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Rambo I: The Missouri Supreme Court vs. The Wrongful Death Statute--Prelude to the Sequel

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Rambo I: The Missouri Supreme Court vs. The Wrongful Death Statute—Prelude to the Sequel?

Rambo v. Lawson

I. INTRODUCTION

Rambo v. Lawson answered the question left open by O'Grady v. Brown. O'Grady determined that a wrongful death cause of action existed for the death of a viable fetus. The O'Grady court, however, did not decide the question of whether a wrongful death cause of action existed for the death of a non-viable fetus. Rambo held that Missouri does not recognize a wrongful death cause of action for a non-viable fetus.

Rambo also significantly impacted Missouri law in two other areas. First, Rambo refused to breathe substantive life into the Missouri anti-abortion statutes beyond the abortion context. Because the anti-abortion statutes provide that "all laws" of Missouri should be changed to hold that "life begins at conception" and to endow a fetus with full property and legal rights, it is puzzling that the court resisted applying the statute to determine fetal wrongful death rights. Part III of this Note will analyze the court's reticence with applying the anti-abortion statute to the wrongful death context.

Second, and perhaps even more interesting for the future of Missouri wrongful death law, was the concurring opinion in Rambo written by Judge Robertson. Judge Robertson's opinion is significant because it applies the legislative re-enactment rule of statutory construction, a rule previously

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1. Rambo v. Lawson, 799 S.W.2d 62 (Mo. 1990).
2. Id.
3. 654 S.W.2d 904 (Mo. 1983).
4. Id. at 911.
5. Id.
6. Rambo, 799 S.W.2d at 63.
9. Rambo, 799 S.W.2d at 63 (citing Mo. Rev. Stat. § 1.205 (1986)).
10. Id. at 64.
11. For a complete analysis of the legislative reenactment rule of statutory construction, see infra notes 163 & 164 and accompanying text.
applied only in the areas of tax or corporate law, to the area of tort law (wrongful death). Judge Robertson’s application of the statutory construction rule should come as no surprise, however, because of the increasing development in Missouri of a statute-based tort law. As Missouri tort law becomes more based in statute, Missouri courts will increasingly rely on statutory construction arguments to resolve tort law controversies.

Judge Robertson’s opinion may also represent a trend of the court’s reasoning on the fetal wrongful death issue. Judges Blackmar, Higgins, and Billings, the three judges who signed the Rambo majority opinion, face imminent retirement or are presently not sitting on the Missouri Supreme Court. Thus, the two judges ascribing to the concurring opinion, Judges Robertson and Covington, now comprise a majority of judges who decided Rambo and remain on Missouri’s highest court. For these reasons, Part II of this Note will critically analyze Judge Robertson’s statutory construction argument in Rambo as a blueprint for future Missouri tort law.

II. LEGAL HISTORY OF MISSOURI’S WRONGFUL DEATH CAUSE OF ACTION

The original Missouri Wrongful Death Statute was enacted in 1855. Missouri courts originally interpreted this statute to create a wrongful death cause of action that did not exist at common law. Because the common

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12. The legislative reenactment rule of statutory construction has never been applied to Missouri tort law. For examples where the rule has been applied in the fields of tax and corporate law, see Roy F. Stamm Elec. Co. v. Hamilton Brown Shoe Co., 171 S.W.2d 580 (Mo. 1943); State ex rel Steed v. Nolte, 138 S.W.2d 1016 (Mo. 1940); State ex rel Gentry v. Meeker, 296 S.W. 411 (Mo. 1927).

13. Many areas of tort law that were originally based in common law causes of action now have a statutory basis. See Mo. Rev. Stat. §§ 538.205-.235 (1986) (tort actions based on medical malpractice); § 281.065 (liability of certified commercial pesticides); § 537.037 (liability of paramedics rendering emergency medical treatment); § 537.180 (liability of railroads for injuries to employees); § 537.105 (liability of radio stations for defamation actions).

14. At present, Judge Blackmar is the only judge on the Rambo majority still sitting on the Missouri Supreme Court.

15. This is because the three judges of the Rambo majority, as mentioned at supra note 14, face mandatory retirement or are currently not sitting on the Missouri Supreme Court. Further, the only dissenting judge who does not face mandatory retirement next year is Judge Holstein.


law did not recognize the wrongful death action, the Missouri courts deemed the wrongful death action to be substantive law and strictly construed it.18

The Missouri Supreme Court first addressed the issue of fetal wrongful birth in Buel v. United Railway Company.19 Buel denied wrongful death recovery for the parents of a viable fetus injured en ventre sa mere (in the womb), born alive, but dying later as a result of the pre-natal injuries.20 Buel's analysis derived from two landmark common law wrongful death cases that shaped American law for nearly sixty years: Dietrich v. Inhabitants of Northampton21 and Allaire v. St. Luke's Hospital.22 Dietrich and Allaire held that because an unborn child cannot be considered a separate legal entity from its mother, there can be no recovery in wrongful death for injuries the child sustained before birth.23

In 1953, Steggal v. Morris24 overruled Buel and declined to follow the Dietrich and Allaire reasoning.25 Steggal held that the law attributes "a legal personality to an unborn child."26 Because a child is a person, the child could maintain a cause of action after its birth for injuries received before its birth.27 The Steggal court also took the next logical step and held that if the injury caused the death of the child after birth, the parents of the child could maintain a cause of action for the wrongful death of the child.28

In Steggal, however, the child was born alive.29 The decision did not address the question of whether the parents of a still-born child could maintain a wrongful death suit against the tortfeasor. This question was answered in the negative in 1965 with the case of Acton v. Shields.30 In Acton, relatives of the fetus were not allowed wrongful death recovery for the death of the fetus.31 The court denied wrongful death recovery to the relatives because

19. 154 S.W. 71 (Mo. 1913).
20. Id. at 72.
22. 56 N.E. 638 (Ill. 1900).
23. Dietrich, 138 Mass. at 16-17; Allaire, 56 N.E. at 640-41. For a further discussion of the reasoning in Dietrich and Allaire, see Rambo, 799 S.W.2d at 67-69 (Holstein, J., dissenting).
24. 258 S.W.2d 577 (1953).
25. Id. at 579.
26. Id.
27. Id.
28. Id.
29. Id. at 578.
30. 386 S.W.2d 363 (Mo. 1965).
31. Id. Note that in 1965, the Missouri wrongful death statute required that claimants prove pecuniary losses as a pre-requisite to wrongful death recovery:
they could not prove actual damages, a prerequisite to a recovery under section 537.080 of Missouri's wrongful death statute, which states the following:

Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, which damages may be sued for and recovered.\textsuperscript{32}

The relatives of the deceased baby in Acton were denied relief because they could not demonstrate that they were damaged as a result of the baby's death.\textsuperscript{33} To prove damages, section 537.090 of the old Missouri Wrongful Death statute required that the plaintiff suffer pecuniary loss from the death of the fetus. The statute stated that "parties [are] entitled there to such damages as will fairly and justly compensate such party or parties for any damages he or they have sustained and are reasonably certain to sustain . . . ."\textsuperscript{34} Therefore, because the Acton relatives could not prove pecuniary loss, they were denied wrongful death recovery.\textsuperscript{35} By denying recovery on

In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as will fairly and justly compensate such party or parties for any damages he or they have sustained and are reasonably certain to sustain in the future as a direct result of such death. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts.

See historical note to Mo. Rev. Stat. § 537.090 (1979) (emphasis added). Thus, a different result might have been reached in Acton if the parents had brought suit. Presumably, parents of the fetus would be in a better position than relatives to prove pecuniary losses.

32. Mo. Rev. Stat. § 537.080 (1978) (prior to 1979 amendments). For the text of the 1979 amendments, see infra text at note 44. Thus, in effect, Acton held that the death of the fetus was not an event, which "if death had not ensued, would have entitled the party injured to maintain an action and recover damages in respect thereof" because the relatives of the fetus would not have been able to maintain an action for damages. To maintain an action for damages, they would have needed to prove "pecuniary losses." Acton, 386 S.W.2d at 364-65. See Mo. Rev. Stat. § 537.090 (1978) (prior to 1979 amendments). The text of section 537.090 is located at infra note 44.

33. Acton, 386 S.W.2d at 369.


35. Acton, 386 S.W.2d at 369. Note also that the child in Acton was injured en
the basis of the lack of demonstrable damages, Acton skirted the question that would trouble later Missouri courts: whether a fetus was a person for the purposes of the Missouri Wrongful Death Statute.\textsuperscript{36}

The first time the Missouri Supreme Court addressed the question of whether a fetus never born alive was a "person" was in State ex. rel Hardin v. Sanders.\textsuperscript{37} Hardin denied a wrongful death cause of action for a viable fetus that was injured \textit{en ventre sa mere} and born dead.\textsuperscript{38} More significantly, the Hardin court also held that a fetus was not a "person" within the meaning of wrongful death statute section 537.080.\textsuperscript{39} Hardin based its decision on four factors: (1) at common law an unborn fetus was not a person and if the Missouri legislature wanted to define a fetus as a person they would have done so explicitly; (2) that other words in the wrongful death statute like "deceased" imply that the legislature intended to include only those persons who had been born alive for wrongful death recovery; (3) that in other legal contexts, perfection of a fetus's legal interests are contingent upon live birth.\textsuperscript{40}

In 1983, \textit{O'Grady} v. Brown\textsuperscript{41} overruled Sanders and held that a wrongful death cause of action does exist for a viable fetus killed by a tortfeasor and never born alive.\textsuperscript{42} O'Grady interpreted the 1979 amendments

\textit{ventre sa mere} and never born alive. \textit{Id.} at 364.

\textsuperscript{36} Recall that according to Mo. REV. STAT. \S 537.080 (1978) (prior to 1979 amendments) a party can maintain a wrongful death cause of action only for the death of a person. For the relevant text of section 537.080, see supra note 32 and accompanying text.

\textsuperscript{37} 538 S.W.2d 336 (Mo. 1976).

\textsuperscript{38} \textit{Id.} at 338-39.

\textsuperscript{39} \textit{Id.} at 338.

\textsuperscript{40} \textit{Id.} at 338-41. The court cited Roe v. Wade, 410 U.S. 113, 161-62 (1973), as an example that the "unborn have never been recognized in the law as persons in the whole sense." Hardin, 538 S.W.2d at 339. The court also noted that an unborn child's interest in inheritance rights is generally contingent upon live birth. Hardin, 538 S.W.2d at 304-41.

\textsuperscript{41} 654 S.W.2d 904 (Mo. 1983).

\textsuperscript{42} \textit{Id.} at 910.
to Missouri Wrongful Death Statute sections 537.080\(^43\) and 537.090.\(^44\) Amended section 537.090 states the following:

[p]arties [are] entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death . . . .

Amended section 537.090 significantly changed the nature of recoverable damages allowed in wrongful death suits. Recall that in Acton and Hardin the pre-amendment section 537.090 was construed to allow recovery only for pecuniary losses.\(^45\) No recovery was permitted for loss of "companionship, society, or comfort as a result of the death."\(^46\) Because amended section 537.090 allowed for the recovery of the loss of companionship, society, and consortium, O'Grady held that parents of unborn children were among the class of plaintiffs that the Missouri Wrongful death statute was designed to protect.\(^47\)

\(^43\) Id. at 907. As amended in 1979, Mo. Rev. Stat. § 537.080 (1986) states as follows:

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 . . . .

Id.

For a complete discussion of the 1979 revisions to the Missouri Wrongful Death statutes, see Michael J. Patton, Note, Missouri's New Wrongful Death Statute—Highlights of Some Significant Changes, 45 Mo. L. Rev. 476 (1980).

\(^44\) Mo. Rev. Stat. § 537.090 (1986) states in pertinent part:

In every action brought under section 537.080, the trier of the facts may give to parties or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel . . . .

\(^45\) Acton v. Shields, 386 S.W.2d 363, 367-69 (Mo. 1965); see also O'Grady 654 S.W.2d at 907. For the complete text of the pre-amended section 537.090, see supra note 34 and accompanying text.

\(^46\) Acton, 386 S.W.2d at 366; see also O'Grady, 654 S.W.2d at 907.

