IN THE SUPREME COURT OF ALABAMA

CHRISTIANE ZIADE and ROBERT ZIADE, Individually, and as Parents of CHRIS ZIADE, a deceased minor,	)	
***Appellants*,**	)	
v.	)	**Case No. 1050378**
HENRY J. KOCH, M.D.; ROBERT A. WOOD, M.D.; MOBILE OBSTETRICS & GYNECOLOGY, P.C.; and PROVIDENCE HOSPITAL,	)	
Appellees	)	

On Appeal from the Circuit Court of Mobile County, Case No. CV-02-00307

BRIEF OF APPELLANTS

Oral Argument Requested

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs request oral argument because this case involves important procedural and substantive questions under Alabama law concerning the waiver of the statute of limitations defense and when the statute of limitations begins to run in a case involving the death of a fetus *in utero*.

STATEMENT REGARDING JURISDICTION

The amount of damages sought in this matter is greater than $50,000.00, which is in excess of the exclusive jurisdictional limits imposed upon the Court of Civil Appeals. Code of Alabama (1975), § 12-3-10. Therefore, this Appeal is brought before this Honorable Court pursuant to § 12-2-7, Code of Alabama, 1975 and Constitution of Alabama of 1901, Amend. No. 328, 6.02.

Plaintiffs appeal a final judgment entered by the trial court on November 4, 2005. (C. IV, 678). Plaintiffs timely filed a Notice of Appeal on December 15, 2005. The trial court's November 4th judgment in favor of the two individual physician defendants (OB-GYN's Koch and Wood) inadvertently omitted the professional corporation (Mobile Obstetrics & Gynecology, P.C.) from the court's order. Subsequently, on December 20, 2005 the trial court entered a "Revised Order Granting Summary Judgment As To All Defendants" making it clear that all defendants were encompassed in the November 4, 2005 order stating:

> . . . said summary judgment on behalf of all defendants shall relate back and be of full force and effect as if entered as such November 4, 2005. The plaintiffs' right of appeal from this summary judgment as to all defendants, shall be preserved and protected by their Notice of Appeal, filed of record in this matter on December 15, 2005.

On January 24, 2006 this Court entered an Order directing the trial court to clarify whether the summary judgment applied to all defendants. On February 7, 2006 Judge Wood entered an order granting summary judgment as to Mobile Obstetrics & Gynecology, P.C. and made the previous November 4, 2005 order "final and appealable." Judge Wood directed that the February 7, 2006, order be forwarded by the Circuit Court clerk to this Court via a supplemental record.

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Statement of the Case

A. Nature of the Case

This medical malpractice/wrongful death action involves the application of a statute of limitations defense in the case of the death of a viable (35 week) fetus who was stillborn. An autopsy performed on September 15, 2005 at Providence Hospital in Mobile after the stillbirth recorded the date of death as September 14, 2000 (the date of the stillbirth). The Ziades filed suit on September 11, 2002--*less* than two years from the date of death shown on the autopsy report.

The trial court granted summary judgment in favor of the Defendants on the basis of the two-year statute of limitations applicable to wrongful death actions on the ground that the death of the fetus *in utero* (based upon the testimony of retained "Rule 26" experts) was at some date (not specified or known) earlier than September 11, 2000.

This appeal presents a legal question of when does the statute of limitations begin to run in the case of a stillborn fetus? The Plaintiffs submit that in the case of a "fetal death" "the death" for limitations purpose is the date of the stillbirth or date of death determined

at autopsy by a licensed Alabama physician pursuant to ALA. CODE § 22-31-1 and § 22-19-41(2). That date in this case is September 14, 2000.

The trial court permitted the Defendants to amend their Answer to add the affirmative defense of limitations just 10 days before the trial date and *after* all expert disclosure and other deadlines had passed. Appellants objected to this amendment as an abuse of discretion and have preserved this procedural issue for appeal.

B. Course of Proceedings

Plaintiffs filed this suit on September 11, 2002. The date of stillbirth and the date of death listed on the autopsy report was September 14, 2000. Defendants were served with process and after a motion to dismiss was denied, filed their Answer on October 23, 2002. The Defendants' Answer failed to assert an affirmative defense of limitations as to the wrongful death claim.

Discovery proceeded, the parties and experts were deposed, and on September 6, 2005 the Court set the case for trial beginning on November 14, 2005. An Agreed Scheduling Order was entered that foreclosed any further identification of experts after October 3, 2005. When that

date arrived and the time expired for further experts, Defendants filed a motion for summary judgment contending that the statute of limitations had expired because expert testimony had been adduced from Plaintiffs' expert pathologist, Dr. David Schwartz (and two OB-GYN expert M.D.s of the Plaintiffs who deferred to Dr. Schwartz) that the "objective findings" from the placental pathology "indicated", and were "consistent with" "fetal demise of a minimum of seven days prior to delivery".

