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Raina Weaver

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I. INTRODUCTION

While fetal rights have been recognized in some areas of the law for hundreds of years, the first instance of fetal protection under wrongful death law in the United States did not occur until 1946.\(^1\) Since then, a majority of jurisdictions have developed laws permitting an action on behalf of a fetus under wrongful death statutes.\(^2\) In 2001, the Arkansas Supreme Court joined the majority of jurisdictions when it overruled precedent\(^3\) and held that a survivor could bring an action on behalf of a viable fetus under the Arkansas wrongful death statute.\(^4\)

This note examines the Arkansas Supreme Court’s holding in Aka v. Jefferson Hospital Ass’n,\(^5\) in which the court overruled precedent and recognized a fetus as a “person” under the Arkansas wrongful death statute. First, the note discusses the tragic facts underlying the Aka case. Next, the note examines the historical development of fetal rights in wrongful death actions. The note then addresses the major issues surrounding fetal death claims, focusing on the inclusion of a fetus within the definition of “person” and the various tests courts use to determine whether fetal recovery for wrongful death is allowed. Reviewing case law, legislation,\(^6\) and a voter initiative, the note examines the legal status of a fetus in Arkansas. The note then analyzes the Arkansas Supreme Court’s reasoning in Aka, indicating the differences in the reasoning of the majority and minority opinions. Finally, this note considers the significance of the Aka holding, suggesting that including “fetus” within the statutory definition of “person” may have a far-reaching effect on a woman’s right to reproductive choice.

4. Aka, 344 Ark. at 641, 42 S.W.3d at 518.
5. 344 Ark. 627, 42 S.W.3d 508 (2001).
II. FACTS

At approximately 7:00 p.m. on December 11, 1995, Evangeline Aka was admitted for the induction of labor to the Family Practice Center (FPC), a resident-in-training program at Jefferson Regional Medical Center (JRMC) in Pine Bluff, Arkansas. The University of Arkansas for Medical Sciences (UAMS) and the Area Health Education Center (AHEC) operated the training program via an affiliation agreement. Following Mrs. Aka's admission, Dr. Kimberly Garner administered Prostin gel and Pitocin to induce labor.

Twenty-seven hours after her admission to the FPC, Mrs. Aka had failed to progress in labor, so a hospital employee made an attempt to contact Dr. Betty Orange, the physician listed as the patient’s consult.

7. Aka, 344 Ark. at 633, 42 S.W.3d at 512. Evangeline Aka was a thirty-four year old mother of two sons, ages five and eight. Brief of Appellant at xvii, Aka v. Jefferson Hosp. Ass'n, 344 Ark. 627, 42 S.W.3d 508 (2001) (No. 99-1366). She and her husband, Dr. Philip Aka, moved to Arkansas from New Jersey in 1995. Brief of Appellee St. Paul Fire & Marine Insurance Co. at vii, Aka v. Jefferson Hosp. Ass'n, 344 Ark. 627, 42 S.W.3d 508 (2001) (No. 99-1366) ("Brief of St. Paul"). Mrs. Aka was pregnant prior to the move, and she had seen a doctor in New Jersey. Id. Her first visit to the FPC was on November 27, 1995. Id. On December 5, 1995, Dr. Kimberly Garner advised Mrs. Aka to return to the hospital for the induction of labor on December 11 if she had failed to spontaneously go into labor. Brief of Appellees Gamer, Higginbotham, and Hill at 2, Aka v. Jefferson Hosp. Ass'n, 344 Ark. 627, 42 S.W.3d 508 (2001) (No. 99-1366) ("Brief of Gamer"). Nurse Gail Parker testified that Mrs. Aka appeared to be nervous about the induction when she checked into the hospital on December 11, 1995. Id. Parker testified that when she asked Mrs. Aka why she had arrived late to the hospital, Mrs. Aka told her that she did not want to come to the hospital because she was nervous about the induction process. Brief of Appellant at 642, Aka (No. 99-1366). Parker also testified that Mrs. Aka said that “she had a hard time separating herself from her children that afternoon and when she had hugged them goodbye she had a feeling she would never see them again and something terrible was going to happen.” Id.

