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47-CV-2019-900259.00
CIRCUIT COURT OF
MADISON COUNTY, ALABAMA
DEBRA KIZER, CLERK

IN THE CIRCUIT COURT OF MADISON COUNTY
STATE OF ALABAMA

RYAN MAGERS, individually and on behalf of his deceased child, BABY ROE,

Plaintiff,

v.

ALABAMA WOMEN'S CENTER FOR REPRODUCTIVE ALTERNATIVES, LLC; JOHN DOE #1, JOHN DOE #2, and JOHN DOE #3, being agents, employees, directors, representatives, contractors, or servants of Alabama Women's Center for Reproductive Alternatives, LLC; and UNKNOWN PHARMACEUTICAL COMPANY, being the manufacturer and distributor of a pill designed to kill unborn children; all of whose true and correct are otherwise unknown to Plaintiff as this time, but will be added by amendment when properly ascertained.

Defendants.

Case No. 47-2019-900259.00

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Pursuant to Ala. R. Civ. P 12(b)(6), Code of Ala. §§ 6-5-551, 6-5-410, 6-5-391, and 6-5-482, Defendants Alabama Women's Center for Reproductive Alternatives, LLC and JOHN DOE #1, JOHN DOE #2, and JOHN DOE #3, being agents, employees, directors, representatives, contractors, or servants of Alabama Women's Center for Reproductive Alternatives, LLC[1], hereby move to dismiss the Complaint of Plaintiff Ryan Magers, individually and on behalf of Baby Roe ("Plaintiff"). For the reasons that follow, Plaintiff fails to state a claim against Defendants.

[1] The John Doe Defendants have not been served in this matter and on that basis alone should be dismissed; however, to the extent Plaintiff alleges a claim against any "agents, employees, directors, representatives, contractors, or servants of Alabama Women's Center for Reproductive Alternatives, LLC" any such claim must fail as a matter of law as to these parties for the reasons stated here. *See also* section III, *infra*.

INTRODUCTION

In this action, Plaintiff alleges that a physician at the Alabama Women's Center prescribed medication for a legal abortion of a six-week embryo at the request of an unidentified patient. This patient is alleged to be Plaintiff's ex-girlfriend, and he purports to assert a wrongful death claim on behalf of the embryo, "Baby Roe." Under both state and federal privacy laws, Defendants cannot confirm or deny whether anyone matching the vague description of Plaintiff's ex-girlfriend was ever even a patient at the Alabama Women's Center, which is one of the many incurable flaws in this lawsuit, but because there is no legal basis for the claims even assuming for the purposes of this Motion only that she was a patient, Defendants respond accordingly.

Plaintiff's Complaint and all derivative claims alleged therein against Defendants should be dismissed in its entirety with prejudice for failure to state a claim under Ala. R. Civ. P 12(b)(6) because: (1) Plaintiff's claim for wrongful death of an embryo on the basis of a legal abortion done at the request of a pregnant woman is not cognizable under Alabama law; (2) Plaintiff failed to include the requisite detailed specification and factual description of each act and omission alleged by Plaintiff to render Defendants liable to Plaintiff under the Alabama Medical Liability Act; and (3) binding United States Supreme Court precedent precludes any claim against a healthcare provider for performing a legal abortion on the basis that an ex-boyfriend did not consent to the abortion.

FACTUAL BACKGROUND

Plaintiff alleges in his Complaint ("Compl.") that in early 2017, Plaintiff's then-girlfriend discovered that she was six weeks pregnant, and that Plaintiff allegedly made known that he wanted to keep the pregnancy. (Compl. ¶¶ 9–10, 14). Plaintiff alleges his then-girlfriend determined that she did not wish to continue the pregnancy and that on February 10, 2017, his ex-girlfriend sought and obtained a medication abortion at the Alabama Women's Center that resulted in the termination of her pregnancy. (*Id.* ¶¶ 13–14, 16). The Complaint does not—and of course cannot—contend that there was anything unlawful about the medical services Plaintiff's ex-girlfriend sought and that Defendants allegedly provided. *See, e.g.*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 871, 898 (1992) (upholding "[t]he woman's right to terminate her pregnancy before viability," and holding that "[a] husband has no enforceable right to require a wife to advise him before she exercises her

personal choices").

On January 23, 2019, Plaintiff filed a petition for letters of administration with the Madison Probate Court to serve as the personal representative of the embryo's[2] estate.[3] (*Id.* ¶ 17). Plaintiff asserts four counts in his complaint: (I) "wrongful death," (II) "agency Defendants;" (III) "combined and concurring wrongful acts;" and (IV) "fictitious parties."[4] However, Plaintiff's Complaint only provides information related to a wrongful death claim. Count II "Agency Defendants" is a theory of vicarious liability, which fails if the underlying wrongful death claim fails. (*Id.* ¶¶ 22–24). Count III "Combined and Concurring Wrongful Acts" is a theory of causation, which fails if the underlying wrongful death claim fails. (*Id.* ¶¶ 25–26). Finally, Count IV "Fictitious Parties" does not apply to Defendant Alabama Women's Center for Reproductive Alternatives, LLC as it is a named party. (*Id*. ¶¶ 27–28). Therefore, resolution of Plaintiff's claim for wrongful death is dispositive of Plaintiff's entire Complaint against Defendants.

LEGAL STANDARD

Under Alabama law, a motion to dismiss for failure to state a claim is properly raised in the first responsive pleading. *Trotter v. Sumner*, 56 Ala. App. 87, 89 (1975). A complaint must be dismissed if the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief. *Watwood v. R. R. Dawson Bridge Co*., 293 Ala. 578, 581 (1975). A Rule 12(b)(6) motion to dismiss encompasses only the determination of whether the pleading states a claim upon which relief can be granted, and matters outside the pleadings should not be considered in deciding where to grant a Rule 12(b)(6) motion. *Poston v. Smith,* 666 So. 2d 833 (Ala. Civ. App. 1995). It is for the plaintiff and not the court to articulate the claims forming a basis for relief under this rule. *Martin v. Fidelity &* Casualty Co., 421 So. 2d 109, 111 (Ala. 1982).

