Rel: 05/18/2012

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2011-2012

1100192

Amy Hamilton, individually and on behalf of her stillborn son

v.

Dr. Warren Scott et al.

Appeal from DeKalb Circuit Court
(CV-06-149)

On Application for Rehearing

PARKER, Justice.

This Court's opinion of February 17, 2012, is withdrawn, and the following is substituted therefor.

Amy Hamilton, individually and on behalf of her stillborn son, sued Dr. John Blakely Isbell, Dr. Steven Coulter, Dr. Warren Scott, and the Isbell Medical Group ("IMG") (Dr. Isbell, Dr. Coulter, Dr. Scott, and IMG are hereinafter sometimes referred to collectively as "the defendants"), as well as several fictitiously named defendants, claiming that their negligent and wanton acts had wrongfully caused the death of her son and also caused her to suffer emotional distress. The DeKalb Circuit Court entered a summary judgment in favor of the defendants, holding that a wrongful-death action could not be maintained for the death of an unborn child who died before he was viable. The trial court also held that Hamilton was not in the "zone of danger" and, thus, could not recover damages for emotional distress. We reverse in part, affirm in part, and remand.

Facts and Procedural History

A. Hamilton's pregnancy and medical care[1]

[1]In accordance with the standard of review in an appeal from a summary judgment and as noted in the "Standard of Review" section of this opinion, we have reviewed the record in the light most favorable to Hamilton, the nonmovant; the facts regarding Hamilton's pregnancy and treatment are presented in light of that standard. Hobson v. American Cast Iron Pipe Co., 690 So. 2d 341, 344 (Ala. 1997).

In December 2004, Hamilton, pregnant with her second child, sought prenatal care from IMG, which had provided Hamilton with prenatal care during her first pregnancy. On Monday, January 10, 2005, Hamilton contacted IMG; she explained that she and her seven-year-old son had a rash that she believed might be "fifth disease," an infection caused by human parvovirus B19. The next day, January 11, 2005, Hamilton had blood drawn at IMG and was told that she would be notified of the results. On Friday, January 14, 2005, an IMG employee told Hamilton over the telephone that Hamilton "had been exposed to fifth disease and had the parvovirus" and that, consequently, she needed to immediately schedule an ultrasound, to be followed by an ultrasound every 2 weeks for the next 10 weeks. Hamilton understood this every-two-weeks ultrasound schedule to have been ordered by Dr. Isbell; Dr. Isbell confirmed this in his deposition.

On Monday, January 17, 2005, Hamilton went to IMG for the first scheduled ultrasound as well as a consultation regarding treatment for fifth disease. However, the doctor with whom Hamilton was scheduled to meet was unavailable; Hamilton was also unable to undergo the scheduled ultrasound because the technician was leaving early. Hamilton's request that she be

sent to the adjoining hospital for an ultrasound was denied by an IMG employee; instead, she was told to wait for her next appointment two weeks later.

Hamilton returned to IMG two weeks later, on Monday, January 31, 2005; during the appointment, the doctor she met with, Dr. Coulter, listened to the unborn child's heartbeat and told Hamilton that an ultrasound was unnecessary. He also explained to Hamilton the potential complications of fifth disease and the procedure for potential treatment of her unborn child, if necessary.

On February 18, 2005, Hamilton returned to IMG for her next scheduled appointment; she again requested an ultrasound, but the doctor she met with, Dr. Scott, said that an ultrasound was unnecessary.

On February 25, 2005, Hamilton returned to IMG for her next scheduled appointment, at which an ultrasound was performed. During the ultrasound, IMG's technician noticed that Hamilton's unborn son was not as large as the technician thought he should be at that stage of the pregnancy and that there was "a little fold at the back of his neck which worried [the technician] a little bit because it might be a sign of anemia." The technician told Hamilton "not to be alarmed

because [she] would probably be referred to a perinatologist for a second opinion" and that treatment, if any was necessary, would be available at "Kirklin Clinic."

Following the ultrasound, Hamilton met with Dr. Scott, who looked at still photographs from the ultrasound. Dr. Scott told her that a "nuchal fold [was] beginning to form" and that the nuchal fold "was one of the signs of becoming severely anemic and having hydrops," which, he said, "can lead to congestive heart failure." However, Dr. Scott told Hamilton that hydrops "can reverse itself" and that Hamilton should wait two weeks and return to IMG for another ultrasound. Hamilton requested that Dr. Scott refer her to "a perinatologist at Kirklin Clinic," but Dr. Scott told her that IMG could "handle it" at its office. Instead, Dr. Scott told Hamilton to come back in two weeks for another ultrasound, and he promised to refer Hamilton to a perinatologist at that point, if necessary.

Eleven days later, on March 8, 2005, Hamilton visited IMG without a scheduled appointment because she was feeling ill. In her deposition, Hamilton described how, after she tested positive for the flu, Dr. Scott "prescribed Extra Strength Tylenol for body aches, pain, and fever, because he said with

that particular situation, there's nothing you can do, you just have to wear it out." Hamilton summarized her symptoms as an "acute illness."

On March 10, 2005, Hamilton returned to IMG; as she explained in her deposition, she was "feeling really bad" and "seemed to be getting worse." She had also noticed "decreased movement" of her unborn child. An ultrasound performed by IMG determined that Hamilton's unborn son had died, probably in the previous 24 or 48 hours; labor was induced, and the child was stillborn on March 11, 2005. Dr. Isbell, Dr. Coulter, and Dr. Scott agree that Hamilton's unborn son had not reached viability, which is to say that, if her son had been born alive on that date, he was unlikely to have survived outside the womb.

B. Hamilton's litigation

On April 28, 2006, Hamilton filed a complaint in the trial court, alleging that the defendants had caused the death of her unborn son "and that the death of her unborn son was wrongful within the meaning of the Alabama Wrongful Death Act, Ala. Code § 6-5-410 (1975)."[2] Hamilton later amended her

[2]In her complaint, Hamilton stated that she was bringing "this action pursuant to [the Wrongful Death Act] as well as

complaint to allege that the defendants' negligence had caused her to suffer "mental anguish and emotional distress."

After completing discovery, the defendants filed a summary-judgment motion on June 7, 2009, arguing that this Court's decisions in Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993), and Lollar v. Tankersley, 613 So. 2d 1249 (Ala. 1993), did not permit a wrongful-death action where a previable child died before birth: "The Supreme Court of Alabama has held that a plaintiff cannot maintain a wrongful death action for a fetus not viable to live outside of the womb .... As such, summary judgment must be granted on behalf of the Defendants in regard to the wrongful death claim of the fetus." The defendants also argued that Hamilton could not recover damages for her emotional distress because, they said, she had not shown either that she had sustained physical injury or that she was placed at risk of immediate physical harm by the

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the provisions the Medical Liability Act of 1987, as amended, Ala. Code § 6-5-540 et seq. (1975)." The defendants also cited the Alabama Medical Liability Act ("the AMLA") in their answer and in their motions for a summary judgment. Hamilton does not dispute the applicability of the AMLA to this case; indeed, in her reply brief, Hamilton acknowledged that "claims against healthcare providers, whether in contract or tort, are now subsumed into one action by the Alabama Medical Liability Act." Hamilton's reply brief, at 6.

defendants, as required by this Court in AALAR, Ltd. v. Francis, 716 So. 2d 1141 (Ala. 1998). The defendants stated that Hamilton "failed to demonstrate that she was in the 'zone of danger' as required by Alabama law."[3]

Dr. Isbell and Dr. Coulter separately moved for a summary judgment; Dr. Isbell argued that Hamilton had presented no argument or evidence to show that he had breached the standard of care in his treatment of her.