The trial court heard Defendants' motion for summary judgment on November 4, 2005. The court granted leave for the Defendants to amend their answer (over the Plaintiffs' objections) and granted summary judgment on the basis that the date of death of the fetus *in utero*, according to the medical expert opinion testimony, had occurred more than two years prior to the filing of suit on September 11, 2002. The trial court entered summary judgment in favor of the two physician defendants, Drs. Koch and Wood. (C. IV, 678-679). The Court inadvertently omitted the doctors' professional corporation from the summary judgment order. However the court corrected this omission in a subsequent order entered December 20, 2005, which made clear that all

defendants were dismissed and that the Plaintiffs' original notice of appeal protected this appeal. (C. IV, 679).

On January 24, 2006 this Court entered an Order directing the trial court to clarify whether the summary judgment applied to all defendants. On February 7, 2006 Judge Wood entered an order granting summary judgment as to Mobile Obstetrics & Gynecology, P.C. and made the previous November 4, 2005 order "final and appealable." Judge Wood directed that the February 7, 2006 order be forwarded by the Circuit Court clerk to this Court via a supplemental record.

Statement of the Issues

1. Whether the trial court erred, and abused its discretion, by permitting the Defendants to amend their Answer to assert a statute of limitations defense after all discovery and expert deadlines had passed and within ten days of trial.

2. Whether the trial court erred as a matter of law in granting summary judgment based upon the expiration of limitations by ruling that the date of death, in the case of the death of a fetus *in utero* (stillbirth) is governed by expert testimony as to the approximate date of death *in utero* as opposed to the discrete date of stillbirth (the date of death shown on the autopsy report).

Statement of Facts

On September 14, 2000 Mrs. Ziade delivered a stillborn child of thirty-five weeks gestational age at Providence Hospital. (C. I, 7). In the case of a stillborn child, no death certificate is prepared or recorded. Instead, the hospital or physician prepares a "Report of Fetal Death." (C. III, 460). This is recorded with State Department of Vital Statistics. This form does not ask for or set forth a date of death and asks only if the fetus died: "before delivery, during delivery or unknown." (C. III, 460). The Report of Fetal Death form in this case was filled out (typed in) that the Ziades' fetus died "Before Delivery."

An autopsy was performed on September 15, 2000 at Providence Hospital by the hospital pathologist, Dr. M. Margaret O'Brien. (C. III, 463). She recorded the date of death as "9/14/00" and the time of death as "0612" (the time of delivery). (C. III, 463). Her report concluded that "The infant of Christiane Ziade was a normally developed male who experienced intrauterine death at approximately 35 weeks' gestational age." (C. III, 466).

Plaintiffs filed suit on September 11, 2002 – three days *before* the date of stillbirth and the date of death

listed on the autopsy report. (C. I, 1; III, 463). Defendants were served with process and after a motion to dismiss was denied, filed their Answer on October 23, 208.2. (C. III, 463). The Defendants' Answer failed to plead the affirmative defense of limitations as to the wrongful death claim. (C. III, 463).

Discovery proceeded, the parties and experts were deposed, and the case was set for trial on November 14, 2005. An Agreed Scheduling Order was entered on September 19, 2005 that foreclosed any further identification of experts after October 3, 2005. (C. III, 442). When this date arrived and the time expired for further experts, Defendants filed a motion for summary judgment on October 4, 2005 contending that the statute of limitations had expired because expert testimony had been adduced from Plaintiffs' expert pathologist, Dr. David Schwartz (and two OB-GYN M.D.s who deferred to Dr. Schwartz) that the "objective findings" from the placental pathology "indicated", were "consistent with" "fetal demise of a minimum of seven days prior to delivery". (C. II, 210).

At his deposition Dr. Schwartz explained his opinion was an "approximation", a "median" or "mean" date that was "consistent with" or would "suggest" fetal demise "approximately" before September 7, 2000:

> Q. Those objective findings [changes in the chorionic villi], in your opinion, are **consistent with** a fetal demise of a minimum of seven days prior to delivery?
>
> A. Yes, sir.
>
> Q. Is that your opinion in this case?
>
> A. It is, sir.
>
> Q. Do you feel that is reliable information to base that opinion on?
>
> A. It's my—it's my best judgment with a reasonable degree of medical probability. Obviously, these things don't come with, you know, hour and minute hands. There has to be reasonability in interpreting all pathology, but especially when we are looking at types of changes for fetal demise. And so if someone came to me and said they felt it was five or six days, I wouldn't argue with them. If someone were to come in and say eight days, I wouldn't argue with them.
>
> But based on my training, my knowledge and experience, I feel it's **approximately** seven days.
>
> . . .
>
> Q. You say fetal demise of a minimum of seven days prior to delivery. So you would say at least seven days and perhaps more? Is that what we're looking at here?
>
> A. A minimum of seven days, yes sir. And like I said, there's going to be some variability when we

look at fetal demise. Any of us in our specialty will tell you that. We obviously have to have a starting point. We have to have a **median** to our range, and **mine would be seven days**. Could it have been eight days? Yes, sir.

