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 PETITION FOR REVIEW

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INTRODUCTION

This case does not raise any issues meriting the Court's review. Petitioners Mayo Clinic, Nicole Secrest, and Robert Scott, M.D. ("Petitioners") argue the Court of Appeals held A.R.S. § 12-516 was unconstitutional because its holding was "based on a fundamental misunderstanding of Arizona tort law, specifically that gross negligence is a tort separate and apart from ordinary negligence." (Pet. Br., at p. 2.) The Court of Appeals made no such distinction; indeed, the Court noted only that which Arizona courts have long recognized, i.e., that ordinary negligence and gross negligence are "distinct theories of liability" differing in "quality and not degree." (Slip. Op. ¶ 24, citing *Walls v. Ariz. Dep't of Pub. Safety,* 170 Ariz. 591, 595, 826 P.2d 1217, 1221 (App. 1991)).

The Court of Appeals based its holding on that which Petitioners acknowledged but failed to address in its Petition, i.e., that "[t]he legislature may regulate negligence….without offending the anti-abrogation clause", but *only if* "a claimant is left a reasonable possibility of obtaining legal redress" and that the legislature "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." (Slip. Op. ¶ 19, citing *Nunez v. Pro. Transit Mgmt. of Tucson, Inc.*, 229 Ariz. 117, 122-23 (2012), and *Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 313 (2003)). Petitioners fail to address how extending immunity to healthcare

providers absent a showing of gross negligence leaves Plaintiff or other would-be claimants a "reasonable possibility of obtaining legal redress."

In arguing that the Court of Appeals erred in finding that Mayo Clinic did not have immunity under the PREP Act, Petitioners adopt an argument that not only they did not argue below in their motion for summary judgment or in their answer to Plaintiff's appeal, but which contradicts the position they adopted in the lower courts. Specifically, Petitioners argue that it was the administration of tocilizumab that constituted a "covered countermeasure", as defined by the PREP Act, and not the ABG procedure. (Pet. Br., at p. 16.) However, Petitioners argued specifically in the lower courts that it was the ABG procedure that constituted the covered countermeasure. (*See* R. 27, at p. 19, and Mayo Clinic answering brief in Court of Appeals, at pp. 41-42.)[1] Petitioners now seek review based on new arguments not previously made and never briefed by the parties.

RELEVANT FACTS

I. The District Court of Arizona Remands the Case to Superior Court

On March 23, 2021, Defendants/Petitioners removed Plaintiff's complaint to federal court, claiming that Plaintiff's state law claim of medical negligence was preempted by the PREP Act. (R.9.) Considering Defendants' motion to dismiss and

[1] Plaintiff's reference to the record in the Superior Court is signified by "R.XX", representing the specific citation to the record.

Plaintiff's motion to remand, the United States District Court, District of Arizona, held Plaintiff's complaint did not necessarily raise a federal issue and the PREP Act did not completely preempt Plaintiff's state law claim, and accordingly remanded the matter to Superior Court.

II. The Court Orders the Parties to Engage in Limited Discovery on the Purpose of the ABG Procedure

On December 16, 2021, the Superior Court directed the parties to engage in limited discovery for the sole purpose of discovering the purpose of the ABG procedure administered to Plaintiff, directing the parties to take only the depositions of persons who had knowledge of the procedure. (R.29.) Pursuant to the Court's Order, the parties held depositions of the physician who ordered the ABG procedure and the defendant physician who supervised administration of the ABG procedure.

Defendants subsequently moved for summary judgment, arguing they were immune from suit pursuant to A.R.S. § 12-516 and the PREP Act and that Plaintiff could not prove Defendants' actions constituted gross negligence.

III. The Court Granted Defendants' Motion for Summary Judgment

On April 27, 2022, the Superior Court granted Defendants' Motion for Summary Judgment on the grounds that Defendants were immune from liability under A.R.S. § 12-516, but that Plaintiff's claims were not barred by the PREP Act. (R.43.) The Court reasoned that Plaintiff's right of action was not abrogated by A.R.S. § 12-516 because the statute allowed Plaintiff to pursue his claims if he could

meet the higher evidentiary standard of proving by clear and convincing evidence that Defendants acted with willful misconduct or gross negligence.

