

SUPREME COURT OF ARIZONA

ROBIN ROEBUCK

Plaintiff/ Appellant,

v.

MAYO CLINIC, et al.

Defendants/ Appellees.

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

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

Maricopa County
Superior Court
No. CV2021-090429

**SUPPLEMENTAL AMICUS CURIAE BRIEF OF THE STATE OF
ARIZONA IN SUPPORT OF DEFENDANTS/APPELLEES**

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INTRODUCTION

Section 12-516 extends qualified immunity to healthcare providers and institutions acting in good faith to provide care in connection with a public health pandemic. It states:

If the governor declares a state of emergency for a public health pandemic ... 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 question in this case is whether requiring plaintiffs to prove gross negligence instead of ordinary negligence in these circumstances violates the anti-abrogation clause, [Ariz. Const. art. 18, § 6](#). It does not, for three reasons.

First, the legislature can adjust the standard of care for medical malpractice claims without violating the anti-abrogation clause. The clause protects the right to recover for injury, and both gross negligence and ordinary negligence permit recovery for the same type of harm.

Second, this regulation is reasonable in light of the legislature’s competing constitutional interests in public health and safety. The law requires that even fundamental constitutional rights be balanced against the State’s interest in public health and safety, particularly in an emergency.

Third, even if the statute could be considered an abrogation of a fundamental right, it passes strict scrutiny. It serves a critical governmental interest and is narrowly tailored both in time and in substance to the emergencies it addresses.

ARGUMENT

I. **A.R.S. § 12-516 does not abrogate the right to recover for medical negligence.**

A. **The statute reasonably modifies the standard of care.**

Article 18, § 6 prevents the legislature from abrogating the right to sue to recover damages for injuries recognized at common law, including injuries caused by medical negligence. See *Francisco v. Affiliated Urologists Ltd.*, 553 P.3d 867, 876 ¶ 39 (Ariz. 2024). As this Court previously explained, “[o]ur anti-abrogation jurisprudence normally asks whether a statute unconstitutionally deprives a litigant of access to the courts.” *Nunez v. Pro. Transit Mgmt. of Tucson, Inc.*, 229 Ariz. 117, 123 ¶ 26 (2012). Importantly, however, “[t]he legislative authority of the state” remains “vested in the

legislature.” [Ariz. Const. art. 4, pt. 1, § 1\(1\)](#). Accordingly, “the legislature may modify the elements of common law causes of action, subject to constitutional constraints.” [Seisinger v. Siebel, 220 Ariz. 85, 93 ¶ 30 \(2009\)](#). For anti-abrogation clause purposes, that means the legislature remains free to “regulate common law tort actions as long as reasonable legal redress remains available for those claiming injury.” [Nunez, 229 Ariz. at 123 ¶ 26](#); *see also* [Duncan v. Scottsdale Med. Imaging, Ltd., 205 Ariz. 306, 313 ¶ 29 \(2003\)](#) (“Article 18, Section 6 precludes abrogation but not regulation.”).

The legislature’s power of regulation over tort claims extends to standards of care, burdens of proof, and evidentiary and procedural requirements. For example, the legislature may adopt a lower standard of care for defendants accused of negligence without violating the anti-abrogation clause. In *Nunez*, a plaintiff argued that the Court could not abandon the “common carrier rule,” which imposed a higher standard of care on common carriers, without violating article 18, § 6 because the rule had been part of Arizona common law at statehood. [229 Ariz. at 119 ¶ 9, 123 ¶ 24](#). The Court disagreed, observing that “[a]pplication of the traditional negligence standard of care to actions against common carriers ... does not ‘prevent the possibility of redress for injuries; the claimant remains entirely

free to bring his claim against all responsible parties.” *Id.* ¶ 25 (citation omitted).

