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Constitutional Considerations Underlie Missouri's Expansion of Fetal Rights Within its Wrongful Death Statute

*Connor v. Monkem*¹

I. INTRODUCTION

When Missouri courts determine the existence of a cause of action under the wrongful death statute they have considered it necessary to address whether a fetus is a "person" within the statute. In *Connor v. Monkem*, Missouri extended its recognition of the rights of a fetus within its wrongful death statute beyond its previous decisions and those noted in other jurisdictions.² Missouri's decision differs distinctively from the law's traditional view of the fetus as a part of the woman, therefore devoid of rights as a separate entity.

Additionally, the decision may implicate constitutional concerns. In adopting its definition of a "person," the court relied on section 1.205³ to decide that "viability is the determinative point at which the legally protectable rights, privileges, and immunities of an unborn child should be deemed to arise."⁴ In *Webster v. Reproductive Health Services*,⁵ petitioners challenged the constitutionality of this statute. The U.S. Supreme Court stated that this portion of the Missouri statute would only be ripe for review if the state relied on the statute for more than simply an opinion about its concern for life. In holding that viability is the determinative point where fetal rights begin, the *Connor* decision expresses more than merely an opinion about Missouri's concern for life.

II. FACTS & HOLDING

Vicki Richards, a passenger in an automobile driven by Kathy Lindsey, died after a tractor trailer driven by Warren Richter, an employee of Monkem Company, Inc., struck the Lindsey vehicle.⁶ Ms. Richards was approximately

1. 898 S.W.2d 89 (Mo. 1995) (en banc).

2. *Id.* at 93.

3. MO. REV. STAT. § 1.205 (1994).

4. *Connor*, 898 S.W.2d at 92.

5. 109 S. Ct. 3040 (1989).

6. *Connor*, 898 S.W.2d at 90.

four months pregnant at the time of the accident.⁷ The four-month-old nonviable fetus did not survive.⁸

Jason Connor was the unmarried father of the unborn child.⁹ Connor brought a wrongful death action against Lindsey, Richter, and Monkem Company for the death of the unborn fetus.¹⁰ The trial court dismissed the suit for failure to state a claim, finding no cognizable cause of action for the wrongful death of a nonviable fetus.¹¹

The Missouri Court of Appeals for the Eastern District reversed the trial court's dismissal, concluding that Missouri recognizes a cause of action for the wrongful death of a nonviable fetus.¹² The Missouri Supreme Court granted transfer to cure an inconsistency with the decision of the Western District Court of Appeals.¹³

In its opinion, the Missouri Supreme Court addressed the fundamental issue of whether a nonviable unborn child qualifies as a "person" capable of supporting a claim for wrongful death under Missouri's wrongful death statute.¹⁴ The court reversed the judgment of the trial court and remanded

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* The unpublished opinion of the Court of Appeals is *Connor v. Monkem Co.*, No. 64884, 1994 WL 493561 (Mo. Ct. App. Sept. 13, 1994).

13. *Id.* This decision of the Eastern District Court of Appeals was also inconsistent with the Missouri Supreme Court's decision in *Rambo v. Lawson*, 799 S.W.2d 62 (Mo. 1990).

In *May, D.D.S. v. Greater Kansas City Dental Soc'y*, 863 S.W.2d 941 (Mo. Ct. App. 1993), the Court of Appeals for the Western District upheld the trial court's dismissal of an action for the wrongful death of a three-month-old fetus. *Id.* at 948. The mother, who was three months pregnant, allegedly miscarried after she read a purportedly libelous newsletter written by defendant. *Id.* The Western District Court of Appeals relied upon the Missouri Supreme Court's holding in *Rambo* when it stated, "In *Rambo*, a plurality [of the Missouri Supreme Court] ruled that the term person does not include a nonviable fetus, and therefore, a civil cause of action for the wrongful death of a nonviable fetus will not lie. . . . The *Rambo* decision controls and decides this point against plaintiff. . . ." *Id.* at 949.

14. *Connor*, 898 S.W.2d at 90. Missouri's wrongful death statute provides: Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured. . . .

