

IN THE SUPREME COURT
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,
Defendants-Appellees.

APPELLANT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

While the Arizona Legislature has broad constitutional authority to act in response to emergencies, “it cannot enact laws which will supersede constitutional provisions adopted by the people.” *Kilpatrick v. Superior Ct. In & For Maricopa Cnty.*, 105 Ariz. 413, 416 (1970). And by the enactment of the Arizona Constitution’s anti-abrogation provision, Article 18, section 16, “the common-law action of negligence ... was taken from its status as one subject to the will of the Legislature and imbedded in the Constitution.” *Alabam’s Freight Co. v. Hunt*, 29 Ariz. 419, 443 (1926). As such, no matter the reason, the Legislature may not abrogate the “fundamental” right to bring a negligence action. *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 388 ¶ 39 (2013). For decades, this Court has recognized that the touchstone for determining whether the legislature has violated this fundamental right is whether it has left the plaintiff with “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 (1984). The legislature may regulate *how* plaintiffs may pursue an action to recover for negligence, so long as some reasonable mechanism to recover remains. But it cannot, explicitly or in practice, eliminate the possibility of recovery in such cases.

Yet, as the Court of Appeals correctly held, the legislature did just that in enacting A.R.S. § 12-516 and retroactively barring all claims for medical

malpractice connected to a public health pandemic state of emergency except for those alleging gross negligence or wilful misconduct. That statute is more than a regulation of the manner in which a negligence victim can bring an action, and it precludes Plaintiff Robin Roebuck and other victims of “ordinary” or “simple” medical negligence from bringing any action—with no alternative. As a statute “that is specifically intended to and does directly impinge on an established general negligence cause of action that Arizona courts previously had expressly recognized, thereby totally depriving a foreseeable class of plaintiffs of that established tort claim,” it is unconstitutional under Article 18, section 16. *Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, 334 ¶ 31 (App. 1998).

That, while abrogating the right of action for ordinary negligence, the legislature preserved the right to recover for “wilful misconduct or gross negligence” is immaterial. As this Court has previously recognized, the first step of Article 18, section 16 analysis focuses on whether a claim for a specific wrong—not an “umbrella” category of wrongs—existed at common law. By the same token, at the second step of the analysis, the elimination of that specific claim will be an unconstitutional abrogation, unless a reasonable alternative remains available to plaintiffs. The right to recover for ordinary negligence by medical providers—not only for their wilful misconduct or gross negligence—has been recognized since Arizona’s founding. Claims for wilful misconduct and gross negligence do not serve

as reasonable alternatives to ordinary negligence claims, as they target different wrongs and require proof of additional elements beyond those for common-law negligence. This Court has never upheld the abrogation of a right of action for a common-law tort simply because a right of action for a related, but different, tort remains. It should not do so now.

BACKGROUND

I. Relevant Facts

In 2017, Plaintiff-Appellant Robin Roebuck had a heart and kidney transplant at Mayo Clinic in Phoenix. (R.14 ¶ 2.) On April 20, 2020, presenting cough, fever, and diarrhea, he was re-admitted to the Clinic, where he was diagnosed with COVID-19, chronic renal disease, valvular heart disease, and metabolic acidosis. (*Id.* ¶ 10; R.33 ¶¶ 2, 3.) After an echocardiogram showed decreased heart function, one of his physicians ordered Mr. Roebuck to undergo an arterial blood gas (“ABG”) procedure. (R.14 ¶ 11.) Unfortunately, that relatively common procedure went wrong, and Mr. Roebuck developed severe complications that required emergency surgery in order to save his right arm. (R.14 ¶¶ 12–13; R.33 ¶ 8.) While the surgery was successful in saving his arm, Mr. Roebuck has significant cosmetic scarring and suffers from chronic decreased strength and diminished use of his right arm and hand. (R.14 ¶¶ 15–16.)

