Nebraska Fights the Trend to Recognize the Unborn Child under Its Wrongful Death Statute

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Nebraska Fights the Trend to Recognize the Unborn Child Under its Wrongful Death Statute

Smith v. Columbus Community Hospital, 222 Neb. 776, 387 N.W.2d 490 (1986)

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I. INTRODUCTION

*Smith v. Columbus Community Hospital*¹ is the Nebraska Supreme Court’s most recent reaffirmation of the traditional rule that no cause of action may be brought on behalf of a stillborn child² under the Nebraska wrongful death statute.³ The court disregarded the significant trend in other jurisdictions favoring the recognition of a statutory cause of action for the wrongful death of a stillborn child.

This Note analyzes the significance of the court’s holding and criticizes its rationale. The Note begins by outlining the majority and dissenting opinions in *Smith*, including the general holding of the case and the basic arguments used by the majority and dissenting opinions. Second, the Note analyzes the logic of the majority’s justification for refusing to recognize the cause of action, including its interpretation of the Nebraska wrongful death statute, its reliance on previous Nebraska cases on this issue, its neglect of evidence of medical advances in the study of fetal development and birth, and its failure to consider the persuasive opinions of those jurisdictions which have allowed a statutory cause of action for wrongful death of a viable, stillborn child. The Note concludes that the court is clinging to outdated precedent and ignoring advances in medical science to justify its refusal to recognize this cause of action.

II. *SMITH v. COLUMBUS COMMUNITY HOSPITAL*

A. Facts and Issues

On October 17, 1982, Barbara Smith was admitted to Columbus Community Hospital. Later that same day, Mrs. Smith delivered a stillborn, male infant. Mrs. Smith subsequently brought suit in Platte County District Court alleging that the infant’s death was caused by the negligence of the hospital and its staff. Mrs. Smith claimed that nurses in the hospital’s employ failed (1) to properly monitor fetal heart tones; (2) to promptly and properly notify Mrs. Smith’s physician of Mrs. Smith’s admission to the hospital; and (3) to assemble an emergency surgical team for a cesarian section when it became apparent that the infant could not be delivered normally. Mrs. Smith’s complaint alleged the defendant’s negligence proximately resulted in the death of her unborn child.⁴

As the personal representative of the deceased child’s estate, Mrs.

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¹. 222 Neb. 776, 387 N.W.2d 490 (1986).
². A stillborn child is defined as “[a] child born dead or in such an early stage of pregnancy as to be incapable of living though not actually dead at the time of birth.” *BLACK’S LAW DICTIONARY* 1268 (5th ed. 1979).
Smith sought recovery of general damages under the cause of action created by the Nebraska wrongful death statute in the form of loss of comfort, companionship, and society, as well as special damages in the form of funeral expenses. The hospital demurred to Mrs. Smith's petition for failing to state a cause of action upon which relief could be granted. The District Court for Platte County sustained the hospital's demurrer, and when Mrs. Smith refused to replead, the court dismissed her action.\(^5\)

On appeal, the Nebraska Supreme Court focused on the issue of whether the personal representative of the estate of an unborn, viable fetus who dies prior to birth as the result of another's negligence has a cause of action for damages under the wrongful death statute.\(^6\)

### B. Majority Opinion

The court held that an unborn child does not have a cause of action under the wrongful death statute and affirmed the trial court's dismissal of Mrs. Smith's action.\(^7\) The court noted that the same issue had already been raised in Drabbels v. Skelly Oil Co.\(^8\) and Egbert v. Wenzl\(^9\), and that in both cases the court had refused to allow a cause of action for the wrongful death of a stillborn child.\(^10\)

The court quoted extensively from both the Drabbels and Egbert opinions in justifying its denial of the cause of action in Smith. The court cited Drabbels to make three arguments to rationalize its holding. The first argument relied on Drabbels' interpretation of Nebraska's wrongful death statute.\(^11\) Drabbels held the statute specifically required that in order to maintain a cause of action on behalf of the deceased for his wrongful death, the deceased must have been a "person" able to maintain a cause of action for his injuries if he had not died.\(^12\) In the case of fatal injuries to a child before birth, the court held that the common law did not recognize an unborn child as a "person."\(^13\) Drabbels therefore found that the personal representative could not bring a wrongful death action on behalf of the child.\(^14\)

The second argument given by Smith and supported by Drabbels was the traditional doctrine that the unborn child is a part of the mother with no separate juridical existence until the child is born.

