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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.	**NO.: CV202200007** **PLAINTIFFS' REVISED RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and PLAINTIFFS' REVISED CROSS-MOTION FOR SUMMARY JUDGMENT** **(Assigned to the Hon. Bryan B. Chambers)**

Plaintiffs submit revised versions of their Response to Defendants' Motion for Summary Judgment, and Plaintiffs' Cross-Motion for Summary Judgment. These pleadings are supported by revised versions of Plaintiffs' Response to Defendants' Statement of Facts (PRDSOF) and Plaintiffs' Separate Statement of Facts (PSSOF).

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction. Are the unborn protected by the Arizona Constitution?

Facts. On July 26, 2018, Defendants aborted Mario Villegas's living, "pre-viable" child (not developed enough to be capable of extrauterine life). Without the abortion, the child probably would have delivered at term, have lived a normal life, and have had net lifetime earnings of at least $125,000. *PRDSOF ¶14; PSSOF ¶3.*

Defendants rushed Mario's wife ("M.S.V.") through a perfunctory, "assembly line" consent process, designed to increase profits more than satisfy the informed consent requirements of A.R.S. § 36-2153(A)(1)-(4). Defendants chose to proceed with the abortion, knowing they had not given M.S.V. the required abortion-related information, in the manner dictated by the Statute. *PSSOF ¶1*.

Law. From 1864 until 1973, a pregnant woman in Arizona could not choose an abortion unless her life was at risk; her unborn child's right to life trumped her wish not to bear it. After 1973, a woman could choose an abortion at will, at least during the first trimester, because of *Roe v Wade*, 410 U.S. 113 (1973); her wish not to bear her child trumped the child's right to life. The result was unscrupulous "abortion mill" clinics like Defendants', whose assembly line systems sold patients on having an abortion without informing them of the procedure's true risks. Roe allowed no state regulation of abortion services during the first trimester.

Then, in 1992, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) reined in these "profit centers" a little by allowing states to condition a woman's right to choose on her giving real informed consent, which required her doctor to give her certain mandated information in a specific mandated manner. A.R.S. § 36-2153, passed in 2009, was Arizona's version of this *Casey*-approved abortion regulation.

Defendants did not inform M.S.V. as required, so she could not give informed

consent, and the condition precedent was not met. *Casey* and the Statute effectively rendered *Roe* and its federal constitutional abortion jurisprudence, moot in this case.

An unborn's right to life. Without the constraint of *Roe* and its federal abortion jurisprudence, in this case, Arizona was free to enforce its own abortion policy, but only with civil damage remedies because its pre-*Roe* criminal ban on abortion was still enjoined and unenforceable. But at least, the aborted child's right to life in this case, trumped M.S.V.'s wish for an elective abortion. The issue of whether Mario's aborted child was a "person" with rights to life and to due process protection, is now governed by the Arizona Constitution.

This issue is ripe for decision, both in this case and more broadly in Arizona. Some of Defendants' claimed defenses would violate the aborted child's due process rights. Also, now pending before the Arizona Supreme Court is *Planned Parenthood v. Mayes,* CV-23-0005-PR, an abortion dispute that could turn on the outcome of the unborn's "personhood" under the Arizona Constitution.

Damage claims. Mario and the child's probate estate sued for statutory and common law relief:

1. Statutory. Mario seeks money damages for the death of his child, statutory damages of $5,000, attorney fees, and costs, all under A.R.S. § 36-2153(K). The Estate seeks the same statutory remedies via an implied private cause of action.
2. Common law. Mario seeks money damages for Defendants' medical battery on his child, causing her wrongful death, under A.R.S. § 12-611. The Estate seeks the same remedy plus punitive damages, pursuant to A.R.S. § 14-3110.

Prior rulings. The Court has already ruled on many issues of fact and law in the case, at least ten of which "Findings" are contained in the Court's 11/10/2022 Order that denied Defendants' February 9, 2022 Motion for Summary Judgment.

Summary judgment standard. Plaintiffs prefer to adopt the Court's statement of the standard for summary judgment, on page 2 of its 11/10/2022 Order.

Roadmap for Plaintiffs' Response and Cross-Motion.

First, Plaintiffs will urge the Court to grant summary judgment on all 10 of its prior Findings, including the legal conclusion that a patient cannot legally choose an abortion until her doctor satisfies all of the Statute's informed consent requirements.

Second, Plaintiffs will urge the Court to rule that the unborn are persons with rights to life and due process within the meaning of A.R.S. Const. Art. II, § 4.

Third, Plaintiffs will urge the Court to reject Defendants' four new claims:

1. The Statute violates their free-speech rights.
2. The Statute has no implied private cause of action.
3. The wrongful death statute does not cover the death of an embryo.
4. The Estate may not recover economic losses or punitive damages.

