TORT LAW

A. *SUMMERFIELD V. SUPERIOR COURT*: FETAL WRONGFUL DEATH ACTIONS IN ARIZONA

The law concerning prenatal injuries has undergone rapid development in recent years.[1] This legal movement corresponds with the advancement of medical science in the area.[2] Courts that previously precluded actions for any prenatal harms now voice near-unanimous approval of recovery for these injuries by a child born alive.[3] The Arizona Supreme Court in *Summerfield v. Superior Court* adopted this rule of recovery for children born alive.[4] *Summerfield*, however, went on to address whether parents have an action for the wrongful death of their viable fetus.

Mrs. Summerfield became pregnant in October of 1980. Approximately one month later, during a consultation with the doctor-defendants regarding prenatal care, she informed them of her history of diabetes.[5] Defendants performed no special tests as a result of her disclosure, and told her not to be concerned. On June 10, 1981, Mrs. Summerfield complained to the defendants that she no longer felt fetal movement. After an examination, the doctors sent her home, assuring her there was no problem. She continued to feel no fetal movement, and on June 18, 1981, the defendants admitted her to the hospital where she delivered a stillborn 37-week-old fetus. The causes of death were diabetes and toxemia of pregnancy. The Summerfields brought an action for, among other things, wrongful death of the fetus. The trial court granted defendants' motion to dismiss the wrongful death action under the authority of *Kilmer v. Hicks*,[6] an Arizona Court of Appeals decision prohibiting fetal wrongful death actions.

On appeal, the Arizona Supreme Court recognized a cause of action for the wrongful death of a stillborn, viable fetus.[7] The court relied on both common law principles and the Arizona Wrongful Death Statute in recognizing the action.

This Casenote focuses on four major implications of the *Summerfield* decision: (1) the court's discussion of common law wrongful death in Ari-

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1. W. PROSSER AND W.P. KEETON, THE LAW OF TORTS § 55, at 368 (5th ed. 1984).

2. *See* Note, *The Impact of Medical Technology on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 556-62 (1962).

3. Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884), held that a cause of action did not exist because a fetus was part of its mother and not its own legal personality. *Id.* at 17, 52 Am. Rep. at 245. This rule went unchallenged until Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946), held prenatal injuries actionable by a child born alive. *Id.* at 140-41. Today, nearly all courts that have addressed the issue permit recovery by a child born alive. *See* Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 MO. L. REV. 639, 642 (1980); RESTATEMENT (SECOND) OF TORTS § 869 comment a (1979).

4. 144 Ariz. 467, 475, 698 P.2d 712, 720 (1985).

5. The facts of *Summerfield* are set forth in 144 Ariz. at 470, 698 P.2d at 715.

6. 22 Ariz. App. 552, 529 P.2d 706 (1974).

7. *Summerfield*, 144 Ariz. at 479, 698 P.2d at 724.

zona; (2) the hybrid common law/statutory remedy created by the court to reach its decision; (3) a definition of "viability" and the scope of the "viability" requirement for fetal wrongful death actions; and (4) the classes of tortfeasors who may be subject to these actions.

COMMON LAW WRONGFUL DEATH

Before interpreting the Arizona Wrongful Death Statute, the court explored the possibility of a common law cause of action for wrongful death.[8] The traditional American view has been that the common law does not permit recovery for damages resulting from death.[9] This rule originated in the English case of *Baker v. Bolton*,[10] where Lord Ellenborough in dicta stated that "[i]n a civil court, the death of a human being could not be complained of as an injury."[11] American courts shortly followed the *Baker* rule.[12]

Many commentators criticized the *Baker* rule for permitting the unjust and illogical result of relieving a tortfeasor from liability when his acts cause death, but holding him accountable for lesser injuries.[13] Some even questioned whether American courts properly adopted *Baker*. In *Moraqne v. States Marine Lines, Inc.*, Justice Harlan stated that the historic justification for the rule was the felony-merger doctrine, a doctrine which American courts rejected.[14]

Legislative movement to supercede the *Baker* rule also began in England with the passage of the Fatal Accidents Act of 1846,[15] commonly referred to as Lord Campbell's Act, which permitted recovery by close relatives of the decedent. Most American states, including Arizona,[16] eventually passed similar legislation.[17] Since the passage of these wrongful death acts, courts have widely adhered to the principal that the remedy was exclusively statutory.[18]

Although the *Summerfield* court seriously questioned the underpin-

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8. *Id.* at 470-74, 698 P.2d at 715-19.

9. *See* Halenar v. Superior Court, 109 Ariz. 27, 29, 504 P.2d 928, 930 (1972); *In re* Estate of Lister, 22 Ariz. 185, 187, 195 P. 1113, 1113 (1921).

10. 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

11. *Id.*

12. *See* 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1.1 (2d ed. 1975). The first case in America to so hold was Carey v. Berkshire R.R., 55 Mass. 475, 48 Am. Dec. 616 (1848). Some earlier American courts came to the opposite result. *See, e.g.*, Cross v. Guthery, 2 Root. 90, 1 Am. Dec. 61 (Conn. 1794), Ford v. Monroe, 20 Wend. 210 (N.Y. 1838). These cases were later overruled. *See* Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R., 25 Conn. 265, 65 Am. Dec. 571 (1856); Green v. The Hudson River R.R. Co., 28 Barb. 9, 20 (N.Y. 1859).