\(^47\) O'Grady, 654 S.W.2d at 907-10. The court discerned three objectives behind the amended statute: "to provide compensation to bereaved plaintiffs for their loss, to
O'Grady also determined that a fetus was a person for the purpose of the Missouri Wrongful Death Statute section 537.080. The court noted that to hold that a fetus was not a person would frustrate the legislative intent behind the 1979 amendments. Additionally, the court reiterated the analysis in Steggal that the fetus itself has recognizable interests protected from injury at birth.

The O'Grady decision made two other significant changes in Missouri wrongful death law. First, the court reversed a line of Missouri cases which held that the wrongful death statute was in derogation of the common law and should be strictly construed by the courts. To be a derogation of common law, the court held, there must be a "lessening, weakening, curtailment or taking away of a power or authority." However, the wrongful death statute, according to O'Grady, did not to take away a common law right. Instead, it "mend[ed] the fabric of the common law" providing additional statutory remedies. Further, the court held that "[r]emedial acts are not strictly construed although they do change a rule of the common law." Thus, after O'Grady, the wrongful death statute was not strictly construed; it was interpreted "with a view to promoting the apparent objective of the legislative enactment.

ensure that tortfeasors pay for the consequences of their actions . . . [and] to deter harmful conduct." Id. at 909. The court noted that these policies support wrongful death compensation for the parents without regard to whether the deceased child had survived until birth. Id.

48. Id. at 910 (interpreting Mo. Rev. Stat. § 537.080 (1986)). For the complete text of amended section 537.080, see supra text accompanying note 43.

49. O'Grady, 654 S.W.2d at 910.

50. Id. at 909-11. The court found that in other situations, the infants' legal interests were protected. For instance, an unborn child has property rights, id. at 909, and a viable fetus is protected by the abortion statute. Id. (citing Roe v. Wade, 410 U.S. 113 (1973)).

51. Id. at 907-08. Although O'Grady did not acknowledge that it was implicitly overruling Missouri precedent on this point, previous Missouri cases had held that the wrongful death statute should be strictly construed. See Cummins v. Kansas City Pub. Serv. Co., 66 S.W.2d 920 (Mo. 1933).

52. Id. (quoting 3 OXFORD ENGLISH DICTIONARY 232 (1933)).

53. Id.

54. Id.

55. Id.

56. Id.
III. Rambo v. Lawson: Fact Summary and Holding

Rambo involved the wrongful death of a non-viable fetus.\(^{57}\) Plaintiffs Julius and Yulanda Rambo were riding in an automobile that collided with a vehicle driven by defendant Lawson.\(^{58}\) Yulanda was three months pregnant at the time of the collision and suffered a miscarriage.\(^{59}\) The Rambos sued Lawson for negligence and sought damages for the wrongful death of their unborn child.\(^{60}\) The case was dismissed by the trial court.\(^{61}\) The Missouri Western District Court of Appeals reversed the dismissal.\(^{62}\)

A. The Rambo Majority and Dissent Holding

Rambo decided two issues in Missouri wrongful death law: (1) whether a fetus is a "person" per the Missouri wrongful death statute and,\(^{63}\) (2) what role viability should play in that determination.\(^{64}\)

The issue of whether a fetus is a "person" arises because Missouri law only allows wrongful death recovery for the death of "persons":

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 . . . .\(^{65}\)

The majority and dissenting opinion in Rambo answered the question of whether a fetus was a person by following the same conceptual framework as O'Grady,\(^{66}\) they sought to determine the "legislative purpose" behind the wrongful death statute.\(^{67}\)

\(^{57}\) Rambo, 799 S.W.2d at 62.
\(^{58}\) Id. at 62.
\(^{59}\) Id.
\(^{60}\) Id.
\(^{61}\) Id.
\(^{62}\) Id.
\(^{63}\) Id. at 62-63.
\(^{64}\) Id. at 62-64.
\(^{66}\) See supra notes 41-56 and accompanying text for a discussion of the O'Grady holding.
\(^{67}\) Rambo, 799 S.W.2d at 63.
Judge Blackmar wrote the majority opinion in which Judges Higgins and Billings joined. Judge Blackmar wrote that the legislative purpose behind the wrongful death statute was not served by allowing recovery for a non-viable fetus. His conclusion was based on four policy and statutory considerations:

(1) there is always uncertainty and speculation about whether a pregnancy will culminate in a live birth, and the uncertainty is greater during the early part of the term; (2) the mother has won her action for negligently inflicted injury, in which the circumstances of her pregnancy and miscarriage may be brought out and considered as part of the intangible damages; (3) the father has an action for loss of the mother's services, in which the jury may consider such psychological problems as she may have sustained on account of the accident; (4) fertile parents may conceive another child, and any damage to reproductive capacity may be compensated in the parents' actions.

The majority also found that the Missouri anti-abortion statutes, particularly section 1.205, had no application in the wrongful death context. Section 1.205 states the following:

(1) The life of each human being begins 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 . . .

The majority held that section 1.205 regulated only abortions. The court noted that section 188.010 of the Missouri statutes made this intention explicit when it stated: "It is the intention of the general assembly of the state . . ."
of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion . . . "

The court assumed that if the legislature had intended section 1.205 to modify wrongful death actions, the legislature would have made this intention explicit. As a result, "life does not begin at conception" for the parents of a non-viable fetus, and the Rambos were denied recovery.

Judge Holstein, author of the dissenting opinion, argued that viability should play no role in determining whether a wrongful death cause of action exists. The dissent rejected the viability standard on three grounds: (1) because the common law recognized the fetus as a person; (2) medical science recognized a non-viable fetus as a person; (3) medical science will gradually expand the period by which fetuses are considered viable, thus the viability distinction is unworkable and based on "shifting grounds."

The dissent also criticized the majority's analysis of policy and legislative intent. Judge Holstein noted that the four policy reasons cited by the majority to deny wrongful death recovery for a non-viable fetus could also be made to deny recovery for a viable fetus or even a newborn infant. Finally, the dissent noted that, because a fetus who had been merely injured could recover against the tortfeasor, it would be "economically preferable for a tortfeasor to kill the fetus rather than merely injure the fetus." Such a result, Judge Holstein argued, contravenes the legislative purpose behind the wrongful death statute.