. . .

Q. . . . So just so I can get the dates to match up with your opinions, you would say fetal demise—the evidence to a reasonable degree of medical certainty would **suggest** fetal demise on or before the 7th of September?

A. **Approximately** the 7th of September. Could have been—also could have been sooner. But you know I'm talking about **a mean** or a modal.

Deposition of David Schwartz, M.D., pp. 43-46 (emphasis supplied). (C. II, 311-311A).

The Plaintiffs opposed the Defendants' motion for summary judgment on two grounds: (1) the Defendants' Answer did not plead limitations as to the wrongful death claim and thus there was a waiver of this defense; (2) as a matter of law the date of death in the case of a stillborn fetus is the date of stillbirth or date shown on the autopsy report. The Defendants then moved for leave to amend their Answer (C. IV, 644). Plaintiffs opposed the amendment. (C. IV, 513). The Court granted leave to amend and granted the summary judgment on November 4, 2005.

STATEMENT OF STANDARD OF REVIEW

The trial court's decision to permit the Defendants to amend their answer within ten days of trial is reviewed under an abuse of discretion standard. *Stead v. Bluecross-Blueshield of Alabama*, 294 Ala. 3, 6, 310 So. 2d 469, 471 (1975).

The trial court's granting of summary judgment on the legal ground that the date of death in the case of the death of a fetus *in utero* is the approximate date established by expert testimony, as opposed to the discrete date of death established by the autopsy or stillbirth is governed by *de novo* review and the Court must accept the tendencies of the evidence most favorable to the nonmoving party and must resolve all reasonable factual doubts in favor of the nonmoving party. *Blackwood v. City of Hanceville*, 2006 WL 254071 (Ala., February 3, 2006).

SUMMARY OF THE ARGUMENT

The Circuit Court abused its discretion in permitting the Defendants to amend their Answer ten days prior to trial to assert the statute of limitations as a defense to the wrongful death claim because the defense had been waived and the amendment was untimely, unfairly prejudicial and futile given that the substantive and controlling law is that the date of death in the case of fetal death is the date of stillbirth.

The Circuit Court erred as a matter of law in granting summary judgment on limitations ground on the basis that an *approximate* date of death based on "more likely than not" *opinion* testimony of experts as to the probable date of death of a fetus *in utero* was somehow controlling (over) the date of death established by a lawful autopsy (and the date of stillbirth).

ARGUMENT

I. Defendants Waived a Limitations Defense as a Matter of Law as to the Claim for Wrongful Death and the Trial Court Abused its Discretion in Granting Leave to Amend

The Ziades and their attorneys reasonably relied on the date of death *determined* by a licensed Alabama physician at autopsy – September 14, 2000 – in regulating their conduct and filing suit on September 11, 2000 – three days before the "date of death" as found by the Alabama licensed medical doctor who prepared and signed the autopsy report. More than five years later, after all discovery and expert opinion had been foreclosed, the Defendants filed a summary judgment/statute of limitations motion premised on the *opinions* of experts who quite candidly qualified their opinions as approximations and medians that were "consistent with" or "suggested" that the death of the fetus *in utero* may have occurred as many as seven days earlier (than September 14, 2000).

The Circuit Court erred in reaching the merits of when does "the death" occur for limitations in the case of a stillborn because the Defendants waived any limitations defense as to the wrongful death claim. Plaintiffs ask this Court to rule that the limitations defense should not have

been permitted by the trial court under the facts presented.

Alabama law is clear that if a party fails to plead an affirmative defense, that defense is deemed to have been waived. *Robinson v. Morse*, 352 So.2d 1355, 1356 (Ala.1977) (citing 5 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1278, pp. 339-52); *see also* Rule 8(c), Ala. R. Civ. P. In this case the Answer of Defendants expressly limited the limitations defense to only claims barred by the Medical Liability Act. The Sixth Defense states:

> To the extent that the plaintiff asserts a claim as to any matters that are barred by the applicable statute of limitations set forth in § 6-5-482, Code of Alabama (1975), these defendants plead the statute of limitations as an affirmative defense.