8. Aka, 344 Ark. at 633, 42 S.W.3d at 512.

9. Brief of Garner at 3, Aka (No. 99-1366). Prostin is the “trademark for preparations of dinoprostone.” DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1472 (29th ed. 2000). Dinoprostone is used as an oxytocic for the induction of abortion as well as for the induction of labor. Id. at 505. Pitocin is synthetic oxytocin. MICHAEL D. VOLK & MELVIN D. MORGAN, MEDICAL MALPRACTICE: HANDLING OBSTETRIC AND NEONATAL CARE § 8.10 (1986). Oxytocin, a hormone produced by the pituitary gland, stimulates smooth muscle contraction. Id. § 8.09. Oxytocin helps initiate spontaneous labor, and it is used in obstetrics to induce labor. Id. §§ 8.09-8.10. The Food and Drug Administration has not approved the use of Pitocin for the elective induction of labor. Id. § 8.10.

10. Brief of Appellant at xvii, Aka (No. 99-1366). Dr. Orange denied ordering the induction of Mrs. Aka. Id. at 575. She testified, “[W]hen I learned that I was being used as the excuse to induce Mrs. Aka it confused me and made me angry.” Id.
Cheryl Jones, a labor and delivery nurse, determined that Dr. Orange was off shift and that Dr. Erma Washington was substituting for her. Jones contacted Dr. Washington at home at approximately 10:00 p.m. on December 12, 1995. Jones testified that Dr. Washington instructed her to prepare Mrs. Aka for a Cesarean section ("C-section"). Dr. Washington informed Jones that she was on her way to the hospital, and she told Jones that she would contact Dr. Orange. However, Dr. Washington called back ten minutes later and cancelled the orders for the C-section. Instead, she ordered medication and instructed the resident physicians to rupture Mrs. Aka's membrane.

Dr. Shane Higginbotham, a first-year resident, attempted to rupture Mrs. Aka's membrane using an amnio hook, but he was unsuccessful. Dr. Higginbotham called Dr. Washington after he failed to rupture the membrane, and Dr. Washington told him to call third-year resident Dr. Randy Hill for assistance. Dr. Hill subsequently attempted to rupture Mrs. Aka's membrane with a fetal scalp electrode, but he was also unsuccessful. When Dr. Hill applied fundal pressure to place the fetal scalp electrode, Mrs. Aka complained of dyspnea. Once the fundal pressure was relieved, the dyspnea subsided. However, ninety minutes later, "Mrs. Aka sat up in bed and said, 'I cannot breathe.'"

Dr. Higginbotham testified that Mrs. Aka was "going into respiratory failure." During Mrs. Aka's respiratory failure, no board-

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11. *Id.* at xviii; *Aka*, 344 Ark. at 633, 42 S.W.3d at 512.
12. *Aka*, 344 Ark. at 633, 42 S.W.3d at 512.
13. *Id.* at 634, 42 S.W.3d at 512.
16. *Id.*, 42 S.W.3d at 513.
18. *Aka*, 344 Ark. at 634, 42 S.W.3d at 513.
20. *Aka*, 344 Ark. at 634, 42 S.W.3d at 513. Fundal pressure involves applying pressure on the baby's buttocks in an attempt to lower the baby's head into the mother's pelvis. Interview with Cynthia N. Frazier, M.D., *supra* note 19. Dyspnea is shortness of breath or labored breathing. 2 J.E. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER D-245 (2000).
23. *Aka*, 344 Ark. at 634, 42 S.W.3d at 513.
certified obstetrician was present in the delivery room. Dr. Washington arrived at the hospital during Mrs. Aka’s respiratory failure, but no attempts were made to deliver the baby. Mrs. Aka and her unborn baby died at approximately 1:15 a.m. on December 13, 1995. Dr. Frank Peretti, a pathologist, performed an autopsy on Mrs. Aka and listed the cause of death as “amniotic fluid embolism.” Dr. Peretti’s report indicated that Mrs. Aka’s unborn son was a full term infant weighing eight pounds, fifteen ounces. In addition, Dr. Peretti noted that the baby was “well-developed” and “well-nourished,” and exhibited “[n]o evidence of congenital malformations, natural disease, trauma or infection.”

