

2009

Migual Carranza and Amelia Sanchez v. United States : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

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

Plaintiffs/Appellants,

v.

UNITED STATES, et al.,

Defendant/Appellee.

Case No.: 20090409-SC

BRIEF OF APPELLANTS

CERTIFICATION OF QUESTION OF STATE LAW TO UTAH SUPREME COURT BY
THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH—CENTRAL DIVISION
JUDGE DALE A. KIMBALL

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §78A-3-102(1).

QUESTION OF LAW CERTIFIED TO UTAH SUPREME COURT

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

Standard of Review: On certification from federal district court, the Utah Supreme Court's duty is to answer the legal question presented. The Court will not seek to resolve the underlying dispute. Spackman v. Board of Educ. Of the Box Elder County Sch. Dist., 2000 UT 87.

CONTROLLING STATUTORY PROVISIONS

§ 31A-22-627. Coverage of emergency medical services

- (1) A health insurance policy or health maintenance organization contract may not:
 - (a) require any form of preauthorization for treatment of an emergency medical condition until after the insured's condition has been stabilized; or
 - (b) deny a claim for any covered evaluation, covered diagnostic test, or other covered treatment considered medically necessary to stabilize the emergency medical condition of an insured.
- (2) A health insurance policy or health maintenance organization contract may require authorization for the continued treatment of an emergency medical condition after the insured's condition has been stabilized. If such authorization is required, an insurer who does not accept or reject a request for authorization may not deny a claim for any evaluation, diagnostic

testing, or other treatment considered medically necessary that occurred between the time the request was received and the time the insurer rejected the request for authorization.

(3) For purposes of this section:

(a) "emergency medical condition" means a medical condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that a prudent layperson, who possesses an average knowledge of medicine and health, would reasonably expect the absence of immediate medical attention at a hospital emergency department to result in:

(I) placing the insured's health, or with respect to a pregnant woman, the health of the woman or her unborn child, in serious jeopardy;

(ii) serious impairment to bodily functions; or

(iii) serious dysfunction of any bodily organ or part; and

(b) "hospital emergency department" means that area of a hospital in which emergency services are provided on a 24-hour-a-day basis.

(4) Nothing in this section may be construed as:

(a) altering the level or type of benefits that are provided under the terms of a contract or policy; or

(b) restricting a policy or contract from providing enhanced benefits for certain emergency medical conditions that are identified in the policy or contract.

Utah Code Ann. § 31A-22-627(3)(a)(I)

§ 76-5-201. Criminal homicide -- Elements -- Designations of offenses

(a) 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.

(b) There shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion.

Utah Code Ann. § 76-5-201(1)

§ 76-7-301.1. Preamble -- Findings and policies of Legislature

(1) It is the finding and policy of the legislature, reflecting and reasserting the provisions of Article I, Sections 1 and 7, Utah Constitution, which recognize that life founded on inherent and inalienable rights is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution.

Utah Code Ann. § 76-7-301.1

§ 75-7-303. Representation by fiduciaries and parents

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

- (1) a conservator may represent and bind the protected person whose estate the conservator controls;
- (2) a guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed;
- (3) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
- (4) a trustee may represent and bind the beneficiaries of the trust;
- (5) a personal representative of a decedent's estate may represent and bind persons interested in the estate; and
- (6) 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)

§ 78-11-6. Injury or death of child -- Suit by parent or guardian

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. § 78B-3-102 (Previously Utah Code Ann. § 78-11-6)

STATEMENT OF THE CASE

Plaintiffs allege that as a result of medical negligence committed in the State of Utah, their full term baby boy was stillborn. Pursuant to 28 U.S.C. 1346(b)(1), the law and place of the negligence applies to all substantive issues in case. Therefore, the law of Utah applies.

Plaintiffs argue that their child died because he was post mature, meaning the baby was alive up to and beyond the time that he reached full term. Plaintiffs allege that Defendant breached the applicable standards of care setting forth reasonable precautions and measures required by the facts of this case.

Plaintiffs evoked Utah's wrongful death statute as set forth in Utah Code Ann. § 78-11-6 in bringing their claim. Plaintiffs requested non-economic damages for the

wrongful death of their child.

Defendant filed its Motion in Limine and requested that “any evidence concerning damages for the wrongful death of their unborn child is inadmissible at trial because none of these damages are cognizable Utah law.” Defendant’s Motion in Limine (Doc. 21), Carranza v. United States, Case No. 2:07cv00291, United States District Court, District of Utah at 1-2. Defendant further argued in its supporting memorandum that “an unborn fetus is not a ‘minor child’ under Utah law and Plaintiffs are not entitled to damages for the wrongful death of their unborn child.” Defendant’s Memorandum in Support of Motion in Limine (Doc. 22 at 3).

Plaintiffs filed their Motion to Certify Question of Law to the Supreme Court. (Doc. 26). This motion was granted by Judge Dale A. Kimball in his Memorandum Decision and Order Certifying Question to Utah Supreme Court. (Doc. 31).

STATEMENT OF RELEVANT FACTS

1. On or about April 14, 2006, Plaintiff Sanchez, nine months pregnant, had an appointment with Dr. George Delaney at the Mountainlands Community Health Center (“MCHC”), located in Provo, Utah. (Doc. 2 at 3).

2. Plaintiff Sanchez had experienced various complications and was subjected to various risks during this pregnancy that concerned her and that should have elicited a

higher standard of care from her treating physicians at MCHC. Id.

3. Treatment notes indicate that the treating physicians at MCHC were aware that Sanchez had suffered from preeclampsia during her first two pregnancies and they suspected that she may have had preeclampsia in this pregnancy. Plaintiff was 39 years old at the time of this pregnancy and as such, her pregnancy was considered a high risk pregnancy which elicits a higher standard of care and caution. Id.

4. Additionally, an ultrasound performed by Dr. Donna S. Dizon-Townson, MD, on February 28, 2006, revealed that the baby may have had an ailment referred to as “double bubble” in the abdomen which raised concerns of a possibility of duodenal atresia and the potential for Down’s Syndrome. In her report, Dr. Dizon-Townson stated that during prolonged observation of the fetus on ultrasound, she felt the “double bubble” had resolved and the stomach appeared to be within normal limits but that it was possible that the baby may have had pyloric stenosis or a partial obstruction with intermittent resolution. Id. at 3-4.

5. Additionally Dr. Dizon-Townson counseled Plaintiff Sanchez that the child was at an increased risk for genetic aneuploidy based on her advanced maternal age, abnormal serum marker screen, and an abnormal ultrasound. Id. at 4.

6. Plaintiff Sanchez was concerned about the baby’s heart rate and expressed

these concerns to Dr. Delaney at the time of her April 14, 2006 visit. A few weeks before her April 14, 2006 visit with Dr. Delaney, Plaintiff Sanchez had an appointment with Monica Sanchez, APRN, of MCHC, where Monica Sanchez, APRN, told Plaintiff that her baby's heartbeat sounded a little weak. Plaintiff Sanchez and her husband, Plaintiff Carranza, asked Monica Sanchez, APRN, why the heartbeat sounded weak. Ms. Sanchez told them that it was due to the positioning of the baby in the womb. On Plaintiff's April 14, 2006 visit, Dr. Delaney told Plaintiff that the heart rate remained low, but was normal at this phase of the pregnancy and that Plaintiff Sanchez had nothing to be concerned about. Id.

7. At this April 14, 2006 appointment with Defendant Delaney, Plaintiff Sanchez expressed concerned about the fact that she had already lost her mucus plug and that she was experiencing erratic, heavy vaginal bleeding and erratic, strong contractions. Id.

8. At the time of the appointment, Plaintiff Sanchez told Dr. Delaney that, based on her experience with the delivery of her first two children and her need to be induced with those deliveries, she felt the loss of her mucus plug, the bleeding, the irregular contractions, the presence of a reduced heart rate, and the fact that she was only one day short of being forty weeks pregnant, were all signs that it was time for her to be

induced. Id. at 4-5.

9. Plaintiff Sanchez requested that she be induced immediately. Id. at 5.

10. Despite the numerous indicators that Plaintiff Sanchez should be admitted to the hospital for induction, including the loss of her mucus plug, the erratic and heavy bleeding, the erratic and strong contractions, the fact that she was forty weeks pregnant, the fact that she was thirty-nine years old, her concern over her baby's weak heartbeat, as well as her experience in her first two pregnancies where she had to be induced, Dr. Delaney negligently told Plaintiff Sanchez that if it were actually time for her to have the baby that she would hurt much more than she did at that time and that her contractions would be more regular. Id.

11. Sanchez again informed Dr. Delaney that her contractions are never regular at the time of her deliveries and that she was in fact quite uncomfortable at this time. Id.

12. Dr. Delaney assured Sanchez that her baby was very strong and that she should not worry. Dr. Delaney negligently ignored Sanchez's request to be induced and the other above described indicators that she and her unborn child were in distress and instead sent Plaintiff Sanchez home without performing a stress test or satisfying Sanchez's concerns. Id.

14. Dr. Delaney negligently set another appointment for Sanchez ten day later,

which would have been a week and half past her due date. Id. at 5-6.

15. On April 19, 2006, Sanchez continued to feel strong erratic contractions. Plaintiff Sanchez checked into Utah Valley Regional Medical Center located in Provo, Utah. She arrived on April 19, 2006 at 10:30 a.m., at which time she received an ultrasound; no heartbeats were found and the baby was diagnosed as deceased. Id. at 6.

16. Dr. Vernon White of MCHC was Sanchez's attending physician and advised that the baby be delivered normally, without the aid of a medical induction. Id.

17. When Sanchez was unable to give birth for many hours and after suffering the physical and emotional pain associated with a prolonged delivery and the knowledge that her child was already dead, Plaintiff Sanchez prevailed upon Defendants to medically induce the labor. Id.

18. The child did not show signs of Down's Syndrome or other defects and was otherwise healthy and viable. Id.

19. Plaintiffs filed suit on May 3, 2007.

20. Following some discovery Defendant's filed their Motion and Memorandum in Limine to Exclude from Trial all Evidence Regarding Plaintiffs' damages for Wrongful Death on April 2, 2009. Doc. 21.

21. On May 14, 2009, Judge Dale A. Kimball of the Utah District Court issued

his Memorandum Decision and Order Certifying Question to Utah Supreme Court. (Doc. 31.)

SUMMARY OF ARGUMENT

Based on the Utah legislature’s explicit and implicit commitment to protecting unborn children, Utah’s wrongful death statute can most reasonably be interpreted to allow for a cause of action for the wrongful death of an unborn child.