MO. REV. STAT. § 537.080 (1994).

the case for further proceedings.¹⁵ The court held that section 1.205¹⁶ defines a "person" for purposes of Missouri's wrongful death statute, thus permitting a parent to recover for the wrongful death of a four-month-old nonviable fetus.¹⁷

III. LEGAL BACKGROUND

A. *The Development of Fetal Rights in Tort*

The common law refused to recognize a duty to an unborn plaintiff. Consequently, children who were born with injuries they sustained during prenatal development could not recover.¹⁸ This doctrine emerged from the historical treatment of the fetus as part of the mother and possessing no rights as a separate entity.¹⁹

In 1946, the court in *Bonbrest v. Kotz*²⁰ reversed the existing law and recognized a cause of action for prenatal injuries to a fetus. The *Bonbrest* court noted, however, that the infant, in addition to being born alive, sustained the injuries when viable.²¹ Therefore, the infant had standing to sue as a separate entity from the mother.²² The impact of this decision led every jurisdiction to follow the *Restatement (Second) of Torts* and permit claims by later born children for their prenatal injuries.²³ The Missouri Supreme Court first recognized such an action for injury to a viable child who was later born alive in *Steggall v. Morris*.²⁴

15. *Connor*, 898 S.W.2d at 93.

16. MO. REV. STAT. § 1.205 (1996).

17. *Connor*, 898 S.W.2d at 92.

18. *Dietrich v. Inhabitants of Northhampton*, 138 Mass. 14, 17 (1884) (denying recovery to administrator suing on behalf of prematurely born child for injuries sustained while child was nonviable fetus).

19. In denying recovery in *Dietrich*, Justice Holmes held that a fetus is part of its mother and is not a separate being of its own right. Any injury to the fetus, therefore, is actually an injury to the mother for her to recover damages on her own behalf. *Id.* at 14.

20. 65 F. Supp. 138 (D.C. Cir. 1946).

21. *Id.* at 139.

22. *Id.*

23. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 55, at 367-68 (5th ed. 1984). See Gary A. Meadows, *Wrongful Death and the Lost Society of the Unborn*, 13 J. LEGAL MED. 99, (1992). See also Joseph McReynolds, Note, *Childhood's End: Wrongful Death of a Fetus*, 42 LA. L. REV. 1411 (1982); Chase, Annotation, *Liability for Prenatal Injuries*, 40 A.L.R. 3d 1222 (1971) (discussion of state cases in which action for prenatal injuries was recognized).

24. 258 S.W. 2d 577 (Mo. 1953) (en banc).

The law soon expanded fetal rights in tort by recognizing a wrongful death cause of action when injuries to a viable fetus resulted in a stillborn fetus as distinguished from a born-alive fetus.²⁵ A Minnesota court first addressed this issue in *Verkennes v. Corniea*.²⁶ The Minnesota court concluded that it would permit an action for wrongful death under the state's wrongful death statute when a tortfeasor destroyed a life capable of independent existence.²⁷ Thirty-seven jurisdictions have since abolished the "born-alive" rule and expanded their wrongful death statutes to encompass a claim for a fetus that dies before birth.²⁸ The Missouri Supreme Court first held that Missouri's wrongful death statute provided a cause of action for a fetus who was injured when viable and who was later stillborn in *O'Grady v. Brown*.²⁹

As in *O'Grady*, almost all of the jurisdictions that currently allow recovery for the wrongful death of an unborn fetus impose the limit that the injured fetus be viable.³⁰ However, four states—Georgia, Rhode Island, Louisiana and, now, Missouri—have emphasized that a fetus is a "person" from conception, thus indicating that a cause of action for wrongful death of a stillborn, nonviable fetus might exist.³¹ The position taken by states reflect the belief that the right extends from the fetus rather than the woman.³²

Although these states have expressed their view that a nonviable fetus is a "person," they have not all, in fact, abolished *both* the born-alive and viability requirements for wrongful death actions. For example, in *Hornbuckle v. Plantation Pipe Line Co.*,³³ the Georgia Supreme Court considered a child "in being, from the time of its conception, where it will be for the benefit of such child to be so considered."³⁴ The Georgia court held that a child had

25. *Id.* at 582.

