1978

State of Utah v. Mark Leslie Larsen : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

MARK LESLIE LARSEN,

Defendant-Appellant.

Case No. 15408

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE ALLEN B. SORENSEN, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 15408
MARK LESLIE LARSEN,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with automobile homicide, in violation of Utah Code Ann. § 76-5-207 (Supp. 1977), a felony of the third degree.

DISPOSITION IN THE LOWER COURT

The case was tried before a jury, the Honorable Allen B. Sorensen, District Judge, presiding. The jury returned a verdict of guilty. Appellant was sentenced to serve an indeterminate term not to exceed five years in the Utah State Prison. Execution of the sentence was suspended and appellant placed on probation on condition that he serve six months in the Utah County Jail, pay a

fine of $1,000, and that he drive no motor vehicle during his probation.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirmi the judgment and sentence rendered below.

STATEMENT OF FACTS

On June 19, 1976, Detective Sergeant Owen Quarnberg of the Utah County Sheriff's Department observed a vehicle travelling south on Interstate 15 at a high rate of speed (T.11). Detective Quarnberg pursued the vehicle, and observed that it was travelling at a speed in excess of 100 miles per hour (T.11,12). Sergeant Quarnberg and Trooper Doug Staheli of the Utah Highway Patrol observed a collision between the suspect vehicle and a second car, and both officers arrived at the scene of the accident within a few seconds of the collision (T.12,20-21). Both vehicles had overturned as a result of the accident; the appellant was the only occupant of the suspect vehicle; Mr. and Mrs. Mlejnek were found inside the second car; and the two Mlejnek children were found a short distance away, having been thrown from their car by the force of the collision (T.13,20-21). The Mlejneks were taken to a hospital.

A number of empty beer cans were found inside

appellant's car, and both officers observed that the appellant had a strong odor of alcohol and was profane and abusive (T.16-17,21-22). Trooper Staheli also observed that the appellant's face was flushed, that his eyes were bloodshot and watery, that he was unsteady on his feet, and that the appellant's speech was slurred and confused (T.21-22). Officer Staheli gave his opinion that the appellant was under the influence of alcohol and unable to operate a motor vehicle safely (T.23).

The appellant was then placed in the custody of Trooper Don Morill of the Utah Highway Patrol. Trooper Morill also observed that the appellant's speech was slurred, and that his manner was belligerent and abusive (T.43-45). The appellant stated in Trooper Morill's presence that "I must be drunker than I thought" and made other statements indicating that he was intoxicated (T.45). Trooper Morill gave his opinion that the appellant was under the influence of alcohol and unable to operate a motor vehicle safely (T.45). Trooper Morill administered a breathalyzer test to the appellant, and the test indicated that the appellant had a blood alcohol content of 0.13 percent (T.55) (State's Exhibit No. 1).

Andrew Mlejnek and his family reside in Port Huron, Michigan; and on June 19, 1976, they were southbound

on Interstate 15 enroute to a vacation in California (T.2 At the time of the accident, they were travelling at approximately 50 miles per hour, and observed no other vehicle prior to the collision (T.30). Mrs. Sandra Mlejnek sustained serious injuries as a result of the accident; her pelvis was fractured, all of the ligaments in left knee were torn, her lung was inflated (sic), her check bone was broken, her mouth was ripped open, and she suffered burns on her right foot and left leg (T.37).

At the time of the accident, Sandra Mlejnek was six and one-half months pregnant (T.32). Mrs. Mlejnek and her physician had calculated the child's probable conception date as January 3 or 4, 1976, and had projecte a due date of October 3, 1976 (T.33). The mother had fel fetal movement shortly before the collision, but felt no fetal movement after the collision (T.34-35,37).

