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Alabama Supreme Court Rules Negligent Destruction of IVF Embryos May Be Treated as Wrongful Death

On Feb. 16, the Alabama Supreme Court issued its decision in *LePage v. The Center for Reproductive Medicine*, in which three families sued a fertility provider for the accidental destruction of their embryos. The case is remarkable because, beyond typical claims of negligence, the families included claims for the wrongful death of the embryos, which would necessitate the court determining, for the first time, that the embryos (or "extrauterine children" in the court's description) were children under the state's Wrongful Death of a Minor Act (the "Act"). The court, relying on statutory interpretation, Alabama public policy (as expressed in amendments to the Alabama Constitution adopted by voters), and invocations of scripture and Christian theologians, found that the embryos were children and thus their destruction could be treated as a wrongful death under the Act.

The case stemmed from a 2020 incident where a hospital patient gained unauthorized access to the clinic's cryogenic nursery. When the patient attempted to remove several embryos, the subzero temperatures caused the patient to drop the embryos, destroying them. Three couples whose embryos were destroyed brought lawsuits against the fertility clinic for wrongful death of a minor. A trial court dismissed the claims, holding that cryopreserved embryos did not fall within the statutory definition of a "minor child" in the Act, originally passed in 1872. The Alabama Supreme Court disagreed and reversed, with one Justice dissenting. In multiple opinions the Justices expressed their conclusions that the Act applied to all born and unborn children and that no exception existed for extrauterine embryos who, by definition, were not currently *in utero*. While the majority opinion focused largely on the statutory text of the Act, other opinions highlighted the importance of Alabama's Constitution in arriving at their

conclusions. In 2018 Alabama voters passed an amendment to the state's constitution that stated, "This state acknowledges, declares, and affirms 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." The concurring Justices also made appeals to the Old Testament/Hebrew Bible and Christian theologians to bolster their conclusions regarding the understanding of Alabama citizens in adopting this constitutional amendment. The sole dissenting Justice, although agreeing with much of the court's reasoning that the embryos were "lives" deserving of protection, opined, in a form of originalist argument, that the court had overstepped its authority in holding that the Act, written in 1872 (when in vitro fertilization (IVF) and extrauterine embryos did not yet exist) was meant to apply to the embryos in question. The dissenting Justice also expressed concern that no other state had interpreted its wrongful death statute to encompass frozen embryos and lamented that "[t]here is no doubt that there are many Alabama citizens praying to be parents who will no longer have that opportunity."

The court's decision potentially throws the fertility industry into chaos, and may also upend the plans of fertility patients in Alabama and those who may have traveled there for care. For example, if unused embryos cannot be routinely discarded, patients may require more frequent retrievals of smaller numbers of eggs. Providers may have to adjust their treatment protocols and devote additional resources to preventing ordinary business risks, such as equipment or power failures. And if the accidental loss of an embryo is treated as a wrongful death rather than a loss of property, insurance and liability costs may increase. Patients may face additional costs not only for additional cycles and retrievals (which are already cost-prohibitive for many and often not covered by insurance), but also for the storage of frozen embryos, potentially in perpetuity. For those health insurers who cover fertility treatment, the additional cycles required by this decision will increase reimbursements, and as a result, the cost of premiums. Anticipating such outcomes, three fertility providers in Alabama have already paused IVF operations, including the University of Alabama at Birmingham, one of the state's largest public institutions. A bipartisan effort is underway in the Alabama Legislature to draft clarifying legislation that would protect IVF treatments following the court's ruling. In addition, there have been renewed calls to pass the federal Access to Family Building Act, which would protect the right to access IVF and other assistive reproductive technology services. Individual states have sought to increase public and private health insurance access to assisted reproductive technology (ART), such as pending California Senate Bill 729, which would require large-group health insurance plans to cover a broad range of fertility treatments. In addition, the federal Office of Personnel Management expanded access to ART for federal employees in 2023.

The *LePage* decision represents the latest controversy related to women's and reproductive health since U.S. Supreme Court decisions have reopened the field to significant state regulation. These issues often draw national media attention, but can pose risks to businesses, benefit plans and health care providers as well. Those seeking to understand the potential risks *LePage* may pose to their businesses and to explore strategies related to their operations and benefits should consult with experienced legal counsel.

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