26. 38 N.W.2d 838 (Minn. 1949); *Meadows*, *supra* note 23 at 102-03.

27. *Id.* at 839. The Minnesota wrongful death statute stated, "when death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefore if he might have maintained an action had he lived . . ." MINN. STAT. ANN. § 573.02 (West 1947).

28. See KEBETON, *supra* note 23, at 370 & n.32 (listing states); *Meadows*, *supra* note 23 at n.29; Murphy S. Klasing, *The Death of an Unborn Child; Jurisdictional Inconsistencies In Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 933-34 (1995).

29. 654 S.W.2d 904, 911 (Mo. 1976) (en banc).

30. See *supra* note 22.

31. *Meadows*, *supra* note 23, at n.71; Klasing, *supra* note 28 at 949-951.

32. *Id.* at 949.

33. 93 S.E.2d 727 (Ga. 1956).

34. *Id.* at 728 (citing *Morrow v. Scott*, 7 Ga. 535, 537 (1849)).

a cause of action for a tortious injury sustained at any point after conception.³⁵ Although the court indicated that the right of action for prenatal injuries becomes available at conception, the child in this case was later born alive.³⁶ Therefore, the case did not present the court with the born-alive requirement. Subsequently, the Georgia Court of Appeals appeared to question its rejection of the viability requirement in *Billingsley v. State*³⁷.

Rhode Island is another state which recognizes a fetus as a "person" at conception.³⁸ In *Presley v. Newport Hosp.*,³⁹ the Rhode Island court stated its adherence to the rule that "one who survives birth may recover damages from a wrongdoer who inflicts prenatal injury regardless of the state of fetal development at which the injury occurs if the injured party can come forth with reliable proof of a causal link between the tortious act and the injury."⁴⁰ Although the Rhode Island court appeared to reject the viability distinction, it counterbalanced this expansion of the law with the requirement, as in *Hornbuckle*,⁴¹ that the nonviable, injured fetus survive birth in order to recover for the injuries it sustained prior to viability.⁴² Furthermore, because the complaint in *Presley* alleged that wrongful acts occurred when the fetus was viable, the facts of *Presley* did not require that the court decide upon the viability issue.⁴³ *Miccolis v. Amica Mutual Insurance Co.*⁴⁴ provided further proof that Rhode Island had not truly abandoned the viability requirement for wrongful death actions.⁴⁵ In *Miccolis*, the Rhode Island Supreme Court held that a five week old fetus was not a "person" within the meaning of the state's wrongful death statute.⁴⁶ The court rejected its prior reasoning when it stated that recognizing a fetus as a "person" at conception

35. *Id.* Similarly, in *Porter v. Lassiter*, the court found that for purposes of determining the existence of a cause of action for the death of a child a "fetus becomes a child when it is 'quick' or capable of moving in the mother's womb." 87 S.E.2d 100, 102 (1955).

36. *Id.*

37. 360 S.E.2d 451, 452 (Ga. Ct. App. 1987) (finding that a fetus is not a "person" under the vehicular homicide statute).

38. Klasing, *supra* note 28, at 950.

39. 365 A.2d 748 (R.I. 1976).

40. *Id.* at 752.

41. 93 S.E.2d 727 (Ga. 1956).

42. *Presley*, 365 A.2d at 752.

43. *Id.*

44. 587 A.2d 67, 71 (R.I. 1991).

45. Klasing, *supra* note 28, at 950.

46. Klasing, *supra* note 28, at 950.

would "give rise to actions based upon speculation and conditions wherein predictability would be virtually nonexistent."⁴⁷

Prior to the Missouri Supreme Court's decision in *Connor*, Louisiana appeared to be the only state truly rejecting both the viability and born-alive requirements in the context of the state's wrongful death statute.⁴⁸ In *Danos v. St. Pierre*,⁴⁹ the Supreme Court of Louisiana allowed a cause of action for the wrongful death of a six-month old fetus.⁵⁰ The court gave three principal reasons for the decision.⁵¹ First, the court stated, "it would be illogical and arbitrary for the cause of action to depend on whether the child lives outside the womb for a few minutes."⁵² Next, the court pointed out that a decision not to recognize a cause of action when the child is born dead benefits the tortfeasor who causes prenatal death rather than serious injury.⁵³ Finally, the court relied on newly enacted legislation in Louisiana which announced the policy that a human being exists "from the moment of fertilization and implantation."⁵⁴

