

DUNCAN V. SCOTTSDALE MEDICAL IMAGING, LTD.: RESTORING A PATIENT’S RIGHT TO SUE FOR BATTERY

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The law protects the doctor-patient relationship for the purpose of furthering open communication, which is deemed essential for proper and effective medical treatment.¹ The law in most states provides an action in battery to recover damages when doctors lie to or mislead patients and injury results. However, Arizona’s Medical Malpractice Act² (“MMA”) precluded such actions, until the Arizona Supreme Court in *Duncan v. Scottsdale Medical Imaging, Ltd.* struck down the offending statutes as being inconsistent with the Arizona Constitution.³

I. FACTS

On June 19, 1998, before arriving at Scottsdale Memorial Hospital North for a magnetic resonance imaging (“MRI”) examination, Martha Duncan telephoned a nurse to discuss the procedure.⁴ She called Scottsdale Medical Imaging (“SMI”), the radiology group that would perform the procedure, to explain that due to a back condition, she would need a sedative during the MRI. She further explained that she was allergic to synthetic medications and could only receive morphine or Demerol.⁵ The nurse assured Duncan that SMI would comply with her request to administer one of those two drugs.⁶

After Duncan arrived for the procedure, she repeated her specific medical needs.⁷ When a nurse informed her she would receive fentanyl, a synthetic drug similar to morphine, Duncan explicitly refused the drug and *again* asked for only

1. Rules of evidence protect the relationship through the doctor-patient privilege. *See* ARIZ. REV. STAT. § 12-2235 (protecting doctor-patient communications in civil trials).

2. ARIZ. REV. STAT. §§ 12-561 to 12-594 (2003). Pertinent to this Case Note is Section 12-562(B) which provides that a medical malpractice action brought against a licensed health care provider shall not be based upon assault and battery. *Id.* § 12-562(B).

3. 70 P.3d 435 (Ariz. 2003).

4. *Id.* at 437.

5. *Id.*

6. *Id.*

7. *Id.*

Demerol or morphine.⁸ Duncan suggested that the nurse call her doctor to discuss the drugs or reschedule the MRI.⁹ The nurse then told Duncan that the medication had been switched to morphine.¹⁰ In reality, the drug had not been changed; the nurse administered a shot of fentanyl, causing Duncan to suffer severe complications.¹¹

II. PROCEDURAL POSTURE

Duncan originally asserted three claims against SMI: medical malpractice, lack of informed consent, and battery.¹² She moved to dismiss the first two claims shortly after the court set a trial date.¹³ SMI argued that Arizona's MMA required the remaining battery claim to advance as a medical malpractice action, which would require expert testimony.¹⁴ Duncan responded that the MMA was an unlawful abrogation in conflict with the anti-abrogation clause contained in the Arizona Constitution.¹⁵ The trial court disagreed, reasoning that the MMA merely regulated existing actions.¹⁶ The Arizona Court of Appeals denied Duncan's subsequent request for special action relief.¹⁷

Duncan then moved for summary judgment, asking the court to consider the battery claim as falling outside the scope of the MMA. SMI cross-claimed for summary judgment, arguing that the battery claim was a medical malpractice action and that summary judgment for SMI was proper because Duncan failed to provide expert testimony as to the issues of standard of care and causation as required by the MMA. The trial court dismissed Duncan's lawsuit, holding that expert testimony was essential to Duncan's claim.

On appeal, Duncan requested that the court consider the abrogation issue; however, the court never reached the constitutional question, instead finding a battery claim unsupported by the facts.¹⁸ The court reasoned that Duncan's consent to the injection precluded a battery claim, the trial court erred in finding a medical

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* The complications included severe headache, projectile vomiting, breathing difficulties, post-traumatic stress disorder, and vocal cord dysfunction. *Id.*

12. *Id.* at 438.

13. *Id.*

14. *Id.* Section 12-563 reads:

Both of the following shall be necessary elements of proof that injury resulted from the failure of a health care provider to follow the accepted standard of care: (1) The health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances. (2) Such failure was a proximate cause of the injury.

ARIZ. REV. STAT. § 12-563 (2003).

15. *Duncan*, 70 P.3d at 438. See *infra* note 36 and accompanying text.

