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Comment
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ALABAMA'S WRONGFUL DEATH ACT AND THE UNBORN PLAINTIFF

I. INTRODUCTION

In the United States Supreme Court's infamous decision of *Roe v. Wade*, [1] the Court held that a State's interest in potential life starts at the point of viability of the fetus. [2] In the years since *Roe*, Alabama has wrestled with the concept of viability as it pertains to wrongful-death causes of action. [3] Recently, the Alabama Supreme Court concluded that the state's Wrongful Death Act [4] permits an action for the death of a fetus regardless of whether the fetus was viable at the time of the death or at the time of the injury. [5]

In light of the court's decision in *Mack v. Carmack*, [6] Kimberly Stinnett ("Stinnett"), just a year later, sued her obstetrician Dr. Karla Kennedy ("Dr. Kennedy") for the wrongful death of her unborn fetus. [7] After the suit had been filed, Dr. Kennedy filed a motion to dismiss [8] Stinnett's wrongful death claim. [9] The trial court granted the motion, and Stinnett appealed to the Supreme Court of Alabama. [10] Stinnett's appeal was based solely on the issue of whether she could assert a wrongful-death claim against Dr. Kennedy for the death of her unborn fetus pursuant to ***196** section 6-5-391 of the Alabama Code. [11] After acknowledging that the court had previously held that Alabama's Wrongful Death Statute permitted an action for the death of an unborn fetus, the court turned to Dr. Kennedy's argument. [12]

Dr. Kennedy argued that the Homicide Act, [13] and the legislature's recent amendment to it--the Brody Act, which provides an exception for physicians--should also be applied to civil claims under the Wrongful Death Act. [14] The court noted that although the legislature intended some congruencies between the Wrongful Death Act and the Homicide Act, there was never any intent by the legislature to synchronize the distinctions in civil and criminal liability stated within the respective statutes. [15] That is, the *Stinnett* court not only reaffirmed its stance that the viability requirements are no longer relevant for pursuing wrongful-death claims, [16] it also drew a line in the sand with respect to the congruency between the Wrongful Death Act and the Homicide Act.

The purpose of this comment is to analyze Alabama's wrongful-death jurisprudence with respect to the death of unborn fetuses. Thus, Alabama's wrongful death statutes, as well as prior common law precedent dealing with the issue of viability as it relates to a fetus, will be explored first. Additionally, this comment will discuss further the newest Alabama Supreme Court decision on the issue, *Stinnett v. Kennedy*. Lastly, this comment will explain the author's views on the future of Alabama's wrongful death laws in regard to unborn fetuses.

II. THE WRONGFUL DEATH ACT VS. THE HOMICIDE ACT

Wrongful-death claims comprise a great number of the causes of action brought in courts throughout the state of Alabama each year. Alabama's Wrongful Death Act lays out when a person can bring a lawsuit after the death of a minor child, by providing that:

> When the death of a minor child is caused by the wrongful act, omission, or negligence of any person, persons, or corporation, or the servants or agents of either, the father, or the mother as specified in Section 6-5-390, or, if the ***197** father and mother are both dead or if they decline to commence the action, or fail to do so, within six months from the death of the minor, the personal representative of the minor may commence an action. [17]

It is well settled that causes of actions commenced under this enactment are purely statutory, with there being no such action or even right of action at common law. [18] The legislative intent behind enacting § 6-5-391 is clear: "The [Wrongful Death Act] is intended to protect human life, to prevent a homicide and to impose civil punishment on those who take human life." [19] In fact, the Alabama Supreme Court has stated that "[o]ne of the purposes of [the] wrongful death statute is to prevent homicides." [20] While this statute was specifically enacted to allow parents to potentially recover for the death of their minor child, there is nothing within the statute that expressly defines what, or who, a "minor child" is for purposes of wrongful-death claims. Although the legislature declined to define "minor child" under section 6-5-391, it has given some indication as to what age constitutes a minor child within the civil context throughout various statutes. [21] However, while Alabama law may state the age of majority, there is not a single civil statute that designates when a person, or embryo, develops into a "minor child."

Under Alabama's Criminal Code, the Homicide Act is similar in nature to the Wrongful Death Act. [22] The Homicide Act first provides for the relevant definitions that pertain to homicide. [23] A person commits criminal homicide "if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of another *person*." [24] As originally written, the statute defined "person" as "a human being *who had been born and was alive* at the time of the homicidal act." [25] It was not until 2006 that the legislature decided to amend the Homicide Act and provided the current definition of what constitutes a "person" under Alabama's Criminal Code. [26] Now, a current reading of the Homicide Act, section 13A-6-1, ***198** provides that a "person" is "a human being, *including an unborn child in utero at any stage of development, regardless of viability*." [27] The legislature wanted to make no mistake about what and who it considered to be a person, and, thus, enacted the amendment known as the Brody Act [28] in 2006. [29] This amendment shows clear legislative intent to not only protect living human beings, but also to protect nonviable fetuses. [30] Additionally, when Alabama enacted the Brody Act, it joined, at the time, thirty-three other states that had laws recognizing the unlawful killing of an unborn child as a homicide. [31]

The Brody Act's implementation of the newly defined "person" is not the only relevant portion of the Homicide Act worth discussion. Moreover, section 13A-6-1(b) is also of particular relevance to this comment. In addition to defining a person, the statute goes on to provide an exception for medical care providers. The exception, known as the "Physician's exception," states that

> Article 1 or Article 2 shall not apply to the death or injury to an unborn child alleged to be caused by medication or medical care or treatment provided to a pregnant woman when performed by a physician or other licensed health care provider. Mistake, or unintentional error on the part of a licensed physician or other licensed health care provider or his or her employee or agent or any person acting on behalf of the patient shall not subject the licensed physician or other licensed health care provider or person acting on behalf of the patient to any criminal liability under this section. Medical care or treatment includes, but is not limited to, ordering, dispensation or administration of prescribed medications and medical procedures. [32]

Essentially, there is no criminal liability for a physician, or even the physician's employees, for the death of an unborn, nonviable fetus as a result of the physician's mistake or unintentional error in treating a pregnant woman. This physician exception is clearly congruent with the Brody ***199** Act's amended definition, by providing that the new definition is "not meant to apply to deaths [that result] from ... treatment provided by a licensed physician that conforms to generally accepted standards of medical care." [33] However, almost eleven years later, this physician's exception appeared at the heart of the *Stinnett* case, leaving the Alabama Supreme Court with the issue of whether this exception should also be applied to civil wrongful-death claims. [34]

III. HISTORY OF VIABILITY [35]

A. Roe v. Wade *and its Influence: "Person and Viability"*

In 1973, the United States Supreme Court decided *Roe v. Wade*, [36] which some regard as one of the most momentous cases decided since the Court's inception in 1789. [37] The Court was faced with the controversial subject of abortion and whether a woman had a right to have an abortion under the Fourteenth Amendment to the Constitution. [38] In a 7-2 majority opinion, the Court held that a woman did have the right to an abortion, but instituted conditions that would allow states to regulate abortions at certain points during the pregnancy. [39] In reaching its opinion, the Court noted that national jurisprudence had been reluctant to declare that "life" began prior to birth and that the law was hesitant to accord legal rights to "the unborn" except in certain limited and narrowly defined situations. [40] Thus, in *Roe*, the Court held that "[a]ll this, together with our observation ... that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word ***200** 'person,' as used in the Fourteenth Amendment, does not include the unborn." [41] When *Roe* was decided, this position was already implemented throughout the different jurisdictions around the nation. [42] In fact, most states prior to *Roe*, held the similar view that would eventually be established in *Roe*, by those states necessitating that in order to recover for prenatal injuries to a fetus, the fetus had to be "viable" [43] when the injury actually occurred. [44] Although, admittedly, *Roe* was predominantly dealing with the concept of viability as it related to abortions, the Court recognized the States' important interest in potential life generally. [45] The Court stated that "[s]tate regulation protective of fetal life after viability thus has both logical and biological justifications." [46] Although *Roe* is regarded as one the Courts' landmark cases, outside of the context of abortions, viability, as both generally and as a legal standard, is not always well-received.