B. Missouri's Pre-Connor approach to fetal rights in the context of wrongful death

The Missouri Supreme Court first abandoned the born-alive requirement for wrongful death actions in *O'Grady*.⁵⁵ The court noted the purpose of the wrongful death statute as providing "compensation for the loss of the companionship, comfort, instruction, guidance, counsel, . . . and support' of one who would have been alive but for the defendants' wrong."⁵⁶ In interpreting Missouri's wrongful death statute, the *O'Grady* court highlighted the three basic objectives behind the statute: "to provide compensation to bereaved plaintiffs for their loss, to ensure that tortfeasors pay for the consequences of their actions, and generally to deter harmful conduct which might lead to death."⁵⁷ The Missouri Supreme Court found

47. Klasing, *supra* note 28, at 950. This line of reasoning conflicts with prior Rhode Island cases which suggest that the courts should not consider the difficulty of proof in deciding whether a cause of action exists. Klasing, *supra* note 28, at 950.

48. Klasing, *supra* note 28, at 950.

49. 402 So. 2d 633 (La. 1981).

50. *Id.* at 637.

51. *Id.* at 638.

52. *Id.*

53. *Id.*

54. *Id.*

55. 654 S.W.2d 904, 911 (Mo. 1983) (en banc).

56. *Id.* at 908 (citing MO. REV. STAT. § 537.090 (1978)).

57. *Id.* at 909.

that it could equally achieve these purposes by allowing causes of action in situations where the deceased fetus was born or unborn.⁵⁸

O'Grady overruled the court's previous ruling in *Hardin v. Sanders*⁵⁹ which held that an unborn fetus was not a "person" entitled to maintain an action under the provisions of the wrongful death statute.⁶⁰ In support of its decision in *Hardin*, the Missouri Supreme court noted that *Roe v. Wade*⁶¹ stated that a fetus is not a "person" within the protection of the Fourteenth Amendment.⁶²

In 1990, the Missouri Supreme Court in *Rambo v. Lawson*⁶³ continued to uphold the viability requirement for wrongful death actions when it reversed a Missouri Court of Appeals decision which held that "a wrongful death action [would] lie for the tortious killing of a nonviable fetus."⁶⁴ The case involved the tortious death of a three-month-old, nonviable fetus.⁶⁵ The Court of Appeals for the Western District noted that "in light of current medical knowledge we see no principled reason to regard viability as the determinant in wrongful death actions for the death of an unborn child."⁶⁶ The Western District Court of Appeals also injected the notion that it would deny the existence of a cause of action due to the difficulty in establishing causation in cases involving injury to a nonviable fetus.⁶⁷

In overruling this decision, the Missouri Supreme Court held that "a nonviable fetus is not a person within the meaning of the wrongful death statute."⁶⁸ The court stated, "we do not believe it is necessary to extend the definition of person beyond the *O'Grady* standard in order to serve the purposes of the wrongful death statute, or to compensate the plaintiffs adequately for their loss."⁶⁹ The court did note, however, that Missouri statute section 1.205.2⁷⁰ points to the rejection of the viability standard when it states that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all

58. *Id.*

59. 538 S.W.2d 336 (Mo. 1976) (en banc).

60. *O'Grady*, 654 S.W.2d at 911.

61. 410 U.S. 113 (1973).

62. *Id.* at 158.

63. 799 S.W.2d 62 (1990).

64. *Rambo v. Lawson*, No. WD 41747, 1990 WL 54277, *7 (Mo. Ct. App., May 1, 1990), *overruled by* 799 S.W.2d 62 (Mo. 1990).

65. *Id.*

66. *Id.* at *3.

67. *Id.* at *5.

68. *Rambo*, 799 S.W.2d 62, 63 (Mo. 1990).

