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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2016-2017

1150889

Kimberly A. Stinnett

v.

Karla G. Kennedy, M.D.

Appeal from Jefferson Circuit Court
(CV-12-903943)

MAIN, Justice.

Kimberly A. Stinnett appeals from the dismissal of her claim against Karla G. Kennedy, M.D., alleging the wrongful death of her unborn previable child. We reverse and remand.

I. Facts and Procedural History

On May 9, 2012, Stinnett's obstetrician, Dr. William Huggins, informed Stinnett that she was pregnant. Two days later, on Friday, May 11, Stinnett experienced abdominal cramping and fever. Because it was after hours on the weekend, Stinnett called Dr. Huggins's answering service and received a call back from Dr. Kennedy. Dr. Kennedy was not a partner of Dr. Huggins's, but she was sharing calls with him on that weekend. Dr. Kennedy instructed Stinnett to go to the emergency room at Brookwood Medical Center. Upon admission to the emergency room, Stinnett reported that her last menstrual period had been on Sunday, April 1, 2012, indicating that she was approximately six weeks pregnant.[1] Stinnett also reported prior miscarriages in 2005 and 2007 and a prior ectopic pregnancy[2] in 2010, which resulted in the rupture and removal of her left fallopian tube.

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[1]The age of gestation is disputed, and there is some evidence indicating that the pregnancy was less than five weeks.

[2]The testimony at trial indicated that an ectopic pregnancy occurs when an embryo implants in a location other than the inner lining of the uterus, usually in one of the fallopian tubes.

An ultrasound performed in the emergency room revealed intrauterine fluid in the endometrial cavity that could be a gestational sac, but there was no evident yolk sac, fetal pole, or cardiac activity.[3] Stinnett's pregnancy-hormone level, HcG, was measured at 18,473. Based on those findings, and Stinnett's history, Dr. Kennedy was concerned that Stinnett was experiencing another ectopic pregnancy. On May 12, 2012, Dr. Kennedy performed a dilation and curettage ("D & C"), a surgical procedure in which the cervix is dilated and tissue is removed from the lining of the uterus, and a laparoscopy to determine whether the pregnancy was intrauterine[4] or ectopic. The operative report from that procedure said that Stinnett had a normal appearing right ovary with "no evidence of ectopic pregnancy." The pathology report for the tissue taken from the uterus showed it was made

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[3]The testimony at trial indicated that the normal progression of a pregnancy is the formation of a gestational sac between three to five weeks; a yolk sac after five weeks, and a fetal pole after five and a half weeks. Dr. Kennedy testified that "[a]t four weeks we should only be seeing a gestational sac."

[4]The testimony at trial indicated that an intrauterine pregnancy is established in the uterus, or womb, which is the proper place.

up of "products of conception."[5] Although Dr. Kennedy's postoperative notes indicate that she had not completely ruled out an ectopic pregnancy, Stinnett said that Dr. Kennedy informed her that there was no ectopic pregnancy but that she still felt as though there had been a miscarriage. Dr. Kennedy, however, testified that she still held "a high suspicion" of ectopic pregnancy on May 13 and, therefore, ordered methotrexate, a cytotoxic drug used to treat ectopic pregnancies, be administered to Stinnett. The drug is intended to cause the end of the pregnancy.

On Monday, May 14, Dr. Huggins returned and took over treatment of Stinnett at the hospital. A follow-up ultrasound showed that what had previously been suspected to be an intrauterine gestational sac had, in fact, progressed to a "definite yolk sac." In his discharge summary for Stinnett, Dr. Huggins stated that Stinnett was having a failing intrauterine pregnancy possibly as a result of her methotrexate injection. Several weeks later, on June 8, 2012, Stinnett suffered a miscarriage. It is undisputed that, at no

[5]In this instance, the testimony at trial indicated that "products of conception" referred to intrauterine chorionic villi.

time before the miscarriage was the fetus viable in the sense that it could have survived outside the womb. The evidence was disputed, however, as to whether the fetus could have reached viability.

On November 29, 2012, Stinnett sued Dr. Kennedy in the Jefferson Circuit Court. Stinnett alleged that Dr. Kennedy committed medical negligence when she performed the D & C and administered methotrexate. Stinnett contended that the D & C should not have been performed and the methotrexate not administered, given that her pregnancy was not ectopic and that those procedures violated the applicable standard of care and proximately caused "the loss," or termination, of her pregnancy, as well as causing her severe physical pain, mental anguish, and post-traumatic stress disorder. In addition to claims based on her own alleged injuries, Stinnett's complaint included a claim alleging the wrongful death of her unborn fetus brought under § 6-5-391, Ala. Code 1975, entitled "Wrongful death of a minor" ("the Wrongful Death Act"). Stinnett later amended her complaint to add Dr. Kennedy's

employer, Women's Care Specialist P.C. ("Women's Care"), as a defendant.[6]

On March 11, 2016, Dr. Kennedy and Women's Care filed a Rule 12(b)(6), Ala. R. Civ. P., motion to dismiss Stinnett's wrongful-death claim. They argued in that motion that, although Mack v. Carmack, 79 So. 3d 597 (Ala. 2011), recognized that the Wrongful Death Act permits an action for the death of a previable fetus, the decision in Mack was based on a desire to establish "congruence" between the criminal Homicide Act, § 13A-6-1 et seq., Ala. Code 1975, and the civil Wrongful Death Act. Dr. Kennedy and Women's Care argued that the decision in Mack was based on an amendment ("the Brody Act") to Alabama's Homicide Act, that changed the definition of a "person" who could be a victim of homicide to include "an unborn child in utero at any stage of development, regardless of viability." § 13A-6-1(a)(3), Ala. Code 1975. Dr. Kennedy and Women's Care noted, however, that the amendment to § 13A-6-1 also contained an exception for imposing criminal liability on a physician for the death of a nonviable fetus as a result of "mistake, or unintentional error on the part of a

[6]Women's Care is not a party to this appeal.

licensed physician." § 13A-6-1(b). Dr. Kennedy and Women's Care thus contended that true "congruence" between the Homicide Act and the Wrongful Death Act required that Dr. Kennedy and Women's Care be excepted from civil liability under the Wrongful Death Act for the death of an unviable fetus.

On April 15, 2016, the trial court entered an order granting the motion to dismiss Stinnett's wrongful-death claim. The trial court concluded:

> "After considering all of the ... arguments and authorities, this Court finds that the existence of the 'physician's exception' to the Brody Act, codified at Ala. Code [1975,] 13A-6-1(b), prohibits the extension of civil liability under the Wrongful Death Act to licensed physicians who through mistake or unintentional error cause the death of a previable fetus.
>
> "Defendants' motion to dismiss plaintiff's wrongful death claim brought on behalf of her non-viable fetus is, therefore, GRANTED and the wrongful death claim is DISMISSED from this case."

