Case No. SC-2022-0515

IN THE SUPREME COURT OF ALABAMA

James LePage and Emily LePage, as Parents and next friend of two deceased LePage embryos, Embryo A and Embryo B., William Tripp Fonde and Caroline Fonde, as Parents and next friend of two deceased Fonde embryos – Embryo C and Embryo D,

Plaintiffs/Appellants,

vs.

Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center, and The Center for Reproductive Medicine, P.C.,

Defendants/Appellees.

On Appeal from Mobile County Circuit Court
Civil Action No. CV-2021-901607

BRIEF OF APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

Respectfully, oral argument is not necessary, nor is it indicated in this case. The legal issues presented have already been decided. The trial court's ruling followed, to the letter, the **direct** instructions from this Court to apply the Brody Act's definition of who is a "person" in the context of a civil wrongful death action in order to "harmonize **who is a person** protected from homicide under both the Homicide Act and the Wrongful Death Act." *Stinnett v. Kennedy*, 232 So. 3d 202, 215 (Ala. 2016) ("…**[I]n light of the shared purpose of the Wrongful Death Act and the Homicide Act to prevent homicide, the [Brody] amendment was an important pronouncement of public policy concerning who is a "person" protected from homicide. Thus, borrowing the definition of "person" from the criminal Homicide Act to inform as to who is protected under the civil Wrongful Death Act [makes] sense…. to harmonize who is a "person" protected from homicide under both the Homicide Act and Wrongful Death Act**.") The trial court's holding here is in complete accord. It applies the Legislature's definition of "person" so that it is consistent and harmonized between the Homicide Act and the

Wrongful Death Act to include unborn children "*in utero*" as instructed. There has been no pronouncement by the Legislature expanding this definition to include "*in vitro*" embryos. As the trial court recognized, any change in this law needs to come from our Legislature. Respectfully, this Court frequently rules without requiring oral argument in such a case. In fact, this Court frequently affirms without opinion in such a case involving definitive and clear precedent – both statutory and case law – which a trial court has followed unswervingly.

It is clear from Plaintiffs' filings they seek to deflect attention away from the above-cited law and instead pressure this Court into legislating. Their Brief repeatedly emphasizes various politicians' public statements regarding abortion and attempts to blur this case with recent law applying to active pregnancies and abortion rights. Oral argument would no doubt be another forum through which they could attempt to confuse the issues and the public, casting this case as something it is not in an effort to tap into the political upheaval and pressure surrounding the abortion issue. As the trial court stated in its dismissal Order, "This Court is not tasked with the responsibility to determine when life begins, as has been suggested by some. This Court's function is to follow existing

Alabama law which has been created by the legislature and follow law which has been previously interpreted by the appellate courts of this state." (C. 351) Respectfully, when a trial court does exactly that, affirmance is indicated. It is up to the Legislature to amend the Brody Act if it wishes to extend the definition of "person" to include *in vitro*, cryopreserved, pre-implantation embryos. Oral argument before this Court is not the proper forum to promote such legislative change.

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STATEMENT OF THE CASE AND RELEVANT FACTS[1]

Plaintiffs' Complaint

The Fondes and the LePages initially filed this action against Mobile Infirmary and The Center for Reproductive Medicine ("CRM") strictly in a representative capacity, "as Parents and next friends" of Embryos A, B, C & D, asserting claims described as "aris[ing] out of the wrongful deaths of four human beings - embryonic human beings A, B, C, and D." (C. 13-14) The Complaint asserted each couple lost 2 cryopreserved embryos when a hospital patient allegedly eloped from his hospital room, gained unauthorized access to CRM's embryology laboratory, and negligently "destroyed … Plaintiffs' embryonic children." (C. 18-19)

The Complaint included background facts relevant to the Fondes' and the LePages' election to undergo *in vitro* fertilization ("IVF"), their decision to have numerous embryos cryopreserved (7 and 8 embryos respectively), the ability these procedures afforded to each to build a

[1] The procedural history and relevant facts are so intertwined in a case such as this, in which a final judgment was entered at the motion to dismiss stage, Defendants found it most logical to discuss both chronologically and together in one section.

family (each family has had 2 children through IVF), and demonstrating each family still has 3 stored cryopreserved embryos potentially available for future implantation were either couple to desire more children. (C. 16-19) The Compliant acknowledges that "cryopreservation allows for peace of mind about a future family" and makes clear it has served that purpose for these two couples. (C. 15) The Complaint is also riddled with generalized, conclusory statements not specific to this case, as well as a number of self-serving medical and legal proclamations pled as if they were facts. (C. 13-16)

The Complaint asserted two alternative causes of action:

- Count One, entitled **"Wrongful Death - Negligence,"** setting out a claim for wrongful death/medical negligence and seeking damages pursuant to ALA. CODE § 6-5-391 and the Alabama Medical Liability Act (the "AMLA").

- Count Two, entitled "**Negligence**," asserting, as an alternative to Count One, a claim for compensatory damages "should Alabama's Wrongful death laws not apply to the deaths of …embryonic children." (C. 21) Count Two did not cite any specific legal basis. Instead it contained only a **one-sentence** assertion that Plaintiffs demand, in

the alternative, a judgment for compensatory damages for "the value of the embryonic human beings that were wrongfully destroyed and for the severe mental anguish and emotional distress they have been caused to suffer and will suffer in the future." (*Id.* ¶ 47)

What is **not** in the Complaint is equally noteworthy. There is **no** property claim asserted. There is no claim asserted for breach of contract or bailment.[2] This is so despite the fact that the Complaint is peppered with assertions that both couples "paid monthly for CRM to store **and**

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[2] As reflected in the transcript of the Motion to Dismiss hearing (R. 1-99) and the trial court's Order of dismissal (C. 352, n. 2), the trial court consolidated this case for purposes of oral argument with the parallel case of *Burdick-Aysenne v. CRM and Mobile Infirmary*, CV 2021-901640.00. Both cases arise out of the same incident, were before the same Circuit judge, were heard jointly, and are simultaneously on appeal before this Court. (The *Burdick-Aysenne* appeal is SC #2022-0579.) Unlike in the case at hand, Plaintiffs in *Burdick-Aysenne* did assert claims for breach of contract and bailment, and those claims were not dismissed and remain pending in the trial court. As the trial court's Order in this case specifically notes:

> While oral argument in this case has thus far been consolidated with that in the similar case filed by Felicia and Scott Aysenne (CV21-901640), the pleadings and claims asserted in the two cases are not identical. There is no property or contract claim asserted here, and nowhere in the LePage/Fonde Complaint is there any assertion that, even alternatively, these cryopreserved embryos should or could be treated as property under Alabama law.

(**Ex. A**, C. 352, n. 2)

protect their embryonic children" (C. 17, 18) but that the embryos were allegedly not protected or stored properly – the services for which they assert they paid monthly. (C. 20) Also, the Complaint does not contain **any** reference to "The Woman's Right to Know Act" codified at ALA. CODE § 26-23A-1, *et seq*. which has now been cited for the first time to this Court on appeal as a statute which "afford[s] the right of a wrongful death action to the LePages and the Fondes." (P's Brief, p. 38) [3]

Defendants' Motion to Dismiss

In response to the Complaint, Defendants filed a joint Motion to Dismiss. (C. 33-145) Attached as exhibits to the motion were the agreements entered into between Plaintiffs and CRM. (C. 58-145) Although Plaintiffs in this case opted not to assert a breach of contract claim in what appears to be an effort to avoid dealing with the contents of the agreements, Defendants' motion pointed out to the trial court that

[3] This is an Act promulgated by the Legislature to ensure pregnant women considering an abortion receive complete information on alternatives to terminating an ongoing pregnancy. It deals only with *in utero* pregnancies. This Act -- cited for the first time on appeal as a statutory basis for reversing the trial court (P's Brief, p. 36-38) -- was not ever pled or cited below, nor was it ever mentioned to the trial court at any juncture as support for deeming a pre-implantation, *in vitro* embryo to be a "minor child" for purposes of a wrongful death action.

these agreements were nonetheless proper for consideration on a Motion to Dismiss because: (1) they were referenced repeatedly in the Complaint (*e.g.*, "[Plaintiffs] paid monthly for CRM to store and protect their embryonic children."), and (2) the contracts are central to Plaintiffs' claims that Defendants failed to properly protect and store the cryopreserved embryos. (C. 17, 18, 20, 37-38) Defendants demonstrated to the trial court that these agreements reflect the very specific terms and risks to which Plaintiffs agreed relating to IVF. These included the option they chose of cryopreserving as many pre-implantation embryos as possible (with full knowledge this could result in fertilization of more embryos than they would want to implant) as well as the risks, storage options, and time parameters they chose and for which they paid as referenced in the Complaint. (C. 17, 18, 20, 37-38)

Defendants' Motion to Dismiss raised numerous grounds for dismissal pursuant to Rule 12(b)(1) and 12(b)(6) as well as ALA. CODE § 6-5-391, § 6-5-551, and in accord with § 13A-6-1 and § 26-23H-1-8. (C. 33) Specifically, the motion asserted:

- As to Count One, Plaintiffs' wrongful death claims on behalf of cryopreserved, *in vitro*, pre-implantation embryos are contrary to

Alabama law and the applicable definition of a "minor child" as that term is used in ALA. CODE § 6-5-391. As instructed by this Court, this term must be in congruence with the Homicide Act and the 2006 Brody Act, wherein "person" is defined as "a human being, including an unborn child ***in utero*** at any stage of development." ALA. CODE § 13A-6-1(a)(3). (C. 46-49)

- Plaintiffs' wrongful death claims are also tantamount to speculative claims of the loss of a chance for a future pregnancy, a process not begun until successful implantation occurs, which is not a proper basis for a claim in this state.

- Plaintiffs lack standing to assert these claims. Since *in vitro* embryos are transferrable and could be used by another couple, no standing attaches until the placement of the embryo *in utero*. Alabama law requires implantation and an ongoing pregnancy when defining the term parent in the eyes of the law. (C. 49-50) Likewise, prior to being *in utero*, an *in vitro* embryo would not have standing to assert a wrongful death claim. Additionally, the Defendants pointed out these couples' lack of standing to now claim that a loss of frozen embryos equates to "killing" an "embryonic child," when this claim is directly contradicted by the

options they chose in their IVF agreements. Specifically, neither couple exercised the option for indefinite, long-term storage. Instead, the Fondes checked a box in 2014 in which they contractually authorized CRM to dispose of any unused and remaining pre-implantation embryos in a number of situations, including death of one of them, divorce, discontinuation of IVF treatment, reaching a certain age, or after storage for 5 years. (C. 79-85) The LePages opted in 2017 to donate any remaining embryos to research in the event of their death, non-payment of storage fees, reaching a certain age, or after a period of 10 years. (C. 123-128)

- As to Count Two, for compensatory damages, Defendants moved to dismiss this claim because Plaintiffs filed their claims in a representative capacity as "next friends" and not as individuals asserting their own claims. (C. 51)

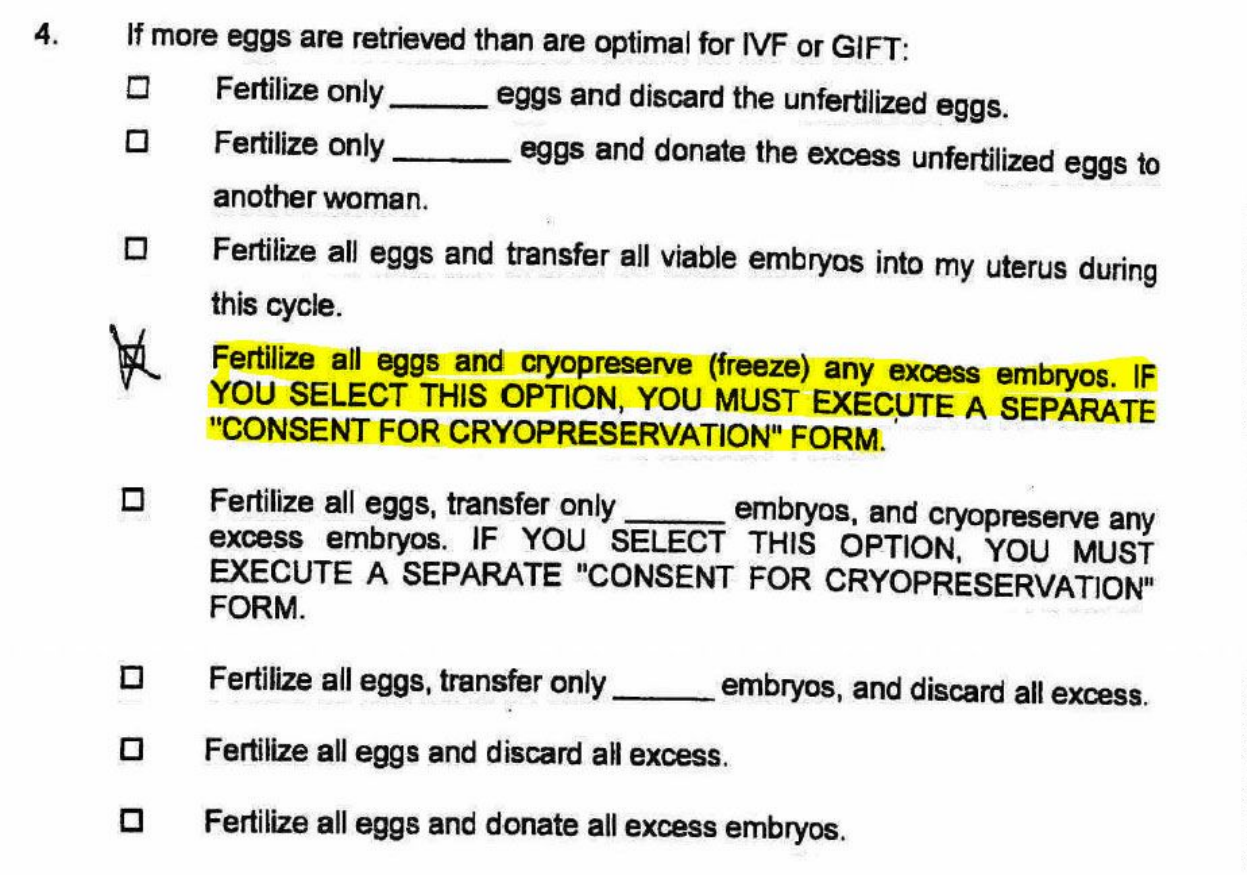
- Defendants also moved to dismiss Plaintiffs' claims for compensatory damages for "the value of embryonic life" as contrary to Alabama law and because Alabama law does not recognize emotional distress as a compensable injury when the plaintiff has not been physically injured or at risk of physical harm/in the zone of danger. (C. 51-54)

- Defendants further raised issues of standing and ripeness with regard to Count Two "to the extent Plaintiffs are attempting to articulate a claim for compensatory damages due to being deprived of additional future pregnancies," given that each couple still has 3 frozen, pre-implantation embryos available for implantation and neither couple pled an intent or desire to attempt additional implantations in the future. (C. 54-56)

The Contracts and Plaintiffs' efforts to strike them

The contracts attached to the Defendants' Motion to Dismiss demonstrate the Fondes entered into agreements with CRM to undergo IVF and cryopreserve multiple pre-implantation embryos in the spring of 2014. The documents confirm consent to the procedures; acknowledge the risks and limitations of IVF and cryopreservation; and outline how and when the frozen pre-embryos could be disposed in a "Disposition of Embryos" form. (C. 59-91) The Fondes were given a number of choices regarding how many eggs would be fertilized. They were given the ability to limit the number fertilized and/or opt for fertilization of only a specific number of eggs, discarding any unfertilized eggs. They also had the option of transferring all viable embryos into Ms. Fondes' uterus without

cryopreservation. (C. 89) They opted instead for all eggs to be fertilized and, if more eggs were retrieved than was optimal for IVF, they opted for all "excess embryos" to be cryopreserved/frozen:



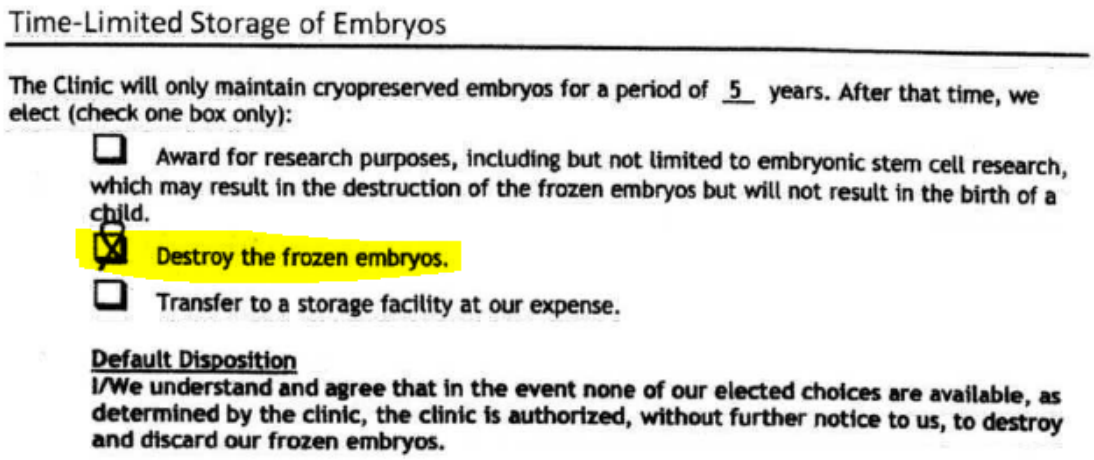
4. If more eggs are retrieved than are optimal for IVF or GIFT:

- ☐ Fertilize only _____ eggs and discard the unfertilized eggs.
- ☐ Fertilize only _____ eggs and donate the excess unfertilized eggs to another woman.
- ☐ Fertilize all eggs and transfer all viable embryos into my uterus during this cycle.
- ☒ Fertilize all eggs and cryopreserve (freeze) any excess embryos. IF YOU SELECT THIS OPTION, YOU MUST EXECUTE A SEPARATE "CONSENT FOR CRYOPRESERVATION" FORM.
- ☐ Fertilize all eggs, transfer only _____ embryos, and cryopreserve any excess embryos. IF YOU SELECT THIS OPTION, YOU MUST EXECUTE A SEPARATE "CONSENT FOR CRYOPRESERVATION" FORM.
- ☐ Fertilize all eggs, transfer only _____ embryos, and discard all excess.
- ☐ Fertilize all eggs and discard all excess.
- ☐ Fertilize all eggs and donate all excess embryos.

(*Id.*) This necessitated executing a separate "Consent for Cryopreservation" form. (*Id.*)

In the accompanying "Disposition of Embryos" agreement, the Fondes checked a box reflecting that as of May of 2014, they wanted CRM to only store the cryopreserved pre-implantation embryos for five (5)

years and elected to destroy any unused frozen pre-embryos at that time, checking and initialing the following option box:



Time-Limited Storage of Embryos

The Clinic will only maintain cryopreserved embryos for a period of 5 years. After that time, we elect (check one box only):

☐ Award for research purposes, including but not limited to embryonic stem cell research, which may result in the destruction of the frozen embryos but will not result in the birth of a child.

☒ Destroy the frozen embryos.

☐ Transfer to a storage facility at our expense.