The wrongful death claim however, is *not* barred by the statute of limitations for Medical Liability Actions, ALA. CODE § 6-5-482. In *McMickens v. Waldrop*, 406 So. 2d 867 (Ala. 1981) this Court ruled that the wrongful death statute of limitations, rather than medical malpractice statute of limitations, is applicable to an action for wrongful death allegedly arising out of act of medical malpractice. A waiver unquestionably occurred in this case. In *McMahan v. Old Southern Life Ins. Co.*, 512 So. 2d 94, 96

(1987) the defendant pleaded that the affirmative defense of the statute of limitations for tort claims, but failed to plead an affirmative defense as to the contract claim. This Court had no trouble finding a waiver had occurred: "Old Southern pleaded the statute of limitations on the tort claims, but did not plead the statute of limitations on the contract claim. Old Southern has shown no reason that the general rule should not apply. Consequently, the defense is waived." *McMahan v. Old Southern Life Ins. Co.*, 512 So. 2d 94, 96 (1987).

The Defendants below sought to raise a statute of limitations defense as to the wrongful death claim three years after suit was filed and after the Plaintiffs were precluded from naming any additional experts under the Scheduling Order. (C. III, 442). The trial was set for November 14, 2005 and the granting of the amendment, ten days before trial, was patently unfair and fatally procedurally deficient.

Rule 8(a) of the Alabama Rules of Civil Procedure provides that the statute of limitations is an affirmative defense that must be affirmatively pleaded. In *Haynes v. Payne*, 523 So. 2d 333 (1987) this Court stated: "Where an

Answer has been filed and an affirmative defense has not been pleaded, the defense is generally deemed to have been waived." *Id.* at 334.

Under Rule 15 of the Alabama Rules of Civil Procedure, however, the Defendants had the right to seek leave of court to amend their Answer. As noted by this Court in *Stead v. Bluecross-Blueshield of Alabama*, 294 Ala. 3, 6, 310 So. 2d 469, 471 (1975)(emphasis supplied):

> If Rule 15 is to be of any benefit to the bench, bar and the public, the trial judges must be given discretion to allow or refuse amendments . . . We state also that Rule 15 must be liberally construed by the trial judges. **But, that liberality does not include a situation where the trial on the merits will be unduly delayed or the opposing party unduly prejudiced.**

As noted in *Haynes v. Payne*:

> The trial judge is vested with discretion to allow or deny amendments under Rule 15 and the trial judge's determination should be not reversed in the absence of an abuse of that discretion.

Haynes v. Payne, 523 So. 2d 333, 334 (Ala. 1987).

In this case, the Defendants sought to amend after all discovery had been concluded and after all expert opinions from the Plaintiffs' experts had been set in stone. (C. III, 442). The amendment resulted in substantial undue

prejudice because Plaintiffs could not amend their expert disclosures or seek other experts to explain the absolute uncertainty of a precise date of death in the case of death in *utero* (or testimony that the range of death in *utero* could have included September 11, 2000).

On September 6, 2005, the trial court sent notice of the trial setting in this case for November 14, 2005. Defense counsel then sought (and obtained agreement on) a new and supplemental scheduling order requiring the Plaintiffs to complete all expert disclosures and presentation of Plaintiffs' expert deposition testimony by September 26th. (C. III, 442). When this procedural "door" was closed and all expert testimony was "in the can" the Defendants promptly filed their Motion for Summary Judgment on October 4, 2005 based upon the statute of limitations and, specifically, testimony from Plaintiffs' expert, Dr. Schwartz, that placental changes indicated death was seven days prior to delivery. (C. IV, 678; II, 215).

Plaintiffs at that point had no expert testimony to present concerning the reasonable likelihood of fetal demise occurring on or after September 11, 2000, because all expert testimony was foreclosed, discovery was complete

and the trial was 10 days away. This prejudice is exactly the type of undue prejudice and procedural setting that caused this Court to affirm a trial judge's decision to refuse to allow an amended answer to assert a statute of limitations defense following the presentation of evidence at trial (including jury verdict and entry of judgment). *Haynes v. Payne*, supra.

Numerous Alabama cases have stated that it is unfairly and unduly prejudicial to allow an amendment of an answer to include an affirmative defense after the door has been closed upon proof. *See Robinson v. Morse*, 352 S.W.2d 1355 (Ala. 1977) and *Magic Tunnel Car Wash Equipment Co. Inc. v. Brush Cane Franchises, Inc.,* 53 Ala. App. 345, 300 So. 2d 116 (Ala. Civ. App. 1974).

Because the statute of limitations is an affirmative defense, the Defendants had the burden of proof and persuasion at trial. Thus, it was manifestly unfair for the Defendants to raise the affirmative defense of statute of limitations *after* all expert discovery had been concluded and within 10 days of trial. *See* Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 1270, citing *Lowery v.*

Texas A&M University Systems, 11 F.2d 895 (D.C. Texas 1998).

