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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

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' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF ON THE APPLICATION OF PLANNED PARENTHOOD ARIZONA, INC. V. MAYES AND HAZLERIGG TO THE ISSUES IN THIS CASE

(Assigned to Hon. Bryan B. Chambers)

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INTRODUCTION

While the parties' cross-motions for summary judgment were pending, the Arizona Supreme Court issued a decision holding that the state's 1864 abortion ban is enforceable on a prospective basis. This Court then invited the parties to submit supplemental briefs addressing whether the Arizona Supreme Court's decision is relevant to any of the issues presented in the summary judgment motions. The answer is no.

Plaintiffs concede at the outset of their supplemental brief that the Arizona Supreme Court's decision does not address whether embryos and fetuses have constitutional rights. Pls.' Supp'l Br. at 3–4. Yet, they proceed to argue for the remainder of their brief that this Court should hold that embryos and fetuses have constitutional rights. Their arguments are wholly divorced from the Arizona Supreme Court's decision.

Fundamentally, this is a tort case about whether certain Arizona statutes—namely, the wrongful death statute, the survival statute, and the abortion informed consent statute—entitle Plaintiffs to recover monetary damages for alleged medical malpractice or battery. It is therefore a poor vehicle for resolving the larger political and philosophical questions about when life begins and the morality of abortion with which Plaintiffs are preoccupied. Defendants urge this Court to follow the Arizona Supreme Court's lead: Exercising judicial restraint, it focused on the narrow issue of statutory interpretation that was necessary for resolution of the case before it and declined to go further. *Planned Parenthood Arizona, Inc. v. Mayes*, 545 P.3d 892, 908 (Ariz. 2024) ("The abortion issue implicates morality and public policy concerns, and invariably inspires spirited debate and engenders passionate disagreements among citizens. A policy matter of this gravity must ultimately be resolved by our citizens through the legislature or the initiative process.

Today, we decline to make this weighty policy decision because such judgments are reserved for our citizens. Instead, we merely follow our limited constitutional role and duty to interpret the law as written."), *reconsideration denied*, No. CV-23-0005-PR, 2024 WL 2215834 (Ariz. Apr. 26, 2024).

BACKGROUND

I. The Arizona Supreme Court's Recent Decision Concerning the 1864 Abortion Ban

In *Mayes*, the Arizona Supreme Court considered a narrow question: did the legislature repeal or otherwise restrict A.R.S. § 13-3603—a civil war era abortion ban—when it passed various laws regulating abortion. 545 P.3d at 895 ¶ 1. Planned Parenthood argued that a later enacted statute, A.R.S. § 13-2322, and other portions of Title 36, which encompasses Arizona's public health and safety code, codified permissive authorization for abortions up to fifteen weeks' gestation, and that those statutes operate as an implicit repeal of A.R.S. § 13-3603. *Id.* at 898 ¶ 18.

The Court began its analysis by reviewing the text of A.R.S. § 13-2322. It concluded that the statute's text is ambiguous as to whether A.R.S. § 13-2322 created an independent statutory authority for abortion intended to repeal A.R.S. § 13-3603 or whether it merely acknowledged the existence of a contemporaneous federal right to an abortion under *Roe v. Wade*, 410 U.S. 113 (1973). *Id.* at 898–99 ¶¶ 21–22. Because the statutory text was not clear and unambiguous, the Court went on to employ other construction tools, considering whether to give weight to the statements of public officials about the passage of A.R.S. § 13-2322 and the absence of statutory amendments following *Roe*, for instance. *Id.* at 902–03 ¶¶ 37, 41. Ultimately, it found that Arizona had never independently created

a statutory right to abortion, and Title 36 serves as a statutory mechanism for restricting and regulating the abortion right established in *Roe*. *Id.* at 903 ¶ 43. It reached this conclusion in part based on the legislature's recodification of A.R.S. § 13-2322 following *Roe*. *Id.* at 896-7 ¶¶ 6–7, 14; 902 ¶ 37.