69. *Id.*

70. MO. REV. STAT. § 1.205 (1986).

the rights, privileges, and immunities available to other persons, citizens, and residents of this state,"⁷¹ The court, however, avoided deciding the effect of this statute when it found that the statute did not become operative until after the accident in *Rambo* and "so could not affect the substantive law governing the plaintiffs' claim."⁷² The court also noted that the legislature directed section 1.205.2 at abortion and did not intend for the bill to expand causes of action for wrongful death.⁷³

The dissent in *Rambo* cited several reasons for abandoning the viability standard when considering whether a wrongful death cause of action exists.⁷⁴ First, the dissent stated that medical authority has long recognized that an unborn child is in existence from the moment of conception.⁷⁵ Additionally, the dissent noted that advances in medical technology have increased the reliability of proving causation in these cases.⁷⁶ Next, the dissent argued that the viability standard is arbitrary because "the sole difference between viability and nonviability is merely a matter of time."⁷⁷ Finally, the dissent pointed out that the law has recognized a nonviable fetus in other areas of the law such as under the Civil Rights Act, within the meaning of insurance policies, and for purposes of inheritance.⁷⁸

House Bill No. 1596 (Act) known as "An Act . . . relating to unborn children and abortion . . . [and] to the use of public funds,"⁷⁹ contained the statute, section 1.205, referred to by the *Connor* court for its definition of "person" for purposes of the wrongful death statute.⁸⁰ In *Webster v. Reproductive Health Services*,⁸¹ petitioners challenged this section of the Act renamed by the Court as the "preamble."⁸² The Missouri Supreme Court found that the preamble was a permissible exercise of the state's authority to

71. *Rambo*, 799 S.W.2d at 63.

72. *Id.* at 64.

73. *Id.*

74. *Id.* at 66-68.

75. *Id.*

76. *Id.* at 68.

77. *Id.* at 69 (citing *State ex rel. Hardin v. Sanders*, 538 S.W.2d 336, 339 (Mo. 1976) (en banc)). Conversely, the majority in *Hardin* noted that conception is a "definite, observable event." *Hardin*, 538 S.W.2d at 339.

78. *Rambo*, 799 S.W.2d at 70.

79. H.R. 1596, 83rd Gen. Ass., 2nd Sess. (1986).

80. Randall D. Eggert, Andrew J. Klinghammer & Jeanne Morrison, Special Project, 'Of Winks and Nods'—*Webster's Uncertain Effect on Current and Future Abortion Legislation*, 55 MO. L. REV. 163, 165-66 (1990).

81. 492 U.S. 490 (1989) [hereinafter *Webster*].

82. *Id.* at 490.

make value judgments favoring childbirth over abortion.⁸³ By viewing the preamble as an expression of the "value judgment" of the state, the plurality avoided a decision on the constitutionality of the preamble.⁸⁴ The plurality concluded that it could avoid a determination on this issue until the Missouri courts decided "the extent to which the preamble's language might be used to interpret other state statutes or regulations."⁸⁵ In finding it unnecessary to decide the preamble's constitutionality, the plurality noted that "it will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way."⁸⁶

In his dissent in *Webster*, Justice Stevens rejected the State's argument that the preamble merely amended its tort, property, and criminal laws.⁸⁷ He supported his conclusion by noting that Missouri did not base these areas of law upon a definition of when life begins.⁸⁸ Additionally, he recognized that this argument could not withstand the prohibition, under the Missouri Constitution, against statutes pertaining to more than one subject matter.⁸⁹

The *Rambo* decision left a potential plaintiff with a substantive opening which would call on the Missouri Supreme Court to determine the effect of

83. *Id.* at 506. The right of a state to express such a "value judgment" was enunciated in *Maher v. Roe*, 432 U.S. 464 (1977), which found that "*Roe* did not declare an unqualified 'constitutional right to abortion....' It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Id.* at 473-74.