Since *Roe v. Wade*, viability as a standard has received some reproach, particularly as it pertains to wrongful-death causes of action and statutes. However, the reproach has often started with the meaning of the word "person," and its application, before viability is discussed. Arguments presented in wrongful-death cases since the decision of *Roe v. Wade* have often quoted the Court's statement, when the Court determined that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." [47] These arguments logically flow that if a "person," under the Fourteenth Amendment, is limited to only living human beings, then state legislation, unless specifically stated otherwise, would not include unborn fetuses as a "person." If that were the case, under wrongful-death statutes that simply defined a "person" as a living human being, unborn fetuses would not be afforded any protection, and a tortfeasor against the fetus would not be subject to any liability. Thus, in unborn fetus wrongful-death cases, arguments would never reach the issue of viability if states decide that a fetus is never considered a person in the first instance. However, every jurisdiction in the nation has now decided that a fetus is protected from prenatal injuries that result in the fetus's death, and that a parent or legal representative has a basis for damages for the wrongful death of the fetus. [48] Nevertheless, viability of an unborn fetus remains at the heart of ***201** states' wrongful-death law where the law has determined that to sustain a cause of action for prenatal injuries, a fetus must be viable at the time of the injury or subsequently become viable after the alleged injury was sustained. [49]

However, some legislatures have decided that viability has no place in wrongful-death law.[50] In fact, some post-*Roe* court decisions, and many other varying authorities, lead to the inference that *Roe* is irrelevant as it pertains to the question of whether one is able to recover for the wrongful death of an unborn fetus.[51] As one commentator has stated, in the instance of wrongful-death claims, "[viability] is certainly not determinative, or even relevant, if the question is the ability of the tortfeasor to escape liability for his acts."[52] To some, distinctions based on the concept of viability obstruct the overarching goals of wrongful-death statutes: to prevent deaths or homicides to persons.[53] For instance, according to one Alabama Supreme Court Justice, viability has been considered an arbitrary, artificial, and even a varying standard that defies logic and in some situations results in an injustice.[54] However, Alabama's civil wrongful-death statutes and criminal homicide statutes vary in their express language about what a "person" is and whether viability is a requirement.

*202 *B. Alabama's History With "Person" and "Viability" in Wrongful Death Claims Pre*-Mack v. Carmack

Before discussing Alabama's history with respect to wrongful-death claims as purports to the death of an *unborn* fetus, it is important to first examine Alabama's history of prenatal injuries resulting in death *after* birth. Alabama has dealt with the issue of wrongful-death claims that arise out of prenatal injuries for many, many years. In fact, the issue of causes of action for injuries that occurred to fetuses first surfaced in 1926, in *Stanford v. St. Louis-San Francisco Railway*.[55] In *Stanford*, the court stated that "a legal personality is imputed to an unborn child as a rule of property for all purposes beneficial to the infant after birth."[56] In the context of criminal law, the court stated that "protect[ing] life before birth, it is a great crime to kill the child after it is able to stir in the mother's womb ... and it may be murder if the child is born alive and dies of prenatal injuries."[57] Despite the court's position, the court held that the authorities and the law were undisputed, there was no basis for a cause of action in damages for a prenatal injury.[58] The court laid out its reasoning for its holding, stating that "a child before birth is, in fact, a part of the mother and is only severed from her at birth."[59] When the *Stanford* court decided that case, the law may have been unanimous as to prenatal injuries, but almost fifty years later, the Alabama Supreme Court decided it was time for change. Beginning in 1972, the Alabama Supreme Court decided a triad of cases in consecutive years that would begin to shape Alabama's jurisprudence in regard to prenatal injuries in wrongful-death causes of action. In the first of the three decisions, *Huskey v. Smith*,[60] the court was faced with one main question for review: "Should Alabama now recognize a wrongful death claim arising from a prenatal injury to a fetal child which is born alive but later dies?"[61] In *Huskey*, the mother was seven and one-half months pregnant when she was involved in an automobile accident that resulted in the injuries to the child she was carrying.[62] Five days after the accident, the child was born alive; however, as a result of the injuries, the child died just five days after his birth.[63]

In answering the question presented to the court, the court realized that the *Stanford* decision was based on the prevailing medical opinions of ***203** that day, and was "no longer supported by contemporary knowledge or precedent."[64] In fact, the *Huskey* court stated that Alabama was the only state that still denied a parent the right to proceed in a wrongful death action "where (a) the fetal child was Viable at the time of the injury and (b) the child is Born alive."[65] Therefore, in analyzing the "overwhelming weight of judicial authority," the *Huskey* court overruled the *Stanford* decision, and stated that Alabama would "join every other jurisdiction" in permitting a parent or legal representative to bring a wrongful-death cause of action against a tortfeasor for the prenatal injuries the child suffered.[66]

Just one year later, in *Wolfe v. Isbell*,[67] the court was again faced with an almost identical issue: whether the father of a child may bring a wrongful-death cause of action when the minor child, who is subsequently born alive, dies from prenatal injuries that were negligently inflicted on the fetus *while it was nonviable*.[68] On March 10, 1970, the mother, who was pregnant at the time, and the father were involved in an automobile accident.[69] The child that the mother was carrying suffered severe prenatal injuries as a result of the collision.[70] Three months after the accident, the child was born alive; however, the child subsequently died just fifty minutes after being born alive as a result of the injuries sustained in the collision.[71] The court noted that while

the case was similar to the one it decided just a year earlier in *Huskey*, the *Wolfe* case presented a slightly different issue. [72] The issue before the *Wolfe* court was dealing with a cause of action for injuries to a *nonviable* fetus, as opposed to injuries to a *viable* fetus as in *Huskey*. [73] At the outset, the court defined nonviable as being "not capable of living, growing, or developing and functioning successfully," and categorized viable as "having attained such form and development of organs as to be normally capable of living outside the uterus." [74] On appeal, the defendant contended that if there was a right of action for prenatal injuries, it was only applicable to a child born alive, who, at the time of the alleged injury, was alive and was capable of being born and remaining alive separate from their mothers. [75] Essentially, the defendant argued that there was no duty to a nonviable fetus and thus, no ***204** cause of action for injuries to the nonviable fetus. As the court pointed out, the issue of viability and nonviability has received conflicting views. [76] Nevertheless, the court stated that the recent trend in jurisprudence had dismissed the distinction between viable and nonviable, "especially where the child [was] born alive." [77] The court went on to say that "the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus ... is not a part of the mother." [78] The court acknowledged the plaintiff's argument on appeal and agreed with the position the plaintiff set forth, "that it makes no difference, in deciding the right to a cause of action for wrongful death, whether the fetal child was viable or not when the injury was inflicted, if the child was subsequently born alive but died from the injury." [79]

In support of its position, the *Wolfe* court then reviewed a variety of different authorities, all of which concluded that a distinction based on viability in wrongful-death causes of action was unsatisfactory. [80] First, the court noted a decision from the Wisconsin Supreme Court, and discussing that decision, the *Wolfe* court noted that

> the [*Puhl v. Milwaukee Auto Ins. Co*.] court pointed out that the viability theory, permitting actions for injuries to viable unborn children, but not to nonviable children has been challenged as unrealistic in that it draws an arbitrary line between viability and nonviability, and fails to recognize the biological fact that there is a living human being before viability. The court said in that case that a child is no more a part of its mother before it becomes viable that [sic] it is after viability, and that it would be more accurate to say that the fetus from conception lived within its mother rather than as a part of her. [81]

The Court next turned to Prosser's views on the subject of viability. Prosser states that "[v]iability of course does not affect the question of the legal existence of the foetus, and therefore of the defendant's duty; and it is a most unsatisfactory criterion, since it is a relative matter ...." [82] Prosser goes on to mention that viability is relative because it depends on the health of the mother and child, along with a variety of other measures ***205** such as the stage of development. [83] As Prosser points out, the fetus, regardless of whether it is viable or not, would be "no less injured" if determined to be viable or nonviable. [84] Thus, Prosser considers viability to be an "arbitrary" standard. [85] Furthermore, the Court discusses the view of the Restatement of Torts and how it has evolved on the issue of viability. [86] Early on, the Restatement of Torts followed consistently with earlier opinions on the issue of viability. [87] The first Restatement provides that "[a] person who negligently causes harm to an unborn child is not liable to such child for the harm." [88] However, the *Wolfe* court noted that the second Restatement must have recognized the trend in jurisprudence toward permitting parents to recover for the fetus's prenatal injuries. [89] In 1979 the second Restatement of Torts provided that a person can be liable for prenatal injuries if the child is born alive; thus, rejecting the viability criteria. [90] On top of that, the *Wolfe* court also relied on numerous other decisions from different jurisdictions. [91] After completing all of its analysis of the different authorities, the *Wolfe* court held that a parent is permitted to maintain a cause of action for the wrongful death of their unborn child even though the injuries that caused the death occurred while the fetus was nonviable. [92]