Hamilton responded to the summary-judgment motions on October 1, 2010. She conceded that Dr. Isbell was entitled to a summary judgment, stating that she "hereby agrees that the 'Motion for Summary Judgment on Behalf of Dr. John Blakely Isbell' is due to be granted and concedes that there is no set of facts that, if proved against Dr. Isbell, would entitle her to recover." However, she argued that the summary-judgment motions filed by the other defendants should be denied. Specifically, she argued that in Gentry this Court had "based

[3]The defendants also argued in their summary-judgment motion that Hamilton had failed to prove that the death of her son was caused by the defendants. Hamilton responded to that argument, and the defendants raised it again in their reply brief to the trial court. However, the trial court's order made no factual determination regarding causation; therefore, the issue of causation is not before this Court. For that reason, we do not discuss causation issues in this opinion.

[its decision to deny recovery for the death of a previable unborn child] on the fact that 'there is no clear legislative direction.' 613 So. 2d at 1244." Hamilton argued that subsequent legislative actions had provided the courts with that "legislative direction." Specifically, Hamilton argued that several statutes on abortion enacted since Gentry was decided "provided clear direction indicating that the term 'minor child' can include nonviable fetuses." On the issue of damages for emotional distress, Hamilton argued that the loss of her unborn child was a physical injury that entitled her to recover damages for her emotional distress; alternatively, she argued that she was entitled to damages for emotional distress under Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369 (1981), in which this Court permitted a mother to recover damages for emotional distress following the death of her child during birth.

On October 5, 2010, the defendants filed a reply brief in support of their summary-judgment motions. In their reply brief, they argued that "the law in Alabama remains that a plaintiff cannot maintain a wrongful death action for a non-viable fetus and the Alabama legislature has not declared otherwise." Specifically, the defendants argued that the

legislature's subsequent, abortion-related legislation did not justify overruling Gentry and Lollar. The defendants also argued that, in seeking damages for her emotional distress, Hamilton did "not state a claim upon which relief can be granted" because, they said, she "misinterprets the holding in Taylor" and her "individual claim is insufficient as a matter of law."

On October 15, 2010, the trial court granted the defendants' summary-judgment motions, concluding:

> "[Hamilton] has conceded that the defendant, Dr. John Blakely Isbell, is due to be granted summary judgment.
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> "[Hamilton's] claims are for wrongful death and for emotional distress suffered by [Hamilton] as a result of being caused to deliver a stillborn child.
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> "The defendants assert, and the court agrees, that [Hamilton] cannot maintain a wrongful death action for a fetus not viable to live outside the womb. Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993); Lollar v. Tankersley, 613 So. 2d 1249 (Ala. 1993). The court considers the Gentry and Lollar cases controlling on this issue. The court is unconvinced that statutes passed by the legislature subsequent to those decisions have altered their application. Accordingly, it is adjudged that the defendants' motion for summary judgment is due to be granted as to the wrongful death claim.
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> "The defendants also assert that [Hamilton] cannot maintain a claim for emotional distress and mental anguish because she has failed to produce substantial evidence that she sustained a physical

injury or was placed in immediate risk of physical harm by the conduct of defendants. [Hamilton] insists that the Alabama Supreme Court's decision in Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369 (Ala. 1981), is controlling on this issue. In Taylor, the plaintiff's action against her physician was based on allegations that the physician negligently failed to attend during her labor and her delivery of a child who either was stillborn or died within moments of birth.

"The Supreme Court in Taylor abandoned the 'physical impact' test that had been the law up until that point and extended the right to recover to those who suffered emotional distress without also suffering a corresponding physical injury. In a later case, the Supreme Court discussed three tests for evaluating claims alleging negligent infliction of emotional distress that have developed in the common law: the physical impact test; the zone of danger test; and the relative bystander test. It then declared the current state of Alabama law to be consistent with the 'zone of danger' test, which limits recovery for emotional injury to those plaintiffs who sustain a physical injury as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. AALAR, Ltd., Inc. v. Francis, 716 So. 2d 1141 (Ala. 1998). In the AALAR decision, the Court found the decision in the Taylor case to be consistent with that test because it was reasonably foreseeable that the plaintiff would be placed at risk of physical injury by the physician's failure to attend her delivery.

"Given that the 'zone of danger' test is the current state of the law in Alabama, this court concludes that it is the test applicable to [Hamilton's] claim for emotional distress and mental anguish. To support that claim, [Hamilton] must establish by substantial evidence that it was reasonably foreseeable that she would be placed at risk of physical injury by the defendants' conduct.

The materials submitted to the court in support of and in opposition to defendants' motions for summary judgment are devoid of any such evidence, and the court finds the evidence insufficient to raise an issue of material fact as to whether the defendants' alleged breach of care placed [Hamilton] within the 'zone of danger.'

"[Hamilton] argues that the death of the fetus constituted 'physical injury' to her body, thereby entitling her to claim emotional distress and mental anguish. She suggests that the fetus was as much a part of her body as a lung, a kidney, a spleen, an arm, a leg or any other organ. Our Supreme Court, however, has quoted with approval holdings in cases from other jurisdictions that the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother. Wolfe v. Isbell, 291 Ala. 327, 280 So. 2d 768 (1973). The death of a fetus does not, without more, constitute a physical injury to the body of the mother, and the court finds as a matter of law that [Hamilton] cannot recover for emotional distress or mental anguish based on such claim.

"In conclusion, the court finds that [Hamilton] cannot maintain a wrongful death claim for the death of a non-viable fetus; she cannot maintain an individual claim for emotional distress because the evidence is insufficient to show that she was within the 'zone of danger,' and she cannot claim a physical injury to her body as a result of the death of the fetus. Based on these conclusions, the court finds it unnecessary to address the issue of causation.

"Accordingly, it is adjudged that the defendants' motion for summary judgment for all defendants on all claims is granted, and [Hamilton] shall have no recovery against the defendants."

Hamilton appealed the summary judgment in favor of the defendants other than Dr. Isbell.