Following the collision, Mrs. Mlejnek was treat by Dr. Lynn Dalton, a physician specializing in gynecolog (T.67). Dr. Dalton was unable to detect any fetal heart tones, and determined that the child was dead (T.68). After waiting a period of time to allow the mother to recover from her other injuries, Dr. Dalton induced labor and caused the dead featus to be delivered (T.69). Dr. Dalton examined the fetus, and found that it had been dead for some time. The placenta was also examined, and

Dr. Dalton discovered a large blood clot around it (T.69). The witness expressed his opinion that the fetus died as a result of a traumatic blow (T.70). The fetus was found to be of average size for a 26 week old fetus, and Dr. Dalton approximated its weight at one and one-half pounds (T.72). Dr. Dalton testified that a one and one-half pound baby had a 25 percent statistical chance of survival outside of the womb, and that the chance of survival would go as high as 50 percent if the fetus had weighed two pounds, but that the chance of survival would have been as low of 5 percent if the fetus had weighed only one pound (T.71).

At the close of the State's case, the appellant moved to dismiss the information on the ground that an unborn fetus is not "another" within the meaning of Utah Code Ann. § 76-5-207 (Supp. 1977). The court denied the motion (T.78). The defendant excepted to jury instruction Nos. 5 and 11.

ARGUMENT

POINT I

AN UNBORN VIABLE FETUS IS "ANOTHER" WITHIN THE MEANING OF THE AUTOMOBILE HOMICIDE STATUTE, UTAH CODE ANN. § 76-5-207 (SUPP. 1977).

Respondent submits that this point on appeal presents a single issue: was it the legislative intent

to include unborn but viable persons within the protectio of the automobile homicide statute which prohibits the causing of death of "another"? Respondent avers that this question must be answered affirmatively because such a legislative intent can be discerned from the totality of the Utah Criminal Code. Respondent further submits that the recognition of a viable fetus as "another" is the better rule of law and is in accord with the trend of the law as announced by a majority of American jurisdictions.

A. THE LEGISLATURE INTENDED TO PUNISH THE KILLING OF A VIABLE FETUS UNDER THE GENERAL HOMICIDE STATUTES OF THE UTAH CRIMINAL CODE.

Under the common law, the killing of an unborn viable child was not murder, although it was a "great misprision." This common law rule was specifically abrogated by Utah Code Ann. § 76-1-105 (Supp. 1977):

> "Common law crimes are abolished and no conduct is a crime unless made so by this code, other applicable statute or ordinance."

The common law rule requiring live birth as an element of homicide is therefore not involved in this appeal.

The statute in issue is Utah Code Ann. § 76-5-207 (Supp. 1977), which provides:

> "(1) Criminal homicide constitutes automobile homicide if the actor, while under the influence of intoxicating liquor, a controlled substance, or any drug, to a degree which renders the actor incapable of safely driving a vehicle, causes the death of another by operating a motor vehicle in a negligent manner." (Emphasis added.)

Utah Code Ann. § 76-5-201 (Supp. 1977), states:

> "A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence unlawfully causes the death of another." (Emphasis added.)

A comparison of these sections reveals that the word "another" in the automobile homicide statute refers grammatically to another "actor" or another "person" (as used in Section 76-5-201). These terms are defined in Utah Code Ann. § 76-1-601 (Supp. 1977):

> "(3) 'Actor'means a person whose criminal responsibility is in issue in a criminal action.
>
> * * *
>
> (5) 'Person' means an individual, public or private corporation, government, partnership, or unincorporated association." (Emphasis added.)

The word "another" therefore refers to a person or an individual. The Utah Criminal Code contains no further definitional aids, and other areas of the code must therefore be analyzed to determine if the legislature intended to include unborn persons within the ambit of the term "another."

Two important sources used by the Utah Legislature in its 1973 revision of the criminal code were the Model Penal Code and the Penal Code of New Hampshire. Martin, Utah Criminal Code Outline, 133-134. Both of these codes limit the definition of "human being" or "another" so as not to include an unborn child as a victim of a homicide. Model Penal Code § 210.D, N.H. Rev. Stat. Ann. § 630:1(IV) (Repl. Vol. 1974). Respondent submits that the omission of such a limiting definition from the Utah Criminal Code is significant, and indicates a legislative intent to include unborn but viable fetuses within the protection of the homicide statutes.

Another area of the Utah Criminal Code which manifests an acute legislative concern for the protection of fetal life is the criminal abortion section, Utah Code Ann. § 76-7-302 (Supp. 1977), which provides:

> "An abortion may be performed in the state only under the following circumstances . . . (3) If performed when the unborn child is sufficiently developed to have any reasonable possibili of survival outside its mother's womb, the abortion is necessary to save the life of the pregnant woman or to prevent serio and permanent damage to her health."

