

**IN THE COURT OF APPEALS**

**STATE OF ARIZONA**

**DIVISION ONE**

BELINDA L. JETER, a married woman;  
WILLIAM R. JETER, a married man,

Plaintiffs-Appellants,

v.

MAYO CLINIC ARIZONA d/b/a MAYO  
CLINIC SCOTTSDALE and/or CENTER  
FOR REPRODUCTIVE MEDICINE, an  
Arizona Corporation,

Defendant-Appellee.

No. 1 CA-CV 04-0048

Maricopa County Superior Court  
No. CV2003-011775

**APPELLEE MAYO CLINIC ARIZONA'S ANSWERING BRIEF**

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## **PREFATORY REMARKS**

Plaintiffs/Appellants Belinda and William Jeter made a strategic decision to allege in their Complaint against Mayo Clinic Arizona ("Mayo") two counts — "loss of potential children" and "loss of irreplaceable property" — that do not exist under Arizona law, and two counts — breach of fiduciary duty and breach of bailment contract — that are expressly barred by Arizona law. The trial court did not, as the Jeters contend, rule that no remedy exists under Arizona law for the allegedly negligent loss or destruction of their frozen embryos. Rather, the trial court correctly concluded that the claims they chose to allege in their Complaint failed to state a claim upon which relief could be granted.

Having been properly refused below, the Jeters are now asking this Court to: (1) deem a one-to-eight cell frozen embryo that has never been implanted in the womb a "person" for whose "wrongful death" they can recover under Arizona's wrongful death statute in direct contravention of the limits set by the Arizona Supreme Court; (2) invent a new cause of action for "negligent loss of viable embryos" without any legal basis; and/or (3) hold Arizona's longstanding Medical Malpractice Act unconstitutional in order to resurrect their impermissible breach of fiduciary duty and breach of bailment contract claims. This Court should decline to do so and should affirm the trial court's dismissal of the Jeters' Complaint.

## STATEMENT OF THE CASE

The Jetters filed their Complaint against Mayo on June 16, 2003, alleging four counts: (1) "Negligence—Loss of Potential Children," (2) "Negligence — Loss of Irreplaceable Property," (3) "Breach of Fiduciary Duty," and (4) "Breach of Bailment Contract." (Clerk's Amended Index of Record ("A.I.") 1 at 9-14.) Mayo moved to dismiss the Complaint on August 19, 2003, alleging that all four counts failed to state a claim cognizable under Arizona law. (A.I. 4.) The Jetters opposed the Motion, asking the trial court to find that a frozen embryo constitutes a "person" under Arizona's wrongful death statute, to create a new cause of action for "negligent loss of viable human embryos," and/or to declare the Medical Malpractice Act unconstitutional. (A.I. 6.) Oral argument was heard on October 2, 2003. (A.I. 8.)

The trial court issued the following minute entry granting Mayo's motion to dismiss on November 3, 2003:

The Court having had under advisement the Defendant's Motion to Dismiss, and after considering the arguments and memoranda, the Court grants Defendant's motion.

The Court specifically finds that the wrongful death statute does not provide relief for frozen cell embryos and that the same are not "persons."

The Court also specifically finds that there is no common law cause of action in Arizona for the alleged negligent loss of viable human embryos.

And lastly, the Court finds that the Arizona medical negligence (malpractice) act is not unconstitutional.

(A.I. 9.) The Jeters moved for partial reconsideration of the trial court's finding that "there is no common law cause of action in Arizona for the alleged negligent loss of viable human embryos" and regarding their contention that consent forms the Jeters signed created a written bailment contract. (A.I. 10.) The trial court denied the motion for partial reconsideration on November 17, 2003. (A.I. 14.)

Judgment was entered in favor of Mayo on December 12, 2003. (A.I. 19.) The Jeters filed their notice of appeal on December 19, 2003. (A.I. 24.) This Court has jurisdiction over this appeal pursuant to A.R.S. § 12-2101(B)

### **STATEMENT OF THE FACTS**

In approximately mid-2000, the Jeters sought fertility treatment at Mayo's Center for Reproductive Medicine. (A.I. 1 ¶ 5.) On or about September 25, 2000, Mayo created seventeen embryos from the Jeters' eggs and sperm, which it cryopreserved by freezing. (A.I. 1 ¶ 10.) On the consent forms the Jeters completed regarding *in vitro* fertilization ("IVF"), cryopreservation, thawing, and transfer (i.e., implantation into the womb) of the embryos, the Jeters opted to discard any extra nontransferred embryos. (A.I. 6 at Exhibit D.) When Mrs. Jeter was unable to become pregnant after two IVF attempts, the Jeters decided to transfer their ten remaining embryos to the Arizona Center for Fertility Studies, Ltd. ("ACFS"). (A.I. 1 ¶ 13.)