After briefing in this case was completed, this Court issued its decision in Mack v. Carmack, 79 So. 3d 597 (Ala. 2011). In Mack, this Court recognized that a wrongful-death action is available for recovery of damages for the accidental death of a previable unborn child, specifically overruling Gentry and Lollar; in those cases, which the trial court in this case relied upon (see the trial court's order, quoted supra), this Court had held that damages could not be recovered for the wrongful death of a child who died without being born alive or reaching viability. In Mack, we stated:

> "In sum, it is an unfair and arbitrary endeavor to draw a line that allows recovery on behalf of a fetus injured before viability that dies after achieving viability but that prevents recovery on behalf of a fetus injured that, as a result of those injuries, does not survive to viability. Moreover, it is an endeavor that unfairly distracts from the well established fundamental concerns of this State's wrongful-death jurisprudence, i.e., whether there exists a duty of care and the punishment of the wrongdoer who breaches that duty. We cannot conclude that 'logic, fairness, and justice' compel the drawing of such a line; instead, 'logic, fairness, and justice' compel the application of the Wrongful Death Act to circumstances where prenatal injuries have caused death to a fetus before the fetus has achieved the ability to live outside the womb.

> "In accord then with the numerous considerations discussed throughout this opinion, and on the basis of the legislature's amendment of Alabama's homicide statute to include protection for 'an unborn child in utero at any stage of development, regardless of viability,' § 13A-6-1(a)(3), [Ala. Code 1975,] we overrule Lollar and Gentry, and we hold that the Wrongful Death Act permits an action for the death of a previable fetus. We therefore reverse the summary judgment in favor of Carmack and remand the action for further proceedings consistent with this opinion."

79 So. 3d at 611-12.[4]

Hamilton submitted copies of the Mack decision to this Court as supplemental authority in her appeal, accompanied by a letter asking the clerk of this Court to distribute those copies to the members of the Court. The defendants filed a motion to strike Hamilton's supplemental authority or, in the alternative, to grant the defendants permission to respond to that supplemental authority. This Court denied the motion to

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[4]Additionally, we note that this Court's holding in Mack is consistent with the Declaration of Rights in the Alabama Constitution, which states that "all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." Ala. Const. 1901, § 1 (emphasis added). These words, borrowed from the Declaration of Independence (which states that "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"), affirm that each person has a God-given right to life.

strike, granted the defendants permission to respond to the supplemental authority, and permitted Hamilton to reply to the defendants' response.

Standard of Review

> "'[O]n appeal a summary judgment carries no presumption of correctness,' Hornsby v. Sessions, 703 So. 2d 932, 938 (Ala. 1997). '"In reviewing the disposition of a motion for summary judgment, we utilize the same standard as that of the trial court in determining whether the evidence before the court made out a genuine issue of material fact" and whether the movant was entitled to a judgment as a matter of law.' Ex parte General Motors Corp., 769 So. 2d 903, 906 (Ala. 1999) (quoting Bussey v. John Deere Co., 531 So. 2d 860, 862 (Ala. 1988)). 'Our review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant.' Hobson v. American Cast Iron Pipe Co., 690 So. 2d 341, 344 (Ala. 1997)."

Harper v. Coats, 988 So. 2d 501, 503 (Ala. 2008).

Discussion

A. Whether Mack should apply in this case

The defendants present several arguments contending that this Court should not apply our recent holding in Mack in this case, which was pending on appeal when Mack was decided. However, these arguments are inconsistent with Alabama law:

> "The general rule is that a case pending on appeal will be subject to any change in the substantive law. The United States Supreme Court

> has stated, in regard to federal courts that are applying state law: '[T]he dominant principle is that nisi prius and appellate tribunals alike should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered.' Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543, 61 S.Ct. 347, 85 L.Ed. 327 (1941). See also United States v. Schooner Peggy, 1 Cranch 103, 5 U.S. 103, 2 L.Ed. 49 (1801). Thus, courts are required to apply in a particular case the law as it exists at the time it enters its final judgment:
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> > "'[I]t has long been held that if there is a change in either the statutory or decisional law before final judgment is entered, the appellate court must "dispose of [the] case according to the law as it exists at the time of final judgment, and not as it existed at the time of the appeal." This rule is usually regarded as being founded upon the conceptual inability of a court to enforce that which is no longer the law, even though it may have been the law at the time of trial, or at the time of the prior appellate proceedings.'
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> "Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907, 912 (1962) (quoting Montague v. Maryland, 54 Md. 481, 483 (1880))."

Alabama State Docks Terminal Ry. v. Lyles, 797 So. 2d 432, 438 (Ala. 2001) (emphasis added). Mack is now controlling precedent on the issue whether "the Wrongful Death Act permits an action for the death of a previable fetus," Mack, 79 So. 3d at 611, and the Court in that case held such an action

permissible. Therefore, we will apply Mack in deciding this appeal.

B. Whether Hamilton Can Recover Damages for the Alleged Wrongful Death of Her Stillborn Son

The first substantive issue we must consider is whether the trial court erred in holding that Hamilton could not maintain a wrongful-death action "for the death of [her] non-viable fetus." As set forth in Mack and as applicable in this case, Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child, even when the child dies before reaching viability. Applying our holding in Mack, quoted supra, we conclude that the summary judgment, insofar as it held that damages for the wrongful death of a previable unborn child were not recoverable, must be reversed and the case remanded for the trial court to reconsider the defendants' summary-judgment motions in light of this Court's holding in Mack; the trial court may conduct such proceedings as it deems necessary in reconsidering those motions.

C. Whether Hamilton Can Recover Damages for Emotional Distress

The second issue raised in this appeal is whether the trial court erred in holding that Hamilton "[could not] maintain an individual claim for emotional distress because the evidence is insufficient to show that she was within the 'zone of danger,' and she cannot claim a physical injury to her body as a result of the death of the fetus."

In their summary-judgment motions, the defendants argued that Hamilton could not recover damages for emotional distress because, they said, Hamilton "was not physically injured as a result of the defendants' alleged conduct" and Hamilton "was never in the 'zone of danger.'" In support of this argument, the defendants cited AALAR, 716 So. 2d at 1148, in which this Court stated that it "has not recognized emotional distress as a compensable injury or harm in negligence actions outside the context of emotional distress resulting from actual physical injury, or, in the absence of physical injury, fear for one's own physical injury." (Citing Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L.Rev. 477, 487 (1982)). The defendants noted that, during her

deposition, Hamilton testified that she had not been "concerned for [her] life."[3]

In her response to the defendants' summary-judgment motions, Hamilton stated that she "[did] not dispute that she never feared for her own life and is therefore not entitled to zone of danger damages." However, Hamilton claimed that she is "entitled to mental anguish damages" under this Court's decision in Taylor v. Baptist Medical Center, supra. Hamilton argued that Taylor "carve[d] out a specific exception" to the zone-of-danger test for cases in which a mother has suffered the loss of her unborn child. However, in AALAR, this Court explained that the test this Court had been applying with regard to claims for emotional-distress damages, including the test applied in Taylor, was "consistent with the 'zone of danger' test discussed in [Consolidated Rail Corp. v.] Gottshall, [512 U.S. 532 (1994)]." 716 So. 2d at 1147. In Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994), the United States Supreme Court stated that "the zone of danger test limits recovery for emotional injury to those plaintiffs

[3]Specifically, during her deposition, Hamilton was asked, "I mean, at any time in this process, were you ever concerned for your life?" Hamilton answered, "I was not concerned for my life."

who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." 512 U.S. at 547-48. Hamilton's assertion that Taylor "carve[d] out a specific exception" to the zone-of-danger test is erroneous.