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[2] An embryo is defined as the developing pregnancy from the time of fertilization until the end of the eighth week of gestation, when it becomes known as a fetus. *See* https://my.clevelandclinic.org/health/articles/7247-fetal-development-stages-of-growth.

[3] If necessary, Defendants will be separately moving to revoke the letter of administration administered to Plaintiff Ryan Magers on behalf of the embryo or "Baby Roe."

[4] Defendants move to dismiss Plaintiff's Complaint in its entirety, including all claims and damages asserted therein. Defendants deny Plaintiff's allegations, denies being negligent or wrongful in any fashion, and denies all liability for Plaintiff's alleged injuries and damages.

ARGUMENT AND CITATION OF AUTHORITY

The Court should dismiss Plaintiff's Complaint in its entirety because it fails as a matter of law. *See* Ala. R. Civ. P 12(b)(6), Code of Ala. §§ 6-5-551, 6-5-40, 6-5-391, 6-5-482. In the present case, Plaintiff attempts to circumvent the doors of justice and hold Defendants civilly liable for conduct that the United States Constitution and the Alabama Legislature have deemed lawful. Put simply, the conduct alleged is neither wrongful nor unlawful, and Plaintiff's claims are foreclosed by Alabama statutes and the federal Constitution. Furthermore, because this is an action against a healthcare provider related to the care and treatment of a patient, Plaintiff must meet a heightened pleading standard provided by the Alabama Medical Liability Act in order to state a claim. Here, Plaintiff failed to include the requisite factual specificity necessary to support a medical malpractice action against Defendants and amendment of the Complaint would be futile. Thus, Plaintiff cannot state a claim for which relief can be granted, and the Complaint should be dismissed with prejudice.

I. PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UNDER THE ALABAMA MEDICAL LIABILITY ACT

In any action for injury, damages, or wrongful death, whether in contract or in tort, against a health care provider concerning the provision of health care, the Alabama Medical Liability Act ("AMLA") governs all aspects of the action. Code of Ala. § 6-5-551. Here, Plaintiff has brought a claim for wrongful death against the Alabama Women's Center, a health care provider, and its agents and employees related to its care and treatment of Plaintiff's ex-girlfriend. Thus, the AMLA governs this action.

Plaintiff's Complaint fails to state a claim under the AMLA because (1) a legal abortion is not "wrongful"; (2) the Complaint lacks the requisite specificity; and (3) Plaintiff lacks standing to bring the claim in his personal capacity or on behalf of the embryo. Therefore, Plaintiff's Complaint should be dismissed with prejudice as it fails to state a claim as a matter of law.

A. Plaintiff's Claim for Wrongful Death Fails Because There Is No Cause of Action for a Legal Abortion under Alabama Law.

Plaintiff's wrongful death claim is unsustainable under Alabama law for a straightforward reason: a legal abortion is not a wrongful act under Alabama law. Alabama law *only* authorizes a wrongful death cause of action for criminal, tortious, or

otherwise unlawful conduct. Furthermore, in the case of wrongful death caused by a healthcare provider, which is governed by the AMLA as here, the conduct of the healthcare provider must be alleged to be below the medical standard of care that was appropriate under the circumstances in which the Defendant health care provider treated the plaintiff. Plaintiff's Complaint does not—and cannot—allege that any such activity occurred here. Thus, as set forth below, the Complaint must be dismissed with prejudice.

1. Wrongful death occurs when death is caused by a wrongful act, omission, or negligence.

The wrongful death statutes provide a cause of action, *inter alia*, "[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, 6-5-410. "A wrongful death action is purely statutory," as "no such action existed at common law." *Waters v. Hipp*, 600 So. 2d 981, 982 (Ala. 1992); *see also South & N.A.R. Co. v. Sullivan*, 59 Ala. 272 (1877) ("The statute creates the right—a right unknown to the common law—and provides a remedy. No other remedy can be pursued."). "The wrongful death statute . . . is designed and intended to punish negligent, wanton or intentional acts causing the death of a person." *Lankford v. Mong*, 283 Ala. 24, 25, 214 So. 2d 301, 301–02 (1968). Thus, "[t]he gravamen in a wrongful death action is the wrongful act, omission, or negligence of anyone causing another's death." *Hanna v. Riggs*, 333 So. 2d 563, 566 (Ala. 1976) (internal quotations omitted); *see also King v. Nat'l Spa & Pool Inst., Inc.*, 607 So. 2d 1241, 1247 (Ala. 1992) (wrongful death statute provides "the sole remedy for *tortious* infliction of death in this state") (emphasis added); *Eich v. Town of Gulf Shores*, 300 So.2d 354, 358 (Ala. 1974) ("[T]he pervading public purpose of our wrongful death statute . . . is to prevent homicide through punishment of the culpable party and the determination of damages[.]").

The nature of the remedy further underscores the legislature's focus on unlawful activity.[5] The Alabama Supreme Court has repeatedly emphasized that "the damages recoverable under [the Wrongful Death Act] are entirely punitive," rather than compensatory, as they "are based on the culpability of the Defendant and the enormity of the wrong." *Eich v. Town of Gulf*

[5] Indeed, Alabama law is uniquely focused on wrongdoing. Although "[i]n forty-nine states, the estates of those wrongfully killed begin the calculation of damages with calculation of the victim's lost income," Alabama "has a different scheme, which provides compensation based on the culpability of the wrongdoer, instead of the harm to the victim's estate." Bonnie Lee Branum, *Alabama's Wrongful Death Act: The Jurisprudence of Accounting*, 55 Ala. L. Rev. 883, 883 (2004).