In this case there is also an issue of inordinate delay. The case had been on file for over three years with extensive discovery. The trial court abused its discretion by allowing leave to amend the answer to add a statute of limitations defense given such delay. *See Archie v. Grand Central Partnerships, Inc.*, 997 F.Supp. 504 (D.C. N.Y. 1998)(citing Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 1270).

The Defendants failed to set forth the statute of limitations defense in their Answer and that Answer was interposed *before* the filing of the Motion for Summary Judgment. Under these circumstances, the Defendants waived the statute of limitations defense as a ground for the motion. In *Witmarsh v. Durastone*, 142 F.Supp. 806 (D.C. R.I. 1954), the Court explained that where a defendant filed its Answer prior to filing a motion where the answer did not raise the defense of statute of limitations, the affirmative defense is deemed to have been waived. *Id.* at 810 (cited in Wright & Miller, 5 FEDERAL PRACTICE AND PROCEDURE CIV. 3d, § 1278). *See also Zimmer v. United Dominion*

Industries, Inc., 193 F.R.D. 616 (D.C. Ark. 2000)(defendant should not be able to prejudice plaintiff's claim by taking advantage of error it helped to create); *Swanson v. Van Otterloo*, 177 F.R.D. 645 (D.C. Iowa)(denying motion to amend and noting that delay in moving to amend can prejudice opposing party even when it had *de facto* notice of defense; it is not plaintiff's responsibility to clarify defendant's pleadings or act on assumption that defense will eventually be asserted properly).

The touchstone principle that called for denying the amendment and the summary judgment is undue prejudice. **Defendants were aware of the limitations issue well before they filed their motion for summary judgment given that *all* of the Defendants' retained experts opined on the specific (earlier) date of death in their written R. 26 disclosures.** (C. III, 521). Defendants boxed in the Plaintiffs and *then* filed a Motion for Summary Judgment based on limitations. When the Plaintiffs response noted that Defendants completely failed to plead the statute of limitations defense, the trial court should have denied the amendment given its timing and the clear procedural prejudice -- the

Plaintiffs having no expert proof at that point to refute the "earlier" date of death issue.

Plaintiffs also opposed the amendment on the grounds that the amendment would be futile. *See Miller v. Jackson Hospital and Clinic*, 776 So. 2d 1222, 1227 (Ala. 2000). Plaintiffs' brief below (and here) makes it clear there is *no* support or legal authority for the Defendants' novel position that the date of death for a fetus (child) who dies at some unknown point *in utero* is an approximate date to be determined by expert testimony. As a matter of Alabama law, the date of death is a specific date to be determined in accordance with the Alabama Uniform Determination of Death Act and Alabama's Uniform Anatomical Gift Act, the latter of which specifically defines a decedent as being a stillborn child or fetus.

The effort by Defendants to amend their Answer after the conclusion of all discovery and within days of trial when all expert opinions had been finalized and disclosed was unduly and unfairly prejudicial.

II. In the Case of a Fetal Death *in utero* the Phrase or Words "within two years from the death" in ALA. CODE § 6-28-38(a) Means the Date of Stillbirth or Date Set Forth on the Autopsy Report; Anything Else is Speculative and Approximate

As argued above, the facts, law and equity in this case warrant a finding that the limitations defense as to the wrongful death claim was waived. Should this Court find that the amendment was proper, this Court should not treat the date of death for the purposes of limitations as subject to *ex post facto* expert testimony given that, by any expert's admission, no expert can ever testify as to the date of fetal death *in utero* as to a discrete/particular day of "the death." This is inherently a matter of medians, ranges and approximation.

The law should not accept or rely upon expert testimony in an attempt to establish an approximate date of death for limitations based on the facts here – where death was not confirmed until delivery, an autopsy provided a date of death and the opinions now advanced, years later, are based on placental pathology findings that are merely "consistent with" or provide "an approximation" of a median death date.

Alabama law has not spoken directly to the issue of date of death in the case of a fetal death *in utero*.

However, well-reasoned out-of-state case-law and Alabama statutes strongly militate in favor of the date of "the death" to be established by the date of stillbirth or as set forth in the autopsy.

The two-year statute of limitations for wrongful death in the case of a death of a minor requires suit to be commenced "within two years from the death." ALA. CODE § 6-2-38(a).[1] Here "the death" occurred, *as a matter of law* on September 14, 2000 – the date a licensed Alabama physician (Providence Hospital pathologist M. Margaret O'Brien. M.D.) determined as the "date of death" pursuant to an autopsy performed on September 15, 2000. (C. III, 463). The examination of the fetus at autopsy by Dr. O'Brien established a "date of death" – September 14, 2000. Plaintiffs filed suit timely on September 11, 2000.