(Capitalization in original.)

The case then proceeded as to Stinnett's claims based on her own injuries, including mental anguish, suffered as a result of Dr. Kennedy's alleged medical negligence. On April 26, 2016, Dr. Kennedy moved for a summary judgment as to those

remaining claims. She contended that Stinnett had failed to produce substantial evidence of a breach of the applicable standard of care by Dr. Kennedy or that Dr. Kennedy's actions probably caused the injuries complained of by Stinnett. The motion focused in large part on Stinnett's alleged failure to establish that the loss of her pregnancy was proximately caused by Dr. Kennedy. Although the wrongful-death claim had been dismissed, Stinnett still maintained that she personally suffered mental anguish and post-traumatic stress disorder as a result of the loss of her pregnancy. Dr. Kennedy contended that the evidence established that Stinnett's pregnancy was failing before she was treated by Dr. Kennedy and that her pregnancy was never viable. Dr. Kennedy argued that it would be "speculation" to conclude that Dr. Kennedy's care and treatment caused the pregnancy to fail.

Stinnett opposed the motion, pointing to testimony of her expert, Dr. William Jamieson, indicating a "great likelihood" that the pregnancy was viable and that Dr. Kennedy's treatment "adversely [a]ffected" Stinnett's pregnancy. The trial court denied Dr. Kennedy's summary-judgment motion. The trial court did, however, clarify that "the dismissal of the wrongful

death claim extends to any claim brought by [Stinnett] for the recovery of mental anguish and/or Post Traumatic Stress Disorder which stems from the loss of the previable fetus." Thus, the trial proceeded only as to claims that the D & C and methotrexate injection caused Stinnett to suffer "severe physical pain and mental anguish and Post Traumatic Stress Disorder," excluding any issue as to mental anguish or post-traumatic stress disorder stemming from the loss of the pregnancy.

The case was tried before a jury during the week of May 2 - 6, 2016. During the trial, the jury heard testimony from Dr. Kennedy; Dr. Jamieson; Dr. Mark Purvis, the defendants' expert; and Stinnett and her husband, Greg Emerson. At the close of evidence, the trial court instructed the jury that Alabama law did not permit recovery for the loss of a pregnancy or the effects of the loss of the pregnancy on Stinnett. On May 6, 2016, the jury returned a verdict in favor of Dr. Kennedy and Women's Care and against Stinnett. The trial court entered a final judgment on the verdict the same day. Stinnett appealed the judgment as to Dr. Kennedy.

II. Standard of Review

Stinnett's appeal relates solely to the issue whether she can assert a wrongful-death claim against Dr. Kennedy for the death of her previable fetus, a claim dismissed by the trial court before trial. In reviewing a dismissal pursuant to Rule 12(b)(6), Ala. R. Civ. P., we apply the following standard of review:

> "'On appeal, a dismissal is not entitled to a presumption of correctness. The appropriate standard of review under Rule 12(b)(6) is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she may possibly prevail. We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'"

Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 791 (Ala. 2007) (quoting Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)).

III. Analysis

Stinnett contends that the trial court erred in dismissing her wrongful-death claim based on the death of her previable fetus brought pursuant to § 6-5-391, Ala. Code 1975. That section provides that "[w]hen the death of a minor child

is caused by the wrongful act, omission, or negligence of any person ..., the father, or the mother ... of the minor may commence the action." Although the Wrongful Death Act does not define "minor child," in Mack v. Carmack, 79 So. 3d 597 (Ala. 2011), this Court held that the Wrongful Death Act permits an action for the death of a previable fetus. In reaching its decision in Mack, this Court overruled two prior cases, Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993), and Lollar v. Tankersley, 613 So. 2d 1252 (Ala. 1993), decisions that had, in turn, limited a trio of prior decisions concerning causes of action for wrongful death based on prenatal injuries -- Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974), Wolfe v. Isbell, 291 Ala. 327, 280 So. 2d 758 (1973), and Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972).

In overruling Gentry and Lollar, this Court in Mack considered the history of wrongful-death claims arising from prenatal injuries in Alabama, scholarly commentary, cases from other jurisdictions, and Alabama's Homicide Act, which, as noted, had been recently amended. We reasoned:

> "Before the release of the Lollar and Gentry decisions on the same day in 1993, Huskey, Wolfe,

and Eich constituted the seminal decisions from this Court concerning causes of action for wrongful death based on prenatal injuries. In each of those cases predating Lollar and Gentry, the Court interpreted the Wrongful Death Act in a manner that eliminated a distinction that otherwise would have prevented recovery for the death of a fetus. Lollar and Gentry halted this trend by concluding that 'the term "minor child" in § 6-5-391 does not include a fetus that dies before becoming able to live outside the mother's womb.' Gentry, 613 So. 2d at 1244.

"In Lollar, Brenda Lollar was examined by Dr. Felix Tankersley on September 15, 1989, during which it was determined that Lollar was three months' pregnant. On September 27, Lollar experienced a hemorrhage and Dr. Tankersley told Lollar that she was experiencing an inevitable, first trimester, spontaneous abortion, i.e., a miscarriage. Dr. Tankersley performed a dilatation and curettage ('D & C') in order to remove the remaining placenta and fetal tissue. On October 9, 1989, Lollar began hemorrhaging again, and she returned to Dr. Tankersley for an examination. She was referred to the Obstetrics-Gynecology Center at the University of Alabama at Birmingham ('UAB') and an ultrasound was performed that showed that Lollar was still carrying a 'well developed' fetus with a 'viable heartbeat.' 613 So. 2d at 1250. Tests further revealed, however, that Lollar had a deficiency of amniotic fluid. On October 13, following the onset of severe pain, Lollar was admitted to UAB, where her uterus was evacuated, resulting in the death of the fetus.

"Gentry involved facts quite similar to Lollar. In Gentry, a pregnant Kathleen Gentry visited Dr. Keith Gilmore on August 5, 1983, when she was complaining of 'flooding blood, passing clots, and cramping.' 613 So. 2d at 1243. Dr. Gentry performed a D & C on Gentry on August 6. An ultrasound test on August 8 revealed an apparently

normal 11-week fetus. Gentry miscarried on August 24. It was 'undisputed that, at the time of the miscarriage, the 13-week fetus was not viable, that is, it was not capable of living outside the womb.' 613 So. 2d at 1243.

"As already noted above, the Court concluded in Lollar and Gentry that the Wrongful Death Act did not permit recovery for the death of a fetus that occurs before the fetus attains viability. In reaching this conclusion, the Gentry Court observed that '[i]n Huskey, Wolfe, and Eich, the deaths admittedly occurred after the fetus had attained viability,' while '[t]his case involves an alleged injury to a nonviable fetus and the death of that fetus before the fetus became viable.' 613 So. 2d at 1244. In Lollar, the Court provided a further explanation as to the ways in which it believed that Huskey, Wolfe, and Eich supported its conclusion.

