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Tort--Viability is Not Prerequisite in Action for Injuries Sustained by Fetus

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of rent abatement to reflect this state of disrepair of leased premises.[10] Even so, the tenant is still forced to live under these substandard conditions. As a matter of public policy, the tenant needs some weapon by which he may compel the landlord to make the needed repairs. Here emerge the remedies of rent withholding[11] and suits for overpayment of rent.[12] This is the minimum economic leverage which the tenant must have to approach a bargaining position equal to that of the landlord. One policy rationale behind such a position may be found in the opinion of the court in *Pines v. Perssion*, where it was stated that, "Permitting landlords to rent 'tumbledown' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners."[13]

Most of these new developments in the field of landlord-tenant relations are occurring in the metropolitan centers where the proliferation of slums and massive low-income housing developments have mandated them. Perhaps adoption of these new concepts in jurisdictions which are not yet faced with these congestive housing problems would serve to lighten the impact of these problems or even to prevent the formation of these blighted areas.

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TORT—VIABILITY IS NOT A PREREQUISITE IN ACTION FOR INJURIES SUSTAINED BY FETUS. *Wolfe v. Isbell*, 280 So. 2d 758 (Ala.1973).

The Alabama Supreme Court recently ruled in *Wolfe v. Isbell*[1] that a fetus which was negligently injured before it became viable and

10. *See* Javins v. First National Realty Corporation, 428 F.2d 1071 (D.C. Cir. 1970); Academy Spires Inc. v. Brown, 111 N.J. Super. 477, 258 A.2d 556 (1970); Glyco v. Schultz, 289 N.E.2d 919 (Mun. Ct. Sylvania, Ohio 1972); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972).

11. *See* Income Properties Investment Corporation v. Trefethen, 155 Wash. 493, 284 P. 782 (1930); Darnall v. Day, 240 Iowa 665, 37 N.W.2d 277 (1949); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972).

12. *See* Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973).

13. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409, 413 (1961).

1. 291 Ala. —, 280 So. 2d 758 (1973).

which was subsequently born alive could maintain a cause of action under Alabama's wrongful death statute.[2] By allowing this action Alabama follows a slight majority of states which have abandoned the requirement of viability in allowing a wrongful death action for the tortious injury to an unborn child.[3] *Wolfe* is significant not only because it establishes in Alabama and affirms the modern view that viability is no longer a question in allowing recovery for a tortious injury to an unborn fetus, but more immediately because it illustrates the continued drift into inconsistency and confusion which the law has followed in regard to the rights of unborn infants.

Under the common law no action was allowed by the infant to recover for prenatal injuries. When various jurisdictions enacted wrongful death statutes and modern medicine established the separate existence of the fetus, the law was forced to recognize a cause of action by the infant. The courts interpreted the pertinent statute to include or exclude an unborn infant as a person. Viability and live birth became focal points in allowing an action. The limitations apparently developed from the need to prove that the fetus would have survived but for the tortious injury.

As some courts admitted the inconsistency of refusing an action by a nonviable fetus when medical science had discovered that the fetus was a separate person shortly after conception, an action was permitted by a fetus born alive whether it was viable or nonviable at the time of injury. This is the status of the law decided in *Wolfe.*

Finally, several jurisdictions rejected the requirement of live birth but required viability at the time of injury. The rationale here is simply that the fetus could live outside the womb. Viability is synonymous with birth; therefore, being stillborn after viability is the same as death resulting from injury after birth.

Though the law of tort regarding infants is confusing and inconsistent the problem is further compounded when viewed in relation to infant rights under property and criminal law and abortion.

While Oklahoma has not ruled on the issue of an injured fetus born alive,[4] it has previously rejected standing of a stillborn, nonviable

2. ALA. CODE, tit. 7, § 119 (1960).

3. Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (Sup. Ct. App. Div. 1953); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960). For complete list see Wolfe v. Isbell, 280 So. 2d 758, 763 (1973).

4. Padillow v. Elrod, 424 P.2d 16 (Okla. 1967).

fetus.[5] *Wolfe* is important because of the impact it will have on jurisdictions such as Oklahoma which eventually will be confronted with the issue of the nonviable fetus born alive. In that event these jurisdictions will have an opportunity to reconcile the contradictions or further develop the conflict. They must deny recovery because of the nonviability; allow recovery because of the live birth; or follow the logic of medical knowledge and permit recovery because the child was a person when conceived, regardless whether it was viable or not at the time of injury or whether it was subsequently born alive.