16. *Id.*

17. *Id.*

18. *Id.*

malpractice claim where a battery action was intended, and Duncan's failure to put forth expert testimony barred any medical malpractice action.¹⁹

III. ARIZONA SUPREME COURT OPINION

A. Administration of the Fentanyl Shot Constituted a Battery

The Arizona Supreme Court began its analysis by examining battery in the medical arena. Generally, battery is defined as an intentional harmful or offensive contact with another person,²⁰ but in the realm of health care, a provider is liable in battery for medical procedures conducted outside the patient's consent.²¹ The court therefore concluded that the central issue was whether Duncan effectively gave her consent to the fentanyl injection.²²

Informed consent "concerns the duty of the physician to inform his patient of risks inherent in the surgery or treatment to which he has consented."²³ SMI argued that Duncan claimed a lack of informed consent. And, because Duncan failed to establish the standard of care to which SMI's conduct could be compared, the court should dismiss the suit for failure to state a claim.²⁴

The Arizona Supreme Court noted the confusion in the use of "informed consent" versus "informed consent battery" in Arizona case law.²⁵ Lower courts used the similar terms to describe factually distinct situations. One Arizona appellate court used "informed consent" to describe the issue of whether a procedure fell within the scope of the patient's consent.²⁶ Another held that "informed consent battery" was the correct cause of action when a physician failed to provide a patient sufficient information with which to make an informed decision.²⁷

The Arizona Supreme Court clarified the distinction by adopting the California Supreme Court's theory of battery regarding informed consent.²⁸ California's *Cobbs v. Grant* clearly delineated the two causes of action, reasoning that a battery theory should be applied to occurrences of medical procedures

19. *Id.*

20. *See* RESTATEMENT (SECOND) OF TORTS §§13, 18 (1965) ("An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.").

21. *See* Hales v. Pittman, 567 P.2d 493, 498 (Ariz. Ct. App. 1978) ("[A]nything greater or different than the procedure consented to becomes a battery.").

22. *Duncan*, 70 P.3d at 438.

23. *Mink v. Univ. of Chi.*, 460 F. Supp. 713, 716 (N.D. Ill. 1978).

24. *Duncan*, 70 P.3d at 438.

25. *Id.* at 439.

26. *Cathemer v. Hunter*, 558 P.2d 975 (Ariz. Ct. App. 1976) (stating that a right hip replacement was not substantially the same operation as the total hip replacement operation to which the patient consented).

27. *Hales v. Pittman*, 576 P.2d 493, 497 (Ariz. Ct. App. 1978).

28. *Duncan*, 70 P.3d at 439.

outside the patient's consent.²⁹ And, negligence applies when consent is given, but a low-probability complication arises of which the patient was not informed.³⁰

After accepting the California nomenclature and theories for negligence and battery in informed consent, the Arizona Supreme Court identified Duncan's claim as one for battery.³¹ The court found the fentanyl injection to be outside the scope of Duncan's consent because her consent was limited to an injection of Demerol or morphine.³² SMI had conceded this fact at oral arguments by admitting that the nurse had injected a drug into Duncan to which she had expressly not consented.³³

Although the court found the injection outside the scope of Duncan's consent and therefore actionable as battery, it also addressed the issue of whether SMI obtained Duncan's consent by misrepresentation.³⁴ The court of appeals had incorrectly reasoned that Duncan's consent was valid, even if obtained by misrepresentation. The Arizona Supreme Court reversed that result. Because Duncan only consented to the injection after the nurse informed her that she would receive morphine, and the nurse knew the injection to be fentanyl, Duncan's consent was obtained by misrepresentation.³⁵ Therefore, Duncan's battery claim was also lawful on this separate ground.

B. Restricting a Patient's Right to Sue for Battery Violates Arizona's Anti-Abrogation Clause

The anti-abrogation clause of the Arizona Constitution provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."³⁶ The clause protects plaintiffs' right to sue in actions recognized at common law, or those evolved from common law, from legislative and executive repeal or revocation.³⁷

Fifteen years before *Duncan*, in *Rubino v. De Fretias*, a federal district court considered whether the anti-abrogation clause eclipsed the MMA.³⁸ Like Duncan, Rubino attempted to bring a battery claim against her physician for medical treatment outside the scope of consent, but the trial judge denied the claim as properly one of negligence for lack of informed consent.³⁹ Using the same steps of analysis that the Arizona Supreme Court would later use in *Duncan*, the federal court reasoned that the anti-abrogation clause protects the plaintiff's right to sue

29. 505 P.2d 1, 8 (Cal. 1972).

30. *Id.*

31. *Duncan*, 70 P.3d at 439–40.

32. *Id.* at 440.

33. *Id.*

34. *Id.*

35. *Id.* at 441.

