

2009

Miguel Carranza Amelia Sanchez v. United States : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MIGUEL CARRANZA and
AMELIA SANCHEZ, natural
parents of Jesua M. V. Carranza-
Sanchez, deceased,

Plaintiffs/Appellants

v.

UNITED STATES and John and
Jane Does I-X.

Defendants/Appellees.

No. 20090409-SC
2:07cv00291DAK

OPENING BRIEF OF THE UNITED STATES

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION
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UTAH APPELLATE COURTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
JURISDICTION	1
ISSUE	1
RELEVANT STATUTE	1
STATEMENT OF THE CASE	2
Proceedings Below	2
Factual Background	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. Legal Framework	5
A. Federal Tort Claims Act	5
B. Utah’s Wrongful Death Statute	5
C. Statutory Construction	6
II. The plain language of Utah’s wrongful death statute does not create a cause of action for the wrongful death of an unborn child	7
III. When the Utah Legislature intends that a statute cover an unborn child, it includes “unborn” in the statutory language	10

IV. The Legislature also demonstrated its intent by retaining the term “minor child” in the wrongful death statute even after this Court had rejected claims based on the alleged wrongful deaths of unborn children	11
CONCLUSION	13
CERTIFICATE OF SERVICE	15
ADDENDUM	16
Memorandum Decision and Order Certifying Question to Utah Supreme Court, No. 2:07cv00291 (D. Utah May 14, 2009)	A-1
Utah Rev. Stat. § 2911 (1898)	A-18
Compiler’s Notes, UTAH CODE ANN. § 78-11-6 (1977 Repl.)	A-20
H.B. 329, Utah Code, 2009 Advance Legislative Service, ch. 79	A-22

TABLE OF AUTHORITIES

STATUTES

28 U.S.C. § 1346(b) (2006)	5
28 U.S.C. § 2674 (2006)	5
42 U.S.C. § 233(a), (g) (2006)	5
UTAH CODE ANN. § 15-2-1 (2009 Repl.)	8
UTAH CODE ANN. § 75-7-303(6) (Supp. 2009)	10
UTAH CODE ANN. § 75-7-304 (Supp. 2009)	10
UTAH CODE ANN. § 76-5-201(1)(a) (2008 Repl.)	10
UTAH CODE ANN. § 78-11-6 (Supp. 2006)	1
UTAH CODE ANN. § 78A-3-102(1) (2008 Repl.)	1
UTAH CODE ANN. § 78B-3-106(1) (Supp. 2009)	6
UTAH CODE ANN. § 78B-7-102(2) (2008 Repl.)	11
Utah Rev. Stat. § 2911 (1898)	6
Compiler’s Notes, UTAH CODE ANN. § 78-11-6 (1977 Repl.)	6, 12, 13
H.B. 329, Utah Code, 2009 Advance Legislative Service, ch. 79	6

CASES

<u>Alma Evans Trucking v. Roach</u> , 714 P.2d 1147 (Utah 1986)	9
---	---

<u>Alternative Options and Services for Children v. Chapman</u> , 2004 UT App 488, 106 P.3d 744	9
<u>Behrens v. Raleigh Hills Hospital, Inc.</u> , 675 P.2d 1179 (Utah 1983)	5, 6
<u>Blackner v. State Dep't of Transportation</u> , 2002 UT 44, 48 P.3d 949	7
<u>Cannon v. Univ. of Chicago</u> , 441 U.S. 677 (1979)	12
<u>Franklin v. United States</u> , 992 F.2d 1492 (10th Cir. 1993)	5
<u>Fuenmayor v. United States</u> , 626 F. Supp. 2d 1222 (D. Utah 2009)	9, 11
<u>Greenhalgh v. Payson City</u> , 530 P.2d 799 (Utah 1975)	13
<u>Martinez v. Media-Paymaster Plus</u> , 2007 UT 42, 164 P.3d 384	7
<u>Nelson v. Peterson</u> , 542 P.2d 1075 (Utah 1975)	13
<u>Perrine v. Kennecott Mining Corp.</u> , 911 P.2d 1290 (Utah 1996)	7
<u>Stephens v. Bonneville Travel, Inc.</u> , 935 P.2d 518 (Utah 1997)	7
<u>U.S. v. Orleans</u> , 425 U.S. 807 (1976)	5
<u>Webb v. Snow</u> , 132 P.2d 114 (Utah 1942)	11, 12
 <u>OTHER</u>	
<u>Black's Law Dictionary</u> (8th ed. 2004)	8
<u>Random House Webster's College Dictionary</u> (2d ed. 1999)	8
<u>Webster's Third New International Dictionary</u> (2002)	7, 8

JURISDICTION

This Court has jurisdiction of the issue of law certified by the United States District Court for the District of Utah pursuant to UTAH CODE ANN. § 78A-3-102(1) (2008 Repl.).

ISSUE

Judge Dale A. Kimball of the United States District Court for the District of Utah certified the following issue of law to this Court:

Does Utah's wrongful death statute allow an action for the wrongful death of an unborn child?

RELEVANT STATUTE

Utah's wrongful death statute in effect in 2006, when the relevant events occurred, provided as follows:

Except as provided in Title 34A, Chapter 2, Workers' Compensation Act, a parent or guardian may maintain an action for the death or injury of a minor child when the injury or death is caused by the wrongful act or neglect of another. Any civil action may be maintained against the person causing the injury or death or, if the person is employed by another person who is responsible for that person's conduct, also against the employer. If a parent, stepparent, adoptive parent, or legal guardian is the alleged defendant in an action for the death or injury of a child, a guardian ad litem may be appointed for the injured child or a child other than the deceased child according to the procedures outlined in Section 78-7-9.

UTAH CODE ANN. § 78-11-6 (Supp. 2006).

STATEMENT OF THE CASE

Proceedings Below

Plaintiffs Miguel Carranza and Amelia Sanchez sued the United States under the Federal Tort Claims Act. First Amended Complaint (Doc. 2, Case No. 2:07cv00291, U.S. District Court, District of Utah) ¶ 4. Plaintiffs alleged that their son was stillborn as a result of negligent prenatal care rendered at the Mountainlands Community Health Center in Provo, Utah. *Id.* ¶¶ 26-27. Plaintiffs based their claim for damages on Utah's wrongful death statute. *Id.* ¶ 28.

The United States filed a Motion in Limine to Exclude from Trial All Evidence Regarding Plaintiffs Miguel Carranza and Amelia Sanchez's Damages for Wrongful Death, in which the United States argued that Utah's wrongful death statute does not permit recovery of damages arising from the death of an unborn child. Docs. 21, 22, 25. Plaintiffs filed a memorandum opposing the United States' motion. Doc. 23. In addition, Plaintiffs filed a Motion for Certification of Issue to Utah Supreme Court, which the United States opposed. Docs. 26-29. Judge Dale A. Kimball of the United States District Court issued a Memorandum Decision and Order Certifying Question to Utah Supreme Court. Doc. 31 (addendum at A-1).