ARGUMENT

The dispute between the parties in this case focuses on the meaning of the term “minor child” in Utah’s wrongful death statute codified in Utah Code Ann. § 78-11-6. The statute does not define the term “minor child” and there is no provision excluding an unborn child from the definition of “minor child.” The statute is therefore ambiguous. While the statute is ambiguous, the legislature’s intent to protect the unborn is clear. Given the Utah legislature’s stated commitment to protecting unborn children, the term “minor child” should be interpreted to encompass a unborn child.

- A. The legislature’s use of the term “minor child” in Utah Code Ann. § 78-11-6 is ambiguous and therefore the Court may properly consider relevant policy considerations in determining the intent of the legislature.**

The Utah Supreme Court has held that “a statute is ambiguous ‘if the terms used . .

. may be understood to have two or more plausible meanings.” R&R Industrial Park, L.L.C. v. The Utah Property and Casualty Insurance Guaranty Assoc. 199 P.3d 917, 923 (Utah 2008) (internal citations omitted). Once a statute is deemed to be ambiguous the court may then “use extrinsic interpretive tools such as policy and legislative intent to guide [its] analysis.” Id.

Here, the term “minor child” is ambiguous because it can plausibly be understood to include unborn children, especially because the term is not defined by the legislature and where there is no provision excluding an unborn child from the definition of “minor child.”

B. The Utah legislature has explicitly demonstrated its commitment to protect the unborn.

The Utah legislature has explicitly and clearly demonstrated its commitment to protecting unborn children. In the preamble to the criminal code’s abortion provisions, the legislature 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).

Defendant argues that if the legislature had intended for plaintiffs to be able to

recover damages for the wrongful death of unborn children then it would have used the words “unborn child” in the wrongful death statute. *See Defendant’s Memorandum in Support of Motion in Limine* (Doc. 22) at 4-5. Defendant then cites to other parts of the code where the legislature has used the term “unborn child” to show that when the legislature wants to protect unborn children it uses the precise words to do so. *Id.*

For example, under Utah’s probate code, “a parent may represent and bind the parent’s unborn child if a conservator or guardian for the child has not been appointed.” Utah Code Ann. § 75-7-303(6). Likewise, under Utah Code Annotated § 31A-22-627(3)(a)(I), an emergency medical condition” is defined as “placing the insured’s health or, with respect to a pregnant woman, the health of the woman or her unborn child, in serious jeopardy.”

Plaintiff interprets these statutes as further evidence of the legislature’s commitment to protect the unborn. These measures each seek to protect the rights of the unborn child. In the probate code, unborn children are enabled to be represented in a probate proceeding, while Utah Code Annotated § 31A-22-627(3)(a)(I) provides assistance to unborn children with respect to access to emergency medical care.

The legislature is expansive and liberal in granting protections and rights to the unborn rather than being restrictive. Therefore a narrow interpretation of Utah Code Ann.

§ 78-11-6 which would lessen protection of the unborn would be incompatible with the legislature's stated commitment to policies protecting the unborn.

C. The legislature is committed to holding individuals responsible for harming the unborn.

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." Utah Code Ann. §76-5-201(1).

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 intends to hold individuals civilly responsible when their negligent actions cause the death of an unborn child.

While the legislature has at times used the term "unborn child" to add clarity with respect to who is affected by certain laws, it does not logically or morally follow that failure to do so necessarily means unborn children are not to be protected. This is particularly true when the legislature has affirmatively stated a duty to protect the unborn. While the legislature has a duty to be clear in its usage of words it is not uncommon for

many people, including legislators to consider of fully developed or viable unborn babies as children or persons.

D. Finding that Utah Code Ann. § 78-11-6 allows a claim for the wrongful death of an unborn child would not violate the principle of state decisis.

Although there is no Utah case that has decided whether a wrongful death claim may be made for the death of an unborn child under § 78-11-6 since it was amended in 2003 to include the phrase “minor child”, there are older cases which have addressed the subject generally. Plaintiffs assert that a review of these cases shows that the Court is clearly not bound by these prior decisions and seems to be moving towards the national majority position which allows such claims to be made.

The first Utah case to address this issue is Webb v. Snow, 132 P.2d 114 (Utah 1942). In Webb, the plaintiff brought an action for assault and battery that resulted in a miscarriage. The Utah Supreme Court held that:

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 (Utah 1942).

Thirty-three years after Webb, the Utah Supreme Court decided Nelson v. Peterson, 542 P.2d 1075 (Utah 1975). In Nelson, the Court upheld the holding in Webb

that the plaintiff was not entitled to seek damages for the wrongful death of her unborn child. Id. at 1077.

However, the Court in Nelson then allowed the plaintiff to introduce evidence of the mother's "mental suffering experienced by a woman undergoing such an experience." Id. Similarly, the court in Nelson allowed the defendant to introduce evidence that the deceased child was illegitimate and that the plaintiff was a welfare recipient even though the trial court had granted plaintiff's pre-trial motion to bar defendant from doing. Id.

When a defense witness testified that the deceased child was illegitimate and that the plaintiff was a welfare recipient the trial court justified its refusal to grant plaintiff's request for a mistrial as follows:

She is here claiming great mental anguish because of the loss of the child. I think the fact that it was an illegitimate child might very well have a bearing upon that very thing. Id. At 1077.

The Utah Supreme Court in Nelson concluded that "the jury was entitled to know all the circumstances if they were fairly to appraise the quantum of mental anguish which [the mother] suffered" including the fact that the mother had seven other children and the fact that the child was illegitimate. *See Id.*

In summary, the Court in Nelson holds that a wrongful death claim may not be made for an unborn child but then allows evidence into trial that is essentially impossible

to differentiate from the type of evidence normally presented in wrongful death cases.

Specifically, the jury in Nelson was allowed to consider evidence that the mother plaintiff may have been less entitled for recovery for the loss of her child because she had a lot of children already, was unmarried, and poor; meaning, impliedly, that her emotional loss would be less than a married affluent woman who had no other children.

The Court in Nelson held that when trying to fairly appraise the amount of mental anguish suffered by a Plaintiff who loses an unborn child, “the jury is entitled to know all the circumstances.” (Emphasis added.) Id. at 1077.

Again, the decision in Nelson is self-contradictory in that it held that there could be no claim for the wrongful death of an unborn child but then the Court allowed extensive wrongful death-type evidence to be introduced.

The Nelson decision was decided by a four to one vote with Justice Maughan authoring a compelling dissent:

. . . we would not do an injustice to stare decisis for the reason that the concept advanced by [Webb v. Snow] 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 fictions of a bygone era.

Nelson, at 1079.

Justice Maughan’s dissent in 1975 is even more accurate today as at least 36 states

recognize the right of heirs to make a wrongful death claim for an unborn child. *See* Wrongful Death and the Legal Status of the Previabie Embryo: Why Illinois is on the Cutting Edge of Determining a Definitive Standard for Embryonic Legal Rights, 19 Regent U.L. Rev. 251, footnotes, 40, 41, and 42 and Primer on Legal Recognition & Protection of Unborn & Newly Born, Defending Life 2009, available at <http://dl.aul.org/ubvv/primer-on-legal-recognition- and-protection-of-the-unborn-and-newly-born>, (copies attached).

The most recent Utah case discussing a possible wrongful death claim for an unborn child is State Farm v. Clyde, 920 P.2d 1183 (1996). In Clyde, Mr. and Mrs. Clyde's minor daughter was killed in an automobile accident. The minor daughter was pregnant at the time of the accident and her unborn child also died. The primary issue before the Court in Clyde was whether the grandparents had standing to make a wrongful death claim for the unborn child. The Court held that under Utah Code Ann. § 78-11-6, the Clydes, as grandparents, did not have standing to make a wrongful death claim on behalf of the unborn child. *Id.* at 1186. In making this finding the Court noted:

Because we conclude that the Clydes do not have standing to maintain an action for the wrongful death of their unborn grandchild, we need not 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.

Id. at n. 4.

Based on this language, the Utah Supreme Court in Clyde considers the question of whether the death of an unborn child may be the basis of a claim under Utah Code Ann. § 78-11-6 to be unresolved. Had the Supreme Court taken the position that the death of an unborn child could never be the basis for a claim under Utah Code Ann. § 78-11-6 it could have easily resolved the case before it in that way.

Similarly, the Court, after determining the Clydes did not have standing, could have simply indicated that the death of the unborn grandchild could not have been the basis for a claim under Utah Code Ann. § 78-11-6 and then directly cited to the Webb case. However, instead of stating “see Webb v. Snow” the court used the abbreviation “Cf.” as in “Cf. Webb v. Snow” meaning compare to Webb v. Snow which indicates that there are differences between the two positions and that there remained a “more general question” that did not need to be decided at that time. *See Id.*

Due to the Court’s decision to not answer the “more general question” of whether the death of an unborn child may be the basis for a wrongful death claim in Utah, the current Supreme Court is not bound by stare decisis when determining the intent of the legislature.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the above stated reasons, Plaintiffs request that the Court rule that a wrongful death claim may be maintained for the death of an unborn child.

DATED this 31st day of December, 2009.

FLICKINGER & SUTTERFIELD

A handwritten signature in black ink, appearing to read "Brett Boulton", written over a horizontal line.

Brett R. Boulton

ADDENDUM

1. Memorandum Decision, Judge Dale A. Kimball, United States District Court, District of Utah.
2. *Wrongful Death and the Legal Status of the Preivable Embryo: Why Illinois is on the Cutting Edge of Determining a Definitive Standard for Embryonic Legal Rights*, 19 Regent U.L. Rev. 251.
3. *Primer on Legal Recognition & Protection of Unborn & Newly Born*, Defending Life 2009.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 2009 the foregoing **BRIEF OF APPELLANT** was mailed for filing with the Utah Supreme Court at the address below, and that a true and correct copy of the foregoing was delivered via first class mail, postage prepaid, to each of the following additional parties:

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Clerk of the Court

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Brett L. Tolman, United States Attorney

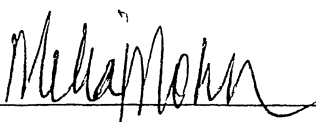
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ADDENDUM 1

Memorandum Decision, Judge Dale A. Kimball,
United States District Court, District of Utah.

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 plaintiffs 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.

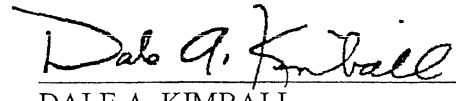
CONCLUSION

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

ADDENDUM 2

Wrongful Death and the Legal Status of the Preivable Embryo: Why Illinois is on the Cutting Edge of Determining a Definitive Standard for Embryonic Legal Rights, 19 Regent U.L. Rev. 251.

