ARIZONA SUPERIOR COURT
GILA COUNTY

Date: 08/07/2024
BRYAN B. CHAMBERS, JUDGE — G. QUINTANA
Division One — Judicial Assistant

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., Respondent.	CV202200007

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT

The court has reviewed Defendants' Motion for Summary Judgment, Plaintiff's Revised Response to Defendants' Motion for Summary Judgment and Revised Cross-Motion for Summary Judgment, Defendants' Response in Opposition to Plaintiffs' Cross-Motion for Summary Judgment, and Reply in Further Support of Their Motion for Summary Judgment, and Plaintiffs' Reply. The court has also considered the oral arguments made by counsel in open court on January 24, 2024. While this Motion was pending before this court and after counsel had submitted the briefs mentioned above, the Arizona Supreme Court issued an opinion in *Planned Parenthood Arizona, Inc. v. Mayes,* 545 P.3d 892 (Ariz. 2024), *reconsideration denied*, CV-23-0005-PR, 2024 WL 2215834 (Ariz. Apr. 26, 2024). In light of

that opinion, the court allowed counsel to file supplemental briefs arguing the applicability of the recent Supreme Court opinion to the issues involved in the instant case. This court has considered those supplemental briefs. For the reasons that follow, the Motion and Cross-Motion for Summary Judgment are granted in part and denied in part.

I. Facts and Procedure and Summary Judgment Standards

Except as indicated otherwise in the Order, the court adopts the Facts and Procedure section and follows the Summary Judgment Standards of the court's Order Denying Summary Judgment of November 10, 2022.

II. A.R.S. § 36-2153 (the "Act") Does Not Violate Constitutional Protections for Free Speech.

Defendants argue that the court should grant summary judgment to defendants on Counts 1 and 3 of the Second Amended Complaint because the Act violates their freedom of speech under the Arizona Constitution and under the First Amendment to the US Constitution. They argue this is because the Act mandates that abortion providers deliver certain governmental messages about abortion to their patients thereby violating the free speech rights of the abortion providers. They argue that even if the court finds that the Act passes the intermediate scrutiny required by First Amendment, it would not pass the stricter strict scrutiny analysis Defendants claim the Arizona Constitution requires.

The Arizona Supreme Court has held:

> Whenever the constitutionality of a legislative enactment is assailed, the party questioning the validity of the statute must overcome the presumption in favor of the constitutionality of legislative enactments. *State v. Krug*, 96 Ariz. 225, 393 P.2d 916 (1964). The Court will uphold the legislation if there is any legal basis for its validity. *Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854 (1949).
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> *Indus. Dev. Auth. of Pinal Cnty. v. Nelson*, 109 Ariz. 368, 371, 509 P.2d 705, 708 (1973).

Both Defendants and Plaintiff have cited to Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra, 585 U.S. 755, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018). NIFLA dealt with a California law that required licensed clinics that offered pregnancy-related services

that opposed abortion to provide a government-drafted script about the availability of state-sponsored services, including abortion, as well as contactinformation for how to obtain them. The NIFLA court found that the law was a content-based regulation of speech because it compelled clinics to inform women how they could obtain state-subsidized abortions which was the very practice that the clinics were devoted to opposing. The court held that content based regulations of speech "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." NIFLA, 585 U.S. at 766, 138 S. Ct. at 2371, 201 L. Ed. 2d 835 (2018). Consequently, the NIFLA court invalidated the law by applying strict scrutiny and held that it unduly burdened clinics' speech.

In its holding, the NIFLA court compared and contrasted the regulation of speech in the California regulation with the regulation of speech in other regulatory circumstances where the Court has "applied a lower level of scrutiny to laws that compel disclosures in certain contexts." *Id.* 585 U.S. at 768. The Court acknowledged that it "has upheld regulations of professional conduct that incidentally burden speech. The First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech, and professionals are no exception to this rule." *Id.* 585 U.S. at 769 (internal citations and quotations omitted). The NIFLA court then approvingly cited *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), overruled by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022) as an example of a regulation of professional conduct that incidentally burdens speech and is subject to a lower level of scrutiny.

> 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. 505 U.S., at 884, 112 S.Ct. 2791 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). 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.' "*Id.,* at 881, 112 S.Ct. 2791. 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. *Id.,* at 884, 112 S.Ct. 2791. 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." *Ibid.* (emphasis added). Indeed, the requirement that a doctor obtain informed consent to perform an operation is "firmly entrenched in American tort law." *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 269, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990); see, *e.g., Schloendorff v. Society of N.Y. Hospital*, 211 N.Y. 125, 129–130, 105 N.E. 92, 93 (1914) (Cardozo, J.) (explaining that "a surgeon who performs an operation without his patient's consent commits an assault").

