NO. SC-2022-0579

IN THE SUPREME COURT OF ALABAMA

Felicia Burdick-Aysenne and Scott Aysenne, in their individual capacities and as parents and next friend of Baby Aysenne, deceased embryo/minor

Appellants,

v.

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

Appellees.

APPEAL FROM THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
CASE NO. 02-CV-2021-901640

AMENDED BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs/Appellants respectfully request oral argument as this is a matter of first impression in this State. The circuit court's order held that Alabama law provides no tort remedies for the wrongful death and destruction of human, *in vitro* embryos. Plaintiffs are asking that this Court reverse this order, and confirm that Alabama law protects all human life, in all of its forms and stages of development. Given the importance of the issues presented in this appeal, Plaintiffs believe oral argument would materially assist the Court.

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STATEMENT OF JURISDICTION

This Court has jurisdiction under Sections 12-2-7(1) and 12-22-2 of the *Alabama Code*, Rule 4(a)(1) of the *Alabama Rules of Appellate Procedure*, and Rule 54(b) of the *Alabama Rules of Civil Procedure*. This appeal requests a *de novo* review of the April 28, 2022 Order of the Mobile Circuit Court (The Honorable Jill Parrish Phillips, Circuit Judge) (Doc. 114, C-417) granting Defendants' Motions to Dismiss.

The circuit court's order dismissed all of the Plaintiffs' tort claims against both Defendants, and further dismissed all pending claims against one of the Defendants. Additionally, the circuit court made an express determination that there is no just reason for delay and expressly directed entry of final judgment in these proceedings. The order therefore constitutes a final, appealable order under Rule 54(b) of the *Alabama Rules of Civil Procedure*.

The Plaintiffs timely filed their Notice of Appeal on May 13, 2022. (Doc. 117, C-428).

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

This case arises from the Defendants' failure to secure against unauthorized access to the cryogenic laboratory housing human embryos. As a result of Defendants' failures in this regard, numerous embryos, including the Plaintiffs' last remaining embryo, were killed.

Plaintiffs Felicia Burdick-Aysenne and Scott Aysenne (at times collectively referred to as the "Aysennes") paid Defendant The Center for Reproductive Medicine, P.C. ("CRM") to safeguard the Plaintiffs' human, *in vitro* embryo in CRM's cryogenic storage unit. On a Sunday evening in December 2020, CRM left the door to its facility, as well as the door to its cryogenic storage area, unlocked, unsecured, and unmonitored. At the same time, Defendant Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center ("MIMC") failed to properly monitor and secure its facilities. As a result, an unauthorized person was allowed to escape from MIMC's hospital, enter CRM's facility, access CRM's cryogenic storage area, remove the Plaintiffs' embryo from the storage unit, and illegally and impermissibly destroy it.

On September 16, 2021, Plaintiffs filed suit against both Defendants in Mobile County Circuit Court. (Doc. 2, C-12). On October

20, 2021, Defendants jointly filed a Motion to Dismiss, asking the circuit court to dismiss the action, "in its entirety." (Doc. 24, C-29). On November 4, 2021, the Defendants each moved separately to stay discovery pending resolution of their Motion to Dismiss. (Doc. 56, C-148). The Defendants refused to answer any discovery citing the pendency of that motion.

Plaintiff's subsequently filed a First Amended Complaint (the operative complaint for purposes of this appeal) on November 7, 2021. (Doc. 61, C-157). The First Amended Complaint is fifteen (15) pages long, includes eighty-six (86) paragraphs of allegations, and sets forth, in great detail, the various shortcomings that lead to the present catastrophe. (Doc. 61, ¶¶ 59 – 65, C-166-167). The First Amended Complaint seeks recovery under four (4) claims: wrongful death, negligence, wantonness, and breach of contract. (Doc. 61, C157).

On November 22, 2021, Defendants jointly filed a Motion to Dismiss Certain Claims in Plaintiffs' First Amended Complaint. (Doc. 71, C-256). In light of the Complaint's amendments, the Defendants no longer sought to dismiss the action in its entirety. Instead, the Motion only sought dismissal of the wrongful death claim. (Doc. 71, C-256, 265). As to the other claims, the Defendants' Motion merely asked for a ruling that

Plaintiffs could not recover mental anguish damages under their negligence claim. (Doc. 71, C-256, 269). The Motion did not seek any remedies regarding the wantonness or breach of contract claims. (Doc. 71, C-256).

On December 30, 2021, Plaintiffs filed an Opposition to Defendants' Motion to Dismiss. (Doc. 77, C-316). Because the present claim arises from the exact same facts and circumstances as those in the *James LePage v. Mobile Infirmary Association* (02-CV-2021-901607, Circuit Court of Mobile; Ala. Sup. Ct. Docket No. SC-2022-0515), the Plaintiffs adopted the pleadings filed and arguments made by the plaintiffs in this related litigation *in toto*. (Doc. 77, C-316).[1] Since the Amended Complaints in the two actions were not identical, and since the Defendants in this case had not asked for dismissal of the entire complaint, the Plaintiffs did file a comprehensive opposition of their own in addition to relying on the arguments made by the *LePage* plaintiffs. (Doc. 77, C-316).

[1] The Aysennes again adopt and incorporate by reference the arguments made by the *LePage* Plaintiffs, a point discussed further in the Argument Section, below.

On January 25, 2022, Defendants filed their collective Reply in Support of Motion to Dismiss. (Doc. 88, C-343). In response to Plaintiffs pointing out that a motion to dismiss was not the proper vehicle to seek to strike the claim for mental anguish damages on the negligence claim, Defendants filed a separate Motion to Strike Plaintiffs' Claim for Impermissible Damages also on January 25, 2022. (Doc. 91, C-366). Plaintiffs filed an Opposition to Defendants' Motion to Strike on January 26, 2022 (Doc. 93, C-371), and Defendants filed a Reply in Support of Motion to Strike on January 28, 2022. (Doc. 95, C-375).