> "'Contrary to the contention that the Eich-Wolfe-Huskey trilogy abrogated the viability requirement, a close reading of these cases reveals that viability was the common -- indeed, the decisive -- consideration, in each case. Huskey and Eich allowed recovery because the fetus was viable at the time of the injury, and Wolfe allowed recovery because the fetus survived the injury long enough to attain viability. The rule proceeding from these cases, therefore, essentially comports with the analysis of Dr. Tankersley ..., that is, that a cause of action for death resulting from a pre-natal injury requires that the fetus attain viability either before the injury or before death results from the injury. To eliminate this requirement ... would require a substantial expansion of the principle emanating from these cases.'

"Lollar, 613 So. 2d at 1252 (emphasis omitted and emphasis added).

"The Lollar Court was correct that the facts in Huskey, Wolfe, and Eich involved fetuses that were viable either at the time of the injury or at the time of death. As our review of these cases has shown, however, viability was not the 'decisive' consideration in this trio of cases. In Huskey, the Court opened the door for recovery in a wrongful-death action based on prenatal injuries by expressly overruling Stanford[v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926),] because the ruling in Stanford was based on the outdated 'medical opinion of that day that a fetal child was a part of the mother and was not a "person" until it was born.' 289 Ala. at 54, 265 So. 2d at 596-97 (emphasis omitted). .... [T]he Wolfe Court emphasized the lack of a principled distinction based on viability and quoted substantial decisional authority and well respected secondary sources for the proposition that, in all good conscience, fairness, and logic, a duty of care is owed to a fetus even if it has not yet attained the ability to live outside the womb. 291 Ala. at 330-31, 280 So. 2d at 761. In Eich, the Court recognized that the fetus is 'a potential human life at the time of the injury,' 293 Ala. at 100, 300 So. 2d at 358, and thus held that live birth was not a prerequisite to recovery for the death of a fetus. Among other things, the Eich Court rejected the notion that recovery should be denied 'where the injury is so severe as to cause the death of a fetus' and that '[i]t would be bizarre, indeed, to hold that the greater the harm inflicted, the better the opportunity for exoneration of the defendant.' 293 Ala. at 97, 300 So. 2d at 355. In sum, though Huskey, Wolfe, and Eich involved viable fetuses, their holdings did not turn on that fact.

"In a lengthy dissent in Gentry, Justice Maddox stated that in his view the Court had misread Wolfe

and Eich. 'I read the essential holdings of Wolfe and Eich to be that viability at the time of injury and live birth are irrelevant to recovery; consequently, I believe those holdings support my conclusion [that a wrongful-death cause of action exists for the death of a nonviable fetus].' Gentry, 613 So. 2d at 1248 (Maddox, J., dissenting). Justice Maddox reasoned:

> "'[U]nder principles established in Wolfe and Eich, neither viability at the time of injury, nor live birth, is a prerequisite to recovery for the wrongful death of a fetus.
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> "'These same principles are no less compelling when both the injury and the death occurred before viability. ... [V]iability is an arbitrary, artificial, and varying standard that is illogical when considered against this Court's recognition in Wolfe of the biological separateness of mother and child from the moment of conception.'

"613 So. 2d at 1249 (Maddox, J., dissenting).

"In support of his conclusion that viability is no less arbitrary a standard when applied to the time of death than it is when applied to the time of injury, Justice Maddox cited further authorities from which he concluded that

> "'the overwhelming majority of commentators has criticized distinctions based on viability of the fetus, for a number of reasons: A child is an entity, a "person," from the moment of conception, 1 Stuart M. Speiser, et al., Recovery for Wrongful Death and Injury § 4.37, at 204 (3rd ed. 1992); the first trimester is the developmental period in which the fetus is

most susceptible to environmental influences, David A. Gordon, The Unborn Plaintiff, 63 Mich. L. Rev. 579, 589 (1965); viability is not determinative or relevant to the question of the tortfeasor's ability to escape liability, David Kader, The Law of Tortious Prenatal Death Since Roe v. Wade, 45 Mo. L. Rev. 639, 659-60 (1980); tortfeasors should not be better off if the fetus dies from injuries sustained before viability than they would be if the fetus lives, Frank J. Hartye, Comment, Tort Recovery for the Unborn Child, 15 J. Fam. L. 276, 297 (1976-77); "[p]otential life is no less potential during the first weeks of pregnancy than in the last weeks, and a fetus is entitled to develop without outside interference," Michael P. McCready, Comment, Recovery for the Wrongful Death of a Fetus, 25 U. Rich. L. Rev. 391, 405 (1991); viability distinctions impede the goals of the wrongful death statutes, Gary A. Meadows, Comment, Wrongful Death and the Lost Society of the Unborn, 13 J. Legal Med. 99, 114 (1992); viability should not be the point at which the unborn gain legal protection, because "viability is dependent upon a number of factors, including the weight and race of a fetus, maternal age and health, nutritional deficiencies and psychological elements," Patricia A. Meyers, Comment, Wrongful Death and the Unborn Child: A Look at the Viability Standard, 29 S.D. L. Rev. 86, 96-97 (1983); "the actual medical determination of the point at which a fetus attains viability is uncertain," Karen Rene Osborne, Comment, Torts -- The Right of Recovery for the Tortious Death of the Unborn, 27 How. L.J. 1649, 1661 (1984); a viability standard results in an injustice, because a

> negligently injured, nonviable fetus probably would have survived but for the wrongful act, Janet I. Stich, Comment, Recovery for the Wrongful Death of a Viable Fetus: Werling v. Sandy, 19 Akron L. Rev. 127, 138 (1985); "viability is as arbitrary a standard in wrongful death cases as was birth," Sheryl Anne Symonds, Comment, Wrongful Death of the Fetus: Viability Is Not a Viable Distinction, 8 U. Pug. Sound L. Rev. 103, 115 (1984); and viability is "[w]ithout a compelling evidential or medical justification" and is "an artificial barrier to wrongful death recovery," Richard E. Wood, Comment, Wrongful Death and the Stillborn Fetus: A Common Law Solution to a Statutory Dilemma, 43 U. Pitt. L. Rev. 809, 835 (1982).'

"Id. at 1248-49 (Maddox, J., dissenting)(emphasis added).

"Although not cited by Justice Maddox, the most recognized treatise on the law of torts observed at the time of the Gentry decision that

> "'[v]iability of course does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty, and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and logic is in favor of ignoring the stage at which the injury occurs. With the recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other

> arbitrary developmental requirement altogether.'

"W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 55, at 369 (5th ed. 1984)(emphasis added).