Shores, 300 So.2d 354, 357, 356 (Ala. 1974). Indeed, that court has left no doubt that "[a] wrongful death claim does not provide compensation for injuries that cause death. Punitive damages are not compensation, and our system should not be contorted to treat them as such." *King v. Nat'l Spa & Pool Inst., Inc.*, 607 So. 2d 1241, 1247 (Ala. 1992); *see also Maryland Cas. Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988)

"[T]his Court's role is to strictly enforce the wrongful-death statute as written, and intended, by the legislature." *Northstar Anesthesia of Alabama, LLC v. Noble*, 215 So.3d 1044, 1048 (Ala. 2016). For the reasons set forth below, Plaintiff cannot use a wrongful death claim to impose civil liability on Defendants for a legal abortion sought by a nonparty. Indeed, contrary to Plaintiff's allegations, the wrongful death statutes were never intended to be used – and indeed, have never been used – to penalize or prevent lawful, let alone constitutionally protected, activity. The purpose of the wrongful death statutes is effectuating the declared public policy of preventing homicides. *Bell v. Riley Bus Lines,* 257 Ala. 120, 123 (1952). Any extended interpretation is incongruous with the jurisprudence of the State of Alabama, as well as that of the United States Supreme Court.

2. The Alabama legislature did not intend for a lawful abortion to give rise to a civil claim for wrongful death except in specifically delineated circumstances, which are not present here.

First, as set forth above, it is indisputable that Alabama does not authorize a wrongful death cause of action for *any* conduct that is not already recognized under Alabama law as criminal, tortious, or otherwise unlawful. *See, e.g.*, *Hanna v. Riggs*, 333 So. 2d 563, 566 (Ala. 1976) ("The gravamen in a wrongful death action is the wrongful act, omission, or negligence of anyone causing another's death.") (internal quotations omitted). Plaintiff does not – because he cannot – cite any case or statutory provision to the contrary.

Second, it is indisputable that no criminal, tortious, or otherwise unlawful activity occurred here: There is no allegation that Defendants performed an abortion that did not comply with state and federal law governing abortions and Defendants owed no duty of care to Plaintiff *not* to perform an abortion sought by his ex-girlfriend. Indeed, more than four decades ago, the U.S. Supreme Court established that a state cannot impose on a physician performing a pre-viability abortion the same "duty to exercise . . . 'that degree of professional skill, care and diligence to preserve the life and health of the fetus' that 'would be required . . . to preserve the life and health of any fetus intended to be born.'" *Planned Parenthood v. Danforth*, 428 U.S. 52, 81-

83 (1976), quoting *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1371 (E.D. Mo. 1975). Moreover, U.S. Supreme Court precedent also establishes that physicians specifically do not owe a duty of care to the putative biological father of an embryo or fetus *not* to perform a legal abortion sought and consented to by the pregnant woman carrying the fetus. *See, e.g.*, *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 887-899 (1992); *Danforth*, 428 U.S. at 67-71.

To the contrary, the Alabama Legislature has deliberately and explicitly identified the circumstances under which the performance of an abortion can give rise to a claim under the Wrongful Death Act, none of which are present here. Alabama law specifically provides for a wrongful death cause of action *for the woman who sought the abortion only* in cases where the physician fails to comply with Alabama's abortion informed consent law. *See* Ala. Code § 26-23A-10(3) ("[F]ailure to comply with the requirements of this chapter shall . . . [p]rovide a basis for recovery *for the woman* for the wrongful death of the child, whether or not the unborn child was viable at the time the abortion was performed or was born alive.") (emphasis added). That same statute contains other civil liability provisions, which are not limited to the woman alone; but the wrongful death provision is exclusively available to her. *See* Ala. Code § 26-23A-10(1) ("[F]ailure to comply with the requirements of this chapter shall . . . [p]rovide a basis for a civil action for compensatory and punitive damages[.]"); Ala. Code § 26-23A-10(2) ("[F]ailure to comply with the requirements of this chapter shall . . . [p]rovide a basis for professional disciplinary action" for physicians and other "licensed or regulated" medical personnel.). None of the multitude of other abortion statutes in Alabama creates a cause of action for wrongful death, whether for the woman or anyone else. *Cf. Ex parte Oswalt*, 686 So. 2d 368, 373 (Ala. 1996) (noting as a "guiding concept" "the legal maxim *expressio unius est exclusio alterius*—the expression of one thing implies an intent to exclude another not so expressed") (internal quotations and citations omitted); *Geohagan v. Gen. Motors Corp*., 291 Ala. 167, 172, 279 So. 2d 436, 440 (Ala. 1973) (finding wrongful death claim unavailable for death arising from breach of contract under Uniform Commercial Code because "there is not one word" in the Uniform Commercial Code "which in anywise even suggests that for the breach of an express or implied warranty in a contract any person is given a right to maintain an action for a wrongful death" and, in fact, "the precision with which the legislature has defined the purpose and policy of the act, limiting the same to commercial transactions, clearly demonstrates that it was not the intent of the legislature . . . to create a wrongful death action in

case of a breach of warranty of the contract involved"). Indeed, the only Alabama statutes that provide that the biological father of an embryo or fetus can sue for civil damages (but *not* wrongful death) are where a physician has performed an abortion after 20 weeks, a crime under Section 26-23B-6, *see* Ala. Code §26-23B-7(a); where a clinic has failed to comply with provisions of the Women's Health and Safety Act, *see* Ala. Code § 26-23E-13; or where a clinic has improperly disposed of fetal tissue after an abortion, *see* Ala. Code §26-23F-7. Notably, none of the foregoing facts are being alleged in the present case.

