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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' SUPPLEMENTAL BRIEF ON THE APPLICATION OF PLANNED PARENTHOOD ARIZONA, INC. V. MAYES AND HAZLERIGG TO THE ISSUES IN THIS CASE** (Assigned to the Hon. Bryan Chambers)

The Court ordered the parties to submit supplemental briefs "on the application of the recent Arizona Supreme Court Decision[1] to the issues in this case . . ." This Court has not ruled on those issues, but Plaintiffs believe, and will explain in this Memorandum, that Hazelrigg supports summary judgment in Plaintiffs' favor on all pending issues.

[1] Planned Parenthood Arizona, Inc., et al v. Mayes, et al, and Hazelrigg, No CV-23-0005-PR (filed April 9, 2024) ("Hazelrigg").

MEMORANDUM OF POINTS AND AUTHORITIES

I. *ROE* DID NOT CHANGE ARIZONA'S ABORTION LAW.

Hazelrigg's essential holding is that Arizona law has never independently authorized elective abortions. When *Dobbs* overruled *Roe v. Wade*, 410 U.S. 113 (1973), the federal right to elective abortions that *Roe* had imposed on Arizona for 50 years was lifted, leaving Arizona abortion law intact as it had existed before *Roe*. *Roe* did not repeal Arizona's abortion ban statutes, nor change Arizona's abortion law and policy, but only prevented their enforcement. Hazelrigg states, at pages 4-5 and 28:

> *"¶2 We conclude that § 36-2322 does not create a right to, or otherwise provide independent statutory authority for, an abortion that repeals or restricts § 13-3603, but rather is predicated entirely on the existence of a federal constitutional right to an abortion since disclaimed by Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 292 (2022). Absent the federal constitutional abortion right, and because § 36-2322 does not independently authorize abortion, there is no provision in federal or state law prohibiting § 13-3603's operation. . . .*
> *. . .*
> *¶63 . . . For the reasons discussed, the legislature has demonstrated its consistent design to restrict elective abortion to the degree permitted by the Supremacy Clause and an unwavering intent since 1864 to proscribe elective abortions absent a federal constitutional right . . . . To date, our legislature has never affirmatively created a right to, or independently authorized, elective abortion. . . ."*

Hazelrigg is important to this case because it clarifies what law governs the parties' rights and duties resulting from the 2018 abortion. If Plaintiffs are correct that Defendants forfeited the protection of *Roe's* federal right to abort Mario's unborn child when they failed to comply with the informed consent requirements of A.R.S. § 36-2153 (the "Statute"), then *Hazelrigg* makes it clear they had no state law protection either. This case is governed by Arizona abortion law as it existed before *Roe*. That law is succinctly stated in the 1973 court of appeals decision, *Nelson v. Planned Parenthood Ctr. of Tucson, Inc.,* 19 Ariz. App. 142 (1973), cited by *Hazelrigg*.

II. HOW *HAZELRIGG* AND *NELSON* AFFECT PLAINTIFFS' CLAIMS.

A. Unborn children are persons under the Arizona Constitution.

Plaintiffs believe that *Nelson*, carefully analyzed, supports their claim that the unborn are persons under the Arizona Constitution. Deciding this constitutional question will be necessary if the Court is inclined to rule against Plaintiffs on any substantial issue in the case, if that ruling would violate the constitutional rights of the unborn.

1. The constitutional status of the unborn is an open issue in Arizona.

The majority opinion in *Hazelrigg* states, at page 4:

> *"This case involves statutory interpretation—it does not rest on the justices' morals or public policy views regarding abortion; nor does it rest on § 13-3603's constitutionality, which is not before us."*

The dissenting opinion by Justice Timmer states, at pages 29-30:

> "Notably, both laws [A.R.S. § 13-3603 and A.R.S. § 36-2322] would remain subject to challenge under Arizona's constitution. That challenge is not at issue here."

Justice Timmer's comment is intriguing. How and why would A.R.S. § 36-2322 be deemed unconstitutional, and why did she mention it? Her dissent argued strenuously that this statute should be upheld as a matter of statutory interpretation, which highlights her suggestion that it might be challenged constitutionally.

Plaintiffs filed an amicus brief in *Hazelrigg* arguing that the unborn are persons under the Arizona Constitution, and that any statute, including A.R.S. § 36-2322, that allows elective abortions at any time after conception, would deprive them of life in violation of their state constitutional rights to equal protection and due process. The issue Plaintiffs raised probably wasn't considered in *Hazelrigg* because the parties hadn't raised it before, and new issues cannot be added by amici.

