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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF GILA

THE ESTATE OF BABY VILLEGAS, DECEASED, by and through MARIO VILLEGAS; MARIO VILLEGAS on his own behalf and on behalf of all survivors of BABY VILLEGAS, Deceased,

Plaintiffs,

v.

JACKRABBIT FAMILY MEDICINE, INC., an Arizona corporation d/b/a CAMELBACK FAMILY PLANNING; GABRIELLE J. GOODRICK, M.D., a single woman; JOHN DOES I-X; JANE DOES I-X; ABC PARTNERSHIPS I-X; and XYZ CORPORATIONS I-X,

Defendants.

CASE NO. CV202200007

MOTION FOR SUMMARY JUDGMENT

AND

MEMORANDUM OF LAW

(Oral Argument Requested)

(Assigned to the Hon. Bryan B. Chambers)

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MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment pursuant to Arizona Rule of Civil Procedure 56 on all counts in Plaintiffs' Second Amended Complaint. Defendants' motion is supported by the following Memorandum of Law, an accompanying Statement of Facts ("SOF"), and the declarations and materials attached thereto.

MEMORANDUM OF LAW

I. Summary Judgment Standard

"The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Summary judgment is appropriate where the facts supporting a claim have "so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (Ariz. 1990).

II. The Court Should Grant Summary Judgment to Defendants on Counts 1 and 3 of the Second Amended Complaint

A. The Act Violates Constitutional Protections for Free Speech

Counts 1 and 3 of the Second Amended Complaint assert that Plaintiffs are entitled to damages based on Defendants' alleged violations of A.R.S. § 36-2153 (the "Act"), which mandates that abortion providers deliver certain governmental messages about abortion to their patients. Second Am. Compl. ¶¶ 29–32, 36–41. Defendants are entitled to summary judgment on these counts because the Act violates their freedom of speech under the Arizona Constitution.

The Arizona Constitution provides that: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz. Const. art. 2, § 6. This guarantee "provides broader protections for free speech than the First Amendment." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281 ¶ 45, 448 P.3d 890, 902 (Ariz. 2019). Consequently, "a violation of First Amendment principles 'necessarily implies' a violation of . . . the Arizona Constitution." *Id.* at 282 ¶ 47(citation omitted). Both the Arizona Constitution and U.S. Constitution protect individuals from laws that compel speech because "an individual has autonomy over his or her speech and thus may not be forced to speak a message he or she does not wish to say." *Id.* at 283 ¶ 52. This is true regardless of whether the speech concerns matters of opinion or of fact. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.* 487 U.S. 781, 797–98 (1988).

The Act compels abortion providers to deliver certain information to their patients as a condition of providing care. *See* A.R.S. § 36-2153. This includes directing patients to a government website that promotes "crisis pregnancy centers,"[1] *see* A.R.S. § 36-2153(A)(2)(f), which are "pro-life (largely Christian belief-based) organizations" that "aim to discourage and prevent women from seeking abortions," *Nat'l Inst. of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2368 (2018) (citations omitted). Notably, the website is prohibited from providing information about "[a]ny agency that counsels, refers, performs, induces, prescribes, or provides any means for abortion." A.R.S. § 36-2153.01(A)(1).

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[1] Ariz. Dep't of Health Servs., *A Woman's Right to Know: Statewide Resources Arizona – 2014* (Aug. 2016), https://www.azdhs.gov/documents/prevention/womens-childrens-health/informed-consent/right-to-know-resources.pdf.

The First Amendment treats statutory informed consent requirements as "regulations of professional conduct that incidentally burden speech." *NIFLA*, 138 S. Ct. at 2373. Under federal law, such regulations are subject to the standard set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), which is a type of intermediate scrutiny. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); *see also Brush & Nib Studio*, 247 Ariz. at 292 ¶ 98. Under the *O'Brien standard*, a regulation is permissible only if it furthers an important or substantial governmental interest unrelated to the suppression of free expression, and the incidental burden on protected speech is no greater than necessary to protect that interest. *See O'Brien*, 391 U.S. at 377.