II. Arizona Revised Statutes § 12-516

On January 26, 2021, SB 1377 was introduced. As signed by the Governor on April 5, 2021, that bill adds two sections to Title 12, chapter 5, article 1 of the Arizona Revised Statutes, both providing immunity for liability during a public health pandemic state of emergency. Relevant to this action, A.R.S. § 12-516 provides that, upon the gubernatorial declaration of such an emergency:

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.

A.R.S. § 12-516(A). The statute explicitly applies both to acts directly related to the public health pandemic and to those unrelated to the public health pandemic if they were “in good faith support of this state's response to the state of emergency.” A.R.S. § 12-516(B). Although not enacted until April 2021, the statute “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.” A.R.S. § 12-516(E).

III. Procedural History

On January 29, 2021, before A.R.S. § 12-516 had even been introduced in the Legislature, Mr. Roebuck commenced a lawsuit against Mayo and its health care

providers, alleging medical negligence. (R.1.) He filed the operative first amended complaint on May 27, 2021. (R.14.) Defendants removed the action to the United States District Court for the District of Arizona, which remanded the action to Maricopa County Superior Court for lack of jurisdiction. *Roebuck v. Mayo Clinic*, No. CV-21-00510-PHX-DLR, 2021 WL 1851414 (D. Ariz. May 10, 2021). Upon remand, the Defendants moved to dismiss Mr. Roebuck’s action on the grounds of A.R.S. § 12-516 and the Public Readiness and Emergency Preparedness Act (the “PREP Act”), 42 U.S.C. §§ 247d-6d, 247d-6e. (R.9.) The superior court denied that motion. (R.23.) The parties engaged in limited discovery, and Defendants moved for summary judgment on the same grounds. (R.27).

On April 17, 2022, the Superior Court granted Defendants’ motion with respect to A.R.S. § 12-516 and rejected its PREP Act argument. (R.43.) Mr. Roebuck appealed the entry of summary judgment against him to the Arizona Court of Appeals, which ruled in his favor on September 19, 2023. 256 Ariz. 161, 536 P.3d 289 (App. 2023). In relevant part, that court held that A.R.S. § 12-516 impermissibly abrogated Mr. Roebuck’s right of action for negligence. Applying the two-part analysis mandated by this Court, the court first held that “the cause of action at issue is one that is protected by Article 18, Section 6.” *Id.*, 536 P.3d at 295 ¶ 22 (citing *Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 313 ¶ 28 (2003)). Next, the court applied this Court’s “reasonable alternatives or choices” standard and held that

the statute goes beyond “regulat[ing] a patient’s right to recover for damages for ordinary negligence,” and impermissibly “bars all claims for ordinary negligence arising out of the provision of COVID-related medical treatment,” without providing an alternative. *Id.*, 536 P.3d at 295–96 ¶¶ 24–26 (citing, among others, *Barrio*, 143 Ariz. at 106).

In doing so, the Court of Appeals rejected Defendants’ arguments that the continued availability of relief for gross negligence eliminates any constitutional concerns. *Id.* The Court of Appeals reasoned that because A.R.S. § 12-516 eliminates the possibility of “relief to patients injured by negligence in the provision of COVID-related medical treatment who cannot make the additional showing required to establish gross negligence” it contravenes this Court’s prior holding that “Article 18, Section 6 does not permit the legislature to wholly extinguish a particular type of claim available at common law even if alternative causes of action remain available to injured claimants.” *Id.* (discussing *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 342–43 (1993), *disapproved of on other grounds by Torres v. JAI Dining Servs. (Phoenix), Inc.*, 256 Ariz. 212 ¶¶ 14–15 (2023)).

Defendants petitioned this Court for review, which was granted only as to the question of whether A.R.S. § 12-516 violates Article 18, Section 6.

ARGUMENT

I. The Court of Appeals correctly held that A.R.S. § 12-516 unconstitutionally abrogated the right of action to recover damages for ordinary negligence.

