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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' REPLY** **(Assigned to the Hon. Bryan B. Chambers)**

Plaintiffs hereby submit their Reply *("Reply")* to Defendants' Response and Reply *("Response")* to Plaintiffs' Revised Cross-Motion *("Cross-Motion").*

I. Dr. Goodrick's statutory violation was dispensing abortion pills to a patient who had not consented.

Defendants seem a bit confused about what their statutory violation actually was.

The ordinary meaning of the phrase "violation of a law" is to do something a law prohibits, or to fail to do something a law commands. Normally, the law will impose a sanction for a violation. The word violation appears three times in the text, in subsections (K), (L)(1), and (M), which essentially refer to statutory sanctions.

A..R.S. § 36-2153 prohibits an abortion provider from dispensing abortion pills without the patient's valid consent, and says a patient consent is not valid unless the provider satisfies certain consent requirements listed in subsection (A). These requirements are a type of "condition precedent" that must be satisfied before the patient can legally consent and the doctor can perform an abortion.

In contrast, there is no violation and no sanction if a provider only fails to inform her patient as required by the Statute, but doesn't perform an abortion. That is, an abortion provider may tell a patient anything she wants about abortion, or nothing at all, without violating the Statute. The patient is free to opt for childbirth, or to seek an abortion from another provider if she chooses, but the first provider will not be sanctioned just because she didn't give her all the required information. But, if the provider intends to dispense the pills, she must satisfy subsection (A) first.

In short, failing to inform a patient without inducing an abortion is not a violation, but inducing an abortion without informing the patient is.

When Dr. Goodrick dispensed abortion pills to M.S.V. intending to induce an abortion, she "was familiar with the statutory requirements". *(Ds' SOF at 9).* She knew she hadn't met every consent requirement; she knew the Statute prohibited inducing an abortion before every requirement is met; and she knew abortion pills induce abortions. Her violation, which triggered her liability for statutory sanctions, was dispensing abortion pills to M.S.V.

M.S.V. did not consent to the abortion. M.S.V. could not legally consent, and

did not consent, because Defendants did not meet every statutory consent requirement before dispensing the pills. Her lack of legal capacity to consent was similar to a minor's lack of capacity to consent to engage in sexual intercourse, and a pregnant minor's lack of capacity to consent to an abortion unless one of her parents, or a judge, consents for her. (See A.R.S. § 36-2152 dealing with this parental consent requirement.)

M.S.V.'s signed consent forms were and are legally meaningless.

Defendants did not satisfy every consent requirement because Dr. Goodrick did not conduct the "consent visit" and there was no "referring physician".

Defendants claim that Dr. Holmes was a "referring physician", hoping to get around the requirement that the "consent visit" must be conducted by the same doctor who induces the abortion. *(Response, at 19.)* It is undisputed that Dr. Holmes conducted the "consent visit and that Dr. Goodrick dispensed the pills.

The Court has already found that Dr. Holmes was not a "referring physician" within the meaning of the Statute. The ordinary meaning of the term "referring physician" is that she is independent of the aborting physician, is not employed by the aborting physician, and is not governed by the aborting physician's business policies and practices. It is undisputed that Dr. Holmes was Defendants' employee, that she used their consent form, and that she followed their consent policies and practices.

The "prevailing professional norms" in the community, discussed in the *Response, at 19,* change nothing. The fact that Dr. Goodrick runs her clinic like other abortion providers doesn't mean she is right, but only that the others are wrong.

Defendants did not satisfy every consent requirement because they did not tell M.S.V. about the DHS website.

Defendants claim that this fact is disputed because "[p]laintiffs cite no conclusive evidence that Dr. Holmes failed to inform the Patient about the website; they can only cite an absence of documentation." *(Response, at 20.)* The "absence of documentation" is

exactly why summary judgment should be granted. Under Rule 56, A.R.C.P., it is Defendants' burden, not Plaintiffs', to produce enough evidence to show there is a fact issue on this point.

M.S.V. cannot waive the Statute's consent requirements or cure Defendants' statutory violation.

Defendants claim that their failure to satisfy subsection (A) did not harm Plaintiffs because M.S.V. would have had an abortion anyway". *(Response at 10).* In effect, Defendants and M.S.V. claim that M.S.V. can "waive" the Statute's consent requirements and cure Defendants' failure to inform her. That would eviscerate the Statute of effect and meaning, and eliminate its protection for the unborn, which is its main purpose.