Similarly, narrowing the circumstances in which a plaintiff can successfully recover does not abrogate a protected right under the anti-abrogation clause. In *Watts v. Medicis Pharmaceutical Corp.*, 239 Ariz. 19 (2016), this Court rejected the argument that the learned intermediary doctrine abrogated a plaintiff’s right to sue for strict products liability. It explained that the doctrine does not “insulate[] a manufacturer from liability,” but “provides a means for a manufacturer to fulfill its duty to warn the end user by properly warning the learned intermediary.” *Id.* at 26 ¶ 24, 27 ¶ 27; see also *id.* at 26 ¶ 24 (“A manufacturer that properly warns the learned intermediary fulfills its duty [and] the drug manufacturer in that circumstance has not breached its duty and therefore is not at fault.”). As such, it does not “prevent a plaintiff from asserting an action against the manufacturer *in appropriate circumstances*, such as when the full medical information and warnings are not given to the medical provider.” *Id.* at 27 ¶ 27 (emphasis added).

In the same vein, making it more difficult for a plaintiff to prove a claim does not automatically equate to an abrogation. In *Baker v. University*

Physicians Healthcare, 231 Ariz. 379 (2013), the plaintiff argued that a statute limiting the class of qualified experts in medical malpractice actions to persons in the same specialty as the defendant-physician violated the anti-abrogation clause. *Id.* at 387 ¶ 32. Again, this Court disagreed. It explained, “[a]lthough plaintiffs might face greater difficulties,” the statute “does not bar medical malpractice lawsuits or preclude plaintiffs from recovery in such actions.” *Id.* at 388 ¶ 37; accord *Francisco*, 553 P.3d at 876–77 ¶¶ 37–42 (rejecting anti-abrogation challenge to statutes establishing affidavit and expert qualification requirements for medical malpractice claims).

In this case, § 12-516 modifies the standard of care for healthcare providers administering treatment in connection with a public health emergency. Ordinarily, healthcare providers can be held liable for negligently inflicted injuries if the plaintiff shows they acted in a manner that a reasonable person would know creates an unreasonable risk of harm. See *Gipson v. Kasey*, 214 Ariz. 141, 143 ¶ 10 (2007). Under § 12-516, providers are liable for negligently inflicted injury only if they acted in a manner that a reasonable person would know creates an unreasonable risk of harm and “involves a high probability that substantial harm will result.” *Noriega v.*

Town of Miami, 243 Ariz. 320, 328 ¶ 35 (App. 2017) (quoting *Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 595 (App. 1991)).

Under this Court's jurisprudence, this adjustment to the duty of care passes constitutional muster. *Nunez* is instructive, as it approved an analogous change to the duty of care owed to the public by common carriers. Notwithstanding that the common law reflected a higher duty of care, the Court held that holding common carriers to a lower duty of care "does not 'prevent the possibility of redress for injuries; the claimant remains entirely free to bring his claim against all responsible parties.'" 229 Ariz. at 123 ¶ 25 (citation omitted); see also *Watts*, 239 Ariz. at 27 ¶ 27 (application of doctrine impacting duty owed by manufacturers did not violate anti-abrogation clause).

The same is true here. Section 12-516 imposes a lower duty of care on healthcare providers operating in a public health emergency, but it does not prevent the possibility of redress against them. Plaintiffs like Roebuck remain free to sue all responsible healthcare providers for negligently inflicted injury. *Nunez*, 229 Ariz. at 123 ¶ 25.

Roebuck nevertheless contends that the statute prevents him from suing responsible healthcare providers because he was not injured by gross

negligence or willful misconduct. Roebuck Suppl. Br. 15. But that confuses the merits of a particular claim with the existence of a right to sue to recover for negligent injury. Although some plaintiffs may not be able to succeed in showing that a healthcare provider fell below the standard of care in § 12-516, that “does not deprive an injured claimant of the right to bring the action.” *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, 229 ¶ 34 (2007). It simply requires plaintiffs to show that a healthcare provider failed to meet a lower standard of care. Cf. *Nunez*, 229 Ariz. at 123 ¶ 25 (“Today’s decision does not prevent a passenger from seeking damages caused by the negligence of a common carrier; we merely clarify [when] that the carrier, like others, departs from its duty....”); *Governale v. Lieberman*, 226 Ariz. 443, 449 ¶ 18 (App. 2011) (upholding against an anti-abrogation challenge a statute that “modifies the common law with respect to a single element of a medical malpractice claim: departure from the standard of care”).