"Commentators have continued to criticize the viability distinction in the years since Gentry was decided. For example, one commentator has noted that the viability standard, like the born-alive test, has outlived its usefulness:

> "'While not every jurisdiction has stopped using the born-alive test first set out in Bonbrest [v. Kotz, 65 F. Supp. 138 (D. D.C. 1946)], most have abandoned the born alive rule, finding it stringent and unjust. Similarly, the single-entity view was rejected as archaic and outmoded due to subsequent developments in science and technology. The viability test, at least in its application to tort law, is likewise outmoded and archaic. The viability test does not affect the defendant's legal duty, and its relative nature makes it an unsatisfactory criterion. As is the case with any tort the issues at hand are first, whether the defendant owed a duty of care to avoid unreasonable risk of harm to others, second whether the defendant breached that duty of care, and third whether that breach of duty caused the harm. Although the age of a defendant's victims, whether they are born or unborn, may be relevant in the analysis of the reasonable standard of care for a particular case, it does not act as a bright line preventing the case from ever reaching a jury. The viability line, although useful as a guide for abortion cases, is an arbitrarily drawn line, and if

> the law relies too heavily on arbitrary line drawing it may very likely become ... mechanical, superficial, dry, sterile formalism ....'

"Daniel S. Meade, Wrongful Death and the Unborn Child: Should Viability be a Prerequisite for a Cause of Action?, 14 J. Contemp. Health L. & Pol'y 421, 441 (1998) (footnotes omitted and emphasis added). See also Sarah J. Loquist, The Wrongful Death of a Fetus: Erasing the Barrier between Viability and Non-Viability, 36 Wash. L.J. 259, 288 (1997) ('The viability requirement is difficult to apply because it is so hard to determine exactly when a fetus becomes viable. Furthermore, medical advances continue to change the point at which a fetus is viable.').

"In Lollar, the Court cited as one of its key reasons for declining to interpret the term 'minor child' in § 6-5-391, Ala. Code 1975, to include a nonviable fetus the fact that, '[a]t the present time, it appears that no court in the United States has, without a clear legislative directive, recognized a cause of action for the wrongful death of a fetus that has never attained a state of development exceeding that attained in this case.' Lollar, 613 So. 2d at 1252. Since this Court's decisions in Lollar and Gentry, the legal landscape has changed in certain material respects.

"Six jurisdictions (Illinois, Louisiana, Missouri, Oklahoma, South Dakota, and West Virginia) now specifically permit wrongful-death actions even where the death of the fetus occurs before the fetus becomes viable. The adoption of the previability standard in five of these six jurisdictions occurred after Lollar and Gentry were decided. See Pino v. United States, 183 P.3d 1001 (Okla. 2008); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996); Connor v. Monkem Co., 898 S.W.2d 89 (Mo. 1995); Farley v. Sartin, 195 W. Va. 671, 466 S.E.2d 522

(1995); Smith v. Mercy Hosp. & Med. Ctr., 203 Ill. App. 3d 465, 148 Ill. Dec. 567, 560 N.E.2d 1164 (1990); and La. Civ. Code Ann. art. 26 (1999). In Illinois, Louisiana, Missouri, and South Dakota, the legislatures expressly changed the wording of their respective wrongful-death statutes to include an 'unborn child.' The Supreme Courts of West Virginia and Oklahoma adopted a previability standard absent any specific change in the wrongful-death statutes by their respective state legislatures.

"In Farley, the West Virginia Supreme Court summarized its decision to eliminate the distinction between viability and nonviability for prenatal wrongful-death actions as follows:

> "'In jurisdictions where the viability standard is controlling, the tortfeasor remains unaccountable for the full extent of the injuries inflicted by his or her wrongful conduct. In our judgment, justice 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. The societal and parental loss is egregious regardless of the state of fetal development. Our concern reflects the fundamental value determination of our society that life -- old, young, and prospective -- should not be wrongfully taken away. In the absence of legislative direction, the overriding importance of the interest that we have identified merits judicial recognition and protection by imposing the most liberal means of recovery that our law permits.'

"Farley, 195 W. Va. at 682, 466 S.E.2d at 533 (emphasis added). In support of its decision, the Farley court quoted at length from Justice Maddox's

dissent in Gentry. 195 W. Va. at 682-83, 466 S.E.2d at 533-34.

"In Pino, the Oklahoma Supreme Court noted the fact that Oklahoma's wrongful-death statute does not mention the death of a 'person'; instead, it creates a cause of action '[w]hen the death of one is caused by the wrongful act or omission of another.' Okla. Stat. Ann. tit. 12, § 1053 (West 2000). The Oklahoma Supreme Court reasoned that in using the word 'one,' the legislature left the reach of the statute to the development of the common law. The Pino court observed that maintaining the viability rule 'would create the anomalous result of allowing a tortfeasor to escape liability for causing the death of a nonviable fetus while subjecting to liability the tortfeasor whose acts caused a nonfatal injury.' Pino, 183 P.3d at 1005. The Pino court also emphasized that interpreting Oklahoma's wrongful-death statute as allowing causes of action for nonviable fetuses 'is in keeping with the focus being placed not on a fetus's status but on the tortious conduct.' Id. (emphasis added).

"In sum, at the time Lollar and Gentry were decided, the viability rule already had been undermined in this State by this Court's reasoning in its earlier decisions in Wolfe and Eich. As the above-quoted passage in Prosser and Justice Maddox's dissent in Gentry clearly demonstrated, commentators also already had heavily criticized the viability rule. Since 1993, criticisms of the viability rule have continued, if not increased, and some jurisdictions have recognized the arbitrary and illogical nature of the viability rule.

"Nonetheless, at the time Lollar and Gentry were decided, there remained one significant factor that provided some support for the viability rule: Alabama's homicide statutes applied only to persons 'who had been born and [were] alive at the time of

the homicidal act.' § 13A-6-1(2), Ala. Code 1975.[7] In concurring in the result in both Gentry and Lollar, Justice Houston wrote specially and used the language of the homicide statute to argue that Eich should be overruled because that decision eliminated any distinction based on the injured fetus being born alive. Justice Houston argued for an approach that he believed would be 'consistent with the criminal law':

> "'To convict a person of homicide, the victim must be "a human being who had been born [and was] alive at the time of the homicidal act." Ala. Code 1975, § 13A-6-1(2). This, I believe, is consistent with the common law. See § 13A-6-1 commentary. There should not be different standards in wrongful death and homicide statutes, given that the avowed public purpose of the wrongful death statute is to prevent homicide and to punish the culpable party and not to compensate for the loss.'

"Gentry, 613 So. 2d at 1245 (Houston, J., concurring in the result); Lollar, 613 So. 2d at 1253 (Houston, J., concurring in the result).

"Our legislature has now expressly amended Alabama's homicide statutes to include as a victim of homicide 'an unborn child in utero at any stage of development, regardless of viability.' § 13A-6-1(a)(3), Ala. Code 1975 (emphasis added). This change constitutes clear legislative intent to protect even nonviable fetuses from homicidal acts. As Justice Houston's comment in his special writings in Gentry and Lollar indicated, this Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes. We have already noted that the

[7]The Brody Act redesignated this section as § 13A-6-1(3).