There is nothing M.S.V. could do that would fulfill Defendants' duty under the Statute to satisfy the requirements of subsection (A) before inducing an abortion. Only Defendants could do that.

M.S.V.'s naïve misunderstanding of the Statute can be excused, but not Dr. Goodrick's knowing conduct. Further, despite M.S.V.'s statement that she "would have had an abortion anyway", it is not an established fact in this case that she actually would have had an abortion. A jury could find that she would have decided to keep the baby if Defendants had taken the Statute's requirements seriously.

More importantly, the Court has already found that M.S.V.'s statement (which Defendants have adopted to protect themselves) is irrelevant and will not relieve them from liability. In the end, the proximate cause of Plaintiffs' harm was not Defendants' failure to inform M.S.V., which caused no harm at all. Rather, it was the unlawfully dispensed abortion pills that caused the abortion and destroyed Mario's child.

But for the illegal delivery of the pills to M.S.V. and the intended, resulting abortion, Mario's unborn child would still be alive today, more probably than not.

The Statute is constitutionally sound in every respect.

Defendants claim the Statute violates their free speech rights, arguing it must pass strict, or at least intermediate, scrutiny. The problem with this starting premise is that it is just plain wrong. To Plaintiffs' knowledge, no court, after *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), has held that abortion consent statutes like Arizona's must pass a heightened constitutional scrutiny test. *Casey* rejected a similar free speech claim, and upheld a Pennsylvania abortion consent statute, using a rational basis analysis. *Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA),* 138 S. Ct. 2361, 2373 (2018) explicitly confirmed the validity of the *Casey* analysis.

Since *Casey* and *Becerra*, federal circuit courts have followed suit. As explained by *EMW Women's Surgical Center, P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019):

> *In NIFLA the Court clarified that no heightened First Amendment scrutiny should apply to informed-consent statutes like the abortion-informed-consent statute at issue in [Casey.] . . . Thus, even though an abortion-informed-consent law compels a doctor's disclosure of certain information, it should be upheld so long as the disclosure is truthful, non-misleading, and relevant to an abortion. (internal citations omitted).*

Defendants cite to a litany of cases, all of which are distinguishable because none involve abortion care. Instead, they involve: (1) creating wedding announcements; (2) soliciting charitable contributions; (3) burning a draft card; (4) providing support to foreign terrorist groups; (5) posting church signs announcing upcoming services; (6) publishing depictions of animal cruelty; (7) publishing content on cable vs tv networks; (8) selecting members to serve on a committee to oversee elections; (9) sale of pharmacy records for marketing purposes; and (10) charging non-union workers for part of union negotiators' fees.

Defendants just don't like the State's preference for childbirth, no doubt because it is less profitable, and they want free reign to sell their abortion services any way they

can, without concern for the unborn, and without limitation of any kind.

Findings 1-5 and 8-10 are appropriate conclusions of law and should be confirmed by summary judgment.

These findings are legal conclusions based on the Court's construction of the Statute. Confirming them now by summary judgment, will shorten the trial and help guide the parties as they prepare for trial.

The Legislature created the Statute with strict consent requirements to protect unborn children.

The Statute's consent requirements may seem harsh to some, but not when its purpose of protecting children is compared with how easy it is to satisfy. The Statute is designed to further Arizona's long-standing interest in protecting the unborn, as stated by *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2243 (2022):

> *The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." Roe's defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both Roe and Casey acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."*

Satisfying the Statute isn't hard. All the patient has to do is listen to her doctor talk for 20-30 minutes instead of 5-10 minutes, Defendants' normal practice. Surely the life of an innocent child is worth that much.

As a matter of policy, even if one unborn child's life is saved out of the thousands aborted in Arizona every year, the Statute will have been worth it. But this law will be rendered meaningless if Defendants persuade the Court to loosen the boundaries the Legislature has set for the practice of abortion care in this State.