NIFLA, 585 U.S. at 769–70.

While the U.S. Supreme Court's recent *Dobbs* opinion overruled much of its prior *Casey* opinion, the lower scrutiny applied to abortion informed consent laws approved in Casey appears to be consistent with *Dobbs*.

> It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson*, 372 U.S. at 729–730, 83 S.Ct. 1028; see also *Dandridge v. Williams*, 397 U.S. 471, 484–486, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance. See, *e.g., Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–368, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) ("treatment of the disabled"); *Glucksberg*, 521 U.S., at 728, 117 S.Ct. 2258 ("assisted suicide"); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 32–35, 55, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) ("financing public education").
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> A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. *Id.*, at 320, 113 S.Ct. 2637; *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (*per curiam*); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491, 75 S.Ct. 461, 99 L.Ed. 563 (1955). These legitimate interests include respect for and preservation of prenatal life at all stages of development, *Gonzales*, 550 U.S. at 157–158, 127 S.Ct. 1610; the protection of maternal health and safety; the elimination of particularly

> gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability. See *id.*, at 156–157, 127 S.Ct. 1610; *Roe*, 410 U.S. at 150, 93 S.Ct. 705; cf. *Glucksberg*, 521 U.S., at 728–731, 117 S.Ct. 2258 (identifying similar interests).

Dobbs, 597 U.S. at 300–01, 142 S. Ct. at 2283–84, 213 L. Ed. 2d 545.

This court does not find that that the Act at issue here violates the Defendant's First Amendment Free Speech rights.

The Defendants also argue that the Act violates their Free Speech rights guaranteed under the Arizona Constitution. They correctly argue that "the Arizona Constitution provides broader protections for free speech than the First Amendment." Brush & Nib Studio, LC v. City of Phoenix, 247 Ariz. 269, 281, ¶ 45, 448 P.3d 890, 902 (2019). Yet, Defendants are unable to cite any Arizona case law explaining how Arizona's Constitution provides greater protection or how that greater protection should be applied in facts similar to the case at bar. This is not surprising because the Arizona Supreme Court has acknowledged that

> although article 2, section 6 does, by its terms, provide greater speech protection than the First Amendment, we have rarely explored the contours of that right. Rather, we have often relied on federal case law in addressing free speech claims under the Arizona Constitution. *Stummer*, 219 Ariz. at 142 ¶ 16, 194 P.3d at 1048 (stating that "Arizona courts have had few opportunities to develop Arizona's free speech jurisprudence," and in "construing [a]rticle 2, [s]ection 6 have followed federal interpretations of the United States Constitution"); *Mountain States*, 160 Ariz. at 358, 773 P.2d at 463 (looking to First Amendment precedent in determining that a government regulation violated Arizona's free speech clause).

Brush & Nib Studio, 247 Ariz. at 282, ¶ 46, 448 P.3d at 903.

Still, given Arizona Supreme Court's tendency to rely on federal case law to interpret article 2, section 6 of the Arizona Constitution and Arizona's presumption in favor of the constitutionality of legislative enactments, this court finds that the Act does not violate the free speech rights of the Defendants under either the First Amendment of the United States Constitution or article 2, section 6 of the Arizona Constitution. Therefore, Defendants' Motion to grant Summary Judgment to defendants on Counts 1 and 3 of the Second Amended Complaint because the Act violates their freedom of speech under the Arizona Constitution and under the First Amendment to the US Constitution is denied.

III. The Act Does Not Provide for an Implied Cause of Action for an Unborn Child

Defendants argue that they are entitled to summary judgment on Count 3 because the Act does not contain an implied private right of action for unborn children. Defendants argue that the Act is plain and unambiguous. It provides for a private cause of action for a specific set of individuals and unborn children are not among one of the groups to whom the Act gives a private cause of action. They argue that the legislature has amended the Act four times since its initial enactment in 2009, and for whatever reason, they have yet to amend the statute to include unborn children.

Plaintiffs concede that "the Statute does not create an express private cause of action, and that it is silent about an implied private cause of action." However, Plaintiffs argue "the legislature's silence 'begins, rather than ends,' the inquiry. *Napier v. Bertram,* 191 Ariz. 238, 240 ¶ 9 (1998)." They argue "the *Napier* court allowed [a] 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."