Fourth, Plaintiffs will show how the Court has already rejected Defendants' proximate cause and standard of care arguments.

I. <u>The Court's 10 Findings of fact and law</u>:

1. **The Statute is plain and unambiguous.** ("*A.R.S. § 36-2153(A) plainly and unambiguously declares. . . " Order*, p. 8).
2. **The Statute must be applied as written.** (. . . *"[even if] some people believe that it is unfair and unreasonable to apply the statute as written . . ." Order,* p. 8).
3. **The Statute defines informed consent for all Arizona abortions.** ("*A.R.S. § 36-2153 plainly and unambiguously defines what informed consent means in the context of an abortion*." Order, p. 9).
4. **Any patient consent for an abortion that does not satisfy all the requirements listed in A.R.S. § 36-2153(A)(1)-(4) is invalid.** (". . . *The plain and unambiguous meaning of the statute is that the statutorily required consent is only valid if it contains the elements listed by the statute*." Order, p. 8).
5. **Any abortion performed without valid consent is a violation of the Statute.** ("*The statute categorically prohibits abortion unless there has been 'voluntary and informed consent of the woman on whom the abortion is to be performed or induced*.'" Order, p. 8).

6. **M.S.V.'s consent was invalid.** (*First full paragraph,* Order, p. 7).
7. **The abortion violated the Statute.** (*First full paragraph,* Order, p. 7).
8. **A.R.S. § 36-2153(K)(2) entitles a father to sue for statutory damages.** (*The statute also specifically allows "[t]he father of the unborn child [to file a civil action to obtain appropriate relief for a violation] if the father was married to the mother at the time she received the abortion." Order, pp. 8-9).*
9. **The Statute does not require proof of proximate cause.** (". . . *it does not matter if the woman would have had an abortion anyway* . . ." Order, p. 8).
10. **The Statute's definition of informed consent applies to both statutory and common law tort litigation for wrongful abortion.** (". . . *which indicates the intention to apply the statute's definition of informed consent to all remedies whether they be statutory or in tort*." Order, p. 9).

These Findings establish that M.S.V.'s consent was invalid and that the abortion violated the Statute, as a matter of law. Plaintiffs urge the Court to grant them summary judgment on each finding, including the legal conclusion that M.S.V. could not legally choose an abortion because Defendants did not satisfy the Statute's informed consent mandate.

II. Unborn children are "persons" within the meaning of Article II, § 4 of the Arizona Constitution with rights to life and to due process of law.

A. The understanding of Arizona citizens in 1912 controls.

The issue is not how today's citizens view abortion after five decades of incessant abortion marketing, but how Arizona citizens in 1912 viewed it. The issue is whether those who drafted and ratified the State Constitution in 1912 understood that the unborn had rights to life and due process, both before birth and following birth.

The principles discussed in Clint Bolick, "Principles of State Constitutional Interpretation", 53 Ariz. St. LJ. 771 (2021) 771, and certain "Gunwall factors" outlined in *State v. Gunwall*, 720 P.2d 808 (Wash. 1986) are helpful to answer the personhood question presented.

Initially, Justice Bolick counsels that Arizona's organic law should be afforded

"primacy", because "*if we subordinate state constitutional protections to federal constitutional jurisprudence, we risk sacrificing liberties that were important to our state constitution's framers*." Bolick, at page 780. He also notes that "*[t]he Arizona Supreme Court has expressly rejected a lockstep approach [with the US Constitution] in construing provisions of the Arizona Constitution*." (Id. at page 782).

Automatically interpretating Arizona's Constitution exactly as *Roe* interpreted the US Constitution would likely miss important nuances that could be determinative, such as preexisting Arizona law banning abortions except to save the life of the mother.

B. Preexisting state law banning abortions would have informed Arizona citizens' views of the rights of the unborn in 1912, including their right to life.

By the time the Arizona Constitution was ratified in 1912, the State's abortion ban had been on the books for almost 50 years. The first version is found in §38 and §45 of the "Howell code" adopted in 1864, and its intent is essentially the same as the present day version, A.R.S. § 13-3603, et seq. The Howell code and later revised codes can be found at https://azmemory.azlibrary.gov.

Similar wording is found in all later versions of the Code: 1887 Code, §§454-455; 1901 Code, §§243-244; 1913 Code, §§273-274; 1928 Code, §4645, and so on. A person who performed an abortion, and a pregnant woman who solicited an abortion for herself, have always been guilty of a crime, punishable by imprisonment. Since 1901, it has been a crime even to advertise abortion care. 1901 Code, §288. Also since 1901, the criminal code has required a stay of execution of any female prisoner under a death sentence who is found to be pregnant, until she is no longer pregnant, at which time she could be executed. 1901 Code, §§1032-33. Finally, Arizona's criminal code has never allowed abortion except when necessary to save the life of the mother. The only way these statutes could have been viewed in 1912 is that they were

designed to protect the unborn from being intentionally killed.