84. Eggert, *supra* note 85, at 170.

85. *Webster*, 492 U.S. at 506. Missouri has attempted to apply the preamble to Missouri law in several instances. The first example involved adding nine months to age in order to calculate a person's age from the time of conception. Eggert, Klinghammer & Morrison, *supra* note 85, at n.47, (citing *Columbia Daily Tribune*, July 25, 1989, at 10, col. 2). According to the Director of the Missouri Department of Revenue, age must be calculated in time since birth rather than from conception. *Id.* Therefore, one does not become eligible for a driver's license at fifteen years and three months. *Id.* Next, a woman in prison relied on the preamble to sue the state on behalf of her fetus. *Id.* (citing *Columbia Daily Tribune*, Aug. 3, 1989, at 1, col. 1). The woman maintained that her fetus was wrongfully imprisoned in violation of its constitutional rights. *Id.* When 21 people were acquitted of trespassing during a sit-in at an abortion clinic they cited the preamble to support their necessity defense. *Id.* (citing *Columbia Daily Tribune*, Aug. 17, 1989, at 1, col.2).

86. *Webster*, 492 U.S. at 506.

87. *Id.* at 570.

88. *Id.* at 570-71.

89. *Id.* at 570. Article 3, section 23 of the Missouri Constitution states:

No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated.

section 1.205 in deciding whether a cause of action for the wrongful death of a nonviable fetus exists.⁹⁰ With the *Connor* decision, Missouri became the fourth state to embrace the definition of a "person" as including a nonviable fetus. Additionally, Missouri and Louisiana may now be the only two states which allow a cause of action for the wrongful death of a stillborn, nonviable fetus.⁹¹

IV. INSTANT DECISION

A. *The Majority Opinion*

Writing for the majority, Judge Price noted that the court faced the issue whether the legislature, in enacting section 1.205.2, expressed an intention to deem a nonviable, unborn child a "person" for purposes of a section 537.080⁹² wrongful death claim.⁹³ The majority found that although section 1.205.2 did not expressly amend section 537.080, it "set out a canon of interpretation" that conception, not viability, is the point when "the legally protectable rights, privileges, and immunities of an unborn child arise."⁹⁴

90. See Klasing, *supra* note 28, at 945-46.

91. See *supra* note 41 (citing *Danos v. St. Pierre*, 402 So. 2d 633 (1981) allowing wrongful death action for nonviable, stillborn fetus).

92. The Missouri wrongful death statute provides:

Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall believe in an action for damages, notwithstanding the death of the person injured

MO REV. STAT. § 537.080 (1994).

93. *Connor*, 898 S.W.2d at 92.

94. *Connor*, 898 S.W.2d at 92. Section 1.205 reads:

1. The general assembly of this state finds that: (1) The life of each human beings at conception; (2) unborn children have protectable interests in life, health, and well-being; (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child. 2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state. 3. As used in this section, the term "unborn children" or "unborn child" shall include all

The court reached beyond the wrongful death context, however, when it stated that Missouri courts should read all Missouri statutes in coordination with this statute's statement about legally protectable fetal rights developing at conception.⁹⁵ Additionally, Judge Price cited section 1.205.1(3) as "especially persuasive" in the court's decision because it provides that "the natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child."⁹⁶ The court determined, therefore, that the legislature enacted section 1.205.2 as a rule of construction not limiting the statute to a mere policy statement within the confines of the abortion statute.⁹⁷ Judge Price concluded that Missouri courts should interpret "person" within the wrongful death statute to support parents' claims for the wrongful death of a fetus even prior to viability.⁹⁸

Next, the court noted its departure from the majority of other jurisdictions in deciding to uphold the wrongful death claim for a nonviable, unborn fetus.⁹⁹ In explaining its arguably unprecedented decision, the court pointed out that the courts in most other jurisdictions cannot rely on guidance from their wrongful death statutes.¹⁰⁰ This is the only reason the court provided to explain its extreme minority decision disregarding viability as the standard for recognizing a wrongful death action for an unborn fetus.¹⁰¹

Finally, the court focused on the issue of damages.¹⁰² The majority recognized that although the death of a nonviable, unborn child may support

unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development. 4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

MO. REV. STAT. § 1.205 (1994).

95. *Connor*, 898 S.W.2d at 92. The court cited its decision in *State v. Knapp*, 843 S.W.2d 345 (Mo. 1992) to support this determination. *Knapp* dealt with the application of § 1.205 to the criminal involuntary manslaughter statute. The *Knapp* court held that the definition of "person" in § 1.205 applied to the manslaughter statute. *Id.* at 347-48. The *Knapp* court noted, however, that § 1.205 and the manslaughter statute were both "passed in the same legislative session, on the same day, and as part of the same act, H.B. 1596." *Id.* at 347.