IV. The Court of Appeals Ruled A.R.S. § 12-516 Was Unconstitutional Because it Barred All Claims for Ordinary Negligence and Did Not Leave Plaintiff a Reasonable Alternative for Bringing His Claims

On September 19, 2023, the Court of Appeals reversed the grant of summary judgment and remanded the matter to Superior Court, holding A.R.S. § 12-516 ran afoul of Arizona's anti-abrogation clause of the Arizona Constitution, Article 18 § 6, and was unconstitutional because it barred all claims for ordinary negligence arising out of the provision of COVID-related medical treatment and thus denied Plaintiff of any reasonable alternative to pursue his claims. The Court of Appeals also found that Defendants failed to argue the ABG procedure was ever declared to be a covered countermeasure under the PREP Act, and affirmed the judgment of the Superior Court that the PREP Act did not bar Plaintiff's state law claims.

REASONS THE COURT SHOULD DENY REVIEW

This case presents none of the hallmarks of a case meriting review. Petitioners seek review by misconstruing and misstating the holding of the Court of Appeals, arguing that the Court's holding that A.R.S. § 12-516 abrogates, instead of regulates, Plaintiff's medical negligence claim was based on "the essential premise that gross negligence and ordinary negligence are separate and distinct torts…" (Pet. Br., at p. 6.) The Court never held such, a point that Petitioners reluctantly concede, and

Petitioners' attempt to contort the Court's holding to manufacture a basis for review is thinly veiled.

Similarly, Petitioners' request for review of the Court of Appeals' holding that Plaintiff's claims are not barred by the PREP Act is even thinner and is based on an argument never advanced or briefed by Petitioners in this matter – in a motion to dismiss in federal court after removal, in their motion to dismiss and motion for summary judgment in state court, or on appeal. For the first time in this matter, Petitioners argue that the covered countermeasure required by the PREP Act was not the ABG procedure but the drug tocilizumab. Having failed to raise this argument below, Petitioners have waived it. *Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC,* 227 Ariz. 382, 386, ¶ 12 (App. 2011)(citation omitted).

Accordingly, the Supreme Court should deny the Petition.

I. The Petition Does Not Pose Questions of Statewide Importance

Setting aside that the Court of Appeals correctly applied the anti-abrogation clause found in Ariz. Const. art. 18, § 6 and properly interpreted existing Arizona case law in light of the impact of A.R.S. § 12-516 on Plaintiff's right to pursue legal redress (*see* Section II, *infra*), the Petition amounts to a plea for correction on a legal issue that occupied a brief period of time (approximately 2020 to 2022) and which may not occur again, and on grounds that are tenuous and misrepresentative of the impact on persons injured by health care providers.

Petitioners acknowledge the unparalleled nature of the reasons underlying the enactment of A.R.S. § 12-516 – "COVID-19 was an unprecedented global crisis" – rivaled only in recent history by the Spanish influenza pandemic of 1918. (Pet. Br., at p. 1.) Petitioners justify A.R.S. § 12-516 on grounds that are flowery at best, but frankly insulting to Plaintiff, who required emergency surgery to save his arm and has incurred over $300,000.00 in medical bills (R.19, at p. 3), arguing the "limited immunity" extended by A.R.S. § 12-516 "ensure[s] health care providers were not subject to fortuitous lawsuits that hinder and discourage their critical and ongoing work, unless they are grossly negligent." (Pet. Br., at pp. 1-2.) Petitioners fail to demonstrate how Plaintiff's case is fortuitous, much less frivolous, or how Plaintiff's action (or others like it) will "hinder and discourage" medical care.[2]

Nor is COVID-19 an "ongoing" pandemic, as Petitioners claim. The federal Centers for Disease Control issued a Declaration on May 11, 2023 declaring the end of the public health emergency surrounding COVID-19. *See, e.g.* www.cdc.gov/coronavirus/2019-ncov/your-health/end-of-phe.html. The State of Arizona preceded this announcement by over one year when Governor Ducey issued a declaration on March 30, 2022 ending the COVID-19 emergency. *See, e.g.,*

[2] Petitioners misstate Arizona State Senator Vince Leach, lead sponsor of Senate Bill 1377 (which enacted A.R.S. § 12-516), who observed one of the primary purposes of A.R.S. § 12-516 was to protect health care providers from "frivolous lawsuits." *See,* www.stateofreform.com, R.19, at p. 6.

www.azdhs.gov/director/public-information-office/index.php#news-release-033022.

II. A.R.S. § 12-516 Effectively Abrogates Plaintiff's Right to Seek Redress

Petitioners seek review on the premise that "A.R.S. § 12-516 regulates causes of action for negligence, it does not abrogate them." (Pet. Br., at p. 6.) Petitioners 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." (Pet. Br., at p. 5, citing *Barrio v. San Manual Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 106 (1984).