13. *See* W. PROSSER AND W.P. KEETON, *supra* note 1, § 127, at 945; SPEISER, *supra* note 12, at § 1.5.

14. 398 U.S. 375, 382 (1970) (citing F. POLLOCK, LAW OF TORTS 52-57 (London ed. 1951) and Holdworth, *The Origin of the Rule in* Baker v. Bolton, 32 LAW Q. REV. 431 (1916)). The felony-merger doctrine, which was a part of early English law, did not permit civil recovery when the tortious act also constituted a felony. English law considered the civil remedy less important than the felony crime so the tort "merged" into the felony. The doctrine made sense only because English law punished all felonies by death and the Crown received all the property of the felon. Since all intentional or negligent homicide was felonious, no civil suit for wrongful death was possible. *Id.*

15. Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93.

16. ARIZ. REV. STAT. ANN. § 12-611 (1982).

17. S. SPEISER, *supra* note 12, at § 1.9.

18. *See, e.g.*, Solomon v. Harman, 107 Ariz. 426, 428, 489 P.2d 236, 238 (1971); Wood v. Dunlop, 83 Wash. 2d 719, 723, 521 P.2d 1177, 1179 (1974). *See also* Britt v. Sears, 150 Ind. App.

nings of the common law rule, it did not expressly recognize a common law wrongful death action.[19] Instead, the court concluded that "at a minimum" there exists a statutory wrongful death cause of action with "common law attributes."[20] The court created this hybrid statutory/common law remedy in reliance on the criticisms of the *Baker* rule,[21] previous decisions interpreting the Arizona statute,[22] and a lack of expressed legislative intent to occupy the field exclusively.[23] Consequently, the court considered common law principles and policies in interpreting the wrongful death statute to the extent they did not drastically conflict with expressed legislative intention.[24]

A HYBRID COMMON LAW/STATUTORY REMEDY

The main issue addressed by the *Summerfield* court was whether the term "persons" in the Arizona Wrongful Death Act[25] included viable fetuses. The court first concluded that the meaning intended by the legislature that initially enacted the statute could not be "devined."[26] Instead, the court turned to general legislative policies and common law principles to define the

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487, 489, 494, 277 N.E.2d 20, 21, 24 (1972) (wrongful death exclusively a statutory remedy, but when the legislature did not consider the issue the courts may "discover" a rule).

19. *Summerfield*, 144 Ariz. at 473, 698 P.2d at 718.

20. *Id.*

21. *Id.* at 471-72, 698 P.2d at 716-17. *See supra* notes 13-14 and accompanying text.

22. *Summerfield*, 144 Ariz. at 472-73, 698 P.2d at 717-18. The court cites several previous cases that arguably interpreted the statute broader than its stated terms. For example, in Boies v. Cole, 99 Ariz. 198, 407 P.2d 917 (1965), the court allowed for recovery of punitive damages although the wrongful death statute did not expressly permit it.

23. *Summerfield*, 144 Ariz. at 471-72, 698 P.2d at 716-17.

24. *Id.* at 473, 698 P.2d at 718. The court apparently discussed a potential common law wrongful death remedy to further support its broad definition of the word "person" in the statute. *See infra* notes 37-41 and accompanying text. The discussion, however, leaves little in the way of a common law remedy and may indicate that the Arizona constitution prohibits legislative limitations on wrongful death actions. Although Justice Feldman, writing for the court, suggests that specific legislation might control in this area, 144 Ariz. at 474, 698 P.2d at 719, he also hints that wrongful death actions may be protected under ARIZ. CONST. art. 18, § 6 and ARIZ. CONST. art. 2, § 31, 144 Ariz. at 472 n.2, 474, 698 P.2d at 717 n.2, 719. Extension of constitutional protections to wrongful death actions would be contrary to *Halenar v. Superior Court*, which stated that the legislature had the power to alter or withhold the right to wrongful death actions notwithstanding art. 18, § 6. 109 Ariz. 27, 29, 504 P.2d 928, 930 (1972).

If, however, a common law action for wrongful death does exist in Arizona, then it is a "fundamental right" and any legislation restricting the action would be subject to strict scrutiny by the court. Kenyon v. Hammer, 142 Ariz. 69, 83, 688 P.2d 961, 975 (1984). Protection under these Arizona constitutional provisions may also extend to fetuses if the court construes "person" to include viable fetuses, as it did for purposes of the Wrongful Death Act. *See infra* notes 25-36 & 38-41 and accompanying text. At least one court so interpreted a similar state constitutional provision. Libbee v. Permanente Clinic, 268 Or. 258, 261, 518 P.2d 636, 637 (1974). Such an interpretation would not be at odds with *Roe v. Wade*, which held that a fetus is not a person under the fourteenth amendment, 410 U.S. 113, 158 (1973), since "person" can mean different things in different contexts. *Summerfield*, 144 Ariz. at 478, 698 P.2d at 723 (*citing* O'Grady v. Brown, 654 S.W.2d 904, 909 (Mo. 1983)). Permitting recovery against third parties would not violate the mother's right to privacy. *See* Kader, *supra* note 3, at 657.