Under Article 18, section 6 of the Arizona Constitution, “[t]he right of action to recover damages for injuries shall never be abrogated.” This provision “is an ‘open court’ guarantee intended to constitutionalize the right to obtain access to the courts,” and its language “is to be construed broadly and unrestrictively.” *Cronin v. Sheldon*, 195 Ariz. 531, 538 ¶ 25 (1999) (citing *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 13 (1986)). This “unique constitutional provision” was intended to embody “a different and more advanced policy,” and to “ma[k]e it possible to enforce in court a claim for personal injury or death without the necessity of overcoming practically insurmountable defenses.” *Barrio*, 143 Ariz. at 106 (quoting *Industrial Commission v. Crisman*, 22 Ariz. 579, 595 (1921) (McAlister, J., concurring)).

This Court “perform[s] a two-part analysis of claims arguably protected under the anti-abrogation clause.” *Duncan*, 205 Ariz. at 313 ¶¶ 28–29. First, the Court asks “whether Article 18, Section 6 protects the right of action at issue.” *Id.* Second, it asks whether the legislative enactment at issue simply regulates the right of action

at issue or abrogates it.¹ *Id.* Here, given its strong roots in the common law, the right of action for “ordinary” or “simple” negligence in the health care context is protected under the anti-abrogation clause. And because section 12-516 goes beyond regulating how a plaintiff like Mr. Roebuck may pursue that right of action, and instead eliminates it without leaving him any choice to pursue an alternative, the statute is an unconstitutional abrogation.

A. The well-established right of action for ordinary medical negligence is protected by the anti-abrogation clause.

“[T]he anti-abrogation clause only applies to rights of action that either ‘existed at common law’ or find their ‘basis in the common law at the time the constitution was adopted.’” *Torres*, 536 P.3d at 793 ¶ 8. While agreeing that Mr. Roebuck’s claim implicates a right of action that meets this standard, Defendants seek to characterize that right of action at a high level of generality—i.e., as implicating all claims “under the umbrella of negligence.” Pet. 6. But to define the protected right of action so broadly is erroneous: this Court has emphasized that the inquiry at the first step of the anti-abrogation analysis is “whether a specific harm

¹ “Article 18, § 6 is stronger and more explicit than the open court provisions contained in other state constitutions.” *Barrío*, 143 Ariz. at 105. Whereas under other states’ open-court provisions, courts proceed to a third step and consider whether an abrogation of a right to recovery may nonetheless be justified for policy reasons, *see, e.g., Rutherford v. Talisker Canyons Fin., Co.*, 445 P.3d 474, 492 ¶ 57 (Utah 2019) (discussing standard under Utah Constitution), there is no analogous “good reason” exception under the Arizona Constitution.

allowed damages against a specific type of defendant in 1912.” *Torres*, 536 P.3d at 796 ¶ 16. If it did, that right to recover for that specific harm is constitutionally protected and cannot be abrogated.

As recognized in Arizona law and by common law courts around the country, “[g]ross or wanton or willful misconduct is different from ordinary negligence in quality and not degree.” *Kemp v. Pinal Cnty.*, 13 Ariz. App. 121, 124 (1970); *see Noriega v. Town of Miami*, 243 Ariz. 320, 328 ¶ 35 (App. 2017).² That difference was recognized by early-20th century common law courts, which recognized “the conceptions are essentially distinct” based on the differences between “the mental state of the person who did or omitted to do that which duty required.” *Ex parte McNeil*, 63 So. 992, 993 (Ala. 1913); *see also Perkins v. Roberts*, 262 N.W. 305, 306 (Mich. 1935) (recognizing that concepts “differ in kind and not merely in degree”); *Banks v. Braman*, 74 N.E. 594, 594–95 (Mass. 1905) (recognizing a “difference in the nature of the conduct of the wrongdoer in the two kinds of cases”)

This Court has previously recognized this distinction for purposes of defining the relevant right of action as part of the anti-abrogation analysis. In *Dickey ex rel. Dickey v. City of Flagstaff*, this Court considered a challenge to the recreational use statute, which, similar to A.R.S. § 12-516, provides immunity for ordinary