In their Complaint, the Jeters conceded that, against Mayo's advice, they insisted on personally transporting the straws containing the cryopreserved embryos to ACFS. (A.I. 1 ¶ 16.) They further conceded that, on September 21, 2001, they signed a "Request for Transfer of Cryopreserved Embryo or Semen Specimens and Assumption of Risk," releasing the embryos and assuming any risk of loss or damage to the embryos as a result of the transfer or actions of subsequent providers' handling of the embryos. (A.I. 1 ¶ 16 and Exhibit A.) The Jeters claim they immediately transported the straws to ACFS. (*Id.*)

On November 7, 2001, ACFS attempted to thaw the embryos for the Jeters' use in another embryonic transfer. (A.I. 1 ¶ 17 and Exhibit B.) The Jeters claim that two of the straws, containing a total of five embryos, were empty, and that Mayo lost or destroyed them. (A.I. 1 ¶ 17, ¶ 20, and Exhibit B.)

#### **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

Whether the trial court properly dismissed the Jeters' Complaint for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), Ariz. R. Civ. P., based on its findings that a frozen embryo does not constitute a "person" for whose wrongful death they can recover, there is no cause of action for "negligent loss of viable human embryos," and the Medical Malpractice Act and its preclusion of unenumerated claims against health care providers is constitutional?

## ARGUMENT

### **I. STANDARD OF REVIEW**

A motion to dismiss for failure to state a claim under Rule 12(b)(6), Ariz. R. Civ. P., should be granted where "it appears certain that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated." *Pritchard v. State*, 163 Ariz. 427, 432-33, 788 P.2d 1178, 1183-84 (1990). "A Rule 12(b)(6) motion to dismiss for failure to state a claim, which assumes the complaint's allegations as true, attacks the legal sufficiency of the complaint." *Logan v. Forever Living Products Int'l, Inc.*, 203 Ariz. 191, 192, 52 P.3d 760, 761 (2002). Thus, the trial court properly granted Mayo's motion to dismiss if, even under the facts alleged in their Complaint, the Jetters failed to establish that they could prevail on their claims against Mayo for wrongful death, "negligent loss of viable human embryos," breach of fiduciary duty, or breach of bailment contract. *See Luchanski v. Congrove*, 193 Ariz. 176, 180, 971 P.2d 636, 640 (App. 1998).

A trial court's decision concerning the constitutionality of a statute is reviewed *de novo*. *Flood Control Dist. v. Gaines*, 202 Ariz. 248, 253, 43 P.3d 196, 201 (App. 2002). A statute is presumed to be constitutional, and the party challenging it bears a heavy burden to demonstrate its unconstitutionality. *Id.*; *Harvest v. Craig*, 202 Ariz. 529, 532, 48 P.3d 479, 482 (App. 2002). Before

invalidating a statute, this Court must be satisfied beyond a reasonable doubt that it is unconstitutional. *Gaines*, 202 Ariz. at 253, 43 P.3d at 201.

**II. THE TRIAL COURT CORRECTLY CONCLUDED THAT A FROZEN EMBRYO IS NOT A "PERSON" FOR WHOSE WRONGFUL DEATH THE JETERS CAN RECOVER UNDER ARIZONA'S WRONGFUL DEATH ACT**

Flouting controlling Arizona Supreme Court precedent to the contrary, the Jeters boldly argue that a frozen embryo should be deemed a "person" for whose wrongful death they can recover under Arizona's Wrongful Death Act, A.R.S. § 12-611, *et seq.* Following well-established Arizona law on this issue, the trial court properly held that "the wrongful death statute does not provide relief for frozen cell embryos and that the same are not "persons," and correctly dismissed the Jeters' "wrongful death" claim for "Negligence—Loss of Potential Children."

**A. The Arizona Supreme Court's Limit Of Wrongful Death Recovery To Viable Fetuses Clearly Excludes Frozen Embryos**

Arizona's wrongful death statute provides:

When death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured . . . .

A.R.S. § 12-611.

In interpreting the word "person" under Arizona's wrongful death statute, the Arizona Supreme Court quite clearly held in *Summerfield v. Super. Ct.*, 144 Ariz. 467, 477, 698 P.2d 712, 722 (1985), that viability, that is, the ability to live outside the womb, is a prerequisite to recovery under A.R.S. § 12-611. The Jeters' assertion that "the *Summerfield* court did not set the watermark for "personhood" under the Wrongful Death Act" at best ignores, and at worst entirely misrepresents, the Supreme Court's plain language:

*[T]he common law now recognizes that it is the ability of the fetus to sustain life independently of the mother's body that should determine when tort law should recognize it as a "person" whose loss is compensable to the survivors. We acknowledge, of course, that this, too, is an artificial line, difficult at times to determine. It is not possible to draw any line without being arbitrary to some extent. Nevertheless, we believe that with regard to the issue of recognizing a loss to the survivors, viability is a less arbitrary and more logical point than the moment of birth.*

*Summerfield*, 144 Ariz. at 477, 698 P.2d at 722 (emphasis added).

In *Summerfield*, plaintiffs brought a wrongful death action, alleging that their 37-week old fetus was stillborn as a result of the defendant physicians' medical malpractice. The trial court dismissed the action on the grounds that a fetus was not a person under A.R.S. § 12-611. *Id.* at 470, 698 P.2d at 715. The Arizona Supreme Court reversed, holding that "person" "encompasses a stillborn, viable fetus" for whose death plaintiffs could recover under Arizona's wrongful

death statute. 144 Ariz. at 479, 698 P.2d at 724. In so holding, the Arizona Supreme Court enunciated prerequisites for recovery under the statute which undeniably exclude a frozen embryo.

