

# MEDICAL DEFENSE AND HEALTH LAW

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## **IN THIS ISSUE**

*Chris Berdy reports on changes to Alabama's Wrongful Death Act.*

## **Alabama Now Recognizes a Civil Cause of Action for the Wrongful Death of a Non-Viable Fetus**

### **ABOUT THE AUTHOR**

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## I. Introduction

Overruling two 18-year old medical malpractice cases, the Alabama Supreme Court has expanded its interpretation of the Alabama Wrongful Death Act, concluding that the Act “permits an action for the death of a pre-viable fetus.”<sup>1</sup> In a per curiam decision, *Mack v. Carmack*, -- So. 3d --, 2011 WL 3963006 (Ala. Sep. 9, 2011), the Alabama Supreme Court now joins six other jurisdictions (Illinois, Louisiana, Missouri, Oklahoma, South Dakota and West Virginia) that specifically permit wrongful death actions even where the death of the fetus occurs before the fetus becomes viable.<sup>2</sup>

## II. Alabama’s Wrongful Death Act

Under Alabama’s Wrongful Death Act, the father or the mother of a minor may commence an action “[w]hen the death of a minor child is caused by the wrongful act, omission, or negligence of another person.”<sup>3</sup> It has long been recognized that Alabama’s wrongful death statutes seek to prevent homicides and “to punish the defendant and deter others from like conduct.”<sup>4</sup> Indeed, the damages recoverable under the Wrongful Death Act are solely punitive and “are based on the culpability of the defendant and the enormity of the wrong, and are imposed for the preservation of human life.”<sup>5</sup>

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<sup>1</sup> *Mack v. Carmack*, -- So. 3d --, 2011 WL 3963006, \*14 (Ala. Sep. 9, 2011), *overruling Gentry v. Gilmore*, 613 So. 2d 1241, 1242 (Ala. 1993), and *Lollar v. Tankersley*, 613 So. 2d 1249 (Ala. 1993).

<sup>2</sup> *Mack*, 2011 WL 3963006, \*12.

<sup>3</sup> See Ala. Code § 6-5-391 (“Wrongful death of a minor”).

<sup>4</sup> *Mack*, 2011 WL 3963006, \*13; see Ala. Code § 6-5-391; Ala. Code § 6-5-410.

<sup>5</sup> *Id.*

Despite the express and long-recognized purpose of the Wrongful Death Act, in two separate 1993 decisions issued on the same day, the Alabama Supreme Court held that no cause of action for wrongful death exists if the fetus was not viable at the time of death.<sup>6</sup>

## III. A Change in The Law: *Mack v. Carmack*

Although not analyzing a medical malpractice case, the *Mack* Court was presented with the opportunity to re-examine whether a nonviable fetus has a cause of action for wrongful death.

In *Mack*, the Plaintiff was twelve weeks pregnant when she was involved in a motor vehicle accident that caused her to suffer a miscarriage.<sup>7</sup> The Plaintiff filed suit, claiming negligence and wantonness for her injuries, and separately asserting a claim for wrongful death on behalf of the deceased fetus.<sup>8</sup> The Plaintiff appealed the trial court’s entry of summary judgment in favor of the defendant’s summary judgment motion on the wrongful death claim.<sup>9</sup>

Critical to the Plaintiffs’ position on appeal—and to the Court’s ultimate rationale—was a 2006 change in a criminal statute. Originally, Alabama’s criminal statute defining homicide offenses defined “person” as a “human being who had been born and was alive at the time of the

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<sup>6</sup> See *Gentry*, 613 So. 2d at 1242 (concluding that Wrongful Death Act does not provide cause of action for death of nonviable fetus); *Lollar*, 613 So. 2d at 1252 (finding that cause of action for death resulting from a pre-natal injury requires that fetus attain viability either before injury or death results from injury).

<sup>7</sup> *Mack*, 2011 WL 3963006, \*1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

homicidal act.”<sup>10</sup> However, in 2006, the Alabama legislature amended that provision, redefining the term “person” as “a human being, including an unborn child in utero at any state of development, *regardless of viability*,”<sup>11</sup> which the Court found constituted a “clear legislative intent to protect even nonviable fetuses from homicidal acts.”<sup>12</sup> Consequently, the Court held that the “Wrongful Death Act permits an action for the death of a previable fetus.”<sup>13</sup>

In expanding the application of Alabama’s Wrongful Death Act, the Court emphasized the need for consistency between civil and criminal law. Conceding that the legislature did not amend the wrongful death statutes, the Court nevertheless recognized “the need for congruence between criminal law and our civil wrongful-death statutes.”<sup>14</sup> Consequently, the Court rationalized that it would be “incongruous” if “a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly.”<sup>15</sup>

Moreover, the Court questioned the “unfair and arbitrary” application of viability as the standard for application of the Wrongful Death Act. The Court concluded that “logic, fairness, and justice” compel the application of the Act, when to do otherwise would allow recovery on behalf of a fetus injured before viability that died after achieving viability, but that prevents recovery on behalf of a fetus injured that does not survive to viability.<sup>16</sup>

#### **IV. Conclusion**

In a significant expansion of Alabama’s Wrongful Death Act, Alabama now joins six other jurisdictions permitting wrongful-death actions even where the death of the fetus occurs before the fetus becomes viable.

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<sup>10</sup> See Ala. Code § 13A-6-1(2); *Mack*, 2011 WL 3963006, \*3.

<sup>11</sup> See Ala. Code § 13A-6-1(3)(emphasis added); *Mack*, 2011 WL 3963006, \*3.

<sup>12</sup> *Mack*, 2011 WL 3963006, \*13.

<sup>13</sup> *Id.* at \*14.

<sup>14</sup> *Id.* at \*13.

<sup>15</sup> *Id.* at \*14.

<sup>16</sup> *Id.*



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