Here, because the Arizona Constitution is more protective of free speech than the First Amendment, *Brush & Nib Studio*, 247 Ariz. at 281 ¶ 45, the Court should apply strict scrutiny to the Act's compelled speech requirements. As the U.S. Supreme Court has recognized, "[t]hroughout history, governments have 'manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities." *NIFLA*, 138 S. Ct. at 2374. The Court's treatment of mandatory disclosures for abortion providers is inconsistent with the rest of its First Amendment jurisprudence, pursuant to which "laws that '[m]andat[e] speech that a speaker would not otherwise make necessarily alter[] the content of the speech' and are therefore considered 'content-based regulation[s] of speech" that are subject to strict scrutiny. *Brush & Nib Studio*, 247 Ariz. at 292 ¶ 100 (citations omitted).

But even if the Court were to apply the *O'Brien* test to the Act, the Act would fail because it imposes burdens on speech that are greater than necessary to serve the State's interest in promoting informed consent to abortion. *See O'Brien*, 391 U.S. at 377. Generally

applicable tort law already requires that medical practitioners obtain a patient's informed consent prior to providing an abortion. *See Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 310 ¶ 11, 70 P.3d 435, 439 (Ariz. 2003). The additional burdens imposed by the Act are duplicative and unnecessary. Further, the State could disseminate the information on its website about crisis pregnancy centers and other resource providers "without burdening a speaker with unwanted speech." *NIFLA*, 138 S. Ct. at 2376 (citation omitted) (holding, under intermediate scrutiny, that the plaintiffs were likely to succeed in their claim that a state law unconstitutionally compelled speech by requiring crisis pregnancy centers to disseminate prescribed government notices about public funding for abortion services). "Most obviously, it could inform the women itself with a public-information campaign." *Id.* Arizona "could even post the information on public property near [abortion clinics]." *Id.*

In sum, because the Act burdens more speech than necessary to serve the State's interest in promoting informed consent to abortion, it violates the First Amendment, and by extension, the Arizona Constitution. And because the Act is unconstitutional, Plaintiffs are entitled to summary judgment on Counts 1 and 3 of the Second Amended Complaint.

B. The Act Does Not Authorize Claims by the Estate

Defendants are additionally entitled to summary judgment on Count 3 because the Act does not contain an implied private right of action for aborted embryos. Count 3 of the Second Amended Complaint erroneously alleges that the Act implies a private right of action for aborted embryos and asserts a survival claim by the Estate based on this implied private right of action. Second Am. Compl. ¶ 41.

In determining whether a statute provides an implied private right of action, Arizona courts must "begin with the statutory language, which is 'the best and most reliable index of its meaning.'" *Burns v. City of Tucson*, 245 Ariz. 594, 596 ¶ 6, 432 P.3d 953, 955 (Ct. App. 2018) (citation omitted). "[W]hen the statute is plain and unambiguous, [courts] will not engage in any other method of statutory interpretation." *Id.* (citation omitted). Here, the Act's language is plain and unambiguous. *See* A.R.S. § 36-2153(K). It creates a private right of action for a specific set of individuals: "(1) A woman on whom an abortion has been performed without her informed consent as required by this section"; "(2) The father of the unborn child if the father was married to the mother at the time she received the abortion, unless the pregnancy resulted from the plaintiff's criminal conduct"; and "(3) A maternal grandparent of the unborn child if the mother was not at least eighteen years of age at the time of the abortion, unless the pregnancy resulted from the plaintiff's criminal conduct." *Id.* By delineating the list of authorized claimants with precision, the legislature plainly intended to limit the class of people who could file suit for a violation of the statute. For example, a putative father may only file suit if he was married to the abortion patient at the time of the abortion. *Id.* § (K)(2). Likewise, paternal grandparents are not authorized to file suit; only maternal grandparents are so authorized—and only if the abortion patient was a minor. *Id.* § (K)(3). Moreover, no other relatives of the abortion patient, such as siblings, aunts, or uncles, are authorized to file suit. *Id.* § (K).

Further, the Act was amended four times after its initial enactment in 2009, 2009 Ariz. Sess. Laws 1439-42: in 2012, 2012 Ariz. Sess. Laws 1356-60; 2015, 2015 Ariz. Sess. Laws 656-60; 2016, 2016 Ariz. Sess. Laws 2021-24; and 2021, 2021 Ariz. Sess. Laws 1734-36.

The legislature never expanded the list of people who could sue for a violation, even though it made stylistic changes to that section of the statute in 2016, 2016 Ariz. Sess. Laws 2024, and 2021, 2021 Ariz. Sess. Laws 1735.