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5. See id. at 777, 387 N.W.2d at 491.
6. Id.
7. Id. at 778-80, 387 N.W.2d at 491-92.
8. 155 Neb. 17, 50 N.W.2d 229 (1951).
11. Id. at 778, 387 N.W.2d at 491.
13. Id. at 22-23, 50 N.W.2d at 232.
14. Id. at 23, 50 N.W.2d at 232.
The third argument from Drabbels was that there was no convincing authority that a child born dead was ever a "person" in the law of torts. Smith cited Egbert for arguments relating to the intent of the Nebraska Legislature in enacting the wrongful death statute. Egbert had concluded the common-law rule at the time of the adoption of Nebraska's statute was that an unborn fetus was not a person within the law of torts. The court in Egbert stated that if the legislature had intended to include an unborn child in its definition of "person" in the statute, the legislature could have drafted the statute to specifically include the unborn child. Smith also cited to legislative inaction since Drabbels as evidence of the legislature's intent to ratify the Drabbels holding.

Smith further indicated that the plaintiff had failed to present any convincing evidence that the legislature had intended to include a fetus within the wrongful death statute's protection and that such a change in the interpretation of the statute allowing a cause of action to lie on behalf of an unborn child should be made by the Nebraska Legislature.

C. Dissenting Opinion

Justice Shanahan dissented, advocating a recognition by the Nebraska Supreme Court of a statutory cause of action for wrongful death of a viable, unborn fetus. The dissent criticized the majority for relying on the old rule in Drabbels and Egbert and for disregarding the clear, rational trend in favor of recognizing this cause of action. The dissent observed that in 1985 twenty-nine states and the District of Columbia recognized a statutory cause of action for wrongful death of a viable, stillborn child.

16. Id. at 778, 387 N.W.2d at 491-92 (citing Drabbels v. Skelly Oil Co., 155 Neb. 17, 23, 50 N.W.2d 229, 232 (1951)).
17. Id. at 778-80, 387 N.W.2d at 492 (citing Egbert v. Wenzl, 199 Neb. 573, 260 N.W.2d 480 (1977)).
20. See id. at 779-80, 387 N.W.2d at 492.
21. Id. at 780-82, 387 N.W.2d at 492-93 (Shanahan, J., dissenting).
22. Id. at 780, 387 N.W.2d at 492-93.
Wrongful death statutes create a cause of action unknown at common law. The common-law rule against recovery for wrongful death dates back to the English case of Baker v. Bolton wherein the court stated that "[i]n a civil Court, the death of a human being could not be complained of as an injury." This rule was based on the English "felony merger" rule in existence since 1607 which disallowed civil recovery for an act that constituted both a tort and a felony. The practical reason for this rule was that English law punished all felonies by death, and upon conviction the criminal was required to forfeit all
property to the government. In 1846, England adopted the Fatal Accidents Act, also known as Lord Campbell’s Act, which allowed recovery for wrongful death by close relatives of the decedent. The statute was highly influenced by the need to prevent an incentive for the tortfeasor to kill rather than merely injure his victim in order to avoid tort liability to the family of the victim.

American courts adopted the Baker rule and every state eventually adopted wrongful death statutes. All states today have some form of a wrongful death statute which either preserves the decedent’s cause of action and is brought by the executor of the decedent’s estate, or creates a separate cause of action to be brought by the decedent’s “personal representative for the benefit of statutorily designated beneficiaries.” Nebraska’s wrongful death statute is a pure, wrongful death statute, creating a new cause of action to be “brought by and in the name of [the decedent’s] personal representatives, for the exclusive benefit of the widow or widower and next of kin.”