Factual Background

Plaintiff Amelia Sanchez received prenatal care at the Mountainlands Community Health Center between December 28, 2005, and April 19, 2006. Memorandum Decision at 2. On April 19, 2006, Mrs. Sanchez went to the Labor and Delivery Department at Utah Valley Regional Medical Center because she was experiencing contractions. Id.; First Amended Complaint ¶ 22. An examination revealed no fetal heartbeat, and it was determined that the fetus had expired. Id. Mrs. Sanchez gave birth to a stillborn male on April 20, 2006. Memorandum Decision at 2; First Amended Complaint ¶ 24.

The parties disagree as to the cause of the fetal demise. Plaintiffs argue that Mrs. Sanchez's labor should have been induced earlier than April 19, 2006, and that the baby would have been born alive if labor had been induced earlier. Memorandum Decision at 2. The United States contends that the medical standard of care did not require earlier induction of labor and that the fetus expired due to an unavoidable "nuchal cord event" (wrapping of the umbilical cord around the fetus's neck). Memorandum Decision at 2-3; see also First Amended Complaint ¶ 24.

SUMMARY OF THE ARGUMENT

Utah's wrongful death statute created a cause of action that did not exist under the common law. Beginning in the late 1800s, the wrongful death statute provided that a parent or guardian could sue for the wrongful death of a "minor child." The plain language of the statute permits a cause of action only for the death of a child who has been born, not for an unborn child. This interpretation of the statute is supported by the Utah Legislature's use of the terms "unborn child" or "unborn individual" when it intends to include an unborn child in a statute's coverage. This interpretation is further supported by the fact that the Legislature has not amended the statute to include unborn children despite the fact that this Court has twice rejected claims for the wrongful deaths of unborn children.

ARGUMENT

I. Legal Framework

A. Federal Tort Claims Act

The Federal Tort Claims Act (“FTCA”) is a limited waiver of the United States’ sovereign immunity. U.S. v. Orleans, 425 U.S. 807, 813 (1976). Under the FTCA, the United States is liable in tort claims to the same extent that a private person would be liable under the law of the state where the alleged tortious activity occurred. 28 U.S.C. §§ 1346(b), 2674 (2006); Franklin v. United States, 992 F.2d 1492, 1495 (10th Cir. 1993). Employees of federally supported community health centers, such as the Mountainlands Community Health Center, are deemed to be employees of the United States for purposes of liability under the FTCA. 42 U.S.C. § 233(a), (g) (2006). Thus, the liability of the United States in the present case is defined by Utah law governing wrongful death claims.

B. Utah’s Wrongful Death Statute

Since the common law recognized no claim for wrongful death, Plaintiffs’ claim derives solely from the wrongful death statute. Behrens v. Raleigh Hills Hospital, Inc., 675 P.2d 1179, 1183 (Utah 1983). Utah’s wrongful death statute, like those of most other states, was patterned after Lord Campbell’s Act, which

was enacted in England in 1846. Id. Utah’s first wrongful death statute was enacted by the Territorial Legislature in 1874. Id. at 1184.

Beginning no later than 1898, Utah’s wrongful death statute provided that a parent could sue for the wrongful death of a “minor child.” See Utah Rev. Stat. § 2911 (1898) (addendum at A-18). The Legislature amended the statute numerous times thereafter, but retained the term “minor child.” See Compiler’s Notes, UTAH CODE ANN. § 78-11-6 (1977 Repl.) [hereinafter “1977 Compiler’s Notes”] (addendum at A-20). The statute did not define “minor child.”

In 2009, the Utah Legislature amended the wrongful death statute in House Bill 329, which “provides that wrongful death claims of children will be handled in the same manner as the wrongful death claims of adults.” See H.B. 329, Utah Code, 2009 Advance Legislative Service, ch. 79 (amending Utah Code sections 78B-3-102 and -106) (addendum at A-22). The legislation consolidated wrongful death claims for both children and adults into a single section that provides for a claim “when the death of a person is caused by the wrongful act or neglect of another.” UTAH CODE ANN. § 78B-3-106(1) (Supp. 2009).

C. Statutory Construction

The question before the Court requires an analysis of what the Legislature intended when it created a cause of action for the wrongful death of a “minor

child.” “When interpreting statutes, we look first to the statute’s plain language with the primary objective of giving effect to the legislature’s intent.” Martinez v. Media-Paymaster Plus, 2007 UT 42, ¶ 46, 164 P.3d 384. The Court will “give effect to the plain language unless the language is ambiguous,” Blackner v. State Dep’t of Transportation, 2002 UT 44, ¶ 12, 48 P.3d 949, or “unless such a reading is unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute,” Perrine v. Kennecott Mining Corp., 911 P.2d 1290, 1292 (Utah 1996). The Court “‘presume[s] that the legislature used each word advisedly [and reads] each term according to its ordinary and accepted meaning.’” Martinez, 2007 UT 42, ¶ 46 (citation omitted). Moreover, “[s]tatutes should be read as a whole and their provisions interpreted in harmony with related provisions and statutes.” Id. When the statutory language is clear, the Court will “refuse to consider public policy arguments or otherwise attempt to assess the wisdom of the legislation.” Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 522 (Utah 1997).

II. The plain language of Utah’s wrongful death statute does not create a cause of action for the wrongful death of an unborn child.

The definition of “child” includes both the living and the unborn. See, e.g., Webster’s Third New International Dictionary 388 (2002) (“1a: an unborn or

recently born human being: fetus, infant, baby . . . 2a: a young person of either sex esp. between infancy and youth”); Random House Webster’s College Dictionary 229 (2d ed. 1999) (“1. a person between birth and full growth; a young boy or girl. 2. a son or daughter. 3. a baby or infant. 4. a human fetus. . . .”); Black’s Law Dictionary 254 (8th ed. 2004) (“1. a person under the age of majority. . . . 3. A boy or girl; a young person. 4. A son or daughter. . . . 5. A baby or fetus. . . .”). However, the Utah Legislature did not establish a cause of action for the wrongful death of a “child,” but rather for a “minor child.” A “minor” child is one “having the status of a legal minor not having reached the age of majority or full legal age” Webster’s Third New International Dictionary 1439; see also Random House Webster’s College Dictionary 843 (“a person under full legal age”); Black’s Law Dictionary 1017 (“A person who has not reached full legal age; a child or juvenile.”). “The period of minority extends in males and females to the age of eighteen years” UTAH CODE ANN. § 15-2-1 (2009 Repl.).