25. ARIZ. REV. STAT. ANN. § 12-611 (1982) states that an action may be brought against one whose wrongful act causes the "death of a person." (emphasis added).

26. *Summerfield*, 144 Ariz. at 475, 698 P.2d at 720. Other courts similarly conclude that their legislatures had no intent concerning the unborn when passing a wrongful death act. *See, e.g.*, Danos v. St. Pierce, 402 So. 2d 633, 638 (La. 1981). One court found that the legislature intended to include unborns on the policy ground that state criminal laws protected a viable fetus at the time the wrongful death act was passed. Salazar v. St. Vincent Hosp., 95 N.M. 150, 153-54, 619 P.2d 826, 829-30 (1980).

scope of the term "persons."[27]

The court stated that two legislative policies support the conclusion that a fetus is a person under the Wrongful Death Act. First, the Wrongful Death Act itself is a remedial measure designed to compensate decendent's survivors for their losses.[28] The court stated that there is not a "qualitative" difference between the losses suffered by parents of a dead fetus and the parents of a dead child. While the court did not elaborate, it would seem that though the degree of emotional attachment and economic expectation may be greater with a child born alive, these same ties exist between parents and a viable fetus.[29]

Second, the court relied on a general legislative policy of protecting fetuses.[30] The court referred to statutes criminalizing the killing of fetuses,[31] requiring physicians to attempt to preserve the life of aborted fetuses,[32] protecting a fetus' property interests,[33] and criminalizing abortion.[34] Defining "persons" to include viable fetuses furthers this protective policy by holding persons who tortiously kill a fetus liable for damages.[35] It also avoids the illogical result of holding persons liable if they harm but do not kill the unborn, while excusing those who actually terminate the life.[36]

The legislative policies recognized by the court point toward permitting parents to recover for wrongful death at any stage of fetal development. Parents have emotional bonds with a previable fetus and the legislation cited by the court does not make any viability distinction.[37]

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27. *Summerfield,* 144 Ariz. at 475, 698 P.2d at 720. The court also disposed of the requirement that the injured party be able to maintain an action if he had survived. *See* Barragan v. Superior Court, 12 Ariz. App. 402, 405, 470 P.2d 722, 725 (1970). The court characterized this requirement as permitting recovery when the injured party would have been able to maintain an action at any time during his life, even if he could not bring an action at the time of death. *Summerfield,* 144 Ariz. at 475, 698 P.2d at 720 (*citing* O'Grady v. Brown, 654 S.W.2d at 910)). Since the fetus would have had an action had it been born alive, *see infra* notes 47-53 and accompanying text, *Summerfield* satisfied this prerequisite.

28. *Summerfield,* 144 Ariz. at 476, 698 P.2d at 721.

29. *See* Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wisc. 2d 14, 20, 148 N.W.2d 107, 111 (1967).

30. *Summerfield,* 144 Ariz. at 476, 698 P.2d at 721.

31. ARIZ. REV. STAT. ANN. § 13-1103(A)(5) (Supp. 1985-86) defines manslaughter to include the intentional or reckless killing of a fetus by inflicting a physical injury to the mother that would be murder if the mother died.

32. ARIZ. REV. STAT. ANN. § 36-2301.01(c) (Supp. 1985).

33. The court cited ARIZ. REV. STAT. ANN. § 14-2108 (1975), which enables relatives of the deceased conceived prior to his death but born afterwards to inherit as if they had been born in the deceased's lifetime. This may not support the court's position, because the statute requires birth to have the right recognized. Further, the statute does not protect the health of fetuses.

34. ARIZ. REV. STAT. ANN. §§ 13-3603 to 3605 (1978). As the court noted, 144 Ariz. at 476, 698 P.2d at 721, these statutes are unconstitutional. State v. New Times, Inc., 20 Ariz. App. 183, 511 P.2d 196 (1973).

35. *See* Eich v. Town of Gulf Shores, 293 Ala. 95, 98, 300 So. 2d 354, 356 (1974) (allowing recovery for the wrongful death of a fetus is "essential to the effectuation of legislative intent . . . to preserve human life"); O'Grady v. Brown, 654 S.W.2d 904, 909 (Mo. 1983) (recovery deters harmful conduct that might lead to death).

36. *See* Stidam v. Ashmore, 109 Ohio App. 431, 434, 11 Ohio Op. 2d 383, 385, 167 N.E.2d 106, 108 (1959), which illustrated this result by stating that if the same act injured two twins and one survived birth by one minute while the other died shortly before birth, it would be illogical to allow the born child to recover and not the other. *See also* Danos v. St. Pierre, 402 So. 2d 633, 638 (La. 1981) requiring birth for recovery benefits tortfeasors who inflict more serious injuries).