2. Common-Law Cause of Action for Wrongful Death?

The Smith majority reiterated its longstanding principle that recovery for wrongful death does not exist in Nebraska absent the wrongful death statute. However, such a traditional rule may not be valid in Nebraska. The Arizona Supreme Court in Summerfield v. Superior Court argued that a cause of action may exist today at com-

32. Id.
33. 1 S. SPEISER, supra note 28, § 1:8; Note, 8 U. Puget Sound L. Rev. 103, 105 & n.16 (1984).
34. Note, supra note 33, at 104-05 & n.15.
35. 1 S. SPEISER, supra note 28, § 1:9.
36. This type of statute is commonly referred to as a “survival-type” wrongful death statute. Note, supra note 33, at 105 n.18.
37. This type of statute is simply referred to as a wrongful death statute. See Note, supra note 33, at 105 & nn.18-19. Cf. 1 S. SPEISER, supra note 28, §§ 1:13-1:14 (discussing wrongful death statutes and other special legislation).
38. Nebraska’s wrongful death statute provides:
Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

mon law for wrongful death, thus eliminating the need for the statutory cause of action. However, the court in *Summerfield* did not specifically hold that such an action existed because it was unnecessary since the court found that a stillborn fetus had a cause of action under that state's wrongful death statute.

In developing the argument for a common-law wrongful death cause of action, *Summerfield* stated that because American courts never adopted the felony merger rule, American courts' reliance on English common law disallowing recovery for wrongful death was perhaps misplaced. *Summerfield* reasoned that the existence of wrongful death statutes in all American jurisdictions had become so pervasive and longstanding that recovery for wrongful death had become a general legislative policy and part of the common law. *Summerfield* also noted that the Arizona Legislature had not intended to occupy the entire field of wrongful death recovery through the enactment of the wrongful death statute, and the judiciary was therefore free to develop a cause of action for wrongful death under the common law. The court noted the statute had changed very little over the years. Additionally, the Arizona Supreme Court had actively entered the field of interpretation of the statute with judicial divinations and clarifications. The court concluded that it was not actually creating such a common-law cause of action for wrongful death; the court was entitled to participate through the common law in the evolution and growth of the statutory cause of action.

The Nebraska Supreme Court could have relied on a common-law cause of action for wrongful death to allow the survivors of a stillborn child to recover for the child's wrongful death. This theory would have eliminated the need to deny the cause of action altogether because the Nebraska Legislature had failed to specifically provide for such recovery. At the least, *Smith* could have recognized that the judiciary was entitled to participate in the evolution and growth of the statutory cause of action for wrongful death.

42. *Id.* at 470-72, 698 P.2d at 715-17.
43. *Id.* at 473, 698 P.2d at 718.
44. *Id.* at 471, 698 P.2d at 716. See also Amadio v. Levin, 509 Pa. 199, 221-24, 501 A.2d 1085, 1096-97 (1985) (Zappala, J., concurring) (the refusal by courts to recognize a common-law action to recover for wrongful death were based on unsound reasoning in that felony merger doctrine was never adopted).
47. *Id.*
48. *Id.* at 472-73, 698 P.2d at 717-18.
49. *Id.* at 473, 698 P.2d at 718.
3. Contrasting Interpretations of Wrongful Death Statutes

Smith held that an unborn child was not a "person" for purposes of the Nebraska wrongful death statute:

The wrongful death statute is plain in stating that the right of action created by it exists only in cases wherein the injured person could himself have maintained an action for damages had he lived . . .

In our opinion a child born dead cannot maintain an action at common law for injuries received by it while in its mother's womb, and consequently the personal representative cannot maintain it under a wrongful death statute limiting such actions to those which would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.\(^{50}\)

This statement merely begs the question of whether a cause of action exists under the Nebraska wrongful death statute by the personal representative of a stillborn child. Smith inferred that because a child born dead did not survive the prenatal injury long enough to maintain an action for its injuries, it did not fit within the requirement of the statute that the "wrongful act, neglect or default, of any person . . . is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof."\(^{51}\)

Smith concluded that if the child born dead could not bring its own cause of action, there was no action to survive the child's death to be brought by the personal representative of the child's estate.\(^{52}\) This illogical statement is equivalent to saying that a tortiously injured adult who dies of tortiously inflicted injuries could not have maintained an action at common law for his mortal injuries because he was dead before he could bring the action.

However, other courts with nearly identical wrongful death statutes have come to exactly the opposite conclusion. By way of example, the Arizona Supreme Court in Summerfield v. Superior Court found that a stillborn fetus could be considered a "person" within the Arizona wrongful death statute.\(^{53}\) The court interpreted the language


\(^{51}\) NEB. REV. STAT. § 30-809 (1985) (emphasis added).