Under Alabama law a physician must make a "determination of death" under Alabama's "Determination of

[1] "(a) An action by a representative to recover damages for wrongful act, omission, or negligence causing the death of the decedent under Sections 6- 5-391 and 6-5-410 must be commenced within two years from the death."

Death" statute, ALA. CODE § 22-31-1.[2] The "determination of death" must be made by "a medical doctor licensed in Alabama" that, specifically: there is "(1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem." Further, under this statute, this "determination of death must be made in accordance with accepted medical standards." Here, the statutorily required determination of death was made by the hospital pathologist who signed an autopsy report that listed the date of death as September 14, 2000.

In the case of a fetal death, by law – ALA. CODE § 22-9A-1(2)[3] – **a fetal death cannot be determined until the**

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[2] " § 22-31-1. Determination of death.
An individual who, in the opinion of a medical doctor licensed in Alabama, has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards."

[3] "§ 22-9A-1. Definitions.
For the purposes of this chapter, the following words shall have the following meanings unless the context clearly indicates otherwise:
(1) DEAD BODY. A human body or parts of the human body from the condition of which it reasonably may be concluded that death occurred.
(2) FETAL DEATH. Death prior to the complete expulsion or extraction from the mother of a product of human conception, irrespective of the duration of pregnancy and which is not an induced termination of pregnancy. The death is indicated by the fact that after the expulsion or extraction the fetus does not breathe or show any other evidence of life, such as beating of the heart, pulsation of the umbilical cord,

umbilical cord is examined (no "pulsation of umbilical cord") and "after expulsion or extraction the fetus does not breathe or show any other evidence of life." *Id.* In other words, the law cautions that death will not be determined until a licensed physician carefully examines the fetus *after* the fetus is *born.* **Under the *Alabama Uniform Anatomical Gift Act* a "decedent" is defined to include a "stillborn infant or fetus." ALA. CODE § 22-19-41 (2).** This definition makes it clear that in order to be dead, to be "a decedent," there must be still*birth*.[4] Moreover, there must be *certification* of death (and time of death) for organ donation under the *Alabama Uniform Anatomical Gift Act* ALA. CODE. § 22-19-47(b).[5]

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or definite movement of voluntary muscles. Heartbeats are to be distinguished from transient cardiac contractions; respirations are to be distinguished from fleeting respiratory efforts or gasps."

[4] Section 22-19-41
Definitions.
For the purposes of this article, the following terms shall have the meanings respectively ascribed to them by this section:
(1) BANK or STORAGE FACILITY. A facility licensed, accredited or approved under the laws of any state for the storage of human bodies, or parts thereof.
(2) DECEDENT. A deceased individual and includes a stillborn infant or fetus.

[5] Section 22-19-47
Powers, duties and liabilities upon death. **(b) The time of death shall be determined by a physician who attends the donor at his death or, if none, the physician who certifies the death.** The physician shall not participate in the procedures for removing or transplanting a part.

The most that can be said is that the date of death of the fetus *in utero* in this (or any) case cannot be determined with any precision or certainty as to a date certain. The best that any expert can opine is that there are a *range* of potential (or probable) earlier or later death *dates*. The "Report of Fetal Death" form required by Alabama law (ALA. CODE § 22-9A-1) was filled out in this case to indicate only that the "fetus died" "Before Labor."

There is *no* precedent or legal authority in *any* state or jurisdiction that in the case of a stillbirth (or stillborn fetus) the date of death is anything other than the date of stillbirth. Many states simply refer to a stillborn or stillbirth as a "spontaneous fetal death" meaning the baby was dead *at birth*. *See e.g.* Arkansas, Delaware, Georgia, Louisiana, Maine, Missouri, New Mexico, North Carolina, Rhode Island, and Virginia. (C. III, 493-503, exhibit listing state statutes).

Under the "logic" of Defendants, supported by no authority or case-law, a fetus who has died *in utero* could somehow be declared dead and used for organ transplantation even though stillbirth had not occurred. This is directly contrary to the provisions of the *Alabama Uniform*

Anatomical Gift Act, ALA. CODE. §§ 22-19-41(2), 47(b) that defines a "decedent" as a "stillborn infant or fetus" and requires, prior to donation, certification and timing of death by a physician. These statutory provisions are definitive, clear and unambiguous. Any attempt to use a sliding scale death date, or range of death dates to provide an earlier "date of death" other than the date of the stillbirth or as attested at autopsy is fraught with speculation, differing medical opinions and removes from the law the necessary certainty and repose interests served by *a* date of death. And how unfair. An autopsy established the date of death on September 14, 2000 (the date of stillbirth) and then five years later expert opinions "come to light" that death may have occurred *in utero* some unknown number of days before September 11, 2000.