On January 31, 2022, the circuit court held a joint hearing on all of the pending motions in both this and the *LePage* case, which was recorded. (R1-99, 47). At the circuit court's request, Plaintiffs submitted a proposed order on February 4, 2022 (Doc. 97, C-382); with Defendants submitting their proposed order on February 11, 2022. (Doc. 99, C-384).

On April 13, 2022, the circuit court entered its order on the motions to dismiss – adopting nearly verbatim the Defendants' proposed order. (Doc. 103, C-197). The order dismissed not only the wrongful death claim, but also dismissed the negligence and wantonness claims, relief that the

Defendants had not requested in their Motions to Dismiss. (Doc. 103, C-397, 406).

The circuit court's order found that the Plaintiffs' embryo was not a "person" or a "minor child" under Alabama law, and thus the embryo was not protected by Alabama's Wrongful Death Act. (Doc. 103, C-400-404). At the same time; however, the circuit court also dismissed the negligence and wantonness claims because the Plaintiffs' embryo was a human life, and thus "the only damages a civil jury may assess for the 'wrongful' taking of a life are punitive damages." (Doc. 103, C-404). As a result, all of the tort claims were dismissed against all parties, MIMC no longer had any claims pending against it, and the only remaining claim was against CRM for breach of contract. (Doc. 103, C-397).[2]

On April 15, 2022, Plaintiffs filed a Motion to Amend Orders pursuant to *Alabama Rules of Civil Procedure* 59(e) and 54(b) to clarify that the circuit court's April 13, 2022 Order was a final judgment for which an appeal may lie. (Doc. 110, C-412). On April 28, 2022, the circuit court granted this Motion, and entered a new Order that included an

[2] The circuit court's order also held that mental anguish damages were not recoverable under the Plaintiffs' negligence claim; however, this part of the order is moot given the dismissal of the negligence claim.

express determination that there was no just reason for delay and that final judgment be entered as to all claims asserted against MIMC and that the wrongful death, negligence, and wantonness claims were dismissed in their entirety against CRM. (Doc. 112, C-416, Doc. 114, C-417, 426).

On May 13, 2022, Plaintiffs timely filed their Notice of Appeal (Doc. 117, C-435); Docketing Statement (Doc. 118, C-437); and Transcript Purchase Order (Doc. 119, C-441).

STATEMENT OF THE ISSUES

I. Given the right to a remedy afforded by Alabama Constitution of 1901, Article I, Section 13, did the circuit court err by dismissing all of the tort claims from the Plaintiffs' Complaint and First Amended Complaint, leaving Plaintiffs and their embryonic children with no remedies for their child's wrongful death?

II. Did the circuit court err in ruling that human, *in vitro* embryos are not living, human beings subject to Alabama's Wrongful Death Act while also ruling that the only remedy for an *in vitro* embryo's wrongful death is for punitive damages under Alabama's Wrongful Death Act?

III. Did the circuit court err in making Findings of Fact when no discovery had been permitted and Plaintiffs were prevented from introducing evidence in opposition to Defendants' Motions to Dismiss?

IV. Given Alabama law that life begins at conception, combined with Alabama's unique wrongful-death remedy, did the circuit court err in relying upon appellate opinions from states other than Alabama premised upon analogous factual scenarios but altogether different views on when life begins and the applicable wrongful-death remedies?

STATEMENT OF THE FACTS

This case is one of an ever-growing number involving the loss or destruction of *in vitro* embryos through tortious conduct.[3] Because this is

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[3] *See, e.g., In re: Pacific Fertility Center Litigation*, Case No. 18-CV-01586-JSC (N.D.CA.) (California jury entered a $15 million verdict in favor of three women and a couple who filed suit against a fertility clinic and a cryogenic tank manufacturer when the tank malfunctioned, destroying embryos, eggs, and sperm); *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz. 2005) (Couple filed suit against reproductive clinic for losing the couple's embryos); *Frisina v. Women and Infants Hospital of Rhode Island*, CIV. A. 95-4037 (Superior Ct. R.I.) (Three consolidated cases arising from a fertility clinic losing the plaintiffs' embryos); Gerard Letterie, M.D., Dov Fox, J.D., and D. Phil, *Lawsuit frequency and claims basis over lost, damaged, and destroyed frozen embryos over a 10-year period*, Fertility & Sterility, Vol. 1, Issue 2, P. 78-82 (Sept. 2020) (Finding that 133 lawsuits had been filed in the 10 year period from January 1, 2009 to April 22, 2019, over lost, discarded or damaged IVF embryos).

an appeal from a motion to dismiss, the facts are those set forth in Plaintiffs' First Amended Complaint. (Doc. 61). The Plaintiffs respectfully request that the Court disregard any assertions of purported additional "facts" filed by the Defendants/Appellees as well as any purported conclusions of facts in the circuit court's Order. For ease of reference, the facts from the Plaintiffs' First Amended Complaint are set forth below:

THE PARTIES

1. Plaintiff FELICIA BURDICK-AYSENNE ("Felicia") is an adult person who is the mother, next friend, and legal guardian of an

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Additionally, in 2018 alone, there were two massive tank failures that lead to the death of over 7,500 frozen eggs and embryos, one in Cleveland, Ohio, and another in San Francisco, California. *See, generally,* https://www.nbcnews.com/news/us-news/15m-awarded-five-people-who-lost-eggs-embryos-fertility-clinic-n1270439 (last accessed October 17, 2022); *and* https://www.cnn.com/2020/02/05/us/ohio-fertility-clinic-lost-eggs-embryos-lawsuits/index.html (last accessed October 17, 2022). In 2019, a clinic "mix-up" lead to embryos being "switched" with two families giving birth, and partially raising, the other's biological child. https://www.nytimes.com/2021/11/09/us/fertility-clinic-embryo-mixup.html (last accessed October 17, 2022).

The Center is also a defendant in the Circuit Court of Mobile County, Alabama for an unrelated, separate incident wherein it lost a family's embryos. *Tonya Taylor, et al. v. The Center for Reproductive Medicine, P.C.*, CV-2021-902171.

embryo referred to herein as Baby Aysenne, deceased. Plaintiff Felicia brings suit in her individual capacity and as the parent and next friend of Baby Aysenne.