Six months after the deaths of Dr. Philip Aka’s wife and unborn baby, he made several phone calls to Drs. Washington and Orange, and on two occasions, he left answering machine messages. The doctors filed complaints with the Pine Bluff police department, and Dr. Aka

24. Id., 42 S.W.3d at 513. Dr. Hill instructed Dr. Higginbotham to scrub for a possible C-section. Id., 42 S.W.3d at 513. Dr. Higginbotham testified that he did not have C-section privileges and did not have the skills to perform a C-section even if it had been necessary to save Mrs. Aka and her baby. Id., 42 S.W.3d at 513. He also testified that no physician with C-section privileges was there to attend Mrs. Aka while he was attempting to rupture her membrane. Id., 42 S.W.3d at 513.


26. Aka, 344 Ark. at 635, 42 S.W.3d at 513.

27. Brief of Appellant at xviii, Aka (No. 99-1366). An amniotic fluid embolism occurs when amniotic fluid and pieces of tissue from the amniotic fluid enter the mother’s blood stream. SCHMIDT, supra note 20, at A-300. When the fluid and tissue reach the blood vessels, clots lodge in the lungs, resulting in a pulmonary embolism, a very serious condition which may cause death. Id.

28. Aka, 344 Ark. at 635, 42 S.W.3d at 513.


30. Brief of Appellant at xix, Aka (No. 99-1366). Dr. Washington testified that in one of the phone calls, Dr. Aka said, “Why haven’t you called to console us? Did you know that she had a husband and some children at home?” Id. at 204. Dr. Washington said the “tone of [Dr. Aka’s] voice was threatening and I terminated the call.” Id. Dr. Aka was a college professor at the University of Arkansas at Pine Bluff with a Ph.D. in political science from Howard University. Brief of Garner at 1, Aka (No. 99-1366); Brief of Appellant at 884, Aka (No. 99-1366). Dr. Aka also obtained a law degree from Temple University, but he was not licensed to practice law. Brief of Appellant at xvii n.1, 884, Aka (No. 99-1366).
was prosecuted for terroristic threatening. Dr. Aka was ultimately acquitted of all criminal charges.

On September 6, 1996, Dr. Aka, as the Special Administrator of the Estates of Evangeline Aka and Baby Boy Aka, filed a medical negligence complaint against JRMC, Erma Washington, M.D. and Associates, P.A., Erma Washington, M.D., Betty Orange, M.D., Kimberly Garner, M.D., Shane Higginbotham, M.D., Randy Hill, M.D., and the FPC. The complaint alleged medical malpractice by the physicians and institutions for unnecessarily inducing Mrs. Aka’s labor, failing to discontinue the induction, failing to perform a C-section, failing to resuscitate Mrs. Aka and the unborn baby, and failing to obtain informed consent. In a separate claim, Dr. Aka alleged that JRMC, AHEC, and AHEC’s faculty supervisors failed to train and supervise residents, proximately causing the deaths of Mrs. Aka and Baby Boy Aka.

On July 28, 1997, Dr. Aka filed an amended complaint adding St. Paul Fire and Marine Insurance Company and AHEC faculty supervisors William Freeman, M.D., Herbert Fendley, M.D., and Harvie Attwood, M.D., as defendants. Motions for partial summary judgment were filed by JRMC and Drs. Higginbotham, Hill, Garner, Attwood, Fendley, Freeman, and Washington, alleging that the wrongful death claim filed on behalf of Baby Boy Aka should be dismissed because