Utah Code Ann. § 76-7-307 (Supp. 1977), provide

> "If an abortion is performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside of its mother's womb, the medical procedure used must be that which, in the best medical judgment of the physician, will give the unborn child the best chance of survival. No medical procedure designed to kill or injure an unborn child may be used unless necessary in the opinion of the women's physician, to save her life or prevent serious and permanent damage to her health."

Utah Code Ann. § 76-7-308 (Supp. 1977), provides:

> "Consistent with the purpose of saving the life of the woman or preventing serious and permanent damage to the woman's health, the physician performing the abortion must use all of his medical skills to attempt to promote, preserve and maintain the life of any unborn child sufficiently developed to have any reasonable possibility of survival outside of the mother's womb."

A physician who performs an abortion which is not authorized by law is guilty of a second degree felony, and a physician who fails to use all of his medical skill to protect the life of an unborn viable fetus during an authorized abortion is guilty of a third degree felony. Utah Code Ann. § 76-7-314 (Supp. 1977). It would be inconsistent to punish a physician for causing a viable fetus's death during an authorized abortion, but allow a drunken driver to kill a similar fetus without being

punished. Respondent submits that the Utah criminal abortion statutes indicate a legislative intent to protect fetal life, and demonstrate that the legislature understands a fetus to achieve "personhood" prior to birth.

The strongest indication of the legislative intent can be found in a joint resolution passed by the same legislature which originally enacted the automobile homicide statute. House Joint Res. 30, Laws of Utah (1973), provides:

> "Be it resolved by the Legislature of the State of Utah:
> That the Congress of the United States take without delay such action as necessary, including a Constitutional amendment if needed, to preserve the right to life of unborn children and to forestall a wholesale wave of lifetaking abortions which could result from the recent decision of the Supreme Court."

There can be no doubt that the Utah Legislature considers human life to begin prior to birth.

Respondent submits that the failure of the Legislature to enact a limited definition of "person," the provisions of the criminal abortion statutes, and the House Joint Res. 30 all indicate a legislative conception of "person-ness" which embraces the unborn viable child as well as the child which is born alive. The automobile homicide statute must be read in context with this

legislative concept. Respondent submits that a comparison of the automobile homicide statute with other relevant indicia of legislative intent leads to the conclusion that an unborn viable fetus is "another" within the meaning of the statute.

B. THE TREND OF THE LAW IS TO RECOGNIZE THE KILLING OF A VIABLE FETUS AS THE KILLING OF A PERSON.

Respondent submits that the holding of the court below that a viable fetus can be the victim of a homicide is in accord with the better rule of law in this country and recognizes the scientific fact that there is no significant biological difference between a viable infant within his mother's womb and an infant recently expelled from the womb by the process of birth. The purpose of a homicide statute is to protect human life. That purpose is best served when life is protected from the moment it has independent significance. To rely on live birth as the criterion for "person-ness" is to depend on the fortuity of the location of the life without the uterus and to ignore the quality of the life taken. The artificial nature of the live birth requirement was commented on in Tribe, Foreward: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 27-28 (1973):

> ". . . the viable fetus may be removed in precisely the same way in late pregnancy--whether surgically or by chemically induced labor--regardless of one's intentions as to its ultimate survival. A premature birth followed by the deliberate killing of what the doctor had removed or delivered would look and sound the same whether the intent to kill had been formed only after the birth was completed or had been present throughout the episode. To call the first of these acts 'infanticide' and the second 'abortion' or even 'feticide' is to play with names that bespeak no relevant difference.
>
> Viability thus marks a point after which a secular state could properly conclude that permitting abortion would be tantamount to permitting murder, . . . or the secular and quite practical ground that a state wishing to prevent the killi of infants simply has no way to distingui the deliberate destruction of the latter from what is involved in postviability abortions. It is not only that such abortions lie close to infanticide and hence not far from other horrors along the 'slippery slope' but rather that in every functional sense, they occupy the same place on that fabled plane." (Emphasis added.)