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77. Rambo, 799 S.W.2d at 64 (citing Mo. Rev. Stat. § 188.010 (1986)). See also Webster v. Reproductive Health Serv., 492 U.S. 490 (1989).
78. Rambo, 799 S.W.2d at 64. The court noted that in other areas of the original anti-abortion bill package (S.C.H.B. 1596, L.1986 pp. 689-694 (1986)), the legislators were aware of matters of civil liability. For instance, in Mo. Rev. Stat. § 188.028.2(4) (1986), the legislators conferred immunity from suit by parent of a minor on whom an abortion is performed by court authority. Similarly, Mo. Rev. Stat. § 188.120 (1986) created a cause of action for an employee who suffers discrimination for refusing to perform an abortion. Because of this awareness of matters of civil liability, the Rambo majority held that if the legislature had intended to change another matter of civil liability (e.g. wrongful death) they would have done so explicitly. Rambo, 799 S.W.2d at 64.
79. Id. at 66-70 (Holstein, J., dissenting).
80. Id. at 67-69.
81. Id. at 68-69.
82. Id. at 69-70.
83. Id. at 70.
84. Id. at 71. This is because if the non-viable fetus is killed there could now be no recovery for it under the Rambo majority holding. Id. at 64.
85. Id.
B. The Rambo Concurring Opinion

Unlike the Rambo majority and dissent, Judge Robertson’s concurring opinion refused to analyze the legislative intent behind the wrongful death statute.\textsuperscript{86} The court was not free to interpret the legislative intent, according to Judge Robertson, because of the legislative reenactment rule of statutory construction.\textsuperscript{87} The legislative reenactment rule states that "[w]here the Legislature, after a statute has received a settled judicial construction by a court of last resort, re-enacts it or carries it over without change or re-incorporates the exact language theretofore construed, it must be presumed that the Legislature knew of and adopted such construction."\textsuperscript{88}

Judge Robertson argued that the legislative reenactment rule became activated when the Missouri legislature reenacted the wrongful death statutes in 1979.\textsuperscript{89} In other words, following the language of the legislative reenactment rule, the "settled judicial construction" of the wrongful death statute was the decision of \textit{State ex. rel Hardin v. Sanders}.\textsuperscript{90} \textit{Hardin} held that a fetus was not a "person" for the purpose of the wrongful death statute until there has been a live birth.\textsuperscript{91} Because the legislature is presumed to be "aware of the decisions of the courts when it chooses to use the words it uses," and the legislature used the same word "person" when it reenacted the wrongful death statute in 1979, Judge Robertson assumed that the legislature intended to preclude fetuses from wrongful death recovery.\textsuperscript{92}

It then follows, according to Judge Robertson, that O'Grady and the Rambo majority were incorrectly decided because they failed to take into account that the legislature, by the legislative reenactment rule, had already decided that a fetus was not a "person" under section 537.080\textsuperscript{93} of the wrongful death statute.\textsuperscript{94} Because Judge Robertson, however, would affirm

\begin{itemize}
\item \textsuperscript{86} \textit{Id.} at 65 (Robertson, J., concurring).
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.} (quoting \textit{State ex rel Smith v. Atterbury}, 270 S.W.2d 399, 403-04 (Mo. 1954)).
\item \textsuperscript{89} \textit{Id.} at 65-66. For a discussion of the 1979 wrongful death reenactment, see \textit{supra} note 44 and accompanying text. Actually, as will be described in detail later, the legislature did not re-enact the wrongful death statutes: it \textit{amended} them. See \textit{supra} note 135-37 and accompanying text. This presents a problem for Judge Robertson's opinion.
\item \textsuperscript{90} 538 S.W.2d 336 (1976).
\item \textsuperscript{91} \textit{Id.} at 338.
\item \textsuperscript{92} \textit{Rambo}, 799 S.W.2d at 65-66 (Robertson, J., concurring) (citing Citizens Elect. Corp. v. Director of Dept. of Revenue, 766 S.W.2d 450, 452 (Mo. 1989)).
\item \textsuperscript{93} Mo. REV. STAT. § 537.080 (1986).
\item \textsuperscript{94} \textit{Rambo}, 799 S.W.2d at 65-66 (Robertson, J., concurring).
\end{itemize}
Hardin, which denied a cause of action for all fetuses never born alive, his opinion concurs in the result reached by the majority.95

IV. ANALYSIS: STATUTORY CONSTRUCTION AS A BLUEPRINT FOR MISSOURI TORT LAW?

A. Analysis of the Concurring Opinion

Judge Robertson’s statutory construction argument is a novel and subtle combination of three rules of statutory construction. The first rule ("Rule I") triggers the application of statutory construction. It states that if a statute is in derogation of common law, courts are "limited to the authority set out in the statute" and the statute "[is] not subject to judicial expansion."96 Judge Robertson argued that the wrongful death statute was in derogation of common law.97 Because the wrongful death statute derogates common law, Judge Robertson claimed that courts are constrained to the narrow intent of the legislature when interpreting the wrongful death cause of action.98 The wrongful death statute should therefore be strictly construed.99 In other words, had the legislature intended to include fetuses as "persons" for purposes of wrongful death, they would have done so explicitly.100

The other two rules invalidate the O’Grady decision by statutory construction. The second rule ("Rule II") states that the legislature is "aware [of] the decisions of the courts when it chooses the words it uses."101 For instance, in Citizens Electric Corp. v. Director of the Department of Revenue,102 the case Judge Robertson cited for support of his rule,103 the court was charged with interpreting the phrase "not organized for profit" for purposes of section 147.010104 of the Missouri tax code.105 The court held that although the phrase "not organized for profit" had not been construed

95. Id. at 66.
96. Id. at 65.
97. Id.
98. Id.
99. Id.
100. Id. This is essentially the conclusion reached by the court in State ex rel. Hardin v. Saunders, 538 S.W.2d 336, 338-39 (Mo. 1989).
101. Rambo, 799 S.W.2d at 65 (Robertson, J., concurring) (citing Citizens Elect. Corp. v. Director of the Dept. of Revenue, 766 S.W.2d 450, 452 (Mo. 1989)).
102. 766 S.W. 2d 450 (Mo. 1989).
103. Rambo, 799 S.W.2d at 65 (Robertson, J., concurring).
within the tax-law context, the legislature and courts had expressly defined the phrase within section 355 of the Missouri Not for Profit Corporation Statutes. The Citizens Electric court thus assumed that the legislature was aware of the decision of previous courts. When the legislature used the phrase "not organized for profit," they meant the definition as found in the Not for Profit Corporation Statutes. Similarly, Judge Robertson argued that when the legislature used the term "person" in section 537.080 of the wrongful death statute, it is presumed that they did so with the knowledge that "person" excluded fetuses per the Hardin decision.