In short, where the Alabama Legislature has intended for the performance of an abortion to give rise to a wrongful death action, it has said so—and has always done so within the boundaries imposed by the U.S. Constitution. In his effort to circumvent state and federal law, Plaintiff asks this Court to ignore statutory text and legislative intent and go well beyond the limited circumstances authorized by the Legislature to read a cause of action into the Wrongful Death Act for the performance of *any* abortion. However, as the Alabama Supreme Court recognized decades ago, "the state has a valid interest and duty in protecting such prenatal life, *so long as that interest does not conflict with that of an individual's right to privacy.*" *Eich v. Town of Gulf Shores*, 300 So.2d 354, 357 (Ala. 1974) (emphasis added) (citing *Roe v. Wade*, 410 U.S. 113 (1974)).[6]

3. The decisions cited by Plaintiff are not supportive of a wrongful death claim here.

Far from supporting Plaintiff's argument, the Alabama Supreme Court decisions cited in the Complaint reinforce that Plaintiff has failed to state a claim. Until recently, the Alabama Supreme Court refused to find a cause of action for the wrongful death of *any* embryo or pre-viable fetus precisely because there was no legislative intent to extend the Wrongful Death Act that far. *See Lollar v. Tankersley,* 613 So. 2d 1249 (Ala. 1993) (refusing to recognize wrongful death claims on behalf of fetuses and embryos before viability "[w]ithout a clearer expression of legislative intent"), *overruled by Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011); *Gentry v. Gilmore,* 613 So. 2d 1241 (Ala. 1993) (concluding that where "there is no clear legislative direction to include a nonviable fetus within the class of those covered by the wrongful death acts," such a cause of action is not available),

[6] In *Eich*, the Alabama Supreme Court considered a wrongful death claim by a woman against the driver of a car after a car accident that resulted in the stillbirth of the woman's eight-and-a-half-month-old fetus. The Court found a wrongful death claim available, holding that the fact that no live birth occurred does not preclude a wrongful death claim, as long as such claim does not interfere with the constitutionally protected right to abortion. *See Eich v. Town of Gulf Shores*, 300 So.2d 354, 357 (Ala. 1974).

overruled by Mack v. Carmack, 79 So. 3d 597 (Ala. 2011). It was only after the Alabama "legislature . . . 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" that the Court overruled *Lollar* and *Gentry* to hold that the Wrongful Death Act *could* be read to include a cause of action on behalf of a nonviable fetus in certain cases. *Mack v. Carmack*, 79 So. 3d at 610 (quoting §13A-6-1(a)(3), Ala. Code 1975); *see also Id.* at 611 (noting that it reached its decision "on the basis of the legislature's amendment of Alabama's homicide statute").

However, Plaintiff ignores that at the exact same time that the Alabama Legislature amended the homicide statutes to include "an unborn child in utero at any stage of development, regardless of viability" it also amended those same statutes to *expressly exclude any criminal liability* for the death of any such embryo or nonviable fetus via legal abortion.[7] Ala. Code § 13A-6-1(e) ("Nothing in this section shall make it a crime to perform or obtain an abortion that is otherwise legal."); *see also* Commentary to Ala. Code § 13A-6-1 ("The definitions make clear that the subsequent homicide sections are concerned with the death of a living human being and do not include an abortional 'killing,' *i.e.*, termination of an unborn child."). Thus, not only is there no "clear legislative intent" that the expansion of the homicide laws would in any way create liability for legal abortion, but there is clear authority to the contrary: the sole evidence of legislative intent to extend the Wrongful Death Act to provide a cause of action for the death of any nonviable fetus *explicitly* exempts abortion as a potential basis for that liability.

Indeed, in reaching its holding the Court in *Mack* also looked to decisions and laws in other states, *none* of which permit the imposition of liability for wrongful death for the provision of a lawful abortion. Of the six states cited, two exempt abortion from wrongful death liability by statute, *see* 740 Ill. Comp. Stat. Ann. 180/2.2 ("There shall be no cause of action against a physician or a medical institution for the wrongful death of a fetus caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully given."); Okla. Stat. Ann. tit. 12, § 1053 ("The provisions of this subsection shall not

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[7] Post-viability abortion is banned in Alabama and is a crime. *See* Code of Ala. §26-22-3 (making it a felony to "intentionally, knowingly, or recklessly perform or induce an abortion when the unborn child is viable" unless the abortion is "necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman"). Plaintiff does not allege the performance of a post-viability abortion and plainly alleges that the embryo was six weeks gestation. *See* Compl. ¶ 14.

apply to acts which cause the death of an unborn child if those acts were committed during a legal abortion to which the pregnant woman consented, or acts which are committed pursuant to the usual and customary standards of medical practice during diagnostic testing or therapeutic treatment."); and two by judicial opinion, *see Wiersma v. Maple Leaf Farms*, 1996 S.D. 16, 543 N.W.2d 787, 790 n.2 (S.D. 1996) ("Clearly, neither physicians nor mothers can be held liable for wrongful death when an abortion is performed with the mother's consent."); *Farley v. Sartin*, 195 W. Va. 671, 684, 466 S.E.2d 522, 535 (W. Va. 1995) ("To be clear, a wrongful death action will not lie against a woman who chooses to exercise her constitutional right to have an abortion."). Two states, Louisiana[8] and Missouri, have not formally weighed in on the issue, perhaps because such a case has never been seriously considered.