In 1974, just about a year later, the last of the trio of Alabama prenatal-injury cases was decided in *Eich v. Town of Gulf Shores*. [93] Again, while this case is similar to both *Huskey* and *Wolfe*, the *Eich* court dealt with the matter of a child who suffered prenatal injuries but was not born alive. [94] In *Eich*, on March 2, 1974, the mother, who was eight and one-half months pregnant at the time, was involved in an automobile accident. [95] As a result of the collision, the mother suffered severe injuries which ultimately led to the stillbirth of her fetal child. [96]

***206** On appeal, the appellee argued that "as a matter of substantive statutory law, live birth is a prerequisite to liability for wrongful death in Alabama." [97] The appellee based the argument on the contention that the legislature intended there to be a prerequisite of live birth before a cause of action could be maintained. [98] However, the Court disagreed with the appellee's argument and instead laid out what it believed to be the legislative intent, stating that "to allow recovery where the fetus is stillborn is essential to the effectuation of legislative intent. It is a deeply engrained principle of Alabama jurisprudence that the paramount purpose of our wrongful death statutes ... is the preservation of human life." [99] When determining whether to construe the term "minor child" as to include fetuses, the court stated that it was concerned with both "insur[ing] the necessary growth of the law in this vital area and the individual justice of the case before [the court]." [100] The appellee argued that for the court to define the term "minor child," which the legislature declined to define in the statute, would not only be an infringement on the separation of powers between the court and the legislature, but would also constitute a judicial amendment of a legislative enactment. [101] The *Eich* Court stated that it did not believe that construing minor child to include a fetus would be a "usurpation of the legislative function for it is often necessary to breathe life into existing laws less they become stale and shelfworn." [102] The court rested its reasoning on that it considered the wrongful death statutes' primary purpose to be the preservation of human life. [103] In reaching its holding, the court emphasized the potential problem with denying recovery based on a stillborn death as a result of prenatal injuries, as opposed to allowing recovery for the same injuries if the child had been born alive. [104] The court stated that

> deny[ing] recovery where the injury is so severe as to cause the death of a fetus subsequently stillborn, and to allow recovery where injury occurs during pregnancy and death results therefrom after a live birth, would only serve the tortfeasor by rewarding him for his severity in inflicting the injury. It would be bizarre, indeed, to hold that the greater the harm inflicted the better the opportunity for exoneration of the defendant. Logic, fairness and justice ***207** compel our recognition of an action, as here, for prenatal injuries causing death before a live birth. [105]

The *Eich* Court therefore held that "due to the pervading public purpose of our wrongful death statute, which is to prevent homicide through punishment of the culpable party" a parent was permitted to bring a wrongful-death action for the death of an eight and one-half month old stillborn fetus. [106] Essentially, the *Eich* court established that the preservation of human life, and insuring the growth of the law, necessitated the holding that a "minor child" included a stillborn fetus.

These three decisions of the Alabama Supreme Court from 1972-1974 laid the framework for the court's position on both the requirements for viability and the overarching issue of whether a parent is permitted to bring a cause of action for the wrongful death of a child caused by prenatal injuries. In solidifying Alabama's common law rule, that a parent is permitted a cause of action, the Court decided those three cases, that were based on injuries the fetus sustained while it was viable, as in *Huskey* and *Eich*, or where the fetus sustained injuries and subsequently reached viability, as in *Wolfe*.

VI. *LOLLAR* AND *GENTRY*: A HALT IN THE TREND

The decisions from the trilogy of *Huskey, Wolfe,* and *Eich* are considered to be "the seminal decisions from this Court concerning causes of action for wrongful death based on prenatal injuries." [107] However, *Lollar v. Tankersley* [108] and *Gentry v. Gilmore*, [109]

two cases decided on the same day, seceded from the trend of expanding the meaning of "minor child" set forth in the trio of cases from 1972-1974. Both *Lollar* and *Gentry* are factually similar cases. In *Lollar*, Brenda Lollar was examined on September 15, 1989, by a licensed obstetrician, Dr. Tankersley, who determined that Lollar was about three months pregnant. [110] Twelve days later, on September 27, Lollar began hemorrhaging, and called Dr. Tankersley who advised her to go to the emergency room. [111] While at the emergency room, Dr. Tankersley told Lollar that she was experiencing a miscarriage. [112] After the diagnosis, Dr. Tankersley performed a dilatation and curettage ("D&C") in order to remove the remaining placenta and fetal ***208** tissue. [113] However, on October 9, 1989, Lollar once again began hemorrhaging, so she went to see Dr. Tankersley again. [114] The next day, Lollar underwent an ultrasound which revealed she was carrying a "well-developed fetus" with a "viable heartbeat." [115] Further tests showed that Lollar had a deficiency of amniotic fluid; and, on October 13, Lollar was admitted to the hospital where her uterus was evacuated, resulting in the death of her fetus. [116]

Lollar and her husband then brought an action against Dr. Tankersley for the wrongful death of their unborn child, alleging that the D&C was an unnecessary procedure. [117] Lollar eventually appealed the case to the Alabama Supreme Court. On appeal, the *Lollar* court noted that it was faced with an issue of first impression: "Whether the Alabama Wrongful Death Act ... permits an action based on the performance of a [D&C] procedure that results in the death of a nonviable fetus." [118] Dr. Tankersley argued that a cause of action for the wrongful death resulting from prenatal injuries requires that the fetus attain viability. [119] In reaching its holding, the court turned to the trilogy of *Huksey, Wolfe,* and *Eich*, reasoning that

> a close reading of these cases reveals that viability was the common--indeed, the decisive--consideration, in each case. *Huskey* and *Eich* allowed recovery because the fetus was viable at the time of the injury, and *Wolfe* allowed recovery because the fetus survived the injury long enough to *attain* viability. The rule proceeding from these cases, therefore, ... is[] that a cause of action for death resulting from a pre-natal injury requires that the fetus attain viability either before the injury or before death results from the injury. [120]

The court also noted that at the time it decided *Lollar*, there was no other jurisdiction in the United States that, absent any legislative directive, permitted a cause of action for the wrongful death of a fetus before it had reached viability. [121] According to the *Lollar* court, because there was not ***209** a "clearer expression of legislative intent," the term "minor child" in the Wrongful Death Act did not include a nonviable fetus. [122]

As mentioned above, *Gentry* was decided on the same day as *Lollar* and follows the same reasoning. [123] In *Gentry*, Kathleen Gentry, who was pregnant at the time, visited her doctor, Dr. Gilmore, on August 5, 1983, complaining of "flooding blood, passing clots, and cramping." [124] The next day, Dr. Gilmore performed a D&C, but an ultrasound test on August 8 revealed an "apparently normal 11-week fetus." [125] On August 24, Gentry had a miscarriage, and "it is undisputed that, at the time of her miscarriage, the 13-week fetus was not viable." [126] On appeal, Gentry argued that the issue of viability of the fetus is irrelevant to recovery under Alabama's Wrongful Death Act. [127] As the court noted, the Wrongful Death Act permits causes of action in "*certain* factual situations in which the injury causing the death is inflicted before the child is born." [128] The *Gentry* court also noted that in the trilogy of *Huskey*, *Wolfe*, and *Eich*, the death of the child or fetus had occurred *after* the fetus had attained viability. [129] Recognizing that the majority of jurisdictions, at the time, did not permit claims on behalf of nonviable fetuses, the *Gentry* court held that the "[Wrongful Death Act] provides no cause of action for the wrongful death of a nonviable fetus." [130]

The court's decisions in both *Lollar* and *Gentry* seemed to make it clear how it interpreted the Wrongful Death Act's "minor child" term. In analyzing its own prior decisions in *Huskey*, *Wolfe*, and *Eich*, the Alabama Supreme Court interpreted those decisions as turning on the issue of viability. Therefore, in deciding *Lollar* and *Gentry*, the court solidified its position that

Alabama's Wrongful Death Act does not permit a cause of action for the wrongful death of a nonviable fetus, and for almost twenty years, those holdings remained as precedent.