Thus, a “minor” child is defined by the child’s age. Age is measured with reference to the date of live birth, not the date of conception or fetal viability. Webster’s Third New International Dictionary 40 (“age” is “the length of time during which a being or thing has lived or existed: the length of life or existence from birth or beginning to the time spoken of or referred to”); Random House

Webster's College Dictionary 24 ("age" is "a period of human life, measured by years from birth . . ."). See also Fuenmayor v. United States, 626 F. Supp. 2d 1222, 1224 (D. Utah 2009) ("Based on the plain language of the [Utah wrongful death] statute, presuming that the legislature used each word deliberately and purposively, the term 'minor child' does not encompass unborn children, and therefore appears to preclude wrongful death claims based on the death of unborn children."); Alternative Options and Services for Children v. Chapman, 2004 UT App 488, ¶ 34 n.8, 106 P.3d 744 (noting that the definition of "child" in UTAH CODE ANN. § 62A-4a-701 "does not specifically include unborn children. Moreover, children in utero are not customarily referred to as minors . . .") (emphasis added)); Alma Evans Trucking v. Roach, 714 P.2d 1147, 1148 (Utah 1986) (holding that worker's compensation death benefits were not payable prior to the birth of a posthumous child: "We believe that the legislature used the word 'child' in its ordinary and usual sense, viz., a child which has been born. . . . Until the child is born, it is usually referred to as a child in utero or a fetus. While the legislature had the power to award benefits to a child in utero, it clearly did not do so.").

The wrongful death statute establishes a cause of action only for the wrongful death of a "minor child." This is an unambiguous reference to a child

born alive, who has achieved an age between birth and the age of majority. Since the plain language of the statute does not include an unborn child, Utah law does not permit a claim arising from the death of a fetus.

III. When the Utah Legislature intends that a statute cover an unborn child, it includes “unborn” in the statutory language.

The Legislature uses the modifier “unborn” when it intends to include an unborn child in statutory provisions. In the Probate Code, for example, “a parent may represent and bind the parent’s minor or unborn child if a conservator or guardian for the child has not been appointed.” UTAH CODE ANN. § 75-7-303(6) (Supp. 2009) (emphasis added). “Unless otherwise represented, a minor, incapacitated, or unborn individual . . . may be represented by and bound by another” UTAH CODE ANN. § 75-7-304 (Supp. 2009) (emphasis added). The Legislature used similarly explicit language in the Criminal Code: “A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child at any stage of its development.” UTAH CODE ANN. § 76-5-201(1)(a) (2008 Repl.) (emphasis added). The Legislature also distinguished between “children” and an “unborn child” in the Cohabitant Abuse Act: “‘Cohabitant’

means an emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who: . . . (d) has one or more children in common with the other party; [or] (e) is the biological parent of the other party's unborn child;” UTAH CODE ANN. § 78B-7-102(2) (2008 Repl.) (emphasis added).

Thus, when the Utah Legislature intends that a statute cover both living and unborn children, it does so by referring to an “unborn child” or “unborn individual.” This corroborates the conclusion that “minor child” in the wrongful death statute refers only to a child who has been born alive, not an unborn fetus. See Fuenmayor, 626 F. Supp. 2d at 1226 (“[T]he Utah legislature has demonstrated a consistent practice of distinguishing between a ‘minor child’ and an ‘unborn child.’ [footnote omitted] In light of these considerations, the legislature’s use of the term ‘minor child’ unambiguously refers to children born alive”).

IV. The Legislature also demonstrated its intent by retaining the term “minor child” in the wrongful death statute even after this Court had rejected claims based on the alleged wrongful deaths of unborn children.

As discussed above, Utah’s wrongful death statute created a cause of action arising from the death of a “minor child” beginning in the late 1800s. This Court first addressed the availability of a claim for the death of a fetus in 1942. In Webb

v. Snow, 132 P.2d 114 (Utah 1942), the plaintiff alleged that she suffered both personal injuries and a miscarriage as a result of an assault and battery. The jury rendered a verdict in the plaintiff's favor and awarded her the full amount of damages she claimed. Id. at 116. On appeal, the defendants asserted several errors, including the trial court's instruction that the jury could award damages not only for the plaintiff's own injuries but also "for the loss of her unborn child as a result of said miscarriage." Id. at 118. This Court agreed that the challenged instruction was improper:

While injuries resulting in a miscarriage are actionable, and compensation may be awarded for the physical and mental sufferings experienced by a woman who has a miscarriage by reason of injuries caused by the wrongful acts of others, damages are not awarded for "loss of the unborn child" itself. There is no basis for the part of the instruction given by the court.

Id. at 119 (emphasis added; citations omitted).

One year after the Webb decision, the Utah Legislature amended the wrongful death statute but continued to use the term "minor child." See 1977 Compiler's Notes (addendum at A-20). The Legislature again amended the statute in 1951, and again retained the term "minor child." Id. This is significant because legislators are presumed to enact legislation with knowledge of prior judicial interpretations of the law. Cannon v. Univ. of Chicago, 441 U.S. 677, 696-97

(1979); Greenhalgh v. Payson City, 530 P.2d 799, 800-01 (Utah 1975). Thus, the Utah Legislature is presumed to have been aware of the Webb decision when it amended the wrongful death statute, yet the Legislature retained the term “minor child” in each amendment.

The Court next addressed the issue in 1975. In Nelson v. Peterson, 542 P.2d 1075 (Utah 1975), the plaintiff brought an action for the wrongful death of her full-term fetus, which she claimed was stillborn due to the defendants’ negligence in managing her labor. The plaintiff appealed from an adverse jury verdict and argued, among other things, that the trial court had erred in refusing to permit her to proceed at trial with her wrongful death claim. This Court affirmed the verdict: “The third assignment of error is without merit and was decided to be so in the case of *Webb v. Snow*.” Id. at 1077. The Court quoted the statement from Webb that “*damages are not awarded for ‘loss of the unborn child’ itself.*” Id. (alteration in original). Two years after the Nelson decision, the Legislature again amended the wrongful death statute and retained the term “minor child.” See 1977 Compiler’s Notes.

Since the Legislature is presumed to be aware of judicial interpretations of statutes, its retention of the term “minor child” in numerous amendments that were

enacted after this Court's decisions reflects an intent not to include in the wrongful death statute a claim based on the death of an unborn child.

CONCLUSION

For the reasons discussed above, the United States requests that the Court answer the question of law certified by the United States District Court as follows:

Utah's wrongful death statute does not create a cause of action for the wrongful death of an unborn child.

DATED this 4th day of January, 2010.

CARLIE CHRISTENSEN
Acting United States Attorney

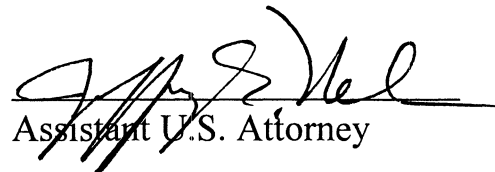
A handwritten signature in black ink, appearing to read "Jeffrey E. Nelson", is written over a horizontal line.