Moreover, in *Mack* and every subsequent case cited by Plaintiff, the underlying conduct giving rise to the wrongful death claim was already recognized to be criminal and/or tortious. And, of particular relevance here, each case was brought by the pregnant woman who lost her pregnancy due to criminally or civilly negligent conduct—none was brought by an ex-boyfriend because of the pregnant woman's lawful and constitutionally protected activities. In *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012) and *Stinnett v. Kennedy*, 232 So. 3d 202, 215 (Ala. 2016), for instance, the Alabama Supreme Court permitted women to bring wrongful death claims against physicians for allegedly negligent medical care leading to stillbirth of their fetuses they intended to carry to term. *See also Ziade v. Koch*, 952 So. 2d 1072, 1082 (Ala. 2006) (mother and father together brought wrongful death action against physician for allegedly negligent medical care leading to intrauterine death of fetus). These are medical malpractice actions based on allegedly negligent conduct of a medical provider. They have no application here, where there is no allegation of negligent medical care

[8] Louisiana courts have nevertheless indicated that their expansion of wrongful death liability is premised on an understanding that the cause of action is limited by clear constitutional precedent. *See Danos v. St. Pierre*, 383 So. 2d 1019, 1030 (La. Ct. App.) (Lottinger, J., concurring) (arguing that expansion of wrongful death liability on behalf of fetuses would not create "technical problems" because "[i]t could be argued that since a wrongful death action is grounded on the Defendant's tortious conduct, and that a woman's right of privacy entitles her to end her pregnancy at certain stages, the abortion is not tortious as to the fetus."), *aff'd*, 402 So. 2d 633 (La. 1981).

Nor can Plaintiff find any support in *Ankrom* and *Hicks*. In *Hicks v. State*, 153 So. 3d 53 (Ala. 2014), the Alabama Supreme Court upheld prosecutions of pregnant women under the chemical endangerment statute—a statute that criminalizes exposing a child not to *any* chemical substance that might be harmful to him/her, but only to specific classes of *independently unlawful* chemical substances—for drug use during pregnancy. In *Ex parte Ankrom*, 152 So. 3d 397 (Ala. 2013), *aff'ing sub nom, Ankrom v. State*, 152 So.3d 373, 384 (Ala. Crim. App. 2011), the Alabama Supreme Court affirmed a holding by the Court of Appeals that a woman could be held criminally liable under a child-endangerment statute for conduct harmful to her fetus precisely because, *inter alia*, the case did "not deal[] with a general endangerment statute," but rather one that "concern[ed] only conduct involving controlled substances or drug paraphernalia," and therefore would not "open the floodgates to prosecution of pregnant women who ingest *legal* toxins, such as alcohol or nicotine, or engage in any [legal] behavior that could conceivably injure the fetus." (emphasis added). Thus, even when the State of Alabama has prosecuted pregnant women for actions during pregnancy on the grounds that those actions may adversely affect the fetus, Alabama courts have resisted penalizing conduct that is not otherwise unlawful.

Finally, nothing in the recent state constitutional amendment changes this. The amendment, similar to the homicide statute, by its own terms, recognizes constitutional protections for abortion, "acknowledg[ing], declar[ing], and affirm[ing] that it is the public policy of this state to ensure the protection of the rights of the unborn child *in all manners and measures lawful and appropriate*." Ala. Act 2017-188 (emphasis added). The legislature, courts, and electorate of Alabama have all recognized the straightforward fact that the State cannot enact laws that violate federal constitution guarantees. This court must do the same.

4. Any ambiguity in statutory construction should be resolved to avoid conflict with the United States Constitution.

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Finally, even if there were ambiguity as to the proper interpretation of the Wrongful Death Act, this court is "obliged to construe statutes so as to avoid conflicts with constitutional provisions if possible." *Madaloni v. City of Mobile*, 37 So. 3d 739, 747 (Ala. 2009) (quotations and citation omitted). Indeed, "[w]here a statute is capable of two constructions, one which renders it [constitutionally] valid and the other invalid, the construction which will uphold its validity must be adopted." *City of Homewood v. Bharat, LLC*, 931 So. 2d 697, 701 (Ala. 2005) (quoting *James v. Todd,* 267 Ala. 495, 505, 103 So.2d 19, 27 (Ala.

1957)). Thus, "[n]o matter how much the parties may desire adjudication of important questions of constitutional law, broad considerations of the appropriate exercise of judicial power prevent[ ] such determinations unless actually compelled by the litigation before the court." *Lowe v. Fulford*, 442 So.2d 29, 33 (Ala. 1983) (internal quotations and citations omitted). Where, as here, the interpretation advocated by a party is not only in direct contravention of federal constitutional law, *see* Section B *infra*, but is also expressly precluded by the language of the relevant state statute, there is no need to wade into federal constitutional waters. Rather, Plaintiff's claims clearly and necessarily fail under Alabama statutes and jurisprudence, and the action can be dismissed on those grounds alone.

B. Plaintiff Fails to State a Claim Under the AMLA Due to Failure to Plead the Requisite Specificity.

Under the AMLA, the plaintiff must include in the complaint a detailed specification and factual description of each act and omission alleged by plaintiff to render the healthcare provider liable to the plaintiff, and must include when feasible and ascertainable the date, time, and place of the act or acts. *See Long v. Wade*, 980 So. 2d 378, 386 (Ala. 2007), quoting Code of Ala. § 6-5-551:

> In any action for injury, damages, or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, whether resulting from acts or omissions in providing health care, or the hiring, training, supervision, retention, or termination of care givers, the Alabama Medical Liability Act shall govern the parameters of discovery and all aspects of the action. The plaintiff shall include in the complaint filed in the action a detailed specification and factual description of each act and omission alleged by plaintiff to render the health care provider liable to plaintiff and shall include when feasible and ascertainable the date, time, and place of the act or acts. The plaintiff shall amend his complaint timely upon ascertainment of new or different acts or omissions upon which his claim is based; provided, however, that any such amendment must be made at least 90 days before trial. Any complaint which fails to include such detailed specification and factual description of each act and omission shall be subject to dismissal for failure to state a claim upon which relief may be granted. Any party shall be prohibited from conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission.