In doing so, the Court made clear that, should the legislature want to repeal A.R.S. § 13-3603 in light of A.R.S. § 13-2322, that would be its prerogative, but the pre-*Roe* ban and the post-*Roe* statutes could otherwise co-exist. *Id.* at 904–05 ¶¶ 46, 53. The Court denied intervenor Dr. Hazelrigg's attorneys' fees, finding his participation in the case unnecessary. *Id*. 907–08 ¶ 62. The Court reversed the Court of Appeals' decision, vacated the injunction, and remanded the case to the trial court to hear the state and federal constitutional challenges to the 1864 abortion ban that had never been decided. *Id.* at 908 ¶ 64.[1] Notably, the Court held that the 1864 abortion ban "may be enforced prospectively only." *Id.*

II. The Legislature's Response

Less than a month after the Court's decision upholding the 1864 abortion ban, the legislature heeded the Court's invitation to clarify its intent. It passed H.B. 2267, which fully repealed the pre-*Roe* ban. 2024 Ariz. Legis. Serv. Ch. 181 (H.B. 2677). On May 2, 2024, Arizona Governor Katie Hobbs signed the repeal legislation. *Id.*

[1] When the litigation was initiated in 1971, the plaintiffs asserted a number of state and federal constitutional claims in addition to those raised in *Roe*. The Court remanded for consideration of those additional challenges if the plaintiffs wish to pursue them. *Id.* at 895, ¶ 3.

ARGUMENT

I. This Case is a Matter of Statutory Construction, Not Constitutional Interpretation.

A. The Supreme Court's Decision is Not Relevant to the Issues in this Case.

The Court never addressed the wrongful death, survival, or medical malpractice statutes at issue in this case. And it mentioned the abortion informed consent statute only briefly, as part of its discussion of Arizona abortion laws that would "remain relevant when [Arizona's] elective abortion ban is enforceable." *Mayes*, 545 P.3d at 904 ¶ 47 (citing the emergency consent provision of A.R.S. § 36-2153). Nor did the Court address whether A.R.S. § 36-2153 contains an implied private right of action for embryos, or whether a pre-viable embryo is a person for purposes of the wrongful death or survival statutes. Significantly, it did not address whether embryos or fetuses have constitutional rights. Indeed, the Court explicitly declined to "make this weighty policy decision because such judgments are reserved for [Arizona] citizens." *Mayes*, 545 P.3d at 908 ¶ 63.

The Court also underscored that its opinion has only prospective effect. *Mayes*, 545 P.3d at 908 ¶ 64. Because the abortion giving rise to Plaintiffs' claims took place in 2018, nearly six years before the decision in *Mayes*, that decision is simply not relevant to the resolution of Plaintiffs' claims.

B. Plaintiffs' Assertion That This Case is Governed by Arizona Abortion Law Prior to 1973 Has No Basis in Law.

By contrast, this case is a tort action filed August 3, 2020, regarding events that allegedly took place on July 25, 2018, and is governed by the wrongful death, survival, medical malpractice, and abortion informed consent statutes. *See* Compl. (Wrongful Death) at 3 ¶ 13; Second Am. Compl. at 7-9 ¶¶ 29–44. It is not, as Plaintiffs erroneously

claim, "governed by Arizona abortion law as it existed before *Roe*." Pls.' Supp'l Br. at 2. Plaintiffs provide no legal basis for such a claim, and, in fact, there is none. As noted above, the Arizona Supreme Court explicitly stated that its decision in *Mayes*, holding that the 1864 abortion ban is enforceable, has only prospective effect. *See supra* at 4. Accordingly, Arizona's pre-*Roe* abortion law does not govern the claims in this case, which concern an abortion that took place in 2018.

C. Plaintiffs' Contention That the Wrongful Death and Survival Statutes Cannot Constitutionally Distinguish Between Viable Fetuses and Pre-Viable Embryos is Both Unsupported and Contrary to Precedent.

Plaintiffs erroneously contend that the wrongful death and survival statutes, A.R.S. §§ 12-611, 14-3110, "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." Pls.' Supp'l Br. at 12.