Like *Hazelrigg*, *Nelson* did not decide this issue, as stated at page 5:

> *"We next turn to the main issue in the case sub judice. Both appellants and appellees frame the issue as being whether a fetus is a 'person' within the meaning of the Constitutions of the United States and the State of Arizona. We do not believe that we have to decide this issue in order to decide whether the Arizona abortion statutes are a valid exercise of the police power."*

2. The constitutional status of the unborn is a vital question that necessarily will be decided at some point in the future.

This issue is especially important in light of last week's repeal of A.R.S. § 13-3603, and the referendum seeking to add abortion rights to the Arizona Constitution, an issue that will be on the ballot in November. Abortion rights for women can't be analyzed in isolation without considering the interests of the unborn, and whether those interests deserve constitutional protection. However, deciding the issue will require the right case, one that cannot be resolved without deciding the constitutional issue.

Interestingly, *Nelson* hints at how it might have decided the constitutional issue under federal law had it been necessary, in footnote #3, on page 9:

> *"A substantial case can be made for holding the fetus is a 'person' within the due process clause of the Fourteenth Amendment." (citations omitted)*

If the unborn are constitutional persons under the 14th Amendment, they should have the same status under the Arizona Constitution, given the state constitution's broader protection for individual rights, as Defendants have argued.

Recent literature supports the view that *Roe* was as wrong about the unborn's constitutional rights to due process and equal protection as it was about women's constitutional abortion rights. Robert P. George and John M. Finnis, recognized scholars in constitutional law, filed an amicus brief in *Dobbs* arguing that *Roe's* rejection of the unborn's status as constitutional persons under the 14th Amendment was wrong, based on an extensive review of pre-Amendment English and American common law, state

statutes, state constitutions, and post-Amendment caselaw interpreting the Amendment. See also the 2017 article by Joshua J. Craddock, "Protecting Prenatal Persons: Does The Fourteenth Amendment Prohibit Abortion?", found at 40 Harvard Journal of Law & Public Policy, page 39.

Craddock discusses an 1885 US Supreme Court opinion, *McArthur v. Scott*, 113 U.S. 340, 382, which is relevant to this issue, at page 29 of his article:

> *"Just a few years after the adoption of the Fourteenth Amendment, the Supreme Court held that the child in utero is entitled to secure inheritance and property rights in McArthur v. Scott. There, the Court determined that an Ohio probate court had violated the rights of the decedent's grandchildren (then in utero) by failing to afford them adequate representation as parties in interest. The Court enforced the common law principle of "treating a child in its mother's womb as in being" for purposes of the rule against perpetuities, and found that the grandchildren's rights had vested in utero at the time of their grandfather's death.* ***If the Due Process Clause protects unborn children's representational rights in a probate hearing, should not a preborn child be even more entitled to due process to secure her life? As Judge John T. Noonan puts it: "it would be odd if the fetus had property rights which must be respected but could himself be extinguished****."* (emphasis added)

Arizona law has always required the courts to protect the due process rights of infants in probate matters:

> *". . . Since the very foundation of judicial proceedings is jurisdiction or the power to act, and the further fact that courts from time immemorial have been charged with the high and exalted duty to scrupulously protect the rights of infants, the question raised here merits the most careful examination.*
>
> *No court can be said to have acquired complete jurisdiction so as to hear and determine any cause until it has obtained through due process, prescribed by law, jurisdiction over both subject matter and the parties, and the power to render the particular judgment that was rendered."*
> *Schuster v. Schuster*, 75 Ariz. 20, 23 (1952).

In probate matters, the law today explicitly authorizes a guardian ad litem for the unborn, in A.R.S. § 14-1408:

> *"At any point in a proceeding brought under this title, the court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn or unascertained person or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, the court may appoint a guardian ad litem to represent several persons or interests. In its order appointing the guardian ad litem, the court shall state the basis for the appointment."*

Arizona courts implicitly accepted these principles in *Hazelrigg* by appointing Eric Hazelrigg, M.D. as guardian ad litem of all "unborn infants" in the state, presumably to protect their rights to life and due process under the state constitution. Also, this Court ruling that established a probate estate for Mario's aborted unborn child, based on other provisions in the Probate Code, is analogous to Dr. Hazelrigg's appointment as guardian ad litem for all unborn infants in Arizona, regardless of their stage of gestation.

Why would a guardian ad litem be necessary to protect a party's constitutional rights, if the party to be protected is a constitutional non-person? Arizona law, policy, and procedure all implicitly recognize that the unborn are constitutional persons with constitutional rights.