Specifically, the Arizona Supreme Court stated that "[o]ne of the prerequisites for recovery under this statute is the ability of the injured party to maintain an action if death had not ensued," that is, "Would the fetus have been entitled to maintain the action had it lived?" *Summerfield*, 144 Ariz. at 475, 698 P.2d at 720. Indisputably, frozen embryos stored in a straw would not be capable of maintaining a civil action. Moreover, in recognizing that one might recover for the wrongful death of a viable *fetus*, where a fetus is defined in humans as "the unborn young from the end of the eighth week after conception to the moment of birth," the Arizona Supreme Court implicitly excluded an embryo, defined in humans as "the *prefetal* product of conception from implantation through the eighth week of development," from the statute's purview. *See The American Heritage Stedman's Medical Dictionary* (1995) (emphasis added).

Despite Plaintiffs' desperate attempts to stretch the *Summerfield* decision, it clearly did not mean to encompass, or even leave open the possibility, that one might recover for the "wrongful death" of a frozen embryo. In determining whether the wrongful death statute applies to stillborn but viable fetuses, the Arizona Supreme Court looked to cases recognizing that "an action may be

brought by an *infant* who survives birth" and the "legislative goal of protecting the *fetus*." 144 Ariz. at 475-76, 698 P.2d at 720-21. In affirmatively answering the question, the Arizona Supreme Court emphasized that "[b]ut for the injury, the child would have been born and entitled to recover." *Id.* at 475, 698 P.2d at 720. The same simply cannot be said for a frozen embryo created in a petri dish and stored in a straw for possible future use. Indeed, even if the embryos were not allegedly lost or destroyed, they may not have been of sufficient quality for implantation; if of sufficient quality, the Jetters may never have chosen to implant them; if implanted, they may not have resulted in pregnancy; and if resulting in pregnancy, they may not have resulted in the birth of a live child. The Jetters' contention that *Summerfield's* recognition that one might recover for the death of a stillborn, viable 37-week old fetus contemplates that one might also recover under Arizona's wrongful death statute for the alleged loss or destruction of a frozen embryo is simply implausible.

**B. The Jetters Have Offered No Authority For Extending Wrongful Death Recovery To Frozen Embryos**

*Summerfield* makes clear that viability, that is, the ability to live outside the womb, is a prerequisite to recovery under A.R.S § 12-611. Certainly, one-to-eight cell frozen embryos stored in straws that have never even been implanted in the womb are non-viable, as they are incapable of extrauterine life, and are, therefore, not "persons" for whom the Jetters can sustain a wrongful death action under A.R.S.

§ 12-611. The Jeters have offered no compelling reason or authority for extending the wrongful death act beyond the limits set by the Arizona Supreme Court in *Summerfield*. Indeed, even the cases cited by the Jeters in support of their position confirm that, consistent with the majority rule across jurisdictions, Arizona law does not — and need not — recognize a wrongful death action for the alleged loss or destruction of a frozen embryo.

For example, the Jeters erroneously cite this Court's decision in *Burnham v. Miller*, 193 Ariz. 312, 972 P.2d 645 (App. 1998) for their contention that "courts are beginning to recognize that 'wrongful death type' claims and damages are appropriate for survivors of negligent injury to an unborn child regardless of viability." (Opening Brief ("O.B.") at 18 (emphasis in original).) To the contrary, this Court in *Burnham* permitted recovery of loss of society damages for a stillborn, but *viable*, child, thereby reaffirming Arizona's viability requirement. 193 Ariz. at 313-14, 972 P.2d at 646-47.

The Jeters similarly misrepresent the holdings of at least five other cases which specifically reject their position. *See Smith v. Borello*, 804 A.2d 1151, 1163 (Md. Ct. App. 2002) (permitting mother to recover for emotional distress from loss of fetus, but specifically denying wrongful death action for 19-week, nonviable, stillborn fetus); *Crosby v. Glasscock Trucking Co.*, 532 S.E.2d 856, 857 (S.C. 2000) (precluding recovery for 20-week, nonviable, stillborn fetus); *Gentry v.*

*Gilmore*, 613 So.2d 1241, 1244 (Ala. 1993) (precluding wrongful death action for miscarriage of nonviable, 13-week fetus); *Modaber v. Kelley*, 348 S.E.2d 233, 236-37 (Va. 1986) (permitting recovery for physical and emotional injury to stillborn fetus *in utero* as injury to mother, but denying wrongful death recovery because unborn child is not a "person" under wrongful death statute); *Danos v. St. Pierre*, 402 So.2d 633, 636 (La. 1981) (denying wrongful death recovery for 6-7 month stillborn fetus).