The 1912 version of A.R.S. Const. Art. II, § 4 is the same as the current version: "*No person shall be deprived of life, liberty, or property without due process of law.*"

The Arizona citizens who voted to ratify the Constitution in 1912 would have interpreted the word "person" to include all those whose lives were already protected by existing criminal law, including the unborn.

First, Arizona citizens understood that it was murder to kill a **newborn** child:

> *If any woman shall endeavor, privately, either by herself or the procurement of others, to conceal the death of any issue of her body, male or female, which, if born alive would be a bastard, so that it may not come to light, whether it shall have been murdered or not; every such mother being convicted thereof shall suffer imprisonment in the county jail for a term not exceeding one year: Provided, however, that nothing herein contained shall be so construed as to prevent such mother from being indicted and punished for the murder of such bastard child. 1864 Howell Code, §38.*

Second, they knew it was a crime for anyone to kill or participate in killing an **unborn** child, including the pregnant mother. Third, they knew that a pregnant mother under a sentence of death could not be executed until her **unborn** child was delivered.

These early criminal statutes reflected the views of the legislators who passed them, who were all citizens themselves who probably voted to ratify the Constitution. Obviously, deterring criminal conduct by punishing the perpetrator after the fact, is one way due process is invoked to protect a life. Likewise, affording an accused a trial and requiring a jury to find him guilty of murder before executing him, is another. The ratifiers of the Arizona Constitution knew about the State's long-standing criminal abortion ban, and would have interpreted the new Constitution consistently with it.

C. The unborn's inevitable path to adulthood is part of this State's public abortion policy favoring the unborn.

It is a scientific reality that once conceived and implanted in her mother's uterus,

an unborn child will probably deliver at term, grow as a child, mature as a teenager, and live a normal life as an adult, if left to develop naturally. *DSOF ¶14; PSSOF ¶3.* Of course, some unborn are miscarried and die before birth, just like some children and adults die from injury or disease after birth. Every human being dies sooner or later. It isn't the reality of death that the law protects against, but intentional human acts that cause premature death, without legal justification, preventing what would have been, from ever becoming reality. Certainly, Arizona citizens in 1912 would have accepted the immorality of intentionally killing an unborn child, just as much as killing a newborn.

Mario's wrongfully aborted pre-viable child, now represented by her Estate, had better than a 90% probability of successfully delivering at term. She was not "potential life", but probable life, a genetically unique and distinct human being, entitled to due process protection before being born, as much as after being born. *DSOF ¶14.*

Shortly before *Roe*, the Arizona Court of Appeals in *Nelson v. Planned Parenthood Center of Tucson, Inc.*, 19 Ariz.App. 142, 148 (1973), recognized the legislature's acceptance of the unborn's inevitable path to adulthood before 1973:

> *"One cannot gainsay a legislative determination that an embryonic or fetal organism is 'life.' Once begun, the inevitable result is a human being, barring prior termination of the pregnancy."*

The *Nelson* court also explained Arizona's law and public policy toward the unborn when a mother's life is not at risk, at page 149:

> *We realize that pregnancy is a crisis in the life of a woman, bringing about a special interaction of mind, body, self and society. The legislature has balanced the interest of the mother against the interest of the fetus and has opted in favor of the fetus. We are unable to say that the legislature's decision is unreasonable. As for the defective fetus we ask, how 'defective' is 'defective'? Is the defect capable of being corrected? The argument in favor of aborting the defective fetus assumes that handicapped life is not worth living. We believe the legislature can legitimately decide that the primary consideration is the protection of life, even abnormal.*

Three weeks later, *Roe* was handed down, and another week or so after that, the *Nelson* opinion was vacated. This judicial snapshot of Arizona law and policy just before *Roe*, based as it was on a review of Arizona law and policy from before statehood to 1973, helps clarify the prevailing attitude of the State and its citizens toward the unborn in the early days of the State's existence.

The only way to change the meaning of a constitutional phrase is by amendment, approved by the citizens of the state. Certainly, *Roe* couldn't, nor can experts, nor the media, nor abortion providers, who are financially invested in preserving abortion. Even the personal attitudes of the judiciary about abortion today, cannot. This Court should not be persuaded by the cultural debate about abortion today, because the intent of the citizens of Arizona who ratified the Constitution in 1912 controls. There have been no amendments to change the original meaning of the due process clause as understood by the framers and citizens of Arizona in 1912.

Plaintiffs urge the Court to determine that the unborn are "persons" within the meaning of Arizona's due process clause, with rights to life and due process protection both before birth, and after.

III. The Statute's informed consent rules do not violate free-speech rights because they regulate conduct, and only incidentally burden speech.