Watts illustrates the difference. The plaintiff there argued that applying the learned intermediary doctrine would prevent her and others from recovering against some drug manufacturers and thus abrogate their right to sue for strict products liability. 239 Ariz. at 26–27 ¶¶ 24–27. The

Court rejected this argument, observing that the doctrine does not “prevent a plaintiff from asserting an action against the manufacturer *in appropriate circumstances.*” *Id.* at 27 ¶ 27 (emphasis added). So too, here. Section 12-516 does not prevent Roebuck and other plaintiffs like him from suing healthcare providers to recover for negligent injury *in appropriate circumstances.*

B. Negligence and gross negligence target the same injury.

As explained above, § 12-516 preserves a plaintiff’s right to sue to recover for negligent medical injury. Roebuck urges, however, that limiting recovery to instances of gross negligence abrogates the right to recover for the “separate concept[]” of ordinary medical negligence. Roebuck Suppl. Br. 15.

But the question under article 18, § 6 is not whether a law prevents a plaintiff from asserting every theory of liability that may support recovery for an injury. The anti-abrogation clause “does not limit itself to protecting specific “causes of action” but rather protects “merely the right to pursue a remedy.” *Torres v. JAI Dining Servs. (Phoenix), Inc.*, 536 P.3d 790, 796 ¶ 16 (Ariz. 2023) (citation omitted). As such, its analysis “hinges on the nature of the injury and the defendant” rather than any particular claim. *Id.* at 797 ¶ 25. Thus, the proper inquiry is whether, by adjusting the duty of care,

§ 12-516 prevents the possibility of recovery for invasion of a protected interest caused by medical negligence. See *Duncan*, 205 Ariz. at 313 ¶ 31. It does not.

The difference between ordinary and gross negligence is the “particular standard of conduct” required, not the harm suffered. *Gipson*, 214 Ariz. at 143 ¶ 10 (citation omitted). Put another way, the same act resulting in the same injury could be simple negligence or gross negligence; the difference is the level of unreasonableness of the defendant’s conduct in causing the injury. See *Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 535 ¶ 20 n.4 (2003) (explaining that “negligence suggests a failure to measure up to the conduct of a reasonable person,” while “[g]ross negligence generally signifies more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences” (cleaned up)). The difference lies not in the type of injury suffered, but instead in the manner in which the defendant deviated from its duty.

Roebuck does not dispute that § 12-516(A)’s gross negligence standard hinges on “differences between ‘the mental state of the person who did or omitted to do that which duty required,’” and not the type of injury experienced. See Roebuck Suppl. Br. 9 (quoting *Ex parte McNeil*, 63 So. 992,

993 (Ala. 1913)). The authorities upon which he depends also describe differences in mental states, not injury. See *Perkins v. Roberts*, 262 N.W. 305, 306 (Mich. 1935) (“A driver overcome by sleep is not guilty of wanton or willful misconduct unless it appears that he continued to drive in reckless disregard of premonitory symptoms.”); *Banks v. Braman*, 74 N.E. 594, 595 (1905) (similar).

But for purposes of analyzing whether the legislature has abrogated the right to sue for negligent injury, what matters is the harm suffered by the plaintiff, not the mental state of the defendant. See *Torres*, 536 P.3d at 796 ¶ 16, 797 ¶ 25. Because gross negligence and simple negligence both target the same harm, adopting a gross negligence duty of care does not prevent recovery for negligent injury.