Because the legislature expressed a clear intention to create a private right of action for a specific group of claimants, and that group does not include aborted embryos, the statute does not imply a private right of action for aborted embryos. *Cf. Burns*, 245 Ariz. at 597 ¶ 12 ("Given that § 11-967 both provides an administrative review process and suggests that the process is final, we conclude that the legislature contemplated no private right of action in enacting that statute.").

In addition, the interpretive canon *expression unius est exclusion alterius* weighs against finding an implied private right of action here. According to that canon, "the expression of one item implies the exclusion of others." *Hancock v. O'Neil*, 253 Ariz. 509, 513 ¶ 15, 515 P.3d 695, 699 (Ariz. 2022). The Arizona Supreme Court has held that the canon "counsels us to construe the legislature's exclusion of remedies as intentional." *Welch v. Cochise Cty. Bd. of Supervisors*, 251 Ariz. 519, 529 ¶ 36, 494 P.3d 580, 590 (Ariz. 2021); *accord McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 196 ¶ 13, 337 P.3d 557, 561 (Ct. App. 2014) ("[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."). Thus, the Court should construe the legislature's decision to create a private right of action for a specific set of individuals, rather than all individuals who might be harmed by a violation of the Act, as intentional. Because the Act does not contain an implied private right of action for aborted embryos, Defendants are entitled to summary judgment on Cout Three of the Second Amended Complaint.

C. The Act Limits Damages for Psychological, Emotional and Physical Injuries to Those Proximately Caused By The Statutory Violation

Alternatively, Defendants are entitled to summary judgement on Counts 1 and 3 insofar as they seek damages for injuries resulting from the abortion because Plaintiffs cannot establish that the alleged statutory violations proximately caused those injuries. It is for the legislature, not the courts, to make policy decisions about the scope of recoverable damages for a statutory cause of action. *In re Est. of Winn*, 225 Ariz. 275, 277 ¶ 12, 237 P.3d 628, 630 (Ct. App. 2010), *as corrected* (Sept. 9, 2010). Here, the legislature authorized statutory damages of "$5,000 or three times the cost of the abortion" for a violation of the Act, A.R.S. § 36-2153(L)(2), but limited compensatory damages to "injuries *resulting from the violation of this section.*" A.R.S. § 36-2153(L)(1) (emphasis added). Accordingly, Plaintiffs may not recover damages for psychological, emotional, and physical injuries unless they can prove that those injuries were proximately caused by a violation of the Act.

In Count 1, Plaintiff Mario Villegas seeks damages for psychological, emotional, and physical injuries "caused by the abortion." Second Am. Compl. ¶ 32. Likewise, in Count 3, the Embryo seeks damages "for all losses caused by the abortion." *Id.* ¶ 41. But it is undisputed that the Patient would have proceeded with the abortion even if the alleged violations of the Act had not occurred. SOF ¶21. As a result, Defendants' alleged failure to comply with the statute is not the proximate cause of the abortion or any injuries that stem

from the abortion.[2] To date, Plaintiffs have presented no evidence whatsoever of compensable injuries caused by alleged violations of the Act. Defendants are therefore entitled to summary judgment on Counts 1 and 3 insofar as Plaintiffs seek damages beyond the statutory amount authorized by A.R.S. § 36-2153(L)(2).

III. The Court Should Grant Summary Judgment to Defendants on Counts 2 and 4 of the Second Amended Complaint

A. Arizona's Wrongful Death Statute Does Not Permit Recovery for the Death of the Embryo

Counts 2 and 4 of the Second Amended Complaint seek damages for the alleged wrongful death of the Embryo. Second Am. Comp. ¶¶ 35, 44. Count 2 is a direct claim by Mr. Villegas under Arizona's wrongful death statute, *id.* ¶¶ 33-35, and Count 4 is a survival claim on behalf of the Estate, *id.* ¶¶ 42-44. Defendants are entitled to summary judgment on both claims because Arizona's wrongful death statute does not permit recovery for the death of a pre-viable embryo.

Although Arizona's wrongful death statute authorizes claims arising from the death of a stillborn, viable fetus, it does not authorize claims arising from the death of a pre-viable embryo. *See Summerfield v. Superior Ct. of Ariz.*, 144 Ariz. 467, 479, 698, P.2d 712, 724 (Ariz. 1985); *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 391 ¶ 21, 121 P.3d 1256, 1261 (Ct. App. 2005).[3] This is because the eventual live birth of a pre-viable embryo is far more speculative

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[2] An issue of fact remains as to whether the Patient's pregnancy resulted from criminal conduct by Mr. Villegas, which would bar him from *any* recovery under A.R.S. § 36-2153(k), but this issue is not before the Court today.