Although the fetus *in utero* in the Ziade's case *may* have been dead for a period of time prior to September 11, 2000, the date of death must be a discrete and knowable date, established by a determination of death made in accordance with ALA. CODE § 22-31-1 and § 22-19-41(2). ALA. CODE § 22-31-1 controls the running of the statute of

limitations in a wrongful death case. *Bassie v. Obstetrics & Gynecology Associates of Northwest Alabama, P.C.*, 828 So. 2d 289 (Ala. 2002).

In *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (Ala. 1974), this Court upheld the right of parents to maintain a wrongful death action for the wrongful death of a viable stillborn fetus. Nothing in Alabama law suggests that the date of death in the case of stillbirth is anything other than the date of stillbirth or "spontaneous fetal death." In fact, the definition of a "decedent" as a "stillborn infant or fetus" in ALA. CODE. §§ 22-19-41(2) codifies the common sense proposition that you can't be declared dead or have your organs donated, or be deemed in the eyes of the law a "decedent" until: (a) there is a birth and (b) a licensed Alabama physician declares and certifies a death. The whole point, or meaning of "stillborn" is that the infant is "born dead." Defendants seek to create a new and special legal category of "earlier" death that would open Pandora's box in the case of a fetal death *in utero*. There would be no certainty to date of death and litigation and expert testimony would be needed to establish the date of "earlier" fetal death,

particularly if physicians attempted to experiment or harvest organs from a fetus that was "to a reasonable degree of medical certainty" dead *en ventre sa mere.*

In this case, although Plaintiffs' pathology expert, Dr. Schwartz (and OB-GYNs Greene and Battaglia) provided opinion testimony concerning an *approximate* timeframe for when the fetus may have been dead prior to September 14, 2000, none of these physicians are licensed in Alabama. Therefore, their determinations or opinions concerning death are not *controlling* as to the date of legal death under Alabama law. Should the legal date of fetal death *in utero* be up for grabs -- in the hands of "forensic pathologists" the likes of Cyril Wecht and Dr. Henry Lee?[6]

No. Under the determination of the death act, only a physician licensed in the State of Alabama may determine death and under the anatomical gift act a "decedent" is defined as "a stillborn infant." That was done in this case, and the date of death is September 14, 2000.

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[6] Cyril H. Wecht, M.D., J.D ("one of the country's leading forensic pathologists). http://www.cyrilwecht.com. Dr. Henry Lee (Chief Emeritus of the Connecticut State Police). http://www.drhenrylee.com/about.

Defendants (and apparently the trial court) misconstrued the truth about the expert pathology testimony in this case. Dr. Schwartz, identified and presented by the Ziades, identified a number of pathological factors and held the opinion that the lack of nuclear staining indicated that the baby had been dead *in utero* at least 48 hours. He further stated changes in chorionic villi **"suggested"** death approximately 7 days prior to delivery. (C. II, 311-311A). These opinions, rightly viewed, are not material to any statute of limitations issue and are approximations at best.

Dr. Schwatz's *material* opinion, however, is that here a healthy baby had decreased perfusion because of a problem with the umbilical cord and had there been proper treatment within the standard of care, a different outcome would have occurred. His opinion was:

> "Based upon my knowledge and experience and review of the case, it is my opinion to a reasonable degree of medical certainty and that had the physician defendants intervened and delivered the baby by August 28th or September 2nd the child would have survived and would not have suffered adverse injury or damage. Thus, had these physicians complied with the standard of care (established by other OBGYN experts) and timely intervened in this case, the child would have survived and would not have suffered injury or damage."

Affidavit of David A. Schwartz. M.D. ¶ 10, p. 4. (C. II, 265).

Clearly, opinion testimony that intervention on August 28th or September 2nd (the date of the last two medical office visits) would have saved the child's life, is relevant to prove that the child was not dead on August 28th and was not dead on September 2nd. The legal date of death for statute of limitations purposes was not the subject of Dr. Schwartz's testimony. Nor was it the testimony of Dr. William Greene or Dr. Frank Battaglia, who offered testimony in tandem with Dr. Schwartz, namely that intervention within the standard of care would have resulted in the child's living.