If an abortion clinic is an "assembly line" affair driven by an ideology that says the worth of an unborn child is de minimis, the outcome is predictable, and profitable. But ultimately, the pregnant woman loses because of the deeply satisfying, maternal-

child bond she might have had if she had only known. *(Ds' SOF, in Dr. Isaacson's deposition, at page 29, lines 8-16).*

If the life of the unborn has value, then something must be done to protect her when she has no voice. Just like a newborn, the unborn cannot advocate for herself, so the law gives to her parents the right and obligation to advocate for her, subject to the fundamental rule that the child's "best interests" are paramount. For pre-viable unborn children after *Roe* and before *Dobbs,* the mother had the ultimate say on whether the child lives or dies.

Casey leveled the playing field a bit, trusting that with a balanced understanding of the pros and cons of abortion, compared to childbirth, a mother would make an informed choice that considered the interests of the unborn. Here, Defendants tilted the playing field in their profit-driven favor, against the interests of Mario's unborn child.

As a result, M.S.V. did not consent to have the abortion Dr. Goodrick induced.

But for the illegal delivery of the pills to M.S.V. and the intended, resultant abortion, Mario's unborn child would still be alive today, more probably than not.

A similar strict condition precedent is found in another statute designed to protect children.

An analogous condition precedent is found in A.R.S. § 8-106(J), which requires a putative father to file a paternity action if he wants to exercise his constitutional right to parent his infant child.

The Arizona Supreme Court recently held in *Cox v. Ponce in and for County of Maricopa*, 251 Ariz. 302 (2021), that equitable principles will not excuse a putative father's failure to timely file a paternity action. The *Cox* court explained:

> *[T]his interpretation of § 8-106(J) as a strict deadline is consistent with Arizona's strong public policy favoring finality in adoptions. This Court has acknowledged that "prompt finality that protects the child's interests in a stable, permanent placement—either with a biological parent or an adoptive parent—is paramount.*

. . . The law favors rapid placement so that the child can bond with those who will be the legal parents and not with those from whom the child may be taken. This sound policy benefits the child, the natural parents, the prospective adoptive parents, and society. (internal citations omitted).

A.R.S. § 36-2153 is a statute designed to protect unborn human children, and to ensure that a woman's right to choose is enhanced with adequate truthful information. Conditions precedent should be strictly applied if they involve decisions that affect the wellbeing of newborns, like in *Cox*, and the unborn, here.

II. Defendants' violation of the Statute establishes their liability under common law medical negligence and medical battery theories, as a matter of law.

Standard of care. The Court has already construed the Statute's definition of informed consent to be required for every Arizona abortion, and to apply to all lawsuits for wrongful abortion, whether the remedy is statutory or common law. *(2022-11-10 "Ruling", at 9.)* The Statute sets the standard of care every abortion provider must meet to avoid sanctions. Therefore, Defendants' violation of the Statute establishes both the applicable standard of care and their breach of it, as a matter of law. Expert opinion is not needed in this case to show that Defendants fell below the statutory standard of care.

Proximate cause. Dr. Goodrick's unlawful dispensing of abortion pills was the proximate cause of the death of Mario's child and Plaintiffs' harm, not Defendants' failure to inform M.S.V. standing alone. It is undisputed that the abortion pills induced the abortion that caused the child's death. Thus, causation has been established for both of Plaintiffs' common law tort claims.

Medical negligence. The Arizona Supreme Court described the elements of common law negligence in *Gipson v. Kasey*, 214 Ariz. 141 (2007):

"To establish a claim for negligence, a plaintiff must prove four elements:
(1) a duty requiring the defendant to conform to a certain standard of care;
(2) a breach by the defendant of that standard;
(3) a causal connection between the defendant's conduct and the resulting injury; and

(4) actual damages. . . .”

“The first element, whether a duty exists, is a matter of law for the court to decide. The other elements, including breach and causation, are factual issues usually decided by the jury. . . .”

Further, the violation of a statute that imposes a duty on a party to conform her conduct to protect a certain class of persons from harm, establishes both duty and breach, as held by the court in *Napier v. Bertram*, 191 Ariz. 238, 244 (1998):

> *We hold that a taxicab passenger may maintain an action in negligence against a person responsible for acquiring or ensuring the acquisition of insurance coverage as provided in § 28–1233, and that a violation of § 28–1233 is a breach of a statutory duty.*

Even though breach and causation are normally decided by the jury in a negligence case, Defendants’ violation of the Statute establishes duty, breach, and causation, as a matter of law. Plaintiffs will decide whether to present a negligence or battery claim to the jury at the appropriate time, unless the Court’s rulings on the pending motions requires something different.