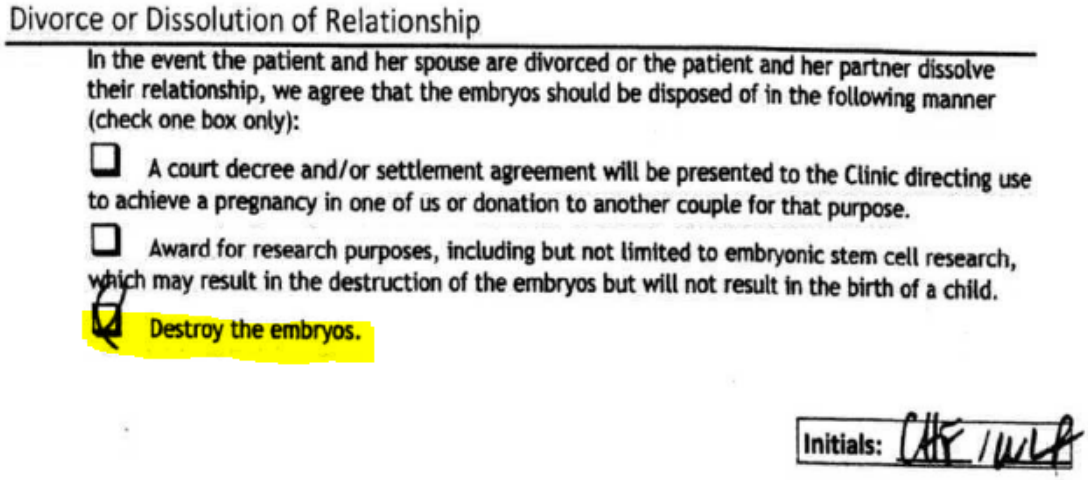
Default Disposition

I/We understand and agree that in the event none of our elected choices are available, as determined by the clinic, the clinic is authorized, without further notice to us, to destroy and discard our frozen embryos.

(C. 84) Thus, while said destruction did not occur, it is a matter of record that in 2014, the Fondes did not opt for transfer to a long-term storage facility but instead opted for CRM to destroy any remaining cryopreserved and non-implanted embryos after five years, which would have been prior to the time of the incident made the basis of this suit in December of 2020.

There is no indication in these agreements that the Fondes wanted their unused frozen embryos to be stored in perpetuity because they viewed the embryos as a special and unique "embryonic children," as they now assert. (P's Brief, p. 44) Instead, the Fondes opted, at several places in the agreements, to forego transfer of remaining frozen embryos to a

long-term storage facility. In fact, the Fondes requested that any unused frozen embryos would be destroyed under various circumstances, including in the event of their death, divorce, or dissolution of their marital relationship, opting for example:



Divorce or Dissolution of Relationship

In the event the patient and her spouse are divorced or the patient and her partner dissolve their relationship, we agree that the embryos should be disposed of in the following manner (check one box only):

☐ A court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.

☐ Award for research purposes, including but not limited to embryonic stem cell research, which may result in the destruction of the embryos but will not result in the birth of a child.

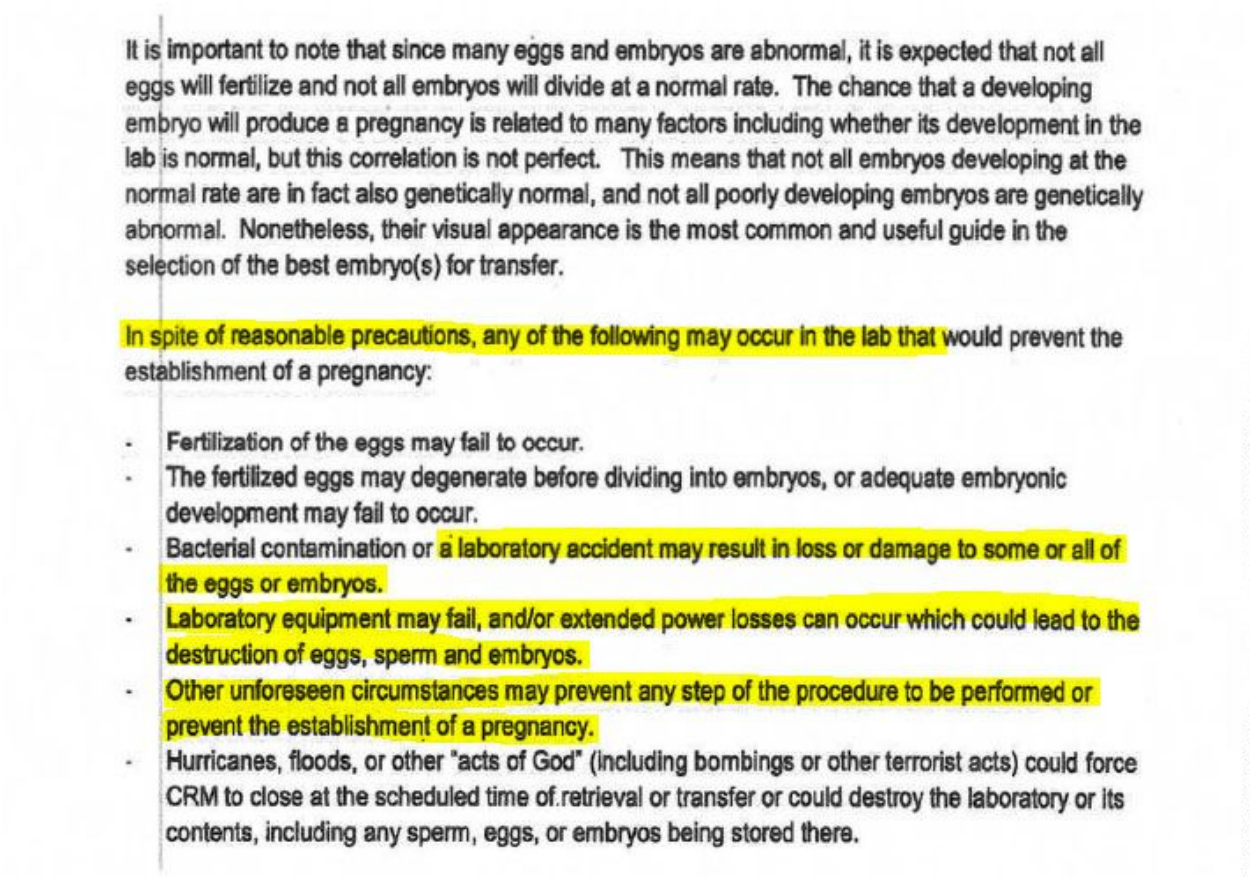
☑ Destroy the embryos.

Initials: CHF / WLF

(C. 82)[4]

[4] As the trial court recognized, the signed agreements are central to Plaintiffs' claims and also crystalize the gross inconsistency of their legal posture (perhaps explaining why Plaintiffs forewent asserting a contract claim and tried so hard to avoid consideration of these agreements). If the trial court (or this Court) were to accept Plaintiffs' more recent, litigation-inspired position -- that these pre-implanted embryos are "embryonic children" -- then these documents affirm that, at another point in time, these couples took a quite different position, *i.e.* instead of definitively planning on using all stored embryos to attempt 7 or 8 pregnancies respectively, they instead exercised alternative options which, under their current theory, would amount to an anticipated "murder" of their unused "embryonic children."

Also of note are the Fondes' initialed acknowledgements of the speculative nature of whether a fertilized embryo would probably progress to produce a pregnancy and the risk that, despite reasonable precautions, laboratory accidents can and do occur causing the loss of some or all embryos:



It is important to note that since many eggs and embryos are abnormal, it is expected that not all eggs will fertilize and not all embryos will divide at a normal rate. The chance that a developing embryo will produce a pregnancy is related to many factors including whether its development in the lab is normal, but this correlation is not perfect. This means that not all embryos developing at the normal rate are in fact also genetically normal, and not all poorly developing embryos are genetically abnormal. Nonetheless, their visual appearance is the most common and useful guide in the selection of the best embryo(s) for transfer.

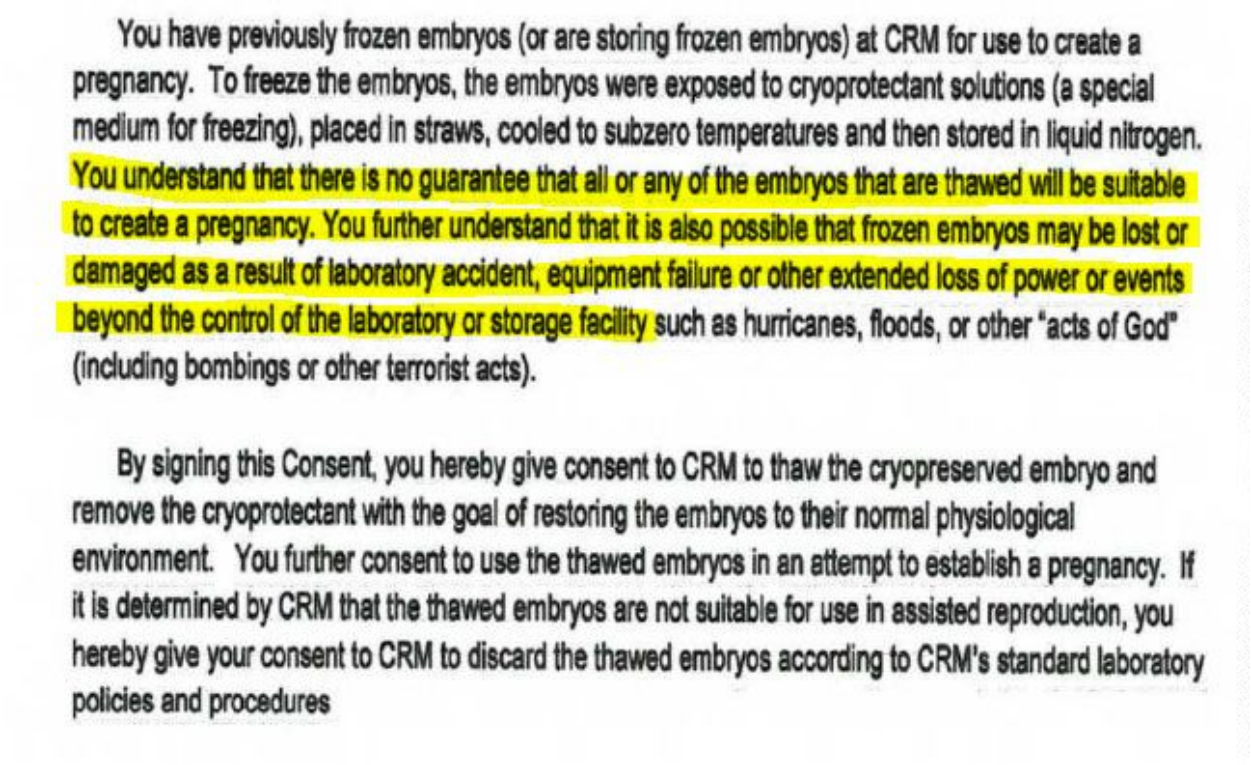
In spite of reasonable precautions, any of the following may occur in the lab that would prevent the establishment of a pregnancy:

- Fertilization of the eggs may fail to occur.
- The fertilized eggs may degenerate before dividing into embryos, or adequate embryonic development may fail to occur.
- Bacterial contamination or a laboratory accident may result in loss or damage to some or all of the eggs or embryos.
- Laboratory equipment may fail, and/or extended power losses can occur which could lead to the destruction of eggs, sperm and embryos.
- Other unforeseen circumstances may prevent any step of the procedure to be performed or prevent the establishment of a pregnancy.
- Hurricanes, floods, or other "acts of God" (including bombings or other terrorist acts) could force CRM to close at the scheduled time of retrieval or transfer or could destroy the laboratory or its contents, including any sperm, eggs, or embryos being stored there.

(C. 65-66)

The Agreement signed by the LePages on January 27, 2017 contains similar language regarding the "chance" an embryo will produce a pregnancy, the risks of thawing embryos, and the known risk that

laboratory accidents or other unplanned events could damage the embryos in spite of reasonable precautions:



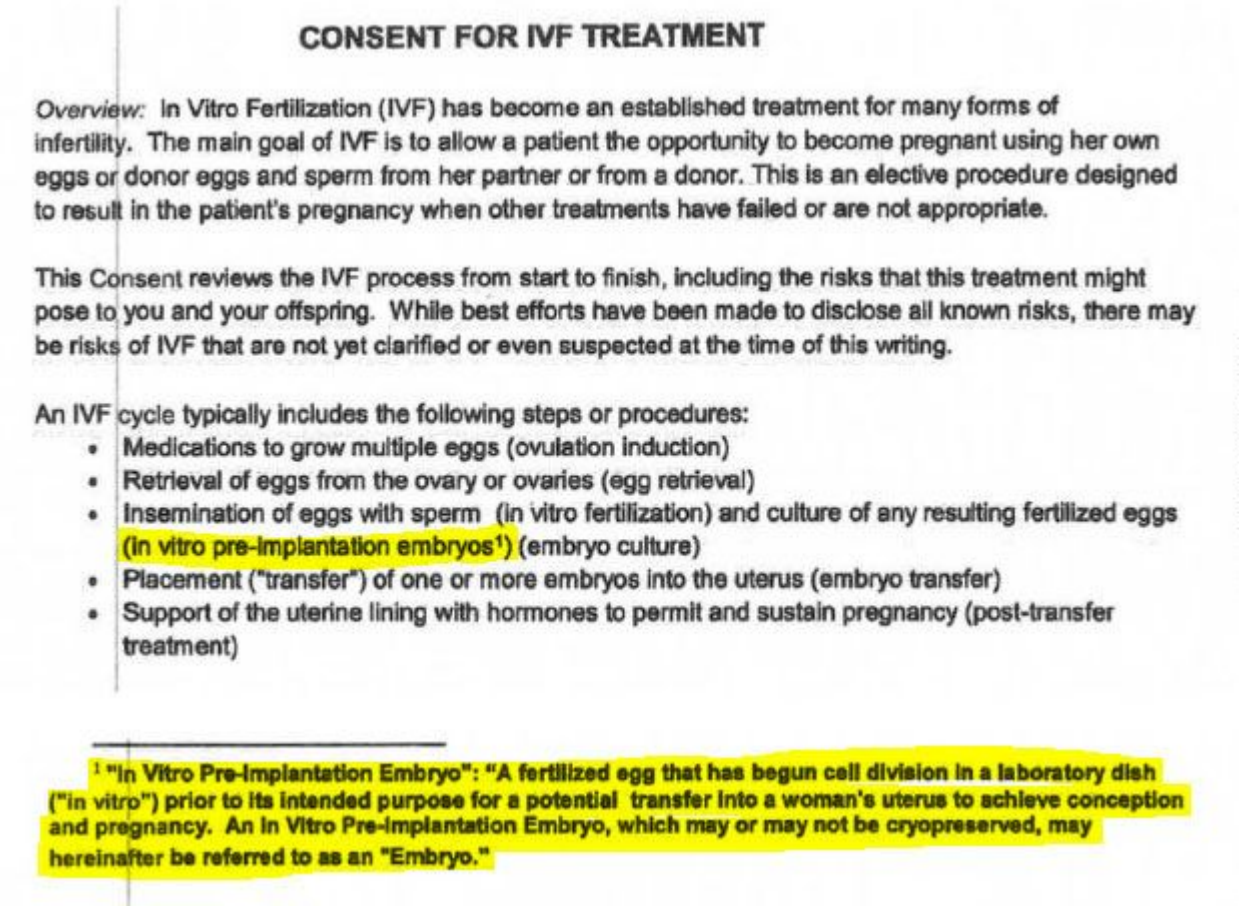
You have previously frozen embryos (or are storing frozen embryos) at CRM for use to create a pregnancy. To freeze the embryos, the embryos were exposed to cryoprotectant solutions (a special medium for freezing), placed in straws, cooled to subzero temperatures and then stored in liquid nitrogen. You understand that there is no guarantee that all or any of the embryos that are thawed will be suitable to create a pregnancy. You further understand that it is also possible that frozen embryos may be lost or damaged as a result of laboratory accident, equipment failure or other extended loss of power or events beyond the control of the laboratory or storage facility such as hurricanes, floods, or other "acts of God" (including bombings or other terrorist acts).

By signing this Consent, you hereby give consent to CRM to thaw the cryopreserved embryo and remove the cryoprotectant with the goal of restoring the embryos to their normal physiological environment. You further consent to use the thawed embryos in an attempt to establish a pregnancy. If it is determined by CRM that the thawed embryos are not suitable for use in assisted reproduction, you hereby give your consent to CRM to discard the thawed embryos according to CRM's standard laboratory policies and procedures

(C. 132)

Given the insistence in Plaintiffs' Brief that the term "embryo" is the *only* term used in these agreements and that all other terms are "made up" or disrespectful, it bears mention that the "Consent for IVF Treatment" form specifically uses the term "pre-implantation embryos" in explaining the IVF process and defines the term "pre-implantation embryo" (at footnote 1) as follows: "A fertilized egg that has begun cell division in a laboratory dish (*in vitro*) prior to its intended purpose for a

potential transfer into a woman's uterus to achieve conception and pregnancy":



CONSENT FOR IVF TREATMENT

Overview: In Vitro Fertilization (IVF) has become an established treatment for many forms of infertility. The main goal of IVF is to allow a patient the opportunity to become pregnant using her own eggs or donor eggs and sperm from her partner or from a donor. This is an elective procedure designed to result in the patient's pregnancy when other treatments have failed or are not appropriate.

This Consent reviews the IVF process from start to finish, including the risks that this treatment might pose to you and your offspring. While best efforts have been made to disclose all known risks, there may be risks of IVF that are not yet clarified or even suspected at the time of this writing.

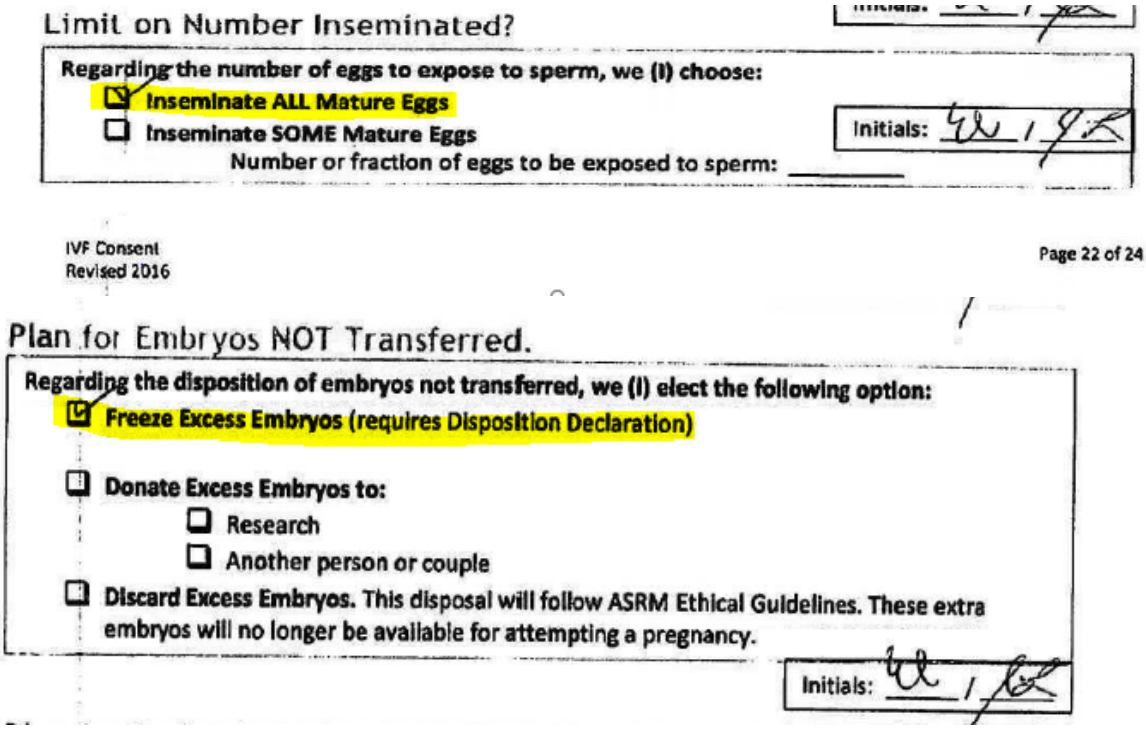
An IVF cycle typically includes the following steps or procedures:

- Medications to grow multiple eggs (ovulation induction)
- Retrieval of eggs from the ovary or ovaries (egg retrieval)
- Insemination of eggs with sperm (in vitro fertilization) and culture of any resulting fertilized eggs (in vitro pre-implantation embryos[1]) (embryo culture)
- Placement ("transfer") of one or more embryos into the uterus (embryo transfer)
- Support of the uterine lining with hormones to permit and sustain pregnancy (post-transfer treatment)

[1] "In Vitro Pre-Implantation Embryo": "A fertilized egg that has begun cell division in a laboratory dish ("in vitro") prior to its intended purpose for a potential transfer into a woman's uterus to achieve conception and pregnancy. An In Vitro Pre-Implantation Embryo, which may or may not be cryopreserved, may hereinafter be referred to as an "Embryo."