The only physical harm Hamilton alleged in her response to the defendants' summary-judgment motions was the death of her unborn son. She argued that her unborn son was a part of her body; thus, she said, his death was a physical injury to her that allows her to recover damages for emotional distress. We reject that argument, however, because it is incompatible with this Court's holding in Wolfe v. Isbell, 291 Ala. 327, 330-31, 280 So. 2d 758, 768 (1973), in which we said "that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother."[6]

Because Hamilton conceded that she was "not entitled to zone of danger damages" and her argument suggesting that Taylor created an exception to the zone-of-danger test is misplaced, and because, in response to the defendants'

[6]In their brief on appeal, the defendants cite Wolfe for this same proposition. See defendants' brief, at 40

summary-judgment motions, she presented no evidence showing that she suffered a physical injury as a result of the defendants' actions, we conclude that the trial court properly entered a summary judgment insofar as it concerns Hamilton's claim for damages for emotional distress.

Conclusion

Based on our recent holding in Mack, we conclude that Hamilton was entitled to pursue a claim against the defendants for the wrongful death of her unborn son. Thus, as to Hamilton's wrongful-death claim, we reverse the trial court's summary judgment in favor of all the defendants except Dr. Isbell, as to whom Hamilton has not appealed, and we remand the case for further proceedings consistent with this opinion. However, because Hamilton failed to demonstrate that she was entitled to damages for emotional distress, we affirm the summary judgment for the defendants -- other than Dr. Isbell -- insofar as it denied Hamilton's claim for such damages.

APPLICATION OVERRULED; OPINION OF FEBRUARY 17, 2012, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Malone, C.J., and Woodall, Stuart, Bolin, Murdock, Shaw, Main, and Wise, JJ., concur.

Parker, J., concurs specially.

PARKER, Justice (concurring specially).

Today, this Court reaffirms that the lives of unborn children are protected by Alabama's wrongful-death statute, regardless of viability. I write separately to explain why the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973), does not bar the result we reach today and to emphasize the diminishing influence of Roe's viability standard. Because Roe is not controlling authority beyond abortion law, and because its viability standard is not persuasive, I conclude that, at least with regard to the law of wrongful death, Roe's viability standard should be universally abandoned.

I. The uncertain status of the viability standard in tort and criminal law since Roe.

Since 1973, when Roe was decided, laws regarding prenatal injury, wrongful death, and fetal homicide have increasingly abandoned the viability standard expressed in Roe. In prenatal-injury law, "every jurisdiction permits recovery for prenatal injuries if a child is born alive. ... This generally holds true regardless whether the injury occurred either before or after the point of viability. ... The majority of jurisdictions also recognize a cause of action for

the wrongful death of a stillborn, viable fetus." Crosby v. Glasscock Trucking Co., 340 S.C. 626, 634, 532 S.E.2d 856, 860 (2000) (Toal, J., dissenting) (footnotes omitted) (citing Farley v. Sartin, 195 W.Va. 671, 466 S.E.2d 522 (1995)).

States have been slower to abandon the viability standard in the area of wrongful death. If the child is stillborn, a majority of states and the District of Columbia allow recovery if the injury occurred after viability. See Aka v. Jefferson Hosp., 344 Ark. 627, 637 n. 2, 42 S.W. 3d 508, 515 n. 2 (2001) (noting that 32 jurisdictions permitted the recovery of damages for the wrongful death of a viable unborn child). Although some states never permit recovery for the wrongful death of a previable child,[7] other states permit recovery if

[7]See Aka, 344 Ark. at 640, 42 S.W. 3d at 516-17; Bolin v. Wingert, 764 N.E.2d 201, 207 (Ind. 2002); Humes v. Clinton, 246 Kan. 590, 596, 792 P.2d 1032, 1037 (1990); Kandel v. White, 339 Md. 432, 433, 663 A.2d 1264, 1265 (1995); Thibert v. Milka, 419 Mass. 693, 695, 646 N.E.2d 1025, 1026 (1995); Fryover v. Forbes, 433 Mich. 878, 446 N.W.2d 292 (1989); Blackburn v. Blue Mountain Women's Clinic, 286 Mont. 60, 86, 951 P.2d 1, 16 (1997) (reaffirming Kuhnke v. Fisher, 210 Mont. 114, 119-20, 683 P.2d 916, 919 (1984) (holding that an unborn child is not a "minor child," as that term is defined by statute)); Wallace v. Wallace, 120 N.H. 675, 677, 421 A.2d 134, 136 (1980); Miller v. Kirk, 120 N.M. 654, 657, 905 P.2d 194, 197 (1995); LaDu v. Oregon Clinic, P.C., 165 Or. App. 687, 693, 998 P.2d 733, 736 (2000) ("[N]othing in the statutory context indicates that a nonviable fetus is to be considered a 'person' for purposes of the wrongful death

the previable child is born alive and later dies.[8]

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statutes."), cert. denied, 331 Or. 244, 18 P.3d 1099 (2000); Coveleski v. Bubnis, 535 Pa. 166, 170, 634 A.2d 608, 611 (1993); Miccolis v. AMICA Mut. Ins Co., 587 A.2d 67, 71 (R.I. 1991); Crosby, 340 S.C. at 629, 532 S.E.2d at 857; and Baum v. Burrington, 119 Wash. App. 36, 43, 79 P.3d 456, 459-60 (2003), cert. denied, 151 Wash. 2d 1035, 95 P.3d 758 (2004).

[8]See, e.g., Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 505, 93 S.E.2d 727, 728 (1954) ("Where a child is born after a tortious injury sustained at any period after conception, he has a cause of action."); Kelly v. Gregory, 125 N.Y.S.2d 696, 697, 282 A.D. 542, 543-44 (1953) ("[L]egal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception."); Simon v. Mullin, 34 Conn. Supp. 139, 147, 380 A.2d 1353, 1357 (1977) ("The development of the principle of law that now permits recovery by or on behalf of a child born alive for prenatal injuries suffered at any time after conception, without regard to the viability of the fetus, is a notable illustration of the viability of our common law."); Bennett v. Hymers, 101 N.H. 483, 485, 486, 147 A.2d 108, 110 (1958) ("We adopt the opinion that the fetus from the time of conception becomes a separate organism and remains so throughout its life. ... We hold therefore that an infant born alive can maintain an action to recover for prenatal injuries inflicted upon it by the tort of another even if it had not reached the state of a viable fetus at the time of injury."); Smith v. Brennan, 31 N.J. 353, 367, 157 A. 2d 497, 504 (1960) ("We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of separate existence. ... Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress."); Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) ("As for the notion that the child must have been viable when the injuries were received, which has claimed the attention of several of the states, we regard it as having

The most significant shift away from the viability standard, however, has been in the law of fetal homicide. At least 38 states have enacted fetal-homicide statutes, and 28 of those statutes protect life from conception. See State v. Courchesne, 296 Conn. 622, 689 n. 46, 998 A.2d 1, 50 n.46 (2010) ("'[As of March 2010], at least [thirty-eight] states have fetal homicide laws.'" (quoting the National Conference of State Legislatures, Fetal Homicide Laws (March 2010) (alterations in Courchesne))).

