

## COURT HOLDS ARIZONA'S COVID IMMUNITY STATUTE UNCONSTITUTIONAL

September 19, 2023 | Law Alerts, News



*Roebuck v. Mayo Clinic*

Arizona Court of Appeals  
September 19th, 2023  
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The Arizona Court of Appeals today held A.R.S. § 12-516, Arizona's COVID immunity statute, unconstitutional.

The COVID immunity statute directs that a health care professional or institution is not liable for treatment arising out illness related to a pandemic (i.e. COVID) unless the claimant proves by clear and convincing evidence that the professional or institution acted with "wilful misconduct or gross negligence." The Arizona Court of Appeals held that the statute violates the Arizona Constitution's anti-abrogation clause, article 18, section 6. That clause prohibits the legislature from abrogating a common law action for negligence. The clause protects claims that existed at the time the Arizona Constitution was adopted.

The court first noted that the anti-abrogation clause protects a medical negligence claim because such a claim has its origins in the common law. The court then noted that if the COVID immunity statute had done nothing more than raise the burden of proof for medical malpractice claimants from a "preponderance of the evidence" to "clear and convincing evidence," the statute would not have been unconstitutional because the legislature may regulate causes of action: for example, it may set burdens of proof and it may prescribe the evidentiary standard necessary for a claimant to prevail. But the COVID immunity statute, said the court, does more than that. It bars all claims for ordinary negligence arising out of the provision of COVID-related medical treatment.

The fact that the statute preserves claims for gross negligence is not simply "regulating" the ordinary cause of action. Regulation occurs when the legislature leaves the claimant with reasonable alternatives or choices with which to bring the action. This statute gives no alternative to a claimant who wants to bring an ordinary negligence claim. As the court stated, "Section 12-516 thus denies 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." As such, it violated the Arizona Constitution's anti-abrogation clause.

The court also rejected Mayo Clinic's argument that Roebuck's claim was barred by the federal PREP Act, an act that immunizes covered persons (health care providers) for injury relating to the administration of a COVID-19 "countermeasure." The diagnostic test at issue, said the court, did not fall within the federal act's definition of a countermeasure. The court therefore reversed summary judgment for Mayo Clinic and remanded the case for the claimant to pursue her claims. We expect Mayo Clinic to ask the Supreme Court to review the case.

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[Eileen GilBride](#) focuses her practice on representing clients in federal and state appellate matters and dispositive motions. She also counsels and assists trial lawyers in the substantive areas of their practices, from the answer stage through the post-trial motion stage. Eileen has handled over 500 appeals at every level of the state and federal courts, in Arizona and other states, which have resulted in more than 80 published decisions. Substantive areas of her appeals include constitutional, contracts, torts, insurance coverage and defense, employment, municipal and school defense, civil rights, prisoner cases, professional malpractice, Indian law, legislative, administrative, personal injury, wrongful death, divorce, child custody and support, property rights and trusts.

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