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COMMENT: WRONGFUL DEATH AND THE LEGAL STATUS OF THE PREVIABLE EMBRYO. WHY ILLINOIS IS ON THE CUTTING EDGE OF DETERMINING A DEFINITIVE STANDARD FOR EMBRYONIC LEGAL RIGHTS

NAME: Amber N. Dina**SUMMARY:**

.. The birth of Louise Joy Brown, better known as the world's first "test-tube baby," sparked a heated worldwide debate as to the ethical and biological implications of creating human life outside the womb. ... The courts are split where, as a result of the injuries he received, the child is subsequently stillborn. ... The reasons for recovery are compelling. A viable fetus is a human being, capable of independent existence outside the womb, a human life is therefore destroyed when a viable fetus is killed; it is wholly irrational to allow liability to depend on whether death from fatal injuries occurs just before or just after birth; it is absurd to allow recovery for prenatal injuries unless they are so severe as to cause death, such a situation favors the wrongdoer who causes death over the one who merely causes injuries, and so enables the tortfeasor to foreclose his own liability. ... Because of the legislative intent behind section 2.2 of the Wrongful Death Act, as well as the Abortion Law's clear definition of "human being" including the unborn child "from the time of conception," the Miller order concludes that under Illinois statutory law an embryo not yet implanted in the womb is just as much a human being as an embryo developing in utero. ...

HIGHLIGHT: Philosophers and theologians may debate, but there is no doubt in the mind of the Illinois Legislature when life begins. It begins at conception. ¹

TEXT:

[*251]

I. Introduction

In 1978, a healthy baby girl was born in northern England, ² a child not of traditional in vivo ³ fertilization, but rather one born as a result of the groundbreaking technology of in vitro ⁴ fertilization. The birth of Louise Joy Brown, better known as the world's first "test-tube baby," sparked a heated worldwide debate as to the ethical and biological implications of creating human life outside the womb. ⁵ This debate continued as the United States implemented its own in vitro fertilization program at the Eastern Virginia Medical School, ⁶ and when in 1981, Elizabeth Jordan Carr, the first American in vitro success, was born in Norfolk, Virginia. ⁷

To some, this technology was frighteningly reminiscent of Aldous Huxley's prophetic vision of genetically engineered children conceived in laboratories, while others hailed it as a medical miracle. ⁸ The media response initially focused on the ethical debate of "playing God"; however, the legal implications of in vitro fertilization quickly became [*252] relevant. For example, a 1989 article in Time magazine discussed the complex legal dilemmas raised by in vitro technology, including such questions as "Who should exercise primary rights over the frozen embryo?" and "What rights, if any, does the embryo have?" ⁹ Today, more than twenty years after the inception of in vitro fertilization, the courts and state legislatures still struggle with these fundamental questions

In February 2005, in a case of first impression, a Cook County district judge chose to review an interlocutory order to determine whether, under Illinois law, a couple could bring a wrongful death action for the destruction of their frozen preembryo. ¹⁰ The court, in *Miller v. American Infertility Group*, held that a preembryo is a human being and should be given the same legal status as an embryo developing in the womb. ¹¹ That determination caused the media and legal community to probe further into the important issue of what rights should be given to all embryos, including those cryogenically preserved.

This note will focus on the legal status of the previable embryo. It begins with an overview of the processes of in vitro fertilization and cryopreservation. Part III examines the historical framework of wrongful death statutes as well as the various state statutory approaches to the wrongful death of an embryo. Part IV focuses on the struggle to define human life in Illinois, and whether, under Illinois law, there is a wrongful death remedy for a pre-implanted embryo. Finally, Part V challenges the states to allow wrongful death suits for all previable embryos and proposes a guide for change through model legislation.

This note will show why *Miller v. American Infertility Group* should be upheld, and why Illinois is on the cutting edge of establishing a definitive standard for embryonic legal rights

II Overview of In Vitro Fertilization and Cryopreservation

Since the dawn of in vitro fertilization (IVF) in the late 1970s, there has been an explosion of reproductive technologies. While no precise figure exists, it is believed "that more than one million babies have been born worldwide since 1978" as a result of IVF. ¹² In

the United States, approximately 400 clinics offer IVF ¹³ and "at least 60,000 IVF [*253] procedures are performed . . . annually, with an average birthrate of 25%." ¹⁴

To begin the in vitro process, a woman takes fertility drugs. These fertility drugs cause the ovaries to produce several mature eggs (as opposed to the single egg that is naturally released each normal monthly cycle). ¹⁵ After the eggs have matured, they are removed from the ovaries by an IVF surgeon using a needle guided by ultrasound technology. ¹⁶ The harvested eggs are then placed in a Petri dish and mixed with sperm and a special medium that assists in keeping them alive. ¹⁷ Around forty-six hours after the Petri dish conception, a growing "embryo is a translucent, amber-colored mass of two to six cells (blastomeres)," ¹⁸ and

within 72 hours of insemination most healthy embryos will have divided into seven to nine blastomeres. . . . By 96 hours the healthy embryo will have more than 80 blastomeres and will look like a mulberry, or morula. By 120 to 144 hours after insemination, most viable embryos will comprise more than 100 cells and have a fluid-filled center or blastula, and are said to be at the blastocyst stage. ¹⁹

When the embryos have reached the blastocyst stage, the IVF surgeon will use a catheter to place several embryos into the uterus where ideally they will implant and continue to grow. ²⁰

While a normal IVF cycle can result in "one dozen to nearly three dozen eggs for fertilization," only "a few of the resulting embryos are implanted and . . . typically the remainder are cryopreserved." ²¹ As of May 2003, "according to a report released by the Society for Assisted Reproductive Technology . . . , an estimated four hundred thousand embryos are suspended in cryotanks in IVF clinics across the [United States] -- the largest population of frozen embryos in the world." ²² The preembryo in Miller was similarly intended for cryopreservation. [*254]

III. Wrongful Death Statutes

A. Historical Development of Wrongful Death Statutes

Under the English common law, no cause of action existed for wrongful death ²³ because when either the tortfeasor or the victim died prior to litigation of the claim, the claim died as well. ²⁴ The tortfeasor paid no monetary price to the deceased victim's dependents or heirs, making it "cheaper for the defendant to kill the plaintiff than to injure him." ²⁵ This inconsistency in the common law meant that "the greatest injury that one person can inflict upon another, the taking of another's life, was without civil redress." ²⁶ The British Parliament rectified this injustice by passing the Fatal Accident's Act of 1846, ²⁷ commonly referred to as Lord Campbell's Act, which allowed for civil suit by any "person answering the description of the widow, parent or child who, under the circumstances, suffers pecuniary loss." ²⁸

In 1847, following England's lead, New York enacted a wrongful death statute patterned after Lord Campbell's Act. ²⁹ Currently, every state has a statutory remedy for wrongful death that provides compensation to the victim's beneficiaries, and also provides deterrence for negligent behavior. ³⁰

B. History of Recovery for Injuries to the Unborn Child

During the first part of the twentieth century, a tortfeasor in the United States owed no duty to the child within a woman's womb -- only a duty to the pregnant mother. ³¹ Early court cases such as *Dietrich v. Inhabitants of Northhampton* failed to recognize any personhood for the unborn. ³² *Dietrich* addressed whether a pregnant woman could bring a civil suit for the death of her child due to a miscarriage induced by her [*255] fall on a defective sidewalk. ³³ The court held that because the "unborn child was a part of the mother at the time of injury," ³⁴ the child had no separate cause of action for "injuries received by it while in its mother's womb." ³⁵ For over fifty years, the common law reflected this "single entity" view that the unborn child had no legal existence apart from the mother.

However, in 1946, the court in *Bonbrest v. Kotz* rejected the notion that an unborn child is merely an extension of the mother. ³⁶ There, a baby sustained nonfatal injuries due to professional malpractice during delivery. The District Court for the District of Columbia denied the defendant physician's motion for summary judgment agreeing with a Canadian court's assertion that "'it is but natural justice that a child, if born alive and viable should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.'" ³⁷ The court explained that a "viable child being 'part' of its mother is a contradiction in terms" when "modern medicine is replete with cases of living children being taken from dead mothers." ³⁸ Moreover, the court also recognized the previable embryo within the womb as human life, noting that "by the eighth week the embryo . . . is an unmistakable human being, even though it is still only three-fourths of an inch long." ³⁹

This case led the way for courts to recognize a separate action for the wrongful death of an unborn child. Today, although fourteen states still deny recovery for the wrongful death of a child that is not born alive, ⁴⁰ the majority of states allow wrongful death actions for the death of a "viable" unborn child. ⁴¹ Six states give ultimate value in protecting [*256] human life by recognizing a claim for the death of a "previable" embryo. ⁴²

C. Three Jurisdictional Approaches to the Wrongful Death of a Fetus or an Embryo

1. Live Birth

Fourteen jurisdictions apply the most stringent test for liability, which denies all recovery for the wrongful death of a child that is not born alive. ⁴³ Thus, a child wrongfully injured during birth will have no cause of action when a stillbirth results. On the other hand, the "live birth" requirement is satisfied even if the child dies within a few minutes of birth. ⁴⁴ This rule effectuates the standard "that if the defendant does enough damage to terminate the life of the fetus before birth, he simply is not liable." ⁴⁵ While this harsh position does create a bright line standard, it has been criticized for lacking an "understanding about fetal development," since "the rule assumes that a fetus cannot be considered a person . . . at any point prior to birth." ⁴⁶

These minority "live birth" jurisdictions advance seemingly contradictory reasoning to "support their failure to permit a cause of action for the wrongful death of a viable unborn child." ⁴⁷ For example, in *Justus v. Atchison*, parents urged the California Supreme Court to recognize a cause of action for the wrongful death of two full-term children who were delivered stillborn due to medical negligence during the course of delivery. ⁴⁸ The parents argued that "because California recognizes an action for prenatal injuries if a child is born alive, it is illogical to deny a cause of action to a different child who suffers identical prenatal injuries but dies shortly before birth

instead of shortly thereafter." ⁴⁹ Nevertheless, the court's analysis centered on "whether a stillborn fetus is a 'person' within the meaning of the California wrongful death statute." ⁵⁰ The court concluded that, based on the legislative intent behind the California statute, a full-term stillborn child is not a person. The court defended its upholding of the live birth view, stating: **[*257]**

In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life In short, the unborn have never been recognized in the law as persons in the whole sense. ⁵¹

While commentators may have initially opposed those states that allow a wrongful death recovery for the viable fetus, this was a weak argument for the California Supreme Court since at the time of the 1977 Justus decision, "twenty-five states had already recognized the cause of action." ⁵² Also, because wrongful death acts compensate or even vindicate the parents for the death of their unborn child, it does not necessarily follow that the unborn child has no intrinsic human value. Other live birth jurisdictions give similar illogical arguments and echo the poor conclusion of Justus "that a viable unborn child is not a person within the meaning" of their state's statute. ⁵³

In *Stern v. Miller*, the Florida Supreme Court held that a viable unborn child is not a "'person' for purposes of [the Florida wrongful death statute]" despite admitting that the great weight of authority supported allowing recovery. ⁵⁴ The court noted the following arguments in support of the majority viability position:

The courts are split where, as a result of the injuries he received, the child is subsequently stillborn The reasons for recovery are compelling. A viable fetus is a human being, capable of independent existence outside the womb, a human life is therefore destroyed when a viable fetus is killed; it is wholly irrational to allow liability to depend on whether death from fatal injuries occurs just before or just after birth; it is absurd to allow recovery for prenatal injuries unless they are so severe as to cause death; such a situation favors the wrongdoer who causes death over the one who merely causes injuries, and so enables the tortfeasor to foreclose his own liability. ⁵⁵

However, the Florida Supreme Court dismissed these compelling grounds for recognizing the viable unborn child as human life, and instead focused on the intent of the legislature to limit recovery to a "minor child," concluding "that a stillborn fetus is not within the statutory classification." ⁵⁶

Similarly, in the leading minority case of *Witty v. American General Capital Distributors, Inc.*, the Texas Supreme Court recognized that an **[*258]** unborn child has "an existence separate from its mother" and that the live birth jurisdictions are substantially outnumbered by those states adopting the majority rule. ⁵⁷ Yet, the court still refused to allow a mother to collect wrongful death damages for her child's death resulting from prenatal injuries. ⁵⁸

While many of the early live birth cases have been "subsequently overruled by judicial or legislative action," ⁵⁹ California, Florida, and Texas, as well as eleven other jurisdictions, still continue to hold to their minority position of no recovery for the wrongful death of an unborn child.