Huskey Court stated that '[o]ne of the purposes of our wrongful death statute is to prevent homicides.' Huskey, 289 Ala. at 55, 265 So. 2d at 597. The Court in Eich similarly observed that 'the pervading public purpose of our wrongful death statute ... is to prevent homicide through punishment of the culpable party and the determination of damages by reference to the quality of the tortious act ....' Eich, 293 Ala. at 100, 300 So. 2d at 358.

"The wrongful-death statutes seek to prevent homicides. The Court in Nettles v. Bishop, 289 Ala. 100, 103, 266 So. 2d 260, 262 (1972), stated that the 'primary purpose' in awarding damages under what it referred to as the 'homicide statute' 'is to punish the defendant and to deter others from like conduct.' The Eich Court emphasized that 'the damages recoverable under [the Wrongful Death Act] are entirely punitive and are based on the culpability of the defendant and the enormity of the wrong, and are imposed for the preservation of human life.' Eich, 293 Ala. at 98, 300 So. 2d at 356.

"Given the purpose of the Wrongful Death Act of preventing homicide, we agree with the Huskey Court that it would be 'incongruous' if 'a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly.' Huskey, 289 Ala. at 55, 265 So. 2d at 597-98. Moreover, the viability rule, much like the born-alive rule, actually benefits the tortfeasor who inflicts a more severe injury. Under the viability rule, a tortfeasor who inflicts an injury that causes the immediate death of a nonviable fetus escapes punishment, while a tortfeasor who inflicts an injury that does not result in death, or that results in death only after the fetus attains viability, may be liable for damages. As the Eich Court reasoned, '[i]t would be bizarre, indeed, to hold that the greater the harm inflicted the better the opportunity for exoneration of the defendant,' especially given the focus in the Wrongful Death Act

on punishing the wrongdoer by allowing punitive damages. Eich, 293 Ala. at 97, 300 So. 2d at 355.

"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), 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 605-12 (footnotes omitted).

Shortly after the decision in Mack, this Court released Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012). The plaintiff in Hamilton, like Stinnett, brought a wrongful-death action

against her medical providers, contending that their medical negligence during her pregnancy caused the loss of her previable fetus. Relying on the then controlling decisions in Gentry and Lollar, the trial court entered a summary judgment in favor of the defendants as to the wrongful-death claim on the ground that Alabama did not recognize a cause of action for the wrongful death of a previable fetus. While that judgment was on appeal, we released our decision in Mack. We held in Hamilton that Mack was controlling, reversed the summary judgment, and remanded the case to the trial court:

> "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, ... 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. ..."

97 So. 3d at 735.

Based on our holdings in Mack and Hamilton, Stinnett argues that the trial court erred in dismissing her wrongful-death claim. This argument is particularly compelling given that our decision in Hamilton concerned a claim alleging the

wrongful death of a previable fetus caused by the medical negligence of the plaintiff's treating physician. Moreover, each of the two cases expressly overruled in Mack -- Gentry and Lollar -- arose from a wrongful-death claim against a treating physician for alleged medical negligence resulting in the death of a previable fetus. Dr. Kennedy, however, counters that our decisions in Hamilton and Mack did not consider an important exception to the Homicide Act.

As set forth above, our decision in Mack rested in part on an amendment to the Homicide Act, the Brody Act. 79 So. 3d at 610-11. As a result of that amendment, the Homicide Act now defines the term "person," when describing the victim of a criminal homicide or assault, as "a human being, including an unborn child in utero at any stage of development, regardless of viability." As explained in Mack, because the public purpose of our wrongful-death statutes is to prevent homicide, "this Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes." 79 So. 3d at 611. We cited the protection in the Homicide Act of unborn children in utero, regardless of viability, as a justification for our holding that the

Wrongful Death Act, in fact, permits a cause of action for the death of a previable fetus.

Dr. Kennedy points out, however, that the amendment to the Homicide Act also provided for an exception to criminal liability for the death or injury of an unborn child caused by an unintentional error on the part of the pregnant woman's treating physician. Section 13A-6-1(b) provides:

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

Dr. Kennedy contends that, in order to achieve the goal of "congruence" between the Homicide Act and the Wrongful Death Act, the physician exception from criminal liability should

also be extended to civil liability imposed by the Wrongful Death Act. She argues:

> "This Court has made it clear that when it has applied the definition of 'person' set out in the Brody Act to the civil context, it has done so to create 'congruence' between the criminal and civil statutes. ... The trial court's reasoning here ... properly recognizes 'congruence' as the stated goal of this Court and indeed creates that congruence by preventing the imposition of civil liability where there can be no criminal liability for the same act in connection with medical care of the same pregnant woman."

(Dr. Kennedy's brief, at 42-43.) We disagree.

First, we note that the express language of § 13A-6-1(b) applies only to "criminal liability." It provides: "Mistake, or unintentional error on the part of a licensed physician .... shall not subject the licensed physician ... to any criminal liability under this section." (Emphasis added.) Thus, the plain language of the statute limits the application of § 13A-6-1(b) to criminal liability.

Of course, it is also true that the amended definition of "person" upon which we relied in Mack, strictly speaking, defined only the victim of a criminal homicide or assault. Nevertheless, in light of the shared purpose of the Wrongful Death Act and the Homicide Act to prevent homicide, the

amendment was an important pronouncement of public policy concerning who is a "person" protected from homicide. Thus, borrowing the definition of "person" from the criminal Homicide Act to inform as to who is protected under the civil Wrongful Death Act made sense. We reasoned "it would be 'incongruous' if 'a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly.'" 79 So. 3d at 611 (quoting Huskey, 289 Ala. at 55, 265 So. 2d at 597-98).

This attempt to harmonize who is a "person" protected from homicide under both the Homicide Act and Wrongful Death Act, however, was never intended to synchronize civil and criminal liability under those acts, or the defenses to such liability. Although we noted that it would be unfair for a tortfeasor to be subject to criminal punishment, but not civil liability, for fetal homicide, it simply does not follow that a person not subject to criminal punishment under the Homicide Act should not face tort liability under the Wrongful Death Act. This argument, followed to its logical conclusion, would prohibit wrongful-death actions arising from a tortfeasor's simple negligence, something we have never held to be

criminally punishable but which often forms the basis of wrongful-death actions. See Alabama Power Co. v. Turner, 575 So. 2d 551, 556 (Ala. 1991) (noting that, in a wrongful-death action, punitive damages may be awarded against a defendant based on its negligent conduct). Such a result would unduly limit the reach of the Wrongful Death Act and undermine its purpose to prevent homicide. Thus, we fail to see how applying an exception from criminal punishment to civil liability would promote "congruence" between the Homicide Act and the Wrongful Death Act.

