

## INTRODUCTION

The Association of American Physicians and Surgeons (the "AAPS") submits this amicus curiae brief to assist the Court in giving guidance on the relationship between Arizona's Medical Malpractice Act, A.R.S. §§ 12-561 to 12-594, and the Arizona Adult Protective Services Act, A.R.S. §§ 46-451 to 46-457 (the "elder abuse statute" <sup>1</sup>), and to urge the Court to declare that the elder abuse statute does not create a cause of action against a licensed health care provider arising out of medical negligence.

The AAPS, like the Arizona legislature and courts, has a vital interest in ensuring that the residents of Arizona are able to obtain quality health care at an affordable price. The AAPS recognizes the legislature's attempt to achieve those goals by enacting the Medical Malpractice Act to govern the trial procedures in medical malpractice cases and the remedies available to injured patients. Petitioners, however, by seeking to pursue a claim under the elder abuse statute in addition to their medical malpractice claim, threaten to destroy the legislature's careful balancing of the rights and limitations of litigants in medical malpractice actions such as this.

Petitioners are seeking to escape the procedural limitations in the Medical Malpractice Act and to recover the enhanced remedies available

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<sup>1</sup> The AAPS borrows that term from this Court's opinion in *Denton v. Am. Family Care Corp.*, 190 Ariz. 152, 153, 945 P.2d 1283, 1284 (1997).

under the elder abuse statute. But the ultimate result of permitting standard medical malpractice actions to be transformed into elder abuse cases could well be a return to the "crisis" days of the 1970s. The cost of medical malpractice insurance would rise as carriers defend medical malpractice cases transmuted into elder abuse cases, with the specter of punitive damages upon a simple showing of negligence and causation. Physicians, nurses, hospitals, and other health care providers could be driven from practice in Arizona or forced to go without coverage. And the people of Arizona will ultimately pay the price for a new cause of action in the reduction of the number of health care providers or in the inability to obtain compensation if injured by an uninsured health care provider.

### **STATEMENT OF THE ISSUE**

The AAPS questions whether the facts of this case raise the issue as stated at page 4 of the "Amended Petition for Review." Nevertheless, because the issue presented by petitioners is one of statewide importance and because the Court has granted review of that issue, the AAPS will focus its amicus brief on that single question:

Does the Adult Protective Services Act, A.R.S. § 46-455, et seq., create a cause of action for negligent medical care of a vulnerable adult or does a claimant have to show something in addition to medical malpractice to pursue a claim?

That question, however, must be answered in two parts. First, a standard medical malpractice action against a licensed health care provider is governed exclusively by the Medical Malpractice Act and cannot be trumped by the elder abuse statute. Thus, the first part of the question must be answered "no." Second, a standard medical malpractice action, for example, one alleging a single act of negligence in diagnosis or the failure to order a timely mammogram (as in this case), does not rise to the level of "abuse" or "neglect" within the meaning of the elder abuse statute. Thus, the second part of the question must be answered "yes."

## **ARGUMENT**

**I. The relationship between the Medical Malpractice Act and the elder abuse statute is a novel issue for Arizona appellate courts, but an issue that is arising with increasing frequency in the superior courts.**

Although enacted into law in 1988, the elder abuse statute has been construed only once by an Arizona appellate court, in *Denton v. Am. Family Care*, 190 Ariz. 152, 945 P.2d 1283 (1997). In *Denton*, a seventy-four year old woman suffered serious medical conditions and eventually died as a result of neglect and abusive treatment in a licensed adult care home. *Id.*, 190 Ariz. at 153, 945 P.2d at 1284. This Court held that, unlike in most civil actions, a personal representative (the surviving husband) of a victim of elder abuse may recover damages under the elder abuse statute for

the victim's pain and suffering, notwithstanding the death of the victim. *Id.*, 190 Ariz. at 154, 945 P.2d at 1285.