2. Viability

The majority of jurisdictions do permit fetal wrongful death actions on the condition that the child is "viable" at the time of death. ⁶⁰ A viable child is one that is capable of living outside the womb. ⁶¹ The concept of legal viability "was first suggested by Justice Boggs of the Illinois Supreme Court in his dissent to *Allaire v. St. Luke's Hospital*." ⁶² The majority opinion in *Allaire* held that an infant could not maintain a cause of action for nonfatal injuries received within the womb. However, in dissent, Justice Boggs argued that if the child had received an injury in utero, which later after birth caused the child's death, the common law would treat this as a punishable injury to a human being. Thus, it follows that one who inflicts nonfatal injuries on a child in the womb should also be punished: ⁶³

The law should, it seems to me, be that whenever a child in utero is so far advanced in prenatal age as that, should by parturition by natural or artificial means occur at such age, such child could and would live separable from the mother, and grow into the ordinary activities of life, and is afterwards born, and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother. ⁶⁴

In 1949, the Minnesota Supreme Court, in *Verkennes v. Corniea*, first rejected the live birth requirement in favor of the viability rule. ⁶⁵ **[*259]** The court held that a cause of action would lie when a stillbirth results from prenatal injuries to a viable unborn child. ⁶⁶ In refuting the common law belief that the child in utero is merely an extension of the woman's anatomy, Verkennes cited several cases including *Bonbrest v. Kotz* ⁶⁷ and Judge Boggs's dissent in *Allaire*. ⁶⁸ Verkennes led the way for other jurisdictions to expand liability for the wrongful death of a viable child within the womb.

3. Previability

Currently, Georgia, Illinois, Louisiana, Missouri, South Dakota, and West Virginia have extended wrongful death liability to those injuries causing the death of a previable child. Of these six, "five permit the cause of action at any point during gestation. Georgia alone uses 'quickening' as the point when a wrongful death action is recognized." ⁶⁹

In Georgia, *Tucker v. Carmichael & Sons* first broached the issue of whether an infant could recover damages for prenatal injuries. The state's highest court held in the affirmative for the child, emphasizing that life begins "when the child is able to stir in the mother's womb." ⁷⁰ Four years later, a Georgia appellate court, in *Porter v. Lassiter*, ruled that an action may be maintained for the death of an unborn child who was "quick" or "able to move in the mother's womb" at the time of death. ⁷¹ In this case, the mother was approximately six weeks pregnant at the time of the accident and was four and a half months pregnant when a miscarriage occurred. ⁷² The court determined that the Georgia Code, which allows suit for the wrongful death of a "child," included that of a "quickened" fetus because it also declares that "the wilful killing of an unborn child so far developed as to be ordinarily called 'quick',

sic is considered as murder." ⁷³ Therefore, "as a result of the Porter decision, Georgia became the first state to allow wrongful death recovery for the death of an unborn fetus that may not be viable at the time of the tortious act." ⁷⁴

In 1981, the Louisiana Supreme Court in *Danos v. St. Pierre* initially denied recovery for a six-month-old fetus that suffered prenatal [*260] injury and was subsequently stillborn. ⁷⁵ However, upon rehearing, the court reversed and allowed the parents of the deceased child to recover for the wrongful death. ⁷⁶ To support its ruling, the court reasoned, "The loss to parents of a child who otherwise would have been born normally is substantially the same, whether the tortfeasor's fault causes the child to be born dead or to die shortly after being born alive" ⁷⁷ Also, recent Louisiana legislation had pronounced "that a human being exists from the moment of fertilization and implantation." ⁷⁸ *Danos* also rejected the argument that an unborn child is a part of the mother's anatomy, stating:

We believe the infant is a child from the moment of its conception although life may be in a state of suspended animation the subject of love, affection, and hope and that the injury or killing of it, in its mother's womb . . . gives the bereaved parents a right of action against the guilty parties for their grief, and mental anguish. ⁷⁹

Missouri courts held to the position that a viable fetus is not a "person" within Missouri's wrongful death statute until the 1983 case of *O'Grady v. Brown*. ⁸⁰ In *Rambo v. Lawson*, the Supreme Court of Missouri declined to extend liability to a previable fetus that died in utero as a result of an automobile accident. ⁸¹ However, the court reversed itself in 1995 and allowed recovery for the wrongful death of a previable child at four months gestation. ⁸² In examining the statutory intent behind state abortion regulation, which in part says that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health, and well-being," the court found that the general assembly had directed "that the time of conception and not viability is the determinative point at which the legally protected rights, privileges, and immunities should be deemed to arise." ⁸³

In 1984, South Dakota specifically amended its statute to include the wrongful death of an unborn child. ⁸⁴ In 1986, the Supreme Court of South Dakota held that even under the pre-amendment statute, because of the "clear, overwhelming and growing majority of jurisdictions" permitting actions in such cases, a cause of action for the death of a [*261] viable, unborn fetus did exist under the former wrongful death statute." ⁸⁵

The court further held in *Wiersma v. Maple Leaf Farms* that South Dakota's amended wrongful death statute provides a cause of action for the loss of the previable unborn child. ⁸⁶ In this case, parents had brought a wrongful death action against a frozen food company claiming that the company's salmonella-contaminated chicken had caused the mother to miscarry. At the time of the miscarriage, the unborn child was clearly previable at only seven weeks gestation. ⁸⁷ The court focused its analysis on the construction of the statute, and found that by amending the statute to include an "unborn child" and not a "fetus or embryo," the legislature meant to "include any child still within a mother's womb." ⁸⁸ Furthermore, the intent of the legislature is seen where an "unborn child" in criminal statutes is defined as "an individual organism of the species homo sapiens from fertilization until live birth." ⁸⁹ The court also noted that apart from balancing "the privacy rights of the mother against her unborn child," the term "viability is purely an arbitrary milestone from which to reckon a child's legal existence," since this is a relative matter that may vary depending on the mother's health and other factors apart from the state of development. ⁹⁰

In West Virginia, the landmark case of *Farley v. Sartin* declared that a previable fetus is a "person" within the meaning of West Virginia's wrongful death statute. ⁹¹ In *Farley*, the plaintiff's pregnant wife was killed in an auto accident along with their child who had developed to approximately eighteen weeks gestation. The court held that

justice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child has not yet reached viability at the time of death. . . . Our concern reflects the fundamental value determination of our society that life -- old, young, and prospective -- should not be wrongfully taken away. ⁹²

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IV. Illinois' Struggle to Define Human Life

A. Illinois Wrongful Death Act ⁹³

The Illinois Wrongful Death Act, "enacted by the General Assembly in 1853, created for the first time in Illinois a cause of action for death." ⁹⁴ The Act patterns the 1847 New York statute, which substantially copied Lord Campbell's Act. ⁹⁵

In 1973, Justice Ryan in his dissent to *Chrisafogeorgis v. Brandenburg* asked: "'Why set the line of demarcation at viability? Why should not a cause of action exist for the death of a fetus in its previable state?'" ⁹⁶ In 1980, the Illinois Legislature enacted section 2.2 of the Illinois Wrongful Death Act which states:

The state of gestation or development of a human being when an injury is caused, when an injury takes effect, or at death, shall not foreclose maintenance of any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default. ⁹⁷

Senator Rhoads introduced this bill by explaining that while at the time case law permitted "the representative of the unborn child at viability to bring a cause of action for wrongful death[,]" there was no case law clarifying the gap between conception and viability, a gap that section 2.2 would now fill. ⁹⁸

B. Illinois Case History

1. Case History Prior to *Miller v. American Infertility Group*

In 1973, the Supreme Court of Illinois in *Chrisafogeorgis v. Brandenburg* first addressed whether under the Illinois Wrongful Death Act parents could recover for the wrongful death of a child who dies in [*263] the womb. ⁹⁹ During her thirty-sixth week of pregnancy, an automobile negligently struck Mrs. *Chrisafogeorgis*, later causing her baby boy to be stillborn. The Court had previously

held in *Amman v. Faigy*¹⁰⁰ that "there is a right of action for injuries wrongfully sustained by a viable child . . . when the child survives the injuries and is born alive."¹⁰¹ In *Chrisafogeorgis*, the court chose to extend this liability to a viable fetus that dies in utero.¹⁰² The court cited cases from other jurisdictions which described the bizarre results of only allowing recovery for a child who is born alive. "For example, a doctor or a midwife whose negligent acts in delivering a baby produced the baby's death would be legally immune from a lawsuit. However if they badly injured the child they would be exposed to liability."¹⁰³ Justice Ryan further argued in his dissent that the distinction between viability and nonviability is relative and thus causes similarly incongruous results as the distinction made between a child who dies shortly before birth and one who dies shortly thereafter.¹⁰⁴

In *Renslow v. Mennonite Hospital*, the court held that an infant could maintain an action against the hospital for injuries sustained from a negligent blood transfusion given to the mother prior to the child's conception.¹⁰⁵ The court noted that viability is a relative matter and that "denial of claims for injuries to the previable fetus may indeed cut off some of the most meritorious claims, for there is substantial medical authority that congenital structural defects caused by factors in the prenatal environment can be sustained only early in the previable stages."¹⁰⁶ While *Renslow* did not address wrongful death, it did cast doubt on upholding viability as the standard for recovery.