V. *MACK V. CARMACK*: THE TURNING POINT IN ALABAMA'S UNBORN FETUS WRONGFUL DEATH JURISPRUDENCE

Until *Mack v. Carmack* was decided, it had become well-settled, or so it seemed, that Alabama's Wrongful Death Act did not provide a cause of ***210** action as a result of the wrongful death of a nonviable fetus. [131] However, on September 9, 2011, the court decided *Mack* and paved a path that *Stinnett* would eventually follow. [132]

On September 13, 2007, April Mack ("Mack"), who was twelve weeks pregnant with "Baby Mack," [133] contacted Thomas Carmack ("Carmack") to drive her to the grocery store with her fiancé. [134] While the three of them were in route to the grocery store, Carmack started to turn through an intersection when another vehicle struck Carmack's vehicle. [135] Both Mack and her fiancé suffered severe injuries as a result of the collision and were transported to the hospital. [136] Five days later, on September 18, 2007, Mack suffered a miscarriage in the hospital that resulted in the death of Baby Mack. [137] Mack and her fiancé filed an action against Carmack, as well as the driver of the other vehicle, alleging (1) negligence and wantonness for their own personal injuries and (2) a wrongful-death claim on behalf of Baby Mack. [138] Mack filed a motion for summary judgment as to the wrongful death claim against Carmack, which the court denied. [139] Carmack also filed a motion for a summary judgment on the issue, and after hearing an oral argument from Carmack on the motion he filed, the trial court granted Carmack's motion for a summary judgment on Mack's wrongful-death claim. [140] The trial court's order signified that the issue presented to the court was whether a person can bring a wrongful-death claim on behalf of a nonviable fetus. [141] The court found that the Wrongful Death Act did not allow for a wrongful-death cause of action on behalf of a nonviable fetus. [142] On April 12, 2010, Mack filed a notice of appeal from the summary judgment granted by the trial court to the Supreme Court of Alabama. [143]

On appeal, Mack contended that the Wrongful Death Act should be applied to the death of an unborn fetus regardless of viability. [144] In arguing that the Wrongful Death Act should apply to unborn children, Mack ***211** acknowledged that the Alabama Supreme Court's prior decisions, *Gentry* and *Lollar*, that expressly held that there was no cause of action for the wrongful death of a fetus if the fetus was not viable at the time of death, should be overruled. [145] The court began its analysis with the Brody Act and noted that the newly amended Homicide Act now defined a person as an unborn child regardless of viability. [146] In *Lollar*, the Court, as Mack pointed out, stated that there could be no cause of action under the Wrongful Death Act for a nonviable fetus "[w]ithout a clearer expression of legislative intent." [147] Relying on the Brody Act's amendment, Mack argued that because the legislature redefined "person," that provided the "legislative intent" the court was seeking when it decided *Lollar*. [148] Although Mack's argument was sound, the obvious counterargument, which Carmack pointed out, [149] is that even though the legislature redefined "person" for purposes of criminal homicide, it declined to also redefine "person" under the Wrongful Death Act. In support of that view, the law is well-established when it purports to statutory interpretation. When the legislature enacts new legislation, such as the Brody Act, it is presumed that the legislature is aware of the other *existing* laws and the *court's interpretation* of those laws. [150] Essentially, Carmack argued that if there was legislative intent to include unborn children as "persons" under the Homicide Act, then, because the legislature declined to amend the Wrongful Death Act, there was no legislative intent, and thus, no basis for overruling *Lollar* and *Gentry*. [151]

To this author, there is no question that Carmack's argument seems logically accurate and acceptable. Nevertheless, the court disagreed and next analyzed the precedential history of wrongful-death claims arising out of prenatal injuries in Alabama. [152] The *Mack* court looked to the trilogy of cases that were decided by the court in consecutive years from 1972-1974, *Huskey*, *Wolfe*, and *Eich*, and analyzed both *Lollar* and *Gentry's* interpretation and application of those cases. [153] Prior to *Mack*, six

other jurisdictions [154] had explicitly permitted wrongful-death claims for ***212** the death of an unborn fetus, even if the death had occurred before viability. [155] Throughout the nation, courts, [156] scholars, [157] commentators, [158] and legislatures [159] were criticizing, undermining, and changing the viability requirements pertaining to wrongful-death claims. The court pointed out that, in fact, the viability rule had been undermined in Alabama by its own decisions in *Wolfe* and *Eich*, and by Justice Maddox, albeit through his dissent in *Gentry*. [160]

The *Mack* court seemed to be seeking that "clearer expression of legislative intent" from the legislature's intent that the *Lollar* court discussed. This court emphasized the Brody Act's amendment and found of particular importance the new definition which incorporated the phrase "regardless of viability." As it happens, the court specifically stated that "[the Brody Act's] change constitutes clear legislative intent to protect even nonviable fetuses from homicidal acts." [161] It is worth noting, particularly as it pertains to this comment's discussion of *Stinnett*, but also to grasp the *Mack* court's analytical steps, that although the court analyzes the Brody Act, the court did not discuss the Brody Act's implementation of the physician's exception to the Homicide Act. As Justice Houston stated, "[t]here should not be different standards in wrongful death and homicide statutes, given that the avowed public purpose of the wrongful death statute is to prevent homicide ...." [162] Admittedly, this court was not dealing with the negligence of a physician or health care provider, but rather just a simple negligence claim arising out of an automobile collision. However, in holding that the Wrongful Death Act applies to circumstances where the fetus dies before reaching viability, the court only extended the definition of a ***213** "person" from the Homicide Act, and it did not discuss or analyze the physician's exception. [163]

VI. *STINNETT V. KENNEDY*: THE FACTS

In order to fully understand both Dr. Kennedy's actions and the court's analysis, it is essential to first discuss the underlying facts from *Stinnett* that illustrate Stinnett's pregnancy complications. Kimberly Stinnett was informed that she was pregnant on May 9, 2012, but shortly after, she started experiencing her first complications. [164] Two days after receiving the news she was pregnant, Stinnett was experiencing abdominal cramping as well as starting to run a fever, so she decided to call her obstetrician. [165] Due to her prior miscarriages in 2005 and in 2007, and an ectopic pregnancy [166] in 2010, Stinnett was advised by Dr. Kennedy to go to the emergency room. [167] Based on Stinnett's prior history, and the tests run in the emergency room, Dr. Kennedy was concerned that Stinnett could possibly be experiencing another ectopic pregnancy. [168] On May 12, 2012, Dr. Kennedy performed a dilation and curettage ("D&C"); [169] however, after conducting the procedure, there seemed to be nothing indicating Stinnett was experiencing another ectopic pregnancy. [170] According to Stinnett, Dr. Kennedy told her that there was no ectopic pregnancy, but that Dr. Kennedy had suspected she may have had a miscarriage. [171] Nevertheless, Dr. Kennedy testified that she considered there was "a high suspicion" of ectopic pregnancy, and, thus, treated Stinnett with methotrexate. [172] A few weeks after being discharged from the hospital and receiving the methotrexate, on June 8, ***214** 2012, Stinnett suffered a miscarriage. [173] Moreover, when Stinnett suffered the miscarriage, it is undisputed that the fetus was not and had never been viable at any point during the pregnancy. [174]

VII. *STINNETT V. KENNEDY*: STINNETT SUES DR. KENNEDY FOR THE WRONGFUL DEATH OF HER UNBORN FETUS

On November 29, 2012, in Jefferson County Circuit Court, Stinnett sued Dr. Kennedy alleging that Dr. Kennedy had committed medical negligence when she performed the D&C and administered methotrexate which caused the wrongful death of her four to five-week old unborn fetus. [175] Stinnett alleged that because her pregnancy was not ectopic, the D&C and methotrexate that Dr. Kennedy ordered should not have been administered. [176] Stinnett's complaint also alleged that Dr. Kennedy caused the wrongful death of her fetus and brought the claim under Section 3-6-391. [177] Thus, Dr. Kennedy filed for a motion to

dismiss Stinnett's wrongful death claim, arguing that, although the Wrongful Death Act permits an action for the death of a nonviable fetus, as decided in *Mack*, the decision of the *Mack* court was based on attempting to establish a congruency between the Wrongful Death Act and the Homicide Act. [178]

As stated in section II, *supra*, the Brody Act amended the definition of a "person," and also established the physician's exception to criminal liability. Thus, Dr. Kennedy argued that although the *Mack* court, in extending the definition of a person from the Homicide Act to the Wrongful Death Act, made an attempt at establishing congruency between the Acts, they failed to do so. [179] As Dr. Kennedy alleged, true congruency, if that is what the court was actually seeking in *Mack*, would require that not only the definitional section from the Brody Act extend to the civil Act, but that the physician's exception also extend to the Wrongful Death Act. [180] This would mean that Dr. Kennedy would be excepted from civil liability under the exact same circumstances that she would be excepted from criminal liability. Moreover, Dr. Kennedy actually argued that it would have the opposite effect if the court declined to extend the physician's exception to the Wrongful Death Act, stating that ***215** "it would create incongruence not congruence - to disregard [the physician's exception] and impose civil liability ... for treatment of a nonviable pregnancy when there could never be criminal liability (even negligent homicide) for that same treatment." [181] The circuit court agreed and granted Dr. Kennedy's motion to dismiss Stinnett's wrongful death claim, stating that "this Court finds that the existence of the 'physician's exception' to the Brody Act ... prohibits the extension of civil liability under the Wrongful Death Act to licensed physicians ...." [182] The case was then tried solely on the basis of Stinnett's own personal injuries from Dr. Kennedy's alleged negligence; however, a jury verdict was returned in favor of Dr. Kennedy and against Stinnett. [183] Stinnett then appealed to the Supreme Court of Alabama solely on the issue of whether she should have been permitted to assert a wrongful-death claim against Dr. Kennedy for the death of her nonviable fetus. [184]