[3] In this context, viable means capable of surviving indefinitely outside the uterus. *See Summerfield*, 144 Ariz. at 477.

than the eventual live birth of a viable fetus. *See Jeter*, 211 Ariz. at 392 ¶ 24; *see also Summerfield*, 144 Ariz. at 477 ("[I]t is the ability of the fetus to sustain life independently of the mother's body that should determine when tort law should recognize it as a 'person' whose loss is compensable to the survivors."). Arizona's rule is consistent with the law in the vast majority of states. 4 Barry A. Lindahl, *Modern Tort Law: Liability and Litigation* § 30:10 (2d ed., May 2023 update) ("A majority of jurisdictions recognize a cause of action for the wrongful death of a stillborn, viable fetus, but not where the stillborn fetus is nonviable. Very few states allow recovery for an unviable fetus." (footnotes omitted)). Here, the Patient was eight weeks pregnant at the time of her abortion. It is undisputed that an eight-week embryo is not viable outside the uterus. SOF at ¶ 6. Accordingly, the abortion of the Embryo cannot give rise to a claim under Arizona's wrongful death statute.

In 2021, Arizona enacted a statute providing that:

> The laws of this state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges, and immunities available to other persons, citizens and residents of this state, subject only to the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court.

2021 Ariz. Sess. Laws 1722 (codified at A.R.S. § 1-219) (the "Interpretation Policy"). It is unclear what impact, if any, this statute has on the wrongful death statute, and a federal court has held it to be unconstitutionally vague. *Isaacson v. Brnovich*, 610 F. Supp. 3d 1243, 1255–56 (D. Ariz. 2022). This Court need not wrestle with the meaning or constitutionality of the Interpretation Policy, however, because it was not in effect at the time of the Patient's abortion, and it cannot be applied retroactively. It is well settled that, under Arizona law, "[s]tatutes must contain an express statement of retroactive intent before retroactive

application may occur," unless they are "merely procedural" or do not impact "vested" rights. *Aranda v. Indus. Comm'n of Ariz.*, 198 Ariz. 467, 470–71 ¶ 12–16, 11 P.2d 1006, 1009–10 (Ariz. 2000); *see also* A.R.S. § 1-244 ("No statute is retroactive unless expressly declared therein.").

Here, the Interpretation Policy does not contain an express statement of retroactive intent. *See* A.R.S. § 1-219. Further, it defines substantive rights; it is not merely procedural. *See Aranda*, 198 Ariz. at 470 ¶ 12 ("Substantive law 'creates, defines and regulates rights' while procedural law establishes only 'the method of enforcing such rights or obtaining redress.'" (citation omitted)). Moreover, at the time the Interpretation Policy was enacted, Defendants had a vested right to be free of liability from wrongful death claims based on the death of a pre-viable embryo. *See id.* at 472 ¶ 21 (explaining that rights are vested "when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest" (citation omitted)). Accordingly, the Interpretation Policy cannot be applied retroactively to the Patient's abortion.

In sum, at the time of the Patient's abortion, Arizona's wrongful death statute did not authorize claims arising from the death of a pre-viable embryo. Regardless of what impact, if any, the Interpretation Policy may have on the wrongful death statute going forward, it cannot be applied retroactively to expand the scope of the wrongful death statute. As a result, Defendants are entitled to summary judgment on Counts 2 and 4 of the Second Amended Complaint.

B. The Estate Has Not Alleged an Injury That is Compensable Under Arizona's Survival Statute

Defendants are entitled to summary judgment on Count 4 for an additional reason:

the Estate has not alleged an injury compensable under Arizona's survival statute.

"A claim under [Arizona's] survival statute and a claim under [Arizona's] wrongful death statute are separate and distinct notwithstanding they originate from the same wrongful act." *Barragan v. Superior Ct. of Pima Cty.*, 12 Ariz. App. 402, 405, 470 P.2d 722, 725 (Ct. App. 1970). "The former permits recovery for the wrong to the injured person and is confined to his personal loss while the latter is for the wrong to the beneficiaries, confined to their loss because of the death." "The latter begins where the former ends . . . ."