JEFFREY E. NELSON
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Assistant United States Attorneys

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office and that two true and accurate copies of the foregoing **OPENING BRIEF OF THE UNITED STATES** were mailed, postage prepaid, this 4th day of January, 2010, to the following:

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ADDENDUM

Memorandum Decision and Order Certifying Question to Utah Supreme Court, No. 2:07cv00291 (D. Utah May 14, 2009).....	A-1
Utah Rev. Stat. § 2911 (1898).....	A-18
Compiler’s Notes, UTAH CODE ANN. § 78-11-6 (1977 Repl.).	A-20
H.B. 329, Utah Code, 2009 Advance Legislative Service, ch. 79.	A-22

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

**MIGUEL CARRANZA and AMELIA
SANCHEZ, natural parents of Jesua M.V.
Carranza-Sanchez, deceased,**

Plaintiffs,

vs.

**UNITED STATES and John and Jane
Does I-X,**

Defendants.

**MEMORANDUM DECISION AND
ORDER CERTIFYING QUESTION TO
UTAH SUPREME COURT**

Case No. 2:07CV291DAK

Judge Dale A. Kimball

This matter is before the court on two interrelated motions: (1) Defendant United States of America's Motion in Limine to Exclude From Trial All Evidence Regarding Plaintiffs Miguel Carranza and Amelia Sanchez's Damages for Wrongful Death; and (2) Plaintiffs' Motion to Certify Question of Law to the Utah Supreme Court. The court held a hearing on the motions on May 12, 2009. At the hearing, Plaintiffs were represented by Brett R. Boulton and Defendant was represented by Amy J. Oliver and Jeffrey E. Nelson. After careful consideration of the parties' memoranda and arguments made at the hearing, as well as the facts and law relevant to the present motions, the court enters the following Memorandum Decision and Order.

BACKGROUND

Between December 28, 2005, and April 19, 2006, Plaintiff Amelia Sanchez received prenatal care at the Mountainlands Community Health Center in Provo, Utah. Mountainlands and its contracted physicians and employees are deemed to be employees of the United States government by the Health Resources and Services Administration and Bureau of Primary Health Care, in accordance with Section 224(g) of the Public Health Service Act, 42 U.S.C. § 233(g) as amended by the Federally Supported Health Centers Assistance Act of 1995 (P.L. 104-73), for purposes of the Federal Tort Claims Act of 1946 (“FTCA”), 28 U.S.C. § 1346.

On April 19, 2006, Sanchez went to the Labor and Delivery Department at Utah Valley Regional Medical Center where it was determined that the fetus exhibited no movement or heartbeat. Sanchez’s labor was induced, and she gave birth to a stillborn male on April 20, 2006.

Factually, the parties dispute whether medical negligence occurred in this case. Plaintiffs argue that the fetus died because he was post mature, meaning that the baby was alive up to and beyond the time that he reached full term. Plaintiffs allege that medical professionals at Mountainlands breached the applicable standards of care by not monitoring her condition more closely in her final weeks of pregnancy and not inducing labor at her doctor’s visit on April 14, 2006. At that visit, Sanchez had lost her mucous plug and informed her doctor that she was experiencing vaginal bleeding and erratic contractions. Her doctor, however, did not induce her.

The United States’ expert witness, Dr. Later, states that “the cause of stillborn was a nuchal cord event, which unfortunately is unavoidable.” Dr. Later states that the loss of a mucous plug and irregular contractions are common several days before delivery and are not an indication to proceed with an immediate induction. The expert’s report notes that Sanchez called

Mountainlands three days after her doctor's visit, on April 17, 2006, complaining of contractions and discharge. She was told to go to Labor & Delivery, but she did not go until April 19, 2009. Dr. Later opines that even had she gone to the hospital on April 17, findings may have been normal and the cord accident may have still occurred later as it did. He states that cord accidents are not age-related and cannot be predicted.

Plaintiffs present action against the United States is brought pursuant to the FTCA. *See* 28 U.S.C. § 1346 *et seq.* The FTCA authorizes actions against the United States for damages caused by the negligence of government employees under circumstances where a private person would be liable under state law. 28 U.S.C. § 1346(b). The United States is liable to the same extent as a private individual in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b)(1).

On October 12, 2006, in accordance with the regulations implementing the FTCA, Plaintiffs filed the requisite "Standard Form 95—Claim for Damage, Injury, or Death" with the Department of Health and Human Services ("HHS"). *See* 28 C.F.R. § 14.2(b)(1). The Standard Form 95 is designed for any type of claim that can be asserted under the FTCA. The Standard Form 95, therefore, provides boxes or sections for the claimant to state the nature and extent of the claim. The boxes describing the claims are then followed by boxes allowing the claimant to identify the amount of damages sought in connection with the claim.

The relevant section provided on the Standard Form 95 for a description of the claim relevant in this case was pre-printed "personal injury/wrongful death." Under this section, Plaintiffs stated that the nature and extent of the claim was: "Death of Claimant's unborn son, Jesua Miguel Valentin Carranza-Sanchez, as a result of medical malpractice. *See* Addendum."

Plaintiffs attached a four-page Addendum providing a narrative of the nature and extent of their claim. Plaintiffs' Addendum states: "Notice is hereby given by Amelia Sanchez and Miguel Carranza . . . of their intent to commence a medical malpractice action against Mountainlands Community Health Center" and the healthcare professionals providing Sanchez prenatal care who were deemed employees of Mountainlands. The Addendum provides a paragraph identified as "Nature of Claim." Under this heading, Plaintiffs state: "Sanchez and Carranza's claim is based upon the negligent care of the above named health care providers and health care facility and those who may have assisted them in treating Sanchez and her unborn child." The Addendum then gives a factual description of Sanchez's medical conditions, prenatal care, and delivery. Plaintiffs state that because there was a nuchal cord entanglement, which consisted of the cord wrapping one time around the baby's throat, the doctor told Plaintiffs' that an autopsy would not be necessary. Pathology examined the baby and the placenta and observed no fetal anomalies.

Plaintiffs' Addendum concludes with a paragraph entitled "Nature of Injuries and Damages." Under this heading, Plaintiffs state that as a result of the medical negligence, "Plaintiffs, as parents of the deceased, have suffered the injuries described above, including funeral expenses and general damages of pain and suffering, loss of affection, loss of companionship, and loss of happiness of association."

Under the section for "Amount of Claim" on the Standard Form 95, the form provides boxes for "property damage," "personal injury," "wrongful death," and a "total amount." In this damages section, Plaintiffs identified \$1,000,000 of damages in the "wrongful death" box, and \$1,000,000 in the "total amount" box. Plaintiffs did not list any damages under "personal

injury.”

