Tom Slutes, Esq.
SLUTES, SAKRISON & ROGERS, P.C.
4801 E. Broadway, Suite 301
Tucson, Arizona 85711
Telephone: (520) 624-6691
Facsimile: (520) 791-9632
TSlutes@sluteslaw.com
State Bar No. 001212

Attorneys for Defendants Jackrabbit Family Medicine, Inc. an Arizona corporation, dba Camelback Family Planning and Gabrielle J. Goodrick, M.D. (Additional Counsel at Signature)

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

Plaintiff,

vs.

JACKRABBIT FAMILY MEDICINE, INC., an Arizona corporation dba CAMELBACK FAMILY PLANNING, GABRIELLE J. GOODRICK, M.D. and "JANE DOE GOODRICK" a married couple, and KRISTIN J. LIVINGSTON, M.D. and "JOHN DOE LIVINGSTON," a married couple, et. al.

Defendants.

Case No. CV202200007

DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

(Assigned to Hon. Bryan B. Chambers)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

INTRODUCTION

In their opening summary judgment brief, Plaintiffs stated unequivocally that Counts 2 and 4 of the Second Amended Complaint do not assert a claim for medical negligence but, instead, assert a claim for medical battery: "Plaintiffs' common law claim is for medical battery, not negligence." Pls.' Revised Resp. to Defs.' Mot. for Summ. J. & Pls.' Revised Cross-Mot. for Summ. J. ("Pls. Revised Mem.") at 21. Then, after Defendants' response and reply brief explained the deficiencies in Plaintiffs' claim for medical battery, Defs.' Resp. in Opp'n to Pls.' Cross-Mot. for Summ. J. & Reply in Further Supp. of Their Mot. for Summ. J. ("Defs.' Resp. Mem.") at 15-17, Plaintiffs' reply brief attempted to revive the medical negligence claim that Plaintiffs had previously disavowed: "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 [sic] something different," Pls.' Reply at 9.

On March 21, 2024, the Court entered an order noting the change in Plaintiffs' position and authorizing Defendants "to file a Supplemental Brief regarding Petitioners' argument that they still might claim medical negligence." Order at 2. Defendants respectfully submit this supplemental brief in accordance with the Court's order.

Defendants maintain that Plaintiffs have expressly waived any claim for medical negligence by disavowing it in their opening brief. But even if the Court were to allow a medical negligence claim to proceed, Defendants would be entitled to summary judgment on Counts 2 and 4 because Plaintiffs have failed to provide competent evidence to establish the necessary elements of a medical negligence claim. This case is 1,351 days old, discovery is closed, and Plaintiffs have offered no qualified medical testimony or affidavit to sustain a medical negligence claim.

ARGUMENT

I. Plaintiffs Have Waived Their Medical Negligence Claim.

Plaintiffs attempt to preserve for trial a medical negligence claim. Pls.' Reply at 9. But they have waived their right to do so. "Waiver is the voluntary and intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right." *Cavallo v. Phx. Health Plans, Inc.*, 254 Ariz. 99, 105 ¶ 22, 518 P.3d 759, 765 (Ariz. 2022). Plaintiffs voluntarily and intentionally relinquished the right to bring a medical negligence claim by expressly stating that their "common law claim is for medical battery, not negligence," Pls.' Revised Mem. at 21, making clear that (1) they bring only one common law claim, (2) that it is for medical battery, and (3) that it is not for negligence. This waiver is clearer than that in *Morgan v. Hays*, 102 Ariz. 150, 155, 426 P.2d 647, 652 (Ariz. 1967), where the Arizona Supreme Court affirmed that a plaintiff

> by making a claim for Workmen's Compensation benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right . . . to file any claim in this Court against his employer.

Where a waiver is clear and explicit, a court should enforce it without any further showing. *See Mohave Cty. v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 421, 586 P.2d 978, 982 (Ariz. 1978) ("There is some authority in Arizona for the proposition that a waiver . . . must be supported by consideration or at least by the equivalent of estoppel. Later cases, however, have continually emphasized the intentional relinquishment aspect of waiver without mention of consideration."); *Wells-Stewart Constr. Co. v. Gen. Ins. Co. of Am.*, 10 Ariz. App. 590, 593, 461 P.2d 98, 101 (Ariz. Ct. App. 1969) ("The essential element in the defense of waiver is the voluntary and intentional relinquishment of a known right.").

Moreover, it is improper for a party to raise an issue for the first time in a reply brief. *See* Ariz. R. Civ. P. 7.1(a)(3). A court may "disregard" issues raised for the first time in reply. *Camelback Contractors, Inc. v. Indus. Comm'n*, 125 Ariz. 205, 208, 608 P.2d 782, 785 (Ariz. Ct. App. 1980).