On appeal, the court first analyzed the Wrongful Death Act and its prior decision in *Mack*, which held that the Wrongful Death Act permits an action for the death of a nonviable fetus. [185] In fact, when the court was faced with this issue, neither the Wrongful Death Act nor Alabama case law supported a wrongful-death cause of action for a nonviable fetus against a physician. When discussing its decision from *Mack*, the court noted that it had considered the history of wrongful-death claims arising from prenatal injuries (not death), scholarly commentary, cases from other jurisdictions, and Alabama's Homicide Act. [186] The court pointed out that before *Mack* was decided, the Wrongful Death Act, and the term "minor child," had been interpreted not to include a fetus that died before becoming viable. [187] After a rather lengthy discussion of the court's holding from *Mack*, the *Stinnett* court then turned to Dr. Kennedy's argument for congruency. [188] Additionally, with regard to Dr. Kennedy's argument, the court stated that the "public purpose of [the] wrongful-death statutes is to prevent homicide," and, therefore, the need for congruency between the criminal and civil wrongful-death statutes was imperative. [189]

In its evaluation of the Homicide Act, the court focused on the express language of section 13A-6-1(b), which states that a physician is excepted from "criminal liability," and, based on the plain, albeit strict, ***216** reading of the statute, the court determined the statute was limited in application only to criminal liability. [190] The court also noted that the amended definition of a "person" established in *Mack* only applies to victims of *criminal* homicide. [191] Recognizing the potential disparity, Justice Main noted that the Wrongful Death Act and the Homicide Act had the "shared purpose" of preventing homicide, and stated that for that reason "borrowing the definition of 'person' from the criminal Homicide Act to inform as to who is protected under the civil Wrongful Death Act *made sense*." [192] Justice Main also stated that it would be "incongruous" to allow a defendant to escape civil liability for the homicide of a fetus if that same defendant could be held criminally responsible. [193] In spite of this previous attempt to "harmonize" the definition of a "person" under the Wrongful Death Act and the Homicide Act, Justice Main noted that this attempted harmonization "was never intended to synchronize civil and criminal liability under those acts ...." [194] Again, the court apparently realized that there may be some potential inconsistencies. The court stated that it was illogical to assume that because a person was not subject to criminal punishment under the Homicide Act he should also not face tort liability under the Wrongful Death Act. [195] However, the court previously held that it would be "unfair" for a tortfeasor to be

subject to criminal punishment, but not civil liability for a fetal homicide. [196] According to the court, the logical conclusion of arguing that a person not subject to criminal punishment under the Homicide Act should also not be subject to civil liability under the Wrongful Death Act, is a prohibition of wrongful-death claims arising from a tortfeasor's negligence. [197]

Is that actually the case though? If there was true congruency, and if the physician's exception applied to both Acts, then it would only apply to physicians and health care providers and only except *that class of individuals* from tort liability when they make a mistake or unintentional error. The physician's exception would not apply to just any tortfeasor as the court has articulated, it would only apply to one specific category of tortfeasors. On top of that, the exception would only apply in the limited number of cases where the death of a fetus occurs. As the court has pointed out, the legislature's intent was obvious, to carve out an exception ***217** for physicians, at the very least in the instance of criminal liability. Nevertheless, the court declined to extend the exception stating that "we fail to see how applying an exception from criminal punishment to civil liability would promote 'congruence' between the Homicide Act and the Wrongful Death Act." [198]

The court next addressed Dr. Kennedy's policy arguments. [199] The court quoted Dr. Kennedy's argument:

> [Dr. Kennedy] asks this Court to recognize (as the Legislature did in codifying [section] 13A-6-1(b)) that physicians and other health care providers dealing with an unsustainable pregnancy are in a unique situation which is different from the provision of care to a mother and fetus in the context of a normally progressing pregnancy. When the care at issue is the very assessment of the viability or sustainability of a pregnancy and necessarily involves treatment decisions designed to preserve the life and health of the mother by clearing an unsustainable pregnancy (such as an ectopic pregnancy, blighted ovum, or spontaneous miscarriage), the imposition of the language of [section] 13A-6-1(3) without considerations of the provisions of [section] 13A-6-1(b) would not be logical. [200]

Dr. Kennedy's argument seemed to be that because physicians are not always faced with treating normal pregnancies, when put in those unique situations, they should be afforded an additional level of immunity from civil liability in the event of an unintentional error. In dismissing those arguments from Dr. Kennedy, the court stated that physicians and health care providers already benefit from a "level of protection from civil liability under the provisions of the Alabama Medical Liability Act." [201] Under the Alabama Medical Liability Act, a plaintiff is required to establish that the injury or death was proximately caused by a physician's failure to meet the applicable standard of care. The applicable standard of care is normally proven by expert testimony given by other health care providers who are in the "same general neighborhood and in the same general line of practice." [202] In defining what "same general neighborhood" means in this context, the Alabama Supreme Court has ***218** stated that "[a] plurality of this Court is of the opinion that 'the language same general neighborhood ... refer[s] to the national medical neighborhood or national medical community, of reasonably competent physicians acting in the same or similar circumstances.'" [203]

On its face, it may not seem like physicians are granted much of a "protection" from liability, but there are a few distinctions that distinguish a medical negligence claim from a garden-variety simple negligence claim. For example, when the complaint is filed, a plaintiff must plead with "detailed specification and factual description of each act and omission ... and shall include ... the date, time, and place of the act or acts." [204] In a medical negligence claim, parties are prohibited from conducting discovery with regard to any other act or omission; thus, parties are strictly limited to discovery based solely on the alleged action or omission that caused the injury or death. [205] Another distinction is that the evidentiary doctrine of *res ipsa loquitor* [206] does not apply in medical malpractice cases. [207] Additionally, the rule for medical malpractice cases is laid out in *Baker v. Chastain*:

> [t]he rule in Alabama in medical malpractice cases is that to find liability, there must be more than a mere possibility or one possibility among others that the negligence complained of caused the injury. There must be evidence that the negligence probably caused the injury. However, in Alabama there need be only a scintilla of evidence to require submission to the jury. If the evidence presents a mere gleam, glimmer, spark, smallest trace or scintilla to support the theory or to sustain the issue, the trial court must submit the question to the jury. [208]

In medical malpractice cases, the plaintiff is required to prove by *substantial evidence* that the physician or health care provider breached the standard of care. [209] Those factors may be some of the factors the ***219** court considered when it labeled the Alabama Medical Liability Act as a "level of protection from civil liability." [210] Whatever the determining underlying reason was, the court ultimately declined to extend the physician's exception from the criminal Alabama Homicide Act to the civil Wrongful Death Act. [211]

VIII. THE FUTURE OF WRONGFUL-DEATH CLAIMS IN ALABAMA

When the United States Supreme Court decided in *Roe v. Wade* that a "person," for Fourteenth Amendment purposes, was limited to those born alive, it did so with a particular constitutional interest. The interest was rather evident: the Court was deciding women's constitutional rights to abortions and privacy. In arguments presented in favor of excluding unborn fetuses from wrongful-death statutes, it becomes difficult to escape the fact that the argument is essentially made to protect a tortfeasor from any potential liability as a result of their wrongful conduct.

Based on the court's holding and reasoning in *Stinnett*, where does that leave Alabama? The overall concern that some may have with the holding are apprehensions involving the nuances that seem to stick out. In *Stinnett* and *Mack*, it seemed that one of the main concerns, if not the number one concern of the court, was seeking to find the congruencies between the two statutes. However, this author finds it hard to swallow that argument. First, if the basis of the "congruency" argument was to actually have true congruency, the court failed to do so. Starting with the legislative intent, the court has seemed to suggest that the legislature intended to extend the definition of a "person" as a criminal homicide victim to include "a human being as well as a child in utero at any stage *regardless of viability*" to the civil statute, simply because they amended the criminal statute to reflect as such. However, when using that logic, it seems clear the answer to the question "did the legislature *actually* intend to extend that definition to the Wrongful Death Act as well?" to be an overwhelming "no." Put simply, it logically follows that *because* the legislature *declined* to extend the definition of "person" under the civil act, the legislative intent is clear: it meant to keep the definition the same. Analyzing this further, it is well established that the legislature is presumed to be aware of the *existing* laws and the *court's interpretation* of those laws. If that presumption is to be applied, it seems that when the legislature passed the Brody Act, they were both aware of the existing Wrongful Death Act as well as aware of the Alabama Supreme Court's interpretation of it. Therefore, this leads to the conclusion that the legislature intended to leave the Wrongful Death Act as it was, and the court intended that there ought to be some differences between the civil act and the criminal act.