After Plaintiffs submitted their Standard Form 95, the claim was deemed denied because six months passed without a formal denial by HHS. The denial of their claim allowed Plaintiffs to bring their action in this court. Plaintiffs’ First Amended Complaint alleges only one cause of action entitled medical negligence. Plaintiffs allege that Defendants failed “to reasonably and adequately provide medical care to Plaintiff Sanchez during her pregnancy.” First Am. Compl. ¶ 26. Although the claim is styled as a medical negligence claim, many of the allegations and requested damages refer to a wrongful death claim. Plaintiffs allege that

[a]s a direct, proximate, and foreseeable consequence and cause of the aforementioned negligence, acts, failures to act, refusals to act, and breaches of duty on the part of Defendants, Plaintiffs, as the surviving natural parents of the deceased, have personally suffered and will continue to suffer loss of companionship, loss of association, loss of advice, loss of counsel, loss of comfort, loss of happiness of association, and other noneconomic and general damages for the wrongful death of their child in such amounts as the Plaintiffs will establish at the trial hereof. Plaintiffs are entitled to recover all economic and noneconomic damages, together with such other damages as may be provided under Utah’s wrongful death statute of § 78-11-7 and other applicable law, from the Defendants.

Id. ¶ 28. Plaintiffs prayer for relief seeks damages against Defendants: “a. for general damages for Plaintiff’s conscious and unconscious pain and suffering from the date of the death of their child in a reasonable amount;” “b. for general and noneconomic damages for the wrongful death of their child in a reasonable amount;” and “c. for special damages for medical, funeral, and burial expenses incurred as a result of injuries to and the wrongful death of their child as proven.”

ANALYSIS

Defendant's motion in limine asks this court to preclude Plaintiffs from testifying as to any alleged damages of loss of companionship, loss of association, loss of advice, loss of comfort, loss of happiness of association, and other noneconomic and general damages for the wrongful death of their unborn child because none of these damages are cognizable under Utah law. Defendant argues that the court should exclude any evidence related to damages associated with a wrongful death cause of action because there is no claim of action under Utah law for the wrongful death of an unborn child.

Plaintiffs, however, contend that this court should recognize a cause of action for the wrongful death of an unborn child and allow Plaintiffs to testify to the associated damages. Plaintiffs brought a Motion to Certify Question of Law to the Utah Supreme Court asking this court to certify the question of whether Utah's wrongful death statute allows a wrongful death cause of action for an unborn child. Plaintiffs argue that the question presents a controlling issue of law in this case and there appears to be no controlling Utah law. Plaintiffs ask this court to stay its ruling on Defendant's motion in limine until the Utah Supreme Court has acted on the order of certification.

Rule 41(a) of the Utah Rules of Appellate Procedure provides that "the Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court . . . if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain." Utah R. App. P. 41(a). The certification order must state the "question of law to be answered," "that the question certified is a controlling issue of law in a proceeding pending before the certifying court," and "that there appears to be no

controlling Utah law.” *Id.* 41(c). Courts have found that certification is appropriate “when the case concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to illuminate a clear path on the issue.” *State Farm Mut. Auto Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001).

As demonstrated by the parties competing motions, both parties in this case seek a determination of whether Utah law allows a wrongful death action for an unborn child prior to trial. The court, therefore, must determine whether Utah law is uncertain on the issue of whether a cause of action exists for the wrongful death of an unborn child.

The Utah Supreme Court has recognized that “‘the right of action to recover damages for death is not a common-law right, but is one created by statute.’” *State Farm Mut. Auto. Ins. Co. v. Clyde*, 920 P.2d 1183 (Utah 1996) (quoting *Parmley v. Pleasant Valley Coal Co.*, 228 P. 557, 560 (Utah 1924)). “The Utah wrongful death act was originally passed by the Territorial Legislature in 1874 to remedy the harsh effects of the common law rule which did not recognize wrongful death actions at all.” *Behrens v. Raleigh Hills Hospital*, 675 P.2d 1179, 1184 (Utah 1983). Under Utah’s wrongful death statute, as it existed at the time of the case in question, “a parent or guardian may maintain an action for the death or injury of a *minor child* when the injury or death is caused by the wrongful act or neglect of another.” Utah Code Ann. § 78-11-6 (2006) *amended and renumbered by* Utah Code Ann. § 78B-3-102 (2008) (changing language from “may maintain” to “may bring”) (emphasis added).

The dispute between the parties in this case focuses on the meaning of the term “minor child.” The statute does not define the term “minor child.” In interpreting a statute, courts “look

first to the statute's plain language to determine its meaning." *H.U.F. v. V.P.W.*, 203 P.2d 943, 951 (Utah 2009). When determining the meaning of a statute's plain language, "[i]t is presumed that . . . the words and phrases were chosen carefully and advisedly." *Amax Magnesium Corp. v. Tax Comm'n*, 796 P.2d 1256, 1258 (Utah 1990). Defendant argues that the plain language of the wrongful death statute provides a wrongful death action for only a minor child, not an unborn child. Plaintiffs, however, assert that a full-term unborn child could be considered a minor child under the statute. There is no provision specifically excluding an unborn child from the definition of minor child.

Defendant contends it is clear that the Utah Legislature did not intend for plaintiffs to recover damages for the wrongful death of or injury to an unborn child because the legislature omitted the words "unborn child" from the wrongful death statute. Defendant contrasts this omission of "unborn child" in the wrongful death statute with legislature's use of the term "unborn child" in other provisions of the Utah Code. Under Utah's probate code, "a parent may represent and bind the parent's *minor or unborn* child if a conservator or guardian for the child has not been appointed." Utah Code Ann. § 75-7-303(6) (emphasis added). Under Utah Code Annotated Section 31A-22-627(3)(a)(i), an "emergency medical condition" is defined as "placing the insured's health or, with respect to a pregnant women, the health of the women or her *unborn child*, in serious jeopardy." (Emphasis added.) Also, under Utah's criminal code, a person commits "criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute, causes the death of another human being, including an *unborn child* at any stage of its development" *Id.* § 76-5-201(1) (emphasis added)).

Plaintiffs argue that if the legislature intended to hold individuals criminally responsible for the death of an unborn child, then it would logically and morally follow that the legislature also intended to hold individuals civilly responsible when their wrongful actions cause the death of an unborn child. Plaintiffs contend that while the legislature has at times used the term “unborn child” to add clarity with respect to who is affected by certain laws, a failure to do so does not necessarily mean unborn children are not to be protected.

Plaintiffs assert that while there are instances of the term “unborn child” being specifically used by the legislature in other provisions of the Utah Code, there are also other provisions of the code demonstrating the legislature’s commitment to protecting the rights of unborn children. Plaintiff’s specifically point to the preamble to the criminal code’s abortion provisions, which states that “the state of Utah has a compelling interest in the protection of the lives of unborn children,” and “[i]t is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution.” Utah Code Ann. § 76-7-301.1(2) and (3).