Alabama's homicide statute, for example, defines "person" specifically to include "an unborn child in utero at any stage of development, regardless of viability." § 13A-6-1(a)(3), Ala. Code 1975. As Justice See wrote in a special concurrence joined by then Chief Justice Nabers and Justices Stuart, Smith, and Parker in Ziade v. Koch, 952 So. 2d 1072, 1082

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little to do with the basic right to recover, when the foetus is regarded as having existence as a separate creature from the moment of conception."); Torigian v. Watertown New Co., 352 Mass. 446, 449, 225 N.E. 2d 926, 927 (1967) ("We are not impressed with the soundness of the arguments against recovery. They should not prevail against logic and justice. We hold that the plaintiff's intestate was a 'person'" for the purposes of the wrongful-death statute."); and Day v. Nationwide Mut. Ins. Co., 328 So. 2d 560, 562 (Fla. Dist. Ct. App. 1976) ("We hold that a child born alive, having suffered prenatal injuries at any time after conception, has a cause of action against the alleged tortfeasor.").

(Ala. 2006), the homicide statute "defines 'person' to include an 'unborn child.' The legislature has thus recognized under that statute that, when an 'unborn child' is killed, a 'person' is killed." See also Ankrom v. State, [Ms. CR-09-1148, Aug. 26, 2011] ___ So. 3d ____, ____ (Ala. Crim. App. 2011) ("Alabama's homicide statute ... does apply to unborn children.").

Noting that Alabama's homicide statute protects an unborn child before viability, this Court recently held that, similarly, Alabama's "Wrongful Death Act permits an action for the death of a previable fetus." Mack v. Carmack, 79 So. 3d 597, 611 (Ala. 2011). In deciding that, for purposes of the Wrongful Death Act, a "person" includes an unborn child at any stage of gestation, this Court recognized the arbitrariness of "draw[ing] a line that allows recovery on behalf of a fetus injured before viability that dies after achieving viability but that prevents recovery on behalf of a fetus injured that, as a result of those injuries, does not survive to viability." Mack, 79 So. 3d at 611. These developments in Alabama match a larger pattern; currently, at least nine other states permit recovery for the wrongful death of previable unborn children, five by judicial construction -- Missouri, Oklahoma, Utah,

South Dakota, and West Virginia[9] -- and four by statute -- Illinois, Louisiana, Nebraska, and Texas.[10] Georgia and

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[9]Missouri: Connor v. Monkem Co., 898 S.W.2d 89, 92 (Mo. 1995) ("[W]e cannot avoid the conclusion that the legislature intended the courts to interpret 'person' within the wrongful death statute to allow a natural parent to state a claim for the wrongful death of his or her unborn child, even prior to viability."); Oklahoma: Pino v. United States, 183 P.3d 1001, 1005 (Okla. 2008) ("Our construction of [Oklahoma's wrongful-death statute] and the Oklahoma Constitution requires that a remedy be afforded for the death of a fetus, whether or not viable and whether or not born alive, and prohibits abrogating such an action."); Utah: Carranza v. United States, [No. 20090409, Dec. 20, 2011] ___ P.3d ____, ____ (Utah 2011) (holding "that the statute allows an action for the wrongful death of an unborn child; the term 'minor child,' as used in the statute, includes an unborn child" and noting that the language of the statute being interpreted by that court had since been amended); South Dakota: Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 791 (S.D. 1996) ("Based on our reading of [South Dakota Codified Law] 21-5-1, we conclude the Legislature clearly intended to encompass nonviable children in the term 'unborn child.'"); West Virginia: Farley v. Sartin, 195 W.Va. 671, 683, 466 S.E.2d 522, 534 (1995) ("[W]e, therefore, hold that the term 'person' ... encompasses a nonviable unborn child and, thus, permits a cause of action for the tortious death of such child.").

[10]Illinois: 740 Ill. Comp. Stat. 180/2.2 (2011) ("The state of gestation or development of a human being when an injury is caused, when an injury takes effect, or at death, shall not foreclose maintenance of any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default."); Louisiana: La. Civ. Code Ann. art. 26 (1999) ("An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception. If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death."); Nebraska: Neb. Rev. Stat. § 30-809(1)

Mississippi permit recovery of damages for the wrongful death of a "quick" unborn child previability.[11] Thus, the law of prenatal injury and fetal homicide has moved decidedly away from the viability standard, while the law of wrongful death has slowly followed.

II. Roe's viability standard is not controlling authority in wrongful-death law.

(2010) ("Whenever the death of a person, including an unborn child in utero at any stage of gestation, is caused by the wrongful act, neglect, or default ... the person who ... would have been liable if death had not ensued, is liable in an action for damages, notwithstanding the death of the person injured ...."); Texas: Texas Civil Practice & Remedies Code Ann. § 71.001(2) and (4) (2011) ("'Person' means an individual. ... 'Individual' includes an unborn child at every stage of gestation from fertilization until birth.").

[11]See Porter v. Lassiter, 91 Ga. App. 712, 716, 87 S.E.2d 100, 103 (1955) ("'[A] suit may be maintained by the mother for the loss of a child that was "quick" in her womb at the time of the homicide. ... The court does not believe it necessary for the child to be "viable" provided it was "quick", that is "able to move in its mother's womb."'" (quoting the trial court)); 66 Federal Credit Union v. Tucker, 853 So. 2d 104, 112 (Miss. 2003) ("[W]e hold that our wrongful death statute includes a fetus who is 'quick' in the womb as a 'person' within the language of that statute."). See also Shirley v. Bacon, 154 Ga. App. 203, 204, 267 S.E.2d 809, 811 (1980) (explaining that "[t]he mere fact that [the mother] had not felt the movement of the fetus does not necessarily mean that the fetus did not move or was not capable of movement at the time of the unborn child's death").

Some state courts have applied Roe's viability standard to wrongful-death law, citing Roe as prohibiting the recovery of damages for the wrongful death of a child who dies without reaching viability.[12] The California Supreme Court held that Roe limited California's criminal statutes protecting unborn children.[13] Misreading Roe, these courts concluded that the United States Supreme Court held in Roe that states have no interest in protecting the life of an unborn child before viability.

Although broadly written, Roe does not support that conclusion; the states are forbidden to protect unborn

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[12]See, e.g., Toth v. Goree, 65 Mich. App. 296, 304, 237 N.W.2d 297, 301 (1975) ("There would be an inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act."); Wallace v. Wallace, 120 N.H. 675, 679, 421 A.2d 134, 137 (1980) ("[I]t would be incongruous for a mother to have a federal constitutional right to deliberately destroy a nonviable fetus ... and at the same time for a third party to be subject to liability to the fetus for his unintended but merely negligent acts."). See also Aka, 344 Ark. at 641, 42 S.W.3d at 517-18; Justus v. Atchison, 19 Cal. 3d 564, 577-78, 565 P.2d 122, 130-31 (1977), disapproved on other grounds, Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1 (1985); Hamby v. McDaniel, 559 S.W.2d 774, 778 (Tenn. 1977); and State ex. rel. Hardin v. Sanders, 538 S.W.2d 336, 339 (Mo. 1976).