***220** There is also another glaring distinction between the two acts. Not only did the legislature decide not to define "minor child" in the Wrongful Death Act, but it amended the Homicide Act to provide an exception for physicians. The legislative intent was clear: to except physicians, healthcare providers, and any of their employees from criminal liability for any unintentional (i.e. negligent) acts that result in the death of a fetus. The court in *Stinnett* rested its reasoning on the fact that because the legislature changed the definition of a "person" to include an unborn fetus regardless of viability, the legislative intent was to "protect even nonviable fetuses from homicidal acts." [212] The *Stinnett* court, in support of its holding, even went as far as to say that applying the definition of a "person from the Homicide Act to the Wrongful Death Act "*made sense*." [213] If the court's reasoning for judicially amending the Wrongful Death Act to now include as a "minor child," unborn fetuses, regardless of viability, was partly because it made sense, would it not also make sense to apply the physician's exception to the Wrongful

Death Act? After all, in the search of true congruency, that would be the outcome. To be fair, the court did not solely rest its decision in *Stinnett* on the congruency argument. It analyzed many varying authorities, jurisdictions, and commentary on the issue of viability. However, it cannot be denied that the court's strongest argument was for congruency. The argument for congruency can be seen by this very court in its prior decision in *Mack*. In *Mack*, the court stated that "this Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes."[214]

The issue that this author has is not with the court being concerned with the growth of the law, or even the court defining the statutory term of "minor child"; the issue is that the court seemed to hide under the cloak of "congruency." As stated, if congruency was really the court's overarching goal, they dropped the ball. It seems that the court simply cherry picked parts of the Homicide Act that they wanted to be congruent with the Wrongful Death Act. There is no escaping that true congruency would lead not only to the definition of "person" from the Homicide Act applying to "minor child" in the Wrongful Death Act, but also the physician's exception applying to the Wrongful Death Act. The court will likely never decide they actually want true congruency between the civil and criminal statutes, which leaves the decision of whether to apply the physician's exception in civil cases solely in the hands of the State's legislative branch.

Looking to the future of Alabama's wrongful death law as purports to the death of an unborn fetus, begs the question: will viability ever again be used as a standard? The likely answer is "no." Based on the court's ***221** rulings in *Mack* and *Stinnett*, viability is no longer used in determining whether a person is permitted to bring a wrongful-death action on behalf of an unborn fetus. In fact, those rulings now mean that from the moment of conception, if injuries to the fetus after conception result in death, a person is permitted to bring an action. In further support of the proposition that viability, as a standard, is gone for good is Justice Parker's concurring opinions in both *Hamilton v. Scott*[215] and *Stinnett*. In *Stinnett*, Justice Parker stated that "[t]he use of the viability standard established in *Roe* is incoherent as it relates to wrongful-death law because, among other things, life begins at the moment of conception. The fact that life begins at conception is beyond refutation."[216] Justice Parker further stated that "[u]born children, whether they have reached the ability to survive outside their mother's womb or not, are human beings and thus persons entitled to the protections of the law--both civil and criminal."[217] Additionally, Justice Parker attempted to define the public policy of the state of Alabama, noting that "the express, emphatic public policy of our State is to uphold the value of unborn life."[218]

Given that Alabama courts have expressed the concern for the need to protect the value of life, even from the moment of conception, the fetus is deemed a "minor child" and is protected under the Wrongful Death Act. Although, as discussed, the legislature has declined to define a "minor child" or provide for a physician's exception under the Wrongful Death Act, Alabama courts will likely continue to support the decisions laid out in *Mack*, *Hamilton*, and *Stinnett*. This is a view that is supported by Justice Parker's view that "[m]embers of the judicial branch of Alabama should do all within their power to dutifully ensure that the laws of Alabama are applied equally to protect the most vulnerable members of our society, both born and unborn."[219] Justice Parker went further in analyzing the the protections of unborn children in the law when he stated that "[p]rotecting the inalienable right to life is a proper subject for state action, and Alabama judges called upon to apply Alabama law should do so consistent with the robust, equal protection with which the Creator God endows and state-law guarantees to unborn children from the moment of conception."

There is no doubt that Justice Parker believes viability is an arbitrary standard that has no place in the law of wrongful death actions and the right to protecting life begins at conception. This view seems to be shared by the other justices of the court as illustrated in the court's decisions in ***222** *Mack*, *Hamilton*, and *Stinnett*. This view has also been recognized by other commentators. As the President of Personhood Alliance, Daniel Becker, put it: "By insisting on the equal protection of the right to life of the preborn child from the moment of conception, Alabama is leading the nation in a return to a culture of life."[220] Mr. Becker went on to say that "[*Stinnett*] is one of the most pro-life opinions written by any American court since *Roe v. Wade*."[221]

The Alabama Supreme Court's recent holdings in *Mack* and *Stinnett* have continued the trend started by the trilogy of rulings in *Huskey*, *Wolfe*, and *Eich* expanding the wrongful-death law in favor of unborn children and have done away with viability as a standard. Based on these holdings and the clear public policy of the state of Alabama, it appears that viability will not be making its way back into Alabama wrongful-death law for a long time absent any definitive legislative direction.

It is also important to look to the potential implications that the *Stinnett* court also rejected to apply the physician's exception to the civil statute. Where does this ruling leave physicians, healthcare providers, and their employees? Along with increased malpractice coverage rates, one obvious implication of the court's ruling is that physicians can anticipate having to inevitably defend themselves against wrongful death liability in the event that their unintentional errors lead to the death of a fetus, even a fetus that is just a couple weeks' post-conception. This concern can be demonstrated in the following hypothetical: what happens when a woman begins to experience a problematic pregnancy that will require the physician to make a medical decision to save the life of the mother who is two weeks pregnant, but that decision could potentially lead to the death of the fetus and the foreseeable subsequent wrongful death claim? Whom to save? As stated in Part VII, *supra*, the *Stinnett* court alluded to the "protections" that are already afforded to physicians. Those "protections" the court mentioned, are listed under the Alabama Medical Liability Act, which merely requires the plaintiff to establish that the death was proximately caused from a deviation from the standard of care. In the event that physicians are likely to be presented with the aforementioned hypothetical, how many physicians will find these "protections" comforting?

There are certain things that can now be taken away from the court's holding in *Stinnett*: Under Alabama's Wrongful Death Act, the term "minor child" now includes any person, or fetus, *regardless of viability*, and physicians are not excepted from any civil liability for a death that occurs as a result of their actions. There is no mistaking what the law now is in ***223** Alabama. In fact, if Alabama courts share even a scintilla of the view that Justice Parker expressed in his concurring opinions, the courts will likely be unwavering in keeping with the principles established in *Stinnett v. Kennedy*. The Alabama Supreme Court has ultimately paved the path for other jurisdictions to eventually follow suit in their own respective future unborn fetus wrongful-death jurisprudence. It will not be long before this trend catches on throughout the nation, and it may even result in the United States Supreme Court eventually revisiting the issue of "viability."

Footnotes

a1 Candidate for *Juris Doctor*, Cumberland School of Law, Samford University, 2019; *Bachelor of Science* in Finance, Auburn University, 2015. The author would like to thank Professor Robin Andrews for her guidance and willingness to help throughout the drafting and revision stages of this comment. The author would also like to thank his parents for their unwavering encouragement and support.

1 410 U.S. 113 (1973).

2 *Roe*, 410 U.S. at 163.

3 *See* Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993), *overruled by* Mack v. Carmack, 79 So. 3d 597 (Ala. 2011); *see also* Lollar v. Tankersley, 613 So. 2d 1249 (Ala. 1993), *overruled by* *Mack*, 79 So. 3d at 611-12.

4 ALA. CODE § 6-5-391 (1975).

5 *See* *Mack*, 79 So. 3d at 611-12 ("In sum, it is an unfair and arbitrary endeavor to draw a line that allows recovery on behalf of a fetus injured before viability that dies after achieving viability but that prevents recovery on behalf of a fetus injured that, as a result of those injuries, does not survive to viability.").

6 *Id*.