Defendants claim, in Section II A. of their Motion, that A.R.S. § 36-2153 violates their constitutional free-speech rights because it compels them to deliver "certain governmental messages about abortion" to their patients "as a condition of providing care". They rely on the Arizona Constitution because it provides broader free-speech protections than the US Constitution.

A. Defendants' free-speech claim would eviscerate the duty of care they owe to the mother, father, and unborn child.

Defendants' free-speech claim in effect rejects the legislature's statutory informed

consent standard of care that was designed to protect the unborn. They don't want to say what the Statute says they must, perhaps because it takes too much time and reduces profits, so they claim a "right" to decide for themselves what abortion information is important. But Defendants' obvious profit motive conflicts with their duty to the unborn.

It is typical in the abortion debate to talk about one's rights but not one's duties. Rights and duties are inter-related and reciprocal. Every right one person claims imposes a corresponding duty on another person to protect that right. Similarly, every duty one person owes to another invests that other person with a right to enforce the duty.

In Arizona medicine, doctors owe patients a duty to inform them before performing any medical procedure, at least before *Roe*. Patients have a corresponding right to be fully informed, and to consent or not consent based on the disclosed risks and benefits. Each person gets to choose for herself whether or not to undergo life-threatening medical care, which is called a "patient's right of self-determination." *Duncan v. Scottsdale Medical Imaging, Ltd.,* 205 Ariz. 306, 314 (2003). Parents own the legal right to choose medical care for their minor children, including the unborn, who have no legal capacity to choose. That right imposes on parents a duty to choose what is best for the child. A physician owes both child and parents a duty of care which parents may enforce.

Of all the actors in the abortion drama, only the unborn owe no duties to anyone, but are owed duties of care by everyone else. However, an unborn child has no voice, except that of her parents, and in the case of her death, her probate estate. Who will advocate for the interest of the unborn, and when?

It is well-settled law in Arizona that a doctor who treats a pregnant woman has two patients, the mother and her unborn child, including pre-viable children, and owes a duty of care to both. First, as stated in *Summerfield v. Superior Court in and For Maricopa County*, 144 Ariz. 467, 470 (1985):

"By contrast, in the case at bench, the defendants had undertaken a direct duty of care to the fetus as well as to the mother and, plaintiffs contend, should be held liable to each for breach of the duty. We agree that the foreseeable risk of harm imposed such a dual duty upon the defendants."

Before *Roe,* Arizona law "*balanced the interest of the mother against the interest of the fetus" . . . and "opted in favor of the fetus*", unless the pregnancy threatened the mother's life. *Nelson*, supra, at 149. *Roe* eliminated abortion providers' duty to the unborn during the first trimester, by holding that maternal rights always trump first trimester fetal rights. But *Roe* also created an irreconcilable conflict of interest, because no doctor can honor a dual duty of care when a mother asks to have her child destroyed. *Casey* helped restore providers' duties to the unborn, by approving a statute that imposed an informed consent standard of care defining how a doctor must fulfill his duty to the unborn. Defendants' free-speech defense would revert Arizona abortion law back to where it was before *Casey*, leaving unscrupulous abortion providers with no oversight.

B. The Statute is a permissible regulation of assembly-line clinics that prioritize profit over patient, and perform unlawful abortions.

Analysis of any statute should begin with its purpose and goals, the "mischief" it is designed to fix. (See, 2021 Notre Dame Law Review Article, "The Mischief Rule", by Samuel L. Bray.) It is no secret that Arizona favors childbirth over abortion, but the real mischief the statute aims at is not abortion, per se, but an assembly-line, profit-driven business model that does not give patients enough unbiased, reliable information to make a rational choice between childbirth and abortion. Less time with each patient means more patients and more profits. *PSSOF* ¶1.

Defendants spent 5-10 minutes "consenting" M.S.V., just like they did with all their patients, but not like traditional obstetricians like Dr. Hazelrigg, who spends at least 20 minutes counseling each patient. *PSSOF,* ¶4. Dr. Goodrick agreed that her "consent" meetings were "pretty quick", but justified her practice by claiming that the state-required

consent meetings are not "medically necessary" anyway. PSSOF, ¶1 (2022-07-11 - Plaintiffs Response to Defendants SOF with Exhibits, Exhibit 1, Goodrick deposition, at p. 16, lines 4-8). The Court is familiar with Defendants' customs and practices, and has already found that M.S.V.'s consent was invalid because Defendants did not satisfy the requirements of A.R.S. § 36-2153(A)(1)-(4). (Finding #6).

Defendants' way of doing business illustrates why the Statute is both permissible and necessary in Arizona.