(C. 94)

Like the Fondes, the LePages chose not to limit the number of eggs inseminated and to instead inseminate all available mature eggs and freeze any not transferred:



Limit on Number Inseminated?

Regarding the number of eggs to expose to sperm, we (I) choose:

☑ Inseminate ALL Mature Eggs

☐ Inseminate SOME Mature Eggs

Number or fraction of eggs to be exposed to sperm: _____

Initials: _____

IVF Consent
Revised 2016

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Plan for Embryos NOT Transferred.

Regarding the disposition of embryos not transferred, we (I) elect the following option:

☑ Freeze Excess Embryos (requires Disposition Declaration)

☐ Donate Excess Embryos to:

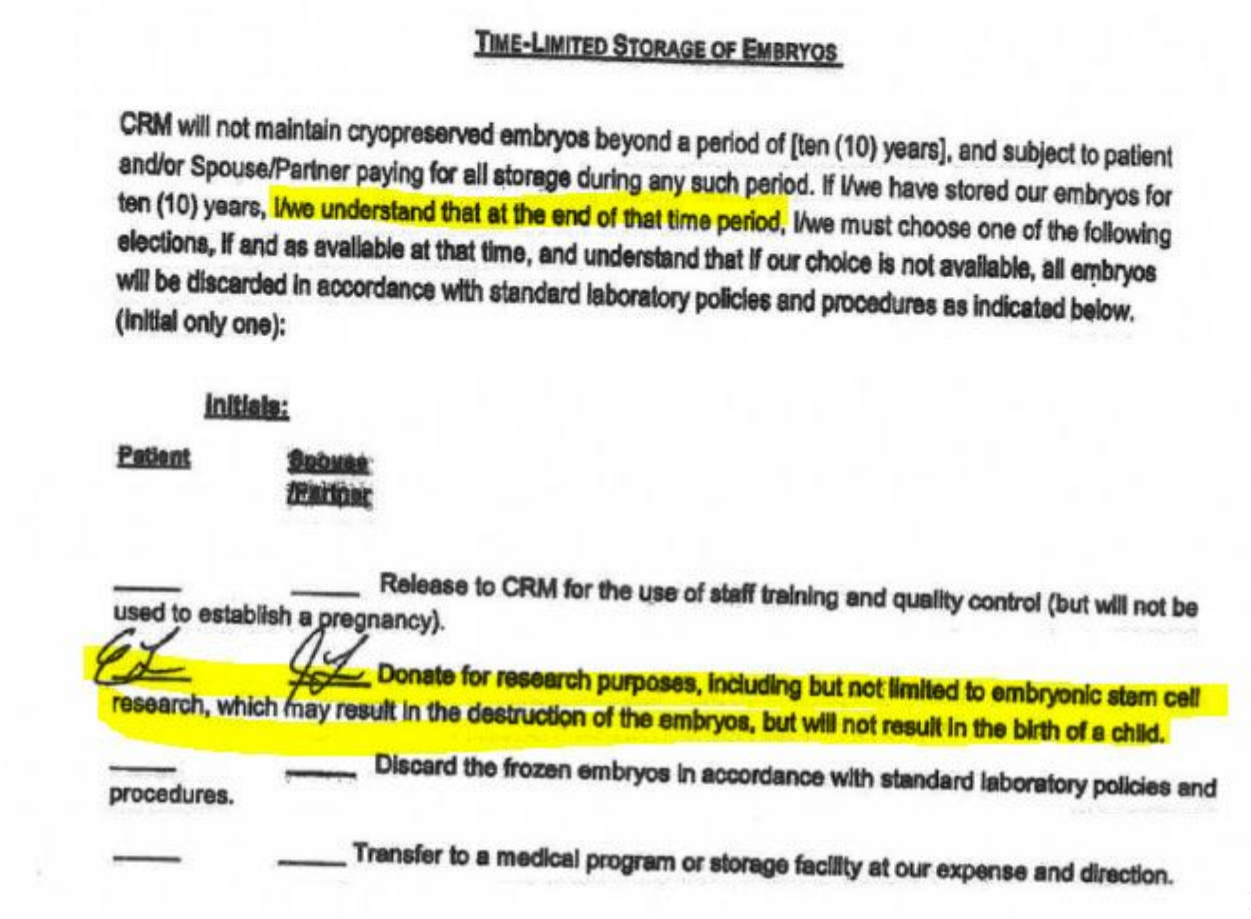
- ☐ Research
- ☐ Another person or couple

☐ Discard Excess Embryos. This disposal will follow ASRM Ethical Guidelines. These extra embryos will no longer be available for attempting a pregnancy.

Initials: _____

(C. 114-115)

With regard to the storage and/or disposition of unused cryopreserved embryos, the LePages were informed that in addition to the option of discarding the embryos or donating them to research, they could donate them to another individual or couple to attempt pregnancy. (C. 118) The LePages did not choose that option, but instead signed an Agreement for Disposition and Storage of *In Vitro* Pre-Implantation Embryos form acknowledging a 10-year time limitation on storage, at which time CRM was authorized to donate remaining embryos for research purposes:



TIME-LIMITED STORAGE OF EMBRYOS

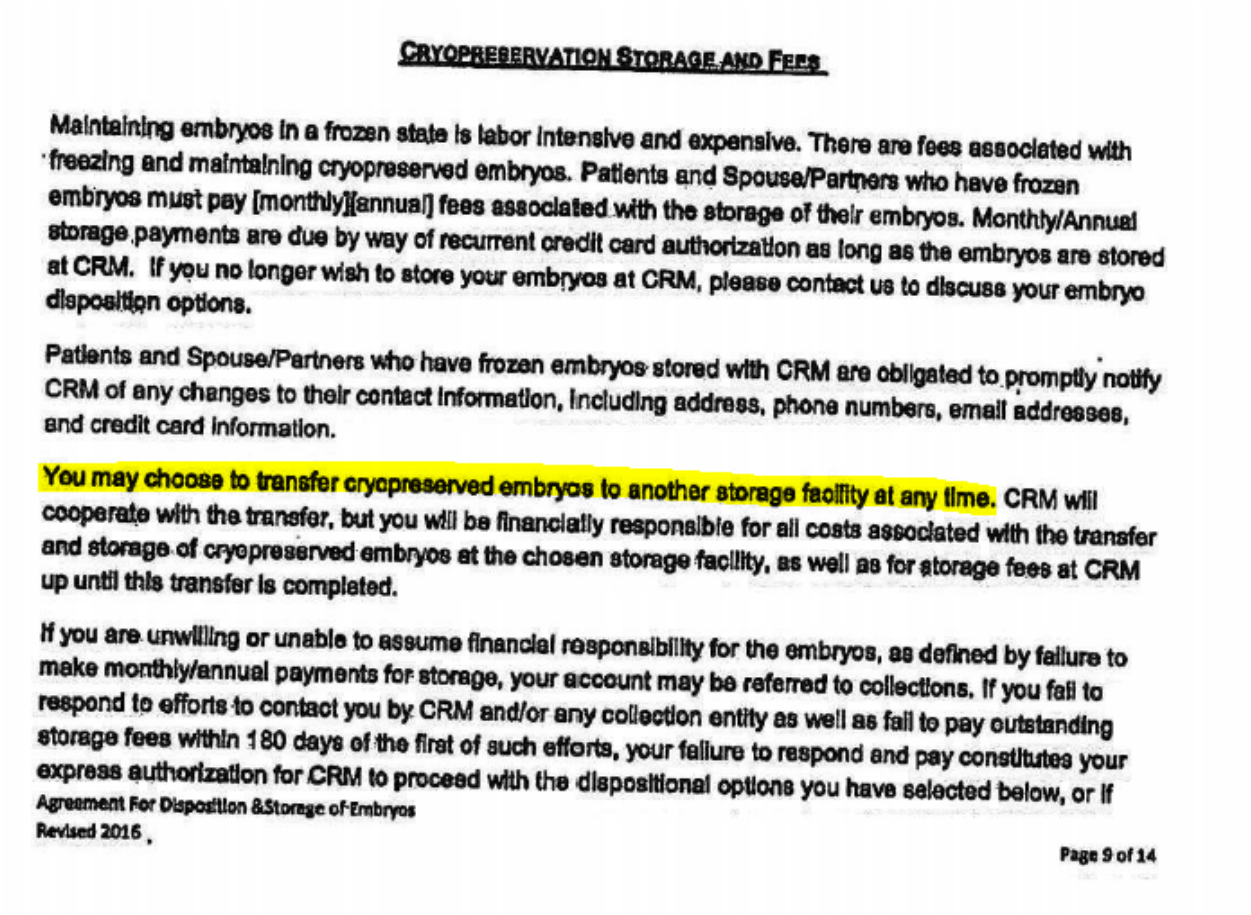
CRM will not maintain cryopreserved embryos beyond a period of [ten (10) years], and subject to patient and/or Spouse/Partner paying for all storage during any such period. If I/we have stored our embryos for ten (10) years, I/we understand that at the end of that time period, I/we must choose one of the following elections, if and as available at that time, and understand that if our choice is not available, all embryos will be discarded in accordance with standard laboratory policies and procedures as indicated below. (Initial only one):

Initials: Patient	Spouse /Partner	
____	____	Release to CRM for the use of staff training and quality control (but will not be used to establish a pregnancy).
EL	JL	Donate for research purposes, including but not limited to embryonic stem cell research, which may result in the destruction of the embryos, but will not result in the birth of a child.
____	____	Discard the frozen embryos in accordance with standard laboratory policies and procedures.
____	____	Transfer to a medical program or storage facility at our expense and direction.

(C. 126-127) They requested that in the event of both of their deaths, or if they reached the age of 55, the frozen embryos would likewise be donated for research purposes. (C. 123-124)[5]

[5] As with the Fondes, the LePage's contract reveals the inconsistencies between their current legal position that they considered the pre-implantation embryos to be "embryonic children." If this were so, attempting pregnancy with all available embryos would be expected, and it would be inconceivable for the LePages to have opted for said "children" be donated to medical experimentation and ultimate destruction.

The LePages were informed of and agreed to storage limitations and fees, the option to transfer cryopreserved embryos to another storage facility for longer storage, or the option of donating to another couple/individual for reproductive persons in the event of inability to pay for storage. They chose donation for research:



CRYOPRESERVATION STORAGE AND FEES

Maintaining embryos in a frozen state is labor intensive and expensive. There are fees associated with freezing and maintaining cryopreserved embryos. Patients and Spouse/Partners who have frozen embryos must pay [monthly][annual] fees associated with the storage of their embryos. Monthly/Annual storage payments are due by way of recurrent credit card authorization as long as the embryos are stored at CRM. If you no longer wish to store your embryos at CRM, please contact us to discuss your embryo disposition options.

Patients and Spouse/Partners who have frozen embryos stored with CRM are obligated to promptly notify CRM of any changes to their contact information, including address, phone numbers, email addresses, and credit card information.

You may choose to transfer cryopreserved embryos to another storage facility at any time. CRM will cooperate with the transfer, but you will be financially responsible for all costs associated with the transfer and storage of cryopreserved embryos at the chosen storage facility, as well as for storage fees at CRM up until this transfer is completed.

If you are unwilling or unable to assume financial responsibility for the embryos, as defined by failure to make monthly/annual payments for storage, your account may be referred to collections. If you fail to respond to efforts to contact you by CRM and/or any collection entity as well as fail to pay outstanding storage fees within 180 days of the first of such efforts, your failure to respond and pay constitutes your express authorization for CRM to proceed with the dispositional options you have selected below, or if

Agreement For Disposition &Storage of Embryos
Revised 2016

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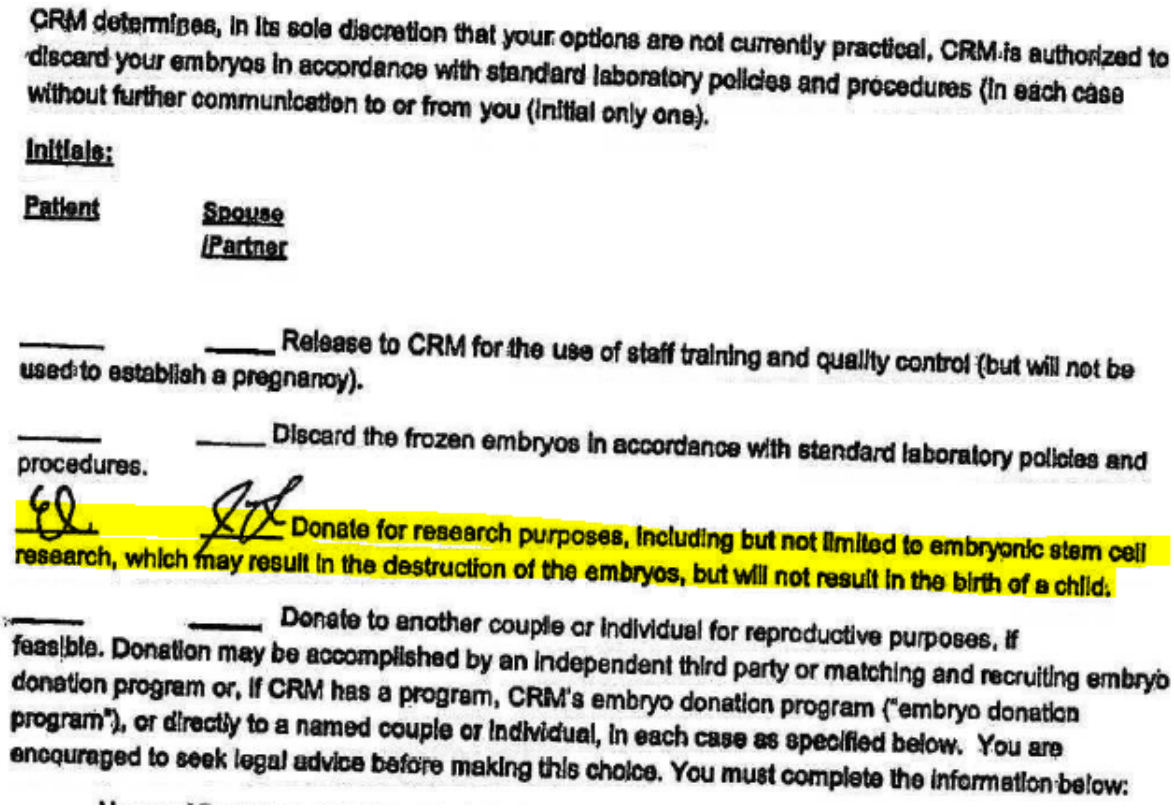

CRM determines, in its sole discretion that your options are not currently practical, CRM is authorized to discard your embryos in accordance with standard laboratory policies and procedures (in each case without further communication to or from you (initial only one).

Initials:

Patient | Spouse /Partner

_____ _____ Release to CRM for the use of staff training and quality control (but will not be used to establish a pregnancy).

_____ _____ Discard the frozen embryos in accordance with standard laboratory policies and procedures.

_____ _____ Donate for research purposes, including but not limited to embryonic stem cell research, which may result in the destruction of the embryos, but will not result in the birth of a child.

_____ _____ Donate to another couple or individual for reproductive purposes, if feasible. Donation may be accomplished by an independent third party or matching and recruiting embryo donation program or, if CRM has a program, CRM's embryo donation program ("embryo donation program"), or directly to a named couple or individual, in each case as specified below. You are encouraged to seek legal advice before making this choice. You must complete the information below:

(C. 125-126)

Plaintiffs filed a Motion to Strike these contractual agreements, based primarily on the fact that they had not asserted a breach of contract claim. (C. 194-195) They cited no law in their motion except a general reference to ARCP 12(b)(6).

Defendants filed an Opposition to Plaintiffs' Motion to Strike which: (1) citied numerous Alabama cases holding documents referenced in a complaint and central to the claims asserted may be attached to a motion to dismiss, regardless of whether a claim for breach of contract is asserted; and (2) reminding the trial court that Rule 12(b)(1) was also at

play and allows a trial court to consider documents outside the pleadings such as these to assure itself of jurisdiction. (C. 334-337)

Plaintiffs' First Amended Complaint

In response to Defendants' Motion to Dismiss, Plaintiffs filed a First Amended Complaint which was substantively identical to the original Complaint except it added the Fondes and the LePages individually as named Plaintiffs in the style of the case. The amended Complaint also specified Plaintiffs were asserting the claim for compensatory damages in Count Two "in their individual capacities." (C. 164-173)

Defendants thereafter filed a Motion to Dismiss the First Amended Complaint which renewed and reasserted their previously-filed Motion to Dismiss on all grounds, except for the no-longer-appliable ground that Plaintiffs were not named as individual parties to the case. (C. 189-191)

Plaintiffs' Response to Motion to Dismiss

In addition to amending their Complaint, Plaintiffs also filed a Response in Opposition to the Motion to Dismiss. (C. 198-303) In their response, Plaintiffs relied primarily on three Alabama cases, which they attached as exhibits and argued as precedent for permitting an *in vitro*, pre-implantation cryopreserved embryo to bring a claim for wrongful

death – *Stinnett v. Kennedy*, 232 So. 3d 202 (Ala. 2016), *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012), and *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011). (C. 201-205) They also argued their wrongful death claims are protected by the 2018 amendment to Alabama's Constitution which, they argued, protects "the rights of unborn children" and should be extended outside the womb to a cryopreserved pre-implantation embryos as well. (C. 200)

With regard to their claim for compensatory damages for "the value of life" and emotional distress, Plaintiffs did not distinguish the cases cited by Defendants. (C. 211-212) Instead, Plaintiffs argued that Section 13 of the Constitution guarantees them a remedy, ignoring the "zone of danger" cases in which Alabama courts have denied similar litigants (who were not in the zone of danger or in immediate risk of physical harm) any right to emotional distress/compensatory damages even when that resulted in no remedy. (C. 211)

Lastly, Plaintiffs argued consideration of the contractual agreements and/or Defendants' use of the term "pre-embryo" converted the Motion to Dismiss to one for summary judgment, stating, "Should the Court conclude Defendants have raised a legitimate factual dispute as to whether there is such a thing as a 'pre-embryo'…then under ARCP 56(f),

Plaintiffs are entitled to discovery before opposing a motion for summary judgment on the issue." (C. 209)

In response to this argument, Defendants demonstrated that, in keeping with the nationwide body of law grappling with these issues and the very contracts signed by Plaintiffs, the Motion to Dismiss specifically stated the terms "pre-embryo" and "pre-implantation embryo" were used interchangeably with the term "embryo." (C. 326-327) It was not these litigants, but courts around the country which identified "pre-embryo" as the medically accurate term for a zygote, or fertilized egg, that has not been implanted in a uterus.[6] Defendants also demonstrated that no

[6] Defendants made clear they used these three terms interchangeably because those terms have been deemed medically and legally accurate in **all** of the cases nationwide involving similar claims surrounding fertilized eggs not implanted in a uterus. (C. 34-35; 326) Alabama courts have used similar terms such as "frozen zygotes" when referring to cryopreserved embryos. *Cahill v. Cahill*, 757 So. 2d 465, 466 (Ala. Civ. App., 2000). *See also, Loeb v. Vergara*, 313 So. 3d 346, 353-54 nn.3-4 (4th Cir. 2021) (finding that though 'embryo' and 'pre-embryo' were used interchangeably in the record, '**pre-embryo'** is the medically accurate term for the products of IVF); *York v. Jones*, 717 F. Supp. 421, 427 (E.D. Va. 1989) (using the term "pre-zygote"); *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256, 1258, n.1 (Ariz. Ct. App. 2005) ("To avoid entering into the emotional discussion about when life begins, in this opinion we use the term "**pre-embryo**." Our use of that term is meant to be neutral and not meant to demean or minimize the special respect the Jeters and others claim for such fertilized, unimplanted eggs"); *McQueen v. Gadberry*, 507 S.W.3d 127, 134 n.4 (Mo. Ct. App. 2017) ("'**Pre–embryo'**

Alabama court (nor the Alabama legislature) has ever used Plaintiffs' chosen terms of "embryonic human being" or "embryonic children."