Significantly, *all* of the cases from various jurisdictions cited by the Jeters address the compensability of death to a *fetus in the womb*, whether viable or nonviable, "quick" (i.e., capable of moving in the womb) or not, stillborn or born alive. (O.B. at 17-18, 24-27.) Not a single case purports to consider recovery for an embryo in the womb, much less a frozen embryo stored in a straw outside the womb with the mere possibility of future implantation and to whose destruction the Jeters have consented. In fact, *Farley v. Sartin*, 466 S.E.2d 522, 524 (W. Va. 1995), on which the Jeters heavily rely, "explicitly limit[ed its] holding to unborn children who are en ventre sa mere [or 'in its mother's womb'] and decline[ed] to address the issues that may arise with advances in medical technology now enabling conception outside the womb." The *Farley* court specifically left resolution of the latter issue to the legislature. *Id.* at 535.

Moreover, in permitting wrongful death recovery for a nonviable, stillborn 18-22 week fetus, the *Farley* court admitted that no other jurisdiction had so extended its wrongful death act and that it was diverging from the majority view. 466 S.E.2d at 532-33. The Jeters cite the Ninth Circuit's statement in *Santana v. Zilog, Inc.*, 95 F.3d 780, 784-85 (9th Cir. 1996) (applying Idaho law), that "the *Farley* opinion is well-reasoned and thoughtful," disingenuously suggesting that the Ninth Circuit adopted its rationale. (O.B. at 27.) The Ninth Circuit, however, declined to follow *Farley's* minority view, specifically noting that the West Virginia Supreme Court was the only court to recognize a cause of action for a nonviable fetus without action by the state legislature. *Santana*, 95 F.3d at 784-85. Significantly, unlike the Arizona Supreme Court's clear resolution of the issue in *Summerfield*, the Idaho courts had not yet resolved at what point a fetus becomes a person for purposes of Idaho's wrongful death statute. *Id.* at 782-83. The Ninth Circuit, therefore, concluded that the Idaho courts would likely follow the majority rule limiting liability to wrongful death of viable fetuses and leaving any further expansion of Idaho's wrongful death statute to the legislature. *Id.* at 786.

The Ninth Circuit expressed several rationales in holding that "person" does not include a nonviable fetus (in that case, a 17-week fetus) under Idaho's wrongful death act. First, "[c]ourts use viability as the dividing line for 'personhood' because it denotes the point at which the fetus, in essence, becomes a person, or a 'separate

entity capable of maintaining an independent action in its own right." *Santana*, 95 F.3d at 783. Second, without clear legislative direction, most courts have refused to further expand potential tort liability by extending wrongful death statutes to cover pre-viable fetuses. *Id.* at 784.

Third, the Ninth Circuit emphasized that "the uncertainty of whether a pregnancy will culminate in a live birth is greatest at the beginning of a pregnancy.' Thus, [courts] refuse to allow recovery because of the uncertainty and unpredictability of actions based on speculation that the fetus would have otherwise survived to viability." *Santana*, 95 F.3d at 783-84 (citations omitted). This rationale is particularly compelling here where the embryos at issue were frozen and stored for possible future use and might never have been implanted in the womb, much less developed and survived to a live birth.

The Jetters' reliance on criminal, property, and anti-abortion law as supporting expansion of the wrongful death statute beyond the *Summerfield* limits is also unavailing. (O.B. at 23-24.) The *Summerfield* court itself noted that "the analogy between civil liability for tort and criminal liability for causing death is not apt." 144 Ariz. at 474, 698 P.2d at 719. Nonetheless, in limiting the definition of "person" to a viable fetus, the *Summerfield* court specifically considered the very fetal manslaughter and abortion statutes cited by the Jetters as evidence of a legislative goal to protect the fetus. 144 Ariz. at 476, 698 P.2d at 721. There is no

reason these same statutes should now persuade this Court to re-define "person" to include a frozen embryo. Indeed, the Arizona Supreme Court has stated in the abortion context that "the state's interest in promoting childbirth is not even compelling until the fetus is viable." *Simat Corp. v. AHCCCS*, 203 Ariz. 454, 459, 56 P.3d 28, 33 (2002). Likewise, this Court has found that the fetal manslaughter statute, A.R.S. § 13-1103(A)(5):

By defining the killing of an unborn child as a separate offense from the killing of a "person," evidenced a legislative determination that a fetus was not to be considered a person within the meaning of the murder statute. We noted that where the legislature has intended to refer to an unborn child or fetus, it has done so specifically. We interpreted its failure to list a fetus as a "person" as evidence that the legislature did not intend to include a fetus as a victim under the homicide statute.

*State v. Cotton*, 197 Ariz. 584, 587, 5 P.3d 918, 921 (App. 2000) (citations omitted). In the nineteen years since *Summerfield* was decided, during which IVF and cryopreservation have become increasingly more common, the legislature could certainly have amended the wrongful death statute to include frozen embryos had it so intended. It has not.