Furthermore, focusing solely on the "congruity" rationale in Mack ignores the other "numerous considerations" upon which we relied in holding that the Wrongful Death Act provided a cause of action for the death of a previable fetus. Those other considerations included our pre-Gentry and Lollar caselaw, scholarly commentary criticizing the viability rule, and the movement of other jurisdictions away from the viability rule. Those reasons, which we also found compelling in Mack, find no mention in the trial court's order or in Dr. Kennedy's arguments on appeal.

Finally, we recognize the policy arguments made by Dr. Kennedy on appeal. She contends that physicians engaged in diagnosing and treating failing and unsustainable pregnancies are in a unique position requiring protection from civil liability:

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

Notwithstanding these concerns, physicians such as Dr. Kennedy are already provided a level of protection from civil liability under the provisions of the Alabama Medical Liability Act, § 6-5-480 et seq. and § 6-5-540 et seq., Ala. Code 1975. That act requires a plaintiff in a civil action to establish that the injury or death was proximately caused by a deviation from the standard of care proven, generally, by

expert testimony from a similarly situated health-care provider.

Based on the above, we find no compelling basis on which to extend the physician exception from criminal liability set forth in § 13A-6-1(b) to bar recover for tort liability imposed under the Wrongful Death Act. We further reject Dr. Kennedy's invitation to qualify our decision in or to overrule Hamilton. Accordingly, we hold that the trial court erred in dismissing the wrongful-death claim on the ground that the wrongful-death claim against Dr. Kennedy was precluded by § 13A-6-1(b).

Notwithstanding our holding that the trial court erred in its application of § 13A-6-1(b), Dr. Kennedy argues that the judgment of the trial court should nonetheless be affirmed on the ground that Dr. Kennedy was entitled to a pretrial summary judgment in her favor as to the wrongful-death claim because Stinnett failed to establish that the death was proximately caused by Dr. Kennedy's treatment. This Court may affirm a trial court's judgment on "any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court." Liberty

Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003). Thus, Dr. Kennedy asserts that if she was entitled to a summary judgment on the wrongful-death claim, we should affirm the judgment of the trial court dismissing that claim.

Under the Alabama Medical Liability Act, "the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case." § 6-5-548(a), Ala. Code 1975. The plaintiff must also prove proximate cause. In Sorrell v. King, 946 So. 2d 854 (Ala. 2006), this Court noted:

> "A plaintiff in a medical-malpractice action must also present expert testimony establishing a causal connection between the defendant's act or omission constituting the alleged breach and the injury suffered by the plaintiff. Pruitt v. Zeiger, 590 So. 2d 236, 238 (Ala. 1991). See also Bradley v. Miller, 878 So. 2d 262, 266 (Ala. 2003); University of Alabama Health Servs. Found., P.C. v. Bush, 638 So. 2d 794, 802 (Ala. 1994); and Bradford v. McGee, 534 So. 2d 1076, 1079 (Ala. 1988). To prove causation in a medical-malpractice case, the plaintiff must demonstrate '"that the alleged negligence probably caused, rather than only possibly caused, the plaintiff's injury."' Bradley, 878 So. 2d at 266 (quoting University of Alabama Health Servs., 638 So. 2d at 802). See also DCH

Healthcare Auth. v. Duckworth, 883 So. 2d 1214, 1217 (Ala. 2003) ('"There must be more than the mere possibility that the negligence complained of caused the injury; rather, there must be evidence that the negligence complained of probably caused the injury."' (quoting Parker v. Collins, 605 So. 2d 824, 826 (Ala. 1992))); and Pendarvis v. Pennington, 521 So. 2d 969, 970 (Ala. 1988) ('"The rule in medical malpractice cases is that to find liability, there must be more than a mere possibility or one possibility among others that the negligence complained of caused the injury; there must be evidence that the negligence probably caused the injury."' (quoting Williams v. Bhoopathi, 474 So. 2d 690, 691 (Ala. 1985), and citing Baker v. Chastain, 389 So. 2d 932 (Ala. 1980))). In Cain v. Howorth, 877 So. 2d 566 (Ala. 2003), this Court stated:

> "'"'To present a jury question, the plaintiff [in a medical-malpractice action] must adduce some evidence indicating that the alleged negligence (the breach of the appropriate standard of care) probably caused the injury. A mere possibility is insufficient. The evidence produced by the plaintiff must have "selective application" to one theory of causation.'"'

"877 So. 2d at 576 (quoting Rivard v. University of Alabama Health Servs. Found., P.C., 835 So. 2d 987, 988 (Ala. 2002))."

946 So. 2d at 862. Dr. Kennedy argues that Stinnett cannot establish that the death of her fetus was proximately caused by Dr. Kennedy because, Dr. Kennedy asserts, Stinnett allegedly failed to establish that "the pregnancy probably

would have progressed and not miscarried but for [Dr. Kennedy's] care." (Dr. Kennedy's brief, at 47.)

Dr. Kennedy contends that Stinnett's expert, Dr. Jamieson, was unable to offer any more than speculative testimony that Kennedy's care caused the demise of Stinnett's pregnancy. Dr. Jamieson testified that the laparoscopic exam proved that there was no ectopic pregnancy and that the pregnancy was intrauterine. He testified that, in such cases, the standard of care is to "let nature take its course." He, therefore, testified that there was no reason for Dr. Kennedy to have performed the D & C or to have administered methotrexate. Dr. Jamieson then testified:

> "Q [By Stinnett's counsel]: Was methotrexate indicated at all?
>
> "A: Not in this case, no.
>
> Q: Doctor, can you explain what methotrexate is and what is does?
>
> "A: Methotrexate is a chemotherapeutic agent. And in simple terms it's what we call a folic acid antagonist. It essentially interferes with the DNA of living tissue.
>
> "....
>
> "Q: What effect would this giving of methotrexate likely have on a fetus?

"A: Most likely a cause of an abortion.

"....

"Q: Did the care and course Dr. Kennedy took in this case adversely affect the viability of this pregnancy or fetus?

"A: Well, by doing a D & C and giving the methotrexate, she certainly interrupted a possible normal presentation for a normal viable pregnancy, yes.

"Q: Are you saying that if there was a viable pregnancy, that it was terminated as a result of the course Dr. Kennedy took?

"A: I think it's a contributing factor. You can never say exactly what causes a miscarriage, but certainly didn't lend itself to continuing the pregnancy.

"Q: Dr. Jamieson, is it your opinion that more likely than not the course Dr. Kennedy took with Ms. Stinnett adversely affected the viability of her fetus, assuming that it were viable?

"A: Well, assuming that it was viable, yes, there's no question. But a viable pregnancy is really one of progression. We start off with an embryo, we start to a yolk sac, to a fetal pole, to a heartbeat. And we never finished the progression of this particular pregnancy.