In reviewing a separate, but related, issue under Utah's Wrongful Death statute, the Utah Supreme Court stated that it did not need to "decide the more general question of whether the death of a fetus can ever provide the basis for maintaining an action under Section 78-11-6." *State Farm Mut. Auto. Ins. Co. v. Clyde*, 920 P.2d 1183, 1187 n.8 (Utah 1996). In *Clyde*, the court analyzed whether an unborn child's grandparents had standing to bring a wrongful death action under the wrongful death statute. *Id.* at 1185. The *Clyde* court addressed this issue in the context of whether the grandparents were entitled to underinsured motorist benefits after the death of their minor daughter and her unborn child. *Id.*

The *Clyde* court stated that "[b]ecause the legislature has authorized only the 'parent or guardian' of a minor child to maintain an action for the child's wrongful death, the Clydes may not maintain an action unless they qualify as the parents or guardians of [their daughter's] unborn child." *Id.* at 1185. The Clydes asserted that because they provided their daughter's, "and therefore her unborn child's, sole means of support, they stood in loco parentis to the unborn child and should be treated as de facto parents or guardians under section 78-11-6." *Id.* The court concluded that it did not need to look past the plain language of the statute "to conclude that the Clydes do not qualify as the parents or guardians of [their daughter's] unborn child." *Id.* at 1186. The court found the term parent to mean only an immediate parent, not a grandparent. *Id.*

The *Clyde* court also supported its conclusion by reasoning that the legislature's "failure to expressly include persons standing in loco parentis within the class of potential plaintiff's under section 78-11-6 appears to have been an intentional rejection" because the legislature had "used the term 'in loco parentis' in several unrelated statutes." *Id.* at 1187. The court found "that the legislature knew how to use the term 'in loco parentis' but chose not to do so in section 78-1-6 and therefore did not intend to allow persons standing in loco parentis to maintain an action for the wrongful death of a minor." *Id.* The court concluded its analysis by explaining that "[t]he fact that the result in some circumstances may be to unreasonably restrict the class of persons who can bring a wrongful death action is an argument for amendment of the statute, not for our ignoring its words." *Id.* (citation omitted).

Most relevant to the present case, the *Clyde* court then included its footnote stating that because the Clydes did not have standing to maintain an action for the wrongful death of their

unborn grandchild, it did not need to decide whether the death of an unborn child could ever provide the basis for a wrongful death action. The court's footnote cites to two previous Utah Supreme court cases. The court cited to *Webb v. Snow*, 132 P.2d 114, 119 (Utah 1942), in which the court found that no damages are available for the loss of an unborn child, and the dissent in *Nelson v. Peterson*, 542 P.2d 1075, 1079 (Utah 1975), criticizing *Webb*.

Defendant asserts that the Utah Supreme Court's decision in *Clyde* is consistent with its position that Utah law does not recognize a wrongful death action for an unborn child. Plaintiffs, however, assert that the *Clyde* court's footnote clearly indicated that the question was not settled. The *Clyde* court's reasoning is similar to Defendant's reasoning in this case. The plain language of the statute states only minor child and does not include unborn child. The fact that the legislature used minor child or unborn child in other statutes and not in the wrongful death statute indicates that the legislature did not intend to include an action for unborn children under the wrongful death statute. In addition, the argument for inclusion of unborn children under the wrongful death statute is an argument for an amendment of the statute, not for broadly interpreting its words or writing in words that are not present.

The court agrees that the Utah Supreme Court could apply the reasoning of *Clyde* to the question at hand. The definition of minor child, however, does not appear to be as plain or clear as the definition of parent. Also, significantly, the *Clyde* court chose to address whether the grandparents had standing to assert the cause of action instead of simply stating that no such cause of action existed under Utah law. Additionally, the *Clyde* court's footnote indicates that the court does not consider the issue settled. The court could have cited to *Webb* and *Nelson* for the proposition that the issue was settled, as Defendant suggests. But, instead, the court cited to

Webb and *Nelson's* dissent criticizing *Webb*.

In *Webb v. Snow*, 132 P.2d 114 (Utah 1942), in which the plaintiff brought an action for assault and battery that resulted in a miscarriage, the Utah Supreme Court stated:

While injuries resulting in a miscarriage are actionable, and compensation may be awarded for the physical and mental sufferings by a woman who has a miscarriage by reason of injuries caused by the wrongful acts of others, damages are not awarded for "loss of the unborn child" itself.

Id. at 119.

In *Nelson v. Peterson*, 542 P.2d 1075, 1076 (Utah 1975), the plaintiff "appealed from an adverse judgment based in an action for the wrongful death of a full-term fetus together with damages for pain and suffering allegedly caused by the negligent care of plaintiff in connection with the delivery of her stillborn baby." *Id.* at 1076. The Utah Supreme Court found the plaintiff's appeal of the trial court's refusal to permit recovery for the wrongful death of a full-term fetus to be without merit as a result of *Webb*. *Id.* at 1077. The court found that the plaintiff could not complain about the trial court's instruction allowing her to be awarded compensation "for her mental distress even though the death of the fetus was not caused by a battery or by wilful misconduct." *Id.* But the court found the question of damages moot because the jury did not find the defendants negligent. *Id.* The court, however, stated that "[c]ertainly the death of a viable fetus should be considered as much a ground for damages as would a miscarriage. Whether or not it gives a different basis for recovery can be determined when liability has been found in a proper case." *Id.* at 1077-78.

The dissent in *Nelson* found the plaintiff's appeal well taken and criticized the majority

opinion's reliance on *Webb*. *Id.* at 1079 (Maughan, J., dissenting). The dissent stated that *Webb* was "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." *Id.* (Maughan, J., dissenting). The dissent further argued that there was "no moral, biological, or legal rationale for sustaining an outmoded, dry rule laced with the fictions of a bygone era." *Id.* (Maughan, J., dissenting). The court referred to an Oregon state case where the court "rejected the view that an unborn child has no judicial existence apart from its mother and cites those cases representing the weight of authority in this country sustaining the court's opinion." *Id.* (Maughan, J., dissenting).

That the *Clyde* court would cite to *Webb* and the dissent in *Nelson* while stating that it need not determine whether the death of a fetus can ever provide the basis for a wrongful death action convinces this court that the Utah Supreme Court views the issue as unsettled. As recognized by the dissent in *Nelson*, *Webb* is not necessarily controlling of the issue. The *Webb* case involved an assault and battery claim, not a wrongful death claim. As a result, the *Webb* court does not cite to or refer to the wrongful death statute. And, factually, the *Webb* case involved a pregnancy at its very early stages, not a full-term fetus as in *Nelson* and the present case. *Nelson's* reliance on *Webb* as binding is, therefore, questionable. And, the *Clyde* court's citation to *Nelson's* dissent calls *Nelson's* holding into question.

Moreover, unlike this case, the *Nelson* court was reviewing the issue after a jury had determined that the defendants were not negligent. In this case, the court must determine whether evidence of damages relating to a wrongful death action can be presented at trial. The court agrees with the parties that the issue should be determined prior to trial. While Defendant

opposes certification of the question to the Utah Supreme Court, it does so only on the grounds that the question of law is settled. Defendant's motion in limine seeks the issue relating to wrongful death damages to be determined prior to trial. If the court were to wait to certify the question until a determination was made as to medical negligence in this case, the court would potentially be required to hold two trials in the matter. Judicial economy, therefore, supports a finding that the question should be certified and determined before the parties and court incur the expenditures of time and money associated with trial.