31. Aka, 344 Ark. at 635, 42 S.W.3d at 513. Additionally, Drs. Washington and Orange sued for a restraining order against Dr. Aka on September 13, 1996, in Jefferson County Chancery Court, and a “consent order of no contact was entered in . . . November 1996.” Brief of Appellant at xix, Aka (No. 99-1366).
32. Aka, 344 Ark. at 635, 42 S.W.3d at 513.
35. Id. at xix. On May 23, 1997, Dr. Washington filed a motion for partial summary judgment, alleging governmental immunity based on her part-time employment with the residency program. Id. at xx. Dr. Washington also sought dismissal from the lawsuit as she had no insurance coverage. Id. The motion was denied without prejudice on July 29, 1997. Id. Dr. Washington renewed her motion on January 2, 1998. Id. On August 10, 1998, Dr. Washington was granted summary judgment based on her part-time employment status. Id. at xx-xxi.
36. Id. at xix.
37. Id. at xix-xx.
38. Aka, 344 Ark. at 633, 42 S.W.3d at 512.
39. Id., 42 S.W.3d at 512. FPC was omitted from the amended complaint because it had been granted summary judgment. Brief of St. Paul at x, Aka (No. 99-1366).
the unborn baby was not a "person" under Arkansas law.\textsuperscript{40} On July 29, 1997, Special Judge Phillip Shirron granted partial summary judgment to all defendants, dismissing the claims of Baby Boy Aka with prejudice.\textsuperscript{41}

A jury trial began on January 28, 1999, in Pine Bluff, Arkansas.\textsuperscript{42} The jury found in favor of all defendants on February 17, 1999.\textsuperscript{43} Dr. Aka filed a motion for a new trial on March 8, 1999.\textsuperscript{44} An order denying the motion was filed on April 22, 1999.\textsuperscript{45}

Dr. Aka appealed to the Arkansas Supreme Court, challenging the following: (1) the trial court's order against the estate of Baby Boy Aka pursuant to \textit{Chatelain v. Kelley};\textsuperscript{46} (2) the trial court's order granting summary judgment to Dr. Washington and Erma Washington, M.D. and Associates, P.A.;\textsuperscript{47} (3) the jury's verdict as being against the preponderance of the evidence; and (4) the trial court's evidentiary rulings excluding an autopsy photograph of Mrs. Aka and related testimony, evidence of previous complaints, and testimony regarding a second-year resident who was involved in the incident.\textsuperscript{48} On May 10, 2001, the Arkansas Supreme Court, citing recent legislative amendments,\textsuperscript{49} held "that the expressed public policy of the General Assembly

\textsuperscript{40} Brief of Appellant at xx, Aka (No. 99-1366).
\textsuperscript{41} Id.
\textsuperscript{42} Id. at xxi.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} 322 Ark. 517, 910 S.W.2d 215 (1995), overruled by Aka v. Jefferson Hosp. Ass'n, 344 Ark. 627, 42 S.W.3d 508 (2001). In \textit{Chatelain}, the court held that a fetus was not considered a "person" under the wrongful death statute. \textit{Id.} at 525, 910 S.W.2d at 219.
\textsuperscript{47} Brief of Appellant at xxi, Aka (No. 99-1366).
\textsuperscript{48} Aka, 344 Ark. at 636, 42 S.W.3d at 514. At the time of Mrs. Aka's autopsy, Dr. Peretti testified that he did not see any damage to the placenta. \textit{Id.} at 646, 42 S.W.3d at 522. However, when shown the photograph of the placenta at trial, Dr. Peretti testified that there was a laceration of the placenta. \textit{Id.}, 42 S.W.3d at 522. Some testimony involved prior complaints about AHEC's lack of faculty supervision. \textit{Id.} at 647, 42 S.W.3d at 522. The trial court allowed the testimony of Nurse Gail Parker, but it excluded the testimony of Dr. Sterling Roaf, a part-time consultant to the residency program at JRMC. \textit{Id.}, 42 S.W.3d at 522. The second-year resident, Candace Stewart, had a doctorate in osteopathy, but she had not passed her medical licensing examination at the time she discussed the induction procedure and obtained consent from Mrs. Aka. \textit{Id.} at 648, 42 S.W.3d at 522-23.
\textsuperscript{49} \textit{Id.} at 641, 42 S.W.3d at 518. In 2001, the General Assembly amended title 16, chapter 62, section 102(a) of the Arkansas Code to include a viable fetus in the definition of "person" under the wrongful death statute. Act of April 4, 2001, No. 1265, 2001 Ark. Acts 1265 (codified at \textit{ARK. CODE ANN.} \S\ 16-62-102(a) (LEXIS Supp. 2001)). In addition, the General Assembly determined "that a deceased viable fetus
justifies a break from precedent” and overruled Chatelain, thereby including a viable fetus within the definition of “person” for wrongful death actions.50