Concluding that the unborn are constitutional persons doesn't minimize the rights of pregnant women, but only brings the interests of mothers and their unborn children into parity, as they were in Arizona before *Roe*. As Nelson explains, at page 7:

> *"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.

It is therefore within the province of the state legislature to weight the competing interests and enact, as the legislature has done in this state, a statute which prohibits all abortions except those necessary to save the life of the mother. . . .”

3. *Nelson* and Arizona pre-*Roe* law support fetal personhood.

Several aspects of Arizona abortion law and policy as declared by *Nelson* support Plaintiffs’ claim of fetal personhood under the State Constitution:

a. Nelson declared that Arizona abortion law and policy are rooted in a belief that human life itself is sacred, at p. 150:

". . . One need not base a sanctity for life on only religious concepts. Its basis can be found in a deeper protoreligious ‘natural metaphysic’ the chief feature of which is the affirmation that life is sacred not because of the existence of God but because of the very fact that it is life. This idea of ‘sacredness' is generated by the primordial experience of being alive, of experiencing the elemental sensation of vitality and the elemental fear of its extinction. . . ."

The idea that human life is sacred has been a fundamental principle in America since the founding of our nation and is implicit in Arizona’s history and traditions. Every citizen fears the "extinction" of life, and expects the law to protect her. These ideas would have been part of the worldview of Arizona's citizens at statehood as much as it is today.

The Preamble to the Arizona Constitution suggests that Arizona’s early citizens derived their belief in the sanctity of life from deeply held religious convictions:

“We, the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution.”

This language is reminiscent of the Declaration of Independence, which declares that life and freedom are fundamental rights that are universal and inviolate:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights,

Governments are instituted among Men, deriving their just powers from the consent of the governed . . . "

Article II, Section 1 of the Arizona Constitution, reminds that:

"A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."

No doubt, these "fundamental principles" include the US Declaration's promise that all human beings are entitled to life and freedom, which is implicit in a free society.

Section 2 declares that Arizona citizens look to their government to preserve and protect their individual lives and freedoms:

Sec. 2. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

These unalienable rights are inherently owned by all human beings and are not endowed by government.

But did Arizona's citizens at statehood, who voted to accept the 1912 Constitution as a declaration of the foundational law that would govern their lives, believe that the unborn are human beings from conception?

b. *Nelson* declared that Arizona law and policy have always been that human life begins at conception; preventing conception may be lawful under *Griswold*, but destroying life after it has been conceived is not, at p. 5:

" . . . 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. Rhetorically, one may ask: Does the fundamental right to privacy as enunciated in Griswold[2] and Eisenstadt[3] include a fundamental right to destroy life? We do not think so."

[2] Griswold v. Connecticut, 381 U.S. 479 (1965)
[3] Eisenstadt v. Baird, 405 U.S. 438 (1972)

c. *Nelson* declared that Arizona's abortion statutes were meant to "embody the belief in the right to life and the necessity of preserving human life", at p. 3:

"Since we have no legislative history in this state, we do not know what the legislature had in mind in 1901 when the original abortion statutes were enacted. Our review of history, however, leads us to the conclusion that there is a twofold reason for the Arizona abortion laws: To embody the belief in the right to life and the necessity of preserving human life even when the existence of 'human life' is problematic to some degree, and to protect the health and life of pregnant women by keeping them from incompetent abortionists and restraining them from attempting dangerous, self-induced abortions."

Nelson's statement that "the existence of 'human life' is 'problematic to some degree'" demonstrates how the question posed by *Roe*, "When does life begin?", is the wrong question. Science has established that an embryo is alive from conception, and by definition is human throughout gestation because it is the "offspring of human beings".[4]

The right question is, "When along the 'inevitable' path from conception to birth should the law protect the unborn?" *Nelson's* declared that there is no "fundamental right to destroy life" in Arizona, obviously referring to conception as the starting point for that protection. As the facts in this case show, Mario's unborn child had a better than 90% chance of being born and reaching adulthood when she was aborted.

The creation of a human being requires human parents, a fact everyone can accept, even those who are not religious. The word "creators", referring to human parents, has as much meaning to a non-religious person as the word "Creator", referring to Deity, does to a religious person. Both describe the fundamental source of life and freedom. There is a special resonance in the idea that free and living parents endow their children with the

[4] (See, PBS program, "Life's Greatest Miracle", broadcast October 31, 2001, available at https://www.pbs.org/video/nova-lifes-greatest-miracle/, and the 2024 article, "Building Embryos", by John Wallingford, Professor of Molecular Biosciences at the University of Texas at Austin, available at https://aeon.co/essays/after-3000-years-of-science-the-embryo-is-very-different/.)

same rights they enjoy, rights to life and freedom. In 1912, like today, all parents in Arizona were free, and their children were conceived and born free. This story was different when slavery existed, but in 1912, slavery was in the past. The promised endowment of life and freedom in the US Declaration applies universally, because free parents always "endow" their children with life and freedom by the very act of procreation.