7 Stinnett v. Kennedy, 232 So. 3d 202, 204 (Ala. 2016).

8 In response, "Dr. Kennedy and [his employer] filed a Rule 12(b)(6), Ala. R. Civ. P., motion to dismiss Stinnett's wrongful-death claim." *Stinnett*, 232 So. 3d at 205.

9 *Id*.

10 *Id*. at 206.

11 *Id*.

12 *Id*. at 214.

13 ALA. CODE § 13A-6-1 (1975).

14 *Stinnett*, 232 So. 3d at 214-15.

15 *Id*. at 215.

16 *Id*. at 216. *See also* Hamilton v. Scott, 97 So. 3d 728, 746 (Ala. 2012) ("Viability is irrelevant to determining the existence of prenatal injuries, the extent of prenatal injuries, or the cause of prenatal death. Viability is irrelevant to proving causation ....").

17 ALA. CODE § 6-5-391(a) (1975).

18 Kennedy v. Davis, 55 So. 104, 104 (Ala. 1911).

19 Ally Windsor Howell, *Professional Liability & Malpractice*, *in* 1 ALA. PERS. INJ. & TORTS § 9:1 (2017).

20 *Mack*, 79 So. 3d at 610.

21 Alabama law states that the age of majority is 19 years of age. ALA. CODE § 26-1-1 (1975). The Code of Alabama also has various statutes that provide for different rights of minors by indicating at what ages the minor's rights come to fruition. *See* ALA. CODE § 6-5-380 (1975).

22 *See* ALA. CODE § 13A-6-1 (1975).

23 *Id*.

24 *Id*. § 13A-6-1(a)(2) (emphasis added).

25 H.B. 19, 2006 Leg., Reg. Sess. (Ala. 2006).

26 *Survey of 2006 Alabama Legislation*, 58 ALA. L. REV. 1215, 1233 (2007) [hereinafter *Survey*].

27 ALA. CODE § 13A-6-1(a)(3) (emphasis added).

28 The Brody Act is named for Brody, the unborn baby of murder victim Brandy Parker who died when she was 8 months pregnant. Cindy West, *Brody Bill goes into effect*, GADSDEN TIMES (July 3, 2006, 2:27 PM), http://www.gadsdentimes.com/news/20060703/brody-bill-goes-into-effect.

29 *Id*.

30 *Mack*, 79 So. 3d at 610.

31 West, *supra* note 28.

32 ALA. CODE § 13A-6-1(b).

33 *Survey*, *supra* note 26.

34 Stinnett v. Kennedy, 232 So. 3d 202, 204 (Ala. 2016).

35 Viability itself is a slippery concept to grasp and has caused many differentiating viewpoints. One thing for certain is that viability is not a set period of time where one can say that at this specific point, every fetus is now viable. The "time" or "period" for viability has changed over the years as a result of medical science and will likely continue to change by getting pushed to a time that is earlier and earlier in the pregnancy. Even in *Roe v. Wade*, the Court was unable to establish a specific time; in fact, the court simply stated that viability "usually" occurs somewhere between the twenty-fourth and twenty-sixth week of the pregnancy. Roe v. Wade, 410 U.S. 113, 160 (1973).

36 410 U.S. 113 (1973).

37 Elizabeth Nix, *7 Things You Might Not Know About the U.S. Supreme Court*, HISTORY (October 8, 2013), http://www.history.com/news/history-lists/7-things-you-might-not-know-about-the-u-s-supreme-court.

38 Roe v. Wade *Fast Facts*, CNN (April 23, 2017, 8:04 PM) [hereinafter *Fast Facts*], https://www.cnn.com/2013/11/04/us/roe-v-wade-fast-facts/index.html.

39 *Id*.

40 *Roe*, 410 U.S. at 161.

41 *Id*. at 158.

42 *See, e.g.*, Stanford v. St. Louis-San Francisco Ry. Co., 108 So. 566, 566 (Ala. 1926).

43 The *Roe* Court stated that a fetus is "viable" if it is "potentially able to live outside the mother's womb, albeit with artificial aid." *Roe*, 410 U.S. at 160. The Court went on to say that viability normally occurred about seven months, or twenty-eight weeks, with the possibility of it occurring earlier. *Id*.

44 *Id*. at 161-62.

45 *Id*. at 163.

46 *Id*.

47 *Id*. at 158.

48 Huskey v. Smith, 265 So. 2d 596, 596 (Ala. 1972).

49 *See* Simmons v. Howard Univ., 323 F. Supp. 529, 529 (D.D.C. 1971); Summerfield v. Superior Court, 698 P.2d 712, 724 (Ariz. 1985) (en banc); Gorke v. Le Clerc, 181 A.2d 448, 451 (Conn. Super. Ct. 1962); Shirley v. Bacon, 267 S.E.2d 809, 810 (Ga. 1980).

50 Green v. Smith, 377 N.E.2d 37, 38-41 (Ill. 1978) (noting that the Illinois legislature considers a fetus to be a human being and a legal person under the laws and constitution of Illinois from the moment of conception, and thus, expressly disagreeing with *Roe v. Wade*).

51 *See* Pino v. United States, 183 P.3d 1001, 1005 (Okla. 2008) ("We find no logical reason to resurrect the criterion of live birth ... merely because the fetus was nonviable at the time of delivery where evidence shows a tortious act ended a fetus's normal development."); Smith v. Mercy Hosp. & Med. Ctr., 560 N.E.2d 1164, 1175 (Ill. App. Ct. 1990); Connor v. Monkem Co., 898 S.W.2d 89, 92-93 (Mo. 1995); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 791-92 (S.D. 1996); Farley v. Sartin, 466 S.E.2d 522, 534 (W. Va. 1995). *See also* Gentry v. Gilmore, 613 So. 2d 1241, 1248 (Ala. 1993) (Maddox, J., dissenting) (contending that "viability at the time of injury and live birth are irrelevant to recovery"); David Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade,

45 MO. L. REV. 639, 651 (1980) ("The irrelevance of *Roe v. Wade* to the question of recovery for the wrongful death of a stillborn fetus may be inferred from the numerous post-*Roe* decisions which do not rely on it in any respect ....").

52 Kader, *supra* note 51, at 659-60.

53 Gary A. Meadows, Comment, *Wrongful Death and the Lost Society of the Unborn*, 13 J. LEGAL MED. 99, 114 (1992).

54 *Gentry*, 613 So. 2d at 1249 (Maddox, J., dissenting).

55 108 So. 566 (Ala. 1926).

56 *Stanford*, 108 So. at 566.

57 *Id*.

58 *Id*.

59 *Id*. at 567 (quoting Allaire v. St. Luke's Hosp., 56 N.E. 638, 640 (Ill. 1900)).

60 265 So. 2d 596 (Ala. 1972).

61 *Huskey*, 265 So. 2d at 596.

62 *Id*.

63 *Id*.

64 *Id*. at 596-97.

65 *Id*.

66 *Id*.

67 280 So. 2d 758 (Ala. 1973).

68 *Wolfe*, 280 So. 2d. at 759.

69 *Id*.

70 *Id*.

71 *Id*.

72 *Id*.

73 *Id*.

74 *Wolfe*, 280 So. 2d at 759.

75 *Id*. at 760.

76 *Id*. at 761.

77 *Id*.

78 *Id*.

79 *Id*. at 761, 764.

80 *Wolfe*, 280 So. 2d at 761-64.

81 *Id*. at 761 (citing Puhl v. Milwaukee Auto Ins. Co., 99 N.W.2d 163, 170 (Wis. 1959)).

82 WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 337 (4th ed. 1971).

83 *Id*.

84 *Id*.

85 *Id*. at 338.

86 *Wolfe*, 280 So. 2d at 761-62.

87 *Id*. at 761.

88 RESTATEMENT (FIRST) TORTS § 869 (AM. LAW INST. 1939).

89 *Wolfe*, 280 So. 2d at 761.

90 RESTATEMENT (SECOND) TORTS § 869 (AM. LAW. INST. 1979).

91 *Wolfe*, 280 So. 2d at 761-63. *See also* Hornbuckle v. Plantation Pipe Line Co., 93 S.E.2d 727, 728 (Ga. 1956); Bennett v. Hymers, 147 A.2d 108, 110 (N.H. 1958); Smith v. Brennan, 157 A.2d 497, 502, 504 (N.J. 1960); Kelly v. Gregory, 125 N.Y.S.2d 696, 698 (N.Y. App. Div. 1953); Sinkler v. Kneale, 164 A.2d 93, 96 (Pa. 1960).

92 *Wolfe*, 280 So. 2d at 759, 764.

93 300 So. 2d 354 (Ala. 1974).

94 *Eich*, 300 So. 2d at 355.

95 *Id*.