Medical battery. The Supreme Court explained the elements of the intentional tort of medical battery, in *Ryan v. Napier*, 245 Ariz. 54 (2018):

> *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. . . .*
>
> *The fundamental distinction between negligence and an intentional tort is whether the consequences of the act or omission are unintentional or intentional. This assessment by the Connecticut Supreme Court captures our view:*
>
> > *It is true, of course, that intentional tortious conduct will ordinarily also involve one aspect of negligent conduct, namely, that it falls below the objective standard established by law for the protection of others against*

> *unreasonable risk of harm. That does not mean, however, as the plaintiff's argument suggests, that the same conduct can reasonably be determined to have been both intentionally and negligently tortious. The distinguishing factor between the two is what the negligent actor does not have in mind: either the desire to bring about the consequences that follow or the substantial certainty that they will occur. If he acted without either that desire or that certainty, he was negligent; if he acted with either that desire or that certainty, he acted intentionally. . . .*

Given what Dr. Goodrick knew when she unlawfully dispensed the pills that killed Mario' unborn child, Plaintiffs' medical battery claim probably has been established as a matter of law, leaving only the nature and amount of damages to be decided by the jury. If the Court grants partial summary judgment in Plaintiffs' favor on their medical battery claims, leaving only damages for trial, Plaintiffs will probably elect to present this tort to the jury. It is more consistent with a claim for punitive damages.

III. The status of the unborn as constitutional persons requires a remedy to right the wrong of an unlawful abortion.

Defendants offer no substantive arguments against Plaintiffs' contention that the word "person" in the Arizona Constitution includes the unborn. Cf. *Cross-Motion, at 5-9 with Response, at 22*. Instead they summarily dismiss the idea as irrelevant to the issues in this case. Plaintiffs will only point out where this argument is relevant. Whether A.R.S. § 12-611 and A.R.S. § 14-3110 encompass the pre-viable unborn is one of those places.

IV. Both A.R.S. § 12-611 and A.R.S. § 14-3110 encompass claims for wrongful abortion of a pre-viable unborn child.

These two statutes afford their remedies when the death of a "person" results from a "wrongful act". Both require that the decedent could have sued for her injuries, had she survived. Obviously, an abortion that violates the Statute is a "wrongful act" by definition. But does the word "person" encompass a pre-viable unborn child? The parties agree that the word should mean the same thing in both statutes. (*Response at 11.)*

In 1985, The Arizona Supreme Court in *Summerfield v. Superior Court in and For*

Maricopa County, 144 Ariz. 467 (1985), construed the word "person" in the wrongful death statute to include "a stillborn, viable fetus." The Statute was not enacted until 2009. Defendants' argument that A.R.S. § 12-611 applies to a viable fetus but not a pre-viable fetus makes no sense. Why would the Legislature intend to extend the similar remedies of A.R.S. § 36-2153 to pre-viable children, and yet deny them the remedies of these statutes, 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).

Any construction of either statute that extends their remedies to viable unborn children, but not to pre-viable children, would probably violate the latter's due process and equal protection rights under the Arizona Constitution. If the Court construes these two statutes to encompass pre-viable unborn children, there will be no need to decide whether the unborn are constitutional persons. Otherwise, the constitutional question will need to be explored because it could require a different result.

V. An implied private cause of action for the Estate is necessary to protect pre-viable children from unlawful abortion.

Defendants' *Response, at 7-8,* mostly repackages the arguments they made in their Motion for Summary Judgment. But a few observations are in order.

First, Defendants do not contest Plaintiffs' argument that the Statute is designed to protect the unborn at all stages of gestation.

Second, Defendants are correct that the Statute provides no relief for an unmarried father of an aborted unborn, or a married father who is barred from suing because the pregnancy resulted from his criminal act. These two statutory limitations highlight the need for the unborn to have a private cause of action of their own, because abortion providers who violate the Statute will suffer no consequences if the mother declines to sue, which is likely, and the father cannot.