III. BACKGROUND

This section begins with a brief discussion of wrongful death actions at common law. Next, this section examines the historical development of fetal wrongful death claims, focusing on the issues courts face when determining whether to allow fetal recovery for wrongful death actions. Finally, this section examines the development of fetal wrongful death actions in Arkansas.

A. Wrongful Death Actions at Common Law

At common law, a cause of action for wrongful death did not exist.51 If the victim or the tortfeasor died, the action died as well.52 In addition, if a victim died, his or her relatives and dependents had no cause of action for any emotional or financial loss suffered after the victim's death.53 In 1808, Lord Ellenborough declared that “in a civil court the death of a human being could not be complained of as an injury.”54 Accordingly, under the common law, a tortfeasor whose victim died owed nothing, while a tortfeasor whose victim survived had to pay the victim for causing the injury.55 Finding this inequitable, England passed the Fatal Accidents Act, or Lord Campbell's Act, in 1846, which established a cause of action for wrongful death.56 Today,
every American state has a wrongful death statute, most of which were modeled on Lord Campbell’s Act.\textsuperscript{57}

B. Historical Development of Fetal Wrongful Death Actions

Though England and America established statutory rights of action for wrongful death, those statutes were often not applied to cases involving fetal death.\textsuperscript{58} Dietrich v. Northampton\textsuperscript{59} was the first reported American case that addressed the issue of whether a wrongful death action could be brought for the death of a fetus.\textsuperscript{60} In Dietrich, a woman who was between four and five months pregnant slipped and fell on the defendant’s highway, and the fall caused her to prematurely deliver her baby.\textsuperscript{61} Ultimately, the premature baby did not survive, and an administrator brought an action on behalf of the mother for the loss of her baby.\textsuperscript{62} In an opinion written by Justice Holmes, the court denied recovery, reasoning that the unborn child was “not yet in being” and was merely “a part of the mother at the time of the injury.”\textsuperscript{63}

\textsuperscript{57} Id. § 127, at 945-46.
\textsuperscript{59} 138 Mass. 14 (1884).
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. The infant did survive for ten to fifteen minutes after birth. Id. at 15. The court wrote that “no case so far as we know has ever decided that if the infant survived, it could maintain an action for injuries received by it while in its mother’s womb.” Id. The court described the unborn child as “not directly injured, unless by a communication of the shock to the mother.” Id.
\textsuperscript{63} Id. at 17. The mother did recover damages for personal injuries she sustained during the fall. Id.
Many years of criticism followed the *Dietrich* decision, and beginning in 1946 with the decision in *Bonbrest v. Kotz*, courts began to recognize fetal wrongful death claims. In *Bonbrest*, an infant, through her father and next friend, alleged that she was injured by doctors when taken from her mother's womb. Rejecting common law precedent, the court allowed the infant to bring an action for injuries sustained while in the womb. The court distinguished *Bonbrest* from *Dietrich* on the grounds that the infant in *Bonbrest* survived and was viable when the injury occurred. Moreover, the court rejected the argument in *Dietrich* that an unborn child was merely a part of the mother, and further opined that a viable child who had shown its ability to survive should have standing in court. Thus, *Bonbrest* established the "born alive" rule, which meant that a viable fetus could recover for prenatal injuries if it survived birth.