Plaintiffs argue that unless an unborn child has a private cause of action pursuant to the Act, there are circumstances where unborn children might not be protected by the Act. They note that in this case, the unborn child's mother was not pursuing any private cause of action pursuant to the Act. They also note that if the "jury accepts Defendants' "criminal conduct" defense, [Mr. Villegas] will be precluded from recovering damages and Defendants may have no financial exposure from violating the Statute." While Plaintiff may be correct in his arguments, this may be precisely what the legislature intended. The legislature has the authority to create a statutory private cause of action, and it has the authority to limit that private cause of action. The specific language of the Act suggests that this is what the legislature intended. This is especially true with the "criminal conduct" defense. The Act specifically precludes married fathers from having a private cause of action if "the pregnancy resulted from the plaintiff's criminal conduct."

Additionally, Plaintiffs argue "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." While this may be a persuasive argument to make to the Legislature as a reason to amend the Act to provide greater protection to unborn children, for the court to follow it in the absence of the

Legislature's inclusion would be to ask the court to legislate what the Legislature has so far failed to do.

Plaintiffs argue that the "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."

The court notes that the Arizona Court of Appeals applied these standards in *Burns v. City of Tucson*, 245 Ariz. 594, 432 P.3d 953 (App. 2018).

> [W]e begin with the statutory language, which is "the best and most reliable index of its meaning." *Arpaio v. Steinle*, 201 Ariz. 353, ¶ 5, 35 P.3d 114 (App. 2001). "[W]hen the statute is plain and unambiguous, we will not engage in any other method of statutory interpretation." *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 13, 181 P.3d 219 (App. 2008). However, in the absence of express language, Arizona law more broadly implies a private right of action "when consistent with 'the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law.' "[2] *Chavez v. Brewer*, 222 Ariz. 309, ¶ 24, 214 P.3d 397 (App. 2009) (quoting *Transamerica Fin. Corp. v. SuperiorCourt*, 158 Ariz. 115, 116, 761 P.2d 1019, 1020 (1988)).

Burns, 245 Ariz. at 596, 432 P.3d at 955.

The Act here expressly provides for a private cause of action for certain classes of individuals who may be affected by lack of informed consent and does not expressly provide for a private cause of action for others. *See* A.R.S. § 36-2153(K).[1] Those with the private cause of action include mothers, fathers of the unborn child if the fathers were married to the mother, and maternal grandparents of the unborn child if the mother was under 18 years of age at the time of the abortion. Paternal grandparents were not included. Fathers of unborn children who were not married to the mother were not included. Significant here, unborn children are specifically referenced throughout the statute but are not listed as those

[1] **K.** In addition to other remedies available under the common or statutory law of this state, any of the following may file a civil action to obtain appropriate relief for a violation of this section:
1. A woman on whom an abortion has been performed without her informed consent as required by this section.
2. The father of the unborn child if the father was married to the mother at the time she received the abortion, unless the pregnancy resulted from the plaintiff's criminal conduct.
3. A maternal grandparent of the unborn child if the mother was not at least eighteen years of age at the time of the abortion, unless the pregnancy resulted from the plaintiff's criminal conduct.

A.R.S. § 36-2153(K).

who have a private cause of action. The court notes that the Arizona Supreme Court has held "[t]he canon of construction *expressio unius est exclusio alterius*—that is, the expression of one item implies the exclusion of others—counsels us to construe the legislature's exclusion of remedies as intentional." *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 529, ¶ 36, 494 P.3d 580,590 (2021).

While this court acknowledges that Plaintiff's citation to *Napier* provides an example of the courts finding an implied cause of action that was not specifically provided for by statute, this court notes that the context and issues at play in *Napier* and in this case are different. This court also notes that in *Napier* the trial court did not find an implied private cause of action. The Arizona Supreme Court found the statute at issue in *Napier* contained an implied private cause of action. Assuming that this court's ruling is likely to be appealed, it is probably more appropriate for Arizona's appellate courts to find the existence of an implied private cause of action for unborn children than for a superior court to make that finding.

Therefore, because the Act does not contain an implied private right of action for unborn children, Defendants are entitled to summary judgment on Count Three of the Second Amended Complaint.

IV. The Act Does Not Limit Damages for Psychological, Emotional and Physical Injuries to Those Proximately Caused by the Statutory Violation

Defendants argue that "Defendants are entitled to summary judgment on Counts 1 and 3 insofar as they seek damages for injuries resulting from the abortion because Plaintiffs cannot establish that the alleged statutory violations proximately caused those injuries." Because the court has already granted summary judgment in favor of Defendant as to Count 3, the court will only consider this argument as it relates to Count 1. Defendants argue "Plaintiffs may not recover damages for psychological, emotional, and physical injuries unless they can prove that those injuries were proximately caused by a violation of the Act." Specifically, they argue that the Act "limit[s] compensatory damages to 'injuries resulting from the violation of this section.'" A.R.S. § 36-2153(L)(1). They argue that any alleged injures Plaintiff suffered were not caused by any failure of informed consent because it is undisputed "that the Patient would have proceeded with the abortion even if the alleged violations of the Act had not occurred."