C. The Statute does not "unduly burden" a woman's right to choose.

Casey upheld the essential holding of *Roe v Wade*, 410 U.S. 113, 1973, that a woman has a protected right to choose, but established a new standard, the "undue burden" test, for judging whether a statute unlawfully hinders that choice. *Casey* upheld the Pennsylvania statute at issue, which is quite similar to Arizona's Statute, finding that it did not impose an undue burden on a woman's right to choose.

The *Casey* opinion was authored in 1992. The Arizona Legislature passed A.R.S. § 36-2153 in 2009. Then in 2011, the Arizona Court of Appeals upheld the Statute in *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262 (2011. *Planned Parenthood Ariz*. held that the Statute does not impose an undue burden on a woman's right to choose.

D. *Casey* rejected a federal free-speech challenge to the Pennsylvania law.

Defendants quote the correct general principle from *Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA),* 138 S. Ct. 2361, 2373 (2018):

> "*The First Amendment treats statutory informed consent requirements as 'regulations of professional conduct that incidentally burden speech'".*

But *NIFLA* also describes how *Casey* rejected a free-speech challenge to the Pennsylvania statute at issue, the one very similar to Arizona's Statute:

> *"In Planned Parenthood of Southeastern Pa. v. Casey, for example, this Court*

upheld a law requiring physicians to obtain informed consent before they could perform an abortion. . . . Pennsylvania law required physicians to inform their patients of "the nature of the procedure, the health risks of the abortion and childbirth, and the 'probable gestational age of the unborn child.'" . . . The law also required physicians to inform patients of the availability of printed materials from the State, which provided information about the child and various forms of assistance. Ibid."

"The joint opinion in Casey rejected a free-speech challenge to this informed-consent requirement. . . . It described the Pennsylvania law as "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion," which "for constitutional purposes, [was] no different from a requirement that a doctor give certain specific information about any medical procedure." Ibid. The joint opinion explained that the law regulated speech only "as part of the practice of medicine, subject to reasonable licensing and regulation by the State . . . ." (Internal citations omitted.)

Casey is controlling as to the federal constitutionality of the Arizona Statute.

E. Defendants have not developed a valid state free-speech claim.

Defendants rely on the Arizona Constitution because it provides broader free-speech protections than the US Constitution, but they do not show how this broader protection applies to them. *State v. Jean*, 243 Ariz. 331 (2018), was a criminal case in which the defendant sought to rely on Arizona's version of the Fourth Amendment. The Court stated, at page 342, ¶ 39:

"Even so, he has not addressed why or how our constitution should afford greater protection than the Fourth Amendment in this context. Merely referring to the Arizona Constitution without developing an argument is insufficient to preserve a claim that it offers greater protection than the Fourth Amendment.".

Defendants have committed the same sin.

First, where are the cases that support their free-speech claim in the context of this case by holding that a physician's conduct may not be regulated by statutory informed consent requirements like the Statute's? How is the Arizona statute different from the Pennsylvania law that *Casey* upheld?

Second, where is Defendants' compelling factual record supporting their claim such as, how does the statutorily mandated information make patients less informed? Or how is a patient less informed because the doctor who performs the abortion must also be the one who informs her? What are Defendants' personal beliefs about abortion, and how does complying with the Statute compromise those beliefs? Why is more than 5-10 minutes informing a patient too much time?

The following paragraph, lines 14-22 on page 2 of the Motion, is Defendants' only attempt to create a factual record to support their free-speech claim:

> *"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," 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).*

This paragraph is misleading because it suggests that Arizona law interferes with a patient's choice, and appears to describe Arizona abortion practices, when actually, it describes California abortion practices. It points to a government website and to crisis pregnancy centers, implying that all this is in Arizona. But the quoted language comes from a California report commissioned by the California legislature referring to a California website and to California crisis pregnancy centers. Most of the quote comes directly from *NIFLA*, at pp. 2368-69.

What happens in California is irrelevant to a challenge of an Arizona law.

Defendants also falsely imply that A.R.S. § 36-2153.01(A)(1) is relevant to their free-speech claim as applied in 2018, but this statute was not passed until 2021. It has no relevance to Defendants' free-speech argument.

Defendants have not met the high burden required to establish that a statute is unconstitutional, as stated in *Nelson*, supra, at pp. 144-45:

> *It is clear that in the State of Arizona there is a presumption in favor of the constitutionality of a legislative enactment. State v. Krug, 96 Ariz. 225, 393 P.2d 916 (1964), and that one assailing the validity of a statute has the burden of establishing that it infringes a constitutional guarantee or violates a constitutional principle. State v. Krug, supra. It is further law in this state that the court must be satisfied beyond a reasonable doubt that a statute is unconstitutional; that every intendment must be indulged in favor of the validity of a statute and that constitutional provisions shall not be given a construction which will nullify legislation, but must be liberally construed. Shaw v. State, 8 Ariz.App. 447, 447 P.2d 262 (1968).*

Plaintiffs urge the Court to grant summary judgment in their favor, holding that the Statute is constitutional in all respects, and to deny § II. A. of Defendants' Motion.