Once again, what is not found in Plaintiffs' response to the Motion to Dismiss is perhaps most noteworthy. There was no argument or case law cited regarding an alleged lack of due process or violation of the right to equal protection. There was one phrase, in the prelude/introduction to the Response, in which Plaintiffs stated, "Defendants' motion to dismiss is, in sum, asking this Court …to create an exception to existing Alabama law where not all embryonic life would be treated equally." (C. 198) Beyond that one phrase, Plaintiffs made no equal protection argument, nor did they ever cite the Equal Protection clause or any law analyzing equal protection. Their filing did not contain any analysis of what level of scrutiny would apply, made no mention of a lack of due process, and

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is a medically accurate term for a zygote or fertilized egg that has not been implanted in a uterus"); *Davis v. Davis*, 842 S.W.2d 588, 592-93 (Tenn. 1992) (relying on physician expert's testimony that "the currently accepted term for the zygote immediately after division is '**preembryo**'"); *Frisina v. Women and Infants Hosp. of Rhode Island*, 2002 WL 1288784 at *2, n.2 (R.I. Super. 2002) ("The term **preembryo** is used to describe the four-to-eight cell stage of a developing fertilized egg."); *Roman v. Roman*, 193 S.W.2d 40, at p. 55 n. 1 (Tex. Ct. App. 2006); *Penniman v. University Hospitals Health System, Inc.*, 130 N.E.3d 333, 335-36 (Ohio Ct. App. 2019) (noting use of 'embryo' for ease of discussion only).

did not contain any reference or analysis of what defines a fundamental right in the context of constitutional analysis. It is a matter of record that literally none of the legal arguments found in Plaintiffs' Brief to this Court on these constitutional issues appear anywhere in the lower court filings.

Likewise, Plaintiffs' Response to the Motion to Dismiss did not contain any citation to ALA. CODE § 26-23B-3 (Alabama's Pain-Capable Unborn Child Protection Act) or to § 26-23A-1, *et seq*. (the Woman's Right to Know Act). None of the arguments found in Plaintiffs' Brief to this Court relying upon these two abortion-related acts (arguing those acts provide a wrongful death cause of action here) are found anywhere in Plaintiffs' filings below. There was also no mention in Plaintiffs' Response of the statutory construction argument (made for the first time on appeal at Appellants' Brief, p. 34-35) that the term "including an unborn child *in utero*" should be treated as inclusive only and presumed to also include *in vitro* embryos. Nowhere in their filings below did Plaintiffs postulate, as they have now to this Court, that although the Legislature specifically defined the term "person" as including unborn children *in utero*, the Legislature really intended, without specifying, for

the term "including" to also cover *in vitro* pre-implantation frozen embryos which may never be part of an active pregnancy.

Defendants' Reply in Support of Motion to Dismiss

In reply, Defendants filed a brief in further support of their motion, responding to each of Plaintiffs' arguments. They demonstrated the three Alabama cases cited by Plaintiffs on the wrongful death issue actually support Defendants' position, holding the legislative definition of a "person" set out in the Brody Act is the definition applicable in civil wrongful death actions involving a minor child. (C. 310-333) Defendants' Reply also laid out for the trial court all of the times the Alabama legislature and this Court have specifically distinguished laws which apply only to *in utero* pregnancies. Defendants directed the trial court to numerous cases from around the country which have drawn this same distinction, demonstrating that no Court in this country, without express instruction from the Legislature, has adopted the position asserted by the Fondes and LePages.

Motion to Stay Discovery

Defendants both filed Motions to Stay Discovery pending the trial court's ruling on their Motions to Dismiss. (C. 179-183; 186-187) These motions were based upon the trial court's broad discretion to enter a stay in the interests of judicial economy pending adjudication of a motion to dismiss, especially given pending issues of standing and ripeness and the complicating factor of patient confidentiality raised by Plaintiffs' requests for the private medical records of the non-party patient alleged to have been involved in this incident. (*Id.*)

The hearing held by the Trial Court

Each of these pending motions was fully argued before the trial court at a lengthy hearing on January 31, 2022. (R. 1-99) As mentioned above, the hearing was consolidated with the *Aysenne* case. (*Id.*) At the hearing, Plaintiffs' counsel admitted Alabama law does not permit compensatory damages for the loss of life, conceding the very basis for Defendants' motion to dismiss the compensatory damage claim as pled. (R. 59)("Well, we don't get compensatory damages for death in Alabama.") Plaintiffs' counsel also conceded Alabama law does not recognize a claim for mental anguish for loss of life. (R. 62)("So if it's a life, if it is a life,

then absolutely, there is no cause of action for mental anguish, there is no harm to her because that's not the law in Alabama.") In essence, Plaintiffs agreed at the hearing that Alabama law does not recognize either of the theories seeking compensatory damages they espoused in Count Two of their Complaint. Equally as noteworthy considering the focus of their appellate brief on a supposed "lack of remedy," Plaintiffs conceded at the hearing they had chosen not to assert a breach of contract, bailment, or property claim, unlike the Plaintiffs in *Aysenne*. ("I don't believe that they may just be property.") (R. 61)

The Trial Court's Rulings

At the close of the hearing, at Plaintiffs' counsel's suggestion, the parties agreed to submit proposed orders for the trial court's consideration. (R. 88-89) ("MR. WIRTES: I really wanted to stand up and talk about how could we help the Court; do you want proposed Orders? THE COURT: I think that's a good suggestion. That helps me if both sides could submit those, I will take a look at them.")[7] Thus, both sides

[7] Given that proposed orders were submitted at Plaintiffs' counsel's suggestion "to help the court," it is unclear why Plaintiffs' brief to this Court infers there was something improper about the trial court's acceptance of Defendants' proposed order, suggesting the trial court did not listen to all sides fairly but only "elected to listen instead to

submitted proposed orders after the hearing as suggested. (C. 339-340; 341-350)

Plaintiffs' submission was a two-paragraph Proposed Order, stating Plaintiffs are guaranteed a remedy but since "this Court is unsure of the exact contours of their remedy," "the Court will endeavor to define their available remedy upon completion of discovery." (R. 339-340) Defendants, on the other hand, submitted a Proposed Order actually addressing all of the arguments, statutes, and case law raised by the parties and quoting therefrom. (C. 341-350)

After considering the issues for several months, the trial court entered its Order of dismissal, attached hereto as **Exhibit A** for this Court's ease of reference. (C. 351-360; **Ex. A**) In that Order, the trial court made clear that its job is to follow existing Alabama statutory and case

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Defendants." (P's Brief, p. v) Nothing could be further from the truth. The trial court listened to all parties, considered all arguments, allowed both sides to submit orders, and gave all sides as much time as needed to fully present their arguments. (R. 39) ("THE COURT: I want to hear what everybody has to say. That's why you guys have basically my whole day, so that you can say whatever you want to say…I'm here as long as you need it.") It is also unclear why Plaintiffs did not take this opportunity to orally argue the recently raised Due Process, Equal Protection and "Right to Know Act" arguments when the trial court gave them the chance to "say whatever they wanted to say," but they did not. (R. 1-99)

law, giving "appropriate deference to the separation of powers" and the Legislature's role to create the law. (C. 358) The trial court's Order stressed its obligation to rule on causes of action as they are pled and follow the law as it exists as opposed to accepting Plaintiffs' suggestion a trial court should or could "endeavor to define an available remedy" at some later date despite the fact that no cognizable claim was pled. (C. 359-360) ("Plaintiffs' assertion that this Court can and should side-step well established principles [of Alabama law] has no legal precedent in this state.") The trial court also entered separate Orders denying Plaintiffs' Motion to Strike (C. 361) and deeming Defendants' motions to stay to be moot. (C. 362-363)

STATEMENT OF THE ISSUES

1. Did the trial court properly deny Plaintiffs' Motion to Strike the contractual agreements given their centrality to the issues raised under both 12(b)(6) and 12(b)(1)?

2. Did the trial court properly follow Alabama law and dismiss Plaintiffs' wrongful death claims given the clear instructions from this Court that the definition of a "person" in a civil wrongful death act should be harmonized and congruent with the definition promulgated by the Legislature in the Brody Act and applied in criminal homicide cases?

3. Even were this Court able to allow an argument never made to the trial court, does the Woman's Right to Know Act, or the other abortion-related statutes cited in Plaintiffs' Brief, create a basis for an *in vitro*, frozen pre-implantation embryo, not part of an active pregnancy with no evidence it will ever be thawed and implanted, to assert a claim for wrongful death?

4. Were Plaintiffs improperly denied a right to remedy or did they simply fail to plead a cognizable cause of action?

5. Does Alabama law prohibit making a "geographical" distinction between *in utero* unborn children and extra-uterine embryos as Plaintiffs contend?

6. Would it be proper for this Court to reverse a trial court based on constitutional/equal protection arguments never raised below and which are also substantively flawed?

7. Did the trial court properly dismiss Count Two, seeking compensatory damages for loss of life and mental anguish, given long-standing Alabama law prohibiting such recovery, especially given Plaintiffs' concessions at the hearing that such recovery has never been allowed in this context under Alabama law?

STANDARD OF REVIEW

As the trial court stated in its Order (C. 352), in considering a challenge pursuant to Rule 12(b)(1) and (6) such as this, it accepted as true the allegations in the Complaint and undertook to decide whether "when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [the pleader] to relief." *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala. 1993); *see also*, *Munza v. Ivey*, 2021 WL 1046484 (Ala. March 19, 2021); *Ex parte Mobile Infirmary Assoc.*, 2021 WL 4129400 (Ala. September 10, 2021). This Court, in reviewing such an order dismissing a case under 12(b)(6) or (1), undertakes a *de novo* review. *Portersville Bay Oyster Co., LLC v. Blankenship*, 275 So. 3d 124, 129 (Ala. 2018); *Sims v. Leland Roberts Const. Inc.*, 671 So. 2d 106, 107 (Ala. Civ. App. 1995); *Hutchinson v. Miller*, 962 So. 2d 884, 886 (Ala. Civ. App. 2007).

However, neither the trial court nor this Court are required to accept as true, for the purposes of a motion to dismiss, conclusory allegations, deductions of fact, or legal conclusions set out in a complaint. *Ex parte Gilland*, 274 So. 3d 976, 985, n. 3 (Ala. 2018); *Ex parte Marshall*,

323 So. 3d 1188, 1207 n. 3 (Ala. 2020). Furthermore, this Court has emphasized the importance of examining allegations *as worded* in the Complaint, instructing that a court "does not consider whether the claimant will ultimately prevail, only whether he has stated a claim under which he may possibly prevail." *Hightower & Co. v. United States Fidelity & Guar. Co.*, 527 So. 2d 689, 702-03 (Ala. 1988) (emphasis added). Further, it is axiomatic that Alabama appellate courts "may affirm a trial court' s judgment if it is supported by any valid legal basis." *GEICO General Insurance Co. v. Curtis*, 2018 WL 6729032 (Ala. Civ. App., December 21, 2018). All of the above are especially relevant here, where the Fondes and LePages had exclusive control over the wording of their Complaint; the claims and theories of recovery they chose to make; and the articulation of their arguments to the trial court.

SUMMARY OF THE ARGUMENT

The proposed Order Plaintiffs submitted to the trial court encapsulates perfectly their "we-realize-we-haven't-articulated-a-cognizable-claim-under-Alabama-law-but-let-us-undertake-discovery-anyway-and-figure-something-out-later" approach. In it, they conceded "the exact contours of their remedy" were "unsure" but nevertheless urged the trial court to ignore deficiencies in their two alternative causes of action as pled, allow discovery, and then "endeavor to define an available remedy" for them. (C. 340) The trial court properly recognized such an approach invades the province of the Legislature and would be impermissible under the laws of this state.

Plaintiffs now ask this Court to also ignore, or at least impermissibly second-guess, the Legislature's purposeful wording of the Brody Act's definition of "person" as including unborn children *in utero*. They ask this Court to assume the Legislature must have intended, without stating, that the definition should also include extra-uterine, *in vitro* pre-implantation embryos which may never be thawed or implanted or growing as part of a pregnancy. This of course begs the question -- why would the Legislature bother to specifically include the term *in utero*, if

such wording was meaningless and not intended to have any significance to the definition? Asking the trial court, or this Court, to impose such an assumption on the chosen wording of the Legislature is improper.

Likewise, it was improper to ask the trial court to ignore this Court's prior *direct* instruction that "…in light of the shared purpose of the Wrongful Death Act and the Homicide Act to prevent homicide,…borrowing the definition of "person" from the criminal Homicide Act to inform as to who is protected under the civil Wrongful Death Act [makes] sense….to harmonize who is a "person" protected from homicide under both the Homicide Act and Wrongful Death Act." *Stinnett v. Kennedy*, 232 So. 3d 202, 215 (Ala. 2016). There would be no reason for this Court to state that the same definition of "person" should be applied in both criminal and civil settings in order to "harmonize who is a person protected from homicide under both the Homicide Act and the Wrongful Death Act" based on the shared purpose of the two acts, unless this Court wanted trial courts to adhere to that instruction. There is something innately unfair in asking this Court to double-back and reverse a trial court for issuing a holding precisely in keeping with that clear directive.

The same is logic applies to Count Two and Plaintiffs' compensatory damage claims. The trial court followed precisely over a century of Alabama law prohibiting compensatory damages to compensate for the value of life or for mental anguish for the loss of life – law that was acknowledged by Plaintiffs' counsel at the hearing in this case. As Plaintiffs' proposed order demonstrates, the only reason given to the trial court to justify ignoring all of this controlling law was a plea that otherwise these Plaintiffs would be without remedy. That reasoning ignores reality. The trial court allowed property/bailment/breach of contract claims to proceed in the almost-identical *Aysenne* case. It is simply inaccurate to state that the trial court, or this Court, is required to ignore binding precedent and fashion a remedy for Plaintiffs who purposefully chose not to plead other available theories of recovery.

The reality is these couples benefited immeasurably from assisted reproduction technology, and specifically from IVF and cryopreservation. It allowed them to start a family and have 2 children each. It allowed them to choose to store extra cryopreserved embryos, and consequently each couple still has 3 additional frozen *in vitro* embryos if they wish to pursue the possibility of additional pregnancies. Not only do the signed

agreements demonstrate these couples entered into the process with full knowledge that they would potentially be creating and storing more inseminated eggs than they could use, they signed agreements stating that at some point any remaining stored pre-embryos could be discarded or donated to research. They would have never checked that box if they viewed this choice as killing their minor children. Further, they would never choose to leave any of these embryos frozen forever, instead of attempting additional pregnancies with all available, if they viewed this choice as relegating their minor children to being cryopreserved in perpetuity and never given an opportunity to be born.

Yet, in their efforts to recover here, Plaintiffs urge this Court to declare all fertilized eggs/zygotes/cryopreserved, pre-implantation embryos to be minor children. If this were to happen, it would upend the availability of assisted reproduction and cryopreservation in this state for other couples or individuals who, like the Fondes and the LePages, need these services to start a family and/or preserve fertilized eggs for future use, including those doing so due to illness or prior to undergoing medical treatment. If all known risks (such as unforeseen lab accidents or failures in storing or successfully implanting frozen embryos) were

deemed to create liability for wrongful death, IVF and cryopreservation would become too risky to continue in its present form. If all unused frozen embryos must be stored forever, because no parent or healthcare provider can opt to discard or donate a "minor child" without liability for killing an "embryonic child," the costs and storage issues would be prohibitive. Indeed, these costs would continue in perpetuity, personally burdening countless future generations with the costs of preserving these eggs *ad infinitum*. Taken to its logical conclusion, this could leave the State of Alabama, at some point, obligated to assume the cost of infinite preservation (in the event families cannot pay, leave the state, etc.) -- another reason this Court cannot and should not insert itself into such monumental matters reserved for legislative consideration. Ironically, Plaintiffs stated in their Complaint that the process of cryopreservation provides "peace of mind" to couples undergoing this process. (C. 15) However, they now ask this Court to significantly limit future couples' ability to make these same choices with peace of mind and without assuming an unending financial burden.

Plaintiffs could have, but did not, plead (nor have they argued) that they intended to implant the 2 embryos they lost or even intend to

implant the 3 embryos each which are still cryopreserved and available. Nor did they plead that they want to try to have more children than they have now. Instead, they have argued that they deserve compensation for the loss of the individual unique lives these embryos represent, regardless of whether they ever intended to try to have them thawed or implanted. This argument reveals the speculative and inconsistent nature of Plaintiffs' claims, as well as their flawed standing to bring these claims. They seem to be saying that, on the one hand, they should be able to opt for permanent cryopreservation for these embryos or the right to decide themselves to discard or donate – either of which would ensure the embryos never progress through implantation and pregnancy into a live birth. But, at the same time, they argue that if a lab accident occurs, they deserve compensation for the unique "lives" lost – "lives" that would be just as absent from the world if stored forever in cryopreservation or destroyed at the insistence of or abandonment by Plaintiffs.

One only need read the first few pages of Plaintiffs' Brief listing a string of quotes from abortion statutes; the U.S. Supreme Court's *Dobbs* opinion; and various politicians' statements regarding abortion to understand Plaintiffs' goal of making this case into a forum on the

politically-fraught issues surrounding the abortion debate. The trial court resisted being drawn into this fray and properly held it is up to the Legislature to change the Brody Act if it wishes to include *in vitro*, cryopreserved pre-implantation embryos in the definition of "minor child" or "person" for purposes of a wrongful death action. The trial court correctly recognized Plaintiffs were relying wholly and completely on inapplicable cases involving *in utero* pregnancies and statutes dealing with the right to abort an *in utero* pregnancy. They could not and did not cite to a single case from any court, in any state or any federal circuit, dealing with *in vitro* embryos in which a cryopreserved embryo was deemed to be a "person" able to assert a wrongful death action.