Neither *Denton* nor any other published appellate opinion has addressed the relationship between the Medical Malpractice Act and the elder abuse statute. But given the far greater remedies available under the elder abuse statute, *see* A.R.S. § 46-455(F), elder abuse claims may soon supplant medical malpractice claims altogether in the absence of clarification from this Court.

If trial courts permit plaintiffs in medical malpractice cases to also pursue elder abuse claims, the AAPS foresees the same type of problems arising as arose under Arizona's Racketeering Act <sup>2</sup> before that act's amendment in 1993. For a time in the 1980s and early 1990s, it seemed that every civil action involving an allegation of common law fraud also gave rise to an allegation of "scheme or artifice to defraud" and a claim of racketeering. *See* A.R.S. § 13-2301(D)(4)(t). The Arizona legislature was forced to amend the statutory scheme to clarify its intent that not every common law fraud action also constituted racketeering. *See* A.R.S. § 13-2314.04, added by Laws 1993, Ch. 257, § 6.

The Court's review in this matter will serve to clarify for the

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<sup>2</sup> A.R.S. §§ 13-2301 to 13-2318.

superior courts the relationship between the elder abuse statute and the Medical Malpractice Act. If, as the AAPS believes, the elder abuse statute does not apply in standard medical malpractice cases, then courts and attorneys should be advised of that holding to plead and try their cases appropriately. If the elder abuse statute does apply under the facts of this case, then the Arizona legislature should be given an opportunity to correct what the AAPS believes are irreconcilable conflicts created by the procedures and remedies available under the two acts.

**II. Under the clear language of the two acts, the elder abuse statute does not apply when the Medical Malpractice Act applies.**

The Medical Malpractice Act expressly provides that: "[n]o medical malpractice action shall be brought against a licensed health care provider except upon the grounds set forth in § 12-561." A.R.S. § 12-562(A). Those grounds are "negligence, misconduct, errors or omissions, or breach of contract." A.R.S. § 12-561(2). Under the clear language of the statute, those grounds are the sole, exclusive grounds for seeking damages from a licensed health care provider. A.R.S. § 12-561 does not address abuse, neglect, and exploitation by long-term care givers, guardians, conservators, and other persons attending to the daily needs of the incapacitated or vulnerable adult, as does the elder abuse statute.

At the beginning of this case, in holding that petitioners stated a

cause of action under both acts, Judge Jeffrey A. Hotham gave great weight to only certain language in A.R.S. § 46-455(M), which states in full:

A civil action authorized by this section is remedial and not punitive and does not limit and is not limited by any other civil remedy or criminal action or any other provision of law. Civil remedies provided under this title are supplemental and not mutually exclusive.

*Id.* (emphasis added). The plain meaning of the provision is that the elder abuse statute does not limit any other provision of law. Accordingly, the provision of the Medical Malpractice Act that makes that Act the exclusive grounds for pursuing a medical malpractice claim, *see* A.R.S. § 12-562, is not limited or supplemented by the elder abuse statute.

A.R.S. § 46-455(M) does not compel a finding that any particular complaint states a claim under the elder abuse statute. To the contrary, the provision states in plain language that it does not limit other provisions of the law. If a plaintiff is otherwise able to state a claim under the elder abuse statute, then the remedies available under that statute are not exclusive and are not limited by other civil remedies. On the other hand, if another statute provides the exclusive procedures and remedies for a particular type of claim, then the elder abuse statute does not limit the other statute's exclusivity.

The statutory schemes here are not in conflict and are easily harmonized. The Medical Malpractice Act governs the procedures and

remedies in medical malpractice actions against licensed health care providers. The elder abuse statute governs the procedures and remedies when incapacitated or vulnerable adults are endangered or injured by neglect, abuse, or exploitation by long-term care providers who attend to their daily needs. Claims under the statutes should not overlap.