The detailed specificity and factual description requirement applies to an any action for injury, damages, or wrongful death, whether in contract or in tort, against a healthcare provider for breach of the standard of care, whether resulting from acts or omissions in providing health care, or the hiring, training, supervision, retention, or termination of care givers. Any complaint which fails to include such detailed specification and factual description of each act and omission shall be subject to dismissal for failure to state a claim upon which relief may be granted. *Id*. Because the pleading requirements of § 6-5-551 are similar to

the requirement of pleading fraud with specificity under Rule 9(b), ARCP, the comments and the case law applicable to Rule 9 are an aid in determining whether a pleading sufficiently complies with the requirements of § 6-5-551. *Mikkelsen v. Salama*, 619 So. 2d 1382 (Ala. 1993).

Ala. R. Civ. P. Rule 9(b) provides that when fraud is alleged the circumstances constituting the fraud shall be stated with particularity. This does not require every element to be stated with particularity, but the pleader must use more than generalized or conclusory statements setting out the fraud. *Crum v. Johns Manville, Inc*., 19 So. 3d 208, 218 (Ala. App. 2009). Likewise, Plaintiff in this instance is required to use more than generalized, and non-specific statements as a basis for his claims. The Complaint should include a statement of how Plaintiff contends the health care provider fell below the standard of care. *See Murray v. Prison Health Servs*., 112 So. 3d 1103, 1106–07 (Ala. App. 2012) ("When a plaintiff files a complaint alleging that a health care provider breached the standard of care owed to the plaintiff, although every element of the cause of action need not be stated with particularity, the plaintiff must give the Defendant health care provider fair notice of the allegedly negligent act and must identify the time and place it occurred [to the extent possible] and the resulting harm.").

Here, Plaintiff's Complaint is devoid of any statements identifying what acts or omissions allegedly fell below the standard of care or give rise to his claims let alone identify the facts or details that contextualize such acts. In fact, Plaintiff conclusorily states "Defendants manufactured, distributed, and gave to the Mother" a pill that wrongfully caused Baby Roe's death" on February 10, 2017. (Compl. ¶¶ 13,19–20). Without more, Defendants are left to speculation and conjecture to identify what acts or omissions were wrongful in this case; a burden which is legally placed on the Plaintiff.

Moreover, Plaintiff is without the ability to remedy these deficiencies because it is neither his medical history nor that of the embryo at issue here. Indeed, it is his ex-girlfriend's medical history that is relevant to the analysis before the Court, confidential information foreclosed to Plaintiff without specific authorization of his ex-girlfriend under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). HIPAA relates, in relevant part, to the privacy of individually identifiable health information and the necessary recommendations and regulations to effectuate that goal. 1996 Enacted H.R. 3103, 104 Enacted H.R. 3103, 110 Stat. 1936 ¶ 264 (a–b). In effect, Plaintiff is attempting to force Defendants to disclose protected health

information about a non-party to substantiate his claims. This he cannot do. In fact, assuming *arguendo* his ex-girlfriend obtained an abortion at the Alabama Women's Clinic, even if he had pled the claim with something approaching the legally required specificity, Defendants cannot appropriately respond or defend themselves except by disclosing the patient's confidential medical history to Plaintiff and this Court. Absent her consent it is unlawful for Defendants to do so and Plaintiff can identify no provision of law that says otherwise. Furthermore, Alabama recognizes causes of action for breach of fiduciary duty and breach of implied contract resulting from a physician's unauthorized disclosure of information acquired during the physician-patient relationship. *See Horne v. Patton*, 287 So.2d 824, 829-30 (Ala. 1973) (reasoning that patients should be entitled to freely disclose symptoms and conditions to their doctor in order to receive proper treatment without fear that those facts may become public knowledge); *see also* Ala. Bd. of Med. Examiners Admin. Code 540-X-9-.07 (giving the state licensing board the power and duty of suspending or revoking a doctor's license who willfully betrays a professional secret).

Defendants are unable to meaningfully defend itself against Plaintiff's claims and the Court is precluded from determining whether Plaintiff's claims are even timely due to threadbare allegations included in the complaint. Per Code of Ala. § 6-5-482, all actions against "healthcare providers for liability….whether based on contract or tort, must be commenced within two years next after the act, or omission, or failure giving rise to the claim**."** Critical to the Court's inquiry into the timeliness of Plaintiff's claim is the date of the alleged injury and the commencement of Plaintiff's lawsuit. Here, Plaintiff has alleged that the procedure took place on February 10, 2017. However, based on the information provided in the Complaint, Defendants are unable to confirm whether the ex-girlfriend was ever even a patient at Alabama Women's Center. It does not have any records related to this alleged appointment on February 10, 2017 that match the description provided in the Complaint.

The statute of limitations is an affirmative defense and must be so pleaded, yet Defendants are unable to do so based on the information provided to it in Plaintiff's complaint. Ala. R. Civ. P. 8(c). A party can obtain a dismissal under Rule 12(b)(6), Ala. R. Civ. P., on the basis of an affirmative defense only when "'the affirmative defense appears clearly on the face of the pleading.'" *Jones v. Alfa Mut. Ins. Co*., 875 So. 2d 1189, 1193 (Ala. 2003). Yet, as written, little to no information is made apparent from the face of Plaintiff's pleading other than the identity of Plaintiff and ambiguous allegations that his ex-girlfriend

underwent a legal abortion to which Plaintiff did not consent. As such, Defendants are prejudiced by Plaintiff's conclusory and non-specific allegations.[9]

As written, Plaintiff's Complaint cannot meet its pleading burden under the AMLA and is thus subject to dismissal for failure to state a claim for which relief can be granted. Furthermore, amendment of Plaintiff's Complaint would be futile here because the information necessary to bring a medical malpractice action against Defendants is in the possession of a third party, which has not consented to disclosure of that information making it impossible to verify Plaintiff's factual contentions.