Plaintiffs counter that its common law claims do not require proof of standard of care or proximate because they are based on medical battery not negligence. They cite to *Ryan v. Napier*.

> 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).

They further argue that the "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." They ask "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."

Both parties argue about the effect of the court's November 10, 2022, Order Denying Motion for Summary Judgment on this issue. They seem to argue about the effect of the following language from that Order:

> A.R.S. § 36-2153(A) plainly and unambiguously declares "[a]n abortion shall not be performed or induced without the voluntary and informed consent of the woman on whom the abortion is to be performed or induced." A.R.S. § 36-2153(A). Then, the statute plainly and unambiguously declares "consent to an abortion is voluntary and informed only if all of the following are true" before it lists the necessary components of [informed][2] consent. *Id.* . . . 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. Additionally, it does not matter if the woman would have had an abortion anyway or if the unborn child's father assists her by taking [her] to her appointments at the abortion clinic. 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." *Id.*
>
> 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

[2] In the November 20, 2022, Order the court erroneously used the word "implied" when it meant to use the word "informed."

married to the mother at the time she received the abortion." A.R.S. § 36-2153(K)(2). The statute then specifically provides

> [a] civil action . . . may be based on a claim that failure to obtain informed consent was a result of simple negligence, gross negligence, wantonness, wilfulness, intention or any other legal standard of care. Relief . . . includes the following:
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> 1. Money damages for all psychological, emotional and physical injuries resulting from the violation of this section.
>
> 2. Statutory damages in an amount equal to $5,000 or three times the cost of the abortion, whichever is greater.
>
> 3. Reasonable attorney fees and costs.

A.R.S.§ 36-2153(L).

Order Denying Motion for Summary Judgment, November 10, 2022, at 8-9. This language from the November 10, 2022, Order merely repeats and adopts the specific language of the Act. Its significance is that the Legislature has unambiguously specified the only way informed consent for an abortion can be given in Arizona. It also clarifies that there are at least three forms of damages those who are entitled to file claims under the Act can make: money damages, statutory damages, and attorney fees. The legislature's mandate as to how to comply with the informed consent requirement applies regardless of whether a claimant is seeking money damages or statutory damages. To claim money damages, a claimant must show that his "psychological, emotional and physical injuries result[ed] from the violation of [the Act.]" This does not mean that he must show that his psychological, emotional and physical injuries were proximately caused by a violation of the Act as proximate cause is generally treated in Arizona law. The legislature has used the term "proximate cause" in other statutes and chosen not to use it here. So, "resulting from the violation of [the Act.]" must mean that Plaintiff must show some causal connection between his injuries and the violation of the Act. Consequently, Defendant can argue before the trier of fact that Defendant's injuries were not a result of the violation of the Act but instead were a result of his wife's determination to abort the child regardless of informed consent. Likewise, Plaintiff is free to argue that his injuries are a result of Defendant's failure to provide informed consent as defined by the Act.

The court notes that for Plaintiff to argue for statutory damages there is no requirement to prove any real damages or that there is any causal connection between the violation of the Act and the award of statutory damages. This may have been because the

legislature realized that there would be circumstances where there would be a violation of the Act, but it would be difficult to show how those violations led to any particular damages.

The Court consequently grants summary judgment 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;[3] that Plaintiff Husband need not produce expert testimony to support standard of care for any of his claims. Likewise, the court denies Defendant's request for summary judgment that the Act requires the Plaintiff to show how his injuries were proximately caused by Defendant's violation of the informed consent provision of the Act.

V. Arizona's Wrongful Death Statute Does Not Permit Recovery for the Death of the Embryo.

Defendants argue that the court should grant summary judgment in their favor on Counts 2 and 4 "because Arizona's wrongful death statute does not permit recovery for the death of a pre-viable embryo." They argue that this position is supported by *Summerfield v. Superior Court In & For Maricopa Cnty.*, 144 Ariz. 467, 698 P.2d 712 (1985). On the other hand, Plaintiffs acknowledge *Summerfield's* holding that "construed the word 'person' in the wrongful death statute to include 'a stillborn, viable fetus.'" Plaintiff's Response/Cross Motion at 17-18. Plaintiffs, however, argue that the holding in *Summerfield* should be enlarged to include unborn children who are not otherwise viable outside the womb but who would be viable if carried to term by their mothers. They argue that *Summerfied* set the boundaries on personhood for its time but that it also invited further expansion. Specifically, they argue