\(^{53}\) 144 Ariz. 467, 698 P.2d 712 (1985). The Arizona wrongful death statute provides:

When death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circum-
of the statute to require that the deceased have been able to maintain an action for the injury against the defendant "if death had not ensued." The court in Summerfield stated that if the stillborn, viable fetus had lived to be born, the injury received by the child prenatally would have been actionable. In essence, Summerfield holds that had the child not died in the womb from the injuries sustained prenatally, the child would have lived to recover for his or her injuries. The Rhode Island Supreme Court in Presley v. Newport Hospital used this same reasoning to allow recovery under its wrongful death statute by a stillborn, nonviable fetus.

The reasoning in Summerfield and Presley is the more logical analysis of the statutes' requirement that the deceased must have been able to maintain an action for his or her injuries had the victim survived the tortious conduct causing the injury. The intent of this requirement was that the conduct be actionable under general tort principles; it is not a requirement that the injured, deceased party be able to bring the action at the exact time of the tortious injury.

B. Criticism of the Smith v. Columbus Community Hospital Reasoning

Smith failed to make any new arguments, to look at any new medical evidence since Drabbels or Egbert, or to examine the well-reasoned opinions among the majority trend in other jurisdictions recognizing a stillborn fetus as a person within wrongful death statutes.

1. Smith's Misplaced Reliance on Drabbels and Egbert

Smith quoted extensively from Drabbels and Egbert and provided no new analysis of the decision whether to retain the traditional rule disallowing statutory actions by a stillborn child for wrongful death.

stances as amount in law to murder in the first or second degree or manslaughter.

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


55. Id.


57. The Rhode Island wrongful death statute provides:

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who, or the corporation which, would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

R.I. GEN. LAWS § 10-7-1 (1985).


Therefore, an analysis of the arguments in these two cases provides support for criticism of the Smith rationale.

a. Analysis of Drabbels

Drabbels was the first case brought on behalf of a stillborn child for wrongful death recovery under the Nebraska statute. The case arose when an unborn, viable fetus was stillborn as a result of the explosion of a container of gas produced by the defendant. The personal representative of the unborn child's estate brought the action under the wrongful death statute, and after sustaining a demurrer to the plaintiff's petition, the District Court of Sheridan County dismissed the case.60

Drabbels first noted that a numeric count of the jurisdictions deciding this issue found the number allowing such an action to be a small minority.61 The court then cited to Dietrich v. Northampton62 for the early common-law rule that an unborn child is part of its mother and has no separate existence in the eyes of the law until live birth.63 The court also cited to the Restatement of Torts for the proposition that no action lies under the traditional common law for prenatal injuries.64

Drabbels also relied on Allaire v. St. Luke's Hospital65 as persuasive authority for three additional arguments against recognizing a cause of action for prenatal injuries: (1) the recognition of this cause of action is for the legislature to establish; (2) there is no precedent for the recognition of such a cause of action on behalf of a stillborn fetus; and (3) if an action for wrongful death of an unborn child is allowed, the same action would have to be permitted against the fetus' mother for negligence during pregnancy (implying that such a notion would be absurd).66

Drabbels next cited to Magnolia Coca Cola Bottling Co. v. Jordan67 as persuasive authority for the arguments that recognition of the cause of action would result in a high probability of fraudulent claims and an impossibility of adequately proving causation.68

61. Id. at 19, 50 N.W.2d at 230.
64. Drabbels v. Skelly Oil Co., 155 Neb. 17, 21, 50 N.W.2d 229, 231 (1951) (citing RESTATEMENT OF TORTS § 869 (1939)).
65. 184 Ill. 359, 56 N.E. 638 (1900).
Every argument provided by Drabbels and subsequently relied on by Smith can be either logically refuted or shown to be obsolete. Since Smith relied on Drabbels without exception or explanation, a refutation of the Drabbels rationale lessens the value of the court's holding in Smith. The numeric count of jurisdictions accepting a statutory wrongful death action on behalf of a stillborn child at the time Smith was decided differs considerably from the count at the time of Drabbels. At the very least, a clear majority of jurisdictions allowed such a cause of action at the time of Smith,69 thereby making Drabbels obsolete. Medical science has also advanced considerably since the early common law, and today the unborn fetus, at least after viability, is generally considered to be separate from its mother.70 Deitrich was essentially overruled in 1967,71 and the most recent update of the Restatement (Second) of Torts no longer forecloses a cause of action by a stillborn child for prenatal injuries resulting in death.72