96. MO. REV. STAT. § 1.205.1(3) (1994).

97. *Connor*, 898 S.W.2d at 92.

98. *Id.*

99. *Id.* at 93.

100. *Id.*

101. *Id.*

102. *Id.*

a wrongful death claim, it may be impossible to prove damages in such cases.¹⁰³ Judge Price noted that a similarly difficult task in establishing damages exists in wrongful conception cases but this difficulty does not prevent wrongful conception claims.¹⁰⁴ The court pointed out the similar difficulty in proving damages in wrongful death cases involving young children or an unborn, viable fetus.¹⁰⁵ The court added, however, that these difficulties "are all the more glaring [in cases] involving a child that has not even reached the point of viability within the womb."¹⁰⁶ Nonetheless, the court found the difficulties in proving damages should not bar a plaintiff's ability to state a claim and attempt such proof.¹⁰⁷ Having concluded that Missouri would allow a wrongful death action for the death of a nonviable, unborn fetus,¹⁰⁸ and that the difficulty of proving damages in such cases would not bar the plaintiffs ability to bring the action,¹⁰⁹ the court reversed and remanded the case to the trial court for further proceedings.¹¹⁰

B. *The Dissenting Opinion*

Chief Justice Covington disagreed with the majority's reliance on section 1.205.2 for its conclusion that a nonviable fetus is a "person" within the meaning of section 537.080.¹¹¹ In her dissent, Justice Covington maintained that "section 1.205 has no effect on the outcome of this case."¹¹² Justice Covington based this decision on the conclusion that section 537.080 creates a cause of action for the survivors of the deceased and does not affect the rights of the unborn.¹¹³ Justice Covington pointed out that the wrongful death statute creates rights for the beneficiaries which have no derivative in the rights of the deceased.¹¹⁴ Therefore, the trial court in the *Connor* decision did not deny the fetus any rights when it held that a non-viable fetus

103. *Id.*

104. *Id.* Wrongful conception claims attempt to hold a physician liable in tort for damage to parents because of the physician's negligent sterilization. The damages difficulty involves calculating the damage to the parents due to their having an unwanted child.

105. *Id.*

106. *Id.* (citing *DiDonato v. Wortman*, 358 S.E.2d 489 (1987)).

107. *Connor*, 898 S.W.2d at 93.

108. *Id.* at 92.

109. *Id.* at 93.

110. *Id.*

111. MO. REV. STAT. § 537.080 (1994).

112. *Connor*, 898 S.W.2d at 94.

113. *Id.*

114. *Id.*

was not a person for the purposes of section 537.080.¹¹⁵ Justice Covington concluded that section 1.205 is inapplicable because Missouri's wrongful death statute is a right of the survivors of the deceased and, therefore, fails to implicate the interpretation of section 1.205 which refers to the "rights, privileges, or immunities of a fetus."¹¹⁶ The dissent noted that it would defy logic to conclude that "a statute concerning the rights of unborn children was intended to create a cause of action in favor of the parents."¹¹⁷ The dissent also rejected the majority's reliance on section 1.205.1(3) which implicates parents protectable interests in the "life, health, and well-being of their unborn child" as support for its holding.¹¹⁸ The dissent recognized that section 1.205.1(3), unlike section 1.205.2, does not call for the interpretation of other statutes in conjunction with it.¹¹⁹ Justice Covington concluded by stating that she would overrule the holding in *Knapp*¹²⁰ in so far as it indicated that § 1.205 defined the term "persons" in conjunction with the involuntary manslaughter statute.¹²¹

V. COMMENT

Chief Justice Covington's dissent in *Connor* highlights Justice Stevens' dissent in *Webster*.¹²² Justice Covington emphasized that Missouri's wrongful death statute creates a cause of action for the survivors of a deceased person.¹²³ She recognized that the right created by the statute does not derive from the rights of the fetus.¹²⁴

The concept of identifying the survivors as the locus of the right rather than the fetus avoids creating fetal rights that treat the fetus as an entity independent from the woman, thus preventing the possibility that these fetal rights could be used against the pregnant women. With the creation of fetal rights that emphasize the independence of the fetus, a woman could be held liable for maternal negligence resulting in accidents that cause fetal injuries. For example, a woman might be held liable for behavior during pregnancy

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* (citing MO. REV. STAT. § 1.205.1(3) (1986)).