2. Plaintiff SCOTT AYSENNE ("Scott") is an adult person who is the father, next friend, and legal guardian of the embryo referred to herein as Baby Aysenne. Plaintiff Scott brings suit in his individual capacity and as the parent and next friend of Baby Aysenne.

3. Plaintiff BABY AYSENNE was the embryo formed by the fertilization of Felicia's egg with Scott's sperm via in vitro fertilization. Baby Aysenne was killed and/or destroyed because of the tortious conduct of the Defendants as more specifically detailed herein. Suit is brought on Baby Aysenne's behalf by and through her parents, Felicia and Scott.

4. Defendant THE CENTER FOR REPRODUCTIVE MEDICINE, P.C., ("CRM" and/or the "Center") is an Alabama entity doing business by agent or otherwise in this County and State. The Center owns and operates a fertility clinic with related functions such as human embryo cryopreservation located at or near Defendant Mobile Infirmary's hospital.

5. Defendant MOBILE INFIRMARY ASSOCIATION d/b/a MOBILE INFIRMARY MEDICAL CENTER (the "Mobile Infirmary") is an Alabama entity doing business by agent or otherwise in this County and State. Mobile Infirmary owns and operates a hospital known as the Mobile Infirmary.

. . .

FACTUAL ALLEGATIONS

I. Alabama law protects all human life, including embryos.

9. Human life is a continuum from fertilization of an egg with sperm until death.

10. A human embryo is a stage in the continuum of life.

11. A human being is the same living organism at every developmental life stage, from an embryo to a fetus, to an infant, toddler, teenager, and into adulthood. The degree of maturation is the only difference.

12. Each embryonic human being is a unique human life that is special and intrinsically valuable from conception.

13. Wrongfully causing and/or allowing the death of an embryonic human being is no different than causing the death of a human being at any other stage of life. Embryonic human beings are human beings.

14. The public policy of the State of Alabama is to protect life, born and unborn, including embryonic human beings.

15. 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.

II. General overview of human reproduction.

16. Every human being has a unique beginning: the moment of conception or fertilization. As soon as the twenty-three chromosomes carried by the sperm encounter the twenty three chromosomes carried by the egg, the whole information necessary and sufficient to create a new being is gathered.

17. A human sperm and a human egg each have only one pair of the 23 human chromosomes, which is half of the required number. Sperm and egg cannot singly develop further into human beings. Individual sperm and egg produce only gamete proteins and enzymes. They do not

direct their own growth and development. They are parts of a human, but they are not individuals in and of themselves.

18. This changes upon fertilization, as at that point, two separate parts of two human beings combine and transform into something very different from what they were before. The sperm and egg actually change into a single, new human being. During the process of fertilization, the sperm and egg cease to exist as such, and a new human being is created.

19. Immediately upon fertilization, a single-celled zygote is formed. A zygote is an entirely new human being, with his or her own unique DNA with 46 chromosomes (23 pairs of two chromosomes – in contrast to the egg and sperm, which each only have one pair of the 23 chromosomes).

20. The zygote is an extremely important aspect of human life. From this single cell will grow the entire person. This so-called "first cell" knows more and is more specialized than any cell which later develops in the human organism.

21. This single-cell human being immediately produces specifically human proteins and enzymes. The zygote further genetically directs his/her own human growth and development.

22. The zygote stage is immediately followed by cleavage, through which the zygote develops into an embryo. This does not mean that the zygote becomes another kind of thing. It simply grows and develops. The embryo is merely a bigger and more complex version of the same human being than the zygote is. This is no different than how an adult is bigger and more complex than a toddler.

23. Thus, once one specific sperm has fertilized one specific egg it becomes a zygote, which is a new human being that is the immediate process of fertilization.

III. Embryos conceived from in vitro fertilization are exactly the same as those conceived in vivo.

24. Assisted reproductive technology ("ART") covers all of the various methods used to treat infertility.

25. At issue in this case are two types of ART. The first is in vitro fertilization ("IVF"), which is a fertilization method that conceives a child by combining the egg and sperm outside of the womb – i.e. "in vitro." The second is cryopreservation, which is simply preserving the conceived embryos in cold temperatures to sustain their lives.

26. There is no difference between an embryo conceived via IVF and one conceived in vivo (i.e. inside the body). Location of the two

embryos would be the only distinguishing aspect. Both are the beginning of a new human life, separate and apart from the egg and sperm from which they came.

27. Following IVF conception, the embryo is either transferred to a woman's uterus or preserved by cryopreservation.

28. There is no difference between embryos preserved by cryopreservation and embryos that are subsequently transferred to a woman's uterus. Cryopreservation does not stop life, to be later started anew. Rather, the low temperatures greatly slow down the embryo's microscopic movements and arrest the flux of time for the embryo. Once thawed, the embryo will continue to flourish and divide. A frozen embryo, once thawed, can, and often does, grow into a healthy child.

29. For many people, including the Plaintiffs herein, cryopreservation allows for peace of mind about their family. Since the first IVF baby was born in 1978, over 9 million children have been born using IVF procedures, including cryopreservation. It is estimated that there are over one-million frozen embryos in the United States right now.

30. If the embryonic human being is not deprived of the cryopreservation environment, he or she can be successfully transferred

many years later and become a healthy child. For example, a healthy baby girl was recently birthed following a 27-year cryopreservation.

IV. Plaintiffs' history with the Center.

31. Felicia and Scott went to the Center for assistance in conceiving children. The Center provides services for conceiving and implanting embryos via IVF, as well as cryopreservation of conceived embryos.

32. The Center claims to help people "realize their dream of having a baby" through a variety of ART including IVF and cryopreservation.

33. On January 29, 2013, Felicia and Scott entered into a written agreement with the Center under which the Center would assist Felicia and Scott with having children of their own. A copy of the parties' contract is attached hereto as Exhibit A and incorporated herein by reference.

34. Pursuant to the agreement, the Center was to provide IVF services to Felicia and Scott along with cryopreservation of the conceived embryos.