The Arizona Supreme Court indisputably limited the reach of A.R.S. § 12-611 to recovery for the death of a *fetus capable of living outside of the womb*. Although the Jetters argue that, because their embryos were created and suspended in time outside the womb, they were by definition "extrauterine life," this clearly is

not what the Arizona Supreme Court intended in enunciating the above threshold for recovery. Being frozen in a straw and prevented from developing from the point of one or a handful of cells is, in no way, life outside the womb, and certainly could not, absent successful implantation in the mother's womb, develop into a fetus, much less a viable fetus. Under the Jeters' bizarre theory, a woman literally minutes or days pregnant could seek a wrongful death recovery. Since, at that point, medical science could not even detect the existence of a pregnancy, the Jeters essentially demand different and greater relief because their embryos were created in a petri dish, rather than conceived naturally, and so their existence was known. Such an interpretation defies logic and stretches the *Summerfield* decision beyond recognition. The Jeters' contention that a one-year old frozen embryo is older, and somehow more of a "person," than a viable 37-week old fetus in the womb is similarly without merit and further demonstrates the implausible lengths to which the Jeters will go to attempt to sustain this clearly frivolous claim. (O.B. at 19 n. 2.)

The Jeters assert that "the unexplained destruction or loss of [their] irreplaceable embryos has caused [them] severe emotional trauma since, among other things, they view *all* of their embryos as their potential children." (O.B. at 11 (emphasis added).) They, therefore, ask this Court to deem a frozen embryo a "person," in part by analogizing their alleged loss or destruction to conduct

criminalized by the fetal manslaughter statute. Yet, in consenting to the IVF and cryopreservation procedures, they specifically elected to discard any extra embryos that were thawed but not transferred to the womb. (A.I. 6 at Exhibit D.) *In vitro* fertilization, which involves harvesting and fertilizing eggs, cryopreserving and storing the resulting embryos, and implanting the embryos in the uterus in the hopes that they result in a pregnancy that develops to a live birth, is a complicated procedure. As the Jetters were well-aware in undergoing IVF, the process requires physicians to select which and how many embryos to implant and discard the rest. Subjecting health care providers to wrongful death liability for embryos destroyed during cryopreservation or IVF would unduly burden those who provide this service, threaten medical decisionmaking, and create a disincentive for performing these valuable procedures. Both Arizona law and public policy, therefore, demand that this Court reject the Jetters' wrongful death claim.<sup>1</sup>

The Arizona Supreme Court has specifically addressed the issue of what constitutes a "person" under the wrongful death statute and limited it to a viable fetus. The Jetters have offered no compelling reason or authority for extending the

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<sup>1</sup> Although they admit that they are not bringing a claim for "harm to an unborn child" under Restatement (2d) of Torts § 869, they inaccurately argue that it supports their position by rejecting viability as a prerequisite to such claims. (O.B. at 30 n. 4.) While § 869 permits recovery for harm to an unborn child when the child is born alive, it only permits recovery for a stillborn child if "the applicable wrongful death statute so provides." Restatement (2d) of Torts § 869(2). As explained above, Arizona's wrongful death statute precludes recovery for the loss of a nonviable frozen embryo. A.R.S. § 12-611; *Summerfield*, 144 Ariz. at 479, 698 P.2d at 724.

wrongful death act to include a frozen embryo. Since a frozen embryo is neither viable, nor a fetus, the trial court correctly dismissed the Jeters' claim for "loss of potential children" under Arizona's wrongful death statute.

### **III. THE TRIAL COURT CORRECTLY DECLINED TO CREATE A NEW CAUSE OF ACTION FOR "NEGLIGENT LOSS OF VIABLE HUMAN EMBRYOS"**

Count Two of the Jeters' Complaint alleged "negligence--loss of irreplaceable property." (A.I. 1 at 11-12.) In response to Mayo's motion to dismiss, at oral argument thereon, and in their opening brief, the Jeters abandoned that claim, thereby conceding that no such claim exists under Arizona law, and instead argued that the trial court should create a new cause of action for "negligent loss of viable human embryos." (A.I. 6, 8; O.B. at 30.) Accordingly, the Jeters have not challenged, nor preserved for appeal, the trial court's dismissal of any claim for "negligence--loss of irreplaceable property."

Other than mischaracterizing the *Burnham* holding, the Jeters have not cited a single Arizona authority in support of their request that this Court invent a new cause of action for so-called "negligent loss of viable human embryos."<sup>2</sup> Rather, the Jeters merely assert that "other states have recognized causes of action for intentional and negligent harm to unborn children based upon various theories and

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<sup>2</sup> The Jeters' use of the term "viable" to describe a one-cell, or even two-to-eight-cell frozen embryo, is inappropriate, as "viable" is defined under Arizona law as a *fetus* capable of extrauterine life. *Summerfield*, 144 Ariz. at 477, 698 P.2d at 722; *see Stedman's Medical Dictionary* (defining "viable" as: "Capable of living outside the uterus. Used of a *fetus* or newborn") (emphasis added).

Arizona should too." (O.B. at 30.) The Jeters then rely on four cases from other jurisdictions which do not stand for that proposition and are wholly inapposite to the present case.

In *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28 (N.Y. App. Div. 2001), plaintiffs did not even allege, much less recover for, any alleged harm to their embryos; they merely sought damages for the emotional distress arising from defendant's mistaken implantation of their embryos into another woman's uterus, which resulted in a child being born and separated from them for four months after birth. That is a far cry from the facts of this case in which the Jeters claim that their frozen embryos were lost or destroyed. In *Del Zio v. Presbyterian Hosp.*, No. 74 Civ. 3588, 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y. 1978), unlike the present case, plaintiffs alleged that defendants *intentionally* destroyed a test tube containing their sperm and ova, thereby preventing fertilization and development before an IVF procedure.