36. ARIZ. CONST. art. XVIII, § 6.

37. *See Dickey v. Flagstaff*, 66 P.3d 44, 46 (Ariz. 2003); *Cronin v. Sheldon*, 991 P.2d 231, 239 (Ariz. 1999).

38. 638 F. Supp. 182 (D. Ariz. 1986).

39. *Id.* at 183; *Duncan*, 70 P.3d at 438.

for the common law claim of battery.⁴⁰ Correspondingly, in *Duncan*, the Arizona Supreme Court held that the anti-abrogation clause protects Duncan's right to litigate for damages as a result of battery by a healthcare provider, contrary to the MMA.⁴¹

The court applied a two-step test in making this determination. First, the court asked if the claim originates from common law or exclusively from within the statute. Battery is a cause of action originating from common law,⁴² and, in the medical arena, provides a right to refuse medical treatment.⁴³ Therefore, if a patient does not give informed consent to a surgery, the patient has a common law action of battery against the doctor.⁴⁴

Second, the court asked if the statute simply regulates or completely abrogates recovery.⁴⁵ Distinguishing between regulation and abrogation requires employing a "reasonable election" test.⁴⁶ To be found constitutional, a statute 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."⁴⁷ The court held that the MMA, by its express language, effectively deprives a claimant of the ability to bring a battery claim against a healthcare provider.⁴⁸ The court further held that the statute requires additional elements for medical malpractice—namely duty, breach, and causation—not connected to prima facie battery. These additional elements essentially transform the nature of a battery claim.⁴⁹ The court also held that the MMA calls for the

40. Compare *Rubino*, 638 F. Supp. at 185–86, with *Duncan*, 70 P.3d at 435.

41. *Duncan*, 70 P.3d at 443.

42. See *Mills v. Rogers*, 457 U.S. 291, 295 n.4 (1982) (finding that trespass and battery are common law doctrines).

43. See *Vacco v. Quill*, 521 U.S. 793, 809 (1997).

44. *McGrady v. Wright*, 729 P.2d 338, 341 (Ariz. Ct. App. 1986).

45. See *Cronin v. Sheldon*, 991 P.2d 231, 238 (Ariz. 1999) (holding that the anti-abrogation clause protects rights originating from common law, including negligence, intentional torts, and strict liability, and is not implicated where the right originates exclusively from the statute).

46. See *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 692 P.2d 280, 285 (Ariz. 1984) (reasoning that the statute left no reasonable choice in requiring that an injured minor younger than seven sue by the age of ten); *Ruth v. Indus. Comm'n*, 490 P.3d 828, 831 (Ariz. 1971) (holding that the 1975 workers' compensation statute does not abrogate because a viable option to the worker existed); *Moseley v. Lily Ice Cream Co.*, 300 P. 958, 960 (Ariz. 1931) (finding the 1928 workers' compensation statute constitutional because it provided a reasonable election between statutory or common law remedy).

47. *Barrio*, 692 P.2d at 285.

48. *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 443 (Ariz. 2003).

49. The court noted in a footnote an apparent paradox in the MMA. Although Section 12-562(B) prohibits a patient from alleging battery against a health care provider, Section 12-561(2) appears to regulate battery as a cause of action against the health care provider. Whether the Arizona legislature intended to abrogate or to regulate battery, the court reasoned, the end result in either case is that the statutes are unconstitutional. A prohibition is in direct conflict with the Arizona Constitution's anti-abrogation clause, and a regulation unconstitutionally alters a claim of battery to include elements of duty, breach, and causation. This regulation would result in a "radical modification" of common law

retention of liability in successful negligence claims but provides no alternative for a battery claim. Accordingly, the court found that, notwithstanding the MMA's allowance of actions for liability under other theories, the statute unconstitutionally abrogated Duncan's right to bring a battery action against a healthcare provider.⁵⁰

IV. CONCLUSION

This decision is most important in finding § 12-562(B) of the Medical Malpractice Act unconstitutional as an abrogation of a patient's right to sue a healthcare provider for battery. The court found that battery sounds at common law and that the MMA completely abrogated, rather than regulated, the action. Additionally, *Duncan* clarified when battery and negligence are actionable in medical malpractice suits. Battery applies when a procedure is performed outside a patient's informed consent, while negligence applies to injuries resulting from inadequate or incomplete consent. *Duncan* restored a patient's common law right to sue for battery, while distinguishing battery from negligence in medical malpractice suits.

battery, such that the cause of action would essentially be abrogated, in violation of the Arizona Constitution. The "plausible conclusion" is that the MMA violates the anti-abrogation clause. *Id.* at 443.

50. *Id.*