When considering Plaintiffs' arguments relying on and urging an unprecedented application of Alabama's abortion laws in the IVF context, this Court need look no further for guidance than the adjacent state of Tennessee and an Opinion just issued by Tennessee's Attorney General less than a month ago. *Tenn. Op. Att'y Gen.* No. 22-12 (Oct. 20, 2022) (also attached as **Ex. B.**). Faced with the same issue of whether disposal of *in vitro* embryos implicates that state's anti-abortion laws or violates its

declared interest in "protecting unborn children,"[8] Tennessee's Attorney General issued an Opinion answering that question in the negative, clarifying that "the disposal of a human embryo that has not been transferred to a woman's uterus" is not covered by the Human Life Protection Act, which "only applies when a woman has a living unborn child within her body." (*Id.*) The Attorney General reached this conclusion despite the fact that Tennessee's "Human Life Protection Act" defines an "unborn child" as any individual "throughout the entire embryonic and fetal stages…from fertilization until birth."[9] This is completely consistent with the public statements made regarding the passage of Alabama's Human Life Protection Act by that bill's sponsor and co-authors, Senator Clyde Chambliss and Eric Johnston, publicly clarifying that the "*in utero*" language in the Act was intentional, and that it was *not* the intent of the Legislature through this Act to impact *in vitro* fertilization or to apply to fertilized *in vitro* eggs in the IVF lab setting.[10]

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[8] T.C.A. §39-15-214.

[9] T.C.A. §39-15-213(a)(4).

[10] https://www.washingtonpost.com/health/2019/05/24/planned-parenthood-other-health-clinics-sue-alabama-over-near-total-abortion-

Plaintiffs' declaration that location of an embryo has never been determinative of how it is treated is simply incorrect. Alabama's Legislature, like many other states, has repeatedly used the term *in utero* as a defining term to differentiate from the extra-uterine setting in abortion and other statutes. Furthermore, our Legislature has specifically declared ectopic or tubal pregnancies can be ended without violation of abortion laws – another example which clearly involves an intrauterine versus extrauterine designation among embryos and treats them differently in the eyes of the law based on location outside, as opposed to inside, a mother's uterus.[11]

Plaintiffs' decision to rely so heavily on Alabama's abortion laws and otherwise fill their appellate brief with a myriad of arguments never made below, with citations to law never cited below, is telling. They would never rely so heavily upon new arguments not made to the trial court if they felt secure in the arguments preserved below. Defendants urge this Court to reject all such arguments raised for the first time on

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ban-law/; https://lawandcrime.com/high-profile/alabama-abortion-law-says-terminating-a-fertilized-egg-is-legal-in-a-lab-setting/.

[11] See, *e.g.* ALA. CODE § 26-23E-3(1).

appeal and, like the trial court, resist the pressure to allow this case to be used as a political vehicle, and instead stay true to controlling, well-defined precedent and deference to the Alabama Legislature.

ARGUMENT

I. The trial court properly denied Plaintiffs' Motion to Strike the contractual agreements given the centrality of those contracts to the issues raised under Rules 12(b)(6) and 12(b)(1).

Plaintiffs argue to this Court, as they did below, that the contractual agreements they signed do not form the basis of their claims and are not central to those claims, because they did not allege a breach of contract claim. Regardless of whether they asserted a claim for breach of contract, Plaintiffs' Complaint references the IVF/cryopreservation agreements in various places, asserting Plaintiffs paid fees on a monthly basis (payments indisputably made pursuant to these agreements), and that in exchange CRM agreed to (and Plaintiffs' had an expectation that CRM would) "store and protect their embryonic children." (C. 17, 18, 168, 169) This alleged "failure to protect" is without question the central claim in the case. It was Plaintiffs who purposefully alleged the fee they paid pursuant to their IVF/cryopreservation agreements was paid in exchange for an agreement to "store and protect."

The trial court properly perceived that Plaintiffs' Motion to Strike did not cite any law beyond a general reference to ARCP 12(b)(6), and that the motion completely ignored the fact that Defendants' Motion to

Dismiss was also based on Rule 12(b)(1) and raised jurisdictional issues of standing and ripeness regarding the claims against both Defendants as well. Plaintiffs made no effort to address or distinguish well-established Alabama law that "a court ruling on a Rule 12(b)(1) motion to dismiss may consider documents outside the pleadings to assure itself that it has jurisdiction." *Munza v. Ivey*, 2021 WL 1046484 (Ala. March 19, 2021).

Alabama law is clear (and Plaintiffs' Motion to Strike did not cite any law to the contrary) -- a party may attach to a motion to dismiss any document referenced in the complaint and central to the claims asserted in the case regardless of whether a claim for breach of contract is asserted. For example, in *Borden v. Malone,* 2020 WL 6932738 (Ala. November 25, 2020) – a defamation/negligence/wantonness case in which there was no claim for breach of contract – this Court held it did not convert the Defendant's Motion to Dismiss into one for summary judgment for the Defendant to attach a letter to the motion because "the letter is central to the action, and it was repeatedly referenced throughout the complaint." *Id* at *4. *See also, Bell v. Smith*, 281 So. 3d 1247, 1252 (Ala. 2019); *Donoghue v. American Nat'l Ins. Co.*, 838 So. 2d

1032, 1035 (Ala. 2002); *Wilson v. First Union Nat'l Bank of Georgia*, 716 So. 2d 722, 726 (Ala. Civ. App. 1998).

Despite Plaintiffs' attempts to disavow the relevance of these agreements, the trial court properly found them central to the relationship between Plaintiffs and CRM; the asserted duty "to store and protect" owed to Plaintiffs according to the Complaint; and the issues of ripeness and standing raised by both Defendants. Further, under the facts of this case as pleaded, the agreements are inextricably intertwined with all the claims against all Defendants. Plaintiffs claim these embryos should be deemed "children" able to assert claims of wrongful death; it is therefore critical that a reviewing court understand and appreciate how the Fondes and LePages characterized the embryos and exercised their contractual options prior to litigation. Plaintiffs' pre-litigation agreements, which described the potential voluntary destruction of their pre-embryos, are inconsistent with their claims that the cryopreserved embryos are "minor children" under the Wrongful Death Act. As such, in addition to defining the alleged duty owed to Plaintiffs in exchange for the fees they paid, these contracts were at the very core of the trial court's consideration of standing, jurisdiction, and the wrongful death issue as a

whole. Plaintiffs' Motion to Strike was based only upon self-serving and conclusory statements, not any controlling law, and the trial court did not err in denying such an unsupported motion.[12]

II. The trial court properly followed Alabama law in dismissing Plaintiffs' wrongful death claims given clear instructions from this Court that the definition of a "person" in a civil wrongful death act should be harmonized and congruent with the definition promulgated by the Legislature in the Brody Act and applied in criminal homicide cases.

In our state, there was no right of action at common law for civil wrongful death and "the right to recover [such] damages therefore is

[12] It is certainly contradictory for Plaintiffs to, on the one hand assert that the trial court erred by considering documents outside (but referred to within) the Complaint, and then, on the other hand, attach to their own Brief a pamphlet published by the Alabama Department of Public Health over 20 years ago entitled, "Did You Know…" (Ex. A to P's Brief) and excerpts from 15 secondary sources (all at least over 25 years old) supposedly illustrating when life begins (Ex. B to P's Brief). It is unfair for Plaintiffs to argue the trial court erred by considering matters outside the pleadings when they submitted outdated and unauthenticated literature themselves. *See, Meadows v. Shaver*, 327 So. 3d 213, 217 (Ala. 2020) ("[W]hen both sides submit or refer to evidence outside the complaint, they consent to the conversion, and the court is not required to notify them of it."); *Lifestar Response of Alabama, Inc. v. Admiral Ins. Co.*, 17 So. 3d 200, 213 (Ala. 2009) (" [I]t appears that both sides acquiesced in the trial court's consideration of matters outside the pleadings either by submitting or by referring to evidence beyond the pleadings; therefore, notice by the trial court that it would consider matters outside the pleadings would not have been necessary under Rule 56, Ala. R. Civ. P.").

purely statutory." *Taylor v. City of Clanton*, 18 So. 2d 369, 372 (Ala. 1944). A civil action for the wrongful death of a child arises from Alabama's "Wrongful Death of Minor" Act, ALA. CODE § 6-5-391. In determining under what conditions a suit may be brought pursuant to this Act, this Court, like the trial court, is required to "strictly enforce the wrongful death statute as written, and intended, by the legislature." *Alvarado v. Estate of Kidd ex rel. Kidd*, 205 So. 3d 1188, 1192 (Ala. 2016); *see also, Ex parte Weeks*, 294 So. 3d 147, 153-154 ("Alabama statutes allowing recovery on a theory of wrongful death are 'in derogation of the common law, creating a new punitive liability not recognized by the common law, and will not be extended by construction beyond the reasonable import of' the language of the pertinent statutes.").

The issue presented to the trial court by Plaintiffs' Count One was a strictly legal issue -- whether Alabama law deems an extrauterine, pre-implantation embryo, frozen at sub-zero temperatures, not developing and certainly not yet implanted or developing *in utero* (and perhaps never to be so implanted), to be a "minor child" as that term is used ALA. CODE. § 6-5-391. The trial court correctly held that, under the law as it currently is written, it does not.

In interpreting the term "minor child" in wrongful death actions, this Court has consistently relied on Alabama's criminal Homicide Act, ALA. CODE § 13A-6-1 *et seq*. and "repeatedly has emphasized the need to establish congruence between the criminal law and [Alabama's] civil wrongful death statutes." *Mack v. Carmack*, 79 So. 3d 597, 602, 611 (Ala. 2011) (finding that "the purpose and reach of the Wrongful Death Act [are] tied to the State's criminal homicide statutes" and "[t]he wrongful death statutes seek to prevent homicides."); *Lollar v. Tankersley*, 613 So. 2d 1249, 1253 (Ala. 1993); *Gentry v. Gilmore*, 613 So. 2d 1241, 1245 (Ala. 1993) ("There should not be different standards in the wrongful death and homicide statutes, given that the avowed public purpose of the wrongful death statute is to prevent homicide and to punish the culpable party and not to compensate for the loss.") Concurring in both *Lollar* and *Gentry*, Justice Houston discussed at length the importance of congruency between criminal Homicide Act's definition of "person" and the Wrongful Death Act's definition of "minor child."

The trial court properly rejected Plaintiffs' argument that the trial court itself had the power in this case to expand the definition of the term "minor child" in the context of Alabama's Wrongful Death of a

Minor Act (ALA. CODE §6-5-391(a)). The trial court properly followed the holdings of this Court which are directly on point and which have twice addressed this issue directly. First, in *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011), this Court instructed unequivocally that the term should be defined in the civil context consistent with the definition of a person utilized by the Legislature in the Brody Act, stating as follows:

> In pertinent part, the so-called "Brody Act," Act No. 2006–419, Ala. Acts 2006, codified as Ala. Code 1975, § 13A–6–1, changed the definition of the term "person" in the article of the Alabama Code defining homicide offenses. Before its amendment in 2006, this article defined the term "person" as "a human being who had been born and was alive at the time of the homicidal act." § 13A–6–1(2), Ala. Code 1975. As amended by the Brody Act, § 13A–6–1(a)(3), Ala. Code 1975, now defines the term "person" as "a human being, *including an unborn child* ***in utero*** *at any stage of development, regardless of viability*."…
>
> Our legislature has now expressly amended Alabama's homicide statutes to include as a victim of homicide "an unborn child **in utero** at any stage of development, *regardless of viability*." § 13A–6–1(a)(3), Ala. Code 1975 (emphasis added). This change constitutes clear legislative intent to protect even nonviable fetuses from homicidal acts. As Justice Houston's comment in his special writings in *Gentry* and *Lollar* indicated, this Court repeatedly has emphasized **the need for congruence between the criminal law and our civil wrongful-death statutes**. We have already noted that the *Huskey* Court stated that "[o]ne of the purposes of our wrongful death statute is to prevent homicides." *Huskey,* 289 Ala. at 55, 265 So.2d at 597. The Court in *Eich* similarly observed that "the pervading public purpose of our wrongful

> death statute ... is to prevent homicide through punishment of the culpable party and the determination of damages by reference to the quality of the tortious act...." *Eich,* 293 Ala. at 100, 300 So.2d at 358.....
>
> In accord then with the numerous considerations discussed throughout this opinion, and on the basis of the legislature's amendment of Alabama's homicide statute to include protection for "an unborn child **in utero** at any stage of development, regardless of viability," § 13A–6–1(a)(3), we overrule *Lollar* and *Gentry,* and we hold that the Wrongful Death Act permits an action for the death of a previable fetus.

Mack, 79 So. 3d at 600, 610-611 (emphasis added).

Several years later, in *Stinnett v. Kennedy*, 232 So. 3d 202 (Ala. 2016), this Court reaffirmed the logic and holding in *Mack*, explaining that while there may not always be mirror civil and criminal liability or mirror exceptions to liability under both the Brody Act and the Wrongful Death Act, it nonetheless "made sense" to use the same definitions in both Acts to "harmonize" the definition of who is a person under the two Acts, stating:

> Of course, it is also true that the amended definition of "person" upon which we relied in *Mack*, strictly speaking, defined only the victim of a criminal homicide or assault. **Nevertheless, in light of the shared purpose of the Wrongful Death Act and the Homicide Act to prevent homicide, the amendment was an important pronouncement of public policy concerning who is a "person" protected from homicide. Thus, borrowing the definition of "person" from the criminal Homicide**

> **Act to inform as to who is protected under the civil Wrongful Death Act made sense**. We reasoned "it would be 'incongruous' if 'a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly.' " 79 So. 3d at 611 (quoting *Huskey*, 289 Ala. at 55, 265 So.2d at 597–98). This attempt to **harmonize who is a "person" protected from homicide under both the Homicide Act and Wrongful Death Act**, however, was never intended to synchronize civil and criminal liability under those acts, or the defenses to such liability….Thus, we fail to see how applying an exception from criminal punishment to civil liability would promote congruence between the Homicide Act and the Wrongful Death Act.

Stinnett, 232 So. 3d at 215 (emphasis added).

The holding of *Stinnett* was very limited, turning on whether "the physician exception from criminal liability found in the Brody Act should be extended" to bar recovery for tort liability imposed under the Wrongful Death Act. In reaching its decision, this Court re-emphasized its prior instruction in *Mack* that the same definition of a "person" should apply to both Acts given the shared purpose of the two acts. Indeed, the *Stinnett* Court specifically stated that it "**made sense**" to "**harmonize**" these definitions so that there is congruency between "who is protected from homicide under both the Homicide Act and the Wrongful Death Act." *Id.* It is unclear how Plaintiffs can continue to argue that the holding in *Stinnett* supports the application of inconsistent definitions of who is a

person/child between the two Acts; this Court plainly stated just the opposite in both *Mack* and *Stinnett*. Given that the shared purpose of both acts is to prevent homicide, it is inconsistent for Plaintiffs to argue for a substantial expansion of the wrongful death statute to include the "homicide" of cryopreserved embryos, when the Fondes/LePages themselves personally contracted to destroy these embryos if certain criteria were met. The Plaintiffs' position, if accepted, would immediately create an inherent conflict in the Wrongful Death Statute. That is, destruction of cryopreserved embryos by a third party in this case would be "homicide," while the same action by the family, or destruction by a third party at the request of or abandonment by the family would not.

Given this Court's stated intent that there be congruency between the definition of a "person" in Alabama's homicide laws and its civil wrongful death statutes, it would have been improper for the trial court to hold otherwise. There was no proper legal basis upon which the trial court could have redefined the term "person" more expansively in the civil context than in the criminal one; destroy congruence between the

statutes; and expand the term "person" to include *in vitro*, as opposed to *in utero*, pre-embryos.

Though Plaintiffs focused heavily in their filings on excerpts pulled from Justice Parker's special concurrence in *Stinnett,* they failed to acknowledge the portion of Justice Parker's concurrence which supports the holding in *Mack* and the goal of congruence between the Acts:

> We settled the incongruence between civil and criminal statutes in *Mack* not by giving unborn children less protection but by recognizing that unborn children, viable or not, are **equally** protected under the Wrongful Death Act.

Id. at 223. Nothing in Justice Parker's concurrence rejects the logic of *Mack* or suggests disagreement with the application of the same definition of "minor child" equally under both Acts. The trial court was bound to follow suit and apply that same definition, *i.e.* "a human being including an unborn child *in utero* at any stage of development regardless of viability." ALA. CODE §13A-6-1. Had the trial court held otherwise, it would have violated the very principles of deference to legislative intent and separation of powers[13] cited by Justice Parker in his concurrence:

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[13] Article III, Section 43 of the Alabama Constitution of 1901 provides that "[i]n the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, ... the judicial [department] shall never exercise the legislative

"This Court is not at liberty to rewrite statues or to substitute its judgment for that of the Legislature." *Stinnett*, 232 So. 3d at 223.

Justice Parker wrote another special concurrence in 2021 which is relevant here. In *Ex parte Z.W.E.*, 2021 WL 1190748 (March 26, 2021), this Court was tasked with analyzing how to define the term "child" as used by the Legislature in the Alabama Uniform Parentage Act (ALA.

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and executive powers, or either of them; to the end that it may be a government of laws and not of men." *See also*, ALA. CONST. 1901, Art. III, § 42 ("The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."); *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 902 So. 2d 204, 212 (Ala. 2005) ("The Constitution of Alabama expressly adopts the doctrine of separation of powers that is only implicit in the Constitution of the United States."); *Ex parte James*, 836 So. 2d 813, 815 (Ala. 2002) ("In Alabama, separation of powers is not merely an implicit "doctrine" but rather an express command; a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns."); *Opinion of the Justices*, 100 So. 2d 681, 684 (Ala. 1958) ("The cardinal rule in interpreting legislative enactments, to which all other rules are subordinate, is that the court must ascertain and give effect to the true legislative intent."); *Employees' Ret. Sys. of Ala. v. Head*, 369 So. 2d 1227, 1228 (Ala. 1979)(In interpreting statutes, "the underlying consideration, always, is to ascertain and effectuate the intent of the legislature as expressed in the statutes.")

CODE §26-17-204(a)(5)). The main opinion found the language of the Uniform Parentage Act is not inclusive of unborn children as written and held that the use of the word "child" in that statute is unambiguous, making it unnecessary to engage in principles of statutory construction. However, Justice Parker's concurrence in that case discusses that when a term is not defined within a statute, courts should undertake the very approach taken in *Mack* and *Stinnett* to "interpret a statute *harmoniously with statutes that address related subjects*," cataloging examples of statutes in which the term "child" was specifically defined as an unborn child ***in utero***, or within the womb of a pregnant woman, stating as follows:

> When faced with an unclear statute, we try to interpret the statute harmoniously with statutes that address related subjects. *See Bandy v. City of Birmingham,* 73 So. 3d 1233, 1242 (Ala. 2011); *Dunn v. Alabama State Univ. Bd. of Trs.*, 628 So. 2d 519, 523 (Ala. 1993), overruled on other grounds by *Watkins v. Board of Trs. of Alabama State Univ.*, 703 So. 2d 335 (Ala. 1997). …The homicide statutes define "person" as "including an unborn **child in utero** at any stage of development." § 13A-6-1(a)(3), Ala. Code 1975. **The recently enacted Alabama Human Life Protection Act uses the same words in defining "person.**" § 26-23H-3(7). The death-penalty statutes prohibit execution of a woman who is "**with child**." § 15-18-86. The statute governing health-care advance directives prevents a **pregnant woman's** wish to decline medical treatment from being carried out until the child is born. § 22-8A-4(h) ("Advance Directive for Health

> Care," § 3). The intestacy statutes provide an unborn child inheritance rights. § 43-8-47. And the trust code allows a court to appoint a guardian for an "unborn individual." § 19-3B-305(a).