The third rule ("Rule III") Judge Robertson relied on is the usual formulation of the "legislative reenactment rule." As mentioned above, this rule states that when the legislature reenacts a statute without change which has already been construed by the courts, it is presumed that the legislature was aware of the court's interpretation and adopted it. Using this rule, Judge Robertson argued that when the legislature reenacted the wrongful death statute in 1979, it was presumed to adopt the Hardin construction of the statute.

The legislative reenactment rule, however, was not sufficient for Judge Robertson's purpose because the reenactment of the wrongful death statute did not "reincorporate the exact language theretofore construed." The language of the amended wrongful death statute was different from that of the original statute. The most significant difference, as mentioned above, was

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108. Citizens Elect., 766 S.W.2d at 451-52.
109. Id. at 452. Of course, the Citizens Electric situation could be distinguished from Rambo because in Citizens Electric there was a previous court decision and a statute defining the phrase "not organized for profit," Id. In Rambo, there is only a previous court decision. More importantly, the Citizens Electric decision was not made in the context of a reenacted statute. This distinction is important because the legislature had explicitly spoken to what "not organized for profit" entailed in Citizens Electric. In Rambo, there is not explicit pronouncement by the legislature as to what a "person" is. Rather, Judge Robertson infers by legislative silence that the legislature meant that fetuses should not be considered persons. For a more detailed analysis of this criticism of Judge Robertson's argument, see supra notes 121-60 and accompanying text.
110. Rambo, 799 S.W.2d at 65 (Robertson, J., concurring).
111. For a complete restatement of this rule, see supra text at note 88.
112. Rambo, 799 S.W.2d at 65-66 (Robertson, J., concurring).
113. Id. at 66. Reincorporating the exact language of the statute is a requirement of the legislative re-enactment rule. See supra note 88 and accompanying text.
114. For a complete description of the differences, see supra note 44-47 and
the addition of language in section 537.090 that allowed compensation for loss of comfort, companionship, and consortium. The addition of this language, as noted above, provided the impetus for the court in O'Grady to overrule Hardin.

The legislature, though, did reenact the same term "person." Thus, by a combination of Rule II, which claims that the legislature is presumed to be aware of court defined terms (in this case Hardin's definition that a fetus is not a person) with Rule III, Judge Robertson presumed that the legislature reenacted the Hardin definition of a "person" in the 1979 amendments to the wrongful death statute. Judge Robertson's opinion marks the first time rule II and III have been combined by Missouri courts.

B. Criticism of the Concurring Opinion

This Note criticizes the statutory construction argument at three levels: (1) by presenting evidence against the presumption; (2) by criticizing the application of the presumption to the facts of this case; and (3) by criticizing the presumption as normative Missouri law.

1. Evidence Against the Presumption

Unfortunately, there is no published legislative history in Missouri to verify that the legislature was aware of the Hardin decision and intended to preclude fetal wrongful death claims when it reenacted the wrongful death statute. There is, however, other evidence that the legislature was not aware of the presumption. For instance, Senator Schneider, who co-sponsored the wrongful death statute amendments, has indicated longtime support of accompanying text.

116. See supra notes 46 & 47 and accompanying text.
119. Rambo, 799 S.W.2d at 65 (Robertson, J., concurring).
120. Indeed, as mentioned above, it marks the first time that the legislative reenactment rule was used outside of the tax or corporate law context. See supra note 12 and accompanying text.
121. Indeed, the 1979 amendments to the wrongful death statutes were written by Senators Dinger and Schneider. See S. 368 4th Assembly 1st Sess. (1979). According to the legislative research clerk in Jefferson City, all records pertaining to the amendments were stored in Senator Dinger's office and were discarded with his retirement from the legislature.
granting all fetuses full legal and property rights of personhood. Thus, it is unlikely that Senator Schneider would have proposed the 1979 wrongful death amendments with the realization that their adoption would deny fetuses this aspect of personhood.

Second, the wrongful death amendments passed without incident by an overwhelming majority in both the Missouri House and Senate. Under Judge Robertson's interpretation, the adoption of the amendments would have been made with the legislators' explicit knowledge that they were specifically denying the fetus the status of a statutory "person". Such an inference is unlikely, given the legislators' mechanical approval of the amendments and the legislature's later adoption of the abortion law.

2. Criticism as Applied to the Facts of Rambo

The three rules of statutory construction outlined above do not readily fit the combined legal history of Rambo, O'Grady, and Hardin. First, Rule I of Judge Robertson's statutory construction argument hinges on the wrongful death statute being in derogation of the common law. O'Grady, however, held that the wrongful death statute was a remedial act and not in derogation of the common law. Judge Robertson's opinion ignores this aspect of the O'Grady decision. Moreover, if the wrongful death cause of action is not in derogation of the common law, the statute need not be strictly construed, which would allow the court to interpret the statutory language "with a view to promoting the apparent objective of the legislative enactment"—precisely the approach taken by the Rambo majority.

122. This information was obtained from a phone conversation with Senator Schneider (R. 14th Dist.) who consented to the publication of his remarks in this Note.


125. See supra notes 96-120 and accompanying text.

126. "When the legislature creates a cause of action in derogation of the common law, that cause of action is limited to the grant of authority set out in the statute." Rambo, 799 S.W.2d at 65 (Robertson, J., concurring). Thus, by negative implication, the courts are not so constrained if the cause of action is not in derogation of the common law. See supra notes 96-100 and accompanying text for an analysis of Judge Robertson's application of Rule I.