As an initial matter, Plaintiffs' bare assertion of this claim, without supporting argument or authority, is not sufficient to preserve it for the Court's consideration. *See State v. Kinney*, 225 Ariz. 550, 554 ¶ 7, 241 P.3d 914, 918 (Ariz. Ct. App. 2010) ("To preserve an argument for review, the defendant must make a sufficient argument to allow a trial court to rule on the issue."). It is well settled that a party fails to properly present an issue for consideration if it mentions it only in a cursory manner, without citation to relevant authority. *See, e.g.*, *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 43 n.21, 945 P.2d 317, 354 n.21 (Ariz. Ct. App. 1996); *AMERCO v. Shoen*, 184 Ariz. 150, 154 n.4, 907 P.2d 536, 540 n.4 (Ariz. Ct. App. 1995); *see generally* Ariz. R. Civ. P. 7.1(a)(2) ("All motions must be accompanied by a memorandum setting forth the reasons for granting the motion, *along with citations to the specific parts or pages of supporting authorities* and evidence." (emphasis added)).

Here, Plaintiffs fail to explain why the Court should conclude that a pre-viable embryo is similarly situated to a viable fetus, which is a pre-requisite to finding an equal protection violation. *See State v. Panos*, 239 Ariz. 116, 118 ¶ 7, 366 P.3d 1006, 1008 (Ariz. Ct. App. 2016) ("The effects of the federal and state equal protection guarantees 'are essentially the same,' each generally requiring the law treat all similarly situated persons alike." (citations omitted)). Likewise, Plaintiffs fail to explain what standard of constitutional scrutiny the Court should apply to determine whether the hypothesized constitutional rights have been violated. *See State v. Arevalo*, 249 Ariz. 370, 374 ¶ 15, 470 P.3d 644, 648 (Ariz. 2020) ("Under the three-tiered scrutiny level analysis, we apply one of three standards of review ranging from strict to intermediate scrutiny to rational basis review, depending on the right impacted, to assess a statute's constitutionality."). Plaintiffs cannot prevail on a novel and highly complex claim about the supposed constitutional rights of embryos by merely asserting that those rights, if they exist, would be violated.

In any event, Plaintiffs' contention is fatally undermined by the Arizona Court of Appeals' decision in *Jeter v. Mayo Clinic Arizona*, 211 Ariz. 386, 121 P.3d 1256 (Ariz. Ct. App. 2005). There, notwithstanding the court's duty to avoid unconstitutional interpretations of statutes, it held that, although a viable fetus constitutes a "person" for purposes of the wrongful death statute, a pre-viable embryo does not.[2] *Id.* at 391 ¶ 19 – 401 ¶ 62. Plaintiffs point to nothing in *Mayes* that overrules or abrogates *Jeter*, and it is therefore controlling authority that this Court is bound to follow.

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[2] It is well settled that, when possible, courts have a duty to interpret statutes in a manner that avoids rendering them unconstitutional. *See, e.g.*, *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 272, 872 P.2d 668, 676 (1994); *Larsen v. Nissan Motor Corp.*, 194 Ariz. 142, 147, 978 P.2d 119, 124 (Ct. App. 1998).

II. *Nothing in* Mayes *Supports Plaintiffs' Argument That the Abortion Informed Consent Statute Grants the Estate a Private Right of Action.*

Plaintiffs seize on the following dicta in *Mayes* to argue that the abortion informed consent statute grants the Estate a private right of action: "We typically do not infer legislative intent from silence." Pls.' Supp'l Br. at 11–12. But their argument misses the mark. *Mayes* contains no discussion of implied private rights of action. The section on which Plaintiffs rely rejects Planned Parenthood's argument that the legislature's failure to amend the 1864 abortion ban following the U.S. Supreme Court's decision in *Roe* implies legislative acquiescence in *Roe*'s abrogation of the ban. *Mayes*, 545 P.3d at 901 ¶ 34. But whether the legislature has implied a private right of action is a completely different issue than whether the legislature has acquiesced to a judicial decision interpreting a statute. Inquiries into implied rights of action necessarily involve analysis of legislative silence. Nothing in *Mayes* suggests that the silence in the abortion informed consent statute should be resolved in favor of finding an implied right of action for aborted embryos.

In short, in *Mayes*, the Arizona Supreme Court refused to imply a legislative intent where none was apparent. This Court should do the same and reject Plaintiffs' unsupported contention that the legislature intended to include a private right of action for aborted embryos in the abortion informed consent statute, even though it omitted aborted embryos from the detailed list of parties who may recover damages for violation of its terms. Pls.' Supp'l Br. at 11-12; A.R.S. § 36-2153, subd. (K).

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 7th day of June, 2024.

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