The negligent killing of a viable fetus is similarly functionally indistinguishable from negligently causing the death of an infant. Live birth is a purely artifici line to draw for purposes of a homicide prosecution, but viability is a significant distinction. As the United States Supreme Court conceded in Roe v. Wade, 410 U.S. 1 164 (1973):

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then has the capability of meaningful life outside of the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications."

The live birth requirement for homicide is not predicated on any relevant medical criteria, and appears to be based in part on the ignorant assumption that, prior to birth, a fetus is only part of its mother. See generally Mellman, Legal Concepts of Human Life: The Infanticide Doctrines, 52 Marq. L. Rev. 105 (1968).

The live birth requirement is not only artificial and unscientific, but unworkable as well. This criticism of the rule was voiced in People v. Chavez, 77 Cal.App.2d 621, 176 P.2d 92, 94 (1947):

> "There is no sound reason why an infant should not be considered a human being when born or removed from the body of its mother, when it has reached that stage of development where it is capable of living an independent life as a separate being and where in the natural course of events it will so live if given normal and reasonable care. . . these questions should be met and decided on the basis of whether or not a living baby with the natural possibility and probability of growth and development was being born, rather than on any hard and fast technical rule establishing a legal fiction that the infant being born was not a human being because some part of the process of birth had not been fully completed."

Thus, the Court in Chavez held that a complete live birth need not be shown for a homicide prosecution, and only required a showing of viability during the birth process. This reasoning was approved and followed in Singleton v. State, 35 So.2d 375 (Ala. App. 1948).

The common law rule requiring a live birth for a homicide prosecution, although well-established, is neither reasonable, scientific nor practical.

Respondent urges this Court to adopt as its rule of decision in this case the holding of the majority of American courts as to the law of wrongful death for unborn viable fetuses. Appellant has recognized the appropriateness of looking to the law of wrongful death in deciding the issue presented by this point on appeal by reliance on Kihner v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (1975), and Justiss v. Atchison, 139 Cal.Rptr. 565 P.2d 122 (1977) (Brief of Appellant, page 7). Both of these cases hold that a parent cannot recover under a wrongful death statute for a defendant's negligence causing a stillbirth. These cases represent the distinct minority position in American law.

Under the common law, an infant could not recover in tort for prenatal injuries on the ground that a fetus en ventre sa mere was only a part of his mother.

The rule was announced as part of American jurisprudence by Justice Holmes in Dietrich v. Northampton, 138 Mass. 14, 52 Am.Rep. 242 (1884). This decision was followed by other jurisdictions, and not questioned until Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900), Justice Boggs, in dissent, criticized the rule as unscientific and unsound. No case allowed recovery until 1946, when ". . . a rapid series of cases, many of them expressly overruling prior holdings, have brought about what was up till that time the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts." Prosser, Handbook on the Law of Torts 336 (4th ed. 1971). Professor Prosser has observed, ". . . it is now apparently literally true that there is no authority left still supporting the older rule (that an infant cannot recover for prenatal injuries)," id. at 337, and that "all writers who have discussed the problem have joined in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother. . . ." Id. at 336. Although the right of an infant to recover in tort for prenatal injuries is no longer questioned, there is a split of authority as to whether a parent may recover in wrongful death for the stillbirth of her/his child. In Justiss, supra at 565 P.2d 125, nn. 4,5, the court indicated that 25 jurisdictions now allow recovery, while only 12 deny

recovery. The highest courts of two states have recentl reversed prior holdings and have allowed recovery in wro ful death for negligently causing a stillbirth. Mone v. Greyhound Lines, 331 N.E.2d 916 (Mass 1975), overruling Leccesse v. McDonough, 279 N.E.2d 339 (1972); Evans v. Olsen, 550 P.2d 924 (Okla. 1976), overruling Padillow v. Elrod, 424 P.2d 16 (1967). The holdings in these cases offer a useful analogy to the issue presented by this point on appeal. An action for wrongful death, like the definition of automobile homicide in Utah, is a statutor creation and independent of the common law. The issue resolved by these cases is whether the legislatures intended to include unborn viable fetuses within the ter "person" or "minor children" in wrongful death statutes. A majority of American jurisdictions have concluded that unborn persons are indeed "persons" within the meaning o a relevant statute, and have imposed liability for negligently causing the "person's" death. The aptness of the analogy of the wrongful death statutes is made ev more clear by the fact that, in some jurisdictions, wron death statutes are not compensatory but penal with the amount of damages depending entirely on the defendant's culpability and not upon the plaintiff's loss. The Alabama Supreme Court, for example, has described its wrongful death statute as entirely penal and quasi-crimi