One year after *Renslow*, the court in *Green v. Smith* addressed whether a father could recover for the wrongful death of a child who died in utero at fourteen weeks gestation.¹⁰⁷ The court held that unless the fetus was viable, there would be no recovery, and that viability was a question of fact to be determined by the jury.¹⁰⁸ The court distinguished this from *Renslow* by stating:

In our opinion there is a clear distinction between a common law cause of action on behalf of a live-born infant for injuries suffered prior to its

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having become viable, and a statutory cause of action for the destruction of a fetus not yet viable. The extent of the loss incurred by a living child burdened with mental or physical defects resulting from a prenatal occurrence is not affected by whether the injuries were suffered prior to or after he became viable. On the other hand, the Wrongful Death Act provides for recovery for the "death of a person," and we find no basis upon which to hold that one can cause the death of a fetus not yet viable.¹⁰⁹

However, in 1980, the Illinois legislature amended the Wrongful Death Act to clarify that age of gestation will not bar recovery for the wrongful death of a developing child.¹¹⁰ *Seef v. Sutkus* is the primary case addressing the wrongful death of a fetus following the amended legislation.¹¹¹ In *Seef*, a child was stillborn at thirty-eight weeks after a physician and hospital negligently failed to monitor the child and to perform a timely c-section.¹¹² The parents sought pecuniary damages for loss of the child's society.¹¹³ The court explained that because section 2.2 of the Wrongful Death Act prohibits limitation of a wrongful death claim based on the state of gestation or development, "an unborn fetus is recognized as a 'person' and parents may recover damages for 'pecuniary injuries' resulting from the death of the unborn fetus."¹¹⁴ The concurring opinion clarifies that the 1980 legislation eliminates the viability requirement of *Chrisafogeorgis*; however, the amount of pecuniary damages that the parents may recover is a separate issue.¹¹⁵

Illinois has led the way in enacting legislation that provides recovery for the wrongful death of a previable fetus. Recently, *Miller v. American Infertility Group* raised the important issue of whether the right of recovery given under the Illinois Wrongful Death Act to any "state of gestation or development of a human being" includes not only an embryo developing in the womb, but also an embryo artificially created and preserved in vitro, outside the womb.¹¹⁶

2. *Miller v. American Infertility Group*

Allison Miller and her husband, Todd Parish, sought treatment for [*265] infertility from the Center for Human Reproduction in Illinois (Center).¹¹⁷ In the typical preparation for in vitro fertilization,¹¹⁸ the Center harvested Allison's eggs and then fertilized them with Todd's sperm. As a result, nine viable embryos were created and then frozen so that they could later be implanted in Allison's uterus. The couple believed "that at least one of these embryos developed into a healthy blastocyst", however, it was wrongfully destroyed by the Center on or around January 13, 2000.¹¹⁹ Allison and Todd first learned of their loss in June 2000 when they wished to transfer the embryo to another facility. The Center notified them by letter stating: "Based on our records, one of our junior embryologists informed you that we would freeze one embryo at the blastocyst stage . . . A [senior embryologist] then decided not to cryopreserve this embryo."¹²⁰

Miller and Parish filed suit against the Center and their complaint consisted of three counts including claims for negligence, willful and wanton misconduct, breach of contract, and wrongful death. On May 4, 2004, Judge David Lichtenstein dismissed with prejudice the claims based on negligence, willful and wanton misconduct, and breach of contract "with leave to replead, provided that the references to the Wrongful Death Act were removed."¹²¹ Upon dismissal, Miller and Parish moved to reconsider. The court (with a new judge, as the previous trial judge had retired) denied the motion, refusing to reconsider the original order. The plaintiffs again moved for reconsideration, and Judge Jeffrey Lawrence chose to review Lichtenstein's dismissal order and the order denying reconsiderations.¹²²

A trial judge has the authority to revisit interlocutory orders -- those orders that do not dispose of "all the counts or issues in the case."¹²³ Lawrence chose to review these orders since the case "involves an issue of public importance which is apparently one of first impression in Illinois."¹²⁴

Not only is this an issue of first impression for Illinois, but one for almost all jurisdictions, with the exception being Rhode Island. In *Frisina v. Women & Infants Hospital of Rhode Island*, the Superior Court of Rhode Island held that three couples could not maintain an action for negligent infliction of emotional distress against a fertility [*266] clinic following the loss and destruction of several frozen embryos.¹²⁵ In analyzing whether the destroyed preembryos were victims, the court cited various cases from other jurisdictions where frozen embryos were "'not recognized as 'persons' for constitutional purposes."¹²⁶ Also, the court deferred to *Miccolis v. Amica Mutual Insurance Co.*,¹²⁷ in which it had held "that a previable fetus is not a 'person' within the meaning of the wrongful death statute."¹²⁸ The *Frisina* court held that this "would also preclude pre-embryos from being considered victims."¹²⁹ Because Rhode Island holds to the viability approach for the wrongful death of the unborn, *Frisina's* failure to extend legal rights to the frozen embryo is not surprising.

In *Miller*, Judge Lawrence presented two key issues. "(1) is a pre-embryo a 'human being' within the meaning of Sec. 2.2 of the

Wrongful Death Act, and (2) must it be implanted in its mother's uterus to give rise to a claim under the Act for its destruction?" ¹³⁰

In analyzing whether section 2.2 of the Illinois Wrongful Death Act includes legal standing for the preembryo, as it does for the previable embryo, Miller emphasizes that the "words in a statute must be given their plain and ordinary meaning." ¹³¹ In 1980, section 2.2 was added to the Wrongful Death Act. It states: "The state of gestation or development of a human being when an injury is caused . . . shall not foreclose maintenance of any cause of action . . . arising from the death of a human being caused by wrongful act" ¹³² This amendment was sponsored by Senator Rhoads, who believed the bill would "close a gap in the current law, both case and statutory law, covering that period . . . from the time of conception to the time of viability." ¹³³

However, neither Rhoads nor any of the other legislators attempted to define "human being." When necessary, the court may use "legislative history and the language of other statutes concerning related subject matter" to discern statutory construction. ¹³⁴ While the Wrongful Death Act fails to define "human being," the Illinois Abortion Law of 1975 does [*267] define the term. ¹³⁵ According to Miller, the Abortion Law makes it clear that while "philosophers and theologians may debate . . . there is no doubt in the mind of the Illinois Legislature when life begins. It begins at conception." ¹³⁶ Section 1 of the Abortion Law declares:

The General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. ¹³⁷

Section 2 of the Illinois Abortion Law states that:

(5) "Fertilization" and "conception" each mean the fertilization of a human ovum by a human sperm, which shall be deemed to have occurred at the time when it is known a spermatozoon has penetrated the cell membrane of the ovum.

(6) "Fetus" and "unborn child" each mean an individual organism of the species homo sapiens from fertilization until live birth. ¹³⁸

Because of the legislative intent behind section 2.2 of the Wrongful Death Act, as well as the Abortion Law's clear definition of "human being" including the unborn child "from the time of conception," the Miller order concludes that under Illinois statutory law an embryo not yet implanted in the womb is just as much a human being as an embryo developing in utero. ¹³⁹

The second issue addressed by Miller is whether a preembryo must be implanted in its mother's uterus to give rise to a claim under the Wrongful Death Act. Judge Lawrence again turns to the construction of the amendment. Although Rhoads's discussion of the bill focuses on the term "gestation," the final version of amendment section 2.2 reads "gestation or development of a human being." ¹⁴⁰ Because section 2.2 also includes the term development, and not merely the term gestation, "it is a reasonable inference that [the legislature] must have contemplated nongestational development or development outside the womb." ¹⁴¹ In conclusion, Miller finds that it would be illogical to "allow a claim for the death of a human being after implantation in its mother's womb but deny it for one before implantation." ¹⁴² [*268]

V. Proposal

A. Why All States Should Permit Recovery for the Wrongful Death of Both Previable Embryos and Preembryos

1. Natural Law Tradition of Valuing Life

If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished . . . and he shall pay as the judges determine. And if any mischief follow, then thou shalt give life for life . . . ¹⁴³

Many jurisdictions, struggling with the determination of when life truly begins, have cited Blackstone to support a position of valuing early human life. For example, Justice Boggs, in his dissent in *Allaire v. St. Luke's Hospital*, cited Blackstone in support of the then innovative concept of legal viability. ¹⁴⁴ Blackstone, reflecting the principle of justice for the unborn in Exodus 21:22, states:

The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But [the modern law] doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemeanor.

An infant in ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours. ¹⁴⁵

Verkennes v. Corniea, the first case to reject the live birth requirement and adopt the viability standard, cited Blackstone in support of its expansion of legal rights for the unborn. ¹⁴⁶ Both Boggs's dissent in Allaire and the majority in Verkennes found inconsistency between the current property and criminal law which treated the unborn as human "from the moment of conception," and the law of negligence [*269] which continued to treat the child as part of the mother. ¹⁴⁷ Blackstone first emphasized this contradiction and declared that life begins "as soon as an infant is able to stir in the mother's womb." ¹⁴⁸

In the Illinois Supreme Court case of Amman v. Faigy, the court similarly cited Blackstone in support of its decision to allow an infant to maintain an action for prenatal injuries when it stated, "It would therefore seem to us to be an unwarranted reflection upon the common law itself to attribute to it a greater concern for the protection of property than for the protection of the person." ¹⁴⁹

The natural law, as reflected by Blackstone, gives foundational support for valuing human life and not treating the death of the unborn as a mere misdemeanor, but rather as an offense equal to that of the wrongful death of any other human being.

2. Scientific Evidence that the Preivable Embryo is Human Life

In Davis v. Davis, a mother sought custody of seven cryogenically frozen embryos following a divorce. ¹⁵⁰ Her ex-husband desired custody in order to have the embryos destroyed. At the trial in Maryville, Tennessee, world renowned French geneticist Jerome Lejeune, M.D., Ph.D., testified to the humanity of the frozen embryos. ¹⁵¹ Lejeune passionately articulated that life begins at conception:

Each of us has a unique beginning, the moment of conception As soon as the twenty-three chromosomes carried by the sperm encounter the twenty-three chromosomes carried by the ovum, the whole information necessary and sufficient to spell out all the characteristics of the new being is gathered." ¹⁵²

Lejeune went on to speak of the unnecessary and potentially misleading terminology of labeling a frozen embryo a preembryo since

before an embryo there is a sperm and an egg, and that's it. And the sperm and the egg cannot be a pre-embryo because you cannot tell what embryo it will be, because you don't know what sperm will go into what egg, but once it is made, you have got a zygote and when it divides it's an embryo and that's it.