[13]People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498, 501 (1976).

children only in ways that conflict with a woman's "right." Roe held that a pregnant woman's "right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. See also Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992) (describing Roe as "holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages"). No one, however, other than a woman seeking to "terminate her pregnancy," possesses the "right" created in Roe. Nothing in Roe indicated that anyone other than the pregnant woman has any right to terminate her pregnancy and thereby to cause the death of her unborn child.

Roe does not prohibit states from protecting unborn human lives. To the contrary, in Casey, the Supreme Court acknowledged that "the State has legitimate interests from the outset of the pregnancy" in protecting the unborn child, 505 U.S. at 846, and a "substantial state interest in potential life throughout pregnancy." 505 U.S. at 876. Thus, unless a state's law conflicts with a woman's "right" to an abortion, the state law does not conflict with Roe. See also Gonzales v. Carhart, 550 U.S. 124, 158 (2007) (noting that "the State, from the inception of the pregnancy," has an interest "in

protecting the life" of the unborn child). Webster v. Reproductive Health Servs., 492 U.S. 490, 516 (1989); and Harris v. McRae, 448 U.S. 297, 313 (1980).

Roe's statement that unborn children are not "persons" within the meaning of the Fourteenth Amendment is irrelevant to the question whether unborn children are "persons" under state law. Because the Fourteenth Amendment "right" recognized in Roe is not implicated unless state action violates a woman's "right" to end a pregnancy, the other parts of the superstructure of Roe, including the viability standard, are not controlling outside abortion law.

Many state appellate courts have recognized that, except in the case of abortion, Roe does not limit state criminal or civil protection of the unborn child.[14] Justice Maddox

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[14]See, e.g., Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 792 (S.D. 1996) (Roe's viability standard not applicable to wrongful-death action); Commonwealth v. Bullock, 590 Pa. 480, 491-92, 913 A.2d 207, 214 (2006) (Roe does not prohibit charging killer of unborn child with murder); State v. MacGuire, 84 P.3d 1171, 1179-80 (Utah 2004) (Parrish, J., concurring) (Roe does not prohibit charging killer of unborn child with murder); 66 Federal Credit Union v. Tucker, 853 So. 2d 104, 113-14 (Miss. 2003) (Roe does not apply to action brought under wrongful-death statute); Farley v. Sartin, 195 W.Va. 671, 683-84 & n. 28, 466 S.E.2d 522, 534-35 & n.28 (Roe does not apply to wrongful-death action); People v. Davis, 7 Cal. 4th 797, 809, 872 P.2d 591, 598 (1994) (Roe's viability standard does not apply in the context of fetal murder); State

explained this distinction in his dissent in Gentry v. Gilmore, 613 So. 2d 1241, 1247 (Ala. 1993):

> "Roe and its progeny address the potential conflicts between a woman's right to an abortion and the State's interest in the woman's health and the fetus's life. Roe is not implicated when, as in this case, both the State and the mother have congruent interests in preserving life and punishing its wrongful destruction. I conclude that the legislature has a right to protect nonviable fetal life when its interest is congruent with that of the mother."

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v. Merrill, 450 N.W.2d 318, 322 (Minn. 1990) ("Roe v. Wade protects the woman's right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."), cert. denied, 496 U.S. 931 (1990); Summerfield v. Superior Court, 144 Ariz. 467, 478, 698 P.2d 712, 723 (1985) (Roe does not apply to wrongful-death action); and O'Grady v. Brown, 654 S.W.2d 904, 910 (Mo. 1983) (noting that Roe, "while holding that the fetus is not a person for purposes of the 14th amendment, does not mandate the conclusion that the fetus is a nonentity"). See also Crosby, 340 S.C. at 642, 532 S.E.2d at 864 (Toal, J., dissenting) ("Unlike abortion cases, wrongful death actions do not automatically implicate any countervailing constitutional liberties. No one can argue in this case that the state or federal constitution shields the defendants' allegedly wrongful conduct."); Lawrence v. State, 240 S.W.3d 912, 917-18 & n.24 (Tex. Crim. App. 2007) (Roe does not prohibit state from charging killer of unborn child with capital murder), cert. denied, 553 U.S. 1007 (2008); State v. Alfieri, 132 Ohio App. 3d 69, 78-79, 724 N.E.2d 477, 483 (1998) (Roe does not prohibit state from criminalizing fetal homicide); and People v. Ford, 221 Ill. App. 3d 354, 368-69, 581 N.E.2d 1189, 1199 (1991) (Roe does not apply to third-party assault of pregnant woman, which kills the unborn child).

Scholars have also recognized the limitations of Roe.[15] For these reasons, Roe is not controlling authority in this case.

III. Roe's viability standard is not persuasive.

Numerous scholars have criticized the viability rule of Roe.[16] Today, "there is broad academic agreement that Roe

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[15]See, e.g., Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U. L. Rev. 563, 614 (1987) ("[Roe] does not apply to the context of nonconsensual third party acts against the unborn child."); Jeffrey A. Parness, Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life, 22 Harv. J. on Legis. 97, 112 (1985) ("The decision in Roe does not preclude the state from protecting previable fetal life when such protection is reasonable and infringes upon no fundamental or other federal or state right ...."); and David Kadar, The Law of Tortious Prenatal Death Since Roe v. Wade, 45 Mo. L. Rev. 639, 657 (1980) ("Roe v. Wade neither prohibits nor compels consistency of interpretation of the meaning of 'person' as between the fourteenth amendment and wrongful death statutes.").

[16]Randy Beck, Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework, 51 Am. J. Legal Hist. 505, 516-26 (2011); Randy Beck, Gonzales, Casey, and the Viability Rule, 103 Nw. U. L. Rev. 249, 268-70 (2009); Paul Benjamin Linton, Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court, 13 St. Louis U. Pub. L. Rev. 15, 38-40 (1993); Mark Tushnet, Two Notes on the Jurisprudence of Privacy, 8 Const. Com. 75, 83 (1991) ("[U]sing the line of viability to distinguish the time when abortion is permitted from the time after viability when it is prohibited (as Roe v. Wade does), is entirely perverse."); John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 924-25 (1973); and Mark J. Beutler, Abortion and the Viability Standard -- Toward a More Reasoned Determination of the State's Countervailing Interest in Protecting Prenatal Life, 21 Seton Hall L. Rev. 347, 359 (1991) ("It is difficult to

failed to provide an adequate explanation for the viability rule." Randy Beck, Gonzales, Casey, and the Viability Rule, 103 Nw. U. L. Rev. 249, 268-69 (2009).