37. *See supra* notes 31-34. Some of the legislation cited by the court aims at previability. *See,*

Although the court did not expressly recognize this extention of the legislative policies, it relied on common law concepts to limit "persons" under the statute to viable fetuses. The court pointed out that a majority of jurisdictions use the viability standard.[38] Further, the court stated that the common law recognizes that a fetus capable of independent life is a "person" for tort purposes.[39] Medical science has developed so that today a physician can use drugs or perform surgical procedures that enable a childbirth to occur much earlier than by natural processes.[40] Since this option is available at viability, the court stated that recovery is proper at that point.[41]

The viability requirement is subject to the same criticisms as the birth requirement the court rejected. A tortfeasor who is negligent before viability is better off if his acts kill the fetus than if he injures it less severely.[42] The court also relied on common law concepts of a "person" in establishing the viability requirement.[43] According to the court, the legislature did not contemplate whether the word "person" included prenatal life.[44] The court's resurrection of "person" under the common law seems contrary to the court's "devined"[45] legislative policies.[46]

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e.g., ARIZ. REV. STAT. ANN. § 13-3605 (1978) (criminalizing the advertisement of abortion facilities while making no viability distinction, and also prohibiting advertisement for the prevention of conception).

38. *Summerfield*, 144 Ariz. at 477, 477-78 n.5, 698 P.2d at 722, 722-23 n.5 (citing 31 jurisdictions recognizing a wrongful death action for a viable fetus). All the jurisdictions referred to, however, do not agree on the viability standard. One adopted "quickening," which occurs when the fetus is able to move in its mother's womb. *See* Porter v. Lassiter, 91 Ga. App. 712, 716, 87 S.E.2d 100, 103 (1955). Another jurisdiction allows an action at any time after conception. *See* Presley v. Newport Hospital, 117 R.I. 177, 188-89, 365 A.2d 748, 753-54 (1976). Most courts faced cases with a viable fetus, and consequently did not address the issue of the death of previable fetuses. *See, e.g.*, State *ex rel* Odham v. Sherman, 234 Md. 179, 182, 198 A.2d 71, 72 (1964); Rainey v. Horn, 221 Miss. 269, 283, 72 So. 2d 434, 440 (1954); O'Grady v. Brown, 654 S.W.2d 904, 911 (Mo. 1983); Moen v. Hanson, 85 Wash. 2d 597, 598, 537 P.2d 266, 268 (1975). When faced with the issue factually, at least two courts that otherwise permit recovery held that a previable fetus cannot recover. Green v. Smith, 71 Ill. 2d 501, 377 N.E.2d 37 (1978); Toth v. Goree, 65 Mich. App. 296, 304, 237 N.W.2d 297, 302 (1975).

39. *Summerfield*, 144 Ariz. at 477, 698 P.2d at 722. *See also*, Vaillancourt v. Medical Center Hosp. of Vermont, Inc., 139 Vt. 138, 142, 425 A.2d 92, 94 (1980) (viable fetus is biologically a person because it could live outside the mother's body).

40. *Summerfield*, 144 Ariz. at 477, 698 P.2d at 722.

41. As a result, the "viability" requirement may merely be an update of the traditional common law live birth requirement. A viable fetus can be "born alive" with modern technical techniques. The traditional rule permits recovery for wrongful death if doctors perform these procedures and the fetus only lives for a short time. *Cf.* Baldwin v. Butcher, 155 W. Va. 431, 443, 184 S.E.2d 428, 435 (1971). It is inconsistent to deny recovery because doctors did not remove a viable fetus from its mother while still alive.

42. This result would arise if previability injuries to a child that survives to viability or birth are actionable. *See infra* notes 48-55 and accompanying text. *See also* Note, *Wrongful Death of the Fetus: Viability is Not a Viable Distinction*, 8 U. PUGET SOUND L. REV. 103, 116 (1984).

43. *See supra* notes 38-41 and accompanying text. Many courts have relied on the human characteristics and the potential of independent existence to bring a viable fetus into the definition of persons for tort purposes. *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138, 142-43 (D.D.C. 1946).

44. *Summerfield*, 144 Ariz. at 475, 698 P.2d at 720.

45. The court's determination of legislative intent appears woven out of the same cloth as the "methodology" it rejected for determining the intent of the 1887 legislature. 144 Ariz. at 475, 698 P.2d at 720. Using other statutes to determine "legislative policies" is tantamount to guessing how the current legislature would define the term "person" if it were to address the issue. Furthermore, examination of statutes other than those handpicked by the court arguably reveals policies that exclude fetuses as a person under the Wrongful Death Statute. The legislature has passed statutes designed to protect physicians from spurious claims. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-567

THE VIABILITY STANDARD

The court left unresolved two major issues when adopting the "viability" standard: (1) what is meant by "viability;" and (2) whether the viability requirement applies only to the timing of the death of the fetus or also the the timing of the injury.