Not only has Allaire v. St. Luke's Hospital been overruled,73 but the arguments on which that case relied are subject to refutation. The most persuasive argument of that case was deference to the legislature to specifically create a cause of action for the wrongful death of the stillborn child.74 This argument is a clear abdication of judicial duty. It is a longstanding principle that the legislature is assigned the task of making the laws, and the judiciary must interpret those laws. By deferring to the legislature in this case, the court actually denied application of the wrongful death statute created by the legislature.

The argument used by Allaire and relied on by Drabbels that there is no precedent for the recognition of such an action75 no longer applies in the face of a clear majority trend to recognize a cause of action for the wrongful death of a stillborn, viable fetus.76 Allaire found the logical consequence of allowing a cause of action for the wrongful death of a stillborn child would be that the court would have to allow the same action against the mother of the unborn child.77 While rec-

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69. See Note, DiDonato, supra note 23, at 214; Note, Witty, supra note 23, at 997 n.121.
72. RESTATEMENT (SECOND) OF TORTS § 869 & comment f (1986).
75. See supra note 22-23 and accompanying text.
ognizing that such an action could be brought, it is clearly distinguishable from a cause of action for the wrongful death of a stillborn child and could be addressed without denying such a cause of action.

Drabbels' reliance on Magnolia Coca Cola Bottling Co. v. Jordan allowed the court to use two traditional arguments against the cause of action for the wrongful death of a stillborn child. However, these arguments have long been rejected by courts as insufficient to deny the cause of action. The possibility of fraudulent claims is a concern which arises in any cause of action, and "if the common law has vitality it should be elastic enough to provide safeguards against fraudulent and speculative claims."78 The difficulty in proving causation is also an insufficient reason to deny the cause of action because this difficulty works against the plaintiff, and therefore should not foreclose the plaintiff's right to try to prove the elements of the action.79

Additionally, although Drabbels noted the dissent's argument in Allaire that a viable, unborn fetus should be considered a person for purposes of wrongful death recovery, the court failed to discuss the merit of this argument.80 By quoting from Allaire, Drabbels made an argument for recognition of the cause of action it denied. By failing to refute the argument, Drabbels lent merit to the proposition that the cause of action should be recognized.

b. Analysis of Egbert

The court in Egbert was faced with a challenge to the rule established in Drabbels that no cause of action was allowed on behalf of a stillborn child under the Nebraska wrongful death statute.81 Egbert refused to distinguish or overrule Drabbels. Egbert involved an action brought by the parents of a stillborn, viable fetus. The parents alleged the defendant negligently drove her automobile thereby causing a collision with the pregnant mother's car and the death of the eight-month-old unborn fetus. The Nebraska District Court for Douglas County sustained the defendant's demurrer to the plaintiff's petition and subsequently dismissed the plaintiff's action for the wrongful death of the stillborn, viable fetus.82

The arguments relied on by Egbert in denying the plaintiff's action dealt mainly with the legislative intent behind the wrongful death statute. The court refused to recognize a common-law action for this injury, holding it could only interpret the existing wrongful death statute. The court looked to the intention of the legislature with regard to the status of an unborn fetus under the statute at the time the

78. 1 S. SPEISER, supra note 28, § 438, at 560-61.
82. Id. at 573-74, 260 N.W.2d at 481.
statute was enacted. The court found the plaintiff’s action was outside the statute because, at the time of the enactment of the statute, the common law did not recognize a fetus as a person. Egbert also noted that had the legislature wanted to include an unborn fetus within the purview of the statute, the legislature could have done so specifically. Finally, the court said that the inaction of the legislature with regard to the Nebraska wrongful death statute since Drabbels evidenced the legislature’s agreement with the interpretation of the court in that case. Egbert cited to three cases from other jurisdictions which relied on this same “legislative deferral” argument.

The arguments used to justify the court’s decision in Egbert can also be refuted and shown to be antiquated. Because Smith relied so heavily on Egbert and Drabbels, a weakening of the Egbert arguments also weakens Smith’s rationale.