Although *McClain v. Univ. of Mich. Bd. of Regents*, 665 N.W.2d 484 (Mich. Ct. App. 2003) (17½-week nonviable fetus), and *Borello*, 804 A.2d 1151 (19-week, nonviable, stillborn fetus), permitted mothers to recover emotional distress damages for the loss of their nonviable fetuses, binding Arizona precedent limiting recovery to loss of viable fetuses clearly prohibits such a result here. See *Summerfield*, 144 Ariz. at 477, 698 P.2d at 722 (limiting wrongful death recovery

to viable, stillborn fetus); *Burnham*, 193 Ariz. 312, 972 P.2d at 646-47 (limiting loss of society recovery to viable, stillborn fetus). Moreover, those decisions treated the injury to the fetus as a physical injury to the mother for which she was entitled to recover. *McClain*, 665 N.W.2d 484; *Borello*, 804 A.2d 1151. These cases in no way suggested that emotional distress damages might be similarly recoverable for the alleged loss or destruction of a frozen embryo that was never implanted in the womb and to whose possible destruction the Jeters consented.

The Jeters next rely on Restatement (2d) of Torts § 868 regarding "interference with dead bodies," arguing that this Court should recognize a "right to control" frozen embryos similar to the right to control dead bodies under § 868. Once again, neither § 868, nor the irrelevant and unhelpful cases they cite in support of this proposition, provides a basis for creating a cause of action for emotional anguish caused by allegedly negligent loss or destruction of frozen embryos. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), was merely a dispute over who would gain "custody" of frozen embryos following a divorce and in no way supports the creation of a new cause of action in Arizona for the "negligent loss of viable human embryos." In *York v. Jones*, 717 F. Supp. 421, 423 n.2 (E.D. Va. 1989), plaintiffs' breach of contract and related claims merely sought the release and transfer of their frozen embryos from one fertility clinic to another, and the court specifically found that plaintiffs could *not* sustain an emotional distress

claim for the clinic's refusal to transfer the embryos.

The Jeters' request that this Court adopt a claim based on Restatement (2d) of Torts § 323 is equally unavailing. Section 323 imposes liability on one who "voluntarily undertakes an act, even when there is no legal duty to do so," and does so negligently. *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 176 Ariz. 247, 250, 860 P.2d 1300, 1303 (App. 1992). The Jeters have presented no authority applying §323 in the health care context. In fact, the only case cited by the Jeters has no bearing on the present case, as it imposed liability on an insurance company for negligently defending its insured, despite no coverage for the accident at issue, because the insurer undertook the duty to defend. *Id.* at 251, 860 P.2d at 1304. Again undermining the Jeters' contention that their "negligent loss of viable human embryos" claim is rooted in existing legal authority, the Jeters ask this Court to base this claim on § 323, but to permit recovery of emotional distress damages to which they are not entitled under that section. *Id.* at 250, 860 P.2d at 1303 (permitting recovery for physical and economic harm, not emotional harm).

The Jeters unpersuasively attempt to cobble together from inapplicable authorities a new cause of action for "negligent loss of viable human embryos" so that they may recover emotional distress damages to which they are not entitled. *See Summerfield, supra; Burnham, supra.* The trial court correctly concluded that "there is no common law cause of action in Arizona for the alleged negligent loss

of viable human embryos." (A.I. 9.)

**IV. THE TRIAL COURT PROPERLY DISMISSED THE JETERS' BREACH OF BAILMENT CONTRACT AND BREACH OF FIDUCIARY DUTY CLAIMS BECAUSE THEY ARE CONSTITUTIONALLY BARRED BY ARIZONA'S MEDICAL MALPRACTICE ACT**

The Jeters boldly claim that Arizona's Medical Malpractice Act, A.R.S. § 12-561, *et seq.*, violates the Arizona Constitution's anti-abrogation clause and is, therefore, unconstitutional, citing *Duncan v. Scottsdale Medical Imaging, Ltd.*, 205 Ariz. 306, 70 P.3d 435 (2003).<sup>3</sup> As with *Summerfield* and several other cases cited in their opening brief, however, the Jeters have misrepresented the holding of that case. The *Duncan* court merely addressed the constitutionality of a single subsection of the Act, § 12-562(B), prohibiting actions against licensed health care providers based upon assault and battery, and held it unconstitutional. *Id.* at 443.

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<sup>3</sup> Although the anti-abrogation clause does not render unconstitutional the Medical Malpractice Act's bar of the Jeters' breach of fiduciary duty and bailment contract claims, Mayo submits that *Kenyon v. Hammer*, 142 Ariz. 69, 82, 688 P.2d 961, 974 (1984), which extended the anti-abrogation clause to all common law negligence actions, was wrongly decided. In *Kenyon*, the Arizona Supreme Court held that a statute of limitations provision for medical malpractice actions violated the equal protection clause, A.R.S. Const. Art. 2, § 13. *Id.* at 87, 688 P.2d 979. In reaching its decision, the court found that A.R.S. Const. Art. 18, § 6, the "anti-abrogation clause," extended to all common law negligence actions, not just employment-related actions. *Id.* at 82, 688 P.2d at 974.