64. KEETON ET AL., supra note 52, § 55, at 367-68. In a dissenting opinion, Justice Boggs, in *Allaire v. St. Luke's Hospital*, criticized Justice Holmes's opinion that a fetus was only a part of the mother, writing:

Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother. If at that period a child so advanced is injured in its limbs or members, and is born into the living world suffering from the effects of the injury, is it not sacrificing the truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?

56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting) (holding there was no action for prenatal injuries of an infant caused by defendant's failure to properly operate the elevator carrying the infant's mother), overruled by *Amann v. Faidy*, 114 N.E.2d 412 (Ill. 1953).


68. Id. at 142-43. The *Bonbrest* court wrote:

The absence of precedent should afford no refuge to those who by their wrongful act, if such be proved, have invaded the right of an individual—employed as the defendants were in this case to attend, in their professional capacities, both the mother and child. And what right is more inherent, and more sacrosanct, than that of the individual in his possession and enjoyment of his life, his limbs and his body?

*Id.* at 142.

69. Id. at 140.

70. Id.

After Bonbrest, many courts expressly overruled prior holdings and allowed actions for prenatal injuries.72 In Williams v. Marion Rapid Transit, Inc.,73 the plaintiff suffered severe medical problems after her mother fell from defendant's bus and went into premature labor.74 The Supreme Court of Ohio held that a viable fetus was a "person" under the state constitution, and as such was allowed to bring an action for negligent injury.75

Bonbrest and Williams allowed a right of action for a surviving child who was viable at the time of the prenatal injury, but Verkennes v. Corniea76 went a step further and allowed a wrongful death action for a viable unborn child who died as a result of prenatal injuries.77 In Verkennes, the unborn child died after her mother's uterus ruptured.78 The court recognized that it was in the minority, but wrote that "[i]t seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises under the statutes cited."79

Similarly, in Stidam v. Ashmore,80 the Ohio Court of Appeals held that a viable fetus did not have to be born alive to maintain a wrongful death action for prenatal injuries.81 The court reasoned that allowing wrongful death actions for infants born alive and disallowing wrongful death actions for infants born dead would create odd results.82 To illustrate this point, the court offered a hypothetical situation involving twins who were simultaneously injured while still in the womb; one twin survived birth, and the other twin died after birth.83 The court opined that logic dictated that a cause of action should exist for both or neither.84 To the Stidam court, it was absurd that one could recover for injuries unless the injuries were so severe as to cause death.85 However,
the Second Restatement of Torts and a minority of jurisdictions still adhere to the “born alive” rule for the wrongful death claims of unborn children. 86

C. Major Issues Surrounding Fetal Wrongful Death Claims

Courts must consider many issues when determining whether to recognize a cause of action for the death of a fetus in wrongful death actions. This section of the note will discuss the following issues: (1) whether a fetus is considered a “person” under wrongful death statutes; (2) whether a fetus is considered a “person” in Roe v. Wade; 87 and (3) whether courts follow the “born alive” rule or allow recovery at viability, regardless of survival. Finally, this section will examine the development of fetal wrongful death actions in Arkansas.

1. Is the Fetus a “Person”?

For centuries, scholars have debated the issue of whether a fetus is a “person.” 88 Much of the debate has been in the context of abortion law. 89 Greek and Roman law generally allowed abortions, 90 but any cause of action for abortion involved the father’s right to his offspring. 91 The Ephesian physician, Soranos, was opposed to Rome’s abortion practices, and only performed an abortion if necessary to save the life of the mother. 92 Similarly, Hippocrates opposed abortion and included a prohibition of abortion in his Hippocratic Oath. 93

88. See id. at 130 (discussing historical views toward abortion).
89. See id.
90. Id.
91. Id.
92. Id. Soranos is described as the “greatest of the ancient gynecologists.” 410 U.S. at 130.
93. Roe, 410 U.S. at 131. The Hippocratic Oath states: “I will not give a deadly drug (pharmacon), not to anyone, when asked, nor will I suggest such a plan of action;
At common law, a person could legally obtain an abortion before "quickening."\textsuperscript{94} Scholars have argued that the lack of a common law crime for pre-quickening abortions was the result of varying opinions concerning when an embryo became "formed" or recognizably human, or in terms of when a 'person' came into being.\textsuperscript{95}