**III. The Arizona legislature did not intend the elder abuse statute to disrupt its carefully crafted medical malpractice scheme.**

The AAPS believes that the legislature's intent can be discerned from the plain language of the statutes. *See Denton*, 190 Ariz. at 155, 945 P.2d at 1286 ("Our ultimate goal in statutory interpretation is to discern the intent of the legislature. To accomplish this, we look first to the statute's words.") (citation omitted). The Medical Malpractice Act governs those claims within its sphere and the elder abuse statute governs those claims within its sphere.

Nevertheless, if the Court deems it necessary to examine the secondary indicia of legislative intent, the result is the same: the Medical Malpractice Act provides the exclusive procedures and remedies for medical malpractice actions against licensed health care providers. There is nothing in the language of either act or in the legislative history to suggest that the Arizona legislature intended to disrupt and possibly usurp the carefully

crafted Medical Malpractice Act when, years later, it enacted the elder abuse statute to address a completely different problem.

Of the various indicia of legislative intent – the context of the statutes, the subject matter, the historical background, the effects and consequences, and the spirit and purposes of the laws -- *see, e.g., Martin v. Martin*, 156 Ariz. 452, 457, 752 P.2d 1038, 1043 (1988) -- probably none is more important to the issue raised in the amended petition for review than the effects and consequences of permitting the elder abuse statute to trump the Medical Malpractice Act.

As real parties in interest Beach have pointed out in their briefs in the various special actions in this case, the Arizona legislature enacted the Medical Malpractice Act in response to a crisis in medical malpractice insurance costs. *See Eastin v. Broomfield*, 116 Ariz. 576, 583, 570 P.2d 744, 751 (1977). The legislature, in effect, created a hybrid system to govern medical malpractice actions, somewhere between the workers' compensation system and pure tort law.

Among the limitations placed upon medical malpractice actions were a two-year statute of limitations (A.R.S. § 12-542(1)), an exclusive and limited number of grounds upon which medical malpractice actions can be based (A.R.S. § 12-561(2)), elimination of claims based upon assault and

battery (A.R.S. § 12-562(B)), permission to introduce collateral source evidence (A.R.S. § 12-565(A)), and a prohibition against an award of damages for pain and suffering after the victim's death (A.R.S. § 14-3110). In addition, except in rare circumstances, expert testimony is needed.

Each element of the Medical Malpractice Act was hammered out after long debate and deliberation and formed an integral part of the final Act. What emerged was a comprehensive and exclusive system that has served the residents of Arizona and the medical community in Arizona for more than a quarter century.

In contrast, in response to a newly perceived crisis that had nothing to do with licensed health care providers or medical malpractice, the Arizona legislature enacted the elder abuse statute to criminalize abuse of an incapacitated or vulnerable adult and to create a statutory civil cause of action for elder abuse. *Denton*, 190 Ariz. at 155, 945 P.2d at 1286. The elder abuse statute provides for remedies and procedures that vary significantly in every aspect listed above from those provided by the Medical Malpractice Act. *See* A.R.S. § 46-455.

Rather than the two-year statute of limitations for medical malpractice cases, the elder abuse statute provides a seven-year statute of limitations. *See* A.R.S. § 46-455(I). The elder abuse statute does not limit

the grounds upon which an elder abuse claim can be based, does not eliminate claims based upon assault and battery, and does not permit the introduction of collateral source evidence. Furthermore, unlike most civil actions, including medical malpractice actions, the elder abuse statute permits an award of damages for a victim's pain and suffering even after the victim's death. *See Denton*, 190 Ariz. at 154, 945 P.2d at 1285.

After a determination of liability, the court may order any person to divest himself or herself of any direct or indirect interest in any enterprise involved with providing care to an incapacitated or vulnerable adult. *See* A.R.S. § 46-455(F)(1). The court may order the dissolution or reorganization of any such enterprise and may order the payment of all costs and expenses of the investigation and prosecution of the conduct, both civil and criminal. *See* A.R.S. § 46-455(F)(3) and (5). The court may order the payment of costs and attorneys' fees, actual and consequential damages, and punitive damages. *See* A.R.S. § 46-455(F)(4). Finally, the standard of proof, even apparently for punitive damages, is the preponderance of the evidence. *See* A.R.S. § 46-455(J). In brief, the elder abuse statute would strip away all of the limitations in the Medical Malpractice Act.

