly prove gross negligence in a medical malpractice action.

The burden of proof in a medical malpractice action requires plaintiff to prove that the defendant acted below the professional standard of care. This is accomplished by plaintiff retaining a medical expert to opine that the defendant failed to act as a reasonable and prudent medical provider would act in similar circumstances, i.e., the "applicable standard of care." Ariz. Rev. Stat. § 12-2603(B)(3). The retained expert's opinion is based on: (1) facts made available to

him/her; (2) the expert's scientific, technical, or specialized knowledge; (3) testimony that is the product of reliable principles and methods; and (4) reliably applying the principles and methods to the facts of the case. Ariz. R. Evid. 702. However, 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." *Noriega v. Town of Miami,* 243 Ariz. 320, 328, 407 P.3d 92, 100 (Ariz.App. 2017), citing *Fargo v. City of San Juan Bautista,* 857 F.2d 638, 641 (9th Cir. 1988), abrogated on other grounds by *Lewis v. Sacramento County,* 98 F.3d 434, 440 (9th Cir. 1996). Such a standard speaks less of the facts of the case and more to the state of mind of the defendant, leaving plaintiff and the expert with the seemingly impossible task of divining what the defendant was thinking when the act or omission occurred. It is no wonder that the Arizona Supreme Court recognized that the definition of gross negligence "is, at best, inexact." *Weatherford ex rel. Michael L. v. State,* 206 Ariz. 529, 535 n.4, 81 P.3d 320, 326 n.4 (2003); *see also Scott v. Scott,* 75 Ariz. 116, 122, 252 P.2d 571, 575 (1953)(observing that gross or wanton negligence is "flagrant and evinces a lawless and destructive spirit").

The language of A.R.S. § 12-516 requires a showing of "wilful misconduct or gross negligence", though it is unclear if the legislature considered these terms to be synonymous. Regardless, such a heightened 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 of a *Daubert* challenge. *See, e.g.,* Ariz. R. Evid. 702(a)(requiring an expert opinion to be based on the expert's scientific, technical or specialized knowledge, skill, experience, training, or education); *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). Far from enabling plaintiffs to be able to bring a medical negligence action, A.R.S. § 12-516 sets the legal bar so high as to effectively deny plaintiffs the realistic opportunity to seek redress from the very outset.

D. A.R.S. § 12-516 Is Not Justified by Important Public Interests

Amici argue that the Court of Appeals' decision lacked a complete constitutional analysis and that the legislature may, in times of emergency, suspend or alter constitutional rights for the safety of the general public. (Am. Brief, at p. 15.) In making this argument, amici seemingly acknowledge that A.R.S. § 12-516 does invade the constitutional rights of Arizona citizens but may do so as long at the statute is not "a plain, palpable invasion of constitutional rights." *Id.,* at p. 16, citing *Jacobson v. Massachusetts,* 197 U.S. 11, 31 (1905).

That A.R.S. § 12-516 both plainly and palpably invades the constitutional rights of persons seeking redress for medical negligence is beyond question. As stated herein, *supra at* Section C, elevating the burden of proof in medical negligence actions to that of gross negligence leaves a plaintiff with no viable or reasonable

means of pursuing redress. It amounts to window dressing: giving the appearance that plaintiffs may still pursue an action for medical negligence but depriving them of any reasonable means of doing so. Amici's argument such an outcome protects the public interest strains credulity.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny review, sustain the decision of the Court of Appeals, and rule that A.R.S. § 12-516 is unconstitutional.

RESPECTFULLY SUBMITTED this 22nd day of January, 2024.

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