"Whether it was viable or not at that time, we'll never know. But certainly the indications were there was a great likelihood or possibility that it was viable.

"Q: Of course we can't know to a certainty if this fetus or any fetus at this stage goes to a successful term delivery, would that be true?

"A: That is true.

"Q: Was the likelihood or probability of that occurring here adversely impacted and prevented by the actions of Dr. Kennedy?

"A: Certainly adversely effected, yes.

"Q: To a reasonable degree of medical probability did the actions of Dr. Kennedy cause the demise of this fetus or embryo?

"A: Well, it certainly -- if viability could have gone to progression, it certainly could have caused the pregnancy to fail and miscarry, yes.

"Once again, we'll never know whether this would have gone to viability and certainly there are other causes, sometimes just nature taking its course, but we never had that opportunity in this particular case, because, in my opinion, the pregnancy was mishandled.

"Q: Doctor, do you hold that opinion to reasonable degree of medical probability?

"A: I do."

Dr. Kennedy argues that the above testimony establishes no more than a mere "possibility" that Stinnett's pregnancy would have progressed to viability and that she would not have miscarried but for Dr. Kennedy's treatment. Thus, she argues, Stinnett cannot meet her burden of establishing "that the

alleged negligence probably caused, rather than only possibly caused," the wrongful death of her previable fetus.

We decline to affirm the judgment on the proximate-cause issue. We interpret the testimony of Dr. Jamieson as indicating that, although there was a "great likelihood or possibility" of viability, there is simply no way to know with any certainty at this early a stage of gestation whether the pregnancy would ultimately have progressed to viability. Thus, we tend to agree that the evidence establishes only a possibility that the fetus would have ultimately achieved viability and not miscarried. In light of the legislative recognition that a "person" includes an "unborn child in utero at any stage of development, regardless of viability," we do not believe that probable progression to viability is the appropriate relevant proximate-cause inquiry in this case. Indeed, requiring proof of future viability in order to establish the element of proximate cause would effectively reimpose the viability rule. Rather, we hold that, in order to establish proximate cause, Stinnett was required to show that Dr. Kennedy's actions probably caused the death of the fetus, "regardless of viability." Here, there was ample

evidence indicating that the administration of methotrexate had the intended effect of ending Stinnett's pregnancy such that the question of proximate cause warrants submission to the jury.[8]

Nor do we find the cases cited by Dr. Kennedy in support of her proximate-cause argument to be compelling. DCH Healthcare Authority v. Duckworth, 883 So. 2d 1214 (Ala. 2003), and Pope v. Elder, 671 So. 2d 730 (Ala. Civ. App. 1995), involved cases in which it was alleged that the failure to make a timely diagnosis (of a subdural hematoma and breast cancer, respectively) lead to a "loss of chance" to save the life of the deceased patient, but for which there was ultimately no evidence indicating that earlier treatment would have led to a different result. This case, however, is not about delay in potentially life-saving treatment. Indeed, it is the opposite. The treatment at issue was not intended to save the life of the previable fetus, whom our law recognizes as an independent "person," but to hasten the end of the

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[8]In addition to the testimony of Dr. Jamieson stating that methotrexate would cause an abortion and would interrupt the pregnancy, Dr. Kennedy testified that methotrexate would be expected to cause the death of tissue in the uterus, i.e., the fetus.

pregnancy. Thus, we find the cases cited by Dr. Kennedy inapposite to the facts before us.

In reaching this holding, we recognize that there is substantial evidence that Stinnett's pregnancy was not progressing normally and may have been failing. We do not mean to imply that this evidence is irrelevant to proximate cause. The jury could, indeed, consider this evidence and conclude that Dr. Kennedy's treatment was not the proximate cause of death. Furthermore, assessment of the ultimate viability of the pregnancy -- especially in light of health risks to Stinnett -- certainly goes to whether Dr. Kennedy abided by the applicable standard of care, which, except as discussed below, is not an issue directly before this Court. We merely hold that the evidence indicating that Dr. Kennedy's treatment caused the death of the fetus was sufficient to create a jury question.

Finally, Dr. Kennedy argues that the judgment of the trial court on the wrongful-death claim is due to be affirmed on the basis of the doctrine of collateral estoppel. Specifically, she contends that Stinnett cannot be awarded the relief she seeks on appeal because the issue whether Dr.

Kennedy met the standard of care in performing of a D & C and administering methotrexate has already been litigated before a jury.

As set forth above, after the dismissal of the wrongful-death claim, the case proceeded to trial on Stinnett's claims based on personal injuries arising from the D & C and the methotrexate injection. The jury returned a verdict in favor of Dr. Kennedy and against Stinnett on those claims, and the judgment entered on the jury verdict as to Stinnett's personal-injury claims was not appealed. Dr. Kennedy contends that the jury's verdict necessarily decided that her treatment fell within the standard of care, a necessary element of proving medical negligence as to both claims. Because the wrongful-death claim arises out of the same treatment made the basis of Stinnett's personal claims, Dr. Kennedy argues that the doctrine of collateral estoppel bars relitigation of this issue and compels this Court to affirm the judgment of the trial court.

We've set forth the elements of collateral estoppel as follows:

> "The doctrine of collateral estoppel, or issue preclusion, does not require identity of the causes

> of action involved. The elements of collateral estoppel are: (1) an issue identical to the one litigated in the prior suit; (2) that the issue was actually litigated in the prior suit; (3) that resolution of the issue was necessary to the prior judgment; and (4) the same parties."

Dairyland Ins. Co. v. Jackson, 566 So. 2d 723, 726 (Ala. 1990).

In this case the jury returned a general verdict in favor of Dr. Kennedy as to Stinnett's personal-injury claims. Although it is possible that the jury determined that Dr. Kennedy did not violate the applicable standard of care, it is also possible that the jury determined that Stinnett suffered no compensable damages. Accordingly, we cannot say that the standard-of-care issue was necessary to the judgment on the personal-injury claims. Thus, we reject the argument that the doctrine of collateral estoppel compels us to affirm the trial court's judgment as to the wrongful-death claim.

IV. Conclusion

Based on our previous holdings in Mack and Hamilton, we hold that the trial court erred in dismissing Stinnett's claim alleging wrongful death based on the death of her previable unborn child. Nor do we find that Dr. Kennedy was due a summary judgment on the wrongful-death claim on lack-of-

proof-of-causation grounds or that the judgment of the trial court is due to be affirmed on the basis of the doctrine of collateral estoppel. Accordingly, the judgment of the trial court dismissing the wrongful-death claim is reversed and the case remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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

Parker, J., concurs specially.

Shaw, J., concurs in part and concurs in the result.

Murdock, J., concurs in the result.

PARKER, Justice (concurring specially).