35. The Center harvested eggs from Felicia, which were fertilized in vitro by Scott's sperm. The resulting zygotes developed into embryos.

36. The Center cryopreserved some of Felicia and Scott's embryos in the Center's cryogenic nursery. According to the Center, "freezing (or 'cryopreservation') of embryos is a common procedure. Since multiple eggs (oocytes) are often produced during ovarian stimulation, on occasion there are more embryos available than are considered appropriate for transfer to uterus. These embryos, if viable, can be frozen for future use." (Exhibit A, Pg. 12).

37. From these embryos, Felicia and Scott were able to conceive healthy children, including from embryos that had been frozen and then thawed.

38. Baby Aysenne was the last embryo that Felicia and Scott had conceived. Even had Felicia and Scott chosen not to get pregnant, they considered this embryo a human being or life.

39. For years following the conception of their embryos, Felicia and Scott maintained contact with the Center. They paid the Center a monthly nursery fee to ensure that the Center would preserve and

protect their embryos, including Baby Aysenne, in the Center's cryogenic nursery.

40. For example, on November 20, 2020, the Center emailed Felicia confirming receipt of the December 2020 nursery fee. (Exhibit B).

41. In return for accepting Felicia and Scott's payment for embryonic-nursery fees, the Center promised and agreed to protect, secure, and care for the embryos, including Baby Aysenne.

42. These plans were ruined when the Center called Felicia and Scott stating that their last remaining embryo had been killed and/or destroyed.

V. An eloping Infirmary patient entered the Center's unsecured IVF lab and cryogenic nursery.

43. The Center's IVF lab/clinic is located in or near Defendant Mobile Infirmary's hospital facilities.

44. The Center preserves the embryos under its care in an embryonic storage-unit referred to herein as the cryogenic nursery, which is located in the Center's IVF lab/clinic.

45. Both the Center's IVF lab/clinic and its cryogenic nursery are supposed to remain locked, secured, and/or monitored at all times.

46. Both the Center's IVF lab/clinic and its cryogenic nursery are supposed to remain locked and secured at all times, in part, to prevent unauthorized person(s) from entering those areas.

47. Both the Center's IVF lab/clinic and its cryogenic nursery are supposed to remain locked, secured and/or monitored to prevent the death and/or destruction of the embryos that the Center is responsible for caring for, protecting, and securing.

48. Despite the need to have the Center's IVF lab/clinic locked, secured, and/or monitored at all times, on or about December 13, 2020, the doors to the lab were left unlocked, unsecured, and/or unmonitored.

49. Leaving the door to the Center's IVF lab/clinic unlocked, unsecured, and/or unmonitored was a direct violation of the policies and procedures of both Mobile Infirmary and the Center.

50. It was foreseeable that harm could come to the unprotected embryos preserved in the Center's cryogenic nursery should the door to the Center's IVF lab/clinic be left unlocked, unsecured, and/or unmonitored.

51. Despite the need to have the Center's cryogenic nursery locked, secured, and/or monitored at all times, on or about December 13, 2020, the nursery was left unlocked, unsecured, and/or unmonitored.

52. Leaving the Center's cryogenic nursery unlocked, unsecured, and/or unmonitored was a direct violation of the Center's policies and procedures.

53. It was foreseeable that harm could come to the unprotected embryos preserved in the Center's cryogenic nursery should the nursery be left unlocked, unsecured, and/or unmonitored.

54. Defendant Infirmary allowed one of its patients to leave and/or elope from his or her room in the Infirmary's hospital area and begin wandering the hospital. This eloping patient then accessed the Center's cryogenic nursery because the area had been left unlocked, unsecured, and/or unmonitored in direct violation of the Defendants' policies and procedures.

55. This person removed Baby Aysenne and other embryos from the cryogenic environment that was sustaining their lives.

56. It is believed that the cryopreservation's subzero temperatures burned the eloping patient's hands, causing him or her to

drop the cryopreserved embryonic human beings on the floor, where they began to slowly die.

57. Once the embryos were removed from their cryogenic storage environment in such manner, they were no longer living nor could they be revived. They were forever lost.

58. By the time the Defendants' staff discovered what happened, all of the embryos that had been removed had died.

STANDARD OF REVIEW

Although the Defendants' motion cites to *Alabama Rules of Civil Procedure* 12(b)(1) and 12(b)(6), the crux of the circuit court's order was a finding that the First Amended Complaint did not survive a 12(b)(6) challenge. As such, "[t]he appropriate standard of review under Rule 12(b)(6) is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears the pleader could prove any set of facts that would entitle her to relief." *Stinnett v. Kennedy*, 232 So. 3d 202, 206 (Ala. 2016). The Court must "accept the allegations of the complaint as true," and further view all facts and inferences "most strongly in the [plaintiffs'] favor." *Weaver v. Firestone*, 155 So. 3d 952, 956 (Ala. 2013). The "Court does not consider whether the plaintiffs will

ultimately prevail, but only whether [they] may possibly prevail." *Stinnett*, 232 So. 3d at 206. "[A] Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Id.*

SUMMARY OF THE ARGUMENT

A basic notion of Alabama's civil-justice system is that the law provides a right for every wrong. This principle is so important to our jurisprudence that it is enshrined in our Constitution: "every person, for any injury done him, in his lands, goods, person, or reputation, ***SHALL HAVE A REMEDY*** by due process of law; and right and justice shall be administered without sale, denial, or delay." Ala. Const. of 1901 §13 (emphasis added). Thus, as a starting point, the law requires that the Plaintiffs have a cause of action against all possible wrongdoers for the embryo's wrongful death.

Because the law requires a remedy, the next step is to determine what that remedy should be. The most logical remedy for the wrongful death of a conceived, human embryo would be under Alabama's Wrongful Death Act. Alabama law already provides such a remedy when an *in utero* embryo has been wrongfully killed. *Mack v. Carmack*, 79 So. 3d 597

(Ala. 2011); *Stinnett v. Kennedy*, 232 So. 3d 202 (Ala. 2016). Alabama law does not require that embryos reach viability or be born alive to be worthy of protection. All that matters is conception. Once an embryo is conceived, it is considered a minor child such that its wrongful death gives rise to a claim under the Alabama's Wrongful Death Act.