Definition of "Viability"

The court did not clearly define "viability," but merely stated that it occurs when the fetus is able to "sustain life independently of the mother's body."[47] The court apparently adopted the definition of "viability" developed in abortion cases.[48]

Abortion cases define a "viable" fetus as one capable of sustained and meaningful life outside the womb. Survival must be more than momentary, and artifical aid may be employed.[49] Viability is a matter for medical judgment.[50] It will vary from case to case[51] and with advancements in medical science.[52] Fetal wrongful death cases view the viability concept consistently with abortion decisions.[53]

Timing of the Injury

The court stated that an action for negligently-caused prenatal injuries may be brought by an infant who survives birth.[54] The opinion does not, however, state whether children born alive can recover for previability injuries nor whether a different rule applies to a fetus that dies before birth.

A strong argument exists for recovery by a child born alive for previability injury. Although jurisdictions differ on the issue,[55] most cases

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(1982) (medical review panels required in medical malpractice actions). The potential for spurious claims due to the difficulty of establishing causation has been a major criticism against fetal wrongful death actions. *See, e.g.*, Libbee v. Permanente Clinic, 268 Or. 258, 260, 518 P.2d 636, 638 (1974).

46. *See* text accompanying *supra* notes 30-36. This conflict with the court's "legislative policies" might be reconciled under the rationale of the hybrid common law/statutory remedy. The court stated that common law principles control unless they drastically conflict with expressed legislative policy. *Summerfield,* 144 Ariz. at 473, 698 P.2d at 718.

47. *Summerfield,* 144 Ariz. at 477, 698 P.2d at 722.

48. *Id.* at 478, 698 P.2d at 723.

49. Colautti v. Franklin, 439 U.S. 379, 387-89 (1979); American College of Obstetricians v. Thornburger, 737 F.2d 283, 292 (3rd Cir. 1984); Schulte v. Douglas, 567 F. Supp. 522, 524 (D. Neb. 1981).

50. *See Colautti,* 439 U.S. at 388; Wolfe v. Schroering, 388 F. Supp. 631, 636 (W.D. Ky. 1974).

51. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 64 (1976).

52. *Coilautti,* 439 U.S. at 387.

53. *See, e.g.,* Werling v. Sandy, 17 Ohio St. 3d 45, 49, 476 N.E.2d 1053, 1056 (1985); Libbee v. Permanente Clinic, 268 Or. 258, 267, 518 P.2d 636, 640 (1974). Some early cases are to the contrary. *See, e.g.,* Tursi v. New England Winder Co., 19 Conn. Supp. 242, 243, 111 A.2d 14, 14 (1955) (viability is when the fetus is capable of continued existence, under *normal conditions,* outside the womb (emphasis added)).

This definition is also consistent with an Arizona statute regulating abortions of viable fetuses. ARIZ. REV. STAT. ANN. § 36-2301.01(D) (Supp. 1985).

54. *Summerfield,* 144 Ariz. at 475, 698 P.2d at 720.

55. *See, e.g.,* Wolfe v. Isbell, 291 Ala. 327, 333, 280 So. 2d 758, 762 (1973) (recovery allowed for injuries occurring before viability); Mallison v. Pomeroy, 205 Or. 690, 697, 291 P.2d 225, 228 (1955) (recovery allowed from point of viability); Kine v. Zuckerman, 4 Pa. D. & C. 227, 230 (1924) (recovery allowed for injuries while "quick in the womb").

have involved injuries during viability.[56] No jurisdiction that has recently faced the issue of previable injuries to a child born alive has refused recovery.[57] Most commentators,[58] including the treatise cited by the court,[59] and the Restatement,[60] support permitting a child born alive to recover for previability injuries. These authorities assert that a duty toward a fetus should begin at conception because it is a separate entity for medical and many legal purposes.[61]

Even if the court were to permit recovery for previability injuries for children born alive, the issue would remain whether the same rule applies to previability injuries suffered by a fetus that survives to viability, but dies prior to birth. Courts that permit children born alive to recover for previability injuries have been reluctant to extend the rule to fetal wrongful death actions.[62] These cases, however, have involved only postviability injuries.[63]

The court's rational supports recovery for previability injuries. The policy of protecting a fetus[64] also extends to nonviable fetuses. The survivors of a viable fetus have the same loss regardless of when the injury occurred.[65] Furthermore, the illogical distinction between a viable fetus and a child born alive that the court sought to eliminate[66] would be continued by maintaining differing rules.[67]

CLASSES OF TORTFEASORS

Summerfield dealt specifically with only one class of tortfeasors—physicians treating the mother during pregnancy.[68] A distinguishing feature of this class is that physicians providing maternity care have a specific duty toward the fetus. The court, however, did not rely on this rationale in finding that an action existed.[69] Consequently, three other classes of tortfeasors

56. W. PROSSER AND W.P. KEETON, *supra* note 1, § 55, at 368.

57. *See* generally Note, *Parental Liability for Prenatal Injury,* 14 COLUM. J.L. AND SOC. PROB. 47, 54-56 (1978); Annot., 40 A.L.R.3d at 1229. Courts permitting recovery include: Group Health Assoc., Inc. v. Blumenthal, 295 Md. 104, 116-19, 453 A.2d 1198, 1206 (1983); Bennett v. Hymers, 101 N.H. 483, 486, 147 A.2d 108, 110 (1960); Sinkler v. Kneale, 401 Pa. 267, 273-74, 164 A.2d 93, 96 (1960).