Ex parte Z.W.E., 2021 WL 1190748 at *9 (emphasis added). This recent writing makes clear that: (1) Plaintiffs' argument that it is improper to use location within the uterus as a defining feature of a "person" or "child" is simply incorrect, and (2) a strong belief in the sanctity of life among the members of this Court has not prevented them from recognizing and applying the Legislature's consistent use of the term "*in utero*" when defining the terms "person" or "unborn child."[14]

[14] In fact, in an Act created for the very purpose of preserving "the dignity and value of life, especially the lives of children born and unborn," entitled "Unborn Infants Dignity of Life Act," our Legislature specifically defined the term "unborn infant" as "a human being ***in utero*** at any stage of development regardless of viability." ALA. CODE § 26-23F-3. There is simply no basis for Plaintiffs to contend that it is improper to utilize an *in utero*, ongoing pregnancy as the legal line for defining an unborn infant, child, or person in this state. Nor does doing so indicate any lack of respect for the dignity of life as that is the definition used in the Dignity of Life Act, created to serve that very purpose.

III. The Woman's Right to Know Act, and the other abortion-related statutes cited in Plaintiffs' Brief, were not raised below and do not create a wrongful death cause of action for an *in vitro*, frozen pre-implantation embryo not part of an active pregnancy with no evidence it will ever be thawed and implanted.

Plaintiffs' Brief to this Court cites, for the very first time on appeal, the Women's Right to Know Act (ALA. CODE § 26-23A-1 *et seq*.), arguing this Act evidences that "the Legislature has already created a statutory civil action for the wrongful death of an unborn child" which they argue, when read *in pari materia* with § 6-5-391, "affords the right to a wrongful death action to the LePages and Fondes." (P's Brief, p. 36, 38) This argument is without any basis procedurally and substantively.

First, procedurally, it is beyond dispute that this Court will not consider an argument raised for the first time on appeal, out of realization that it is patently unfair to reverse a trial court based on an argument not presented to it. *See, Birmingham Hockey Club, Inc. v. Nat'l Council on Comp. Ins., Inc*., 827 So. 2d 73, 81 (Ala. 2002)(" Because BHC argues this issue for the first time on appeal, the trial court's dismissal of BHC's unjust-enrichment claim is due to be affirmed."); *P.J. Lumber Co., Inc. v. City of Prichard*, 249 So. 3d 1135, 1138 (Ala. Civ. App. 2017)("It is axiomatic that '[t]his Court cannot consider arguments raised

for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court.' … Because '[i]t is well settled that an appellate court may not hold a trial court in error in regard to theories or issues not presented to that court,' … we will not reverse the judgment of the circuit court on this ground.") Here, The Women's Right to Know Act was not pled, was not cited in any brief, and was not mentioned by Plaintiffs at oral argument. Their eleventh-hour proclamation that this Act is the key to the case and provides a heretofore uncited cause of action for Plaintiffs in this case: (1) is an argument this Court cannot consider for the first time on appeal, and (2) demonstrates Plaintiffs are searching for new arguments in tacit acknowledgment that the ones made previously are unavailing and inconsistent with Alabama law.

Second, this argument fails substantively. Even if this Court could consider an issue not raised below (which it cannot), it would readily see the Woman's Right to Know Act has no bearing on *in vitro* frozen, pre-implantation embryos. The Act's stated goal is to "ensure that every woman considering an abortion receives complete information on the procedure, risks, and alternatives." ALA. CODE § 26-23A-2(b). Its goals

and definitions demonstrate unquestionably that this Act deals only with ongoing pregnancies and women considering terminating a known pregnancy. ALA. CODE § 26-23A-3. The only remedies which this Act provides are "for recovery for a woman for the wrongful death of a child, whether or not viable at the time an abortion was performed." ALA. CODE § 26-23A-10(3). The term "abortion" is, in turn, specifically defined as termination "of a pregnancy of a woman known to be pregnant." ALA. CODE § 26-23A-3(1). The term "pregnancy" is defined as "the female reproductive condition of having an unborn child in the mother's (woman's) body." ALA. CODE § 26-23A-3(8). Plaintiffs' suggestion that this Act applies to frozen *in vitro* embryos or any embryo outside a woman's body is directly contrary to the very language of the statute. Their suggestion that this Act creates a remedy or a cause of action for the wrongful death of an "unborn child" outside of a woman's body is simply inaccurate.

Along these same lines, our Legislature in 2019 specifically clarified within the Human Life Protection Act, codified at ALA. CODE § 26-23H-2, that the term "abortion of an unborn child" applies only to unborn children *in utero*. ALA. CODE § 26-23A-3(7). ("Unborn child…A human

being specifically including an unborn child *in utero* at any stage of development regardless of viability.") It was clearly the Legislature's intent that *in vitro* embryos, not within a woman's body and part of an active pregnancy, be excluded from the definition of an "abortion." Consistently, ectopic pregnancies formed outside the uterus were also excluded from the definition of abortion in this Act. ALA. CODE § 26-23A-3(2). *See also*, ALA. CODE § 26-23D-1; ALA. CODE § 26-23F-3(12): The Unborn Infants Dignity of Life Act (defining "unborn infant" as "a human being *in utero* at any stage of development."); ALA. CODE § 26-23E-3: The Women's Health and Safety Act (using the term unborn child only in context of a known pregnancy); ALA. CODE § 26-22-2 (defining the term "pregnant" as "the female reproductive condition of having a developing fetus in the body and commences with fertilization.)" In light of all these efforts our Legislature has made to clarify that abortion-related statutes only apply to active pregnancies and do not apply to extra-uterine or *in vitro* embryos, this Court may confidently reject Plaintiffs' new and baseless attempts to analogize the case at hand to an abortion or rely upon abortion-related statutes not cited below.

Similarly, Plaintiffs' reliance upon the constitutional amendment at ALA. CONST. ART. I, §36.06, though raised in its filings to the trial court, is misplaced. The amendment at ART. I, §36.06 establishes an intent to protect the rights of unborn children "in all manners and measures lawful and appropriate" – a tenet of law *not* in dispute in this case. But, when our Legislature passed the related "Alabama Human Life Protection Act," it included in that Act a list of related "Legislative findings" and specifically quoted ALA. CONST. ART. I, §36.06 in conjunction with the Brody Act's definition of a "person" using the term "unborn child *in utero*." ALA. CODE §26-23H-2(b) and (c) ("On November 6, 2018, electors in this state approved by a majority vote a constitutional amendment to the Constitution of Alabama of 1901 declaring and affirming the public policy of the state to recognize and support the sanctity of unborn life and the rights of unborn children. The amendment made it clear that the Constitution of Alabama of 1901 does not include a right to an abortion or require the funding of abortions using public funds. (c) **In present state law, Section 13A-6-1 defines a person for homicide purposes to include an unborn child in utero at any stage of development, regardless of viability**.") Thus,

the Legislature in 2019, adopted, incorporated, and linked the constitutional amendment at ART. I, §36.06 with the Brody Act, which specifically uses the very "*in utero*" distinction Plaintiffs contend is untenable. In sum, this "*in utero*" distinction was not only utilized by the Legislature in the Brody Act but was later repeated in 2019 legislation intended, by its very title, as the "Human Life Protection Act," alongside quotes from both ART. I, §36.06 and the Brody Act's "*in utero*" language. Suffice it to say Plaintiffs have mis-relied upon this law and seek here to create an improper extension of legislative reach where no truly supportive legislative intent or statute exists.[15]

[15] The same is true of Plaintiffs' mis-reliance on the recent U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct. 2228 (2022). That case dealt only with intrauterine pregnancies and the abortion of such a pregnancy. It does not address pre-implantation embryos or when prenatal life becomes a "person." In fact, Justice Alito specifically stated in that opinion, "[O]ur decision is not based on any view about when a state should regard prenatal life as having rights or legally cognizable interests." *Id.* at 2255. (emphasis added) The suggestion that *Dobbs* is controlling here or speaks to whether or when *in vitro* prenatal life should be deemed to have all legally cognizable rights of a "person" is directly contradicted by Justice Alito's disclaimer on this very point.

IV. Plaintiffs were not improperly denied a right to remedy; they simply failed to plead a cognizable cause of action.

Plaintiffs' assertions they have been left without a remedy in a constitutionally violative manner are inaccurate. They know, and it is a matter of record in this case, that the Plaintiffs in the almost identical *Aysenne* case articulated property and contract claims which were not dismissed and which remain pending. The intentional decision of the Fondes and LePages to forego pleading similar claims in this case (likely in an effort to avoid the content of the contracts themselves) is the only reason Plaintiffs do not have a currently pending contract claim as well.

Furthermore, Plaintiffs' reliance on the Remedies Clause is misplaced. Strict review under the Remedies Clause in Alabama's Constitution is **not** required when the statute at issue does not involve a common-law cause of action. *Shelton v. Green*, 261 So. 3d 295, 298 (Ala. 2017). The Remedies Clause restrains the legislature from altering or amending a common-law remedy, not a statutorily-created one. Dismissal of Plaintiffs' claim under Alabama's Wrongful Death Act – a cause of action which did not exist at common-law but was created by the Legislature – would not be in any way violative of Plaintiffs' constitutional right to a remedy. In fact, it is this Court's job to strictly

construe any statutory remedy providing for rights that did not exist at common-law. *Johnson v. Brunswick Riverview Club, Inc.*, 39 So. 3d 132, 138 (Ala. 2009) ("[S]tatutory remedies for rights unknown to the common law are to be strictly construed.") Because Plaintiffs could not show that a ruling in Defendants' favor would abolish some remedy they would have had at common law, there is no basis upon which this Court could find a violation of ALA. CONST. § 13.

Additionally, Plaintiffs conflate the legal doctrine of "lack of remedy" with some amorphous concept that all Plaintiffs must recover. In considering Plaintiffs' "lack of remedy" argument, it cannot be stressed strongly enough that the Fondes and LePages had exclusive control of their Complaint and the remedies sought. They cannot properly ask this Court (nor could they properly ask the trial court) to create or provide remedies not specifically and clearly requested by their Complaint.

V. Alabama law does not prohibit making a location-based distinction between *in utero* unborn children and extra-uterine embryos as Plaintiffs contend.

The Alabama Legislature has already, on more than one occasion, specifically drawn the very distinction Plaintiffs insist is improper

between an *in utero* pregnancy and an *in vitro* or extra-uterine embryo.[16] Had the Legislature not mindfully made a legal distinction between *in vitro* and *in utero* embryos, countless numbers of couples like the Plaintiffs would already have been vulnerable to criminal and civil liability when, for whatever reason (whether it be death of a spouse, divorce, the passage of time, other successful pregnancies, etc.), they opted to discard unused embryos or donate them to science for research purposes rather than store them indefinitely. It is truly inconsistent for Plaintiffs to insist that the loss of some, but not all, of their cryopreserved embryos should be deemed a killing or homicide, when they themselves opted to inseminate more eggs than they were potentially planning to have implanted; have taken the position that they may not ever implant all of their remaining cryopreserved embryos; and were given, and at one point exercised, the option of choosing when and how to dispose of unused embryos in the event of events such as a divorce or after the passage of a

[16] *See*, ALA. CODE §13A-6-1(a)(3) ("PERSON – The term…means a human being including an unborn child ***in utero*** at any stage of development regardless of viability."); ALA. CODE §26-23H-3((7) ("UNBORN CHILD, CHILD, OR PERSON – a human being, specifically including an unborn child ***in utero*** at any stage of development, regardless of viability."); ALA. CODE § 26-23F-3(12) (defining "unborn infant" as "a human being ***in utero*** at any stage of development.")

certain number of years. In fact, with respect to their remaining embryos, Plaintiffs could still contractually exercise their right to destroy the remaining frozen embryos at any time, *i.e.*, commit the same act they equate with homicide and wrongful death in the pending lawsuit.

Notably, the distinction between embryos which are *in utero* versus outside the uterus, which Plaintiffs' Opposition contends is so offensive and improper, was not only used by the Legislature in the 2019 Human Life Protection Act, it is also the key distinguishing factor in the exemption of ectopic or extra-uterine pregnancies in Alabama's anti-abortion statutes. *See,* ALA. CODE §26-23H-3(7)) ("UNBORN CHILD, CHILD, OR PERSON – a human being, specifically including an unborn child **in utero** at any stage of development, regardless of viability."); ALA. CODE §26-23E-3. This distinction, based on location of the embryo outside the uterus combined with the lack of an ongoing-intrauterine pregnancy, is one which other states have made as well in both the abortion and wrongful death context. *See, e.g., Saleh v. Damron*, 836 S.E.2d 716, 723-724 (W.Va. Ct. App. 2019) ("[T]his Court stated twice that its decision was limited to children who were en ventre sa mere (in the womb) which necessarily excludes an ectopic embryo or ectopic fetus…We must

assume that our decision correctly interpreted the Legislature's intent that the meaning of the term "person" for purposes of the wrongful death statute also includes only a child that is en ventre sa mere or in the womb.")

Furthermore, it is a matter of public record (over which this Court may take judicial notice) that during the debate on the Alabama Senate floor regarding that Act, one of the bill's sponsors, Senator Clyde Chambliss, publicly clarified that the "*in utero*" language in the Act was indeed intentional (as opposed to a meaningless, "non-exclusionary" term as suggested by Plaintiffs' brief). In fact, Senator Chambliss is on record as stating it was *not* the intent of the Legislature through this Act to impact or prevent the destruction of fertilized *in vitro* eggs in the IVF lab setting.[17]

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[17] *See,* Lambe, Jerry, *Alabama Abortion Law Says Terminating a Fertilized Egg Is Legal in a Lab Setting* (May 29, 2019) https://lawandcrime.com/high-profile/alabama-abortion-law-says-terminating-a-fertilized-egg-is-legal-in-a-lab-setting/ ("During the bill's legislative debate, a Democratic state Senator inquired as to how the law would impact labs that discard fertilized eggs at an *in vitro* fertilization clinic. Republican state Senator and sponsor of the bill, Clyde Chambliss, responded that, **'The egg in the lab doesn't apply. It's not in a woman. She's not pregnant.**'")

At the trial court level, Plaintiffs' purposefully avoided addressing the logic articulated by this Court regarding the shared purpose of both the Brody Act and the Wrongful Death Act and the need for a harmonized and consistent definition of "person" under both Acts. They urged the trial court to ignore that part of *Stinnett* and now ask this Court to hold the trial court in error for following that part of *Stinnett*. Instead, they want this Court to contradict *Stinnett* by adopting a new definition of "person" to apply in the civil wrongful death context which diverges from the definition of "person" contained in the Brody Act.[18]

See also, Ariana Eunjung Cha and Emily Wax-Thibodeaux, American Civil Liberties Union sues Alabama over near-total abortion ban, Washington Post (May 24, 2019) https://www.washingtonpost.com/health/2019/05/24/planned-parenthood-other-health-clinics-sue-alabama-over-near-total-abortion-ban-law/, quoting Eric Johnston, founder and president of the Alabama Pro-Life Coalition and who helped write the bill, as stating the Alabama Human Life Protection Act would "**absolutely not" affect *in vitro* fertilization.**

[18] Plaintiffs also offer, for the first time on appeal, an argument that the use of the term "**including**" within the Brody Act's definition of "person" is an indication that Legislature used the term "*in utero*" only as an example of one type of unborn child covered by the Act and with no intent to exclude *in vitro* embryos. This argument was not preserved, nor is it valid. In fact, it is directly contradicted by the use of that same word "including" in other legislation which clearly applies only to intrauterine, active pregnancies. For example, our Legislature used that same term -- "**including** an unborn child *in utero*" -- in the "Alabama Human Life

Plaintiffs' assertion that Alabama law does not allow courts to distinguish between *in vitro,* as opposed to *in utero*, embryos is without support in the very statutes or cases they cite, all of which draw that distinction and specifically reference and/or apply only to *in utero* pregnancies. Plaintiffs' ask this Court to, in essence, instead legislate an expansion of existing statutory law. This position is not only legally flawed under Alabama law, it is contradictory to law from around the country which specifically draws this same distinction, holding that frozen, *in vitro* pre-implantation embryos are not "persons" under the law or do not have standing as "persons" to assert a wrongful death claim in deference to the role of those states' legislatures.

This Court should be aware of the following relevant opinions with obvious parallels to the case at hand:

Protection Act" with a clear intent of limiting that Act to "known" intrauterine pregnancies. ALA. CODE §26-23H-3(7). That Act also cites to and purposefully aligns itself with the Brody Act, stating as a Legislative Finding: "In present state law, section 13A-6-1 defines a person for homicide purposes to include an unborn child **in utero** at any stage of development…" ALA. CODE §26-23H-2(c). Plaintiffs' suggestion that the use of the word "including" was meant to leave open the door for application to *in vitro*, extra-uterine embryos is baseless and directly contradictory to the use of that same word in our state's Human Protection Act.

- *Tenn. Op. Att'y Gen.,* No. 22-12 (Oct. 20, 2022) (attached at **Ex. B**): Tennessee's Attorney General answered directly, just weeks ago, the question of whether the disposal of a human embryo that has not been transferred to a woman's uterus is a "criminal abortion" under Tennessee's Human Life Protection Act (an Act quite similar to Alabama's "Human Life Protection Act" with similar goals of protecting unborn life). In response, the Attorney General advised:

> No. The Human Life Protection Act only applies when a woman has a living unborn child within her body…. To "perform an abortion" within the meaning of the law, a person must use an "instrument, medicine, drug, or ... other substance or device with intent to terminate the pregnancy of a woman known to be pregnant." Id. § 39-15-213(a)(1). And to be "pregnant" within the meaning of the law, a woman must have "a living unborn child within her body." Id. § 39-15-213(a)(4) (emphasis added).
>
> Disposing of an embryo that was created outside a woman's body and that has never been transferred to a woman's body thus does not qualify as "abortion." Id. § 39-15-213(a)(1). Such an embryo may fit the Act's definition of "[u] nborn child," id. § 39-15-213(a)(4), **but the Act does not prohibit the embryo's disposal unless and until it is "living within" a woman's body**, id. § 39-15-213(a)(3). Only then can the embryo's gestation render a woman ""[p]regnant," id., and if there is no "pregnancy" to "terminate," there can be no "abortion," id. § 39-15-213(a)(1)….In sum, the Human Life Protection Act does not apply to a human embryo before it has been transferred to a woman's uterus and, therefore, disposing of a human embryo that has not been transferred to a woman's uterus is not punishable as a "criminal abortion" under the Act.

- *Jeter v. May Clinic Arizona*, 121 P. 3d 1256 (Ariz. Ct. App. 2005): This wrongful death case was filed by a couple asserting the negligent destruction of five "pre-implantation embryos or pre-embryos," which the Mayo Clinic agreed to cryopreserve and store. The Court of Appeals of Arizona affirmed the dismissal of the wrongful death claim and held that "**absent legislative action** expanding the wrongful death statutes, as a matter of law, a cryopreserved three-day old fertilized human egg is not a 'person' for purposes of that statute." *Id*. at 1259 (emphasis added).