There is no reason to differentiate between an embryo *in utero* and one *in vitro*. They have both been conceived, they will exist a single, solitary time in this realm, and they contain the exact same genetic materials and characteristics as every other human being. The embryo at issue would never be anything else other than human. The law should treat her wrongful death the same way as any other human's wrongful death.

Alternatively, to the extent there is a distinction between *in utero* and *in vitro* embryos such that Alabama's Wrongful Death Act does not apply, this does not mean that the Plaintiffs should be left without any tort remedies at all. Instead, they would still have their usual negligence and wantonness claims. The Defendants certainly recognized this fact at the circuit court level given that they did not even move to dismiss these claims (nor did CRM move for dismissal of the breach of contract claim).

Instead, the Defendants' motion on these alternative tort claims was limited to the type of damages that could be recovered on a negligence claim.

And finally, this Court has not just the inherent power, but the concomitant duty, to declare the protections that will be afforded to all human life. Allowing the circuit court's order to stand would leave *in vitro* embryos as the ONLY type of life, human or otherwise, that is not protected by Alabama's civil-justice system. That wrong must be righted.

This Court should hold that conceived, human, *in vitro* embryos, are human lives worthy and deserving of legal protection. Such a finding is in line with the public policy of this State that human life begins at conception. This Court must reverse the circuit court's ruling, and in so doing confirm and declare the remedy to be afforded for the wrongful death or destruction of human, *in vitro* embryos. Our Constitution demands nothing less.

ARGUMENT

Pursuant to Rule 28(k), *Alabama Rules of Appellate Procedure*, Plaintiffs incorporate and adopt by reference the Argument made in the Appellants' Brief in *LePage v. Mobile Infirmary Association*, SC-2022-

0515 as if set forth fully herein. The legal issues are nearly identical in the two cases, and Plaintiffs herein have endeavored to not overload the Court with unnecessary, repetitive arguments.

I. Alabama's Constitution Requires that "every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy." (Ala. Const. Section 13).

The circuit court's order violates the Plaintiffs' Constitutional Rights in holding that there is no remedy for the negligent or wanton death of an *in vitro* embryo. The Alabama Constitution requires that "every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." Ala. Const. of 1901, §13. "It will be noticed that this provision preserves the right to a remedy for an injury. That means when a duty has been breached, producing a legal claim for damages, such claimant cannot be denied the benefit of his claim for the absence of a remedy." *Pickett v. Matthews*, 192 So. 261, 263 (Ala. 1939).

In the earliest case on the subject of the legal remedies to be afforded the unborn, this Court stated that, even if no wrongful death claim existed, the parents still had a remedy for their loss. In *Stanford v.*

St. Louis-San Francisco Ry. Co., 108 So. 566 (Ala. 1926), this Court held that though there was no claim for wrongful death of an unborn child in the womb, "the mother . . . may recover for any damage which was not too removed to be recovered at all." This case was overruled by subsequent decisions affirming that since life begins at conception the wrongful death of an embryo, regardless of viability, gives rise to a wrongful death claim. But regardless, this central tenet – that every wrong must have a remedy – is ingrained in our legal system.

The circuit court's fundamental error here was ruling that the Plaintiffs were left with no tort remedies, at all, for the wrongful death of their embryo. In essence, the circuit court ruled that there is no claim for wrongful death because *in vitro* embryos are not considered "persons" under Alabama law, but also that there is no claim for negligence or wantonness because the embryos are persons such that the only damages that can be awarded are punitive damages under Alabama's unique wrongful death system. (Doc. 103, C-397, 402, 404). If the circuit court's order is not reversed, then all other forms of life would be protected under either the wrongful death act (for human lives) or common law negligence/wantonness claims (for non-human lives, such as livestock

and crops). The only type of life that would not be protected under Alabama's tort laws would be human, *in vitro* embryos.

The fallacy of this argument can be seen in the following example: Suppose CRM decided to move from one location to another. In the process, it packed up all of its office supplies and equipment, including its cryogenic nursery equipment storing *in vitro* embryos, into a moving truck. As the truck was traveling along, a drunk driver hits it, destroying everything inside. Under the circuit court's ruling, the moving company would have a claim for the loss of its truck, CRM would have a claim for the loss of its supplies and equipment – including its cryogenic nursery equipment, but the parents of the embryos stored inside that very equipment that were being transported on that same truck would have no tort claims against the drunk driver for the loss of their embryos.

Thus, as a starting point, Alabama law mandates a mechanism of recovery for the injuries the Plaintiffs have suffered as a result of the Defendants' tortious conduct. There is simply no way that these human, *in vitro* embryos can be completely unprotected by Alabama's tort laws. The circuit court's ruling must be reversed to comply with the constitutional requirement of providing a remedy for every injury.

II. Alabama's Wrongful Death Act Provides the Remedy for the Wrongful Death of All Human Life, including an *in vitro* embryo.

Because there must be a remedy, the real question in this case is which remedy should apply. The logical starting point for the death of a human embryo is obviously Alabama's Wrongful Death Act, which provides for a cause of action "[w]hen the death of a minor child is caused by the wrongful act, omission, or negligence of any person." (*Ala. Code* § 6-5-391).

The statute is silent as to who is included as a "minor child," leaving it to the courts to interpret the term. Over the past one-hundred (100) years, this Court has endeavored to broaden this term in the prenatal context such that, at present, "the Wrongful Death Act permits an action for the death of a previable fetus." *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011); *Stinnett v. Kennedy*, 232 So. 3d 202 (Ala. 2016). Under current Alabama law, were Plaintiffs' embryo *in utero*, there is no question that her death as a result of the wrongdoing that occurred in this case would give rise to a wrongful-death claim. Why, then, would there be such a sharp legal distinction between human embryos based solely on whether they are *in utero* or *in vitro*?