What is the date of death as a matter of law for the purposes of the wrongful death statute of limitations under Alabama law when the fetus dies *in utero*? Again, this metaphysical/legal question need not be reached in this case given the procedural waiver of the affirmative defense. But here there was an autopsy by a duly licensed Alabama physician that recorded that date and time of death. This fully comports with Alabama's statutory definition of a "decedent" as a "stillborn infant or fetus." ALA. CODE. § 22-19-41 (2). Plaintiffs submit that

because a determination of death can only be made by a medical finding that there is, in fact, irreversible cessation of all functions of the entire brain, including the brain stem, with further findings that the criteria for fetal death have been satisfied, date of death determination can only be made by an Alabama physician after the stillbirth.

Dr. Henry Koch's own deposition testimony supports Plaintiffs' reliance on the autopsy report. At page 55 of his deposition, Dr. Koch was asked:

> Q. Do you intend to offer opinions as to what the cause of the baby's death was?
>
> A. Yes.
>
> Q. In your opinion, what was the cause of the baby's death?
>
> A. What we call a cord accident.
>
> Q. What is the basis for your opinion?
>
> A. The clinical picture, the reassuring negative contraction strips, the findings at the time of delivery and *the lack of any indication of distress in the fetus along the way up until the time she came in on the 12th. And I may add one thing; the pathology report from the hospital.*

Koch Deposition, pp. 55-56 (emphasis supplied). (C. III, 408). Dr. Koch further testified that if the baby had been

delivered on September 2nd the baby would have lived. Koch Deposition, p. 57. (C. III, 408).

Although no case in Alabama has addressed the date of death in a fetal death *in utero* case, well reasoned law and policy holds that in the case of a stillborn, the date of death is the date of the stillbirth for limitations purposes. **Logically, this follows because a person cannot die until they are born.** In this case, the Ziade's baby boy was born on September 14, 2000 and was dead on that date. The stillbirth is the date of death. For example, in *Fenton v. United Technologies Corp.*, 204 F. Supp. 367, 374 (D. Conn. 2002)(emphasis supplied) the Court explained:

> Plaintiffs rely on *Slater v. Mount Sinai Hospital*, 1997 WL 345349 (1997), and fairly so. *Slater*, a Connecticut Superior Court decision, does support plaintiffs' position. In *Slater*, a child was stillborn on September 5, 1992. **The statute of limitations governing wrongful death of the stillborn child-Conn. Gen.Stat. § 52-555-required the complaint to be served no more than two years after the death, i.e., before September 5, 1994.**

In *Slater v. Mount Sinai Hospital*, 1997 WL 345349 (Conn. Super. Ct. 1997) the child was "delivered stillborn" on September 5, 1992 and the Connecticut wrongful death statute of limitations was "two years from the date of death" and no more than five years from the date of the

negligent act or omission. *Id.* at *1-2. The Court applied the date of stillbirth as the date of the death to conclude that the suit was timely filed "within two years **from the date of death**". *Id.* at *5 (emphasis supplied).

In *Nordsell v. Kent*, 157 Ill. App. 3d 274, 510 N.E.2d 606, 109 Ill. Dec. 738(Ill. App., June 7, 1987) a medical malpractice wrongful death case was brought for the death of twins. One twin was stillborn (on July 26, 1983) and the other lived for two weeks and then died (on August 9, 1983). Suit was filed on August 14, 1985. The Court granted summary judgment on both death claims on the basis of Illinois' two-year statute of limitations (that ran from the date of discovery of injury). In both cases the Court reasoned that the two year statute of limitations on a medical malpractice cause of action for death "began to run on the "date of death" and noted that the "date of death" was different for the two twins. *Id. at* 510 N.E.2d 609.

CONCLUSION

The Ziades' 35 week old child was dead, and pronounced dead, at the time of its birth. The limitations defense proffered by the Defendants is demonstrably unfair in this case because the earliest indication the parents (or the physicians) had that the child might be dead (absence of heartbeat and ultrasound showing demise) was September 12, 2000. The stillbirth and date of death recorded on the autopsy was September 14, 2000. The Defendants did not plead limitations as a defense to the wrongful death claim. Suit was timely and fairly filed on September 11, 2000. The law and social policy in Alabama has long recognized "Certainty is the mother of repose, and therefore the law aims at certainty. . . It is better that the law should be certain." *St. Paul Fire & Marine Ins. Co. v. American Compounding Co.*, 211 Ala. 593, 100 So. 904, 907 (Ala. 1924.). Defendants should not be permitted to litigate the date of fetal death in derogation of a properly determined date of death at autopsy when a child is stillborn based upon the approximate opinions of pathologists. Such a "fact question" will always be uncertain and subject to the vagaries of expert testimony

whereas the statutes of this state, and every other, establish clear definitions and procedures for the determination and timing of death.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this **14th day of February 2006,** a copy of the foregoing pleading was served upon each other party to this action by hand delivery, facsimile transmission, or depositing same in the United States Mail, properly addressed to counsel of record, first class, postage prepaid as follows:

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