² Under Arizona law, “[g]ross negligence and wanton conduct have generally been treated as one and the same.” *Williams v. Thude*, 188 Ariz. 257, 259 (1997).

negligence claims against covered defendants, but not for wilful misconduct or gross negligence claims. 205 Ariz. 1 (2003). The Court rejected an anti-abrogation statute challenge on the grounds that Article 18, section 6 did not apply to “the right to bring a lawsuit sounding in simple negligence against the City of Flagstaff,” since, at common law at the time of the Constitution, municipalities could only be sued for “willful neglect, ... gross negligence or willful misconduct.” *Id.* at 3–5 ¶¶ 8, 11.

Here, though, the right to bring a claim against one’s medical provider for simple or ordinary negligence—not just for wilful misconduct or gross negligence—*was* established at the time of the Constitution’s enactment. “[T]he common law imposed upon the surgeon ... the duty to act as a reasonable surgeon would under the circumstances.” *Nunez v. Prof. Trans. Mgmt. of Tucson*, 229 Ariz. 117, 121 ¶ 19 (2012) (citing *Acton v. Morrison*, 62 Ariz. 139, 142 (1945)); *cf. Fowler v. Sergeant*, 1856 WL 6922, at *1 (Pa. 1856) (stating that liability in the standard case for medical malpractice is based on whether the defendant displayed a lack “of ordinary skill ... in not detecting the kind of injury” from which a patient is suffering). As such, it is Mr. Roebuck’s right of action for ordinary negligence, specifically, that is protected as fundamental under Article 18, section 6.

B. A.R.S. § 12-516 eliminates Mr. Roebuck’s right of recovery without preserving a reasonable alternative.

While Defendants maintain that A.R.S. § 12-516 is merely a permissible “regulation” of Mr. Roebuck’s right of action, under the “reasonable election” test

applied by this Court, it is an unconstitutional abrogation, as it leaves him with no reasonable alternative mechanism for recovering for the alleged harm.

1. This Court has long applied the “reasonable election” test to determine whether a given enactment constitutes a permissible regulation or a prohibited abrogation. *See Barrio*, 143 Ariz. at 106 (citing *Kilpatrick*, 105 Ariz. 413, and *Ruth v. Indus. Comm’n*, 107 Ariz. 572, 575 (1971)). Under this test, a restriction on a constitutionally protected right of action will only be sustained as a permissible regulation if “it leaves a claimant reasonable alternatives or choices which will enable him or her to bring the action.” *Francisco v. Affiliated Urologists Ltd.*, 553 P.3d 867, 876 ¶ 39 (Ariz. 2024) (quoting *Baker*, 231 Ariz. at 388 ¶ 34). A statute is constitutional only if it “does not deprive an injured claimant of the right to bring the action,” or “prevent the possibility of redress for injuries.” *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, 229 ¶ 34 (2007).³

In applying this test, the Court has drawn a line between statutes that eliminate a plaintiff’s path to recovery for his injury and those that simply make that path more difficult by regulating “the manner and time for bringing the action.” *See Barrio*,

³ In seeking review in this Court, Defendants did not engage with the reasonable election test, instead arguing that there can be no abrogation of the right of action for victims of ordinary negligence so long as the legislature has not abrogated the right of action for others. But the reasonable election test is how this Court analyzes whether a given enactment is a regulation or abrogation, and Defendants present no basis for adopting another test.