The Defendants argued, and the circuit court agreed, that such a distinction was necessary to ensure congruence between criminal homicide law and civil wrongful death law. (Doc. 103, C-401). That was a mistake; however, because this Court has made clear that the congruency argument is aimed at ensuring that a defendant who is responsible criminally is ALSO responsible civilly. Congruency is only necessary in those cases where the civil law must be expanded to prevent situations where "a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly." *Stinnett v. Kennedy*, 232 So. 3d 202, 216 (Ala. 2016), *quoting Mack*, 79 So. 3d at 611 (Ala. 2011), *in turn quoting Huskey v. Smith*, 265 So. 2d 596, 597-97 (Ala. 1972)(internal quotation marks omitted).

In contrast, the congruence argument is not a means to limit civil liability. As this Court noted in *Stinnett*: "for fetal homicide, it simply does not follow that a person not subject to criminal punishment under the Homicide Act should not face tort liability under the Wrongful Death Act." *Id.*[4] In fact, *Stinnett* explicitly states that attempts to harmonize or

[4] This is true in other contexts as well. A tortfeasor that takes his eyes off the road to change the radio station and fails to see the car ahead of

ensure congruity were "never intended to synchronize civil and criminal liability." *Id.* at 215. Justice Parker, in his special concurrence, addressed this very issue: "We settled the incongruence between civil and criminal statutes in *Mack*, not by giving unborn children **less** protection under the law, but by recognizing that unborn children, viable or not, were **equally protected** under the Wrongful Death Act." *Id.* at 223 (Parker, J. specially concurring)(emphasis added).

The congruency argument also ignores the history of this Court's jurisprudence in this area, which has worked to expand who is protected under our wrongful death law because the "paramount purposes" of Alabama's wrongful death statute are "the preservation of human life" and "to prevent homicide." *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 356 (Ala. 1974); *Mack v. Carmack*, 79 So. 3d 597, 610 (Ala. 2011); and *Huskey v. Smith*, 265 So. 2d 596, 597 (Ala. 1972). In light of these purposes, this Court has worked to "interpret[ed] the Wrongful Death Act in a manner that eliminate[s] a distinction that otherwise would have prevented recovery for the death of a fetus." *Mack v. Carmack*, 79 So. 3d

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him stop, thereby causing a wreck, can be responsible civilly but not criminally.

at 605. Plaintiffs ask the Court to continue to interpret the Wrongful Death Act in such a manner, and eliminate any *in vitro* versus *in utero* distinction that would prevent recovery for the death of the human embryo that was killed in this case.

With the exception of two (2) cases in the early 1990s,[5] all of this Court's opinions on this subject over the past fifty (50) years have served to ensure that Alabama's Wrongful Death Act provides a mechanism of recovery for the death of a human life in all of its various forms and stages of development.

> *Huskey*, *Wolfe*, and *Eich* constituted seminal decisions from this Court concerning causes of action for wrongful death based on prenatal injuries. **In each of those cases . . . the Court interpreted the Wrongful Death Act in a manner that eliminated a distinction that otherwise would have prevented recovery for the death of a fetus.** *Mack v. Carmack*, 79 So. 3d 597, 605 (Ala. 2011)(emphasis added).

For fifty (50) years, this Court has held that "the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the

[5] These two cases are *Lollar v. Tankersley*, 613 So. 2d 1249 (Ala. 1993) and *Gentry v. Gilmore*, 613 So. 2d 1241 (Ala. 1993) both of which were expressly overruled by *Mack v. Carmack*, 79 So. 3d 597, 611 (Ala. 2011).

mother, but rather has a separate existence within the body of the mother." *Wolfe v. Isbell*, 280 So. 2d 758, 761 (Ala. 1972). The reason for this is simple: human life begins at conception. At this point in time, an entirely new person has been created, with his or her own, unique DNA. Regardless of whether this new person is *in vitro* or *in utero*, he or she is fundamentally the exact same thing – a human being. The Defendants' argument, and the circuit court's Order, creates an exception to this rule, treating some embryos different than others based on nothing more than their physical location. This line of demarcation is completely arbitrary, would not serve to protect human life, and is not in line with well-established Alabama law.

The circuit court's Order treating *in vitro* embryos differently than all others ignores the fundamental fact that all embryos are human lives, and that, under Alabama law, "once we accept the basic premise that a fetus is a potential human life at the time of the injury . . . the substantive rights resulting from wrongful death must be protected." *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 358 (Ala. 1974). This biological fact – that all human embryos are independent from their surroundings or living environments, explains why the death of a previable fetus gives rise to a

wrongful death claim. Such a claim exists in the *in utero* context precisely because the fetus is NOT part of the mother, but merely resides in her. *Wolfe v. Isbell*, 280 So. 2d 758, 761 (Ala. 1973) (*citing Puhl v. Milwaukee Auto. Ins. Co.*, 99 N.W. 2d 163 (Wis. 1959) ("[I]t would be more accurate to say that the fetus from conception lived within its mother rather than as part of her.")). Were the previable fetus residing somewhere else when it was wrongfully killed, the wrongful death claim would still exist. It is NOT the location of the embryo that is important, but its existence alone that matters.

Similarly, the order also fails to consider that the public policy of this State is to protect unborn life, in all of its various stages. As this Court wrote in *Hamilton v. Scott*, 97 So. 3d 728, 734 n.4 (Ala. 2012):

> [T]his Court's holding in *Mack* is consistent with the Declaration of Rights in the Alabama Constitution, which states that "all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." These words, borrowed from the Declaration of Independence affirm that each person has a God-given right to life.

The Alabama Constitution is in accord, confirming that "it is the public policy of this state to recognize and support the sanctity of unborn life

and the rights of unborn children, including the right to life." *Ala. Const.* Art. I, §36.06(a). This public policy extends "to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate." *Id.* at §36.06(b).