The effects and consequences of construing the elder abuse statute to permit a claim in a medical malpractice action thus become readily

apparent. By permitting far greater remedies (both monetary and non-monetary) for a much longer period of time upon a lesser showing of proof, the elder abuse statute, if applied in actions governed by the Medical Malpractice Act, would destroy the legislature's carefully crafted balancing of rights and limitations in the Medical Malpractice Act.

As a practical matter, a trial in which the plaintiff is permitted to pursue a medical malpractice claim and an elder abuse claim against the same licensed health care provider would be difficult at best. How is a jury to be instructed that expert testimony is needed for the medical malpractice claim but that such expert testimony is not needed for the elder abuse claim, although based upon the same evidence? How is the jury to be instructed that they can consider collateral source evidence for determining damages for the medical malpractice claim but not for the elder abuse claim? How is the jury to be instructed that they may only award punitive damages upon a clear and convincing showing of an "evil hand" guided by an "evil mind" in the medical malpractice action but that a showing of "abuse" by a preponderance of the evidence may suffice for elder abuse?

The effects and consequences of permitting an elder abuse claim at the same time as a medical malpractice claim against a licensed health care provider are potentially so severe that it would require finding

that the legislature implicitly repealed the Medical Malpractice Act when it enacted the elder abuse statute. There is no basis for such a finding in the case law or the legislative history. The legislature intended that the Medical Malpractice Act provide the exclusive procedures, limitations, and remedies in medical malpractice actions against licensed health care providers.

**IV. A retroactive expansion of the elder abuse statute to medical malpractice claims would violate due process.**

Physicians have a constitutional due process right to prior notice of the clear legal standards applicable to their care. *See, e.g.,*

*Grayned v. City of Rockford*, 408 U.S. 104, 109-10 (1972):

First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that the laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

*Id.*, citing, among others, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972)(footnotes omitted).

The retroactive expansion of the elder abuse statute sought by petitioners here, with its draconian and criminal penalties, including punitive damages, would retroactively subject physicians to liability and prosecution

in violation of due process. Physicians have a right to clear, prior notice that the onerous penalties imposed by the elder abuse statute would apply to alleged malpractice concerning a single patient, if this Court so decides. Some physicians may elect not to undertake that risk, but the due process clause requires that they have clear, prior notice of laws affecting that informed choice.

Even applying the elder abuse statute prospectively would be a denial of due process. Applying the elder abuse statute as expansively as petitioners urge would criminalize a simple act of negligence. Furthermore, an elder abuse claim would subject physicians to punitive damages for that simple act of negligence, not under a "clear and convincing" evidence standard mandated by this Court and the Constitution, but under a mere preponderance of the evidence standard.

**V. To pursue an elder abuse claim, the plaintiff must show something more than a single act of simple negligence.**

Turning to the second part of the issue presented, Judge Rebecca A. Albrecht, using criminal parlance, characterized a medical malpractice action as a "lesser-included offense" of an elder abuse action.

It is clear from the language of the elder abuse statute that something more than "negligence" as the term is used in the medical malpractice/medical negligence [act] would be required.

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. . . In order to be entitled to go to the jury on elder abuse the plaintiff would have to show something in addition to medical malpractice.

(*See* minute entry filed October 26, 2001, copy attached to "Amended Appendices to Petition for Review" at Appendix 5, p. 3.)