and has not hesitated to impose liability for causing the death of an unborn viable fetus. Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So.2d 354, 357 (1974).

The cases advance a number of reasons for including unborn viable fetuses within the coverage of the wrongful death statutes. First is a conclusion that the legislatures intended the terms "person" or "minor child" to include an unborn fetus. See Libbee v. Permanente Clinic, 518 P.2d 636, 639, reh. denied 520 P.2d 361 (Ore. 1974). Another reason for allowing recovery is that a denial of recovery for a stillborn child is logically inconsistent with allowing recovery for other prenatal injuries. Stidham v. Ashmore, 11 Ohio App.2d 383, 167 N.E.2d 106, 108 (1959). A live birth requirement would produce other inconsistencies. As was pointed out in Todd v. Sandidge Construction Co., 341 F.2d 75, 77 (4th Cir. 1964), the live birth rule means that the graver the harm influcted to a fetus, the greater the wrongdoer's chance of immunity. The rationale of all the decisions was well summarized by the court in Chrisafogeogis v. Brandenburg, 55 Ill.2d 368, 304 N.E.2d 88, 91 (1973):

> "To hold, as a matter of law that no viable fetus has any separate existence which the law will recognize is for the law to deny a simple and easily demonstrable fact."

In short, the rule allowing recovery in tort for prenatal death is supported by reason, science and the weight of authority.

This Court has not yet ruled on the question of whether recovery is permitted under Utah's Wrongful Death Statute, Utah Code Ann. § 78-11-6 (1953), for the death of an unborn child. In Webb v. Snow, 102 Utah 534, 132 P.2d 114 (1942), this Court held that damages could not be awarded for the loss of a child which was not viable. In Nelson v. Patterson, 542 P.2d 1075 (Utah 1975), this Court expressly reserved judgment on the issue. Two justices dissented and stated:

> "Our case of Webb v. Snow is not applicable for two reasons: First, the operative facts are completely distinguishable and we would not do an injustice to stare decisis for the reason that the concept advanced by that case is no longer a part of the weight of authority in this country. Additionally, I see no moral, biological or legal rationale for sustaining an outmoded, dry rule laced with the fiction of a bygone era." 542 P.2d at 1079.

A conclusion that an unborn viable fetus is a "person" who can be the victim of a wrongful death compels the conclusion that an unborn viable fetus is a "person" who can be the victim of a homicide. See The Unborn Child: Consistency in the Law, 2 Suffolk L. Rev. 228, 242-243 (1968).

Respondent submits that the weight of authority and the better reasoned cases hold that a fetus is a person for the purposes of wrongful death. These authorities rejected a well-established but outmoded tort rule requiring live birth to reach this result. Respondent submits that the live birth requirement for homicide is outmoded for substantially the same reasons. Respondent urges this Court to recognize the trend of the law in this area and to reject the obsolete live birth definition of "person." Appellant's conviction should be affirmed.

C. THE AUTHORITY CITED BY APPELLANT IS NOT APPLICABLE TO THIS CASE.

Appellant has cited the following cases in support of his contention that proof of a live birth is required for a homicide conviction: Commonwealth v. Edelin, 359 N.E.2d 4 (Mass. 1976); Keeler v. Superior Court, 2 Cal.3d 619, 87 Cal.Rptr. 481, 470 P.2d 617 (1970); State v. Dickenson, 28 Ohio. St. 2d 65, 275 N.E.2d 599 (1971); State v. Gyles, 303 So.2d 799 (La. 1975). Respondent submits that these authorities are not applicable to the case at bar. Edelin is not applicable because the court in that case did not construe the meaning of any term in a statutory definition of homicide. In Massachusetts, there is no statutory definition of manslaughter (the crime charged in that case) and the court's decision was controlled by the common law which requires a live birth. The common

law is not involved in this appeal. Utah Code Ann. § 76-1-105 (Supp. 1977).