143 Ariz. at 106; *see also Kenyon v. Hammer*, 142 Ariz. 69, 83 (1984) (distinguishing between statutes that “affect the essence of the fundamental right to bring a lawsuit” and those that “merely regulate what is done with the action after it is brought and prescribe the procedure to be followed before trial and the admission of evidence at trial”). This distinction is reflected in this Court’s decisions rejecting anti-abrogation clause challenges to A.R.S. § 12-2604, which limits who can serve as qualified experts in medical malpractice actions. *See Francisco*, 553 P.3d at 877 ¶¶ 41–42; *Baker*, 231 Ariz. at 387–88 ¶¶ 34–37. While that statute “might deny a plaintiff his expert of choice,” it leaves a plaintiff with reasonable alternatives—i.e., experts that *do* meet the statutory criteria. *Baker*, 231 Ariz. at 388 ¶ 35. Thus, while the statute causes plaintiffs to “face greater difficulties” in litigating their claims, it does not “preclude plaintiffs from recovery in such actions.” *Id.* ¶ 37.

Similarly, in *State Farm*, the Court found that, though it made it more difficult for claimants to establish liability against some defendants, the elimination of joint and several liability in strict products liability cases did not violate the anti-abrogation clause because it did not “excuse any responsible party from liability,” *id.*, 217 Ariz. at 229 ¶ 36, and “the claimant remains entirely free to bring his claim against all responsible parties,” *id.* ¶ 34.

But where an enactment makes it impossible for a claimant to obtain recovery, or even unreasonably difficult to do so, this Court has found unconstitutional

abrogation—even if the statute leaves a right of recovery available to some *other* claimants. In *Hazine*, this Court held that limiting product liability actions to those commenced and prosecuted within twelve years from the date the product was first sold ran afoul of the anti-abrogation clause. 176 Ariz. at 342–43. While the statute at issue did not eliminate the right to recover in product liability for *all* plaintiffs, it abolished that right for a class of injured people—those who were injured more than twelve years after a product was first sold. *Id.* Moreover, the Court found that the possibility that the plaintiffs in that case could sue under theories of express warranty or negligence was irrelevant, as “strict products liability developed because other theories of recovery proved inadequate to protect injured users and consumers.” *Id.* at 343. As such, “a right to sue in negligence or express warranty is not a reasonable alternative to a products liability action.” *Id.*

More recently, in *Duncan*, the Court applied *Hazine* and found the legislature’s abolition of the right to bring an assault or battery action against a health care provider violated the anti-abrogation clause—even though harmed patients could still theoretically bring medical malpractice actions. 205 Ariz. at 313–14 ¶¶ 27–34. The Court held that a malpractice action was not a reasonable alternative for victims of battery for two reasons. First, a malpractice action “requires proof of elements not present in a common law action for battery,” which “dramatically transform[] the nature of the battery claim.” *Id.* By requiring a plaintiff to prove

additional elements “for an action to succeed,” the “battery as known at common law would no longer exist.” *Id.* at 313 ¶ 33 n. 2. Second, embracing the reasoning of a federal district court, the Court recognized that the tort of battery implicates different interests, and different injuries, from the tort of negligence. *Id.* ¶ 34 (quoting *Rubino v. De Freitas*, 638 F. Supp. 182, 185–86 (D. Ariz. 1986)). That the plaintiff might pursue a different theory of liability for the same act was thus irrelevant to the legislature’s abrogation of her right to recover for the injury that gave rise to her battery claim. *Id.*

2. A.R.S. § 12-516, unlike the statutes at issue in *State Farm*, *Francisco*, and *Baker*, does more than impose difficulties on plaintiffs who have been wronged in establishing their entitlement to recovery. Instead, like the statutes at issue in *Hazine* and *Duncan*, A.R.S. § 12-516 precludes recovery by plaintiffs who have suffered a specific harm—here, ordinary medical negligence. Unlike the statute at issue in *State Farm*, A.R.S. § 12-516 *does* “excuse [a] responsible party from liability”: any party who committed common law negligence but not gross or willful misconduct.

