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 AMERICAN MEDICAL ASSOCIATION, ARIZONA MEDICAL ASSOCIATION, PHOENIX CHILDREN'S HOSPITAL, HONORHEALTH, AND MUTUAL INSURANCE COMPANY OF ARIZONA

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I. REASONS REVIEW SHOULD BE DENIED

A. Increasing the Burden of Proof to Gross Negligence Profoundly Affects Plaintiff's Right of Action

Amici argue that increasing the burden of proof from ordinary negligence to gross negligence "might make it more difficult to obtain relief in a negligence action" but it doesn't wholly abrogate the entire negligence right of action. (Am. Brief, at p. 5.) This argument amounts to an irrelevant conclusion, missing the point of whether would-be plaintiffs can realistically bring an action in negligence when the hurdle to do so is effectively insurmountable. Indeed, 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 v. San Manuel Div. Hosp. for Magma Copper Co.,* 143 Ariz. 101, 106, 692 P.2d 280, 285 (1984)(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.

B. Societal Interests Include Plaintiff's Right of Action

Amici argue that there is no difference between ordinary and gross negligence in that they both "protect the same societal interests: encouraging people to act reasonably so as not to harm others." (Am. Brief, at p. 7.) This argument is both flawed and misrepresentative of whose interests are best served by A.R.S. § 12-516. It is beyond dispute that raising the burden of proof from ordinary negligence to gross negligence serves the interests of medical providers, and not persons harmed by medical providers. Amici go so far as to suggest the "availability of quality medical care throughout Arizona" is contingent on A.R.S. § 12-516 and its heightened burden of proof. (Am. Brief, at p. 4.) Respectfully, Plaintiff believes that amici and the thousands of physicians and other medical professionals they represent were already providing quality medical care before the enactment of A.R.S. § 12-516. Indeed, certifications of hospitals and those they employ would never occur unless the strictest standards were met. That is not to say that incidences of medical negligence never occur; they do, and laws exist in Arizona enabling persons harmed by acts of ordinary medical negligence to be able to seek redress. *See, e.g.,* A.R.S. § 12-561 *et seq.*

Nor is amici's argument that the gross negligence standard encourages people to "act reasonably" availing. Gross negligence doesn't speak to a medical provider's *reasonableness* of action; rather, it is grounded in "conscious disregard" of a risk.

Ordinary negligence, on the other hand, occurs when a medical provider fails to act as a reasonable and prudent medical provider should act, i.e., the "applicable standard of care." Ariz. Rev. Stat. § 12-2603(B)(3). Thus, amici are incorrect in arguing that ordinary negligence and gross negligence are fundamentally "the same." (Am. Brief, at p. 7.) They are not, and the societal interests served by changing the current standard to gross negligence inordinately shifts legal protection in favor of medical providers and to the detriment of plaintiffs who would seek redress but are prevented from doing so.

C. The Ordinary Negligence Standard Doesn't Prevent Medical Providers From Providing Medical Care During Emergencies

Amici argue that elevation of the burden of proof in A.R.S. § 12-516 from ordinary negligence to gross negligence ensured that "Arizonans [would] have access to treatment" during the pandemic and that healthcare providers would be willing to provide that care. (Am. Brief, at p. 10.) Amici's argument suggests at least two conclusions that are erroneous: (1) that medical providers didn't already have protections in place against so-called "high-stakes lawsuits" (*id.,* at p. 11); and (2) that medical providers wouldn't provide treatment unless they had qualified immunity from lawsuits. The first conclusion ignores Arizona law balancing the rights of medical providers and persons injured by medical providers who seek redress. *See, e.g.,* A.R.S. § 12-561 *et seq.,* A.R.S. § 12-2603, and Ariz. R. Evid. 702. The second conclusion suggests that medical providers would withhold care unless

they received qualified immunity. Both conclusions are a disservice not only to the general public but to medical providers as well. 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 "for over a year" before the legislature enacted A.R.S. § 12-516. (Am. Brief, at p. 8.) It is mere conjecture by amici that if another public health crisis should occur medical providers will refuse to "volunteer for frontline duty" unless qualified immunity is extended to them while providing "essential medical services." *Id.,* at p. 11. In so speculating, amici conflate two very distinct issues: the provision of necessary medical services to patients (it seems self-evident that *all* medical services provided to patients are "essential", regardless if given during a pandemic or otherwise) 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. *Id.,* at pp. 7, 11; citing *Valerie M. v. Arizona Dep't of Econ.,* 219 Ariz. 331, 336 (2009).

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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