C. Plaintiff Does Not Have Standing to Bring a Wrongful Death Claim.

In addition to asserting a wrongful death claim on behalf of "Baby Roe," Plaintiff purports to assert such a claim "in his individual capacity." (Compl. 1.) He lacks standing to do so.

Pursuant to Code of Ala. § 6-5-410 (a), only a *personal representative*

> may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama where provided for in subsection (e), and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or her or their servants or agents, whereby the death of the testator or intestate was caused, provided the testator or intestate could have commenced an action for the wrongful act, omission, or negligence if it had not caused death.

"Personal representative," when used in this section, means the executor or administrator of the testator or intestate. *Hatas v. Partin*, 278 Ala. 65, 175 So. 2d 759 (Ala. 1965); *Smith v. Tribble*, 485 So. 2d 1083 (Ala. 1986). As such, under § 6-5-410, wrongful death as the alleged cause of action is not vested in Plaintiff in his individual capacity or on behalf of the embryo. On the foregoing basis, Plaintiff's claim in his individual capacity for wrongful death should be dismissed.

II. PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM BECAUSE BINDING U.S. SUPREME COURT PRECEDENT PRECLUDES ANY CLAIM AGAINST A HEALTHCARE PROVIDER FOR PERFORMING A LEGAL ABORTION

Finally—and indeed most fundamentally—the U.S. Constitution forecloses Plaintiff's claim. The essence of Plaintiff's claim is that a physician who provides a lawful abortion in accordance with the intent of a pregnant woman is liable to the putative biological father for the wrongful death of the embryo or fetus. Any such claim is barred by decades of binding U.S.

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[9] Defendants reserve the right to move for dismissal of the Complaint on statute of limitations grounds.

Supreme Court precedent protecting the constitutional right of a woman to obtain an abortion and holding that the decision whether to obtain an abortion belongs to the woman alone—even where her spouse, partner, or ex-partner as the case may be, disagrees with that decision. *See, e.g.*, *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 887-899 (1992); *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-71 (1976). This court is, of course, bound to apply this precedent. *See, e.g.*, *Weems v. Jefferson-Pilot Life Ins. Co*., 663 So. 2d 905, 913 (Ala. 1995) ("This Court . . . is bound by the decisions of the United States Supreme Court.") (internal quotation and citation omitted). It is the pregnant woman's right to make a voluntary and informed decision to undergo an abortion, and the putative father "*has no enforceable right* to [that she] . . . advise him before she exercises her personal choices," much less to sue for wrongful death over the healthcare she voluntarily sought and Defendants allegedly provided. *Casey*, 505 U.S. at 898 (emphasis added). Because decades of undisturbed federal precedent bars Plaintiffs' claim, it must be dismissed.

The Supreme Court's abortion jurisprudence rests on the fundamental right of every woman to determine the course of her pregnancy before viability, "because . . . [her] liberty . . . is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Casey*, 505 U.S. at 852. Recognizing "the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty," *Id.* at 869, the Supreme Court has consistently recognized that even where a woman and her partner disagree about the abortion decision "[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor," *Danforth*, 428 U.S. at 71. Plaintiff's wrongful death claim is flatly barred by this binding constitutional precedent.

For example, in *Planned Parenthood Cent. Missouri v. Danforth*, the U.S. Supreme Court held unconstitutional a Missouri law that made it a crime for a physician to perform an abortion without first obtaining written consent from a woman's husband. *Id.* at 67–71. While "not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying," the Court held it could not uphold any law that "afford[s] the husband the right unilaterally to prevent or veto an abortion." *Id.* at 70.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 887-899 (1992), the Supreme Court similarly struck a provision of a Pennsylvania statute that, *inter alia*, provided that physicians who performed abortions without obtaining a signed statement from a woman that she had notified her spouse of the abortion would be subject to automatic revocation of their medical license and liable to the spouse for damages. Finding this notification requirement no less unconstitutional than *Danforth*'s consent requirement, the Court unambiguously held that the interest of the man that fathered a fetus in the potential life of that fetus gives way to the pregnant woman's right to decide *for herself* whether to terminate the pregnancy.[10]

Lower courts have unanimously recognized that allowing a claim by a putative biological father of an embryo or fetus against a physician for performing an abortion to which he did not consent would violate this binding precedent. For example, citing *Casey*, the Middle District of Alabama recognized that provisions granting "father" of the fetus a cause of action in tort against physicians for performing an abortion were "tantamount to statutory requirements that women seek the consent of their parents or spouses before obtaining abortions" because "although they do not expressly require that the woman or her physician obtain the consent of the husband or parents, only by seeking such consent may the physician evade liability under the statute.", *Summit Med. Assocs., P.C. v. James*, 984 F. Supp. 1404, 1447 (M.D. Ala. 1998), *aff'd in part, rev'd in part sub nom. Summit Med. Assocs*., *P.C. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999) (holding Eleventh Amendment precluded challenge to civil liability provision in federal court due to sovereign immunity because there was no proper state Defendant); *see also Planned Parenthood of Southern Arizona, Inc. v. Woods*, 982 F. Supp. 1369, 1380 (D. Arizona 1997) (enjoining civil liability provision of abortion statute that "expose[d] physicians to the risk of civil lawsuits if they fail[ed] to obtain consent from the spouse of a woman"

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[10] While this federal precedent is binding regardless of state law, it is worth noting that Alabama law recognizes that the abortion decision is the woman's and the woman's alone. *See* Code of Ala. § 26-23A-5 ("[I]tis unlawful for any individual to coerce a woman to undergo an abortion[.]"). Indeed, *Roe v. Wade* and its progeny "has been sensibly relied upon to counter any . . . suggestions" that "the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it." *Casey*, 505 U.S. at 859; *see also McKenzie v. Thomas*, 678 So.2d 42, 47 (La. Ct. App. 1996) ("As has been clearly announced in later decisions by the Supreme Court, the father or spouse does not possess the authority to prevent or require the mother to terminate her pregnancy.").