A. Roe misstated the protection of the unborn child under the common law.

Roe's viability rule was based, in significant part, on an incorrect statement of legal history. The Supreme Court in Roe erroneously concluded that "the unborn have never been recognized in the law as persons in the whole sense." 410 U.S. at 162. Roe also referred to "the lenity of the common law." 410 U.S. at 165. However, scholars have repeatedly pointed to inaccuracies in Roe's historical account since Roe was decided in 1973.[17] "[T]he history embraced in Roe would

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understand why viability should be relevant to, much less control, the measure of a state's interest in protecting prenatal life."). See generally Douglas E. Ruston, The Tortious Loss of a Nonviable Fetus: A Miscarriage Leads to a Miscarriage of Justice, 61 S.C. L. Rev. 915 (2010); Justin Curtis, Including Victims Without a Voice: Amending Indiana's Child Wrongful Death Statute, 43 Val. U. L. Rev. 1211 (2009); and Sarah J. Loquist, The Wrongful Death of a Fetus: Erasing the Barrier Between Viability and Nonviability, 36 Washburn L.J. 259 (1997); see also the sources cited by Justice Maddox in his dissent in Gentry v. Gilmore, 613 So. 2d at 1248-49.

[17]See generally Joseph Dellapenna, Dispelling the Myths of Abortion History (Carolina Academic Press 2006); John Keown, Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982 (Cambridge

not withstand careful examination even when Roe was written." Joseph Dellapenna, Dispelling the Myths of Abortion History 126 (Carolina Academic Press 2006).

Sir William Blackstone, for example, recognized that unborn children were persons. Although the Court cited Blackstone in Roe, it failed to note that Blackstone addressed the legal protection of the unborn child within a section entitled "The Law of Persons." It also ignored the opening line of his paragraph describing the law's treatment of the unborn child: "Life is an immediate gift of God, a right inherent by nature in every individual." 1 William Blackstone, Commentaries on the Laws of England *129.[18] As

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University Press 1988). See also Paul Benjamin Linton, Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court, 13 St. Louis U. Pub. L. Rev. 15 (1993); Dennis J. Horan, Clarke D. Forsythe & Edward R. Grant, Two Ships Passing in the Night: An Interpretavist Review of the White-Stevens Colloquy on Roe v. Wade, 6 St. Louis U. Pub. L. Rev. 229, 230 n.8, 241 n.90 (1987); James S. Witherspoon, Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment, 17 St. Mary's L.J. 29, 70 (1985) ("In short, the Supreme Court's analysis in Roe v. Wade of the development, purposes, and the understandings underlying the nineteenth-century antiabortion statutes, was fundamentally erroneous."); and Robert Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L. Rev. 807 (1973).

[18]See Dellapenna, at 200:

"[M]odern research has established that by the close

Professor David Kadar noted in 1980, "Rights and protections legally afforded the unborn child are of ancient vintage. In equity, property, crime, and tort, the unborn has received and continues to receive a legal personality." David Kadar, The Law of Tortious Prenatal Death Since Roe v. Wade, 45 Mo. L. Rev. 639, 639 (1980) (footnotes omitted).

B. Roe misstated the protection of the unborn child under tort law and criminal law.

Professor Kadar and others have pointed out "the mistaken discussion within Roe on the legal status of the unborn in tort law." Kadar, 45 Mo. L. Rev. at 652. The Court's discussion in Roe of prenatal-death recovery "was perfunctory, and unfortunately largely inaccurate, and should not be relied upon as the correct view of the law at the time of Roe v.

> of the seventeenth century, the criminality of abortion under the common law was well established. Courts had rendered clear holdings that abortion was a crime, no decision indicated that any form of abortion was lawful, and secondary authorities similarly uniformly supported the criminality of abortion. The only difference among these authorities had been the severity of the crime (misdemeanor or felony), an uncertainty that, under Coke's influence, began to settle into the pattern of holding abortion to be a misdemeanor unless the child was born alive and then died from the injuries or potions that led to its premature birth."

Wade." 45 Mo. L. Rev. at 652-53. See also William R. Hopkin, Jr., Roe v. Wade and the Traditional Legal Standards Concerning Pregnancy, 47 Temp. L.Q. 715, 723 (1974) ("[I]t must respectfully be pointed out that Justice Blackmun has understated the extent to which the law protects the unborn child.").

Roe's adoption of the viability standard in 1973 did not reflect American law. Viability played no role in the common law of property, homicide, or abortion. Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U. L. Rev. 563, 569 n.33 (1987). And there was no viability standard in wrongful-death law because the common law did not recognize a cause of action for the wrongful death of any person. Farley v. Sartin, 195 W.Va. at 674, 466 S.E.2d at 525 ("At common law, there was no cause of action for the wrongful death of a person."); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 127, at 945 (5th ed. 1984) ("The common law not only denied a tort recovery for injury once the tort victim had died, it also refused to recognize any new and independent cause of action in the victim's dependants or heirs for their own loss at his death.").

The viability standard was introduced into American law by Bonbrest v. Katz, 65 F. Supp. 138 (D.D.C. 1946), the first case to recognize a cause of action for prenatal injuries. Bonbrest implied that such a cause of action would be recognized only if the unborn child had reached viability. 65 F. Supp. at 140.

Viability was initially adopted by courts in prenatal-injury law, but its influence was waning by 1961. See Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961) (holding that an infant born alive could recover damages for injuries suffered before viability); see also Note, Torts -- Extension of Prenatal Injury Doctrine to Nonviable Infants, 11 DePaul L. Rev. 361 (1961-62). One thorough legal survey of prenatal-injury law a decade before Roe was decided concluded that "[t]he viability limitation in prenatal injury cases is headed for oblivion. Courts are coming to realize that it is illogical and unjust to the children affected and not readily amenable to scientific proof." Charles A. Lintgen, The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries, 110 U. Pa. L. Rev. 554, 600 (1962).

C. Roe's viability standard was dictum.

The viability standard adopted in Roe was dictum. Randy Beck, Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework, 51 Am. J. Legal Hist. 505, 516-26 (2011). It was not a part of either the Texas statute addressed in Roe or the Georgia statute addressed in Doe v. Bolton, 410 U.S. 179 (1973); neither case was conditioned on viability. In fact, the viability standard was adopted in Roe without any evidentiary record and was not discussed in the briefs or arguments. Beck, 51 Am. J. Legal Hist. at 511-12. The viability rule was also dictum in Casey because the Pennsylvania statute at issue in that case was not conditioned on viability but applied throughout a woman's pregnancy. Beck, 103 Nw. U. L. Rev. at 271-76.

Additionally, "the Roe Court's internal correspondence" demonstrates that the Justices themselves recognized that the viability standard was not only "'arbitrary,'" but also "'unnecessary.'" Beck, 51 Am. J. Legal Hist. 505, 520, 521, 526; see also Randy Beck, The Essential Holding of Casey: Rethinking Viability, 75 UMKC L. Rev. 713, 713 (2007) (quoting Justice Blackmun's "Internal Supreme Court Memo," as quoted in David J. Garrow, Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade 580 (1994)) ("'"You will observe

that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary."'").