Even though Arizona's citizens in 1912 may not have understood the science of procreation like we do today, they certainly understood where their kids came from. These are fundamental principles that are:

> *"'deeply rooted in this Nation's history and tradition,' . . .and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' . . . It therefore follows that fundamental rights protected by the due process provision of our state constitution are those firmly entrenched in our state's history and tradition and implicit in the concept of ordered liberty that may be, or may not be, shared with the rest of the country." Standhardt v. Superior Court ex rel. County of Mari*copa, 206 Ariz. 276, 280-281 (2003).

This Court should declare the unborn to be constitutional persons under the state constitution, if necessary to resolve any of the following issues in this case.

B. The Estate was validly established.

When the Court was considering Mario's Petition to establish an Estate, M.S.V. filed a motion to dismiss the petition, which the Court denied by a 4/26/2021 minute entry order, which states at page 3:

> *"M.S. asserts two reasons to dismiss Petitioner's Petition. First, she argues that 'Petitioner's request for the appointment of a personal representative for an 8-week embryo on the basis of a legal abortion done at the request of a pregnant woman is not cognizable under Arizona law.' . . ."*

M.S.V. raised other constitutional and statutory objections to the probate estate, but the Court rejected those arguments and granted Mario's Petition. Plaintiffs believe the

Estate was properly established, especially in light of *Summerfield v. Superior Court In and For Maricopa County*, 144 Ariz. 467 (1985), and the Court's statement in its 4/26/2021 order at page 2, footnote 5:

> *"The importance of the Summerfield opinion in this probate case is that M.S.'s assertion that A.R.S. § 14-2108 somehow provides that to be a decedent and have an estate a person must live at least 120 hours after birth is incompatible with the holding in Summerfield".*

The Probate Code should be interpreted consistently with Arizona's pre-*Roe* abortion law and public policy of protecting the unborn, as declared in *Nelson*. Defendants have not challenged the validity of the Estate, but they do, and if the Court cannot resolve the dispute by interpreting the Probate Code alone, then deciding the personhood issue may be necessary.

C. The Court's Findings of fact and law.

Plaintiffs see nothing in *Hazelrigg* or *Nelson* that would affect the arguments already made in prior memoranda.

D. A.R.S. § 36-2153 does not violate Defendant' speech rights.

Plaintiffs see nothing in *Hazelrigg* or *Nelson* that would affect their prior arguments.

E. The Estate is entitled to an implied private cause action.

Hazelrigg dicta supports this claim. A.R.S. § 36-2153 is silent on this issue since it neither allows nor denies the unborn an implied private cause of action. *Hazelrigg* confirms, at page 18, what *Napier v. Bertram*[5] said about the legislature's silence on this issue:

> *We typically do not infer legislative intent from silence. Cf. Sw. Paint & Varnish Co. v. Ariz. Dep't of Env't Quality, 194 Ariz. 22, 25 ¶ 21 (1999) (noting that*

[5] 191 Ariz. 238, 240 (1998).

legislative acquiescence by silence is "limited to instances in which the legislature has considered and declined to reject the relevant judicial interpretation").

To Plaintiffs' knowledge, the legislature has never considered whether the unborn should be added to the Statute as claimants. If the Court decides this issue against Plaintiffs on statutory grounds, it should decide whether the constitutional status of the unborn would change its ruling.

F. A.R.S. § 12-611 and A.R.S. § 14-3110 encompass claims by the unborn.

This issue is one of statutory construction, unless the Court is inclined to rule against Plaintiffs, in which case, the personhood issue should be decided. The two statutes cannot be interpreted to encompass a viable unborn child but not a pre-viable unborn child, without violating the latter's constitutional due process and equal protection rights.

G. The Estate is entitled to recover economic and punitive damages.

This issue is one of statutory interpretation, unless the Court decides it against Plaintiffs. If so, the personhood issue must be decided.

H. The abortion was a medical battery on M.S.V. and the unborn child.

Plaintiffs have nothing to add to their prior memoranda.

I. Proximate cause is not a requirement for liability.

Plaintiffs have nothing to add to their prior memoranda.

J. A.R.S. § 36-2153 establishes the standard of care for abortions.

Plaintiffs have nothing to add to their prior memoranda.

May 20, 2024

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ORIGINAL of the foregoing e-filed
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