119. *Id.* See *supra* note 71.

120. 843 S.W.2d 345. See *supra* note 98. The *Knapp* court held that the § 1.205 defines the term person for purposes of Missouri's manslaughter statute.

121. *Id.* at 94-95.

122. *Webster*, 492 U.S. at 560-571.

123. *Connor*, 898 S.W.2d at 94.

124. *Id.*, 898 S.W.2d at 94.

having potentially adverse effects on the fetus such as poor nutrition, smoking, or even exposing herself to work-place hazards.¹²⁵

Lawmakers need not view their options as either labelling the fetus a person or denying its existence. By identifying the survivors as the focus of the statutorily created wrongful death action rather than the fetus, lawmakers could achieve the purposes of the statute while avoiding a threat to women's autonomy.¹²⁶ The effect of a wrongful death action emanating from the survivors would continue to compensate parents for the loss of their expected child and protect the interest of a woman who has chosen to carry her pregnancy to term.¹²⁷ Additionally, recognition of the survivor's right would also continue to protect and preserve life by deterring harmful conduct and ensuring that tortfeasors pay for the consequences of their actions.¹²⁸ Finally, recognizing the action as the survivor's would also make it unnecessary for Missouri to give a meaning to "person" within the wrongful death context which could conflict with the meaning of "person" as announced in *Roe v. Wade*¹²⁹ for purposes of the Fourteenth Amendment.

Although a word may mean different things in different contexts, the problem here is that the definition of "person" for purposes of the wrongful death statute comes directly out of the abortion statute. This indicates that the courts will apply the same definition of fetal rights and personhood within the abortion context contrary to the holding in *Roe*. The *Webster* court seemed to warn against this outcome when it refused to decide the constitutionality of the "preamble" until Missouri courts decided "the extent to which the preamble's language might be used to interpret other state statutes or regulations."¹³⁰ In the nonabortion contexts, the Supreme Court has not considered the possible adverse effects that granting fetal rights will have on women's exercise of their constitutional rights.¹³¹ However, the expansion

125. Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 606 (1986).

126. In *O'Grady v. Brown*, the Missouri Supreme court identified three basic objectives behind the wrongful death statute: "to provide compensation to bereaved plaintiffs for their loss, to ensure that tortfeasors pay for consequences of their actions, and generally to deter harmful conduct which might lead to death . . . these reasons apply with equal force whether the deceased is born or unborn." 654 S.W.2d at 909 (citing MO. REV. STAT. § 537.080)).

127. *Id.*

128. *Id.*

129. 410 U.S. at 158. The holding in *Roe* was that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.*

130. 492 U.S. at 506.

131. Johnsen, *supra* note 125 at 614.

of fetal rights advocated in *Connor* may implicate constitutional liberty and privacy interests that the Court has recognized in *Roe* and other cases.

Courts could avoid implicating such constitutional considerations when allowing a tort claim for negligent destruction of a fetus by structuring and interpreting laws to focus on compensating parents for the loss of their expected child. This alternative would avoid equating the previable fetus with a person while appropriately serving the goals of the wrongful death action.

VI. CONCLUSION

In its decision in *Connor*, the Missouri Supreme Court decided to expand fetal rights to allow a wrongful death cause of action for a nonviable, unborn fetus. Only one other jurisdiction has in fact rejected both the viability and born-alive requirements for fetal wrongful death actions.

The *Connor* decision drags Missouri into unexplored and possibly unconstitutional territory by using Missouri's abortion statute for the definition of person within its wrongful death statute. The case presents the possibility for an unprecedented intrusion on women's rights because it implicates and threatens to destroy constitutional liberty and privacy interests previously recognized by the United States Supreme Court.

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