Third, Defendants' argument that to allow the Estate to bring a claim would enable

Mario to evade the consequences of his criminal conduct since he is the personal representative, is specious. Certainly, **not allowing** the Estate to sue under the Statute might give Defendants a free pass to escape accountability for their statutory violation.

Given the facts in the record, though, Defendants' criminal conduct defense is not likely to be accepted by a jury. Further, Mario's alleged "criminal act" had nothing to do with the death of his unborn child, and should not bar him from pursuing his common law claims against Defendants.

Fourth, Defendants are correct that the Legislature has not amended the Statute to add the unborn as claimants. But how would the Legislature become aware of the widespread violation of the Statute by abortion clinics unless someone complains? And who is most likely to complain about what is happening, other than the fathers of the unborn? Probably not the mothers of the aborted unborn, because by definition, they want an abortion. And, by far, most fathers of aborted children can't do anything about it.

According to data published by the Center for Disease Control for the year 2020, 86.3% of all abortions nationwide involved unwed mothers. (See https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm for these data.) Plaintiffs ask the Court to take judicial notice of this published data pursuant to Arizona Rules of Evidence, Rule 201, Judicial Notice of Adjudicative Facts. Plaintiffs found no Arizona data on this precise issue, and no nationwide data for the year 2018. However, it is unlikely that these data would be significantly different in Arizona in 2018.

This means that only a small minority of aborted unborn children have someone with the legal ability, and the motivation, to advocate for them.

This case is the first time a father has successfully brought suit for an alleged wrongful abortion, and the first time a court has appointed a personal representative for the probate estate of an aborted unborn child. By allowing the aborted child to bring an

implied private cause of action, the Court can address a problem certainly not foreseen, and probably not recognized by the Legislature.

An implied private cause of action was authorized by the Arizona Supreme Court in *Napier v. Bertram*, 191 Ariz. 238 (1998). The court stated, quoting from Restatement (Second) of Torts § 874A:

> *When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.*

The Court further explained:

> *Therefore, in determining whether [the plaintiff] may maintain an action under [the statute], we consider "the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law." . . .*

Because the enforcement mechanisms of the statute at issue in *Napier* probably would not have been adequate to accomplish the Legislature's goals in enacting it, the Court allowed a member of the protected class to bring an implied private cause of action for a violation of the statute. The Court's language is perfectly analogous to this case:

> *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. Such tort liability will provide ample incentive to a taxi owner to acquire the mandatory coverage. In sum, we conclude that permitting a tort remedy against a common carrier for violating § 28–1233 is "consistent with the legislative provision, appropriate for promoting its policy and needed to assure its effectiveness.*

Further, such a cause of action would allow the Estate to claim the damages specifically authorized by the Statute, like the other claimants, including a fixed statutory penalty, attorney's fees, and costs, as suggested by *Sunland Dairy LLC v. Milky Way Dairy LLC*, 251 Ariz. 64, 68 (2021):

> *Moreover, even if the statutes were read as not expressly contemplating a private right of action, the statutes imply a private right of action. In determining whether a statute implies a private right of action, "we consider 'the context of the statutes, the language used, the subject matter, the effect and consequences, and the spirit and purpose of the law.' . . . The statutes in question are designed to protect the owner of livestock and hold a tortfeasor "liable to the owner." Their spirit and purpose is to allow punishment—both criminal, through felony designation, and civil, via treble damages— of anyone who unlawfully converts, kills, or sells another's livestock. We cannot read the remedies outlined in A.R.S. §§ 3-1304 and -1307 as limited to establishing criminal liability for the prohibited conduct. We affirm the superior court's holding that these statutes provide a private right of action.*

This approach is ideal because it affords an aborted unborn child the protection intended by the Legislature when it passed the Statute, in situations that perhaps the Legislature never contemplated.

Finally, if all other remedies are foreclosed as Defendants want, an interpretation of the Statute that denies the unborn child an implied private cause of action would deny them due process of law, in violation of their constitutional right to life under the Arizona Constitution. The law must provide a remedy of some kind for the child's wrongful death, if she is a constitutional person entitled to due process of law, and if the Legislature's purpose is truly to protect the unborn.

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

Defendants argue that the Estate cannot recover future economic losses or punitive damages under A.R.S. § 14-3110. Plaintiffs will not add anything about punitive damages to their *Cross-Motion*.