A.R.S. Const. Art. 18, § 6, however, was not intended to apply to all common law claims. Roger C. Henderson, *Tort Reform, Separation of Powers, and the Arizona Constitutional Convention of 1910*, 35 Ariz. L. Rev. 535, 617 (Fall 1993). Rather, events leading up to and during the state constitutional convention demonstrate that the clause was only intended to govern employment situations: "[t]here does not appear on the basis of the evidence available today to be any real justification for holding that the guarantees under Section 6 of Article XVIII were ever intended for 'the benefit of all.'" *Id.* The *Kenyon* court, therefore, improperly extended the anti-abrogation clause to cases outside the employment context. Accordingly, Mayo respectfully requests that this Court take this opportunity to correct *Kenyon's* historically inaccurate misapplication of the anti-abrogation clause to non-employment related actions.

The court in no way held the entire Act, or §§ 12-561(2) and 12-562(A) limiting the grounds upon which an action against a licensed health care provider can be brought, unconstitutional. Indeed, the Arizona Supreme Court has on more than one occasion held specific provisions of the Act unconstitutional and certainly has had ample opportunity to deem other portions of the Act, or the entire Act itself, unconstitutional had it so desired. *Id.*; *Barrio v. San Manuel Div. Hosp. for Magma Copper Comp.*, 143 Ariz. 101, 692 P.2d 280 (1984) (holding Act's special tolling provision for claims brought by minors unconstitutional). It has not done so. The trial court, therefore, correctly found "that the Arizona medical negligence (malpractice) act is not unconstitutional." (A.I. 9.)

**A. Arizona Law Bars The Jeters' Breach Of Fiduciary Duty And Breach of Bailment Contract Claims**

The Arizona legislature passed the Medical Malpractice Act in response to a medical malpractice crisis. *See Tort Reform*, 35 Ariz. L. Rev. at 537. Due to rampant litigation, malpractice insurance premiums — and, thus, health care costs — were rapidly escalating. *Id.* In adopting the Act, which expressly limits the grounds upon which an action against a health care provider arising from the rendition of health care services can be based, the State sought to ensure that quality medical care was available to the public at a reasonable cost. *Kenyon*, 142 Ariz. at 84, 688 P.2d at 976; A.R.S. §§ 12-561(2), 12-562(A).

A.R.S. § 12-562(A) mandates that *no* action shall be brought against a health care provider regarding the rendition of health care services except upon the grounds enumerated in A.R.S. § 12-561. Since breach of fiduciary duty is not one of the enumerated grounds, the trial court properly dismissed that claim. *See* A.R.S. § 12-561(2). Similarly, A.R.S. § 12-562(C) specifically provides that no "action based upon breach of contract for professional services shall be brought unless such contract is in writing." As explained in Section IV(D) below, no written contract exists in this matter. The trial court, thus, correctly dismissed the Jeters' breach of bailment contract claim, because an action based on the existence of an implied bailment contract is expressly barred. *See* A.R.S. § 12-562(C).

Significantly, the Jeters do not dispute that, if constitutional, the Act bars both their breach of fiduciary duty claim and, absent a written contract, their breach of bailment contract claim. In order to rescue these impermissible claims, the Jeters ask this Court to hold the entire Act and/or its subsections unconstitutional, yet they have provided absolutely no authority for doing so. In fact, the Jeters have not cited a single Arizona case permitting a plaintiff to bring a claim for breach of fiduciary duty or bailment contract against a licensed health care provider arising from the rendition of health care services. Even the cases from other jurisdictions the Jeters rely on in support of their argument that the Act is unconstitutional do not permit such claims. Rather, the Jeters, citing *Duncan*,

merely argue that, "a regulation that limits the theories of liability under which a plaintiff may sue is nonetheless an abrogation when the 'alternative' [legal] theory of recovery protects different interests." (O.B. at 44.) Implicit in the *Duncan* court's analysis, however, is the recognition that § 12-561(2) can and does constitutionally limit the theories of recovery against a health care provider, so long as it does not entirely abrogate a plaintiff's claim. *See Duncan*, 70 P.3d at 442.

**B. The Anti-Abrogation Clause Does Not Apply To The Jeters' Breach of Bailment Contract Claim**

It is well-established that the anti-abrogation clause is limited to tort actions and "does *not* extend to common law contract claims." *Samaritan Health Sys. v. Superior Court*, 194 Ariz. 284, 294, 981 P.2d 584, 594 (App. 1998) (emphasis added); *see Cronin v. Sheldon*, 195 Ariz. 531, 539, 991 P.2d 231, 239 (1999) (explaining that "the anti-abrogation clause applies only to *tort* causes of action that either existed at common law or evolved from rights recognized at common law") (emphasis added); *Duncan*, 205 Ariz. at 313, 70 P.3d at 442 (confirming that "the anti-abrogation clause 'prevents abrogation of all common law actions for *negligence, intentional torts, strict liability, defamation, and other actions in tort* which trace origins to the common laws") (citing *Cronin*, 195 Ariz. at 538, 991 P.2d at 238) (emphasis added). As such, the anti-abrogation clause does not insulate the Jeters' bailment contract claim from the Medical Malpractice Act's bar.