IV. An implied private cause of action is essential to protect pre-viable children from unlawful abortion.

In § II. B. of their Motion, Defendants claim there is no implied private cause of action to be found in the Statute. It is true that the Statute does not create an express private cause of action, and that it is silent about an implied private cause of action. But the legislature's silence "begins, rather than ends", the inquiry. *Napier v. Bertram,* 191 Ariz. 238, 240 ¶ 9 (1998). *"A statute's silence on whether a cause of action is conferred by the statute or should be recognized as a result of the statute is not dispositive. ibid.*

This Court should consider "*the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law" (Napier,* at page 241, ¶ 9) to determine whether the Estate may maintain a private action under A.R.S. § 36-2153.

Defendants argue that because the Statute delineates "*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."* It is true that the Statute's express private

right of action is limited to the unborn's married parents and maternal grandparents. Defendants also point to the fact that the legislature has never expanded this list of claimants, and to the interpretive canon *expression unius est exclusion alterius,* (the expression of one item implies the exclusion of others) to support their claim. (Motion, pp. 5-6).

However, the *Napier* court allowed the plaintiff taxi passenger to bring an implied private action, in spite of legislative inaction, and even though the statute provided criminal sanctions for its violation, because he was an excluded member of the protected class, and probably would not be fully protected any other way. The unborn child here is an excluded member (excluded from enforcing the Statute's remedies) of the protected class (the unborn).

The purpose of the statute in *Napier* was to ensure that taxi drivers and owners purchased higher than minimum UM insurance coverage for their passengers. As the court stated, "*Given the legislature's goals in enacting § 28-1233, the best and perhaps only effective way to attain those goals is to permit a passenger to bring a negligence action for the owner's failure to comply with the statutory mandate". Napier, supra,* at 242, ¶ 13.

How might an unborn child be precluded from benefiting from the Statute's protection? This case is a perfect example. First, M.S.V. did not bring a claim, no doubt because her interests are aligned with Defendants and not with her aborted child. That situation is likely to exist in many wrongful abortion cases.

Second, if the jury accepts Defendants' "criminal conduct" defense[1], Mario will be precluded from recovering damages and Defendants may have no financial exposure from violating the Statute. How will the Statute discourage providers from ignoring its

[1] See footnote #2 on page 8 of Defendants' Motion.

informed consent rules if there is no one to sue them? By allowing an implied private cause of action, the Estate can bring a claim on behalf of the aborted child under A.R.S. § 14-3110. An implied private cause of action by the Estate of a wrongfully aborted unborn child may be the only way the legislature can accomplish its purpose of ensuring that patients give real informed consent before the life of an innocent child is taken.

Third, an implied private cause of action is necessary to fully protect unborn children because the damages recoverable by a parent under A.R.S. § 36-2153 may not include the unborn child's future economic losses. With an implied private cause of action, the Estate would be entitled recover money damages for **all** losses the Estate sustained that resulted from the unlawful abortion, including the aborted child's net lifetime earnings, a statutory penalty of $5,000, reasonable attorney's fees, and costs.[2] These remedies cannot help to regulate abortion care in Arizona if there is no one to claim them.

The Estate urges the Court to grant summary judgment in its favor, holding that the Estate may bring an implied private action under the Statute, and to deny § II. B. of the Motion.

V. A.R.S. § 12-611 and A.R.S. § 14-3110 encompass claims for the death of a pre-viable child from unlawful abortion, after A.R.S. § 36-2153 was passed.

Defendants claim, in § III. A. of the Motion, that the word "person" in A.R.S. § 12-611 and A.R.S. § 14-3110, does not encompass "pre-viable" children. In general, these statutes provide remedies for wrongful death.

A.R.S. § 12-611. In 1985, *Summerfield v. Superior Court in and For Maricopa County*, 144 Ariz. 467 (1985), construed the word "person" in the wrongful death statute

[2] See *Sunland Dairy LLC v. Milky Way Dairy LLC,* 251 Ariz. 64 (2021) for a case that allows a corporate plaintiff to pursue statutory remedies as part of its private cause of action.

to include "a stillborn, viable fetus." In 2005, *Jeter v Mayo Clinic Arizona*, 211 Ariz. 386 (Ariz.App. 2005) construed the word to exclude frozen "preimplantation fertilized human eggs". Thus, *Summerfield* and *Jeter* set the outer boundaries of the law's protection for the unborn, as of 2005, to include only viable, unborn children. However, *Summerfield* acknowledged that the legislature could change the scope of the wrongful death statute, stating, at page 479:

> *"We hold, therefore, that absent a clear and definitive demonstration of legislative intent to the contrary, the word "person" in the wrongful death statutes (A.R.S. § 12–611 et seq.) encompasses a stillborn, viable fetus."*

This language implies that the definition of a "person" under the wrongful death statute could be expanded if the legislature showed a *"clear and definitive demonstration of legislative intent"* to do so. A.R.S. § 36-2153 demonstrates that intent. The Statute makes no distinction between pre-viable and viable unborn children, and its remedies for wrongful abortion apply to unborn children at all stages of gestation.