There is no choice or alternative that a plaintiff who is harmed by the ordinary negligence of a health care professional or institution during a pandemic can make that would allow them to proceed with their claim. This lack of any choice for the plaintiff thus distinguishes A.R.S. § 12-516 from the statute at issue in *Lindsay v. Cave Creek Outfitters, L.L.C.*, 207 Ariz. 487 (App. 2003), relied upon by Defendants

in seeking review, Pet. 7. There, the Court of Appeals held that the qualified immunity to equine owners provided by A.R.S. § 12-553 for ordinary negligence claims, but not for gross negligence claims, did not violate the anti-abrogation clause. But that holding was not based on the availability of gross negligence claim as an alternative to an ordinary negligence claim. 207 Ariz. at 493 ¶¶ 21–24. Rather, the court reasoned that the statute was permissible because it only “denies ordinary negligence claims to those who have elected to sign a release.” *Id.* at 493–94 ¶ 24. As to all other injured equine riders, “ordinary negligence is still available.” *Id.* Here, no such choice was presented to Mr. Roebuck.

Indeed, Defendants have not suggested that there is anything Mr. Roebuck could have done that would have allowed him to recover for the harm done to him. Rather, they argue that the elimination of claims for ordinary medical negligence is nonetheless permissible regulation because claims for gross negligence and wilful misconduct—which, as discussed above, were recognized as separate concepts at the time of the Constitution’s enactment—have not been precluded. But the fact that Mr. Roebuck could sue if something else had happened to him does not leave him with any alternative means of recovery—reasonable or otherwise—for the injury recognized at common-law that he *did* suffer.

Notably, this is not the first time the Court has considered whether a statute that eliminates the right to recover for ordinary negligence while preserving the right

to recover for gross negligence violates the anti-abrogation clause. In *Clouse ex rel. Clouse v. State*, 199 Ariz. 196 (2001), the Court considered an anti-abrogation clause challenge to the qualified immunity provided to public employees by A.R.S. § 12-820.02(A), which, like A.R.S. § 12-516, provides immunity from claims other than those for gross negligence and intentional harm. While the Court upheld the provision, it did not do so on the grounds that the law constituted a mere regulation of the right of action. Rather, the Court found that the anti-abrogation clause was inapplicable, as it was displaced by the specific authority conferred upon the Legislature by the Constitution's immunity clause, Art. IV, Part 2, section 18. 199 Ariz. at 199 ¶ 11. That clause, the Court held, "confers upon the legislature a power to control actions against the state that it *does not possess* with regard to actions against or between private parties," i.e., actions like this one. *Id.* at 203 ¶ 24 (emphasis added). As Justice Feldman noted in dissent, in reaching this conclusion, the *Clouse* court "implicitly recognize[d] [that] conferring immunity except for gross negligence or intentional conduct is a type of abrogation of the cause of action for negligence." That is just what A.R.S. § 12-516 does. But here, unlike in *Clouse*, Defendants do not assert any other Constitutional provision displaces the anti-abrogation clause.

The recognition that eliminating all claims except those for gross negligence and wilful misconduct abrogates the eliminated claims is consistent with this Court's

recognition in *Duncan* and *Hazine* that an enactment impermissibly abrogates a right of action even if some class of injured parties could recover via a claim that requires proof of additional elements and vindicates different interests.

While gross negligence is not “wholly separate from negligence,” *DeElena v. S. Pac. Co.*, 121 Ariz. 563, 566 (1979), a gross negligence plaintiff must establish something different than what is required for an ordinary negligence claim. An ordinary “negligence claim requires proof of four elements: ‘(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages.’” *Noriega*, 243 Ariz. at 326 ¶ 23 (quoting *Sanders v. Alger*, 242 Ariz. 246, 248 ¶ 7 (2017)). Gross negligence requires proof of these same four elements, but “additionally requires a showing of ‘[g]ross, willful, or wanton conduct.’” *Id.* (alteration in original) (quoting *Armenta v. City of Casa Grande*, 205 Ariz. 367, 372 ¶ 20 (App. 2003)).⁴ That additional element is satisfied if a plaintiff proves the “creation of an unreasonable risk of bodily harm to another (simple negligence) together with a high degree of probability that substantial harm will result (wantonness).” *DeElena*, 121 Ariz. at 566.