Egbert’s first argument relied on a lack of precedent for the recognition of the statutory cause of action for the wrongful death of a stillborn fetus. This argument is no longer true today, and was also not true in 1986 when Smith was decided. Egbert next attempted to determine the legislative intent behind Nebraska’s wrongful death statute. There may have been no legislative intent as to the recognition of a fetus within the purview of the statute at the time the statute was adopted. However, the legislative intent of statutes adopting the common law as the background must necessarily assume that the common law is not static, but rather is changing. The legislature must have intended that the common law would supplement the statutes and assumed that the status of the common law is evolving.

Egbert relied on three cases which it said were indicative of the trend among courts to refuse to recognize the cause of action. Two of the three cases relied on have since been overruled in states that have joined the trend to recognize the cause of action.

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83. Id. at 574-76, 260 N.W.2d at 481-82.
84. Id. at 576, 260 N.W.2d at 482.
85. Id.
86. Id. (citing State ex rel. Hardin v. Sanders, 538 S.W.2d 336 (Mo. 1976); Kilmer v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (Ariz. Ct. App. 1974); McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971)).
87. See Note, DiDonato, supra note 23, at 214; Note, Witty, supra note 23, at 997 n.121.
88. See e.g., Summerfield v. Superior Court, 144 Ariz. 467, 475, 698 P.2d 712, 720 (1985).
Additionally, the argument in Egbert pointing to legislative inaction to change the language of the wrongful death statute in Nebraska since the court's holding in Drabbels is equally unpersuasive. The opposition to this argument relies on the principal that it is the legislature's duty to make laws and the judiciary's duty to interpret them. The process of amending statutes is clearly a political one which in many cases depends not on the intention of the legislature, but rather on political forces outside the merits of the legislation.

Because all of the arguments supporting the holding in Egbert have been shown to be unprincipled and antiquated, Smith should have at least justified its holding on arguments that take into account the change in the state of the law and in society since the decisions in Drabbels and Egbert.

2. Neglect of Evidence of Medical Advances

There are several new arguments which go directly to the court's finding that a fetus is not a "person" for purposes of the wrongful death statute. Smith retained the traditional theory that a fetus is a part of the mother until live birth. This argument is no longer valid in the face of advances in the medical field regarding the diagnosis and treatment of the fetus before birth.

Dr. Jeffrey L. Lenow, M.D., chronicled the dramatic advances in obstetrics and perinatology which have increased the chances for the healthy survival of children through the application of the physician's talents to the fetus before birth. "[F]etuses can successfully be diagnosed and treated in utero, regardless of viability, for a number of disorders that would otherwise result in fetal demise or post-birth abnormalities." Lenow has also noted the medical technology which allows visualizing, monitoring, and measuring fetal activity before birth and the increased diagnostic skills made possible by these medical advances. Fetal surgery is gaining common acceptance as doctors are now able to treat certain defects with medicines administered

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94. Id. at 15.
95. Id. at 15-16.
orally to the mother or directly into the amniotic fluid. Lenow described one case involving fetal surgery in which the fetus was partially removed from its mother's uterus and onto an open operating field. As a result of these advances in fetal treatment, Lenow concluded that there is an emerging concept of the fetus as a patient which is owed a duty of care by the physician.

However, most courts which have allowed a cause of action for the wrongful death of a stillborn fetus have allowed the action only for a viable fetus. The argument is that at viability, the fetus could live separate from the mother and should be considered as a separate entity from the mother both biologically and legally.

The Nebraska Supreme Court in Smith should have judicially recognized the changes in medical science and especially in the science of fetal medicine since Drabbels and Egbert. In the face of such advances in the biological underpinnings of the old rule that the fetus is part of the mother until birth, Smith should have provided some new explanation for its reaffirmation of the old rule.