For the reasons stated in the preceding sections of this brief, neither Judge Albrecht nor this Court need reach the second part of the issue presented if the Court determines that a plaintiff may not pursue an elder abuse cause of action in addition to a medical malpractice action against a licensed health care provider. In other words, if a licensed health care provider is sued for a negligent diagnosis or a negligent surgery, even one involving a vulnerable adult, then the action is one for medical malpractice, not elder abuse. Conversely, if a licensed health care provider is sued as the owner or operator of a nursing home for abuse or neglect, then the action is one for elder abuse, not for medical malpractice.

If the Court does reach that part of the issue presented, Judge Albrecht's ruling and the second part of petitioners' issue raise a larger, more general question about the application of the elder abuse statute, a question that is not necessarily a part of this case. That is, did the legislature intend a single act of simple negligence to ever constitute "abuse" or "neglect" within the meaning of the elder abuse statute? Although there appears to be little,

or no, legal authority or legislative history on that issue, the AAPS respectfully submits that the answer must be "no."

Petitioners allege that: "Under the Adult Protective Services Act, abuse may consist of a single act of negligence." *See* "Amended Petition for Review" at p. 10. They cite solely to A.R.S. § 46-451(A)(1)(b), which defines "abuse," in part, as "injury caused by negligent acts or omissions." *See* "Amended Petition for Review" at p. 8. Even standing alone, however, that definition addresses "acts" or "omissions" in the plural, indicating that a single act of negligence would not suffice to state a claim.

But more fundamentally, those few words cannot be read out of context, without reference to the act as a whole and the spirit and purpose of the act. *See, e.g., Gortarez v. Smitty's Super Valu, Inc.*, 140 Ariz. 97, 103, 680 P.2d 807, 813 (1984) ("we must construe a statute as a whole and give effect to all its provisions."); *Martin*, 156 Ariz. at 457, 752 P.2d at 1043 ("To find legislative intent we consider the context of the statute . . . and the spirit and purpose of the law.").

In the statute, "abuse" is also defined as "intentional infliction of physical harm," "unreasonable confinement," and "sexual abuse or sexual assault." *See* A.R.S. § 46-451(A)(1). Each of those definitions is far more in line with the common understanding that "abuse " means knowingly

harming another person physically, mentally, or emotionally. *See Denton*, 190 Ariz. at 155, 945 P.2d at 1286 ("The legislature clearly perceived elder abuse as a very serious problem," justifying legislative intervention by "criminaliz[ing] abuse of an incapacitated or vulnerable adult.").

The definition of "abuse" as including injury caused by negligent acts or omissions dovetails into the definition of "neglect," which means "a pattern of conduct without the person's informed consent resulting in deprivation of food, water, medication, medical services, shelter . . ." *See* A.R.S. § 46-451(A)(7) (emphasis added). A single act of negligence, whether by a medical professional or a non-medical layperson, does not constitute a "pattern of conduct." Nor does a single act of medical malpractice result in a deprivation of medical services.

The elder abuse statute was designed to protect incapacitated or vulnerable adults in nursing homes and long-term care facilities, not to criminalize every negligent action of a licensed health care provider. Under the broad and expansive definition of "vulnerable adult,"<sup>3</sup> any adult who seeks treatment from a doctor or a hospital and receives allegedly negligent care arguably could state a claim under the elder abuse statute.

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<sup>3</sup> "an individual who is eighteen years of age or older who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment." *See* A.R.S. § 46-451(A)(10).

Nothing in the language of the elder abuse statute or its legislative history suggests that the legislature intended to open the door to punitive damages claims against licensed health care providers for a single act of negligence in the care or treatment of their patients or to create a new cause of action to supersede medical malpractice actions.

### **CONCLUSION**

For the foregoing reasons, the AAPS respectfully urges the Court to declare that the elder abuse statute does not create a cause of action against a licensed health care provider for negligent medical care of a vulnerable adult. If the Court addresses the second part of the issue presented by petitioners, the AAPS respectfully urges the Court to declare that a claimant must show something more than medical malpractice or a single act of negligence to pursue a claim under the elder abuse statute.

DATED this \_\_\_\_ day of June, 2002.

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