> . . . *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*

[3] The court's Summary Judgment Order today does not directly address Plaintiffs' possible Claim for Negligence. In Plaintiff's Response and Counter Claim, Plaintiffs stated, "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." Plaintiff's Response and Counter Motion at 21. Then, in Plaintiffs' Reply, Plaintiff states "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." Reply at 9. Noting this discrepancy, the court allowed Defendants an opportunity to address it. *See* Order of March 21, 2024. Defendants filed a Supplemental Brief on April 5, 2024, addressing the issue. In that Brief, they argue that Plaintiffs waived the possible Negligence claim by disavowing it in their Response and Counter Claim. They also argue that Plaintiffs cannot prevail on a Negligence Claim because they cannot establish the necessary elements. The court heard supplemental argument on this issue on April 17, 2024. The Court notes that Plaintiffs have indicated that they probably will choose to pursue the Medical Battery Claim instead of the Negligence Claim. This court finds that Plaintiffs chose Medical Battery over a possible Negligence Claim when they disavowed the Negligence Claim in their Response and Counter Claim. For this reason, the court is not further analyzing whether a possible Negligence Claim is viable in this case.

> *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.

Response/Cross motion at 18. Plaintiff then argues that by passing the Act, the Legislature clearly and definitively demonstrated its intent to change the scope of the wrongful death statute.

This court notes that the much of Justice Feldman's *Summerfield* opinion setting forth the arguments for expanding the common law definition of "person" as it applied to the wrongful death statute to include viable fetuses could be used here to justify further expansion to include all unborn children. Justice Feldman acknowledged that "[i]t is not possible to draw any line [determining when an unborn child becomes a person for purposes of the wrongful death statute] without being arbitrary to some extent." *Summerfield*, 144 Ariz. at 477, 698 P.2d at 722. As Plaintiffs point out, the Act "makes no distinction between pre-viable and viable unborn children." Defendants, however, counter that "the Act makes no reference to the wrongful death statute, and the relief it authorizes is discrete and limited to a narrow class of beneficiaries." Defendant's Response/Reply at 11.

Just as this court is unwilling to expand the statutory list of people who can sue under the Act to include unborn children, this court is also unwilling to expand the common law definition of "person" as applied to the wrongful death statute to include all unborn children whether viable outside the womb or not. While Plaintiffs argue that the Act's language shows a "clear and definitive demonstration of legislative intent" to expand the definition of "person" as applied to the wrongful death statute, the Act could have been clearer had the Legislature specifically referenced the wrongful death statute and clarified that the Act applied to the wrongful death statute and that unborn children regardless of viability were included in the wrongful statute's definition of "person." *Summerfield* was decided before the Legislature wrote and approved of the Act. So, it can be assumed that the Legislature understood the *Summerfield* opinion and chose not to expand *Summerfield's* definition of "person" to include all unborn children. This court is unwilling to write into the Act the

"person" definition that the Legislature failed to include.[4] Consequently, Defendants' Motion to grant summary judgment in their favor on Counts 2 and 4 is granted.[5] [6]

VI. Plaintiff Seeks Summary Judgment as to All Ten of the Court's Prior Findings

Plaintiffs ask "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." Response/Cross Motion at 4. Plaintiff's lists these finding as follows:

The Court's 10 Findings of fact and law:

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).

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[4] This court notes that in 2021, the Legislature passed A.R.S. § 1-219 which provides,

[t]he laws of this state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state, subject only to the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court.

A.R.S. § 1-219. However, the abortion at issue in this case occurred before the enactment of A.R.S. § 1-219. Additionally, the constitutionality of the statute has been questioned in *Isaacson v. Brnovich*, 610 F. Supp. 3d 1243 (D. Ariz. 2022). Depending upon the ultimate resolution of *Isaacson v. Brnovich*, A.R.S. § 1-219 arguably could be used to show the Legislature's intent to view "person" for purposes of the wrongful death statute.

[5] This court notes that the wrongful death statute allows for claims by statutory beneficiaries of a decedent for their damages as a result of a decedent's wrongful death whereas the survival statute allows a decedent's claims to survive her death and he pursued by her estate. *Barragan v. Superior Court of Pima Cnty.*, 12 Ariz. App. 402, 404, 470 P.2d 722, 724 (1970)("A wrongful death action is an original and distinct claim for damages sustained by the statutory beneficiaries and is not derivative of or a continuation of a claim existing in the decedent. . . A survival statute, on the other hand, does not create a new claim but merely prevents abatement of the injured person's claim and provides for its enforcement by his personal representative" (internal citation omitted)). Count 2 was Husband's wrongful death statute claim. Count 4 was the Estate's survival statute claim. *Summerfield* dealt only with the meaning of "person" as it applied to the wrongful death statute and not with the survival statute, however, *Summerfield*'s analysis should apply to the survival statute as well as it deals with the meaning of "person." Even if it does not, this court's decision not to allow the unborn child's estate to bring a claim under the Act would also require summary judgment in favor of the Defendants as to Count 4.