Of course, when two theories of liability target different harms, they cannot be treated as alternatives. In *Duncan*, the Court explained that while the legislature can regulate tort actions, a regulation which “limits the theories of liability under which a plaintiff may sue is nonetheless an abrogation when the ‘alternative’ theory of recovery protects different interests.” 205 Ariz. at 313 ¶ 31. Accordingly, a statute that purported to bar claims for battery against licensed medical providers violated the anti-

abrogation clause, notwithstanding that patients could still sue for negligence. *Id.* at 314 ¶ 32 (“The battery theory sustains a patient’s right of self-determination; the negligence theory recognizes a physician’s obligation to provide reasonable disclosure” (quoting *Rubino v. De Fretias*, 638 F. Supp. 182, 186 (D. Ariz. 1986))). But unlike the difference between negligence and battery, the difference between simple and gross negligence isn’t so vast that it eliminates the right to recover for invasion of a particular interest.

Finally, Roebuck seeks to frame the issue as one of “reasonable election,” asserting that the statute does not give plaintiffs a choice between suing for gross negligence and simple negligence, nor is the former a reasonable alternative for the latter. *See* Roebuck Suppl. Br. 10, 14–18. But the “reasonable election” test is a poor fit for this (and many other) anti-abrogation cases. The test arises out of early anti-abrogation decisions in the worker’s compensation context. *See Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 106 (1984) (citing *Ruth v. Industrial Commission*, 107 Ariz. 572 (1971), *Moseley v. Lily Ice Cream Co.*, 38 Ariz. 417 (1931), and *Kilpatrick v. Superior Court*, 105 Ariz. 413 (1970), as the source of the “reasonable election” test). In those cases, the question was whether a statute providing employees with a choice of accepting a statutory payout

or pursuing a negligence suit violated article 18, § 6. *See id.* Framing the question as one of a reasonable “election” thus made sense. *See id.* at 106–07.

Implicitly recognizing that many cases do not fit an “election” framework, subsequent cases use broader language. *See, e.g., Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 18 (1986) (“We differentiate between abrogation and regulation by determining whether a purported legislative regulation leaves those claiming injury a reasonable possibility of obtaining legal redress.”), *disapproved of on other grounds by Torres*, 536 P.3d at 795 ¶ 15; *State Farm*, 217 Ariz. at 229 ¶ 32 (same); *Nunez*, 229 Ariz. at 123 ¶ 26 (“[T]he legislature may regulate common law tort actions as long as reasonable legal redress remains available for those claiming injury....”). Accordingly, in cases like this one where the law is not about an election of remedies, the appropriate inquiry is whether “a claimant is left ‘a reasonable possibility of obtaining legal redress.’” *Nunez*, 229 Ariz. at 122 ¶ 25 (citation omitted). Because § 12-516 does not deprive injured claimants from the right to bring an action for medical negligence against healthcare providers in appropriate circumstances, it is a permissible regulation and not an abrogation.

II. The legislature's police powers underscore that this regulation is reasonable and thus constitutional.

Because the court of appeals failed to consider that § 12-516 is an exercise of the legislature's constitutional interest in securing health and safety, its analysis was incomplete. *Cf. Large v. Superior Court*, 148 Ariz. 229, 235–36 (1986) (“We think that a complete due process analysis must include consideration of the competing state interest that encroaches on the individual liberty or property right.” (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905))).

“This court has long recognized ... that the legislature has a constitutional role and may regulate, so long as it does not abrogate.” *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 346 (1993) (Feldman, J., specially concurring), *disapproved of on other grounds by Torres*, 536 P.3d at 795 ¶ 15. Given the legislature's “constitutional role in tort law,” the implications for health and safety of striking down a legislative enactment under article 18, § 6 bear directly on the reasonableness of the regulation. *See Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 407–08 (1995) (declining to hold a statute unconstitutional where doing so would “exclude the legislature from any meaningful enactment ... dealing with tort actions” and thus interfere with

its constitutional role in tort law). Accordingly, the constitutional interests underlying § 12-516, and the consequences of holding that the anti-abrogation clause prevents its enactment, must be given due consideration as part of the “reasonable regulation” analysis.