The "survival statute provides for recovery of damages sustained by the deceased party from the time of accident *until his death*." *Id.* at 404 (emphasis added) . "Such damages include expenses incurred, necessitated by the injuries, in the nature of hospital and medical expenses." *Id.* Arizona's survival statute does not permit the deceased party's representative or estate to recover damages for lost future earnings. *Gandy v. United States*, 437 F. Supp. 2d 1085, 1089 (D. Ariz. 2006) (applying Arizona law). Prospective economic damages may only be recovered in an action under the wrongful death statute. *Id.* Further, the survival statute, on its face, prohibits recovery for pain and suffering. A.R.S. § 14-3110 ("[U]pon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed."); *see Harrington v. Flanders*, 2 Ariz. App. 265, 267, 407 P.2d 946, 948 (Ct. App. 1965).

Here, the Estate seeks to recover damages under the survival statute for the alleged wrongful death of the Embryo. Second Am. Compl. ¶ 44. But the embryo did not incur any medical expenses or other economic losses prior to its death. Accordingly, the Estate is not entitled to recover compensatory damages. *See Barragan*, 12 Ariz. App. at 404–05; *Gandy*, 437 F. Supp. 2d at 1089; A.R.S. § 14-3110. And it is well settled that a plaintiff may not recover

punitive damages in the absence of compensatory damages. *See, e.g., Wyatt v. Wehmueller*, 167 Ariz. 281, 285, 806 P.2d 870, 874 (Ariz. 1991) ("A plaintiff must be entitled to actual damages before being entitled to punitive damages.").

Because the Estate has not suffered any compensable damages in connection with its survival claim, Defendants are entitled to summary judgment on Count 4 of the Second Amended Complaint.

C. Plaintiffs' Medical Expert Must Be Disqualified Because He Does Not Specialize in Abortion Care

In addition to the reasons cited above, Defendants are entitled to summary judgment on Counts 2 and 4 because Plaintiffs' medical expert does not specialize in abortion care.

In a medical malpractice action under Arizona law, the plaintiff's medical expert must "specialize[] at the time of the occurrence that is the basis for the action in the same specialty or claimed specialty as" the defendant, A.R.S. § 12-2604(A)(1), and must be actively engaged in the practice of that specialty "[d]uring the year immediately preceding the occurrence giving rise to the lawsuit," A.R.S. § 12-2604(A)(2). A defendant may move for summary judgment based on a putative expert's failure to satisfy these statutory requirements. *Rasor v. Nw. Hosp., LLC*, 243 Ariz. 160, 161 ¶ 1, 403 P.3d 572, 573 (Ariz. 2017).

Generally, for purposes of these provisions, "specialty" means a practice area in which it is possible to obtain a certification. *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 386 ¶ 25, 296 P.3d 42, 49 (Ariz. 2013). "Whether the relevant 'specialty' is an area of general certification, like pediatrics, or subspecialty, like pediatric hematology-oncology, will depend on the circumstances of a particular case." *Id.* A putative medical expert may also be disqualified when they lack "'comparable training and experience' with the physician accused

of negligence." *Fadely v. Encompass Health Valley of Sun Rehab. Hosp.*, 253 Ariz. 515, 522 ¶ 33, 515 P.3d 701, 708 (Ct. App. 2022). In *Fadely*, for example, the plaintiff offered the testimony of an internal medicine specialist on "the standard of care to transfer patients from acute-care hospitals to rehabilitation facilities." *Id.* at ¶ 32. The court excluded the testimony on the ground that the witness was not a hospitalist like the defendant, even though "'hospitalist' is not a recognized subspecialty" of internal medicine. *Id.* at ¶ 33. It reasoned that the witness "does not work in a hospital, does not assess acute care patients for transfer to rehabilitation facilities, does not transition patients from acute care hospitals to rehabilitation hospitals, and rarely drafts discharge summaries." *Id.* at ¶ 34.