3. Trend Toward Recognizing a Cause of Action

Four persuasive arguments in favor of recognizing a cause of action for the wrongful death of an unborn fetus have been presented by the courts in states following the trend toward recognition. These arguments were not addressed by Smith and merit discussion here because they are persuasive, well-reasoned arguments which would be hard to ignore if addressed by the Nebraska Supreme Court. The arguments include (1) a general legislative policy in favor of protecting the unborn; (2) consideration of the remedial nature of the wrongful death statute and its interpretation to achieve that remedial purpose; (3) the recognition by the Supreme Court in Roe v. Wade of the use of

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96. Id. at 16. The advent of fetal surgery has produced documented cases of treatment of intracranial pressure in an unborn fetus. See id. at 16 & n.102. See also J. PRITCHARD & P. MACDONALD, WILLIAMS OBSTETRICS vii (16th ed. 1980) ("Happily, we have entered an era in which the fetus can be rightfully considered and treated as our second patient.... Fetal diagnosis and therapy have now emerged as legitimate tools the obstetrician must possess . . . .")

97. Lenow, supra note 93, at 17. This procedure was used to correct a urinary tract abnormality in a 21-week-old fetus with urethral obstruction. Id.

98. Id. See also Summerfield v. Superior Court, 144 Ariz. 467, 477, 698 P.2d 712, 722 (1985) (discussion of the advances in medicine which may mean the "magic moment of 'birth' is no longer [entirely] determined by nature").

99. See Note, Witty, supra note 23, at 998.

100. See, e.g., Amadio v. Levin, 501 Pa. 199, 218-19, 501 A.2d 1085, 1095 (1985) (Zappala, J., concurring) (the mother and child are two distinct entities—the child has a separate system of circulation, maintains a separate heartbeat (with a heart rate more rapid than that of the mother's), and is independent of the mother except for sustenance).

state wrongful death statutes to protect the unborn; and (4) the “dilemma of the twins.”

The first argument involves those jurisdictions which determine that the intent of the legislature regarding the fetus as a person within the wrongful death statute is unknown and therefore must be divined. Those states look for general legislative policies in other statutes within the state which protect the unborn.102 Nebraska statutes contain many of the types of legislation which these courts look to as evidence that the general legislative intent is to protect the unborn and that this intent should be applied to the interpretation of the wrongful death statute.

The first statute which could be advanced to evidence legislative intent to protect the unborn is the protection of the property rights of the unborn fetus through the intestate succession statutes within the state. In Nebraska, the statute on intestate succession dealing with afterborn heirs103 protects the rights of an unborn fetus to share in intestate succession upon its birth.

The second type of legislation evidencing legislative intent to protect the unborn is the abortion statutes.104 Nebraska specifically declares its legislative intent to protect the lives of the unborn.105 Experimentation is prohibited on any premature infant aborted alive.

104. Id. § 28-325 to -347.
105. Section 28-325 (1985) provides:

The Legislature hereby finds and declares:

(1) That the following provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-325 to 28-345 are in no way to be construed as legislatively encouraging abortions at any stage of unborn human development, but is rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible;

(2) That the members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court's decision on abortion of January 22, 1973;

(3) That it is in the interest of the people of the State of Nebraska that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to insure the unborn child its continued life after its abortion;

(4) That currently this state is prevented from providing adequate legal remedies to protect the life, health, and welfare of pregnant women and unborn human life . . . .

except to preserve the life or health of the child. Abortions are not allowed to be performed if the unborn child has reached viability, except to protect the life of the mother. If an abortion is performed, the physician is required to take all reasonable steps for the protection of the life of the viable, unborn child. The intentional violation of any of these statutes is considered a Class IV felony.

The Nebraska Legislature also recognizes the need to protect the unborn child in the Anatomical Gift Act which allows a stillborn child's body to be donated. Nebraska statutes also provide for a death certificate to be issued for the death of a fetus. Further, a paternity action may be instituted before the birth of a child. These statutes clearly indicate a general legislative policy in favor of protecting the unborn. The Nebraska Supreme Court in Smith could have relied on this general legislative policy in forming an argument for recognizing the plaintiff's cause of action for the wrongful death of a stillborn, viable fetus.

The second argument pointed to by the majority trend of cases is the need to interpret the wrongful death statute in light of the remedial nature of that statute. One of the purposes of the wrongful death statute is that the statute is a method of compensating survivors and preventing the injustice of allowing a tortfeasor to go without penalty for killing where he would have been liable if he had only injured his victim. The cases that recognize this argument point to the purposes of the statute as evidencing the need for the judiciary to liberally construe the statute to achieve those purposes. Because the wrongful death statute is seen as a method of providing a remedy for wrongfully caused death, the judiciary feels compelled to liberally construe the statute to achieve that purpose.