[6] Because this Court granted Defendants' Motion for Summary Judgment as to Counts 2 and 4 because the wrongful death statute and the survival statute do not allow claims for or by a nonviable unborn child, this court will not address Defendant's other arguments in support of granting summary judgment as to Counts 2 and 4.

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).

Response/Cross Motion at 4-5.

Defendants respond by arguing that "Plaintiffs' proposed findings of fact and conclusions of law are random statements taken out of context from the Court's summary judgment decision on an earlier version of Plaintiffs' complaint." Reply at 18. They argue generally that "many of these statements are at such a high level of generality that they would contribute little or nothing to the ultimate resolution of the case." *Id.* Additionally, they argue that "[s]ome of the proposed findings and conclusions turn on disputed issues of fact." *Id.*

Defendants also point out that in "the Court's previous summary judgment order," the court "was required to view all evidence in a light most favorable to Plaintiffs—who were non-moving parties—and draw all reasonable inferences in Plaintiffs' favor." Reply/Response at 24. As to Plaintiff's Cross Motion for Summary Judgment, the court must view all evidence in a light most favorable to Defendants who are the non-moving parties.

Specifically, Defendants argue that

> [f]irst, it appeared that no physician had referred the Patient to Dr. Goodrick, who prescribed the abortion medications to the Patient, so the requirements of A.R.S. § 36-2153(A)(1) could not have been satisfied. MSJ 1 Order at 7. But subsequent, undisputed testimony establishes that it is common practice in Arizona for physicians working at the same clinic to refer patients to one another. *See* Tr. of Dep. of Paul Isaacson, M.D. ("Isaacson Tr.") (appended to Aff. of Tom Slutes (Second) as Ex. E) at 14:8-13; 15:11-16:1. Thus, based on prevailing professional norms, Arizona abortion providers would understand Dr. Holmes to be the "referring physician" for purposes of the Patient's abortion. *Id.* at 14:14-17; 14:24-15:3.

Id. Plaintiffs counter that

> [t]he 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.

Plaintiff's Reply at 3.

Regardless of what "the Court has already found," the court notes that there is no statutory definition of "referring physician" in the Act. The Act provides that "'[p]hysician' means a person who is licensed pursuant to title 32, chapter 13 or 17." A.R.S. § 36-2151(11). However, the Act never defines what differentiates a "physician" from "referring physician." *The Merriam Webster Online Dictionary* defines

"refer" as "to send or direct for treatment, aid, information, or decision/ refer a patient to a specialist/ refer a bill back to a committee." *Meriam Webster Online Dictionary*, accessed at https://www.merriam-webster.com/dictionary/refer on August 8, 2024. While most people have had the experience of being referred by a general practitioner to a medical specialist outside of the general practitioner's practice group or clinic for medical issues, physicians can also refer patients to other physicians within in the same practice group or clinic. There is nothing in the Act that prevents one physician in a practice group from referring an abortion patient to another physician in the same practice group or clinic. Just because the initial referral to Jackrabbit Family Medicine was not made by a "referring physician" does not mean the Act prohibits a physician within a clinic from referring a patient to another physician in the same clinic. Consequently, despite the court's Order Denying Motion for Summary Judgment of November 10, 2022, the court does not now find that Plaintiff is entitled to Summary Judgment on the issue of whether a "referring physician" under the Act can provide the consent required A.R.S. § 36-2153(A)(1) if that physician and the physician performing the abortion are from the same practice group or clinic.

> Next Defendants argue that in the prior Summary Judgment Order
>
> the Court noted that no evidence conclusively established that Dr. Holmes informed the Patient of the existence of a website maintained by the Arizona Department of Health Services or offered to give the Patient a printed copy of the website's information, as required by A.R.S. § 36-2153(A)(2)(f)-(g). *See* MSJ 1 Order at 7 (citing "noncompliance facts #10 and #11" in Pls.' Resp. to Defs.' Mot. for Summ. J. at 6 nn. 13-14). It concluded that "a reasonable jury could find that [the Patient] was not provided informed consent." *Id.* But a reasonable jury could also make a contrary finding based on Dr. Holmes' testimony that she answers all of a patient's questions and frequently "elaborate[s]" on each point in the state-mandated script, Tr. of Dep. of Jessica Holmes, M.D. (May 17, 2022) ("Holmes Tr.") at 66:14–20; 72:17–73:14 (appended to Pls.' Separate Statement of Facts (July 11, 2022) as Ex. 7). Notably, the Patient testified that she couldn't remember all of the specifics of her informed consent visit with Dr. Holmes, Patient Tr. at 55, and she couldn't remember if Dr. Holmes told her about the website, *id.* at 59, but "[she] didn't feel like [she] left there with any questions at all," *id.* at 56. Plaintiffs cite no conclusive evidence that Dr. Holmes failed to inform the Patient about the website; they can only cite an absence of documentation.