Yet, well-aware of this controlling law, the Jeters extensively argue that their breach of bailment contract claim is "protected by the Arizona Constitution's anti-abrogation clause, which applies to 'common law' claims." (O.B. at 41.) Only in a footnote do the Jeters concede that their position is contrary to Arizona law and attempt to argue for a change in the law. The Jeters' failure to clearly apprise this Court of contrary law is not only improper, but again demonstrates the lengths to which they will go to grasp onto claims which are clearly barred by Arizona law. *See* ER 3.3 cmt. 2 (a "lawyer must not mislead the tribunal by false statements of law or fact or evidence that the lawyer knows to be false").

Here, the Jeters do not dispute, and indeed admit, that their breach of bailment contract claim sounds in contract, not tort. (O.B. at 41-42 (stating "there can be no doubt that 'bailment' existed as a type of contract claim at common law").) The Medical Malpractice Act's preclusion of their breach of bailment contract claim cannot, therefore, be unconstitutional under the anti-abrogation clause.

C. **The Medical Malpractice Act Constitutionally Bars The Jeters' Breach of Fiduciary Duty Claim, Because It Does Not Protect Any Different Interests**

The Jeters contend that the Act unconstitutionally abrogates their breach of fiduciary duty claim, because "it protect[s] different interests than a claim for medical negligence." (O.B. at 46 (emphasis in original).) Specifically, the Jeters claim that a fiduciary owes a higher duty than mere negligence. *Id.* In support of

this proposition, the Jeters rely solely on an Alaska banking malpractice case. *See Trapp v. State of Alaska*, 53 P.3d 1128 (Alaska 2002). Arizona law, however, equates professional and fiduciary duties. *See Walk v. Ring*, 202 Ariz. 310, 317-18, 44 P.3d 990, 997-98 (2002). A breach of fiduciary duty claim against a health care provider, therefore, does not provide different or greater protection or recovery to a plaintiff. Accordingly, the Medical Malpractice Act properly bars the breach of fiduciary duty claim. Since the Jeters do not dispute that the statute, if constitutional, precludes their breach of fiduciary duty claim, this Court must affirm the trial court's dismissal of this claim if it rejects their constitutional argument.

**D. There Is No Written Bailment Contract Between The Jeters And Mayo**

To avoid the Medical Malpractice Act's prohibition of breach of contract claims not based on a written contract, the Jeters alleged in response to Mayo's motion to dismiss and in their opening brief that their bailment claim is based on a written contract comprised of three "writings." (O.B. at 48.) However, the three "writings" to which the Jeters refer are merely various informed consent forms that they signed regarding the IVF and cryopreservation procedures. (A.I. 6 at Exhibit D.) They do *not* constitute a written bailment contract.<sup>4</sup> *Id.* Indeed, the Jeters

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<sup>4</sup> The Jeters' suggestion that the "Request for Transfer of Cryopreserved Embryo or Semen Specimens and Assumption of Risk" also created a written bailment contract is nonsensical, as they signed this document when Mayo released the embryos to the Jeters for transport to ACFS. (O.B. at 48.)

once again have cited no authority — and none exists — for the proposition that routine informed consent forms create a written contract upon which a plaintiff can rely to avoid the Act's preclusion of contract claims against health care providers. Such an interpretation would effectively nullify § 12-562(C) and turn Arizona law on its head, as it would subject health care providers to potential contract liability every time a patient signs an informed consent form. Since the Act constitutionally precludes contract claims not based on a written contract, the trial court properly dismissed the Jeters' bailment claim.

In sum, the Jeters have concocted false constitutional arguments to divert the Court's attention from the fact that every count alleged in their Complaint is a product of their own invention. The bottom line is that the controlling Arizona statutes, § 12-561(2) and § 12-562(A), expressly limit the grounds upon which claims against health care providers arising out of the rendition of health care services can be brought and bar the Jeters' fiduciary duty and bailment claims here.

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**CONCLUSION**

Mayo respectfully requests that this Court affirm the trial court's dismissal of the Jeters' Complaint and entry of judgment in favor of Mayo.

RESPECTFULLY submitted this 21st day of April, 2004.

SNELL & WILMER L.L.P.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to ARCAP 14, I certify that the attached Appellee Mayo Clinic  
Arizona's Answering Brief:

  X   Uses proportionately spaced type of 14 points or more, is double-  
spaced using a Times New Roman font and contains 6,885 words, or

       Uses monospaced type of no more than 10.5 characters per inch  
and

       Does not exceed 40 pages (opening and answering briefs) or 20  
pages (reply briefs).

Dated: April 21, 2004

\_\_\_\_\_  
Stephanie V. Hackett

**CERTIFICATE OF SERVICE**

The undersigned, counsel for Defendant-Appellee Mayo Clinic Arizona, hereby certifies that on this 21st day of April, 2004, two copies of the foregoing APPELLEE MAYO CLINIC ARIZONA'S ANSWERING BRIEF were sent via U.S. Mail, first class, postage-prepaid, addressed to the following:

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