127. See supra note 51-56 and accompanying text. See also Stegglal v. Morris, 258 S.W.2d 577 (Mo. 1953).

128. O'Grady, 654 S.W.2d at 908 (quoting United Airlines v. State Tax Comm'n of Mo., 377 S.W.2d 444, 451 (Mo. 1964)).
Judge Robertson's opinion also failed to discuss the *O'Grady* analysis of the statutory construction argument. A statutory construction argument similar to Judge Robertson's legislative reenactment argument confronted the *O'Grady* court. 130 *O'Grady* dismissed the statutory construction argument because the wrongful death statute is dependent on the common law right of action for damages. 131 Therefore, if courts expand the common law action for damages, the scope of wrongful death recovery is also increased. 132 *O'Grady* further reasoned that the legislature's failure to close the link between wrongful death and common law damages recovery "patently" indicated that the legislature "did not intend to occupy this (wrongful death) field of law entirely, leaving room for judicial development of wrongful death remedies." 133 The court noted that other jurisdictions similarly allowed judicial expansion of the wrongful death remedy. 134 Thus, under the *O'Grady* analysis, the *Rambo* court should not be constrained to adhere to the doctrine of strict statutory construction.

*Rambo* also fits very uneasily into Rule II and III. Missouri courts have insisted that for the legislative reenactment rule to apply, the reenacted statute must incorporate the exact language of the original statute for the presumption to operate. 135 The 1979 amendments to the wrongful death statute, however, did not incorporate the exact language of the original statute. 136 In fact, it was this change in language that provided the impetus for the *O'Grady* court to overrule *Hardin*. 137

Judge Robertson's concurring opinion skirts the "exact language" requirement by combining Rule II with Rule III. 138 This combination has

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129. *Rambo*, 799 S.W.2d at 63 (Robertson, J., concurring).
130. *O'Grady*, 654 S.W.2d at 911.
131. Id. at 909. Wrongful death is dependent on the cause of action for damages because MO. REV. STAT. § 537.080 (1986) allows recovery "[w]henever the death of a person results . . . which, if death had not ensued, would have entitled such person to recover damages . . ." (emphasis added). Thus, wrongful death recovery is allowed only if a cause of action for damages exists.
132. *O'Grady*, 654 S.W.2d at 910-911.
133. Id. at 909.
134. Id. (citing Justus v. Atchison, 565 P.2d 122 (Cal. 1977) (Tobriner, J., concurring); O'Neil v. Morse, 188 N.W.2d 785, 786 (Mich. 1971)).
135. See State *ex rel.* Smith v. Atterbury, 270 S.W.2d 399 (Mo. 1954); Roy F. Stamm Elect. Co. v. Hamilton-Brown Shoe Co., 171 S.W.2d 580 (Mo. 1943); State *ex rel.* Steed v. Nolte, 138 S.W.2d 1016 (Mo. 1940).
136. See *supra* notes 44-46 and accompanying text.
137. *O'Grady*, 654 S.W.2d at 907-08.
138. See *supra* note 88 and accompanying text.
never been attempted in Missouri law\textsuperscript{139}—and for good reasons. To begin
with, the two rules of construction apply to completely different situations: Rule III applies when the legislature reenacts the same statute,\textsuperscript{140} while Rule II applies when the words or phrases of a newly enacted statute already have a settled meaning.\textsuperscript{141}

Combining Rules II and III may also compromise legislative intent, because Rule III applies to interpreting the statute as a whole,\textsuperscript{142} not the individual words of a statute. If the reenacted statute contains the same language as the original, the legislative purpose behind the statute presumably has not changed. On the other hand, if the reenacted statute contains significantly different language than the enacted statute, then the intent behind the statute has arguably changed.\textsuperscript{143} Courts should be allowed to give effect to this change in language by interpreting the statute differently.\textsuperscript{144}

Judge Robertson's statutory construction scheme, however, forecloses the judiciary's ability to interpret the new language of the reenacted statute even if the language of the statute has significantly changed. He accomplishes this by applying Rule II, normally reserved to interpreting new statutes, to the reenactment of an old statute.\textsuperscript{145} Using Rule II with a reenacted statute compromises legislative intent with circular reasoning. For example, if the word "liberal" was used in the context of a 19th Century social welfare statute, the word might have been interpreted to mean a proponent of an egalitarian government rather than a monarchy. If the same statute were later reenacted with the same word "liberal" and other altered language, the word might be intended to mean a proponent of the social welfare system. Nevertheless, by Judge Robertson's construction argument, the word "liberal" must still mean "a proponent of an egalitarian form of government," regardless of the intent of the reenacting legislature. Using Rule II within the reenacted statute may thus compromise legislative purpose because the definition of words in the

\textsuperscript{139} Only two Missouri cases have utilized Rule II: Citizens Elec. Corp. v. Director of Dep't of Revenue, 766 S.W.2d 450 (Mo. 1989); Hudson v. School Dist. of Kansas City, 578 S.W.2d 301, 311 (Mo. Ct. App. 1979). Neither of these cases mention the legislative re-enactment rule (Rule III).


\textsuperscript{141} United States v. Parker, 326 U.S. 803 (1945); 82 C.J.S. Statutes § 370 (1953).

\textsuperscript{142} See supra note 88 and accompanying text.

\textsuperscript{143} O'Grady, 654 S.W.2d at 907.

\textsuperscript{144} Id.

\textsuperscript{145} See supra notes 101-10 and accompanying text.
linguistic and historical context of the original statute may not be the
definition intended or implied within the new context of the reenacted statute.

_O'Grady_ and _Rambo_ serve as other examples of how legislative purpose
may be compromised. For example, _Hardin_ interpreted "person" within the
context of the original wrongful death statute to exclude fetuses. The
wrongful death statute was reenacted in 1979 with a significant change in
language. _O'Grady_ determined that within this new context, the definition of the word "person" had changed as well: no longer would "person"
exclude fetuses per the _Hardin_ decision, but "person" would include viable
fetuses as well. Again, Judge Robertson's opinion would mandate the
_Hardin_ definition of person even if the intent of the legislature had changed.

3. Normative Criticism

The legislative reenactment rule used by Judge Robertson has recently
received growing criticism from judicial and academic sources. Most of
the criticism focuses on the legislative reenactment rule's ability to predict
legislative intent. Indeed, one of the arguments often used to support the
rule is that the legislature is aware of all the judicial rulings concerning the
statute. Thus, when the legislature reenacts the statute without change or
objection to the judicial rulings, the legislature intended to give effect to the
judicial interpretation.