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I think it's important because people would believe that a pre-embryo does not have the same significance as an embryo. And in fact, on the contrary, a first cell knows more and is more specialized . . . than any cell which is later in our organism. ¹⁵³

Lejeune's testimony is filled with detailed explanation of scientific advancements concerning the genetic code and the beginning of life. He describes the process of freezing embryos as placing them in a "concentration can." ¹⁵⁴ This "can" does not stop life, to be later started anew after thawing. Rather, the low temperatures greatly slow down cells' microscopic movements and arrest "the flux of time" for the embryo, which if thawed "will again begin to flourish and to divide." ¹⁵⁵ Lejeune clarifies that

an early human being in this suspended time inside the can, cannot be the property of anybody because he is the only one in the world to have the property of building himself. And I would say that science has a very simple conception of man; as soon as he has been conceived, a man is a man. ¹⁵⁶

The trial court heard from a total of seven experts in the fields of genetics, embryology, and in vitro fertilization, four of which agreed "that the seven cryopreserved embryos are human; that is, 'belonging or relating to man.'" ¹⁵⁷ Based on their determination that the embryos were human beings, the trial court awarded the mother custody so that she would have the opportunity to bring the children to term through implantation. However, the court of appeals reversed, holding that "the parties share an interest in the seven fertilized ova" and remanded the case to the trial court to give them "joint control . . . and equal voice over their disposition." ¹⁵⁸ The Supreme Court of Tennessee held that the husband's interests outweighed the wife's, and thus the husband was entitled to custody of the embryos and had the ability to determine whether the embryos should be destroyed. The final outcome of Davis resulted in Tennessee adopting the standard that "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life." ¹⁵⁹

Although Tennessee chose to treat frozen embryos as quasi-property, the testimony of Jerome Lejeune, as well as his research and that of others within the scientific community, gives strong evidence for [*271] supporting the standard that human life begins from the moment the sperm fertilizes the ovum.

The law has long given deference to scientific advancement in the shaping of legal rights given to the unborn. For example, in 1900 Justice Boggs argued that

medical science and skill . . . have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother. . . . Is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother? ¹⁶⁰

In *Bonbrest v. Kotz*, the landmark case which rejected the notion that an unborn child is merely an extension of the mother, the court used current science to correct an error in the law.¹⁶¹ The court held that because "modern medicine is replete with cases of living children being taken from dead mothers," a fetus can no longer be treated as legally one with the mother.¹⁶²

Like *Bonbrest* and other cases which have used the understanding of modern medicine and human development to correct a scientifically outdated law, states should specifically amend their wrongful death statutes to reflect the current scientific evidence that life begins at conception. Not only must the law give rights to embryos in utero, but also to those embryos which are fully human but not yet implanted within the womb. "Once conceived, a man is a man."¹⁶³

3. Inconsistency in Distinguishing In Vivo and In Vitro Preivable Embryos

Those jurisdictions which reject the viability standard in favor of allowing wrongful death recovery for a preivable embryo have justly done so in part due to the relativity and inconsistency of the viability standard. Likewise, Justice Ryan's concurrence in *Green v. Smith* argues for abandoning the viability standard in favor of a more definite standard.¹⁶⁴ Ryan argues that

viability is . . . dependent upon the weight and race of the child and the techniques which are presently available to sustain the life of the fetus outside the womb. . . . For this court to base its determination

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that an unborn child becomes a 'person' only at the point of viability is to premise the right to maintain an action for wrongful death on an uncertain and continually changing standard.¹⁶⁵

However, it is similarly inconsistent for those jurisdictions that have extended legal rights to the preivable embryo in the womb to deny the same rights to the frozen preivable embryo. The only difference between those embryos is that an in vivo embryo has implanted within the lining of the uterus.¹⁶⁶ Implantation, however, is not a definite standard for determining human legal status, since it can occur anywhere from six to twelve days after fertilization of the ovum.¹⁶⁷

The best standard supported by scientific evidence is that of conception. From a legal standpoint, the actual date of conception may be less significant for naturally conceived children; however, it is crucial for those children conceived through in vitro fertilization, since in those cases one can pinpoint the precise timing of conception. The moment that the sperm fertilizes the egg -- whether inside or outside of a woman's body -- human life begins. Wrongful death law, as in *Miller v. American Infertility Group*, should reflect this definite standard.

B. Model Legislation

Below is suggested legislation which states may use as a model to amend their Wrongful Death Acts to reflect modern scientific understanding of human development and give equal legal rights to in vivo and in vitro human life.

The state of gestation of a human being or the location of a developing human being when an injury is caused, when an injury takes effect, or at death, shall not bar any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default.

A "human being" is an individual organism of the species *homo sapiens* beginning with the moment of conception, meaning the fertilization of a human ovum with a human sperm. Any form of preservation of a fertilized human ovum does not change its status as a human being.¹⁶⁸

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VI. Conclusion

All jurisdictions have struggled to define when human life reaches the stage of development that will warrant recovery for wrongful death. The answer to this struggle is modeled both by Illinois' statutory and case law. The legislation protects the preivable embryo, as does *Miller v. American Infertility Group*, which affirms that human life exists from conception until death. According to *Miller*, even preivable frozen embryos should be recognized under wrongful death law as persons with legal status equal to that of a living child. Other preivability jurisdictions should make the logical step to include rights not only for preivable embryos in the womb, but also for those created and preserved through in vitro procedures. Those jurisdictions which still hold to the scientifically outdated standard of "live birth," as well as those which hold to the inconsistent standard of "viability" for wrongful death recovery, should follow Illinois' lead and amend their legislation to adopt "conception" as the definitive standard for embryonic legal rights.

Legal Topics:

For related research and practice materials, see the following legal topics:

[Family Law](#) > [Family Relationships & Torts](#) > [Wrongful Death & Survival](#) > [Children](#) ^{¶1}
[Healthcare Law](#) > [Treatment](#) > [Reproductive Technology](#) > [Artificial Insemination](#) ^{¶1}
[Torts](#) > [Wrongful Death & Survival Actions](#) > [Deceased Persons](#) ^{¶1}

FOOTNOTES:

^{¶1} *Miller v. Am. Infertility Group*, No. 02-L-7394, slip op. at 6 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (order denying motion to dismiss claims brought under Illinois' Wrongful Death Act).

¶n2 FIONA MACDONALD, THE FIRST "TEST-TUBE BABY" 4 (2004).

¶n3 In vivo is defined as "in the living body, referring to a process or reaction occurring therein." STEDMAN'S CONCISE MEDICAL DICTIONARY FOR THE HEALTH PROFESSIONS 1060 (John H. Dirckx ed., 4th ed. 2001) [hereinafter STEDMAN'S MEDICAL DICTIONARY].

¶n4 In vitro is defined as "in an artificial environment, referring to a process or reaction occurring therein, as in a test tube or culture media." Id.

¶n5 MACDONALD, supra note 2, at 32-34.

¶n6 GEOFFREY SHER, VIRGINIA MARRIAGE DAVIS & JEAN STOESS, IN VITRO FERTILIZATION: THE A.R.T. OF MAKING BABIES xvii (3d ed. 2005).

¶n7 MACDONALD, supra note 2, at 31.

¶n8 The First Test Tube Baby, TIME, July 31, 1978, at 58. Huxley's famous novel, first published in 1932, depicts a futuristic world where technicians orchestrate human conception, birth, and childhood development within a laboratory. This society shuns any barbaric woman who chooses to carry a child in her womb and give birth in the traditional way. ALDOUS HUXLEY, BRAVE NEW WORLD (First Perennial Classics 1998) (1932).

¶n9 John Elson, The Rights of Frozen Embryos, TIME, July 24, 1989, at 63.

¶n10 Miller v. Am. Infertility Group, No. 02-L-7394, slip op. at 1 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (order denying motion to dismiss claims brought under Illinois' Wrongful Death Act). Throughout this article and Miller, the term preembryo is primarily used to describe the embryo that is frozen and not yet implanted in the womb. This term is defined in the Illinois Gestational Surrogacy Act as "a fertilized egg prior to 14 days of development." Id. at 2 n.2 (quoting 750 ILL. COMP. STAT. 47/10 (2002)).

¶n11 See infra note 136 and accompanying text.

¶n12 MACDONALD, supra note 2, at 32-34.

¶n13 SHER, DAVIS & STOESS, supra note 6.

¶n14 Laura Bradford, Three Ways to Give Nature a Helping Hand, TIME, Apr. 15, 2002, at 52.

¶n15 SHER, DAVIS & STOESS, supra note 6.

¶n16 Id. at 38.

¶n17 Id. at 86.

¶n18 Id. at 87.

¶n19 Id. at 87-88.

¶n20 Id. at 95.

¶n21 KIM K. ZACH, REPRODUCTIVE TECHNOLOGY 81 (2004). Cryopreservation is the freezing of the embryos for use at a later date. STEDMAN'S MEDICAL DICTIONARY, supra note 3, at 235.

¶n22 Id. at 82-83.

¶n23 W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 127A, at 945-50 (5th ed. 1984).

¶n24 DAN B. DOBBS, THE LAW OF TORTS 803 (2000); see also 12 AM. JUR. TRIALS Wrongful Death Actions § 2, at 317 (2005) (clarifying that this principle "was embodied in the maxim, 'actio personalis moritur cum persona' which literally . . . means that a personal action dies with the person").

¶n25 KEETON ET AL., supra note 23, at 945.

¶n26 12 AM. JUR. TRIALS, supra note 24, § 2, at 323.

¶n27 Id. § 4, at 327.

¶n28 Id. § 4, at 328.

¶n29 KEETON ET AL., supra note 23, at 945.

¶n30 DOBBS, supra note 24, at 804.

¶n31 Id. at 781.

¶n32 138 Mass. 14, 14 (1884), overruled by Torigian v. Watertown News Co., 225 N.E.2d 926 (Mass. 1967). The Supreme Court of Massachusetts decided the first recorded American case of liability for prenatal injuries. Id.

¶n33 Id.

¶n34 Id. at 17.

¶n35 Id. at 15.

¶n36 65 F. Supp. 138 (D.D.C. 1946).

¶n37 Id. at 142 (quoting *Montreal Tramways v. Leveille*, [1933] S.C.R. 456, P 28).

¶n38 Id. at 140.

¶n39 Id. at 140 n.11 (citing GEORGE WASHINGTON CORNER, *OURSELVES UNBORN: AN EMBRYOLOGIST'S ESSAY ON MAN* 69 (1944)).

¶n40 Fourteen states continue to hold to the live birth requirement: Alaska, California, Florida, Indiana, Iowa, Maine, Nebraska, New Jersey, New York, Tennessee, Texas, Utah, Virginia, and Wyoming. See *infra* Part III.C.1.

¶n41 There are currently thirty states that uphold viability as the standard for wrongful death recovery: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, and Wisconsin. See *infra* Part III.C.2; see also Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising from the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question*, 37 *AKRON L. REV.* 41, 53-71, 77-80 (2004).