58. *See, e.g.*, Kader, *supra* note 3, at 642; 1 J. DOOLEY, MODERN TORT LAW § 14.02.50 (1982).

59. The court cited W. PROSSER AND W.P. KEETON, *supra* note 1, § 55, at 368. *Summerfield*, 144 Ariz. at 475, 698 P.2d at 720.

60. RESTATEMENT (SECOND) OF TORTS § 869 (1979) comment d.

61. W. PROSSER AND W.P. KEETON, *supra* note 1, § 55, at 367.

62. *See, e.g.*, Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis. 2d 14, 20, 148 N.W.2d 107, 112 (1967).

63. *See supra* note 38.

64. *Summerfield,* 144 Ariz. at 476, 698 P.2d at 721. *See supra* notes 30-36 and accompanying text.

65. *Summerfield,* 144 Ariz. at 476, 698 P.2d at 721.

66. *Id.* at 477, 698 P.2d at 722.

67. Although the court did not discuss the issue, previability negligence may have been at issue in *Summerfield.* Mrs. Summerfield informed the defendants of her diabetic condition about one month after conception and the defendants took no precautionary measures. *Summerfield,* 144 Ariz. at 470, 698 P.2d at 715.

Other considerations call for a different rule for the timing of the negligence when the action is against the mother of the fetus. *See infra* notes 90-91 and accompanying text.

68. *Summerfield,* 144 Ariz. at 477, 698 P.2d at 715.

69. The court stated that physicians providing maternal care have a dual duty to both the

could be subject to fetal wrongful death actions: (1) physicians treating the mother before conception; (2) other third parties; and (3) the mother of the fetus.

Some courts provide that a physician who negligently treats a mother prior to any pregnancy may be liable for foresseable injuries to a child conceived subsequently.[70] Courts have not extended liability for preconception negligence beyond physicians, possibly because other persons may not have the medical knowledge necessary to make the harm reasonably foreseeable.[71] In other cases, the Arizona Supreme Court extended liability to the limits of foreseeability.[72]

If the court permits recovery by children born alive for preconception negligence the *Summerfield* rationale should extend recovery to a viable fetus for wrongful death.[73] Liability for preconception negligence also furthers the policies of protecting fetuses and compensating survivors.[74]

Another class of potential defendants includes all third parties except physicians and the mother. Liability turns on the issue of whether injury to the fetus was reasonably foreseeable by the third party.[75] The most typical example of third party liability for fetal wrongful death is when a person negligently injures the pregnant mother in an automobile accident.[76]

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mother and the fetus. *Summerfield,* 144 Ariz. at 470, 698 P.2d at 715. The decision, however, did not focus on the limits of a defendant's duty, but instead looked to the potential common law and statutory limitations on the remedy for breach of a duty. *Id.* The Arizona court previously recognized that a defendant can owe a duty to a plaintiff through a relationship with a third party. *See* Ontiveros v. Borak, 136 Ariz. 500, 508-09, 667 P.2d 200, 208-09 (1983) (tavern owner who negligently served liquor to an intoxiciated patron found liable to persons injured by that patron in an automobile accident). Furthermore, several cases relied on by the court recognized that non-physicians owed a duty to a fetus. *See, e.g.*, Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982) (auto collision killed the fetus).

70. *See, e.g.*, Bergstresser v. Mitchell, 577 F.2d 22 (8th Cir. 1978); Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973); Turpin v. Sortini, 31 Cal. 3d 220, 230-31, 643 P.2d 954, 960, 182 Cal. Rptr. 337, 343 (1982) (in dicta stating that if the child's "deafness was caused by . . . a tort committed upon her mother before conception . . . it is clear that she would be entitled to recover against the negligent party"); Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977). *See also,* Annot., 91 A.L.R.3d 316 (1979).

71. *See Renslow,* 67 Ill. 2d at 353-54, 367 N.E.2d at 1253. McAuley v. Wills, 251 Ga. 3, 6-7, 303 S.E.2d 258, 260 (1983) involved a woman who was paralyzed in an auto accident with the defendant. She subsequently conceived and gave birth to a child in a manner incapatible with her paraplegia. The defendant was not liable for injuries to the child because they were not reasonably foreseeable. The court suggested, however, that physicians may have a duty toward an unconceived child.

72. *See* Markowitz v. Arizona Parks Bd., 146 Ariz. 352, 356, 706 P.2d 364, 368 (1985) (landowner has a duty to protect invitees from foreseeable dangers); University of Arizona Health Services Center v. Superior Court, 136 Ariz. 579, 584, 667 P.2d 1294, 1299 (1983) (physician who negligently performed a vasectomy liable for the cost of rearing a subsequently-born child because these costs were a foreseeable consequence of the physician's negligence); Ontiveros v. Borak, 136 Ariz. 500, 508, 667 P.2d 200, 208 (1983) (tavern owner has duty to protect third parties from foreseeable injuries by patrons).

73. *See supra* notes 66-67 and accompanying text.

74. *Id.*

75. *See supra* notes 69, 70 and 72 and accompanying text.