The three remaining cases are distinguishable because the courts in those cases were declaring the intents of different legislatures as determined by an examination of statutes with distinct legislative histories. The cases of Keeler v. Superior Court and State v. Dickenson are distinguishable on additional grounds. As was pointed out in Point IB above, a rule in tort allowing recovery for prental death impels the conclusion that an unborn viable fetus can be the victim of a homicide. In State v. Dickenson, the prosecution argued that inasmuch as an intermediate appellate court in Ohio had recognized prenatal wrongful death, the Ohio Supreme Court should recognize prenatal homicide. The Supreme Court stated that it did not feel bound by the lower court decision, and went on to state:

> ". . . the definition of a word in a civil statute does not necessarily import the same meaning to the same word in interpreting a criminal statute. The result may be desireable, but criminal statutes unlike civil statutes, must be strictly construed against the state." 275 N.E.2d at 602.

In short, the court sought to justify its narr construction of the word "person" and its inconsistent

treatment of the fetus in tort and criminal law on the basis of a rule of strict construction. This rationale cannot apply in this jurisdiction. Utah Code Ann. § 76-1-106 (Supp. 1977), states:

> "The rule that a penal statute is to be strictly construed shall not apply to this code, any of its provisions, or any offense defined by the laws of this state. All provisions of this code and offenses defined by the laws of this state shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law and general purposes (of the criminal code)."

Contrary to the Dickenson court, this Court must construe the word "another" in the automobile homicide statute according its fair import, and not give it a technical common law meaning.

In Keeler v. Superior Court, supra, the central premise is that the California Legislature did not intend to include a viable fetus within the meaning of the term "human being." That premise is demonstrably in error, because the California Legislature, in response to the Keeler decision, amended its statutory definition of murder to read, "Murder is the unlawful killing of a human being or a fetus with malice aforethought." West's Cal. Pen. Code Ann. § 187(a) (Pocket Part). The Keeler decision was, in effect, overruled by the legislature.

Justice Burke's dissent in Keeler is thoughtfu and well written and bears directly on the issue present by this appeal. Justice Burke notes that although the common law required a live birth to establish a homicide the killing of a viable unborn fetus was still considere a serious crime under the common law. 470 P.2d at 631. Justice Burke also argued that the legal concept of "human being" should change with the advance of medical science, and proposed the following analogy. At common law, a person could not be convicted of the murder of a person whose heart had ceased to beat, because such a person would be considered already dead, given the state of medical science. In modern times, a person whose hea had ceased to beat might, under proper circumstances, be revived by modern medical techniques. Such a person cou no longer be considered dead, and therefore could be the victim of a homicide. Similarly, the law should keep stride with the advances in medicine which can protect the life of the fetus and recognize life as beginning prior to birth. 470 P.2d at 631.

Respondent submits that the authority cited by appellant is not persuasive, and asks that his convic tion be affirmed.

POINT II

INCLUDING A VIABLE FETUS WITHIN THE MEANING OF "ANOTHER" IN UTAH CODE ANN. § 76-5-207 (SUPP. 1977), DOES NOT DEPRIVE APPELLANT OF DUE PROCESS OF LAW.

Appellant contends that the lower court's ruling that a viable fetus is "another" within the meaning of the automobile homicide statute was an "unforseeable judicial enlargement" of a criminal statute, and that the application of the statute to him would be ex post facto and a denial of due process. This argument has two weaknesses. First, the lower court's construction of the statute was not an "enlargement" of the statute and was not "unforseeable." Respondent submits that the ruling below was in harmony with the legislative intent and cannot be viewed as an expansion of the statute's coverage (see Point IA, supra). Respondent further submits that, inasmuch as a majority of American jurisdictions consider a fetus to be a person, the lower court's construction of the term "another" is neither unforseeable, unusual nor unfair to the appellant (see Point IB, supra).