In *Wolfe* the father as the personal representative of the deceased child initiated the wrongful death action against the defendant for negligently operating a truck which collided with an automobile in which plaintiff's pregnant wife was seated. The unborn child allegedly suffered the prenatal injuries on March 10, 1970. More than three months later on June 16, 1970, the child was born alive and expired after approximately fifty minutes.[6] The father claimed that the negligence was the proximate cause of the infant's death.

In its ruling the Alabama court expanded the view it had established in *Huskey v. Smith*[7] where it held that a fetus was not a part of the mother. In that case the fetus was viable and born alive. *Huskey* had overruled *Stanford v. St. Louis-San Francisco Ry. Co.*[8] which represented the traditional view that the "unborn child was a part" of the mother and only became a person when it was born.[9] Since there was no action at common law for injuries to the fetus inflicted before the child's birth, the child itself had no protection for tortious injury. An action for negligent injury was allowed to the mother, who could recover for any damage suffered by the child because it was a part of her.[10] *Stanford* was consistent with the *Restatement of Torts*[11] and the old rule established in *Dietrich v. Northampton.*[12] The *Dietrich* court found that an unborn child was not a person under Massachusetts law and had no cause of action when it was prematurely born and lived for fifteen minutes. The mother had fallen on a defective highway

5. Howell v. Rushing, 261 P.2d 217 (Okla. 1953).
6. 280 So. 2d at 759.
7. 289 Ala. 53, 265 So. 2d 596 (1972).
8. 214 Ala. 611, 108 So. 566 (1926).
9. *Id.* at 611, 108 So. at 566.
10. *Id.*
11. RESTATEMENT OF TORTS, § 869 (1938). It held that "a person who negligently causes harm to an unborn child is not liable to such child for the harm."
12. 138 Mass. 14, 52 Am. Rep. 242 (1884). *Contra,* Keyes v. Construction Service, Inc., 340 Mass. 633, 165 N.E.2d 912 (1960).

which caused the premature birth. Justice Holmes concluded that "as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her . . . ."[13] While the child in *Dietrich* was nonviable at the time of injury, viability was not an issue under such an encompassing rule.

The *Huskey* court did not concentrate solely on the question of viability but relied on the basis of current medical knowledge to find that a "causal connection between the prenatal injury and death is not considered speculative"[14] and to say that "a child before birth is a part of the mother is no longer correct medical fact."[15] *Huskey* found that medical technology provided the impetus in removing many of the legal problems which had prevented prenatal action. A child is in existence from the moment of conception and is not a part of the mother's body.[16] Where the old rule held that a defendant owed no duty to an unborn fetus, Prosser states that writers today find an unborn child to be as much of a person as is the mother.[17] *Wolfe* reflects this change of thought which was first given judicial sanction in the case of *Bonbrest v. Kotz*.[18] In *Bonbrest* the child was viable and born alive. The court reasoned that if the child could live outside the womb it was viable and no longer a part of the mother. It was a person and could maintain the action. The overwhelming majority of jurisdictions which followed the reasoning of Justice Holmes in *Dietrich* have since overruled or confined their previous decision to the facts. Only Nebraska, in *Drabbels v. Skelly Oil Co.*,[19] and Tennessee, in *Hogan v. McDaniel*,[20] have not officially abandoned the theory that a fetus is a part of the mother.

As late as 1953, Oklahoma, in the case of *Howell v. Rushing*,[21] followed the reasoning of *Drabbels* and denied an action to a stillborn fetus. Since no common law right of action for wrongful death exists the "right of action commonly known as wrongful death accrues to the personal representative of decedent solely by virtue of statute."[22] Although Oklahoma's wrongful death statute allows an action to be

13. 138 Mass. at 17, 52 Am. Rep. at 242.
14. 289 Ala. at 56, 265 So. 2d at 598.
15. HERZOG, MEDICAL JURISPRUDENCE, §§ 860-975 (1931).
16. MALLOY, LEGAL ANATOMY AND SURGERY, 716 (2d ed. 1955).
17. PROSSER, LAW OF TORTS, 336 (4th ed. 1971).
18. 65 F. Supp. 138 (D.D.C. 1946).
19. 155 Neb. 17, 50 N.W.2d 229 (1951).
20. 204 Tenn. 235, 319 S.W.2d 221 (1958).
21. 261 P.2d 217 (Okla. 1953).
22. Haws v. Luethje, 503 P.2d 871 (Okla. 1972).