76. In *Kilmer v. Hicks,* the Arizona Court of Appeals held that no action existed for the wrongful death of a viable fetus that died as a result of an auto accident. 22 Ariz. App. 552, 554, 529 P.2d 706, 708 (1974). The court, however, based its decision on its interpretation of "persons" under the Wrongful Death Act and not on grounds of duty under tort law. 22 Ariz. App. at 553, 529 P.2d at 707. In any event, *Summerfield* expressly overruled *Kilmer.* 144 Ariz. at 479, 698 P.2d at 724.

Many courts permit fetal wrongful death recovery against third parties. *See, e.g.*, Volk v.

The mother of the fetus falls into a final class of potential tortfeasors. Since *Summerfield* recognizes a viable fetus as a person independent of its mother for tort purposes, logically the mother is potentially liable for fetal wrongful death.[77] The mother, however, has constitutionally protected interests relating to her conduct during pregnancy.[78] *Summerfield* did not consider these interests because the case concerned the acts of a physician, not the mother.[79] Potential maternal tort liability analytically falls into two categories: (1) abortion and (2) other acts.

In theory, an abortion could constitute a battery and give rise to a wrongful death action on behalf of a fetus.[80] The mother, however, has a constitutionally protected right to choose to have an abortion until the point of viability.[81] Since a nonviable fetus has no cause of action for wrongful death, only rarely will the issue of liability for abortion arise. In cases where an action is feasible, such as when a fetus survives to viability due to a negligently performed abortion,[82] a mother's constitutionally protected abortion decision should not subject her to liability. Holding a mother liable for damages for a previability abortion restrains her autonomy protected by *Roe v. Wade*.[83] An abortion privilege similar to those for other constitutionally

Baldozo, 103 Idaho 570, 651 P.2d 11 (1982) (auto accident); Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971) (auto accident). *But see* McAuley v. Wills, 251 Ga. 3, 6-7, 303 S.E.2d 258, 260 (1983) (defendant's preconception negligence in auto accident not the proximate cause of the child's injury because not foreseeable).

77. At least one court recognized that a mother may be liable to her child for prenatal negligence if it is born alive. Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1980). The Arizona courts previously recognized that the estate of a child born alive can bring a wrongful death action against its parent. Bowslaugh v. Bowslaugh, 126 Ariz. 520, 522, 617 P.2d 28, 30 (Ct. App. 1979). Arizona abolished parental immunity except for acts involving exercise of parental authority and ordinary parental discretion as to care. Streenz v. Streenz, 106 Ariz. 86, 89, 471 P.2d 282, 285 (1970). Further discussion of parental immunity is beyond the scope of this Casenote. For a more detailed discussion, *see generally* Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to her Child Born Alive*, 21 SAN DIEGO L. REV. 325, 333-57 (1984).

78. *See* Roe v. Wade, 410 U.S. 113 (1973).

79. *Summerfield*, 144 Ariz. at 478, 698 P.2d at 723. The court noted that providing a wrongful death action furthered the mother's interests by protecting her right to continue the pregnancy. *Id. See also* O'Grady v. Brown, 654 S.W.2d 904, 910 (Mo. 1983) (the mother's rights under *Roe v. Wade* do not extend to third parties). *But see* Toth v. Goree, 65 Mich. App. 296, 303-04, 237 N.W.2d 297, 301 (1975) (liability for wrongful death of a previable fetus is inconsistent with *Roe v. Wade* since the mother would not be liable if she aborted).

80. An unauthorized touching of a person forms the basis of a battery action. Hales v. Pittman, 118 Ariz. 305, 311, 576 P.2d 493, 499 (1978). Liability extends to one who encourages the tortious act. Ramirez v. Chavez, 71 Ariz., 239, 243, 226 P.2d 143, 146 (1951).

81. Roe v. Wade, 410 U.S. at 163-64.

82. If the abortion were negligently performed, it is possible that the fetus could live to viability or even birth. *See, e.g.*, Wilczynski v. Goodman, 78 Ill. App. 3d 51, 53, 391 N.E.2d 479, 481 (1979) (allegedly negligent therapeutic abortion did not terminate pregnancy and child was born alive). A mother might also decide on an abortion after the point of viability in violation of ARIZ. REV. STAT. ANN. § 36-2301.01 (1985). Further, some discrepancy may exist between the time when the mother may legally terminate her pregnancy, and medical viability. In Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973), the court stated that abortions cannot be prohibited until after the second trimester, or about 25 weeks. *Id.* at 192. Viability may occur prior to the end of the second trimester. Wolfe v. Schroering, 388 F. Supp. 631, 636 (W.D. Ky. 1974). The *Doe v. Rampton* holding seems contrary to *Roe v. Wade*, which like *Summerfield*, defined "viability" in medical terms. 410 U.S. at 163-64; *Wolfe*, 388 F. Supp. 635-36.