This public policy means that, when interpreting the Wrongful Death Act, "Alabama courts should construe such statutes in favor of the express public policy of the State to protect unborn life, not against it." *Stinnett*, 232 So. 3d 202, 223 (Parker, J. special concurrence). As such, "[m]embers of the judicial branch of Alabama should do all within their power to dutifully ensure that the laws of Alabama are applied equally to the most vulnerable members of our society, both born and unborn." *Id.*

Based on the foregoing, this Court has worked to expand the definition of "minor child" over the past 50 years to ensure that all life is protected, regardless of its developmental stage. The law has continued to develop and adapt to new science, knowledge, and technology with the sole goal being to protect human life, from the very, very young, to the very, very old. There is no difference between an *in vitro* and *in utero* embryo, much less a difference that is so deep and wide that we should,

as a legal principle, differentiate the remedy to be provided for an embryo's death based solely on its physical location. (Doc. 61, C-157, ¶26 and 28). This Court should take this opportunity to confirm that all human embryos are protected under Alabama's Wrongful Death Act.

III. Because Alabama Law Requires a Remedy for Every Wrong, if there is No Claim under the Wrongful Death Act there Must be Claims under Common Law Theories of Negligence and Wantonness.

Plaintiffs' First Amended Complaint included alternative claims of negligence and wantonness "should the Courts of this State or the United States Supreme Court ultimately rule that Baby Aysenne is not a minor child." (Doc. 61, C-169, ¶77). The Complaint sets forth, in great detail, factual allegations supporting these theories and seeks damages in the form of "the value of the embryo wrongfully destroyed, and for the severe mental anguish and emotional distress [the Plaintiffs] have been caused to suffer and will suffer in the future." (Doc. 61, C-169, ¶79).

The Defendants conceded that such claims exist should the embryo not be considered a "minor child" under Alabama's Wrongful Death Act as their Motion to Dismiss did not seek dismissal of the entirety of Plaintiffs' alternative claims under negligence and/or wantonness theories. (Doc. 71, C-269-271). Instead, their Motion was quite limited,

merely seeking dismissal of "[t]he Aysennes' claim for damages for mental anguish under a theory of negligence." (Doc. 71, C-269). Plaintiffs' counsel highlighted that Defendants had not moved to dismiss anything other than the wrongful death claim at oral argument. (R.80-81, 85-86 "And so when they filed a motion to dismiss the amended complaint, they only moved to dismiss certain claims. They certainly didn't just move to dismiss the wantonness claim. They didn't move to dismiss the breach of contract action. So I'm not sure what we're down here arguing at this point in time.").

Plaintiffs responded that such an argument was inappropriate in the motion to dismiss context. As this Court made clear in *Raley v. Citibanc of Alabama*, 474 So. 2d 640, 642 (Ala. 1985), arguments regarding the type of relief to be accorded under a specific cause of action are "not subject to a Rule 12(b)(6) motion for failure to state a cause of action." (Doc. 77, C-333). Plaintiffs further pointed out that Alabama law was not clear on whether mental anguish damages could be recovered for the wrongful destruction of an *in vitro* embryo, and noted that the Defendants' argument on this narrow point was limited to the negligence claim ONLY. (Doc. 77, C-333). Defendants' Motion sought no relief, at all,

with regard to the wantonness or breach of contract claims. (Doc. 77, C-333).

The circuit court's Order; however, went beyond the limited grounds of requested relief, dismissing the negligence and wantonness claims in their entirety. Such was done without providing Plaintiffs any warning that such would occur and without giving them the opportunity to oppose such relief. In dismissing the Plaintiffs' alternative tort claims, the circuit court stated that "[i]t 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," citing to *Central Alabama Electric Co-op v. Tapley*, 546 So. 2d 371 (Ala. 1989) and *Killough v. Jahandarfard*, 578 So. 2d 1041 (Ala. 1991).

A. The Circuit Court Erred in Ordering Relief on an Issue that was not Properly before it.

As an initial point, the circuit court violated the Plaintiffs' due process rights by dismissing the negligence and wantonness claims without the Defendants requesting such relief in their Motion, without providing the Plaintiffs with any notice or warning that it was going to rule on that issue, and without providing Plaintiffs with the opportunity to brief and respond to this issue.

> A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. . . . Unless all parties in interest are in court and have voluntarily litigated some issue not within the pleadings, the court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded.
>
> The foregoing rules are all fundamental and state nothing more than the essentials of due process and of fair play. They assure to every person his day in court before judgment is pronounced against him.
>
> *Central Bank of Alabama, N.A. v. Ambrose*, 435 So. 2d 1203, 1206 (Ala. 1983) (*quoting Sylvan Beach, Inc. v. Koch*, 140 F.2d 852, 861-62 (8th Cir. 1944)).

In situations such as this, where a party has been "denied an opportunity to have challenged or defended against such a claim, the opposing party has suffered substantial prejudice and the judgment granting relief must be reversed. Indeed, such a rule is fundamental to the essentials of due process and fair play." *Carden v. Penney*, 362 So. 2d 266 (Ala. Civ. App. 1978).

Plaintiffs did not voluntarily litigate any issue not within the pleadings. Plaintiffs' counsel made clear at oral argument that he was "not sure what we're down here arguing at this point in time" in regards

to the negligence and wantonness claims since the Defendants' motion had not sought dismissal of those claims. (R.86). The circuit court thus erred in granting Defendants' relief that they had not requested.

B. The Circuit Court's Ruling is Circular.

The circuit court's Order is based on circular logic. It held, on the one hand, that the Plaintiffs did not have a claim for wrongful death because their *in vitro* embryo is not a person or minor child under Alabama law. (Doc. 103, C-400, "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 [in] Ala. Code §6-5-391."). But on the other hand, the circuit court held that there were no claims for negligence or wantonness because the embryo was a human life such that "the only damages" that could be awarded for its "wrongful taking" would be "punitive damages." (Doc. 103, C-404). In other words, the Plaintiffs did not have a wrongful death claim because the embryo was not a person, but they also did not have negligence or wantonness claims because the embryo was a person.