brought by the personal representative of the deceased if the latter might have maintained an action for injuries had he lived, the *Howell* ruling excluded the unborn child from the purview of this statute.[23]

In *Padillow v. Elrod*[24] the Oklahoma Supreme Court recognized that *Drabbels* was no longer controlling but followed the ruling of *Howell* in refusing an action by a child born dead. In both *Howell* and *Elrod* the court discussed the status of the unborn fetus and took notice of the viability question, but in both cases the child was stillborn which was the controlling factor. The court indicated that if it were faced with the question of a child born alive which subsequently died of injuries caused by the negligent activity of the defendant the deceased would have a cause of action under Oklahoma's statute. The *Elrod* court through *dicta* recognized the judicial trend not only in allowing recovery for prenatal injuries but also in excluding viability as a controlling element. However, the court specifically stated that before a stillborn child would have an action in Oklahoma the legislature must change the law. The court rejected the reasoning of *Verkennes v. Corniea*[25] where Minnesota allowed an action by the next of kin for the death of a stillborn child which was viable at the time of injury. The *Elrod* view is consistent with that of the American Law Institute which has discarded the criterion of viability and rested the cause of action on the specific requirement of the live birth.[26] Only if the applicable wrongful death statute provides for recovery does a stillborn child have a cause of action.[27] It seems that Oklahoma has accepted the reasoning of *Wolfe* and rejected the requirement of viability but requires live birth before an action can be brought under its statute.

A significant number of jurisdictions have gone further than *Wolfe* and have accepted the reasoning of *Verkennes v. Corniea* in allowing an action even though the fetus was stillborn.[28] The *Verkennes* court centered on the question of viability at the time of injury and abandoned the requirement of live birth. The court concluded that "where independent existence is possible and life is destroyed through a wrongful

23. OKLA. STAT., tit. 12, §1053 (1971).
24. 424 P.2d 16 (Okla. 1967).
25. 229 Minn. 365, 38 N.W.2d 838 (1949).
26. RESTATEMENT (SECOND) OF TORTS, § 869 (Tent. Draft No. 16, 1970).
27. 47 ALI PROCEEDINGS 371-377 (1970).
28. Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Rick v. Risk, 453 S.W.2d 732 (Ky. 1970); State to Use of Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Kwaterski v. State Farm Mutual Auto Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

act a cause of action arises . . . ."[29] Where jurisdictions have allowed an action for the stillborn child, the fetus has been viable. These courts have based the action on the pertinent statute and found that the legislature intended to include an unborn fetus in the definition of a person. The fourth circuit in *Todd v. Sandidge Construction Company*[30] ruled that an unborn fetus is a person under the South Carolina statute. However, where the fetus is not viable and born dead no action results.[31]

Though *Wolfe* is another case which has helped to lay the viability question to rest, the rights of the fetus for negligent injury are no more clearly defined and remain much in dispute. While the Supreme Court in *Roe v. Wade* rejected the argument that the fetus is a person under the fourteenth amendment, most states had premised the action in tort on finding the fetus is a person under its wrongful death statute.[32] Though the *Wade* decision centers on the question of abortion it clearly illustrates some of the confusion and conflict that surrounds the status of the unborn child. The *Wade* Court found that viability was a controlling element for an action in tort. "In most states, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained . . . ."[33] The Court found that "viability" was the "compelling" point at which the state acquired an "important and legitimate interest in potential life . . . ."[34] and could therefore proscribe abortions.

While the status of the unborn child is determined by viability when its interests conflict with the mother, *Wolfe* represents a growing trend to recognize the fetus as a person before viability when the fetus is confronted by a tortfeasor. Where the unborn child is affected by inheritance or property interests or criminal violations different criteria are employed to establish standing for the fetus but in nearly all cases live birth is required.[35] The *Wade* Court found that recovery for a stillborn fetus was often allowed to vindicate the interests of the parents and that the stillborn fetus was not considered a person. The Court did not elaborate on the question of viability in an action for tort

29. 229 Minn. at 368, 28 N.W.2d at 841.
30. 341 F.2d 75 (4th Cir. 1964).
31. West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958).
32. 410 U.S. 113, 158 (1973).
33. *Id.* at 161.
34. *Id.* at 163.
35. *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAWYER 349, 355 (1971).