To support their argument about future economic losses, Defendants quote from *Gandy v. United States*, 437 F. Supp. 2d 1085, 1089 (D. Ariz. 2006), a federal district court opinion. The following part of the opinion shows why the case is distinguishable from this case:

> *". . . The Restatement does not allow the estate in a survival claim to recover decedent's loss of future earnings. Restatement (Second) of Torts § 926(a) (1979) (providing an exception that limits "damages for loss or impairment of earning capacity ... to harms suffered before the death [of injured person]"). The policy behind this limitation is to prevent overlapping recovery between wrongful death and survival statutes. Id. at cmt. (a). Loss of future income is recoverable under Arizona's wrongful death statute, A.R. S. § 12–613, therefore in order to prevent double recovery, as a policy matter, damages for loss of earnings in the survival matter must be limited to those incurred between Decedent's injury and her death.*

In *Gandy,* there was a real potential for a double recovery by wrongful death statutory beneficiaries and the decedent's probate estate. The decedent had sued before her death, claiming future lost earnings. When she died later, in part due to her injuries, other family members brought a wrongful death claim, and one was appointed personal representative of the decedent's estate. Claims for future economic losses were claimed in both lawsuits.

The *Gandy* court, concerned about a double recovery, limited the estate's claim to losses between the decedent's injury and death. The wrongful death statutory beneficiaries claimed future economic losses because of their expectation of support from the decedent. This outcome did not run frustrate Arizona's long-standing policy that an injured party should obtain complete relief, as stated in *Barragan v. Superior Court of Pima County*, 12 Ariz.App. 402, 405 (1970):

> *We do not believe that the legislature intended to provide less than a complete remedy for losses sustained because of a wrongful injury and death.*

Certain dicta in *Barragan* has been cited several times as the rule in Arizona, but *Barragan* and every case that cited it is either distinguishable like *Gandy* or unpublished and not controlling precedent for this Court.[1] The Arizona Supreme Court has not yet

[1] *Martin v. Staheli*, 248 Ariz. 87 (2019) (WD beneficiaries claimed economic losses).
Rodriguez v. Lytle, Not Reported in Pac. Rptr. (2021).
Popal v. Beck, Not Reported in Pac. Rptr. (2022).
Estate of Matus by and through Matus v. Kustom US, Inc., Arizona federal district court, Slip Copy (2023)

opined on the question.

The quoted dicta from *Barragan* is:

> *In general, a survival statute provides for recovery of damages sustained by the deceased party from the time of accident until his death.*

Neither the facts nor the holding in *Barragan* supports the above quote, which is pure dicta. Further, this *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, and does not expressly exclude future economic losses. *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.

Unfortunately, *Barragan* has been repeatedly cited as though it were controlling precedent, which it clearly is not.

Barragan also stated:

> *[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. 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 and recovery on both is not a double recovery for a single wrong but rather separate recoveries for different wrongs. . . ."*

In effect, the rule Defendants espouse is, paraphrasing *Barragan*, "the latter never starts, because the former doesn't exist." That rule leaves the unborn child and her Estate with "*less than a complete remedy for losses sustained because of a wrongful injury and death",* something that is contrary to the policy of full recovery declared by *Barragan*.

Contrast *Gandy* with another Arizona federal district court opinion, *Manion v. Ameri-Can Freight Systems Incorporated*, 391 F.Supp.3d 888 (2019), which did allow an

Estate to claim future economic losses. The language of the *Manion* opinion is highly persuasive, though not controlling authority for this Court, and is cited only for its persuasive value. Plaintiffs urge the Court to adopt the *Manion* reasoning.

Unlike *Gandy* and the other distinguishable cases, Mario is not claiming future economic losses due to the death of his unborn child, because he had no expectation of support from her. On the other hand, like *Manion*, the Estate is claiming future economic losses because otherwise, a complete recovery will not be obtained. There will never be any "*overlapping recovery between [the] wrongful death and survival statutes*" in cases like this one.

More importantly, 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, and even though, as Plaintiffs' believe, the unborn child was a constitutional person under Arizona's constitution, entitled the same rights all other persons in this State have.

January 27, 2024.

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/s/ J. Stanley Martineau