In support of its statement that the Plaintiffs did not have negligence or wantonness claims, the circuit court relied upon *Central*

Alabama Electric Co-op v. Tapley, 546 So. 2d 371 (Ala. 1989) and *Killough v. Jahandarfard*, 578 So. 2d 1041 (Ala. 1991). These two (2) cases involved wrongful death actions where this Court affirmed jury verdicts of $1 million and $2.5 million. Neither case discussed the interplay between Alabama's unique wrongful death law and the facts of this case. It is unclear why these two cases, which both involve human beings killed as a result of the defendants' misconduct, would serve to support the entire dismissal of the negligence and wantonness claims if the embryo is not considered a minor child or person under Alabama law.

Moreover, Plaintiffs agree that, should the case proceed as a wrongful death claim, then the only damages that would be available would be punitive damages under Alabama law. *See, e.g., Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927) (In the wrongful death context, even if the tortious conduct is only negligence, the damages to be awarded are punitive in nature to "strike at the evil of the negligent destruction of human life."); *accord Cent. Ala. Elec. Co-op*, 546 So. 2d at 376 (The theory behind awarding punitive damages for wrongful death claims, even if the misconduct was only negligent, is that "[p]unishing the tort-feasor dissuades others from engaging in life-endangering

conduct."). The issue is not what damages are recoverable under a wrongful death claim, but what claim or theory should govern this action in the first place. If this Court holds that *in vitro* embryos are protected under Alabama's Wrongful Death Act, then the remedy will be punitive damages. If this Court holds that such embryos are protected by negligence/wantonness theories, then the Plaintiffs will be able to recover compensatory damages (and perhaps punitive damages under the wantonness claim).

C. Alabama Law Protects All Life in All of Its Various Forms.

The circuit court's statement that "the only damages a civil jury may assess for the 'wrongful' taking of a life are punitive damages," is only true when the "life" in question is a human being. There are a myriad of other types of "life" that are not subject to Alabama's Wrongful Death Act. But this does not mean that there is no remedy at all when those lives have been wrongfully taken. Instead, those cases simply proceed under negligence and wantonness theories. For example, Section 3-1-11.1(b) of the *Alabama Code* provides for civil damages for the wrongful "killing, disabling, disfiguring, or destroying of livestock in an amount equal to double the value thereof." *See, further*, *Louisville & N.R.*

Co. v. Carter, 104 So. 754 (Ala. 1925) (affirming judgment in favor of plaintiff for wrongful death of his dog); *accord Louisville & N.R. Co. v. Watson*, 208 Ala. 319 (Ala. 1922); *Cent. of Ga. Ry. Co. v. Carroll*, 50 So. 235 (Ala. 1909) (Alabama law provides a cause of action for negligent destruction of growing crops). Alabama law even allows a claim for negligence in handling a dead human body. *Levite Undertakers Co. v. Griggs*, 495 So. 2d 63 (Ala. 1986). It would be odd, indeed, for Alabama law to protect livestock, dogs, plants, and even dead bodies; while at the same time excluding human, *in vitro* embryos from protection under our tort laws.

If the circuit court's Order were left in place; however, this would be the effect. The Defendants in this case would basically have complete civil tort-law immunity from their wrongdoing so long as they destroyed or harmed *in vitro* embryos. They could be sued for negligently destroying the very container housing the embryo, but not for the destruction of the embryo being stored therein. Though seemingly preposterous, this would come to fruition unless this Court acts to reverse the circuit court and confirm that there is a remedy for the wrongful destruction of a human, *in vitro* embryo.

IV. This Court has Not Just the Authority, but the Duty, to Provide a Remedy for the Wrongful Death of a Human, *in vitro* embryo.

As noted above, Alabama's Constitution guarantees "every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." *Ala. Const.* §13. Beginning with the famous case of *Marbury v. Madison*, 5 U.S. 137, 177 (1803), a paramount principle of American jurisprudence is that our courts have not just the authority, but the concomitant duty, to "to say what the law is." In those instances where a rule of law violates the constitution, the court must disregard this rule of law. "This is of the very essence of judicial duty." *Id.* at 178.

This judicial duty requires that this Court espouse the remedy that will be provided to the Plaintiffs for this particular wrong. Plaintiffs believe that such a remedy is already established by Alabama's Wrongful Death Act, which protects minor children. Plaintiffs' human, *in vitro* embryo is exactly the same as all other human embryos, and should therefore be provided with the same protections. Alabama law protects human life from the moment of conception. In the context of Alabama's

civil Wrongful Death Act, there is no reason to differentiate embryos based solely on their location.

In the alternative, to the extent there is a line of demarcation such that the wrongful death of an *in vitro* embryo does not give rise to a wrongful death claim, this does not mean that Plaintiffs should be left without a remedy at all. Instead, they should be allowed to proceed under common law theories of negligence and/or wantonness, just as they could in any other context for any other tangible item that had been wrongfully destroyed. Alabama law protects all other forms of life, from livestock to crops. Human, *in vitro* embryos should be protected as well.

The circuit court's Order holds that there are no tort remedies, at all, for the wrongful death or destruction of a human, *in vitro* embryo. Such an argument violates the Plaintiffs' constitutional rights to a remedy and equal protection, is inconsistent with well-established Alabama law protecting all human life from the moment of conception, and would leave *in vitro* embryos completely unprotected by Alabama's tort laws. This line of reasoning is facially incorrect, and the circuit court's Order codifying it into Alabama law must be reversed.

CONCLUSION

The judgment dismissing the tort claims presented in Plaintiffs' First Amended Complaint should be reversed, and the case remanded for Plaintiffs to move forward with their claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j)(1) of the *Alabama Rules of Appellate Procedure*, I certify that the portions of this brief that count toward the word-count limit in this document contain 8774 words. I further certify that this brief complies with the font requirements set forth in Rule 32(a)(7) of the *Alabama Rules of Appellate Procedure*. This document was prepared in Century Schoolbook font using 14-point type.

/s/Jack Smalley III
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October 2022, I electronically filed the foregoing pleading with the Appellate Courts' Online Information Service and pursuant to the Alabama Rules of Appellate Procedure, I have electronically served a true and correct copy of the foregoing pleading to the following counsel of record for the parties to this appeal:

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