A. The legislature’s interest in public health and safety justifies § 12-516’s regulation of tort liability.

Section 12-516 codified an existing Executive Order from Governor Ducey that ordered healthcare professionals and institutions immune from civil liability absent “gross negligence or reckless or willful misconduct.” [Executive Order 2020-27 \(Apr. 9, 2020\)](#).¹ One purpose of extending limited immunity to healthcare providers was to “maximize participation of medical providers and healthcare facilities in treating COVID-19 patients.” *Id.* The State indisputably has an interest in “increasing the availability of medical services,” [Kenyon v. Hammer](#), 142 Ariz. 69, 84 (1984), which is even more compelling in emergency situations like this one, *see Mincey v. Arizona*, 437 U.S. 385, 392–93 (1978) (“The need to protect or preserve life or avoid serious

¹See also [Executive Order 2020-63 \(Dec. 31, 2020\)](#) (extending existing order until March 31, 2021).

injury is justification for what would be otherwise illegal absent an exigency or emergency.”) (citation omitted).

Roebuck does not dispute the compelling interest in providing a limited form of immunity to healthcare providers and institutions during a pandemic to “maximize participation of medical providers and healthcare facilities in treating COVID-19 patients.” [Executive Order 2020-27](#). Instead, he argues that “gross negligence and willful misconduct target different ills than ... ordinary negligence” because ordinary negligence protects a “personal” interest and gross negligence “a societal one.” Roebuck Suppl. Br. 18. But the cited authorities do not recognize a distinction between “personal” and “societal” interests. Even if one existed, it would be irrelevant to the anti-abrogation clause, which protects the right to pursue a remedy for personally suffered harm, not generalized societal interest. *See Torres*, 536 P.3d at 796 ¶ 16.

Moreover, construing article 18, § 6 to prevent the legislature from temporarily limiting the liability of healthcare providers in the midst of contagious outbreak would undermine its constitutional police powers. *See State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 600 ¶ 47 (2017) (noting “broad police power, including the protection of life, liberty, and property”

(cleaned up)). “In our republic, states are the organic units of government and are invested with the police power—that is, the power to regulate private affairs for public health, safety, or welfare.” *Johnson Utils., L.L.C. v. Ariz. Corp. Comm’n*, 249 Ariz. 215, 234 95 (2020) (Bolick, J., concurring in part and dissenting in part) (citing, among others, *Jacobson*, 197 U.S. at 24–25). And under Arizona’s Constitution, “the police power is vested exclusively in the legislature.” *Id.* As in *Jimenez*, the Court should decline to strike down a statute as unconstitutional when doing so would hamstring the legislature’s constitutional role. “According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.” *Jacobson*, 197 U.S. at 25.

Notably, § 12-516 is indistinguishable in relevant part from many statutes that permit recovery for gross negligence but not simple negligence when undertaking behavior that the legislature has sought to incentivize for “the protection of the health and well-being of [the] people.” *Funk Jewelry Co. v. State ex rel. La Prade*, 46 Ariz. 348, 355 (1935); see, e.g., Ariz. Hosp. & Healthcare Ass’n Amicus Br. 8–11 (listing statutes that provide limited immunity to *inter alia*, students, health professionals, public officers

rendering emergency aid, safe haven providers, individuals rendering first aid to fallen persons, and people administering opioid antagonists). As with § 12-516, the limited-immunity device in those statutes preserves the right to recovery while incentivizing behavior that furthers the public good.

At bottom, “[t]he constitution gives the legislature plenary authority to develop the laws of this state, including tort law, subject only to constitutional constraints.” *Torres*, 536 P.3d at 795 ¶ 15. The legislature’s police power supports the enactment of limited restrictions on tort liability when necessary to public health, safety, or welfare.