Today, this Court again reaffirms the principle that unborn children are protected by Alabama's wrongful-death statute from the moment life begins at conception. This has not always been the case in Alabama. Alabama used to deny unborn children who had not yet grown strong enough to survive outside of their mother's womb the protections of Alabama's wrongful-death statute. Essentially, Alabama previously applied the viability standard established in Roe v. Wade, 410 U.S. 113 (1973), to determine which unborn children received protection under the law and which did not. However, in Mack v. Carmack, 79 So. 3d 597 (Ala. 2011), this Court determined that the viability standard established in Roe does not apply to wrongful-death law. The Court reaffirms that principle today.

In my special concurrence in Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012), I explained why the viability standard set forth in Roe is an incoherent standard generally, but particularly as it relates to wrongful-death law. I stated, in pertinent part:

> "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[v. Sartin, 195 W. Va. 671, 466 S.E.2d 522 (1995)]: '[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."

97 So. 3d at 745-46 (Parker, J., concurring specially).

The use of the viability standard established in Roe is incoherent as it relates to wrongful-death law because, among other reasons, life begins at the moment of conception. The fact that life begins at conception is beyond refutation.

> "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 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.
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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.').
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> "[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)."

97 So. 3d at 746-47 (Parker, J., concurring specially). This Court recognized this fact in Mack: "'"[M]edical authority has recognized long since that the child is in existence from the moment of conception ...."'" 79 So. 3d at 602 (quoting Wolfe

v. Isbell, 291 Ala. 327, 330, 280 So. 2d 758, 760 (1973), quoting in turn Prosser, Law of Torts 336 (4th ed. 1971)).

After Mack and Hamilton, this Court continued to reject the use of the viability standard in contexts beyond wrongful death, holding that "the word 'child' in the chemical-endangerment statute includes an unborn child." Ex parte Ankrom, 152 So. 3d 397, 421 (Ala. 2013). We reaffirmed Ankrom in Hicks v. State, 153 So. 3d 53, 66 (Ala. 2014), holding that the protection of unborn children in Alabama's chemical-endangerment statute "furthers the State's interest in protecting the life of children from the earliest stages of their development. See § 26-22-1(a), Ala. Code 1975 ('The public policy of the State of Alabama is to protect life, born, and unborn.')." I emphasized in my special concurrence in Ankrom that ensuring that the unborn child has the protection of our chemical-endangerment statute was entirely consistent with the laws and judicial opinions throughout the country "that recognize unborn children as persons with legally enforceable rights in many areas of the law," namely, "property law, criminal law, tort law, guardianship law, and health-care law -- demonstrating the breadth of legal

protection afforded the rights of unborn children." 152 So. 3d at 421–22 (Parker, J., concurring specially). Given the clear public policy of the State of Alabama, as enacted by our Legislature, "to protect life, born, and unborn," § 26–22–1(a), and at every stage of development -- and surveying this Court's jurisprudence from Mack to Ankrom -- I wrote in my special concurrence in Hicks that we were once again "consistently recognizing that an unborn child is a human being from the earliest stage of development and thus possesses the same right to life as a born person." 153 So. 3d at 73–74.

Given the clear public policy of this State to protect unborn life and this Court's repeated holdings affirming the same, I find troubling the trial court's holding below that disregards our holding in Hamilton and judicially transfers the so-called "physician's exception" for criminal homicide and assault (§ 13A-6-1(b), Ala. Code 1975) into § 6-5-391, Ala. Code 1975, the Wrongful Death Act, to block any civil liability for physicians "who through mistake or unintentional error cause the death of a previable fetus." The main opinion correctly rejects this argument because, among other reasons,

the plain language of § 13A-6-1(b) expressly applies only to criminal liability. "[T]his Court is not at liberty to rewrite statutes or to substitute its judgment for that of the Legislature." Ex parte Carlton, 867 So. 2d 332, 338 (Ala. 2003). There is no "physician's exception" in the Wrongful Death Act, and as a Court "we are not at liberty to add exceptions to a statute that the legislature has not seen fit to supply." AltaPointe Health Sys., Inc. v. Mobile Cty. Prob. Court, 141 So. 3d 998, 1002-03 (Ala. 2013). See also Water Works & Sewer Bd. of Selma v. Randolph, 833 So. 2d 604, 607 (Ala. 2002) (noting that a court may be called upon to explain, "but it may not detract from or add to the statute").

Even if § 13A-6-1 and the Wrongful Death Act were ambiguous on the issue, Alabama courts should construe such statutes in favor of the express public policy of the State to protect unborn life, not against it. As this Court explained in Hamilton:

> "[T]his 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."

97 So. 3d at 734 n.4. We settled the incongruence between civil and criminal statutes in Mack, not by giving unborn children less protection under the law but by recognizing that unborn children, viable or not, were equally protected under the Wrongful Death Act. Likewise, in Ankrom and Hicks, although we applied the plain language of the chemical-endangerment statute, we settled the controversy over whether the statute protected unborn and born children equally by holding in favor of the equal protection of life. Protecting the inalienable right to life is a proper subject of state action, and Alabama judges called upon to apply Alabama law should do so consistent with the robust, equal protection with which the Creator God endows and state-law guarantees to unborn children from the moment of conception.[9]

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[9] "If the facts of life in the womb were not clearly known in the nineteenth century, they are plainly evident now. The critical issue, of course, is whether the child in the womb is in fact a human being. In deciding this issue, he is entitled to the benefit of whatever doubts we believe to

Unborn children, whether they have reached the ability to survive outside their mother's womb or not, are human beings and thus persons entitled to the protections of the law -- both civil and criminal. "For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails ...." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). It should be all the more intolerable in Alabama, where the express, emphatic public policy of our State is to uphold the value of unborn life. Members of the judicial branch of Alabama should do all within their power to dutifully ensure that the laws of Alabama are applied equally to protect the most vulnerable members of our society, both

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> exist. Even if one somehow does not concede that the child in the womb is a living human being, one ought at least to give him the benefit of the doubt. Our law does not permit the execution, or imprisonment under sentence, of a criminal unless his guilt of the crime charged is proven beyond a reasonable doubt. The innocent child in the womb is entitled to have us resolve in his favor any doubts we may feel as to his living humanity and his personhood."

Charles E. Rice, The Dred Scott Case of the Twentieth Century, 10 Houston L. Rev. 1059, 1070 (1973) (emphasis added).

born and unborn. See Hicks, 153 So. 3d at 76 (Parker, J., concurring specially)("Consistent protection of an unborn child's right to life at every point in time and in every respect is essential to the duty of the judiciary ....").

SHAW, Justice (concurring in part and concurring in the result).

I concur with the main opinion, except as to the discussion of the doctrine of collateral estoppel. I agree, however, that collateral estoppel does not bar litigation of the wrongful-death claim. Therefore, I concur in the result.