Accordingly, Plaintiffs waived their medical negligence claim by expressly disavowing it in their opening brief, and the Court should disregard their attempt to revive it in their reply brief.

II. In Any Event, Plaintiffs Cannot Prevail on a Medical Negligence Claim Because They Have Failed to Provide Competent Evidence to Establish the Necessary Elements.

Unlike claims of medical battery, claims of medical negligence are subject to Arizona's Medical Malpractice Act. *See* A.R.S. §§ 12-561 – 12-573; *Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 309 ¶ 9, 70 P.3d 435, 439 (2003); Defs.' Resp. Mem. at 14 & n.7. Pursuant to that statute, a party asserting medical negligence must prove both that (1) "[t]he health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances" and that (2) "[s]uch failure was a proximate cause of the injury." A.R.S. § 12-563. The Arizona Supreme Court has held that a party asserting medical negligence 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); *see* Defs.' Mot. for Summ. J. & Mem. of Law ("Defs.' Mem.") at 14-15. Further, Arizona law provides that, in a medical negligence case, "a person shall not give expert testimony on the appropriate standard of practice or care" unless certain criteria are met. A.R.S. § 12-2604(A). Those criteria include that the putative expert practices in the

same specialty as the practitioner accused of negligence. A.R.S. § 12-2604(A)(1-2); *see* Defs.' Mem. at 12-13.

Plaintiffs have failed to establish the necessary elements of medical negligence through competent evidence. Discovery has now closed, and the only medical expert proffered by Plaintiffs—Dr. Eric Hazelrigg—does not specialize in abortion care and, indeed, has never provided abortion care or obtained a patient's informed consent to abortion. *See* Defs.' Statement of Facts in Supp. of Mot. for Summ. J. ("Defs.' SOF") at ¶ 17. Thus, Dr. Hazelrigg is statutorily barred from testifying about the standard of care for obtaining a patient's informed consent to abortion. *See* A.R.S. § 12-2604(A)(1-2). That bar precludes Dr. Hazelrigg from testifying, for example, about whether Defendants adequately informed the Patient of "[t]he immediate and long-term medical risks associated with the procedure that a reasonable patient would consider material to the decision of whether or not to undergo the abortion," in accordance with A.R.S. § 36-2153(A)(1)(c).

Likewise, Dr. Hazelrigg is statutorily barred from testifying about whether Defendants' alleged failure to satisfy the standard of care is the proximate cause of Plaintiffs' alleged injuries. *See* A.R.S. § 12-2604(A)(1-2). This is for good reason: Having no experience obtaining patients' informed consent to abortion, Dr. Hazelrigg has no basis on which to opine that providing additional information would have led to the Patient to decline abortion care. *See* Defs.' Mem. at 13-15; Defs.' Resp. Mem. at 13-14. And given the Patient's clear and consistent testimony that she would have chosen to terminate her pregnancy even if forced to receive additional information, *see* Defs.' SOF at ¶ 21, proximate cause is not readily apparent.

Because Plaintiffs have failed to provide competent evidence to establish the necessary elements of a medical negligence claim, even if not waived, their medical negligence claim

would fail as a matter of law. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (Ariz. 1990) (holding that a motion for summary judgment "should be granted if the facts produced in support of the claim or defense 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 or defense." (citations omitted)).

CONCLUSION

For the reasons set forth above and in Defendants' prior briefing, the Court should grant Defendants' motion for summary judgment and deny Plaintiffs' cross-motion for summary judgment.

DATED this 5th day of April, 2024.

SLUTES, SAKRISON & ROGERS, P.C.

By: /s/ Tom Slutes
Tom Slutes
Attorney for Defendants

Stephanie Toti
Lawyering Project
41 Schermerhorn St., No. 1056
Brooklyn, NY 11201
stoti@lawyeringproject.org
Pro Hac Vice

Jamila Johnson
Lawyering Project
3157 Gentilly Blvd., No. 2231
New Orleans, LA 70122
jjohnson@lawyeringproject.org
Pro Hac Vice

Juanluis Rodriguez
Lawyering Project
41 Schermerhorn St., No. 1056
Brooklyn, NY 11201
Telephone: (646) 490-1080
prodriguez@lawyeringproject.org
Motion to Associate Counsel
Pro Hac Vice

Original filed with the Gila County Superior Court; with a copy being mailed this 5th day of April, 2024 to:

J. Stanley Martineau, Esq.
Martineau Law, PLLC
4445 E. Holmes Avenue, Suite 106
Mesa, Arizona 85206