Because the issue of whether Utah's wrongful death statute allows a wrongful death action for an unborn child is controlling of the motion in limine pending before the court and the court finds that there is no controlling Utah law, the court concludes that it is appropriate to certify the question to the Utah Supreme Court. This is an important issue of public policy and will likely recur. Moreover, certification of the issue “would further the interest of comity and federalism by giving the Utah Supreme Court an opportunity to answer it in the first instance should it elect to do so under Utah R. App. P. 41.” *See Ohio Cas. Ins. v. Unigard Ins. Co.*, 2009 WL 1160297 at *5 (10th Cir. April 28, 2009).

Defendant's motion in limine also raises the issue of whether plaintiffs can assert damages other than wrongful death damages. Plaintiffs argue that *Nelson* stands for the proposition that evidence of the mother's mental anguish or suffering is admissible whether or not the court finds that the unborn child is covered by Utah's wrongful death statute. 542 P.2d at 1077. Defendants, however, argue that not only can Plaintiffs not recover damages for wrongful death, they cannot recover any other damages related to a broader claim of medical negligence because Plaintiffs' Standard Form 95 stated damages only under the wrongful death category, not

under the personal injury category.

If Plaintiffs had a “general claim for noneconomic damages from the loss of their child” that was distinct from their “more specific claim for noneconomic damages as provided by Utah’s wrongful death statute,” Defendant contends that they were required to indicate on their Standard Forms 95 a sum for those damages that were not wrongful death damages. “The [FTCA] requires that each claim and claimant meet the prerequisites for maintaining a suit against the government If the claimant fails to provide a sum certain within the claim, the administrative claim fails to meet the statutory prerequisite to maintaining a suit against the government, and leaves the district court without jurisdiction to hear the case.” *See Turner ex rel. Turner v. United States*, 514 F.3d 1194, 1200 (11th Cir. 2008) (internal quotation and citation omitted); *see also* 28 U.S.C. § 2675.

Even though Plaintiffs failed to fill in a specific value for personal injury damages, their Addendum to Standard Form 95, stated that “as a result of the [doctors’] negligence, Plaintiffs . . . have suffered the injuries described above, including funeral expenses and general damages of pain and suffering, loss of affection, loss of companionship, and loss of happiness of association. Plaintiffs argue that they did not put an amount for personal injury damages because Sanchez did not suffer any personal injury. Plaintiffs claim that their damages were mental anguish resulting from the alleged wrongful death of their unborn child. Plaintiffs damages for medical negligence and wrongful death are interrelated given that the result of the alleged medical negligence was the death of Plaintiff’s unborn child. Plaintiff’s gave an exhaustive description of those claims in their Addendum.

Given the level of detail provided in Plaintiffs’ Addendum and the interrelated nature of

the damages, the court finds no prejudice to the government from Plaintiffs' failure to list damages in the personal injury category. The court concludes that Plaintiffs' Standard Form 95 and their attached Addendum adequately notified Defendant that Plaintiffs were bringing a medical negligence claim with associated damages, not just a wrongful death claim. Accordingly, the court finds no jurisdictional bar to Plaintiff pursuing damages for Plaintiffs' mental distress associated with their medical negligence claim.

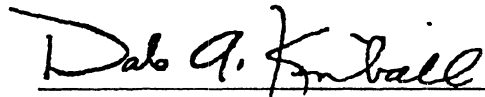
CONCLUSION

Based on the above reasoning, Plaintiffs' Motion to Certify Question of Law to the Utah Supreme Court is GRANTED. This court requests the Utah Supreme Court to answer the following certified question, if it elects to do so: Does Utah's wrongful death statute allow an action for the wrongful death of an unborn child?

As a result of the court's determination to certify this question to the Utah Supreme Court, the court stays its ruling on the wrongful death damages issue raised in Defendant's Motion in Limine to Exclude From Trial All Evidence Regarding Plaintiffs Miguel Carranza and Amelia Sanchez's Damages for Wrongful Death until the Utah Supreme Court rules on the certification order. The court also strikes the pending May 27, 2009 trial date. The court will reset the trial date accordingly.

Pursuant to Rule 41(d) of the Utah Rules of Appellate Procedure, the Clerk of Court shall transmit a copy of this certification order, under this court's official seal, to the Utah Supreme Court. The Clerk of Court shall also certify a copy of any portion of the record in this case as may be directed by the Utah Supreme Court.

DATED this 14th day of May, 2009.



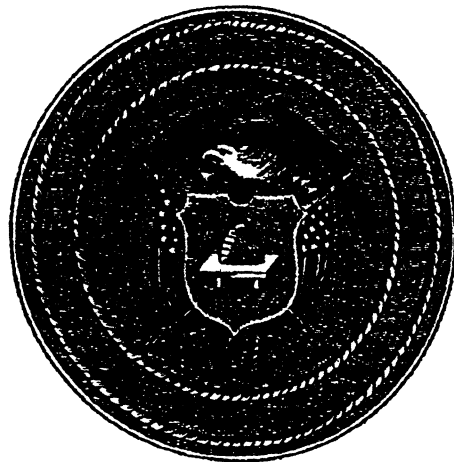
DALE A. KIMBALL
United States District Judge

THE
REVISED STATUTES

OF THE
STATE OF UTAH,

IN FORCE

JAN. 1, 1898.



Revised, Annotated, and Published by Authority of the Legislature,

BY

RICHARD W. YOUNG,

GRANT H. SMITH,

WILLIAM A. LEE,

Code Commissioners.

TOGETHER WITH THE CONSTITUTION OF THE UNITED STATES, THE
CONSTITUTION OF UTAH, THE ENABLING ACT, AND
THE NATURALIZATION LAWS.

infant, insane, or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him. [C. L. § 3174.

Cal. C. Civ. P. § 372.

Guardian to appear for ward, §§ 4009, 4046.

2908. Guardian ad litem, how appointed. When a guardian ad litem is appointed by a court, or the judge thereof, he must be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years and apply within twenty days after the service of the summons, or if under that age or if he neglect so to apply, then upon the application of a relative or friend of the infant, or of any other party to the action.

3. When an infant defendant resides out of this state, the plaintiff, upon motion therefor, shall be entitled to an order designating some suitable person to be guardian ad litem for such infant defendant, unless the defendant or someone in his behalf, within twenty days after service of notice of such motion shall procure to be appointed a guardian for such infant. Service of such notice may be made upon the general or testamentary guardian of such defendant, if he have one in this state; if not, such notice, together with the summons in the action, shall be served in the manner provided by law for publication of summons upon such infant if over fourteen years of age, or, if under fourteen years of age, by such service on the person with whom such infant resides. The guardian ad litem for such non-resident infant defendant shall have twenty days after his appointment in which to plead to the action.