Commentators have pointed out that although the legislative reenactment
rule may have had a valid application 100 years ago, with the explosive
growth of judicial decisions and administrative rulings, it is "absurd" to
suggest that the legislature takes notice of all judicial rulings. The

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146. _See supra_ notes 37-40 and accompanying text.
147. _See supra_ notes 44-46 and accompanying text.
148. _O'Grady_, 654 S.W.2d at 907-12.
149. _See_ Filiberto Agusti, _The Effect of Prior Judicial and Administrative
Constructions on Codification of Pre-Existing Federal Statutes: The Case of the
Federal Securities Code_, 15 HARV. J. LEG. 367, 385-87 (1978); Robert C. Brown,
_Regulations, Re-Enactment, and the Revenue Acts_, 54 HARV. L. REV. 377, 383 (1941);
William N. Eskridge, Jr., _Interpreting Legislative Inaction_, 87 MICH. L. REV. 67
(1988); John C. Grabow, _Congressional Silence and the Search for Legislative Intent:
151. _Id._
152. _Id._
153. _See_ Agusti, supra note 149, at 385-87 (stating that in 1907 there were 106
federal judges, not including the members of the Supreme Court. Today, there are 828
lower federal court judges); Brown, _supra_ note 149, at 383; Grabow, _supra_ note 149,
at 758.
legislature lacks the ability to take notice of all judicial rulings.\textsuperscript{154} Similarly, in Missouri, the proliferation of judicial decisions in the last century belies the legislature's awareness of court decisions.\textsuperscript{155}

As a result, with the explosion of judicial rulings, the legislature's failure to revise or repeal a provision that has received a judicial interpretation may only indicate unawareness, rather than approval, on the part of the legislature.\textsuperscript{156} Even commentators favorable to the legislative reenactment rule have stated that the rule should not apply unless there is specific evidence that the legislature was aware of the judicial decision.\textsuperscript{157}

Further, even with evidence that the legislature was aware of the judicial decision, no conclusion should be drawn as to legislative intent. Commentators point out that inaction on the part of the legislature might just as well indicate a "lack of interest," "preoccupation with more pressing matters," or a belief that the matter is better "left to the courts" for resolution by judicial interpretation.\textsuperscript{158}

Thus, in a situation like \textit{Rambo}, the application of the legislative reenactment rule of statutory construction is speculative at best. There is no indication that the legislature was aware of the \textit{Hardin} decision when it reenacted the wrongful death statute in 1979.\textsuperscript{159} Even if the legislature was aware of the decision, there is no indication that they intended to ratify \textit{Hardin} by reenacting the wrongful death statute. Indeed, as will be explained in the next section, perhaps the legislature intended to modify \textit{Hardin} by enacting the anti-abortion statute.\textsuperscript{160}

\begin{footnotes}
\item[154] Grabow, \textit{supra} note 149, at 758-59.
\item[155] For example, a review of the Missouri reporter indicates that in 1911 there were approximately 475 decisions made by the Missouri Supreme Court and the Missouri Courts of Appeals. By contrast, in 1990, there were over 3500 decisions made by the same courts (not including the multitude of decisions issued by administrative agencies).
\item[156] Grabow, \textit{supra} note 149, at 757-59.
\item[157] See \textit{Sutherland, supra} note 140, at 400.
\item[158] See Grabow, \textit{supra} note 149, at 759.
\item[159] See \textit{supra} notes 121-24 and accompanying text.
\item[160] See \textit{infra} notes 170 & 171 and accompanying text.
\end{footnotes}
V. ANALYSIS OF THE ANTI-ABORTION STATUTE

A. Analysis of the Rambo Decision

As mentioned above, Rambo denied applying section 1.205161 (the anti-abortion law) to define fetal wrongful death rights.162 By its terms, the anti-abortion law dramatically changes fetal rights under Missouri law. Section 1.205.1(3) of the abortion law, for instance, states that "[t]he natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child."163 Possibly more important to the wrongful death arena, section 1.205.2 amends all Missouri laws to grant unborn children the same legal rights as other citizens.164

Unfortunately, the Rambo court could not decide the applicability of section 1.205(2) to the fetal wrongful death context because the statute was not operative until after the Rambos' accident.165 There are indications in Rambo dicta, however, that the court would not apply section 1.205(2) to the wrongful death statute. The majority examined other provisions of the anti-abortion bill166 and concluded that "legislators were very aware of matters of civil liability" and could have easily changed the wrongful death statute itself.167 The court concluded that there was "no indication in the text that this bill [anti-abortion law] was designed to amend the wrongful death statute which the legislature could easily have done had such been its intention."168

B. Analysis of Future Prospects

The future effect of the anti-abortion statute on the wrongful death statute remains uncertain. The Rambo majority refused to apply the anti-abortion law to the wrongful death statute; however, the three judges in the majority will

162. See supra notes 173-77 and accompanying text.
165. Rambo, 799 S.W.2d at 64.
166. The court examined Mo. Rev. Stat. §§ 188.028.2(4), 188.120, 188.130 (1986). "Section 188.028.2(4) confers immunity from suit by parents of a minor on whom an abortion is performed by court authority. Section 188.120 creates a cause of action for an employee who suffers discrimination because of refusal to assist in an abortion. Section 188.130 eliminates the so-called "wrongful life" actions." Rambo, 799 S.W.2d at 64. See also supra notes 75-78 and accompanying text.
167. Rambo, 799 S.W.2d at 64.
168. Id.
soon retire from the court.\textsuperscript{169} Surprisingly, none of the other judges directly mention the abortion law in their decisions.