⁴ A claim for wilful misconduct requires a plaintiff to establish entirely different elements, including that the defendant’s act was “done knowingly and purposely with the direct object of injuring another,” and reflected “a wilful disregard of the life, limb or bodily safety of employees.” *McKee v. State*, 241 Ariz. 377, 382 ¶ 17 (App. 2016) (cleaned up).

As in *Duncan*, requiring an ordinary negligence plaintiff to establish this additional element “dramatically transforms the nature of” the right of action for ordinary negligence that existed in 1915, so that medical malpractice “as known at common law would no longer exist.” 205 Ariz. at 314 ¶ 33. The additional element matters not because it increases a plaintiff’s burden—but because it means relief is only available if something entirely different than ordinary negligence happened. The requisite “‘I-don’t-care-what-happens’ mental attitude” that defines gross negligence,” *Reese v. Bridgmon*, 340 P.2d 573, 576 (Or. 1959), differs in kind, not degree, from the “inadvertence or simple inattention” characteristic of an ordinary negligence claim, *In re William G.*, 192 Ariz. 208, 213 (App. 1997).

Actions for gross negligence and wilful misconduct target different ills than those for ordinary negligence. Their requirement of a particular state of mind is consonant with the fact that they serve broader societal interests than the personal interests at stake in an ordinary negligence—as such, wilful and wanton misconduct differs from ordinary negligence “in the social condemnation attached to it.” William L. Prosser, *Handbook of the Law on Torts* § 52 (1941). This distinction is reflected throughout Arizona law, which treats the harm of ordinary negligence as a personal one—and thus, for example, waivable by private contract—and the harm of gross negligence as a societal one—and thus not only *not* waivable, but subject to criminal penalties. *See Airfreight Exp. Ltd. v. Evergreen Air Ctr., Inc.*, 214 Ariz. 103, 111 ¶

22 (Ct. App. 2007) (recognizing invalidity of “contracts exempting parties from intentional or reckless tort liability”); A.R.S. § 13-105 (discussing criminal penalties for gross negligence). As in *Hazine*, a remedy that serves to vindicate such different rights from that protected by a fundamental right of action are not reasonable alternatives.

II. The invalidation of A.R.S. § 12-516 should be retroactive.

This Court applies a “presumption in favor of retroactive application” of its decisions in civil appeals. *Nunez*, 229 Ariz. at 123 ¶ 27. Nonetheless, in support of Defendants’ petition for review, amicus Arizona Hospital and Healthcare Association asserted that any invalidation of A.R.S. § 12-516 should be solely prospective based on “Arizona healthcare providers’ reliance interests” and the difficulties faced by healthcare providers during the COVID-19 pandemic. Ariz. Hosp. & Healthcare Ass’n Amicus Br. 14–16. This argument should be rejected out of hand as unsupported by the facts.

A.R.S. § 12-516 was not even introduced in the Legislature until January 2021 and was not signed by the Governor until April 2021. No healthcare provider could have reasonably relied upon the immunity provided by a statute not even introduced until January 2021 in providing care in the darkest days of the COVID-19 pandemic, such as the care at issue here, which was provided in April 2020. To the contrary, in seeking care during that time period, Mr. Roebuck and patients like him reasonably

relied on the longstanding protections provided to them via the right of action for ordinary negligence—protections that the Legislature has attempted to, retroactively and unconstitutionally, eliminate. The pandemic was undoubtedly difficult for Arizona’s health care providers. But, as this case shows, it was doubly difficult for patients, like Mr. Roebuck, who were victims of both the disease and, allegedly, of medical negligence. Given that the Arizona Constitution protects Mr. Roebuck’s right to recover, and not providers’ immunity, providers’ interest must yield to Mr. Roebuck’s fundamental right.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

September 30, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the Arizona Rules of Civil Appellate Procedure, Rule 14, I certify that the attached Supplemental Brief uses the proportionately spaced type of 14 points or more, is double-spaced using a Times New Roman font and contains 5,699 words.

DATED this 30th day of September, 2024.

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