- *Miller v. American Infertility Group of Illinois, S.C.*, 897 N.E.2d 837 (Ill. 2008): Another case filed by a couple seeking damages based on an alleged failure by the Defendant "to properly cryopreserve a blastocyst" for future implantation. *Id*. at 839. The Court dismissed the claim for wrongful death, holding:

> Because the Wrongful Death Act is in derogation of common law, the court cannot extend the reach of the statute to embrace situations not within the intent of the legislature. The Wrongful Death Act has never been interpreted to apply to situations involving the *in vitro* fertilization process and cryopreservation of blastocysts or pre-embryos. **Such a cause of action could only come about through legislative action, not judicial pronouncement**.

> Thus, it is clear that the legislature's intent in enacting section 2.2 of the Wrongful Death Act was to extend the cause of action to pregnancies in the mother's body regardless of whether the fetus was viable or nonviable. Therefore, we answer *no* to the certified question that asked whether [that section] allows a cause of action or recovery under the [Wrongful Death] Act for loss of an embryo created by *in vitro* fertilization that has not been implanted into the mother.

Id. at 844-845 (emphasis added).

- *Penniman v. Univ. Hospitals Health System, Inc.*, 130 N.E.3d 333 (Ohio 2019): This case stemmed from a freezer malfunction which resulted in the destruction or loss of a number of embryos being stored at a medical facility. A declaratory judgment was sought declaring that the legal status of a cryopreserved embryo is that of a person. *Id.* at 334. Deferring to the Ohio Legislature, the Court held as follows:

> Some states refer to embryos that have not yet been implanted in the uterus as pre-embryos. There is no contention that an embryo that has not yet been implanted into the uterus can, on its own, become a child. In other words, medical intervention is necessary in order for a pre-implanted embryo to form into a child. …The state legislature has not extended to rights of a fetus to an embryo….Neither have Ohio courts afforded frozen embryos legally protected interests akin to persons….We reject a cause of action for wrongful death on behalf of an embryo and instead **defer to the legislature** for any substantial expansion of the scope of liability under Ohio's wrongful death statute.

Id. at 335-339 (emphasis added).

- *Institute for Women's Health P.L.L.C. v. Imad*, 2006 WL 334013 (Tx. 2006): This case was filed after an embryologist dropped a tray of embryos resulting in the destruction of eight embryos. In addressing the issue of whether the claim was one for "health care liability," the parties conceded (and the Court agreed) that pre-implantation embryos "[do] not qualify as a 'person' under [Texas's] wrongful death statute." *Id*. at *2.

- *McQueen v. Gadberry, 507 S.W.3d 127 (Mo. Ct. App. 2016):* A case analyzing the disposition of "two pre-embryos" frozen during IVF to determine whether they should be considered "children" or deemed marital property. The Court affirmed the trial court's finding that frozen pre-embryos should not be considered "children" despite a legislative declaration that life begins at conception, stating:

> This brings us back to the questions of whether the legislature's declarations in section 1.205, including that life begins at conception/fertilization, constitutionally apply to frozen pre-embryos and whether frozen pre-embryos should be considered "children" under Missouri's dissolution statutes. Based on the foregoing, we hold that when weighed against the interests of McQueen and Gadberry and the responsibilities inherent in parenthood, the General Assembly's declarations in section 1.205 relating to the potential life of the frozen pre-embryos are not sufficient to justify any infringement upon the freedom and privacy of Gadberry and McQueen to make their own intimate decisions.

> *Davis*, 842 S.W.2d at 602 (similarly finding with respect to Tennessee's state interests). Gadberry and McQueen alone should decide whether to allow a process to continue that may result in such a dramatic change in their lives as becoming parents. *See id.* We also hold that an application of section 1.205, including declarations that life begins at conception/fertilization, to the frozen pre-embryos and to Missouri's dissolution statutes under the circumstances of this case, (1) would be contrary to U.S. Supreme Court decisions interpreting the U.S. Constitution; and (2) would violate Gadberry's constitutional right to privacy, right to be free from governmental interference, and right not to procreate. Accordingly, the trial court did not err in failing to classify the frozen pre-embryos as children under Chapter 452.

Id. at 147-148.

Plaintiffs urge this Court to deem frozen, pre-implantation embryos to be "persons." Yet they cannot cite a single case from a single court that has been willing to do so. As is uniformly demonstrated by this sampling of holdings from around the country, this is something no court has been willing to do without a clear legislative directive. Respectfully, this Court should act in accord with courts nationwide, recognizing it is up to the Legislature to make such a change in the law.

VI. A location-based distinction between *in utero* and *in vitro* embryos does not violate constitutional guarantees and, further, it would be improper to reverse a trial court based on constitutional arguments never raised below and substantively flawed.

In their Brief to this Court, Plaintiffs claim, for the first time, that the trial court's Order violates various constitutional rights guaranteed to Plaintiffs and their *in vitro* pre-implantation embryos. Even if this Court could consider such unpreserved constitutional arguments for the first time on appeal, they would still fail on their face as ill-defined blurring of several concepts into one, with Plaintiffs professing theirs is an equal protection challenge while simultaneously invoking due process principles without explanation. It is also unclear whether Plaintiffs seek to invoke federal constitutional protections, Alabama constitutional protections, or both. Regardless, as an initial matter, neither federal nor Alabama constitutional protections apply without state action. *Tucker v. Jefferson County Truck Growers' Association*, 487 So. 2d 240, 242 (Ala. 1986). As Defendants understand it, Plaintiffs now argue that by distinguishing between *in vitro* and *in utero* embryos when defining "minor child," the trial court's dismissal order "creates a new suspect class" and simultaneously violates Plaintiffs' "fundamental rights to procreation, family relationships, child rearing, and the embryonic

children's right to life." (Brief, p. 24; 28). Even assuming *arguendo* the trial court's order satisfies the state action requirement, Plaintiffs' new appellate argument is procedurally and substantively flawed and most certainly does not provide a proper basis for reversal of the trial court's order.

A. Plaintiffs' constitutional arguments fail procedurally.

Plaintiffs' arguments are improperly offered for the first time before this Court. Alabama appellate courts repeatedly refuse to consider arguments raised for the first time on appeal. *See, e.g. Allsopp v. Bolding*, 86 So. 3d 952, 962 (Ala. 2011); *Birmingham Hockey Club, Inc. v. Nat'l Council on Comp. Ins., Inc.*, 827 So. 2d 73, 81 (Ala. 2002); *P.J. Lumber Co., Inc. v. City of Prichard*, 249 So. 3d 1135, 1138 (Ala. Civ. App. 2017); *Shiver v. Butler Cty. Bd. of Educ.*, 797 So. 2d 1086, 1089 (Ala. Civ. App. 2000). This principle applies equally to constitutional arguments raised for the first time on appeal, even ones mentioned vaguely below but unsupported with any substantive argument.

Should Plaintiffs contend the use of the word "equal" in one sentence in one filing below, preserved all of these blurred constitutional issues, it bears mention that this Court has deemed this type of passing

mention, without any specific arguments or meaningful support, to be insufficient to properly preserve a constitutional issue for appellate review. *See e.g., Cooley v. Knapp*, 607 So. 2d 146, 148-149 (Ala. 1992) (case in which Plaintiffs' counsel, Cunningham Bounds, was a party to the case and specifically relied upon this very tenet of law that was accepted by this Court: "The rule is well settled that a constitutional issue must be raised at the trial level and that the trial court must be given an opportunity to rule on the issue…in order to properly preserve that issue for appellate review…[I]n order to challenge the constitutionality of a statute, an appellant must identify and make specific arguments regarding what specific rights it claims have been violated…In this case, the Cooleys failed to mention, even remotely, the jury trial or equal protection issues they argue here until they filed their 'additional brief regarding [the] statute of limitations [issue],' with the trial court… [T]he [trial] court was not apprised of the Cooleys' arguments in a sufficient and meaningful manner."); *see also*, *Ala. Power Co. v. Courtney*, 539 So. 2d 170 (Ala. 1988); *Godwin v. Davis*, 56 So. 3d 646 (Ala. Civ. App. 2010); *Allen Trucking Co., Inc. v. Adams*, 323 So. 2d 367 (Ala. Civ. App. 1975). This Court has also specifically declined to consider new constitutional

arguments when reviewing a trial court's order dismissing a complaint pursuant to Rule 12(b)(6). *See Marks v. Tenbrunsel*, 910 So. 2d 1255 (Ala. 2005).

At the trial court level, Plaintiffs did not argue or cite to any case law regarding an alleged violation of their right to equal protection or infringement of their fundamental rights. They only generally alleged in their Complaint that: "Embryonic human beings are entitled to the protection of Alabama's laws regardless of their race, gender, size, or the environment that sustains their life…." (C. 165). And, they stated generally in the prelude/introduction to their Response: "Defendants' motion to dismiss is, in sum, asking this Court …to create an exception to existing Alabama law where not all embryonic life would be treated equally." (C. 198) However, at no point in any of their trial court filings or at oral argument did Plaintiffs cite to any law supporting an equal protection argument or even mention due process or fundamental rights.

Plaintiffs' two oblique references to equal treatment were never expounded upon or explained to the trial court. Plaintiffs did not cite any relevant constitutional provisions, nor did they provide any analysis of the equal protection issue to which they had briefly alluded. There

certainly was no analysis of what defines a fundamental right or what level of scrutiny would apply in the context at issue here. These new constitutional arguments have obviously been added as a last-ditch effort to bolster the Plaintiffs' position before this Court. They cannot, however, be properly considered for the first time on appeal, nor do they provide a fair basis upon which to reverse a trial court which was not given an opportunity to consider or rule upon any of these arguments below.

B. Plaintiffs' constitutional arguments also fail substantively.

In addition to these fatal procedural infirmities, Plaintiffs' constitutional arguments are also substantively flawed for a variety of reasons. Even if they could be properly considered by the Court, these arguments do not support overturning the trial court's dismissal.

First, "[t]his Court presumes that statutes duly enacted by the legislature are constitutional and will not hold them unconstitutional unless convinced beyond a reasonable doubt of their unconstitutionality. The party challenging the constitutionality of a statute has the burden of establishing its invalidity." *Gideon v. Ala. State Ethics Comm'n*, 379 So. 2d 570, 575 (Ala. 1980) (internal citations and quotations omitted). Plaintiffs' generalized, unsupported statements that constitutional

rights have been violated do not carry Plaintiffs' burden. None of these statements are supported by meaningful discussion or case law explaining the contours of these rights or the analysis applicable to Plaintiffs' argument. Plaintiffs' constitutional arguments are no more than "undelineated general propositions not supported by sufficient authority or argument" which fail to demonstrate the trial court's order should be reversed. *Tolbert v. Tolbert*, 903 So. 2d 103, 109-10 (Ala. 2004).

Second, the majority of Plaintiffs' circular arguments assume *in vitro* pre-implantation embryos have already been deemed to possess constitutional rights. Yet, these constitutional protections apply only to living people. *See* U.S. CONST. amend. XIV, § 1 ("…nor shall any State deprive any *person* of life , liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.") (emphasis added). There is no law declaring frozen *in vitro* pre-implantation embryos qualify as unborn children or persons, and Plaintiffs' argument assumes a critical requirement that has not been proven or accepted by any court.

Plaintiffs also include a passing reference to their "fundamental rights to procreation, family relationships, and child rearing," stating the

trial court's order "implicates" these rights and should be subject to strict scrutiny as a result. (Brief, p. 28) Plaintiffs' newly-concocted and bald assertion that strict scrutiny is appropriate here is belied by the very cases they cite for the first time on appeal.

Specifically, in *Hutchins v. DCH Regional Medical Center*, 770 So. 2d 49 (Ala. 2000), this Court stated that, when assessing whether a statutory classification violates equal protection guarantees or denies a person substantive due process of law, this Court will employ strict scrutiny analysis only if the statutory classification "is based on 'suspect criteria' or affects some fundamental right." *Id.* at 57-58. Neither requirement is present in this case.

Plaintiffs' argue the trial court's Order draws a statutory classification based on an embryo's location, finding that only an *in utero* embryo qualifies as a "minor child" under the Wrongful Death of a Minor Act. They ignore, however, that location is not a recognized suspect classification under equal protection jurisprudence. Plaintiffs ask this Court to create a new "suspect classification" under the equal protection clause without any explanation of the discriminatory application or impact of this Order. Further, the United States Supreme Court has

stated: "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *See San Antonio Indep. Sch. Dist. v. Rodriuez*, 411 U.S. 1, 33 (1973).

Additionally, Plaintiffs offer nothing to support the conclusion that the trial court's Order "affects" their fundamental rights. Plaintiffs reference several familial rights with no citation to any legal authority for such a conclusion, nor do they define the rights or try to explain how they are restricted or otherwise affected by the inability to bring a wrongful death action in this instance. In fact, Plaintiffs intentionally stop short of making any such argument, noting only, without support, that the rights are "implicate[d]." Suffice it to say that Plaintiffs' belated and vague constitutional arguments are insufficient to merit an unprecedented application of strict scrutiny here.

Moreover, Plaintiffs' citations to *Dobbs v. Jackson Whole Women's Health* and *Roe v. Wade* are red herrings. Plaintiffs attempt to equate the subject litigation with the line of constitutional jurisprudence dealing with abortion as a fundamental right, which is completely inapplicable to the case at hand. This case involves un-implanted embryos frozen in a

lab with no ongoing pregnancy, whereas *Dobbs* and its progeny dealt with abortion, i.e., the termination of a known pregnancy involving an *in utero* fetus. By citing these cases, Plaintiffs not only attempt to cash in on political capital, they gloss over the very distinction at the heart of this litigation.

Finally, as discussed above, the statutory distinction between *in vitro* and *in utero* embryos is established and permissible under the law. When a statutory classification does not involve a suspect class and does not impact a fundamental right, this Court applies the rational basis test to evaluate an equal protection or a substantive due process challenge. *Hutchins*, 770 So. 2d at 58. This test asks "(a) whether the classification furthers a proper governmental purpose, and (b) whether the classification is rationally related to that purpose." *Id.*

As Plaintiffs themselves acknowledge, IVF and cryopreservation allow couples struggling with infertility issues to start their own families. (C. 165-167) Accordingly, the citizens of Alabama benefit immensely from the availability of these services in Alabama, and ensuring that IVF treatment continues to be available in Alabama is a legitimate governmental objective. *See, e.g.*, *Hutchins v. DCH Reg'l Med. Ctr.*, 770

So. 2d 49, 59 (Ala. 2000) (holding the Alabama Medical Liability Act's purpose of "'[ensuring] that quality medical services continue to be available at reasonable costs to the citizens of the State of Alabama' is a legitimate goal of state government").

Excluding *in vitro* embryos from the definition of "minor child" is directly related to furthering that objective. *See supra* pp. 34-36; 65 (outlining the myriad ways treating *in vitro* embryos as minor children would upend the availability of IVF services in Alabama). Moreover, this classification is reasonable in that those treated differently under the classification are not similarly situated. Individuals whose embryos are *in vitro* are not similarly situated to individuals whose embryos are *in utero* and are therefore developing as part of an active pregnancy. *See supra* pp. 12-13 (explaining the creation and maintenance of *in vitro* embryos is but a single step in the progression towards pregnancy with no guarantee that a pregnancy will result).

"Classification is an inherent power of the Legislature but it must not be arbitrary or unreasonable." *Gaines v. Huntsville-Madison Cnty. Airport Auth.*, 581 So. 2d 444, 447 (Ala. 1991). Moreover, "[a] statutory discrimination between class is held to be relevant to a permissible

legislative purpose if any state of facts reasonably may be conceived to justify it." *Id.* (internal citations and quotations omitted). Ensuring the availability of fertility treatments to Alabamians is a legitimate objective. This treatment allows Alabamians who are infertile or facing cancer treatment a pathway to create future families which contributes to and strengthens our state in obvious and meaningful ways. The classification under the Wrongful Death of Minor Act is reasonably related to that purpose as it ensures the continued availability of this treatment, thereby bestowing the same benefit to society afforded to Plaintiffs, which outweighs any detriment now articulated by Plaintiffs.

VII. The trial court properly dismissed Count Two, seeking compensatory damages for loss of life and mental anguish, pursuant to long-standing Alabama law prohibiting such recovery, especially given Plaintiffs' concession at the hearing that Alabama law does not allow compensatory damages for loss of life.

It is well-established in this state that the only damages a civil jury may assess for the "wrongful" taking of a life are punitive damages. *Central Ala. Electric Co-op v Tapley*, 546 So. 2d 371 (Ala. 1989). *See also*, *Killough v. Jahandarfard*, 578 So. 2d 1041, 1044-1045 (Ala. 1991) ("In limiting the damages in a wrongful death action to punitive damages only, the Legislature reflects the conviction of the citizens of this state

that the value of human life cannot be measured in dollars… The Supreme Court of the United States…[has also] recognized that …the value of human life cannot be measured…Alabama's law in a civil wrongful death action requires of the jury…that the focus of the jury be the defendant's conduct. It cannot consider the value of the life of the victim in either [a criminal or civil] case.") Plaintiffs' suggestion in Count Two that, if they could not proceed under the Wrongful Death Act, the trial court had the power to simply permit them to side-step these well-established principles and seek compensatory damages for **the value of the lives of** cryopreserved/ *in vitro* pre-embryos has no legal precedent in this state and was due to be rejected out of hand.

Likewise, Plaintiffs' claims for compensatory damages for mental anguish due to negligence were unsustainable and properly dismissed. As a matter of law, Alabama does not recognize emotional distress as a compensable injury when the plaintiff has not been physically injured or placed at risk of physical injury by the alleged negligence. The face of the Complaint demonstrates no Plaintiff was injured or at risk of physical harm as a result of the alleged negligence, nor do Plaintiffs claim to have

been present at the time of the incident made the basis of this suit or in the "zone of danger."

This Court has adhered to this very principle specifically in the context of a parent claiming emotional distress due to the loss of an unborn child. *See*, *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012). In *Hamilton*, this Court held there was *no* exception carved out for loss of an unborn child, and instead held the zone of danger test applies and limits recovery for emotional injury *only* to Plaintiffs who sustained a physical injury as a result of the alleged negligence or who were placed in immediate risk of physical harm by that negligence. *Id.* at 737. ("Because [the Plaintiff] conceded that she was 'not entitled to zone of danger damages' and her argument suggesting that *Taylor* created an exception to the zone-of-danger test is misplaced, and because she presented no evidence showing that she suffered a physical injury as a result of Defendants' actions, we conclude that the trial court properly entered a summary judgment insofar as it concerns Hamilton's claim for damages for emotional distress.") *See also*, *Bailey v. City of Leeds*, 304 So. 3d 719, 721-22, 740 (Ala. 2020); Marsh, Jenelle, *Alabama Law of Damages* § 36:6 (6th ed. 2021) ("Though there are cases with language

broad enough to extend mental anguish damages to negligence cases with no physical injury, these have been limited in later cases to only recovery when the plaintiff is placed in a zone of danger by the defendant's negligent conduct."); *AALAR, Ltd. Inc. v. Francis*, 716 So. 2d 1141 (Ala. 1998); Ala. Pattern Jury Instr. Civ. 11.11 (3d ed.), *Mental Anguish – Zone of Danger*.

Both of these points of law were ultimately conceded by Plaintiffs' counsel at the hearing in this case, and the trial court's ruling on Count Two is most certainly due to be affirmed.

CONCLUSION

To adopt Plaintiffs' position, this Court would have to reject the established legislative definition of a "person" set out in the Brody Act which has twice been deemed by this Court to be the definition applicable in civil wrongful death actions involving a minor child in this state. This Court would then have to contradict its prior holdings and supplant the definition set out in the Brody Act with a new, judicially-created definition which includes not just *in utero* pregnancies but also *in vitro*, cryopreserved embryos not implanted in a uterus. This would go beyond any holding of this Court heretofore, it would go beyond the holding of

any of the other state courts which have considered this issue thus far, and it would go beyond any law codified by our Legislature.