4. When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding. [C. L. § 3175*.

Cal. C. Civ. P. § 373*. Wisconsin § 2614*.

2909. Unmarried female may sue for seduction. An unmarried female, under twenty years of age at the time of her seduction, may prosecute, as plaintiff, an action therefor, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor. [C. L. § 3176.

Cal. C. Civ. P. § 374*.

Limitation of action, one year, § 2879.

2910. Id. When parent or guardian may sue. A father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, who, at the time of her seduction, is under the age of majority; and the guardian, for the seduction of the ward, who, at the time of her seduction, is under the age of majority, though the daughter or the ward be not living with or in the service of the plaintiff at the time of the seduction, or afterwards, and there be no loss of service. [C. L. § 3177.

Cal. C. Civ. P. § 375*.

2911. Parent may sue for injury or death of minor child. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the death or injury of a minor child; and a guardian, for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person. [C. L. § 3178.

Cal. C. Civ. P. § 376.

2912. Heirs, etc., may sue for death of adult. Damages for death unlimited. When the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or, if such person be employed by another person who is responsible for his conduct, then also against

UTAH CODE ANNOTATED 1953

REPLACEMENT

VOLUME 9A

Judicial Code

CONTAINING THE GENERAL AND PERMANENT LAWS OF
THE STATE IN FORCE AT THE CLOSE OF THE
FORTY-SECOND LEGISLATURE, 1977

COMPILED, ANNOTATED AND PUBLISHED UNDER
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criminal or civil action for seduction, 85 A. L. R. 123.

Right of seduced female to maintain action for seduction, 121 A. L. R. 1487.

78-11-5. When parent or guardian may sue.—A parent or guardian may prosecute as plaintiff an action for the seduction of a child who, at the time of seduction, is under the age of majority, though the child or the ward is not living with or in the service of the plaintiff at the time of the seduction or afterwards and there is no loss of service.

History: L. 1951, ch. 58, § 1; C. 1943, pp., 104-11-5; L. 1977, ch. 141, § 2.

Compiler's Notes.

This section is identical to former section 104-3-9 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3. The 1977 amendment rewrote this section to permit parent of either sex to sue for seduction of a child of either sex. Prior to amendment, this section read: "A father, or, in case of his death or desertion of his family, the mother, may prosecute as plaintiff an action for the seduc-

tion of a daughter who, at the time of her seduction, is under the age of majority, and a guardian, for the seduction of his ward, who, at the time of her seduction, is under the age of majority, though the daughter or the ward is not living with or in the service of the plaintiff at the time of the seduction or afterwards and there is no loss of service."

Collateral References.

Seduction § 11.

79 C.J.S. Seduction § 14.

70 Am. Jur. 2d 53, Seduction § 1 et seq.

78-11-6. Injury or death of child—When parent or guardian may sue.—Except as provided in chapter 1, of Title 35, a parent or guardian may maintain an action for the death or injury of a minor child when such injury or death is caused by the wrongful act or neglect of another. Any such action may be maintained against the person causing the injury or death, or, if such person is employed by another person who is responsible for that person's conduct, also against such other person.

History: L. 1951, ch. 58, § 1; C. 1943, pp., 104-11-6; L. 1977, ch. 141, § 3.

who is responsible for his conduct, also against such other person."

Compiler's Notes.

This section is identical to former section 104-3-10 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3 except for the substitution of the reference to section 35 of the 1953 Code for a reference to Title 42 of the 1943 Code.

The 1977 amendment rewrote this section to permit suit by either parent. Prior to amendment, this section read: "Except as provided in chapter 1, of Title 35, a father, or in case of his death or desertion of his family, the mother, may maintain an action for the death or injury of a minor child when such injury or death is caused by the wrongful act or neglect of another; and a guardian may maintain an action for the injury or death of his ward, the ward is of lawful age, when such injury or death is caused by the wrongful act or neglect of another, the action by the guardian to be prosecuted for the benefit of the heirs of the ward. Any such action may be maintained against the person causing the injury or death, or, if such person is employed by another person

Cross-References.

Comparative negligence, 78-27-37 et seq.
Death of person entitled to sue, effect on statute of limitations, 78-12-37, 78-12-38.
Evidence required for recovery, 78-11-12, 78-11-13.

Right to recover damages for death generally, Const. Art. XVI, § 5.

Statute of limitations, wrongful death, 78-12-28.

Survival of cause of action, 78-11-12, 78-11-13.

Voluntary payment of claim not an admission of liability, 78-27-29 et seq.

Conflict of laws.

In action brought in Colorado by father to recover for alleged wrongful death of son while a passenger on defendant's bus, as a result of accident which occurred in Utah, father's right to recover and amount of recovery was governed by constitutional and statutory provisions of Utah. *Stoltz v. Burlington Transp. Co.*, 178 F. 2d 514.

Effective May 12, 2009

WRONGFUL DEATH CLAIMS
2009 GENERAL SESSION
STATE OF UTAH
Chief Sponsor: Lorie D. Fowlke
Senate Sponsor: Curtis S. Bramble

LONG TITLE**General Description:**

This bill provides that wrongful death claims of children will be handled in the same manner as the wrongful death claims of adults.

Highlighted Provisions:

This bill:

► provides that wrongful death claims of children will be handled in the same manner as the wrongful death claims of adults.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:**AMENDS:**

78B-3-102, as renumbered and amended by Laws of Utah 2008, Chapter 3

78B-3-106, as renumbered and amended by Laws of Utah 2008, Chapter 3

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 78B-3-102 is amended to read:

78B-3-102. Injury of a child -- Suit by parent or guardian.

(1) Except as provided in Title 34A, Chapter 2, Workers' Compensation Act, a parent or guardian may bring an action for the ~~[death or]~~ injury of a minor child when the injury ~~[or death]~~ is caused by the wrongful act or neglect of another.

(2) A civil action may be maintained against the person causing the injury ~~[or death]~~ or, if the person is employed by another person who is responsible for that person's conduct, also against the employer.

(3) If a parent, stepparent, adoptive parent, or legal guardian is the alleged defendant in an action for the ~~[death or]~~ injury of a child, a guardian ad litem may be appointed for the injured child ~~[or a child other than the deceased child]~~ according to the procedures outlined in Section 78A-2-227.

Section 2. Section 78B-3-106 is amended to read:

78B-3-106. Death of a person -- Suit by heir or personal representative.

(1) Except as provided in Title 34A, Chapter 2, Workers' Compensation Act, when the death of a person ~~[who is not a minor]~~ is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or, if the person is employed by another person who is responsible for his conduct, then against the other person.

- 44 (2) If the adult person has a guardian at the time of his death, only one action may be
45 maintained for the person's injury or death.
- 46 (3) The action may be brought by either the personal representatives of the adult
47 deceased person, for the benefit of the person's heirs, or by the guardian for the benefit of the
48 heirs, as defined in Section 78B-3-105.