83. *See* Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 433-39 (1983) (states may not place financial burdens on mothers choosing abortion unless reasonably related to maternal health). Insurance policies generally do not cover abortions due to intentional tort exclusions. *Cf.* P.

privileged acts might be fashioned.[84] Abortions occurring outside the scope of *Roe v. Wade*, that is, post viability abortions, would not seem entitled to any abortion privilege. Interests in protecting the life of a fetus outweigh the mother's privacy interests at that point.[85] Liability for post viability abortions would not frustrate the policies underlying *Roe v. Wade* because the state can constitutionally prohibit these abortions.[86]

Whether to hold a mother liable for fetal wrongful death for acts outside the scope of an abortion privilege presents a more difficult question.[87] Constitutional protections extend only to decisions regarding whether to have a child.[88] Therefore, courts should look to the policy justifications for wrongful death actions in deciding whether to permit such an action. The *Summerfield* court stated a wrongful death action for fetuses furthers two legislative policies: (1) deterrence of behavior that might harm a fetus; and (2) compensation of survivors.[89] These policies call for permitting wrongful death actions against the mother, but limiting them to negligence occurring after viability.

Countervailing policies do not seem to require that the mother be immune from liability. The threat of liability for damages may not provide any greater incentive for prudent maternal care than already exists due to the natural love of a mother for her unborn child. All mothers, however, may not have this strong emotional incentive; therefore, a form of deterrence may be proper. An action against a mother may disturb domestic tranquility, but this factor has not prevented mothers from being liable for injuries wrongfully inflicted to their children after birth.[90]

Although the policies behind wrongful death actions seem to call for an action against the mother, courts should limit liability to acts occuring after viability. As for negligence occurring before viability, the mother can terminate the pregnancy and avoid liability.[91] Consequently, the father would not have any recoverable loss. By continuing the pregnancy the mother protects the father's hope that the child will survive and provide him emotional and economic gains. More importantly, holding a mother liable for previability negligence could undercut the policy of protecting fetuses. The mother will have an incentive to terminate the pregnancy and avoid liability.[92] As a result, a strong justification exists for distinguishing between mothers and

KEETON, BASIC TEXT ON INSURANCE LAW, § 5.3(f), at 286-87 (1971). Consequently, wrongful death actions would burden the mother financially and might effectively deter a choice of abortion.

84. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (free speech protections prohibit defamation liability for false statements concerning public officials absent a showing of actual malice).

85. Roe v. Wade, 410 U.S. at 163-64.

86. States may not prohibit post viability abortions necessary to preserve the mother's health or life. *Id.* Any abortion performed for these reasons should be accorded a further privilege similar to self-defense. *Cf.* W. PROSSER AND W.P. KEETON, *supra* note 1, § 3, at 19.

87. Examples of such actions include trauma resulting from an auto accident and ingesting certain drugs. *See* Beal, *supra* note 77, at 358-62.

88. Roe v. Wade, 410 U.S. at 155-56.

89. *Summerfield,* 144 Ariz. at 476, 698 P.2d at 721.

90. *See, e.g.*, Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 2822 (1970); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

91. *See supra* text accompanying notes 80-83.

92. *See* Beal, *supra* note 77, at 369.

other tortfeasors on the issue of the timing of the negligence for fetal wrongful death actions.

A further difficulty encountered in fetal wrongful death actions against the mother involves standing to bring suit. Under the Arizona Wrongful Death Act, if an action for maternal negligence is permitted, only the father or the child's estate could bring the action.[93] The estate may sue only where the fetus is not survived by either parent.[94] The father is unable to bring an action where the interspousal immunity is applicable.[95] The scope of the interspousal immunity is currently unclear in Arizona,[96] but it has been abrogated at least in automobile cases.[97]

CONCLUSION

In *Summerfield v. Superior Court*, the Arizona Supreme Court recognized a wrongful death action for viable fetuses. Although the court relied heavily on common law principles, the Arizona Wrongful Death Act provided the basis for the action.

While not completely resolving the issues, *Summerfield* provides substantial guidance in the areas of the timing of the injury, viability, and scope of liability. Courts should permit recovery whether the negligence occurred before or after viability. *Summerfield* seems to define viability consistently with the abortion decisions under *Roe v. Wade*. Liability should extend to physicians treating the mother before and during pregnancy, to other third parties, and to the mother of the fetus for acts occurring after viability.

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93. ARIZ. REV. STAT. ANN. § 12-612 provides that wrongful death actions may be brought by or on behalf of the deceased's spouse, children, or parents. If none of them survive the deceased, then the action is brought by the deceased's estate. The parents of the deceased are the only possible survivors of a fetus. The mother would be unable to bring an action against herself. Bowslaugh v. Bowslaugh, 126 Ariz. 520, 522, 617 P.2d 28, 30 (Ct. App. 1979), *vacated on other grounds*, 126 Ariz. 517, 617 P.2d 25 (1979).

94. Bowslaugh v. Bowslaugh, 126 Ariz. 517, 519, 617 P.2d 25, 27 (1979).

95. *Id.*

96. *See* Casenote, *Has Interspousal Immunity Been Abolished in Arizona?*, 25 ARIZ. L. REV. 591 (1983).

97. Fernandez v. Romo, 132 Ariz. 447, 646 P.2d 878 (1982).