B. Even fundamental constitutional rights are subject to reasonable restrictions.

Roebuck’s proffered reasonable-election analysis does not account for the legislature’s constitutional role in preserving public health, safety, and welfare. Instead, Roebuck argues in passing that because the right to bring a tort action is “fundamental,” the legislature can *never* infringe on that right. *See, e.g.*, Roebuck Suppl. Br. 1 (acknowledging the legislature’s “broad constitutional authority to act in response to emergencies” but suggesting that power must yield to other constitutional rights).

That's simply wrong. Numerous constitutional rights are subject to reasonable restriction, notwithstanding that they are stated in absolute terms. For example, the First Amendment provides that "Congress shall make no law ... abridging the freedom of speech," [U.S. Const. amend. 1](#), but certain infringements on the freedom of speech and expressive association are reviewed for compelling state interests and tailored means, *see, e.g., Roberts v. U.S. Jaycees*, [468 U.S. 609, 623 \(1984\)](#). Similarly, the Arizona Constitution provides a right to refuse medical treatment, but that "right may be limited by the state's interest in preserving life, safeguarding the integrity of the medical profession, preventing suicide, and protecting innocent third parties." *Rasmussen ex rel. Mitchell v. Fleming*, [154 Ariz. 207, 215-16 \(1987\)](#); *see also Maricopa Cnty. Health Dep't v. Harmon*, [156 Ariz. 161, 166 \(App. 1987\)](#) (excluding unvaccinated kids from public schools does not violate fundamental right to public education under Arizona Constitution).

Emergency is one of the better-recognized justifications for imposing a reasonable regulation on otherwise protected rights. *See Pouquette v. O'Brien*, [55 Ariz. 248, 255-56 \(1940\)](#) (discussing the legislature's prerogative to declare "[t]he existence of a public emergency justifying the suspension of the ordinary constitutional limitations"). And because § 12-516 is not

“beyond all question, a plain, palpable invasion of rights secured by fundamental law,” and has a real, substantial relation to “the protection of public health,” it is a valid exercise of the legislature’s police powers during a public health emergency. [Jacobson, 197 U.S. at 31.](#)

III. Section 12-516 meets strict scrutiny.

Finally, even if § 12-516 could be considered an abrogation of a fundamental right, it is nonetheless constitutional under strict scrutiny.

Section 12-516(A) furthers the state’s compelling interest “in making quality medical care available to the public.” [Kenyon, 142 Ariz. at 84.](#) The immunity granted was a narrow means of “maximiz[ing] participation of medical providers and healthcare facilities in treating COVID-19 patients to ensure that Arizonans have access to treatment when needed” during a time when “health professionals are concerned” that by providing care, they were “subjecting themselves to liability.” [Executive Order 2020-27.](#)

And the statute is narrowly tailored to that end. Its immunity provision is limited in scope, duration, and effect. First, it relates only to a “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.” [A.R.S. § 12-516\(A\).](#) Second, it

applies only to claims arising during the course of the state of emergency declared by governor. *Id.* § 12-516(E) (covering claims for conduct occurring “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”). When the emergency ends, so too does the immunity. And third, it preserves a plaintiff’s ability to recover damages for “wilful misconduct or gross negligence.” *Id.* § 12-516(A).

As Roebuck recognizes, the statute’s immunity extends to a limited “class of plaintiffs,” and the limited immunity provided is defined by its connection to the public health emergency. Roebuck Suppl. Br. 2. Although he criticizes the statute for applying retroactively, *see id.* at 4, he misunderstands that § 12-516 codified an existing executive order. Thus, the only conduct covered by the statute that occurred before its enactment is conduct already subject to a pre-existing executive order providing similar immunity. For all of these reasons, the statute is carefully calibrated to achieve a compelling interest during an emergency.

CONCLUSION

The Court should reverse the court of appeals and affirm the trial court’s judgment.

RESPECTFULLY SUBMITTED this 15th day of October, 2024.

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