seeking an abortion). Similarly, the Seventh Circuit dismissed a damages action by putative biological father of fetus against hospital for performing abortion because the Supreme Court "establish[ed] the constitutional right of a woman to have an abortion without having to notify the father." *Coe v. County of Cook*, 162 F.3d 491, 494 (7th Cir. 1998).[11]

Plaintiff's attempt to impose liability on physicians for performing a legal abortion sought by Plaintiff's ex-girlfriend, solely because Plaintiff did not consent to the abortion, is foreclosed by this settled precedent. Indeed, allowing this claim to proceed would make it impossible for any physician to perform a lawful abortion sought by the pregnant woman[12] absent the express consent of the putative biological father. Such a result is expressly barred by the foregoing Supreme Court precedent.

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[11] Numerous other courts have confirmed that the putative biological father of an embryo or fetus has no legal right to consent to a woman's abortion. *See Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd* 526 N.E.2d 958 (Ind. 1988) (relying on *Roe* and *Danforth* and refusing husband's request for an injunction to prevent wife from obtaining an abortion); *Doe v. Smith*, 486 US 1308 (1988) (Stevens, Circuit Justice) (denying application for injunction by father seeking to enjoin pregnant woman from securing an abortion); *Doe v. Smith*, 527 N.E.2d 177, 178 (Ind. 1988) (denying request by father of fetus for injunction prohibiting woman from obtaining abortion); *Steinhoff v. Steinhoff*, 140 Misc. 2d 397, 398; 531 N.Y.S.2d 78 (N.Y. Sup. Ct. 1988) (same); *Rothenberger v. Doe*, 149 N.J. Super. 478, 481; 374 A.2d 57 (1977) (refusing to issue temporary restraining order requested by father of fetus preventing woman from obtaining an abortion because "any compulsion by state court to require consent of a natural father would constitute unauthorized and unconstitutional state interference"); *Doe v. Doe*, 365 Mass. 556, 560; 314 N.E.2d 128 (1974) (denying injunctive relief requested by husband to enjoin wife from obtaining abortion because he cannot obtain "government assistance to enable him to overturn the private decisions of his fellow citizens"); *Jones v. Smith*, 278 So.2d 339, 344 n.6 (Fla. Dist. Ct. App. 1973) (refusing to grant injunction sought by putative father to prevent girlfriend from obtaining abortion because to do so "would be tantamount to the type of state interference or infringement proscribed by *Roe v. Wade*"). *Cf. Kessel v. Leavitt*, 204 W. Va. 95, 131 n.35; 511 S.E.2d 720 (1998) ("We emphasize that an unwed biological father's right to establish and maintain a parental relationship with his child does not foreclose an unwed biological mother's right to terminate her pregnancy.").

[12] In fact, by effectively imposing strict liability on abortion providers for performing an otherwise lawful abortion, it is likely that allowing a suit like this to continue would eliminate legal abortion in Alabama altogether. *Cf. Planned Parenthood v. Miller*, 63 F.3d 1452 (8th Cir. 1995) (holding unconstitutional strict liability civil penalty provisions of abortion statute because it would "have a profound chilling effect on the willingness of physicians to perform abortions"), *cert. denied sub nom. Janklow v. Miller*, 517 U.S. 1174 (1996); *Women's Med. Prof. Corp. v. Voinovich*, 130 F.3d 187, 205 (6th Cir. 1997), *cert denied*, 118 S. Ct. 1347 (1998); *Evans v. Kelley*, 977 F. Supp. 1283, 1305-06, 1308-09, 1311 n.29 & 1319 n.38 (E.D. Mich. 1997) (striking as unconstitutional abortion statute "lack[ing] mens rea or specific intent requirement" in part due to its potential "chilling effect on the willingness of physicians to perform abortions").

III. PLAINTIFF'S DERIVATIVE CLAIMS FAIL BECAUSE HIS DIRECT TORT CLAIMS ARE SUBJECT TO DISMISSAL

Plaintiff's remaining claims for: Agency Defendants (Count II), Combined and Concurring Wrongful Acts (Count III), and Fictitious Defendants (Count IV) necessarily depend on Plaintiff's underlying tort claim for wrongful death. Because Plaintiff's wrongful death claim fails to state a claim for which relief can be granted under Alabama Law and is preempted by binding United States Supreme Court precedent on abortion, the remaining derivative claims also fail for the same reasons. *Ex parte Sanderson*, --- So. 3d ---, 2018 Ala. LEXIS 11, at * 5–6, 2018 WL 797623, Case Nos. 1160824, 1160832, (S. Ct. Ala. Feb. 9, 2018) (holding plaintiff's derivative claims subject to dismissal on same grounds as his direct claims).

CONCLUSION

Defendants respectfully request that this Court grant their Motion to Dismiss, dismissing the instant action ***with prejudice*** and all derivative claims alleged thereto, on the following bases: (1) Under Alabama law, a legal abortion is not wrongful; (2) Plaintiff failed to plead the Complaint with the specificity required by the AMLA; and (3) binding U.S. Supreme Court precedent precludes any claim against a healthcare provider for performing a legal abortion on the basis that an ex-boyfriend did not consent to the abortion.

Respectfully submitted, this 1st day of April 2019.

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CERTIFICATE OF SERVICE

This document has been filed electronically and served on opposing counsel pursuant to the Administrative Procedure for Filing Signing and Verifying Documents by Electronic Means in the Alabama Judicial System. Any opposing counsel or pro se parties not registered to file electronically were served with this pleading via the U.S. mail, postage pre-paid, to the litigant's address of record in the Circuit Clerk's office.

Dated this 1st day of April, 2019.

/s/ Brian M. White
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