It begs reason to argue that the legislature intended to provide the remedies of A.R.S. § 36-2153 to pre-viable children, and yet deny them common law remedies, especially when the Statute says: "*In addition to other remedies available under the common or statutory law of this state . . .*" A.R.S. § 36-2153(K).

Also, any construction of the wrongful death statute that extends to viable unborn children but not pre-viable children, would violate the latter's due process and equal protection rights under the Arizona Constitution.

A.R.S. § 14-3110. The word "person" is used in both A.R.S. § 12-611 and A.R.S. §14-3110, and should mean the same thing in both. Both of these statutes allow claims against a tortfeasor, but only if the decedent herself could have sued, had she survived:

> "*One of the prerequisites for recovery under* [A.R.S. §§ 12-611] *is the ability of the injured party to maintain an action if death had not ensued."*
> *Summerfield* at p. 475.

"Every cause of action . . . shall survive the death of the person entitled thereto." A.R.S. § 14-3110.

If a pre-viable child's statutory beneficiaries can sue for her death, then her Estate should be able to sue, also, especially if all Arizona unborn are constitutional "persons".

Plaintiffs urge the Court to grant summary judgment in their favor, holding that A.R.S. § 12-611 and A.R.S. § 14-3110 extend their remedies to a wrongfully aborted pre-viable child, and denying § III. A. of Defendants' Motion.

VI. Future economic losses and punitive damages are recoverable under the survival statute, A.R.S. § 14-3110.

The Estate claims future economic losses of $125,000, the net lifetime earnings Mario's child would have had if she had lived, plus punitive damages, under its common law claim for medical battery. *PSSOF ¶3.*

Defendants argue in § III. B. of their Motion, that A.R.S. § 14-3110 does not allow recovery of compensatory damages for future economic losses, and that punitive damages are not recoverable without compensatory money damages. Under Defendants' theory, the Estate recovers nothing, even though A.R.S. § 14-3110 preserves "every cause of action" the decedent could have pursued if she had survived.

For their punitive damages defense, Defendants cite to *Wyatt v. Wehmueller*, 167 Ariz. 281, 285, which in turn cites to *Hubbard v. Superior Court,* 111 Ariz. 585, 586, (1975). So far, so good, except *Hubbard* was overruled by *Medasys Acquisition Corp. v SDMS, P.C.,* 203 Ariz. 420 (2002), on essentially the same issue Defendants raise now. *Medasys* construed the "actual damages" requirement of the traditional rule, as "*including the alteration of one's position to one's detriment.*" *Medasys,* at p. 422, ¶ 10. The Court explained its ruling, on page 423, ¶ 11:

> *"We thus reasoned on review that courts should be able to award the relief appropriate in each case "without distinction as to the nature of the relief*

demanded" and further directed that courts "shall give all the relief either in law or equity to which a party may show himself entitled."

The Court explained more in footnote # 3:

In seeming to require that monetary damages be proved, the court in Hubbard failed to give effect to the well-considered rationale in Starkovich for expanding the definition of "actual damages" to allow Arizona courts to provide more complete relief in equity cases. To the extent that Hubbard may be read to conflict with Starkovich, Hubbard is overruled.

Death is the ultimate "alteration of one's position", and in this case, Defendants intended to cause the child's death. This should qualify the Estate to ask for punitive damages, even if no compensatory damages are awarded. The Statute's purpose is to prevent the very conduct that caused the death of the child. That purpose will be frustrated if Defendants escape punitive damages, but advanced if they have to pay them.

As to their argument about future economic loss damages, Defendants quote from *Barragan v. Superior Ct of Pima Cty*, 12 Ariz. App. 402, 404 (Ct. App. 1970), which stated, in dicta, that the "*survival statute provides for recovery of damages sustained by the deceased party from the time of accident until his death*."

The *Barragan* statement is contrary to the plain language of the survival statute, which preserves all causes of action the decedent could have pursued if she had survived. *Quintero v. Rogers*, 221 Ariz. 536 (2009) held that punitive damage claims, potentially recoverable with the right facts, survive death because the survival statute does not expressly exclude them. The same should be true for past and future economic losses, which have always been part of any personal injury claim.

Finally, assuming the Court determines that the unborn are "persons" under the Arizona Constitution, any construction of A.R.S. § 14-3110 that limits the "amount of damages to be recovered for causing the death . . . of " an unborn would violate A.R.S. Const. Article II, § 31.