Future Missouri courts may address the issue of whether the anti-abortion law regulates only abortion, or whether it can be applied to other areas of fetal rights. By its terms, section 1.205.2 appears to change the "laws" of the state (including the wrongful death statute), to grant fetuses full legal rights. This section, when combined with section 1.205(3), which defines an "unborn child" to include non-viable children,\textsuperscript{170} forms a persuasive argument that the legislature intended to include non-viable fetuses as "persons" within the wrongful death statute. Judge Clark of the Court of Appeals for the Western District of Missouri favored this interpretation.\textsuperscript{171}

However, the anti-abortion law ostensibly only regulates abortions. The title of the anti-abortion law reads: "An act to repeal sections . . . relating to unborn children and abortions, and to enact in lieu thereof twenty new sections relating to the same subject. . . ."\textsuperscript{172} Similarly, section 188.010 states the general intent of the assembly in adopting the bill was to "grant the right to life to all humans, born and unborn, and to regulate abortion. . . ."\textsuperscript{173} There is also no mention of an intent to change the wrongful death statute within the text of the bill.\textsuperscript{174}

There are other indications, however, that the anti-abortion law is not so limited. Missouri courts have applied the law in non-abortion contexts. For instance, Judge Robertson's opinion in Clan v. Harmon\textsuperscript{175} states that provisions of the anti-abortion law\textsuperscript{176} define an overall state policy of "strongly favoring life."\textsuperscript{177} Cruzan decided the rights of an incompetent adult in a "persistent vegetative state,"\textsuperscript{178} not fetal abortion rights. Thus, Cruzan could support the proposition that the anti-abortion law should be

\begin{itemize}
\item \textsuperscript{169} See supra notes 14 & 15 and accompanying text.
\item \textsuperscript{170} Mo. Rev. Stat. § 1.205(3) (1986).
\item \textsuperscript{171} Rambo v. Lawson, No. WD 41747 (Mo. Ct. App. May 1, 1990).
\item \textsuperscript{172} Mo. Rev. Stat. § 1.205 (1986) (preamble).
\item \textsuperscript{173} Mo. Rev. Stat. § 188.101 (1986).
\item \textsuperscript{174} See supra notes 72 & 75 and accompanying text.
\item \textsuperscript{175} 760 S.W.2d 408 (Mo. 1988).
\item \textsuperscript{176} Id. Judge Robertson examined three provisions of the anti-abortion law: (1) Section 188.010, which states that the intention of the General Assembly is to grant the "right to life of all humans, born and unborn . . . ." (2) Section 188.015(7), which determines that a fetus is viable "when the life of the unborn child may be continued indefinitely outside of the womb by natural or \textit{artificial} lifesignet systems" (emphasis added); and (3) Section 188.130, which denies a cause of action for wrongful life and birth. Cruzan, 760 S.W.2d at 419.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Id. at 410.
\end{itemize}
applied beyond the abortion context. Similarly, Judge Blackmar, dissenting in *Wilkins v. State*, 179 would extend section 188.028 180 of the abortion law to define a state policy against allowing a minor to plead guilty and request the death penalty. Section 188.028 prohibits a minor from having an abortion. 181

None of these examples, however, applies the anti-abortion law as substantive law. *Cruzan* and *Wilkins* only cite the abortion law as an indication of general legislative policy to favor life. 182 Thus far, courts have substantively applied the abortion law only within the abortion context. 183

If a Missouri court does apply section 1.205.2 to the wrongful death context, they will have another obstacle to overcome: Article 3, Section 28 of the Missouri Constitution. Section 1.205.2, applied literally, would change the definition of a "person" in every "law of Missouri" to include a fetus at conception. But Section 28 precludes the legislature from making "blanket amendments". 184 That is, if the legislature intends to amend a statute, it must amend the statute explicitly rather than leave the courts to guess as to whether and in what respect an existing statute was amended.

The Missouri Supreme Court struck down similar blanket legislation in *State ex rel. McNary v. Stussie*. 185 The statute in *Stussie* changed the age of majority from 21 to 18 for purposes of Missouri law. 186 As with the anti-

179. 802 S.W.2d 491 (Mo. 1991) (Blackmar, J., dissenting).
181. Id.
182. See supra notes 175-81 and accompanying text.
184. See State ex rel. McNary v. Stussie, 518 S.W.2d 630, 634 (Mo. 1974).
The text of art. 3, section 28 of the Missouri Constitution reads as follows:
No act shall be revived or reenacted unless it shall be set forth at length as if it were an original act. No act shall be amended by providing that words be stricken out or inserted, but the words to be stricken out or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended.

185. 518 S.W.2d 630 (1974).
186. Id. at 631. The proposed statute said, in part:
3. After the effective date of this act, a minor is a person who had not attained the age of eighteen years and whenever the term 'twenty-one years of age' is used as a limiting or qualifying factor it shall be deemed to mean 'eighteen years of age', and the revisor of statutes is hereby authorized to make the appropriate changes in the Revised Statutes of Missouri as they are revised, reenacted or reprinted.

Mo. S.B. 438, act 70, 77th Assembly, p. 190 (Vernon's 1974).
abortion law, the statute in Stussie did not change the language contained in individual Missouri statutes such as the voting age statute or the minimum age for jurors statute.\textsuperscript{187} Rather, the statute intended to change all statutes: "whenever the term 'twenty-one years of age' is included as a limiting or qualifying factor [in Missouri law] it shall be deemed to mean 'eighteen years of age'\ldots"\textsuperscript{188} The Stussie court struck down the statute in accordance with section 28 because it did not specifically amend other statutes.\textsuperscript{189} Thus, because the abortion law would similarly change the wrongful death statute's definition of a person indirectly, it would face serious constitutional challenges.

VI. CONCLUSION

The Rambo decision finally laid to rest the question of whether there is a wrongful death cause of action for the death of a non-viable fetus. The door remains open for the Rambo holding to be challenged by a future case. Rambo expressly did not answer the question of whether the anti-abortion statute (section 1.250) applied in the wrongful death context. New personnel on the Missouri Supreme Court may again consider expanding the O'Grady holding to cover non-viable fetuses.

The most troubling aspect of the Rambo decision, however, is the statutory construction argument. Together with Citizens Electric, Rambo may indicate a trend among the newer members of the Missouri Supreme Court toward increased reliance on statutory construction arguments. As this Note has pointed out, there are numerous theoretical and practical problems with applying the legislative reenactment rule in a context like Rambo.\textsuperscript{190} Future Missouri courts should systematically deal with these conceptual difficulties to avoid compromising legislative intent if they intend to apply statutory construction arguments in a tort law context.

\textbf{Michael T. Kokal}

\begin{itemize}
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{188} Mo. S.B. 438, Act 70, 77th Assembly, p. 190 (Vernon's 1974).
\item \textsuperscript{189} \textit{Id.} at 636.
\item \textsuperscript{190} See \textit{supra} notes 121-60 and accompanying text.
\end{itemize}