D. Roe's viability standard was incoherent.

The United States Supreme Court has "never justified" the viability rule of Roe and Casey "in either legal or moral terms." Randy Beck, 103 Nw. U. L. Rev. at 249; see also Beck, 103 Nw. U. L. Rev. at 253, 268-69 & n. 116 (and authorities cited therein). Justice White explained the lack of foundation for the viability standard in his dissent in Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 794-95 (1986)(White, J., dissenting):

> "A second, equally basic error infects the Court's decision in Roe v. Wade. The detailed set of rules governing state restrictions on abortion that the Court first articulated in Roe and has since refined and elaborated presupposes not only that the woman's liberty to choose an abortion is fundamental, but also that the State's countervailing interest in protecting fetal life (or, as the Court would have it, 'potential human life,' 410 U.S., at 159) becomes 'compelling' only at the point at which the fetus is viable. As Justice O'Connor pointed out three years ago in her dissent in Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. [416], at 461 [(1983)], the Court's choice of viability as the point at which

> the State's interest becomes compelling is entirely arbitrary. The Court's 'explanation' for the line it has drawn is that the State's interest becomes compelling at viability 'because the fetus then presumably has the capacity of meaningful life outside the mother's womb.' 410 U.S., at 163. As one critic of Roe has observed, this argument 'mistakes a definition for a syllogism.' Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 924 (1973).
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> "The governmental interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability."

Similarly, in the article cited by Justice White, Professor John Hart Ely noted that Roe justified the viability standard with a definition:

> "The Court's response here is simply not adequate. It agrees, indeed it holds, that after the point of viability (a concept it fails to note will become even less clear than it is now as the technology of birth continues to develop) the interest in protecting the fetus is compelling. Exactly why that is the magic moment is not made clear: Viability, as the Court defines it, is achieved some six to twelve weeks after quickening.

> (Quickening is the point at which the fetus begins discernibly to move independently of the mother and the point that has historically been deemed crucial -- to the extent any point between conception and birth has been focused on.) But no, it is viability that is constitutionally critical: the Court's defense seems to mistake a definition for a syllogism.
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> > "'With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.'
>
> "With regard to why the state cannot consider this 'important and legitimate interest' prior to viability, the opinion is even less satisfactory."

John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 924-25 (1973) (quoting Roe, 410 U.S. at 163) (footnotes omitted).

Neither Roe nor any of the subsequent cases relying on the viability standard have provided any alternative rationale to support that standard: "In the decades since Roe, the Court has offered no adequate rationale for the viability standard, notwithstanding persistent judicial and academic critiques." Beck, 75 UMKC L. Rev. at 740.

Because of Roe, viability, in abortion law, is a limitation on the exercise of the state's interest in protecting the unborn child. Outside abortion law, viability

has little significance. Viability is largely based on outcome statistics at a specific gestational age, coupled with an estimation of the technological capabilities of a particular facility in medically assisting premature children. As the South Dakota Supreme Court said in Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 792 (S.D. 1996), "'[v]iability' as a developmental turning point was embraced in abortion cases to balance the privacy rights of a mother against her unborn child. For any other purpose, viability is purely an arbitrary milestone from which to reckon a child's legal existence." (Footnote omitted.)

Viability is irrelevant to determining the existence of prenatal injuries, the extent of prenatal injuries, or the cause of prenatal death. Viability is irrelevant to proving causation because the unborn child's anatomic condition can be observed regardless of viability and, if the unborn child dies, the cause of its death can be determined by autopsy regardless of the child's gestational age. Viability does not affect the child's loss of life or the damages suffered by the surviving family. There is no evidence that permitting recovery of damages for the wrongful death of a child before

viability will increase fraudulent litigation. See 66 Federal Credit Union v. Tucker, 853 So. 2d 104, 113 (Miss. 2003).

Quite simply, the use of viability as a standard in prenatal-injury or wrongful-death law is incoherent. As the West Virginia Supreme Court concluded in Farley: "[J]ustice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child had not yet reached viability at the time of death." 466 S.E.2d at 533. Though a number of rationales were originally cited for the viability rule in prenatal-injury or wrongful-death law, the sole remaining justification of not abandoning viability in wrongful-death law seems to be deference to legislative bodies, a rather strange rationale for caution in abandoning a judicially created rule.

Since Roe was decided in 1973, advances in medical and scientific technology have greatly expanded our knowledge of prenatal life. The development of ultrasound technology has enhanced medical and public understanding, allowing us to watch the growth and development of the unborn child in a way previous generations could never have imagined. Similarly, advances in genetics and related fields make clear that a new and unique human being is formed at the moment of conception,

when two cells, incapable of independent life, merge to form a single, individual human entity.[19] Of course, that new life is not yet mature -- growth and development are necessary before that life can survive independently -- but it is nonetheless human life. And there has been a broad legal consensus in America, even before Roe, that the life of a

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[19]See, e.g., Bruce M. Carlson, Human Embryology and Developmental Biology 3 (1994) ("Human pregnancy begins with the fusion of an egg and a sperm ...."); Ronan O'Rahilly & Fabiola Muller, Human Embryology and Teratology 8 (2d ed. 1996) ("Although life is a continuous process, fertilization is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is thereby formed. This remains true even though the embryonic genome is not actually activated until 4-8 cells are present, at about 2-3 days."); Keith Moore, The Developing Human: Clinically Oriented Embryology 2 (8th ed. 2008) (The zygote "results from the union of an oocyte and a sperm during fertilization. A zygote or embryo is the beginning of a new human being."); Ernest Blechschmidt, The Beginning of Human Life 16-17 (1977) ("A human ovum possesses human characteristics as genetic carriers, not chicken or fish. This is now manifest; the evidence no longer allows a discussion as to if and when and in what month of ontogenesis a human being is formed. To be a human being is decided for an organism at the moment of fertilization of the ovum."); C.E. Corliss, Patten's Human Embryology: Elements of Clinical Development 30 (1976) ("It is the penetration of the ovum by a sperm and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual."); and Clinical Obstetrics 11 (Carl J. Pauerstein ed. 1987) ("Each member of a species begins with fertilization -- the successful merging of two different pools of genetic information to form a new individual.").

human being begins at conception.[20] An unborn child is a unique and individual human being from conception, and, therefore, he or she is entitled to the full protection of law at every stage of development.

Conclusion

Roe's viability rule was based on inaccurate history and was mostly unsupported by legal precedent. Medical advances since Roe have conclusively demonstrated that an unborn child is a unique human being at every stage of development. And together, Alabama's homicide statute, the decisions of this Court, and the statutes and judicial decisions from other states make abundantly clear that the law is no longer, in Justice Blackmun's words, "reluctant ... to accord legal rights to the unborn." For these reasons, Roe's viability rule is neither controlling nor persuasive here and should be

[20]See Paul Benjamin Linton, Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court, 13 St. Louis U. Pub. L. Rev. 15, 120-137 (1993) ("Appendix B: The Legal Consensus on the Beginning of Life," citing caselaw and statutes from 38 states and the District of Columbia stating that the life of a human being should be protected beginning with conception).

rejected by other states until the day it is overruled by the United States Supreme Court.

Stuart, Bolin, and Wise, JJ., concur.