The Estate urges the Court to grant summary judgment in its favor, holding that future economic losses and punitive damages are recoverable under the survival statute, and to deny § III. B. of the Motion.

VII. The Findings require summary judgment against Defendants on their proximate cause and standard of care arguments.

A. The Court has already found that the Statute does not require proof of proximate cause for statutory liability.

Defendants argue, in § II. C. of the Motion, that Plaintiffs' statutory causes of action require proof of proximate cause, because:

> *" . . . it is undisputed that the Patient would have proceeded with the abortion even if the alleged violations of the Act had not occurred. . . . 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."* (Motion, pp. 7-8.)

The Court has already found that this fact is irrelevant, *(Finding #9);* therefore, proximate cause is not a requirement of the Statute. The legislature knows all about proximate cause, and how to include it in a statute if it wants to. For example, A.R.S. § 12-563(2) specifically lists "proximate cause" as an element of medical malpractice claims based in negligence.

B. The common law tort of medical battery does not require proof of the standard of care or proximate cause.

Defendants argue, in § III. C. and § III. D. of the Motion, that Plaintiffs' common law claims also require proof of the standard of care and of proximate cause. But, Plaintiffs' common law claim is for medical battery, not negligence. Proof of the standard of care and proximate cause is not required in medical battery cases.

Findings ## 3, 4, and 6 establish that M.S.V.'s consent was invalid. Absent Defendants' compliance with the Statute, M.S.V. lacked the legal capacity to consent. Her invalid consent was the same as no consent at all, and the abortion was a battery.

> *". . . The law is well established that a health care provider commits a common law battery on a patient if a medical procedure is performed without the patient's consent. . . ." Duncan v. Scottsdale Medical Imaging, Ltd.,* 205 Ariz. 306, 314 (2003).

A medical battery claim does not require proof of duty, breach or causation:

> *"Intentional torts, in contrast, do not require proof of duty, breach, or a causal connection between the breach and the injury. . . . As the name suggests, these torts are committed by persons acting with tortious "intent." . . .Acting with "intent" does not refer to the act itself. . . . It means that "the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it." . . . . Thus, as pertinent here, a battery claim requires proof that the defendant intended to cause harmful or offensive contact with the plaintiff. . . ." Ryan v. Napier,* 245 Ariz. 54, 58-59 (Ariz. 2018).

Obviously, when Defendants gave M.S.V. the abortion pills, they intended for her to ingest them, induce an abortion, and destroy her unborn child, a classic example of a medical battery inflicted on both M.S.V. and the unborn child.

Another reason that proof of the standard of care is not required is because the Statute mandates both the content of the information and the manner of delivering it, including when, how, where, and by whom, thereby establishing an informed consent standard of care binding on all Arizona abortion providers. (Finding # 10).

Defendants argue in § III. C. of their Motion that Plaintiffs' expert, Eric Hazelrigg, MD, must be disqualified because he did not limit his obstetrics practice to abortion care, and was not certified in "Complex Family Planning" in 2018. These alleged facts are irrelevant to any issue in the case because proof of the standard of care, whether expert or otherwise, is not necessary for Plaintiffs' common law claims. Dr. Hazelrigg will testify about various scientific matters, consistent with his Declaration. *DSOF, Exhibit A*.

Plaintiffs urge the Court to grant summary judgment in their favor, holding that the abortion was a medical battery; that proof of proximate cause and standard of care are not required for any of Plaintiffs' claims; that Dr. Hazelrigg is qualified to testify as an expert; and to deny §§ II. C., III. C., and III. D. of the Motion.

VIII. Conclusion.

Plaintiffs urge the Court to grant summary judgment in their favor:

1. On each of the 10 Findings.
2. That M.S.V. could not legally choose an abortion because Defendants did not satisfy the Statute's informed consent mandate.
3. That the unborn are "persons" within the meaning of Arizona's due process clause, with rights to life and due process protection both before birth, and after.
4. That the Statute is constitutionally sound in all respects.
5. That the Estate may pursue an implied private cause of action under the Statute.
6. That A.R.S. § 12-611 and A.R.S. § 14-3110 extend their remedies to a wrongfully aborted pre-viable child.
7. That future economic losses and punitive damages are recoverable under the survival statute.
8. That the abortion was a medical battery.
9. That proof of proximate cause is not required by the Statute.
10. That proof of proximate cause is not required for a medical battery.
11. That proof of standard of care is not required for a medical battery.
12. That Dr. Hazelrigg is qualified to testify as an expert.
13. That Defendants' Motion is denied in its entirety.

DATED October 16, 2023.

MARTINEAU LAW, PLLC

/s/ J. Stanley Martineau
J. Stanley Martineau
Attorney for Plaintiff

ORIGINAL of the foregoing e-filed
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