96 *Id*.

97 *Id*. at 356.

98 *Id*.

99 *Id*.

100 *Eich*, 300 So. 2d at 356.

101 *Id*. at 357.

102 *Id*.

103 *Id*.

104 *Id*. at 355.

105 *Id*.

106 *Eich*, 300 So. 2d at 358.

107 Mack v. Carmack, 79 So. 3d 597, 605 (Ala. 2011).

108 Lollar v. Tankersley, 613 So. 2d 1249 (Ala. 1993).

109 Gentry v. Gillmore, 613 So. 2d 1241 (Ala. 1993).

110 *Lollar*, 613 So. 2d at 1250.

111 *Id*.

112 *Id*.

113 *Id*.

114 *Id*.

115 *Id*.

116 *Lollar*, 613 So. 2d at 1250.

117 *Id*.

118 *Id*. at 1250-51.

119 *Id*. at 1251.

120 *Id*. at 1252.

121 *Id*.

122 *Lollar*, 613 So. 2d at 1252-53.

123 Mack v. Carmack, 79 So. 3d 597, 606 (Ala. 2011).

124 Gentry v. Gillmore, 613 So. 2d 1241, 1242-43 (Ala. 1993).

125 *Id*. at 1243.

126 *Id*.

127 *Id*.

128 *Id*. (emphasis added).

129 *Id*. at 1244.

130 *Gentry*, 613 So. 2d at 1244.

131 *Id*.; Lollar v. Tankersley, 613 So. 2d 1252-53 (Ala. 1993).

132 *See* Mack v. Carmack, 79 So. 3d 597, 606 (Ala. 2011).

133 "Baby Mack" is what the unborn child was referred to for purposes of the litigation. *Id*. at 598.

134 *Id*.

135 *Id*.

136 *Id*.

137 *Id*.

138 *Mack*, 79 So. 3d at 598.

139 *Id*.

140 *Id*.

141 *Id*.

142 *Id*. at 599.

143 *Id*.

144 *See Mack*, 79 So. 3d at 598-99.

145 *Id*. at 600.

146 *Id*.

147 *Id*. (quoting Lollar v. Tankersley, 613 So. 2d 1249, 1252-53 (Ala. 1993)).

148 *Id*.

149 *Id*.

150 *See, e.g.*, *Ex parte* Haynes Downard Andra & Jones, LLP, 924 So. 2d 687 (Ala. 2005); *Ex parte* Fontaine Trailer Co., 854 So. 2d 71 (Ala. 2003); Carson v. City of Prichard, 709 So. 2d 1199 (Ala. 1998).

151 *Mack*, 79 So. 3d at 601.

152 *Id*.

153 *Id*. at 601-10.

154 Illinois, Louisiana, Missouri, Oklahoma, South Dakota, and West Virginia.

155 *Mack*, 79 So. 3d at 609.

156 *See* Pino v. United States, 183 P.3d 1001 (Okla. 2008); Smith v. Mercy Hosp. & Med. Ctr., 560 N.E.2d 1165-66 (Ill. 1990); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996); Connor v. Monkem Co., 898 S.W.2d 89 (Mo. 1995); Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995).

157 PROSSER, THE LAW OF TORTS 337 (4th ed. 1971).

158 Daniel S. Meade, *Wrongful Death and the Unborn Child: Should Viability be a Prerequisite for a Cause of Action*, 14 J. CONTEMP. HEALTH L. & POL'Y 421 (1998); Sarah J. Loquist, *The Wrongful Death of a Fetus: Erasing the Barrier between Viability and Nonviability*, 36 WASHBURN L.J. 259 (1997).

159 *E.g.*, ALA. CODE § 13A-6-1; LA. CIV. CODE ANN. art. 26 (1999). The *Mack* court noted that "[i]n Illinois, Louisiana, Missouri, and South Dakota, the legislatures expressly changed the wording of their respective wrongful-death statutes to include an 'unborn child.'" *Mack*, 79 So. 3d at 609.

160 *Id*. at 610.

161 *Id*.

162 *Id*. (quoting Gentry v. Gillmore, 613 So. 2d 1241, 1245 (Ala. 1993) (Houston, J., concurring)); *see also* Lollar v. Tankersley, 613 So. 2d 1249, 1252-53 (Ala. 1993) (Houston, J., concurring).

163 *Mack*, 79 So. 3d at 611.

164 Stinnett v. Kennedy, 232 So. 3d 202, 203 (Ala. 2016).

165 *Id*.

166 "An ectopic pregnancy occurs when the fertilized egg attaches itself in a place other than inside the uterus ... [t]he fertilized egg in a [n] [ectopic] pregnancy cannot develop properly and must be treated." *Ectopic Pregnancy*, AM. PREGNANCY ASS'N (July 20, 2017, 12:48 PM), http://americanpregnancy.org/pregnancy-complications/ectopic-pregnancy/.

167 *Stinnett*, 232 So. 3d at 204.

168 *Id*.

169 A D&C is "a surgical procedure in which the cervix is dilated and tissue is removed from the lining of the uterus, and a laparoscopy to determine whether the pregnancy was ... ectopic." *Id*. (footnote omitted).

170 *Id*.

171 *Id*.

172 *Id*. Methotrexate is a cytotoxic drug used to treat ectopic pregnancies and is intended to cause the end of the pregnancy. *Stinnett*, 232 So. 3d at 204.

173 *Id*.

174 *Id*. The court noted, however, that there was some dispute as to whether the fetus could have potentially reached viability but for the miscarriage. *Id*.

175 Brief of Appellant at 1, Stinnett v. Kennedy, 232 So. 3d 202 (Ala. 2016) (No. 1150889).

176 *See* Brief of Appellant, *supra* note 175, at 1, 7-11.

177 *Stinnett*, 232 So. 3d at 204-05.

178 *Id*.

179 *Id*.

180 *Id*.

181 Brief of Appellee at 3, Stinnett v. Kennedy, 232 So. 3d 202 (Ala. 2016) (No. 1150889).

182 *Stinnett*, 232 So. 3d at 205.

183 *Id*. at 205-06.

184 *Id*. at 206.

185 *Id*.

186 *Id*. at 207.

187 *Id*.; *see also* Gentry v. Gillmore, 613 So. 2d 1241, 1244 (Ala. 1993).

188 *Stinnett*, 232 So. 3d at 214.

189 *Id*.

190 *Id*. at 215.

191 *Id*.

192 *Id*. (emphasis added).

193 *Id*.

194 *Stinnett*, 232 So. 3d at 215.

195 *Id*.

196 *Id*.

197 *Id*.

198 *Id*.

199 *Id*. at 215.

200 *Stinnett*, 232 So. 3d at 215-16.

201 *Id*. at 216. *See also* ALA. CODE §§ 6-5-480 to -488 (1975); ALA. CODE § 6-5-540.

202 ALA. CODE §§ 6-5-481(9), 6-5-484(a).

203 Baker v. Chastain, 389 So. 2d 932, 935 (Ala. 1980) (quoting Zills v. Brown, 382 So. 2d. 528, 532 (Ala. 1980)).

204 ALA. CODE § 6-5-551.

205 *Id*.

206 The Restatement provides that *res ipsa loquitor* is a form of circumstantial evidence and states that "[t]he factfinder may infer that the defendant has been negligent when the accident causing the plaintiff's harm is a type of accident that ordinarily happens as the result of the negligence of a class of actors of which the defendant is the relevant member." RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARMM §17 (AM. LAW INST. 2010).

207 Howell, *supra* note 19, § 8:11.

208 *Baker*, 389 So. 2d at 934.

209 *See* ALA. CODE §§ 6-5-484, 6-5-548.

210 Stinnett v. Kennedy, 232 So. 3d 202, 216 (Ala. 2016).

211 *Id*.

212 *Id*. at 212.

213 *Id*. at 215.

214 Mack v. Carmack, 79 So. 3d 597, 611 (Ala. 2011).

215 Hamilton v. Scott, 97 So. 3d 728, 742 (Ala. 2012) (Parker, J., concurring) ("Today, there is broad academic agreement that agreement that *Roe* failed to provide an adequate explanation for the viability rule.").

216 *Stinnett*, 232 So. 3d at 221 (Parker, J., concurring specially).

217 *Id*. at 224.

218 *Id*.

219 *Id*.

220 Gualberto Garcia Jones, *Alabama Supreme Court Unanimously Recognizes Personhood of Unborn Children*, LIFESITE (Jan. 4, 2017, 3:07 PM), https://www.lifesitenews.com/news/alabama-supreme-court-unanimously-recognizes-equal-protection-for-pre-born.

221 *Id*.

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