Reply/Response at 24 at 25.

Plaintiffs respond that "[t]he '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." Plaintiff's Reply at 4.

The Court agrees that Defendants have the burden of producing evidence to show there is a fact issue on this point. They have not done so. Their defense amounts to "mere speculation." *United Bank of Arizona v. Allyn*, 167 Ariz 191, 195, 805 P.2d 1012, 1016 (app. 1990). They have shown that Dr. Holmes read the clinic's implied consent form to M.S.V. and answered her questions. There is no evidence that M.S.V. ever asked a question about the Arizona Department of Health Services website. There was no reference on the implied consent form to the AZDHS website. To avoid summary judgment on this issue, this court would have to find that a reasonable jury could find that M.S.V. asked Dr. Holmes to tell her about the AZDHS website despite the fact that it was not listed anywhere on the clinic's implied consent form. The jury would then have to find that she then forgot that she asked Dr. Holmes about the website. Finally, the jury would also have to believe that Dr. Holmes forgot that M.S.V. asked her about the AZDHS website. This court finds that no reasonable jury could make such fact findings without speculation. Consequently, the court grants Summary Judgment to Plaintiffs finding that Defendants violated the Act by failing to inform M.S.V. that the AZDHS maintains a website that describes the unborn child and lists the agencies that offer alternatives to abortion pursuant to A.R.S. § 36-2153(A)(2)(f).

As to Plaintiffs' specific request that the courtgrant Summary Judgment on all ten of its prior findings, the court finds:

Finding #1. The Statute is plain and unambiguous. The court notes that in today's Order, the court has found potential ambiguity in the concept of "referring physician." The court is unwilling to make a blanket summary judgment order stating that everything in the Act is plain and unambiguous. Much and perhaps most of the Act is plain and unambiguous. If Plaintiffs believe the court should go beyond the findings in today's Order and declare other specific portions of the Act plain and unambiguous, Plaintiffs will need to file a more specific Motion to the court and explain why the desired Order is necessary or relevant.

Finding #2. The Statute must be applied as written. The court agrees with the finding but does not understand why the court should grant Summary Judgment over what is essentially one of the rules of statutory construction. This issue might be relevant in some future Motion in Limine or in argument regarding jury instructions, but the court declines at this time to grant Summary Judgment as to Finding #2.

Finding #3-5. #3The Statute defines informed consent for all Arizona abortions; #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; and #5 Any abortion performed without valid consent is a violation of the Statute. The court agrees with each of these findings. The Act provides,

> An abortion shall not be performed or induced without the voluntary and informed consent of the woman on whom the abortion is to be performed or induced. Except in the case of a medical emergency and in addition to the other requirements of this chapter, consent to an abortion is voluntary and informed only if all of the following are true . . . .

A.R.S. § 36-2153(A). The statute then dictates what must be included in informed consent. However, like Finding #2, the court fails to understand why the court should grant Summary Judgment on what is essentially statutory language. These issues might be relevant in some future Motion in Limine or in argument regarding jury instructions, but the court declines at this time to grant Summary Judgment as to Finding #3-5.

Findings #6-7. #6 M.S.V.'s consent was invalid; #7 The abortion violated the Statute. These findings are addressed more specifically elsewhere in this Order. For the reasons previously addressed in this Order, Summary Judgment is granted in favor of Plaintiffs.

Finding #8. A.R.S. § 36-2153(K)(2) entitles a father to sue for statutory damages. The Act allows "[t]he father of the unborn child [to bring a suit under the Act] if the father was married to the mother at the time she received the abortion, unless the pregnancy resulted from the plaintiff's criminal conduct." The court declines to make summary judgment regarding the clear and unambiguous language of the statute but notes that this issue might become relevant in a future Motion in Liminie orin arguments regarding jury instructions.

Finding #9. The Statute does not require proof of proximate cause. As discussed previously in this Order, Summary Judgment is granted as to this issue.