The trial court followed the law. Respectfully, Judge Phillips should not be reversed on the basis of newly-raised arguments, remedies not sought in the Complaint, or political posturing borrowed from the abortion debate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Ala. R. App. P. 28(j)(1) as extended by this Court's Order of November 10, 2022 permitting the inclusion of an additional five thousand words because this brief contains 17,771 words, excluding the parts of the brief exempted by Ala. R. App. P. 28(j)(1) and 32(c), as counted by the word count function of Microsoft Word processing software.

2. This brief complies with the typeface and type style requirements of Ala. R. App. P. 32(a)(7) because this brief has been prepared in a proportionately spaced typeface using the Microsoft Word processing software in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

We do hereby certify that on **November 14, 2022**, the above and foregoing Brief of Appellees was electronically filed with the Clerk of the Court using the Alabama Supreme Court's C-Track electronic filing system and we will have it served on the following counsel via email:

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APPENDIX

EXHIBIT A - Trial Court's Dismissal Order of April 13, 2022

EXHIBIT B - Tenn. Op. Atty. Gen. No. 22-12 (2022)

EXHIBIT A

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

LEPAGE JAMES, LEPAGE EMILY, FONDE WILLIAM TRIPP, FONDE CAROLINE ET AL, Plaintiffs,	)	
V.	)	Case No.: CV-2021-901607.00
MOBILE INFIRMARY ASSOCIATION DBA MIMC, CENTER FOR REPRODUCTIVE MEDICINE PC, Defendants.	)	

ORDER

This matter comes before the Court on the Defendants' 12(b)(1) and 12(b)(6) Motion to Dismiss the Plaintiffs' First Amended Complaint. (Doc. 65)[1] The Plaintiffs filed a Response to the Motion to Dismiss (Doc. 75), and the Defendants filed a Reply in further support of dismissal. (Doc. 95) The Court conducted a hearing and heard oral arguments from all parties on January 31, 2022.

To be clear, this Court is not tasked with the responsibility "to determine when life begins," as has been suggested by some. This court's function is to follow and interpret existing Alabama law which has been created by the legislature and to follow law which has been previously interpreted by the appellate courts of this state.

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[1] The original Complaint was filed by the Plaintiffs in a representative capacity "as parents and next friends." (Doc. 2) The First Amended Complaint asserts the same claims and identical two causes of action as those in the original Complaint but was filed by the parents in both a representative and individual capacity. (Doc. 47) The Defendants' Motion to Dismiss the original Complaint (Doc. 17) was thereafter adopted and reasserted with only minor modifications as a Motion to Dismiss the First Amended Compliant. (Doc. 65)

Claims asserted by the Plaintiffs

The operative First Amended Complaint asserts two causes of action against both Defendants: (1) "First Cause of Action-Wrongful Death-Negligence," asserting a claim pursuant to Ala. Code § 6-5-391 ("Wrongful Death of a Minor") based on alleged negligent "departure[s] from the accepted standard of care" (Doc. 47, ¶ 44) by the defendant health care providers, which the Plaintiffs claim led to the wrongful death of four of Plaintiffs' cryopreserved, *in vitro* embryos; and (2) "Second Cause of Action- Negligence," an alternatively-pleaded claim asserting that "should Alabama wrongful death laws not apply," the Plaintiffs are entitled to compensatory damages specified as "the value of the embryonic human beings that were wrongfully destroyed" and "for the severe mental anguish and emotional distress [the parents] have been caused to suffer and will suffer in the future." *Id.*[2]

Standard of Review

In considering a challenge pursuant to Rule 12(b)(1) and (6), this Court accepts as true the allegations in the complaint and decides whether, "when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [the pleader] to relief." *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala. 1993); *see also*, *Munza v. Ivey*, 2021 WL 1046484 (Ala. March 19, 2021). Although this Court is required to accept the Plaintiffs' factual allegations as true at this stage,

[2] While oral argument in this case has thus far been consolidated with that in the similar case filed by Felicia and Scott Aysenne (CV21-901640), the pleadings and claims asserted in the two cases are not identical. There is no property or contract claim asserted here, and nowhere in the LePage/Fonde Complaint is there any assertion that, even alternatively, these cryopreserved embryos should or could be treated as property under Alabama law.

and has done so in reaching its holding, it is not required to accept as true for the purposes of a Motion to Dismiss any conclusory allegations or deductions of fact or legal conclusions set out in the Complaint. *Ex parte Gilland*, 274 So. 3d 976, 985, n. 3 (Ala. 2018); *see also, Ex parte Marshall*, 323 So. 3d 1188, 1207 n. 3 (Ala. 2020). Dismissal is proper when it appears that the plaintiffs can prove no set of facts in support of the claims as plead that would entitle them to relief, or if this Court determines that it lacks jurisdiction. *Nance*, 622 So. 2d at 299; *Ex parte Mobile Infirmary Assoc.*, 2021 WL 4129400 (Ala. September 10, 2021).

- Facts as set out in Plaintiffs' Complaint

The LePages and the Fondes assert they underwent *in vitro* fertilization performed by The Center for Reproductive Medicine, P.C. ("CRM"), followed by cryopreservation of a number of embryos. (Doc. 47, ¶¶ 23-24, 30-31) The operative Complaint asserts that these cryopreserved embryos were stored at sub-zero temperatures by CRM in a room within Mobile Infirmary's hospital in exchange for the Plaintiffs' agreement to pay a storage fee to CRM. (*Id.* at ¶¶ 14, 22, 24, 25, 29, 31, 32, 35)

According to the Complaint, the LePages originally had eight embryos cryopreserved in February of 2017, three of which were transferred to Mrs. LePage's uterus on three separate occasions. (*Id.* at ¶¶ 23-29) Of the three transfers of a cryopreserved embryo to Mrs. LePage's uterus, two resulted in the birth of children (in 2017 and 2020 respectively). (*Id.*) The LePages had five remaining cryopreserved embryos being stored at the time of the incident made the basis of this suit, at which time they assert that two of those pre-embryos were destroyed. (*Id.* at ¶ 41) The Fondes originally had seven embryos following IVF in June of 2014, one of which was directly transferred to Mrs. Fonde's uterus at that time and resulted in the birth of a child in February of 2015. (*Id.* at ¶¶ 31) The other six pre-embryos were cryopreserved, and in

September of 2018, another was transferred to Mrs. Fonde's uterus resulting in the birth of a second child in May of 2019. (*Id.* at ¶¶ 31-34) The Fondes had five remaining cryopreserved pre-embryos at the time of the incident made the basis of this suit, at which time they assert two were destroyed. (*Id.* at ¶ 41)

The Plaintiffs claim that some but not all[3] of these cryopreserved embryos were "killed" as a result of an incident on December 20, 2020 when, they assert, a hospital patient "gained unauthorized access to CRM's embryology laboratory and [negligently] destroyed numerous embryos, including the Plaintiffs' embryonic children A, B, C, and D." (*Id.* at pp. 1-2 and ¶¶ 36-41) Neither couple specifically asserts in the Complaint that they presently have or ever had an intent to pursue future implantation or future pregnancies. Rather, their Response to the Motion to Dismiss clarifies that their claims are based on the loss of these four individual embryos, regardless of whether the couples ever planned to pursue future implantation of any of the cryopreserved embryos. (Doc. 75, p. 16)

Count One – Wrongful Death/Negligence

The Defendants move to dismiss the Plaintiffs' first count for wrongful death under Ala. Code § 6-5-391, arguing that Alabama law does not recognize or support a finding that an extrauterine, *in vitro*, cryopreserved embryo, not yet implanted or developing *in utero,* is a "minor child" as that term is used Ala. Code § 6-5-391. For the reasons explained below, this Court agrees.

[3] It is not in dispute that three of the LePages' stored cryopreserved pre-embryos and three of the Fondes' stored cryopreserved pre-embryos remain available for potential implantation, or potential abandonment, in the future. (*Id.*)

The Alabama Supreme Court has twice examined and answered the question of how to define the term "minor child" in an action for wrongful death. In both cases, the Court held that the term "minor child" found in Ala. Code § 6-5-391(a) is to be defined consistently and in harmony with the established legislative definition of a "person," which is an unborn child "*in utero*," as utilized by the Legislature in the Brody Act at Ala. Code. § 13A-6-1(a)(3). *See Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011); *Stinnett v. Kennedy*, 232 So. 3d 202 (Ala. 2016). The Court has instructed that, while civil and criminal liability may not perfectly mirror each other, due to the Legislature's decision to create exceptions to liability, the criminal and civil Acts share the same purpose of preventing homicide. As such, the Court has held that it "made sense" to "harmonize" the definitions of "person" and "minor child" in determining who is protected under the two Acts. *See Mack*, 79 So. 3d 597 at 610 (Ala. 2011) ("Our legislature has now expressly amended Alabama's homicide statutes to include as a victim of homicide 'an unborn child in utero at any stage of development, regardless of viability.' § 13A–6–1(a)(3), Ala. Code 1975....[T]his Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes."); *Stinnett*, 232 So. 3d at 215 (Ala. 2016) ("[I]n light of the shared purpose of the Wrongful Death Act and the Homicide Act to prevent homicide, the [Brody] amendment was an important pronouncement of public policy concerning who is a 'person' protected from homicide. Thus, borrowing the definition of 'person' from the criminal Homicide Act to inform as to who is protected under the civil Wrongful Death Act made sense.")

Stated another way, even if the Legislature creates exceptions to liability in one statute or the other, depending on the conduct involved, *who* is protected under the criminal homicide and wrongful death statutes must remain harmonious and consistent. Further, this

Court is obligated to follow the Alabama Supreme Court's repeated instruction that, given the shared purpose of the criminal homicide and wrongful death statutes, "'[t]here should not be different standards in wrongful death and homicide statutes, given that the avowed public purpose of the wrongful death statute is to prevent homicide. . . .'" *Stinnett*, 232 So. 3d at 212, *quoting Gentry*, 613 So. 2d at 1245 (Houston, J. concurring in the result) and *Lollar*, 613 So. 2d at 1253 (Houston, J. concurring in the result). The Plaintiffs' position, if accepted, would create such conflict, incongruency, and "different standards" between the two statutes, a legal construct which has been repeatedly rejected by our Supreme Court. Specifically, the Plaintiffs' position seeks to push civil liability beyond the clear bounds set by the criminal statute (*in utero*) to a place where neither the Alabama Legislature nor any Alabama Court has extended protection (*in vitro*). And while the Defendants have cited numerous opinions from other states which are consistent with this Court's present ruling, the Plaintiffs have cited no case, in Alabama or otherwise, which extends wrongful death civil liability to the frozen, extrauterine embryos.

Given the Alabama Supreme Court's specific pronouncement that it seeks to "harmonize" the definitions under these two Acts, and in order to promote the stated goal of congruency between "who is protected from homicide under both the Homicide Act and the Wrongful Death Act," this Court is bound to apply the same definition in this case as was used in both *Mack* and *Stinnett*, *supra*. The cryopreserved, *in vitro* embryos involved in this case do not fit within the definition of a "person" under the Brody Act ("[A]n unborn child *in utero* at any stage of development regardless of viability"), or the "*in utero*" definition of "minor child" which the Alabama Supreme Court has twice applied in actions under Ala. Code § 6-5-391(a). To hold otherwise would contradict the holdings of the Alabama Supreme

Court and violate the principles of deference to legislative intent and separation of powers cited by Justice Parker in his concurrence in *Stinnett*: "This Court is not at liberty to rewrite statues or to substitute its judgment for that of the Legislature." *Stinnett*, 232 So. 3d at 223. Put simply, the Plaintiffs' proposed change in the definition of who is protected under these two Acts must come from the Legislature. This is especially true here, since the Alabama Supreme Court has stated that the Alabama Legislature expressed "clear legislative intent" (*Mack*, 795 So. 3d at 610) and made "an important pronouncement of public policy" (*Stinnett*, 232 So. 3d at 215) when the Legislature defined person as "an unborn child **in utero**." This Court cannot override this intent and public policy.

The Plaintiffs argue it is inappropriate to distinguish between *in vitro* embryos and *in utero* embryos. However, this distinction already exists in Alabama law. The application of the Brody Act's "*in utero*" definition to the present case is not only consistent with the prior cases, discussed above, but the recent case of *Ex parte Z.W.E.*, 2021 WL 1190748 (March 26, 2021) – a case in which Justice Parker's concurrence reiterates that courts should "interpret a statute harmoniously with statutes that address related subjects." See, *id.* at *9. Justice Parker then catalogues numerous examples of Alabama statutes in which the term "child" has been defined as an unborn child *in utero*, or within the womb of a pregnant woman. *See*, *Id.* at *9 ("When faced with an unclear statute, we try to interpret the statute harmoniously with statutes that address related subjects....The homicide statutes define 'person' as 'including an unborn **child in utero** at any stage of development.'" § 13A-6-1(a)(3), Ala. Code 1975). Of note, the *Z.W.E.* opinion came after Justice Parker's concurrence in *Stinnett*, upon which the Plaintiffs heavily rely in their briefing and argument to this Court.

The Plaintiffs also heavily rely on a 2018 Constitutional Amendment which seeks to protect "the rights of the unborn child in all manners and means lawful and appropriate." However, after this amendment, the Alabama Legislature enacted the Alabama Human Life Protection Act, presumably in furtherance of the 2018 Constitutional Amendment's statement of public policy. Yet, the Legislature again used the same phrase as in the Brody Act, "*in utero*," to define "person" in the Human Life Protection Act. § 26-23H-3(7). Similarly, the death-penalty statutes prohibit the execution of a woman who is "**with child**." § 15-18-86. The statute governing health-care advance directives prevents a **pregnant woman's** wish to decline medical treatment from being carried out until the child is born. § 22-8A-4(h) ("Advance Directive for Health Care," § 3) (emphasis added).[4]

In summary, a strong belief in the sanctity of life has not prevented the Alabama Supreme Court from recognizing and upholding our Legislature's clear pattern of using the term "***in utero***" when defining the term unborn or minor child, including in the context of a wrongful death case. Further, in light of this Court's role within Alabama's constitutional construct, and giving appropriate deference to the separation of powers within the same, this Court is not permitted to reject such clear, consistent and repeated expressions of legislative intent.

Count Two – Negligence

[4] Here, these embryos are not in a position to "develop" and be "born" until someone takes the affirmative steps of: (1) unfreezing the embryos and, assuming they survive this process; (2) implanting them into someone's womb. Given the fact that embryos can be voluntarily abandoned for destruction and/or implanted into any woman's womb also raises significant questions of standing, which may be a primary reason why Alabama Courts, the Alabama Legislature, and courts around the country have refused to define these embryos as "persons" for the purposes of criminal and civil liability.

The Plaintiffs assert in Count Two that, in the alternative, they are entitled to damages for mental anguish and "the value of the embryonic human beings that were wrongfully destroyed." (Doc. 47, ¶ 47) However, their claim for compensatory damages for the value of an alleged loss of life is not one permitted under Alabama law. It is well-established in this state that the only damages a civil jury may assess for the "wrongful" taking of a life are punitive damages. *Central Ala. Electric Co-op v Tapley*, 546 So. 2d 371 (Ala. 1989). *See also*, *Killough v. Jahandarfard*, 578 So. 2d 1041, 1044-1045 (Ala. 1991). The Plaintiffs' assertion that this Court can and should side-step these well-established principles has no legal precedent in this state. In fact, during oral argument, counsel for the Plaintiffs acknowledged that in some other states, the law compensates "the surviving spouse and next of kin for the pecuniary losses due to the decedent's death. Well, we don't get compensatory damages for death in Alabama."

Likewise, the Plaintiffs' claim for mental anguish damages in Count Two is unsustainable under Alabama law. The face of the Complaint demonstrates that no Plaintiff was present, injured, or at risk of physical harm as a result of the alleged negligence. *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012). In *Hamilton*, the Alabama Supreme Court upheld the dismissal of a claim for emotional distress caused by alleged negligent and wanton acts asserted to have wrongfully caused the death of an *in utero* unborn child. Specifically, the Alabama Supreme Court held there was *no* exception to the zone of danger test carved out for the loss of an unborn child. *Id.* at 737. The Court also affirmed that the zone of danger test limits recovery for emotional injury *only* to plaintiffs who sustained a physical injury as a result of the alleged negligence or wantonness, or were placed in immediate risk of physical harm by that negligence or wantonness. *Id.* at 737 ("Because [the Plaintiff] conceded that she

was 'not entitled to zone of danger damages' and her argument suggesting that *Taylor* created an exception to the zone-of-danger test is misplaced, and because she presented no evidence showing that she suffered a physical injury as a result of the defendants' actions, we conclude that the trial court properly entered a summary judgment insofar as it concerns Hamilton's claim for damages for emotional distress.") *See also,* Ala. Pattern Jury Instr. Civ. 11.11 (3d ed.), *Mental Anguish – Zone of Danger*. The cases involving alleged mishandling of dead bodies, upon which the Plaintiffs rely in urging this Court to create an exception to the zone of danger test, are both distinguishable and predate *Hamilton*, which controls here.

It is therefore ORDERED and DECREED that Defendants' Motion to Dismiss both counts of Plaintiffs' Complaint is hereby **GRANTED**.

DONE this 13th day of April, 2022.

/s/ JILL PARRISH PHILLIPS
CIRCUIT JUDGE

EXHIBIT B

Tenn. Op. Atty. Gen. No. 22-12 (Tenn.A.G.), 2022 WL 16701602

Office of the Attorney General

State of Tennessee
Opinion No. 22-12
October 20, 2022

Applicability of the Human Life Protection Act to the Disposal of Human Embryos that Have Not Been Transfer red t o a Woman's Uterus

***1** The Honorable Jack Johnson
Senate Majority Leader
702 Cordell Hull Building
Nashville, Tennessee 37243

Question

Is the disposal of a human embryo that has not been transferred to a woman's uterus punishable as "criminal abortion" under the Human Life Protection Act?

Opinion

No. The Human Life Protection Act only applies when a woman has a living unborn child within her body.

ANALYSIS

Under Tennessee's Human Life Protection Act, "[a] person ... commits the offense of criminal abortion" by "perform[ing] or attempt[ing] to perform an abortion." Tenn. Code Ann. § 39-15-213(b). To "perform an abortion" within the meaning of the law, a person must use an "instrument, medicine, drug, or ... other substance or device with intent to terminate the pregnancy of a woman known to be pregnant." *Id.* § 39-15-213(a)(1). And to be "pregnant" within the meaning of the law, a woman must have "a living unborn child *within* her body." *Id.* § 39-15-213(a)(4) (emphasis added).

Disposing of an embryo that was created *outside* a woman's body and that has never been transferred *to* a woman's body thus does not qualify as "abortion." *Id.* § 39-15-213(a)(1). Such an embryo may fit the Act's definition of "[u] nborn child," *id.* § 39-15-213(a)(4), but the Act does not prohibit the embryo's disposal unless and until it is "living ... within" a woman's body, *id.* § 39-15-213(a)(3). Only then can the embryo's gestation render a woman ""[p]regnant," *id.*, and if there is no "pregnancy" to "terminate," there can be no "abortion," *id.* § 39-15-213(a)(1).

In sum, the Human Life Protection Act does not apply to a human embryo before it has been transferred to a woman's uterus and, therefore, disposing of a human embryo that has not been transferred to a woman's uterus is not punishable as a "criminal abortion" under the Act.

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