The purposes cited to by the courts are achieved by allowing recovery for the wrongful death of a stillborn child. The survivors are compensated for their loss, and an injustice is prevented which would have allowed the tortfeasor to kill with impunity. These purposes apply

106. Id. § 28-346.
107. Id. § 28-329.
108. Id. § 28-331.
109. Id. § 28-332, -346. Additionally, section 28-337 allows hospitals and clinics to refuse to perform abortions; section 28-338 allows any physician to refuse to perform an abortion; section 28-339 makes the discrimination against a physician who refuses to perform abortions a Class II misdemeanor; sections 28-340 to -341 create a civil action to allow a remedy in the form of damages or injunctive relief for such discrimination; and section 28-343 requires that all abortions be reported to the Nebraska Department of Health. Id. §§ 28-337 to -341, -343.
110. NEB. REV. STAT. § 71-4801(2) (1986).
111. Id. § 71-606.
112. NEB. REV. STAT. § 43-1411 (1989).
equally to the Nebraska wrongful death statute. Smith could have recognized these purposes and interpreted the statute to achieve these purposes, thereby allowing a cause of action for the wrongful death of a stillborn child.

Roe v. Wade\textsuperscript{114} is cited by older cases as prohibiting a cause of action for the wrongful death of a stillborn child,\textsuperscript{115} but more recent cases find distinguishing factors between the issues presented in wrongful death actions and those presented in Roe.\textsuperscript{116} The older cases argue that because the United States Supreme Court has refused to recognize a nonviable fetus as a “person” within the protection of the fourteenth amendment, the unborn fetus should not be protected by the state’s recognition of a cause of action for the wrongful death of an unborn child.\textsuperscript{117}

More recent cases correctly note that the issues involved in the two cases are very distinct.\textsuperscript{118} Roe is seen as a balancing of the constitutionally protected privacy interests of the mother with the state’s interests in protecting the unborn. The issue in the cases involving wrongful death actions brought on behalf of a stillborn child involves no balancing of privacy interests against state interests.\textsuperscript{119} Roe specifically recognized the state’s right to protect the unborn in contexts where the protection does not interfere with the privacy rights of others.\textsuperscript{120} More conclusively, Roe recognized that some states already did allow wrongful death actions to be brought on behalf of the unborn.\textsuperscript{121}

Finally, the most well-known argument in favor of recognition of a statutory cause of action for the wrongful death of an unborn fetus is sometimes referred to as “the dilemma of the twins.”\textsuperscript{122} The argument refers to the inconsistency in allowing an action for wrongful death resulting from prenatal injuries where the child is born alive and lives for a short time and not allowing an action for wrongful death where the prenatal injury causes death to the child before it can

\textsuperscript{114} 410 U.S. 113 (1973).
\textsuperscript{115} See Note, DiDonato, supra note 23, at 220 & n.129.
\textsuperscript{116} See, e.g., Summerfield v. Superior Court, 144 Ariz. 467, 477-78, 698 P.2d 712, 722-23 (1985); O’Grady v. Brown, 654 S.W.2d 904, 909-10 (Mo. 1983) (en banc).
\textsuperscript{118} See Note, DiDonato, supra note 23, at 220-21.
\textsuperscript{121} Id. at 162.
\textsuperscript{122} See generally Note, The Fetus as a Person in Wrongful Death Actions, 57 U. COLO. L. REV. 885, 900-01, 904-06 (1986) (discussing the rationale of the “dilemma of the twins” argument).
be born. Such an inconsistency in the law is unjustifiable. This kind of an arbitrary line drawn at live birth is no longer acceptable in light of advances in medical science making the timing of live birth no longer solely in the hands of nature.

IV. CONCLUSION

Smith reaffirmed the antiquated rule denying parents a right to bring a statutory action for the wrongful death of their stillborn child. Smith ignored changes in medical science, the majority trend in favor of recognition of the cause of action, and the persuasive arguments from those jurisdictions which allow a wrongful death action on behalf of a stillborn, viable fetus. The court should have adopted the better-reasoned view in recognition of Nebraska legislative policies favoring protection of the unborn and should have allowed Mrs. Smith to recover for the wrongful death of her stillborn, viable child.

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