Finding # 10. The Statute's definition of informed consent applies to both statutory and common law tort litigation for wrongful abortion. The Act specifically provides

> [a] civil action . . . may be based on a claim that failure to obtain informed consent was a result of simple negligence, gross negligence, wantonness,

wilfulness, intention or any other legal standard of care. Relief . . . includes the following:

1. Money damages for all psychological, emotional and physical injuries resulting from the violation of this section.

2. Statutory damages in an amount equal to $5,000 or three times the cost of the abortion, whichever is greater.

3. Reasonable attorney fees and costs.

A.R.S. § 36-2153(L). The Act also provides "[i]n addition to other remedies available under the common or statutory law of this state, any of the following may file a civil action to obtain appropriate relief for a violation of this section." A.R.S. § 36-2153(K). The combination of these two paragraphs of the Act demonstrates that there are statutory damages for violating the Act and that there may be remedies in tort for violating the Act. Referencing "other remedies available under the common or statutory law of this state" shows the legislature's determination to apply the informed consent requirements of the Act to all remedies whether they be statutory or in tort." For reasons previously stated, the court declines to make Summary Judgment as to Finding #10. However, the court will rule consistently with this finding in any future Motion in Limine or argument regarding jury instructions.

VII. Effect of *Planned Parenthood Arizona, Inc. v. Mayes*

At Oral Arguments on April 17, 2024, the court allowed counsel to file supplemental briefs regarding what effect, if any, the recent Arizona Supreme Court decision in *Planned Parenthood Arizona, Inc. v. Mayes*, 257 Ariz. 110, 545 P.3d 892 (2024), *reconsideration denied*, CV-23-0005-PR, 2024 WL 2215834 (Ariz. Apr. 26, 2024) would have on the issues pending in this case. The court has considered the supplemental briefs.

Plaintiffs' Supplemental Brief largely invites this court to find "that the unborn are persons under the Arizona Constitution." Plaintiffs' Supplemental Brief at 3. They argue "[d]eciding 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." *Id.*

Defendants, argue that the issues in this case are statutory, not constitutional. They argue that the Arizona Supreme Court in *Planned Parenthood Arizona, Inc. v. Mayes* "focused on the narrow issue of statutory interpretation that was necessary for resolution of that case

before it and declined to go further." Defendant's Response to Plaintiff's Supplemental Brief at 1. They specifically cite to the majority's conclusion.

> 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.

Planned Parenthood Arizona, Inc. v. Mayes, 257 Ariz. 110, ¶ 63, 545 P.3d 892, 908 (2024), *reconsideration denied*, CV-23-0005-PR, 2024 WL 2215834 (Ariz. Apr. 26, 2024).

This court acknowledges that if unborn children are persons under the Arizona Constitution, many of the statutes addressed in the ruling would potentially unconstitutionally violate their rights to the extent these statutes do not allow them the same ability to bring claims as viable unborn children or as other persons with rights under those statutes. But as addressed previously in this ruling, "[w]henever the constitutionality of a legislative enactment is assailed, the party questioning the validity of the statute must overcome the presumption in favor of the constitutionality of legislative enactments." *Indus. Dev. Auth. of Pinal Cnty. v. Nelson*, 109 Ariz. 368, 371, 509 P.2d 705, 708 (1973) citing *State v. Krug*, 96 Ariz. 225, 393 P.2d 916 (1964). Consequently, this court declines to decide the pending Motions on whether all unborn children are persons under Arizona's Constitution.

VIII. Trial Setting Conference and Status Hearing

Having ruled on the pending Motions for Summary Judgment, this court sets a Trial Setting Conference and Status Hearing for **Friday, September 6, 2024, at 11:00 a.m., before the Hon. Bryan B. Chambers, Division One Globe.** Counsel and parties may appear virtually by contacting the court's judicial assistant at gquintana@courts.az.gov or (928) 402-8686 two days prior to the hearing.[7]

[7] Because there is no caselaw on the application of A.R.S. § 36-2153 to husbands and unborn children, one or both parties may wish to consider filing a Petition for Special Action to the Arizona Court of Appeals.

DATED the 6th day of August, 2024

JUDGE OF THE SUPERIOR COURT

cc:
MARTINEAU LAW. PLLC
J. STANLEY MARTINEAU, ESQ
3850 W. BASELINE ROAD, SUITE 125
MESA, AZ 85206
stan@martineau.law

TOM SLUTES, ESQ.
SLUTES, SAKRISON & ROGERS, P.C.
4801 E. BROADWAY, SUITE 4301
TUCSON, AZ 85177
TSlute@sluteslaw.com

OFFICE DISTRIBUTION: