**REL: October 30, 2020**



# SUPREME COURT OF ALABAMA

**OCTOBER TERM, 2020-2021**

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**1190010**

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**Ryan Magers, individually and on behalf of Baby Roe, a deceased unborn child**

**v.**

**Alabama Women's Center Reproductive Alternatives, LLC**

**Appeal from Madison Circuit Court**
**(CV-19-900259)**

PER CURIAM.

Ryan Magers appeals the Madison Circuit Court's dismissal of his wrongful-death claim against Alabama Women's Center Reproductive Alternatives, LLC ("the AWC"), for its role in

the abortion of Baby Roe. Because Magers's brief fails to comply with Rule 28, Ala. R. App. P., we must affirm.

Facts and Procedural History

On February 10, 2017, Baby Roe was aborted at approximately six weeks of gestation after the AWC provided Baby Roe's mother with an abortifacient pill to end her pregnancy. Magers, Baby Roe's father, then petitioned the Madison Probate Court to be appointed personal representative of Baby Roe's estate. The probate court granted Magers's petition, and, on February 6, 2019, Magers filed suit in the Madison Circuit Court asserting a wrongful-death claim against the AWC, individually and on behalf of Baby Roe. The AWC moved to dismiss Magers's complaint, and its motion was granted. Magers appealed.

Analysis

Magers has failed to comply with Rule 28, leaving this Court with nothing to review on appeal. Rule 28 requires the argument section of an appellant's initial brief to set out "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the

record relied on." Rule 28(a)(10), Ala. R. App. P. Magers's brief falls far short of this requirement.

Magers's argument section, in its entirety, is as follows:

> "Under Alabama law, an unborn child is a legal person and the estate of a child who was killed by abortion in utero can sue the abortion providers (et al.) for wrongful death. Ala. Act [No.] 2017-188 (to be codified in Ala. Const. 1901);[1] § 1, Ala. Const. 1901; § 6-5-391, Ala. Code 1975; § 13A-6-1(a)(3), Ala. Code 1975; § 13A-5-40(10), Ala. Code 1975; § 13A-5-49(9), Ala. Code 1975; § 26-15-3.2, Ala. Code 1975; § 26-22-1(a), Ala. Code 1975; Ex parte Phillips, No. 1160403 (Ala. Oct. 19, 2018) [287 So. 3d 1174 (Ala. 2018)], slip op. at 41, 70-71; Hamilton v. Scott, No. 1150377 (Ala. Mar. 9, 2018)[278 So. 3d 1180 (Ala. 2018)] (Hamilton II), slip op. at 11; Stinnett v. Kennedy, 232 So. 3d 202, 203, 215 (Ala. 2016); Ex parte Hicks, 153 So. 3d 53, 66-72, 84 (Ala. 2014); Ex parte Ankrom, 152 So. 3d 397, 411, 421, 429, 439 (Ala. 2013); Hamilton v. Scott, 97 So. 3d 728, 734 n.4, 737, 739 (Ala. 2012) (Hamilton I); Mack v. Carmack, 79 So. 3d 597, 599, 600, 607, 611 (Ala. 2011) (per curiam); Zaide v. Koch, 952 So. 2d 1072, 1082 (Ala. 2006); Gentry v. Gilmore, 613 So. 2d 1241, 1249 (Ala. 1993) (Maddox, J., dissenting); Ankrom v. State, 152 So. 3d 373, 382 (Ala. Crim. App. 2011). Therefore, the trial court should be reversed."

Magers's brief at pp. 7-8. Magers's argument thus consists of one conclusory statement followed by a string citation.

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[1]Amendment No. 930, proposed by Act No. 2017-188, was proclaimed ratified December 3, 2018, and is now included as § 36.06, Ala. Const. 1901 (Off. Recomp.).

Magers does not discuss how the cited authority is relevant to his argument. See Spradlin v. Spradlin, 601 So. 2d 76, 78-79 (Ala. 1992) (holding that a citation to a single case with no argument about how that case supports the appellant's contention failed to satisfy Rule 28). Nor does Magers cite to the record or apply the cited authorities to facts in the record that might support his wrongful-death claim. These omissions are fatal to his appeal. See Alonso v. State, 228 So. 3d 1093, 1108 (Ala. Crim. App. 2016) (explaining that an appellant must provide an argument and analysis supported with authority and citations to the record and show how those authorities support the existence of a reversible error); Hart v. State, 852 So. 2d 839, 848 (Ala. Crim. App. 2002) ("By failing to include any citation to the record on this issue, [the appellant] has failed to comply with Rule 28(a)(10), Ala. R. App. P., and has waived this claim for purposes of appellate review.").

Rule 28(a)(10) is in place for at least two reasons. First, it enables the appellate court to focus on determining whether the arguments presented by the appellant have merit. It is not the responsibility of this Court to construct

arguments for a party or to fill in gaps from string citations offered in lieu of arguments. Rather, it is our duty to decide whether the arguments presented have merit. See Wagner v. State, 197 So. 3d 517, 520 n.3 (Ala. 2015) ("It is well settled that it is not the function of this Court to create legal arguments for the parties before us."). It is the responsibility of the appellant to make arguments accompanied by analysis, supported by relevant authority and citations to the record, and to show how that authority supports the finding of reversible error. A conclusory statement followed by a string citation does not suffice.[2]

Second, delineated arguments advise the appellee of the issues that must be addressed in response. Ex parte Borden,

[2]Alabama's requirement that an appellant provide more than a bald citation to authority in support of an argument is not unique. See Wisconsin v. Freeman (No. 2019AP205, Sept. 1, 2020)(pending final publication decision, see Wis. State Ann. § 809.23) __ N.W.2d __ (Wis. App. Ct. 2020) (refusing to address legal contention based upon a conclusory statement followed by a string citation of cases); Beaman v. Freesmeyer,[No. 4-16-0527, Dec. 17, 2019] __ N.E.3d __, __ (Ill. App. Ct. 2019) (holding that the appellant forfeited his claim when he "simply provided string cites and left the burden on this court to research those cases and to surmise his position"); State v. Thomas, 961 P.2d 299, 304 (Utah 1998) (holding that, when the overall analysis of an issue is so lacking as to shift the burden of research and argument to the reviewing court, the issue is inadequately briefed for review).

60 So. 3d 940, 943 (Ala. 2007). If an argument is presented without reasoned analysis, specific legal authority, and adequate facts from the record to support the appellant's contention that the trial court's ruling was in error, it is difficult, if not impossible, for the appellee to adequately respond. And it creates an unfair advantage for the appellant -- because he or she can make arguments for the first time in a reply brief, leaving the appellee without an opportunity to counter those arguments absent permission from this Court. For these reasons, even though the reply brief Magers filed contained some reasoned arguments and analysis of pertinent caselaw, it was insufficient to cure his initial failure to comply with Rule 28. See United States v. Leffler, 942 F.3d 1192, 1197-98 (10th Cir. 2019) (explaining that allowing an appellant to raise an argument for the first time in a reply brief would be manifestly unfair to an appellee that has no opportunity for a written response); Meigs v. Estate of Mobley, 134 So. 3d 878, 889 n.6 (Ala. Civ. App. 2013) (explaining that Rule 28 "requires compliance in an appellant's initial brief" (emphasis added)).

Conclusion

Magers's initial brief fails to comply with Rule 28, leaving this Court with nothing to review. We therefore affirm the judgment of the circuit court.

AFFIRMED.

Bryan and Stewart, JJ., concur.

Parker, C.J., and Bolin, Wise, and Mitchell, JJ., concur specially.

Shaw, Sellers, and Mendheim, JJ., concur in the result.

MITCHELL, Justice (concurring specially).

The judgment of the Madison Circuit Court must be affirmed because Ryan Magers failed to comply with Rule 28, Ala. R. App. P., which is necessary to properly bring an appeal before our Court. I write separately, however, to state my view that Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), are due to be overruled by the United States Supreme Court.

Much has been written about the deficiencies of Roe and Casey.[3] I won't recite all of those arguments here. But because abortion is a subject that does not frequently come before our Court, I take this opportunity to point out what I consider to be several serious problems with those decisions.

[3]Even judges and legal scholars who have supported abortion rights have been critical of Roe's reasoning and analysis. See, e.g., Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375, 376, 382 (1985) (noting that the United States Supreme Court "ventured too far" and "went astray" in Roe); Laurence H. Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 7 (1973) ("One of the most curious things about Roe is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.").

First, the central holding of Roe -- that there is a constitutional right to have an abortion based on a judicially created trimester framework -- has no grounding in the text of the United States Constitution. See, e.g., June Med. Servs., L.L.C. v. Russo, __ U.S. __, __, 140 S. Ct. 2103, 2150 (2020) (Thomas, J., dissenting) ("Roe is grievously wrong for many reasons, but the most fundamental is that its core holding -- that the Constitution protects a woman's right to abort her unborn child -- finds no support in the text of the Fourteenth Amendment."); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) ("[T]he Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution -- not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins."). That holding was pulled out of thin air by using a novel theory put forward only a few years earlier in Griswold v. Connecticut, 381 U.S. 479 (1965), in which the United States Supreme Court identified a constitutional right of privacy based on "penumbras" extending from the "emanations" of five amendments

in the Bill of Rights. Unfortunately, the Court compounded its error in Casey, when it affirmed the holding of Roe and invented a new analytical framework based on a judicially created "undue burden" standard.[4] 505 U.S. at 874. Casey, which is simply a reimagining of Roe, fares no better when held up to the text of the Constitution.

Second, the right to have an abortion has no foundation "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). The English common law did not recognize a right to have an abortion. See 1 William Blackstone, Commentaries on the Laws of England *125-26. American colonists brought that common-law view with them when they crossed the Atlantic and established their own governments. See 5 St. George Tucker, Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of

[4]That undue-burden standard is itself an "aberration of constitutional law," West Alabama Women's Ctr. v. Williamson, 900 F.3d 1310, 1314 (11th Cir. 2018), and is rife with problems when applied. See Harris v. West Alabama Women's Ctr., 588 U.S. ___, ___, 139 S. Ct. 2606, 2607 (2019) (Thomas, J., concurring) (explaining that the Court's "abortion jurisprudence has spiraled out of control").

Virginia 198 (1803). States soon adopted statutes restricting abortion, beginning with Connecticut in 1821. Conn. Stat., Tit. 22, §§ 14, 16 (1821). By the time the Fourteenth Amendment was adopted in 1868, at least 36 states and territories had laws limiting abortion. Roe, 410 U.S. at 174 n.1 (Rehnquist, J., dissenting) (listing abortion-limitation laws in existence by 1868).

To conjure the right to have an abortion from the Due Process Clause, the United States Supreme Court "had to find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." Id. at 174 (Rehnquist, J., dissenting). And while we are bound by text rather than drafters' intentions, no reasonable person in 1868 would have equated "liberty" -- let alone "due process of law" -- with "right to have an abortion." See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 7, at 78 (Thomson/West 2012) ("Words must be given the meaning they had when the text was adopted."). Yet that is exactly what the United States Supreme Court did.

Finally, Roe and Casey hamstring states as they seek to prevent human tragedy and suffering. Take, for example, West Alabama Women's Center v. Williamson, 900 F.3d 1310 (11th Cir. 2018), in which a constitutional challenge was brought against an Alabama law regulating a particularly gruesome type of abortion. Id. at 1314. The United States Court of Appeals for the Eleventh Circuit described the procedure -- referred to clinically as dilation and evacuation and more descriptively as dismemberment abortion -- in excruciating detail:

> "In this type of abortion the unborn child dies the way anyone else would if dismembered alive. It bleeds to death as it is torn limb from limb. It can, however, survive for a time while its limbs are being torn off. The plaintiff practitioner [in an earlier] case testified that using ultrasound he had observed a heartbeat even with extensive parts of the fetus removed. But the heartbeat cannot last. At the end of the abortion -- after the larger pieces of the unborn child have been torn with forceps and the remaining pieces sucked out with a vacuum -- the abortionist is left with a tray full of pieces."

Id. at 1319-20 (citations and quotation marks omitted). At least two of the three judges who decided Williamson did not like having to invalidate a law restricting such a brutal

method of abortion.[5] Id. at 1314, 1329-30. Yet they were duty-bound to follow Roe and Casey, leading the court to strike down the law. Id. at 1330. Thus, as demonstrated in Williamson, states remain severely constrained in their ability to account for the unborn by enacting and enforcing laws that protect them in the womb, even in the face of a procedure as horrific as dismemberment abortion.

In my view, the doctrine of stare decisis creates no barrier to overruling Roe and Casey. As has been observed: "Stare decisis is a cornerstone of our legal system, but it

[5]They are far from outliers in their discontent about the United States Supreme Court's abortion jurisprudence. See, e.g., McCorvey v. Hill, 385 F.3d 846, 853 (5th Cir. 2004) (Jones, J., concurring) ("It takes no expert prognosticator to know that research on women's mental and physical health following abortion will yield an eventual medical consensus, and neonatal science will push the frontiers of fetal 'viability' ever closer to the date of conception. One may fervently hope that the [United States Supreme] Court will someday acknowledge such developments and re-evaluate Roe and Casey accordingly. That the Court's constitutional decisionmaking leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer not only about the abortion decisions, but about a number of other areas in which the Court unhesitatingly steps into the realm of social policy under the guise of constitutional adjudication."); Edwards v. Beck, 786 F.3d 1113, 1119 (8th Cir. 2015) ("Courts are ill-suited to second-guess these legislative judgments [on abortion] .... To substitute its own preference to that of the legislature in this area is not the proper role of a court." (citation omitted)).

has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes." Webster v. Reproductive Health Servs., 492 U.S. 490, 518 (1989); see also Bryan A. Garner et al., The Law of Judicial Precedent, § 40, at 352 (Thomson/Reuters 2016) ("The doctrine of stare decisis applies less rigidly in constitutional cases ...."); Amy Coney Barrett, Statutory Stare Decisis in the Courts of Appeals, 73 Geo. Wash. L. Rev. 317, 321 (2005). Roe and Casey are untethered from the text and history of the Constitution and, for that reason, have never been accepted by a critical mass of the American people. Further, those precedents require judges -- many of whom are unelected -- to make policy decisions that lie outside the judicial power. All of these features make Roe and Casey ripe for reversal. See Scalia & Garner, Reading Law at 411-12.

The time has come for the United States Supreme Court to overrule Roe and Casey. I respectfully urge the Court to do so at the earliest opportunity. I also encourage other courts across the country to raise their judicial voices, as appropriate, by pointing out the constitutional infirmities of

Roe and Casey and asking the Court to overrule those highly regrettable decisions.

Parker, C.J., and Bolin and Wise, JJ., concur.