¶n42 Six states have extended liability to the previable embryo: Georgia, Illinois, Louisiana, Missouri, South Dakota, and West Virginia. See *infra* Part III.C.3.

¶n43 See *supra* note 40.

¶n44 *Kalafut v. Gruver*, 389 S.E.2d 681, 684-85 (Va. 1990).

¶n45 DOBBS, *supra* note 24, at 782.

¶n46 Robin C. Hewitt, *Farley v. Sartin: Viability of a Fetus No Longer Required for Wrongful Death Liability*, 98 *W. VA. L. REV.* 955, 964 (1996).

¶n47 19 AM. JUR. 3D PROOF OF FACTS Wrongful Death of Fetus § 8, at 125 (1993).

¶n48 565 P.2d 122 (Cal. 1977).

¶n49 19 AM. JUR. PROOF OF FACTS, *supra* note 47.

¶n50 *Justus*, 565 P.2d at 124 (citing *CAL. CIV. PROC. CODE* § 377 cmt. (West 2004)).

¶n51 Id. at 131 (quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

¶n52 19 AM. JUR. PROOF OF FACTS, *supra* note 47.

¶n53 Id.

¶n54 348 So. 2d 303, 303 (Fla. 1977).

¶n55 Id. at 305-06.

¶n56 Id. at 307.

¶n57 727 S.W.2d 503, 505 (Tex. 1987) (citing *Leal v. C.C. Pitts Sand & Gravel Co.*, 419 S.W.2d 820 (Tex. 1967)).

¶n58 Id. at 506.

¶n59 19 AM. JUR. PROOF OF FACTS, *supra* note 47.

¶n60 See *supra* note 41.

¶n61 BLACK'S LAW DICTIONARY 1559 (7th ed. 1999).

¶n62 Hewitt, *supra* note 46 (citing *Allaire v. St. Luke's Hosp.*, 56 N.E. 638 (Ill. 1900) (Boggs, J., dissenting)).

¶n63 *Allaire*, 56 N.E. at 641 (Boggs, J., dissenting).

¶n64 Id. at 642.

¶n65 38 N.W.2d 838, 841 (Minn. 1949); see also Marks, *supra* note 41, at 44.

¶n66 *Verkennes*, 38 N.W.2d at 841.

¶n67 65 F. Supp. 138, 138 (D.D.C. 1946).

¶n68 *Allaire*, 56 N.E. at 641-42 (Boggs, J., dissenting).

¶69 Marks, supra note 41, at 71.

¶70 65 S.E.2d 909, 910 (Ga. 1951).

¶71 87 S.E.2d 100, 102 (Ga. App. 1955).

¶72 Id.

¶73 Id.

¶74 Jill D. Washburn Helbling, To Recover or Not to Recover: A State by State Survey of Fetal Wrongful Death Law, 99 W. VA. L. REV. 363, 423 (1996).

¶75 402So. 2d 633, 639 (La. 1981).

¶76 Id.

¶77 Id. at 638.

¶78 Id.

¶79 Id. at 639.

¶80 654S.W.2d 904 (Mo. 1983).

¶81 799S.W.2d 62, 64 (Mo. 1990).

¶82 Connor v. Monkem Co., 898 S.W.2d 89, 90-93 (Mo. 1995).

¶83 Id. at 91 n.6.

¶84 Helbling, supra note 74, at 426 (citing S.D. CODIFIED LAWS § 21-5-1 (1987)).

¶85 Id. at 427 (quoting Farley v. Mount Marty Hosp. Ass'n, 387 N.W.2d 42, 44 (S.D. 1986)).

¶86 543N.W.2d 787, 789 (S.D. 1996).

¶87 Id.

¶88 Id. at 790.

¶89 Id. (citing S.D. CODIFIED LAWS § 22-1-2(50A) (1996)).

¶90 Id. at 792.

¶91 466 S.E.2d 522, 532 (W. Va. 1995).

¶92 Id. at 533.

¶93 The text of section 1 of the act reads as follows:

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured

740 ILL. COMP. STAT. 180/1 (2002).

¶94 740ILL. COMP. STAT. ANN. 180/0.01 hist. n. (West 2002).

¶95 Id.

¶96 John C. Wunsch, Parental Recovery for Loss of Society of the Unborn: The Plaintiff's Perspective, 77 ILL. B.J. 538, 539 (1989) (quoting Chrisafogeorgis v. Brandenburg, 304 N.E.2d 88, 92 (Ill. 1973) (Ryan, J., dissenting)).

¶97 740 ILL. COMP. STAT. 180/2.2 (2002).

¶98 Wunsch, supra note 96 (quoting 81st Ill. Gen. Assemb., S. Proc., May 17, 1979, at 165 (statement of Sen. Rhoads)).

¶99 Chrisafogeorgis, 304 N.E.2d at 88-89.

¶100 114 N.E.2d 412 (Ill. 1953).

¶101 Chrisafogeorgis, 304 N.E.2d at 89 (citing Amman, 114 N.E.2d at 417-18).

¶102 Id. at 91.

¶n103 Id. at 92.

¶n104 Id. at 92-93 (Ryan, J., dissenting).

¶n105 367 N.E.2d 1250, 1255 (Ill. 1977).

¶n106 Id. at 1252-53 (citing Note, The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries, 110 U. PA. L. REV. 554, 563 (1962)).

¶n107 377 N.E.2d 37, 38 (Ill. 1978).

¶n108 Id. at 39.

¶n109 Id. at 38-39.

¶n110 740 ILL. COMP. STAT. 180/2.2 (2002).

¶n111 583 N.E.2d 510 (Ill. 1991).

¶n112 Id. at 511.

¶n113 Id. In the sense used here, "society" means "the general love, affection, and companionship that family members share with one another." BLACK'S LAW DICTIONARY 1396 (7th ed. 1999).

¶n114 Seef, 583 N.E.2d at 511.

¶n115 Id. at 512-13 (Miller, J., concurring).

¶n116 Miller v. Am. Infertility Group, No. 02-L-7394, slip op. at 3 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (quoting 740 ILL. COMP. STAT. 180/2.2 (2002)) (order denying motion to dismiss claims brought under Illinois' Wrongful Death Act).

¶n117 Id. at 1.

¶n118 See supra Part II.

¶n119 Miller, No. 02-L-7394, at 1-2.

¶n120 Dee McAree, Wrongful Death Suit Allowed over Embryo, NAT'L L.J., Feb. 14, 2005, at 4 (alteration in original).

¶n121 Miller, No. 02-L-7394, at 2.

¶n122 Id.

¶n123 Id.

¶n124 Id.

¶n125 CIV. A. 95-5827, 2002 WL 1288784, at *1-2 (R.I. Super. Ct. May 30, 2002).

¶n126 Id. at *4-5 (quoting Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998)).

¶n127 587 A.2d 67 (R.I. 1991).

¶n128 Frisina, 2002 WL 1288784, at *8 (citing Miccolis, 587 A.2d at 71).

¶n129 Id. at *8.

¶n130 Miller v. Am. Infertility Group, No. 02-L-7394, slip op. at 3 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (order denying motion to dismiss claims brought under Illinois' Wrongful Death Act).

¶n131 Id. at 4 (citing Lulay v. Lulay, 739 N.E.2d 521, 527 (Ill. 2000)).

¶n132 740 ILL. COMP. STAT. 180/2.2 (2002) (emphasis added).

¶n133 Miller, No. 02-L-7394, at 4-5 (quoting 81st Ill. Gen. Assemb., S. Proc., May 17, 1979, at 168 (statement of Sen. Rhoads)).

¶n134 Id. at 4 (citing People v. Hickman, 644 N.E.2d 1147, 1152 (Ill. 1994)).

¶n135 720 ILL. COMP. STAT. 510/1-15 (2002).

¶n136 Miller, No. 02-L-7394, at 6.

¶n137 720 ILL. COMP. STAT. 510/1 (2002).

¶n138 Id. at 510/2; see also id. at 5/9-1.2 (defining "unborn child" under the Illinois intentional homicide statute to "mean any individual of the human species from fertilization until birth").

¶n139 Miller, No. 02-L-7394, at 6.

¶n140 740 ILL. COMP. STAT. 180/2.2 (2002).

¶n141 Miller, No. 02-L-7394, at 8.

¶n142 Id.

¶n143 Exodus 21:22-23 (King James).

¶n144 Allaire v. St. Luke's Hosp., 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting).

¶n145 1 WILLIAM BLACKSTONE, COMMENTARIES *129-30.

¶n146 38 N.W.2d 838, 840 (Minn. 1949).

¶n147 Id. (citing Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946)).

¶n148 1 BLACKSTONE, supra note 145, at *129.

¶n149 114 N.E.2d 412, 429 (Ill. 1953).

¶n150 No. E-14496, 1989 WL 140495, at *1 (Tenn. Cir. Ct. Sept. 21, 1989), overruled by 842 S.W.2d 588 (Tenn. 1992).

¶n151 JEROME LEJEUNE, THE CONCENTRATION CAN: WHEN DOES HUMAN LIFE BEGIN? AN EMINENT GENETICIST TESTIFIES 22-23 (Ignatius Press 1992) (1990). In 1959, Jerome Lejeune's genetic research identified the human chromosomal abnormality that accounts for Down syndrome, or Trisomy 21, the first chromosomal disorder to be positively identified. For his research on Down syndrome, he received the Kennedy Award and the William Allen Memorial Award, the highest honor in the world for genetics. Id.

¶n152 Id. at 30.

¶n153 Id. at 37-38.

¶n154 Id. at 47.

¶n155 Id. at 36.

¶n156 Id. at 47-48.

¶n157 Davis v. Davis, No. E-14496, 1989 WL 140495, at *4 (Tenn. Cir. Ct. Sept. 21, 1989), overruled by No. 180, 1990 WL 130807, at *3 (Tenn. Ct. App. Sept. 13, 1990).

¶n158 Davis v. Davis, 842 S.W.2d 588, 589 (quoting Davis, 1990 WL 130807, at *3).

¶n159 Id. at 597.

¶n160 Allaire v. St. Luke's Hosp., 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting) (emphasis added).

¶n161 65 F. Supp. 138, 139-40 (D.D.C. 1946).

¶n162 Id. at 140.

¶n163 LEJEUNE, supra note 151, at 48.

¶n164 377 N.E.2d 37, 40-41 (Ill. 1978) (Ryan, J., concurring). This case was prior to the 1980 amendment to the Illinois Wrongful Death Act that established a previability standard for wrongful death recovery for the unborn.

¶n165 Id. at 40.