The second flaw in appellant's argument is that, assuming the lower court's ruling was an unforseeable enlargement of the statute, it did not affect the portion of the statute which defines criminal conduct. Certain

kinds of criminal conduct are punished differently depending upon the result produced by the conduct, rather than on differences in the criminal conduct itself. For example, if A and B independently fired weapons at X with the intent to kill X, but only A's aim was true, A would be guilty of murder, while B could only be guilty of a lesser offense (i.e., attempted murder, or assault). In this case, there is no dispute over the definition of appellant's criminal conduct (operating a motor vehicle in a negligent fashion while intoxicated) but over the definition of the culpable result (causing the death of "another"). Appellant made no attempt to conform his conduct to the known and unmistakable requirements of law, and he was not ". . . required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Bouie v. City of Columbia, 378 U.S. 347, 351 (1964). It is a fiction to suggest that if appellant had known that the automobile homicide statute would punish the killing of unborn persons he would not have engaged in the conduct for which he was convicted. Compare Keeler v. Superior Court at 470 P.2d 633 (Burke, J. dissenting):

> "Aside from the absurdity of the underlying premise that defendant consulted Coke, Blackstone or Hale before kicking [the unborn victim] to death, it is clear that defendant had adequate notice that his act could constitute homicide. Due process only precludes prosecution under a new statute insufficiently explicit regarding the specific conduct proscribed, or under a pre-existing statute 'by means of an unforseeable enlargement thereof.'"

Respondent submits that appellant received the "fair warning" required by due process and that his conviction should be affirmed.

POINT III

APPELLANT IS NOT ENTITLED TO A REVERSAL OF HIS CONVICTION ON THE GROUNDS OF INSUFFICIENCY OF EVIDENCE AS TO THE VIABILITY OF THE VICTIM.

A. APPELLANT HAS NOT PROPERLY PRESERVED THIS POINT FOR APPEAL.

At the conclusion of the State's case, the appellant moved for a dismissal on the grounds that a viable fetus is not "another" within the meaning of Utah Code Ann. § 76-5-207 (Supp. 1977) (T.74). The record on appeal does not indicate that appellant ever directed the lower court's attention to the claimed insufficiency of evidence of viability by way of a motion to dismiss, for a directed verdict, a new trial,

or an arrest of judgment. There is consequently no ruling or order below which appellant can claim erroneous. Principles of appellate review prevent this Court from hearing a claim of error for the first time on appeal. State v. Carter, 27 Utah 2d 416, 497 P.2d 2((1972). Respondent submits that appellant has not properly preserved this point for appeal.

B. THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD FIND THAT THE VICTIM WAS A VIABLE FETUS.

The fundamental rule governing a claim of insufficient evidence on appeal is that the evidence an all inferences fairly to be drawn therefrom must be viewed in the light most favorable to the jury's verdic State v. Wilson, 565 P.2d 66 (Utah 1977). In this case, the jury heard the testimony of a medical expert that t victim was of average size for a fetus in the 26th week of gestation and that its weight was approximately one and one half pounds. Viability occurs at different tim in different pregnancies, but usually occurs between the 24th and 28th week. Roe v. Wade, 410 U.S. 113, 160 (19 Some medical authorities feel that viability occurs eve earlier, and viability has been defined to mean "capabi of living; the state of being viable; usually connotes fetus that has reached 500 grams in weight (about 1.1 pounds) and 20 gestational weeks." Stedmen's Medical

Dictionary 1388 (22nd ed. 1972), as quoted in Viability and Abortion, 64 Ky. L. J. 146, 148 n. 14 (1975). The concept of viability does not require that the fetus have a better than even chance of survival. Rather, it suggests that stage of development where the fetus has a reasonable chance of survival. Utah Code Ann. § 76-7-302(3) (Supp. 1977). Respondent submits that there was sufficient evidence for the jury to conclude that the victim was viable, and appellant's conviction should be affirmed.

CONCLUSION

Respondent submits that appellant has been convicted under a correct interpretation of the automobile homicide statute which includes a viable fetus as "another," that appellant's right to due process of law has not been violated, and that appellant is not entitled to a reversal because of insufficiency of evidence. Appellant's conviction should be affirmed.

Respectfully submitted,

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