Here, Plaintiffs' medical expert, Dr. Eric S. Hazelrigg, must be disqualified because he does not specialize in—and indeed, does not even provide—abortion care. *See* A.R.S. § 12-2604(A); SOF at ¶ 17. Abortion care falls within the scope of Complex Family Planning, which is a recognized subspecialty of ob-gyn in which doctors may obtain certification. SOF at ¶ 15. Dr. Hazelrigg need not be certified in Complex Family Planning to qualify as a medical expert under A.R.S. § 12-2604(A), but he must have been actively engaged in the practice of that specialty "[d]uring the year immediately preceding the occurrence giving rise to the lawsuit," *id.* § 12-2604(A)(2), and he was not, SOF at ¶ 17.

Further, Dr. Hazelrigg lacks "comparable training and experience" with Dr. Goodrick, who specializes in providing abortion care. *Fadely*, 253 Ariz. at 522 ¶ 33; SOF at ¶ 13. Critically, Dr. Hazelrigg has never provided abortion care nor obtained any patient's informed consent to an abortion, and he was not actively providing or teaching abortion care in the year preceding the Patient's abortion. SOF at ¶ 17. Accordingly, he is not

qualified to testify about the standard of care for obtaining a patient's informed consent to an abortion. *Cf. Fadely*, 253 Ariz. at 708, ¶¶ 33–34.

Plaintiffs have already conceded, pursuant to A.R.S. § 12-2603(A), that "expert testimony is necessary to prove the healthcare professional's standard of care and liability" in connection with their wrongful death claims. SOF at ¶ 18. Because they have failed to proffer testimony from a qualified medical expert, Defendants are entitled to summary judgment on Counts 2 and 4 of the Second Amended Complaint.

D. Plaintiffs Failed to Proffer Required Expert Testimony on Causation

In addition to the reasons cited above, Defendants are also entitled to summary judgment on Counts 2 and 4 because Plaintiffs have failed to submit causation evidence on their wrongful death and survivorship claims, and such evidence is statutorily required.

A plaintiff cannot prevail on a claim of medical malpractice unless they prove that the defendant's failure to satisfy the standard of care "was a proximate cause of the injury" they allege. A.R.S. § 12-563(2). A plaintiff must provide expert testimony on causation except in rare cases where causation is "readily apparent." *Sampson v. Surgery Ctr. of Peoria, LLC*, 251 Ariz. 308, 311 ¶ 13, 491 P.3d 1115, 1118 (Ariz. 2021) (quoting *Rasor*, 243 Ariz. at 166 ¶ 32) . If a court determines that expert testimony on causation is required and the plaintiff's medical expert is not qualified to provide it, the court should grant summary judgment to the defendant. *Rasor*, 243 Ariz. at 167 ¶ 33. Even in instances of negligence per se, Arizona courts have demanded a plaintiff establish proximate cause. *Motors Ins. Corp. v. Rhoton*, 72 Ariz. 416, 421, 236 P.2d 739, 742 (Ariz. 1951) (finding failure to conform to the statute is not in and of itself an act of actionable negligence, "but could only be an act of

actionable negligence if in fact it proximately caused or contributed to the accident and resulting injuries for which damages are sought.").

In *Barrett v. Harris*, the plaintiffs argued that a doctor had acted negligently during the informed consent process by failing to advise them that their daughter, Emily, would be at risk for respiratory problems if born prematurely. 207 Ariz. 374, 378 ¶ 10, 86 P.3d 954, 958 (Ct. App. 2004). The court found that the failure to disclose that risk was not the proximate cause of the plaintiffs' injuries because Emily did not die from respiratory problems, but instead from a nurse's faulty administration of oxygen as a precaution after birth. *Id.* at 378 ¶ 13, 379 ¶ 18. As a result, it affirmed the lower court's grant of summary judgment to the defendants. *Id.* at 383 ¶ 32.

Here, Plaintiffs have offered no evidence that, had Defendants provided the information they allege was lacking as part of the informed consent process, it would have stopped the Patient from having an abortion. Indeed, their medical expert is neither an abortion provider nor a psychiatrist, SOF at ¶ 17, and is not qualified to offer such testimony. Since Plaintiffs have failed to offer statutorily required evidence that Defendants' alleged negligence during the informed consent process caused their injuries, Defendants are entitled to summary judgment on Counts 2 and 4. *See Sampson*, 251 Ariz. at 312-13 ¶ 21-22; *Rasor*, 243 Ariz. at 166-67 ¶¶ 31–33.

CONCLUSION

For the reasons set forth above, the Court should grant Defendants' motion for summary judgment.

Dated this 29th day of August, 2023.

SLUTES, SAKRISON & ROGERS, P.C.

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