However, 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. Apparently deferring 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,

Petitioners instead embark on an unnecessary exercise examining how ordinary and gross negligence are not distinct torts. Petitioners miss the point of the very language they have cited in their Petition: whether the heightened burden of proof of A.R.S. § 12-516 effectively deprives Plaintiff of the ability to bring his claim by barring all claims for ordinary negligence?

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.

Writing of the difficulty in defining gross negligence, this Court succinctly opined the definition of gross negligence "is, at best, inexact." *Noriega*, 243 Ariz. at 326, citing *Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, n.4, 81 P.3d 320, 326 n.4 (2003). The difficulty in defining gross negligence, much less educing evidence sufficient to establish it, is a significant hindrance, if not altogether bar, to plaintiffs seeking to prove it in medical negligence cases.

Ultimately, Petitioners fail to address how Plaintiff can still bring his cause of action for medical negligence pursuant to the heightened standard set forth in A.R.S. § 12-516. It is not enough to say that A.R.S. § 12-516 regulates causes of action for negligence but does not abrogate them, as Petitioners have done. If Plaintiff has no reasonable alternative to pursue a claim for medical negligence, then it can fairly be

said that A.R.S. § 12-516 has abrogated his claim. Here, Petitioners leave this critical issue unaddressed. Having done so, their Petition for review should be denied.

III. Review Is Not Warranted Merely Because Limited Immunity Has Been Extended in Prior Statutes

Petitioners make the curious argument that the finding that A.R.S. § 12-516 is unconstitutional necessarily renders other statutes extending limited immunity to likewise be unconstitutional. (Pet. Br., at p. 12.) This reasoning is flawed on several grounds. As an initial matter, the Court of Appeals *did not* hold that "the legislature can **never** regulate negligence…", as Petitioners argue. *Id.* (emphasis in original). Rather, the Court very specifically observed that "[t]he legislature may regulate negligence and other common law causes of action without offending the anti-abrogation clause." (Slip. Op., at p. 7, citing *Barrio*, 143 Ariz. at 104.) Secondarily, the various statutes Petitioners identify as comparable to A.R.S. § 12-516 are not, as follows:

(1) A.R.S. § 32-1471 – provides limited immunity to health care providers who gratuitously provide emergency care at the scene of an emergency;

(2) A.R.S. § 12-571 – provides limited immunity to health care providers who gratuitously provide medical, optometric or dental care at a nonprofit clinic;

(3) A.R.S. § 12-564 – provides limited immunity to students in health care programs who are under the supervision of a licensed health care provider.

The care Plaintiff received at Mayo Clinic was not provided gratuitously; in fact, Plaintiff was billed over $300,000 for the services provided by Petitioners. (R.19, at p. 3.) Additionally, Plaintiff's care was not provided at the scene of an emergency, at a nonprofit clinic, or by a student under the supervision of a licensed health care provider; rather, Plaintiff was treated at Mayo Clinic (a for-profit entity) and was treated by licensed physicians and nurses. Finally, A.R.S. § 12-516 is disparate in nature from the statutes cited by Petitioners because all of these prior statutes address situations involving commonplace events that occur on an ongoing basis, whereas A.R.S. § 12-516 addresses a limited emergency (the onset of COVID-19) that has been declared by Governor Ducey and the CDC to have ended.

IV. Review Is Not Warranted Because Petitioners Advance a New Argument

For the first time in this matter, Petitioners argue that the "covered countermeasure", as required under the PREP Act, was not the ABG procedure but was instead the drug tocilizumab. (Pet. Br., at p. 16.) This argument is not only novel, never having been raised by Petitioners at any time during this case's long history through Arizona District Court, Superior Court, and the Court of Appeals, but it directly conflicts with arguments Petitioners made in these other courts, i.e., that the ABG procedure allegedly was the covered countermeasure protected by the PREP Act. (*See* R. 27, at p. 19, and Mayo Clinic answering brief in Court of Appeals, at pp. 41-42.) Whether the ABG procedure is a covered countermeasure or not – the

Court of Appeals specifically held that it was *not* – there is no briefing on the issue of tocilizumab constituting a covered countermeasure and Petitioners are not entitled to raise it now. *Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, 386, ¶ 12 (App. 2011)(citation omitted). Having waited until the matter is before this Court to first raise this argument, Petitioners have waived their right to make it now.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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 3,107 words.

DATED this 14th day of November, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2023, I served the foregoing Response Brief of Plaintiffs-Appellants upon the following counsel by filing through the ECF system:

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