¶n166 Implantation is defined as "attachment of the fertilized ovum (blastocyst) to the endometrium, and its subsequent embedding in the compact layer." STEDMAN'S MEDICAL DICTIONARY, supra note 3, at 490.

¶n167 Allen J. Wilcox, Donna Day Baird & Clarice R. Weinberg, Time of Implantation of the Conceptus and Loss of Pregnancy, 340 NEW ENG. J. MED. 1796, 1797 (1999).

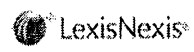
¶n168 This model legislation is a modification of section 2.2 of the Illinois Wrongful Death Act. See 740 ILL. COMP. STAT. 180/2.2 (2002).

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ADDENDUM 3

Primer on Legal Recognition & Protection of Unborn & Newly Born,
Defending Life 2009.

Primer on Legal Recognition & Protection of Unborn & Newly Born

By Denise M. Burke

Vice President of Legal Affairs, Americans United for Life

The unimaginable grief and suffering endured by Laci and Conner Peterson's family has, largely due to their own courageous advocacy, been transformed into a blow for justice on behalf of unborn victims of criminal violence. In April 2004, President Bush signed the "Unborn Victims of Violence Act", more commonly known as "Laci and Conner's Law," filling an important gap in federal law. Federal prosecutors may now charge an assailant in the death of an unborn child when the death occurs on federal property, such as military installations, or when the death stems from the commission of a federal crime.

More importantly, Laci and Conner lived in a state (California) where prosecutors could press murder charges for the deaths of both this young mother and her unborn son. Thirty-six states carry such provisions in their criminal law, often referred to as fetal homicide laws. As for the remaining 14 states, Laci Peterson's mother, Sharon Rocha, has said it best, that they are in effect telling grieving families that "innocent victims [like Conner] are not really victims—indeed that they never existed at all."

Twenty years ago, the picture was even more bleak. The vast majority of states followed the outdated born-alive rule, requiring an unborn victim to be born after the assault, and then to die, before prosecutors could press charges.

Thanks in large part to research and advocacy by Clarke D. Forsythe of Americans United for Life (AUL), this picture has changed, including the enactment of the California law which permitted prosecutors to file charges for the deaths of both Laci and Conner Petersen.

Unborn victims of violence laws are just one example of how states may provide legal recognition of and protection for the unborn outside the context of abortion. There are several more available under both criminal and civil statutes.

Issues

Fetal Homicide

In recent years, several high-profile cases from across the nation have highlighted the need for laws protecting unborn victims from criminal violence. Perhaps most notably, the tragic deaths of Laci and Conner Peterson have focused much-needed attention on this critically important issue. Currently, 36 states provide some degree of protection for unborn victims of homicide.

Under common law,¹ the killing of an unborn child was not considered a homicide unless the child was first born alive and then died as a result of a criminal prenatal act. This rule, called "the born-alive rule," is still followed in a majority of states that have not enacted spe-

cial legislation to protect unborn children from criminal violence. Thus, if someone shoots a pregnant woman, killing her child, he or she is not subject to criminal prosecution for the murder of the child unless the child is first born alive and then dies as a result of the injuries which the child sustained before birth. The purpose of the laws protecting unborn victims of homicide, also known as fetal homicide laws, is to overturn the common law born-alive rule and criminalize conduct causing the death of an unborn child. These laws are not directed at abortion which, under current constitutional doctrine, is protected.

Nonfatal Assaults on the Unborn

On occasion, the assailant's attack does not result in the death of the unborn child, but instead injures the child *in utero* (perhaps also resulting in a premature delivery). In such instances, 21 states permit the prosecution of the assailant for assault.

One-Victim Laws

A minority of jurisdictions—11 states—have enacted one-victim laws that permit prosecutions and enhanced penalties in cases where a woman is assaulted and suffers a miscarriage, stillbirth, or “damage to [her] pregnancy.” Notably, of these states, six do not have another law (such as a fetal homicide law) that recognizes the unborn child as a second victim of the attack.²

Prevention and Treatment of Maternal Drug and Alcohol Abuse

In recent years, a number of states have passed laws providing protection for women and their children from the ravages of drug and alcohol abuse. The intent of these laws is not to criminalize the mother's use of drugs and/or alco-

hol, but to provide, encourage, and, in some cases, mandate reporting and treatment. Similarly, 20 states fund special drug and alcohol treatment programs for pregnant women and newborns.

Civil Causes of Action for the Wrongful Death of an Unborn Child

Moreover, by court decision or statute, 38 states allow a wrongful death (civil) cause of action for the death of an unborn child.³ Of these, 29 states allow a wrongful death suit if the child is viable; nine states allow suits for a pre-viable unborn child; and 12 states still require a live birth, barring a cause of action for the death of the unborn child unless the child is born alive and dies thereafter.

Refusal to Recognize Wrongful Life or Wrongful Birth Lawsuits

A number of states also refuse to recognize wrongful life or wrongful birth causes of action. “Wrongful life” is an “action...brought by or on behalf of the child...[who] alleges, because of the defendant's negligence, his parents either decided to conceive him ignorant of the risk of an impairment or birth defect, or were deprived of information during gestation that would have prompted them to terminate the pregnancy.”⁴ Simply put, in a wrongful life action, a child is arguing that (1) the pregnancy should have been terminated; (2) that “but for the defendant's negligence” the plaintiff would not have been born; and (3) the plaintiff's life would have been better not lived.⁵

Meanwhile, “wrongful birth” is an “action brought by the parent of a child born with an impairment or birth defect.” The basic argument made by the parent is that he/she would have aborted the child if he/she had known that

the child would be disabled.⁶ Since the birth defect is naturally occurring, “[t]he parent alleges that the negligence of those charged with prenatal testing or genetic counseling deprived them of the right to make a timely decision regarding whether to terminate a pregnancy because of the likelihood their child would be born physically or mentally impaired.”⁷

Wrongful life and wrongful birth claims raise significant issues because their core arguments attack the sanctity of life of every human person—these claims assert that some lives are better off not lived, that the disabled are better off dead.⁸ To term children with disabilities “defective” and advocate for their elimination prior to birth is to dangerously re-classify the disabled as less human, to grant these citizens fewer rights, and to attribute a lower value to their lives and contributions to humanity.”⁹

Currently, 29 states have either refused to recognize or limited a wrongful life action, while three states expressly permit this controversial cause of action.

Unfortunately, wrongful birth causes of action have found significantly greater acceptance by state courts, legislatures, and the public. Thirty-two states permit wrongful birth causes of action, while only 11 states expressly prohibit such causes of action.

Myths & Facts

Myth: Laws extending legal recognition and protection to unborn children are unconstitutional because they give legal status to an unborn child and/or contradict the established tenets of *Roe v. Wade*.

Fact: Despite numerous challenges, no law

protecting unborn children outside the context of abortion have been struck down as unconstitutional. Moreover, these laws do not directly implicate the right to choose an abortion. For example, unborn victims of violence laws, also known as fetal homicide laws, specifically exclude the performance of a legal abortion from potential criminal liability. They also do not apply to conduct to which the mother of the unborn child (or her legal guardian) consents, such as medical treatment or an abortion.

Myth: Crimes that result in the death of or injury to an unborn child are merely offenses against the pregnant woman, with death or harm to the unborn child being an incidental or accidental consequence.

Fact: The failed effort by Senator Dianne Feinstein (D-CA) to gut “Laci and Conner’s Law” (by making assault on a pregnant woman an “enhanced offense” if her unborn child also dies) sought to perpetuate this view. Nothing, in fact, could be further from the truth. In many cases involving violence against pregnant women, the assailant attacks a pregnant woman with the intent of killing the unborn child by causing a miscarriage or stillbirth. In some, the woman refused to have an abortion and the child’s father, rather than respecting her choice, reacts violently to end the pregnancy. In these situations, women have been savagely beaten, pushed down flights of stairs, and suffered blows, stab wounds, and gunshots targeted to the abdomen. Sometimes, this violence takes a less savage, but no less deadly turn. In 2002, an Ohio physician whose pregnant girlfriend had refused to have an abortion spiked her drink with a prescription drug known to cause miscarriage.

Myth: Now that we have the federal “Unborn

Victims of Violence Act,” there is no need to pass similar state protections.

Fact: Murder and assaults, except in limited circumstances, are typically state crimes. The vast majority of the criminal prosecutions for homicide and assault take place in state courts, not in federal courts, so it is critical that each state protect the unborn from criminal violence. Conversely, “Laci and Conner’s Law” only applies to federal crimes and federal jurisdictions, such as military installations.

Thus, the biggest impact of “Laci and Conner’s Law” may be in its revisions to the Uniform Code of Military Justice (UCMJ). Military prosecutors can now pursue charges against military personnel stationed anywhere in the world if their actions cause the death of an unborn child; previously, they were limited to filing such charges only in those states with laws protecting unborn victims of violence. A case such as that of Airman Gregory L. Roberts, who in 1996 savagely beat his pregnant wife, rupturing her uterus and killing their unborn daughter, resulted in manslaughter charges only because Ohio, where he was stationed, had such a law on its books. Had Roberts been stationed in Colorado or North Carolina—states with a significant military presence, but no law protecting an unborn child from violence—he could not have been charged with his daughter’s death and would have faced prosecution only for the assault on his wife.

decrees of courts recognizing, affirming, and enforcing such usages and customs. The most common source of American common law is English common law.

² These states are Arkansas, Colorado, Indiana, Iowa, Kansas, Maine, Michigan, Mississippi, New Hampshire, New Mexico, and Wyoming. Five states, Arkansas, Indiana, Kansas, Michigan, and Mississippi, have so-called one-victim laws on the books, but also define certain offenses against the unborn child as “homicide.”

³ See Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising from the Death of an Embryo or Fetus and Michigan’s Struggle to Settle the Question*, 37 Akron L. Rev. 41 (2004). See also Amber Dina, *Wrongful Death and the Legal Status of the Preivable Embryo*, 19 Regent U. L. Rev. 251 (2006/2007). (Nebraska and Texas have changed their law by statute since 2004).

⁴ See e.g., *Willis v. Wu*, 607 S.E.2d 63, 66 (S.C. Dist. Ct. 1980).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See *Gleitman v. Cosgrove*, 227 A.2d 689; *Willis*, 362 S.E.2d 63; *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982); *Harbeson v. Parke-Davis*, 656 P.2d 483 (Wash. 1983); and *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984).

⁹ Darpana M. Sheth, *Better Off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act*, 73 Tenn. L. Rev. 641, n.23 (2006) (arguing that wrongful birth and wrongful life claims violate the “Americans with Disabilities Act”).

For more information about unborn victims of violence laws, see the “Quick Reference Table” in the Appendix.

Endnote

¹ As distinguished from laws created by the enactments of legislatures, the common law comprises the body of those principles and rules of action, relating the government and security of persons and property, that derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and