In \textit{Dietrich v. Northampton},\textsuperscript{96} the court found that a fetus was not a "person" recognized by the law as having standing in court.\textsuperscript{97} However, the \textit{Bonbrest} court found to the contrary, questioning why a fetus was a "person" in some areas of the law, but not in others.\textsuperscript{98}

\textsuperscript{94} Roe, 410 U.S. at 132. Quickening occurs when the mother first notices movement in her womb. \textit{Arlene Eisenburg ET AL., WHAT TO EXPECT WHEN YOU'RE EXPECTING} 159 (2d ed. 1996). It is described as the "first momentous sensation of life," and occurs between the fourteenth and twenty-sixth weeks of pregnancy. \textit{Id.}

\textsuperscript{95} Roe, 410 U.S. at 133.

\textsuperscript{96} 138 Mass. 14 (1884).

\textsuperscript{97} \textit{Id.}

\textsuperscript{98} Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946). The court asked, "Why a 'part' of the mother under the law of negligence and a separate entity and person in that of property and crime? Why a human being under civil law, and a non-entity under the common law?" \textit{Id.} at 140-41. The court noted:

The English word "person" derives from the Latin "persona," and originally meant "mask." It's (1) a specific kind or manifestation of \textit{individual} character; (2) a \textit{being} characterized by \textit{conscious apprehension}, \textit{rationality} and a \textit{moral} sense; a \textit{being} possessing or \textit{forming} the \textit{subject} of personality, hence an \textit{individual human being}; a \textit{particular individual}; (3)(c) one as distinguished \textit{emphatically} from \textit{things} or \textit{animals}. \textit{Id.} at 140-41 n.13 (citing \textit{WEBSTER'S NEW INTERNATIONAL DICTIONARY} (2d ed.)) (emphasis in original). Dr. Roy Bowen Ward argues that the most important word to describe a human being is not "person," but "nephesh." Religious Coalition for Reproductive Choice, \textit{Is the Fetus a Person? The Bible's View}, at http://www.rcrc.org/religion/es2/comp.html (last visited June 26, 2001). The defining characteristic of "nephesh" is breath. \textit{Id.} Ward cites the passage from \textit{Genesis} 2:7, which states: "Then Yahweh God formed the earth creature of dust from the earth, and breathed into its nostrils the breath of life; and the earth creature became a living 'nephesh.'" \textit{Id.} Further illustrating the connection between "nephesh" and "breath," Ward points to \textit{Ezekiel} 37:8 and the vision of the dry bones: "And as I looked, there were sinewes on them, and flesh had come upon them, and skin had covered them; but there was no breath in them." \textit{Id.} \textit{Ezekiel} 37:10 states that Ezekiel called for breath to come and "the breath came into them and they lived." \textit{Id.} Ward concludes that if "nephesh" is the fundamental term for human being in Hebrew thought, and if a "nephesh" is a creature that breathes, then a fetus is not a "nephesh," and not a living person. \textit{Id.}
In many jurisdictions, a fetus may be protected under criminal law.\(^9\) In addition, a fetus is considered a decedent under the Uniform Anatomical Gift Act.\(^{100}\) Some courts have held that because a fetus is a "person" within other areas of law, it should be considered a "person" under a wrongful death statute.\(^{101}\) Conversely, other courts have found that because the legislature expressly included language that afforded rights to a fetus in other statutes, an absence of such express language in a wrongful death statute means that the legislature did not intend for a fetus to be included within the definition of "person."\(^{102}\)

2. The Fetus as a "Person" and Roe v. Wade

In *Roe v. Wade*,\(^{103}\) the United States Supreme Court declared that a fetus was not a "person" under the Fourteenth Amendment of the United States Constitution.\(^{104}\) Justice Blackmun acknowledged that the Constitution "[did] not define 'person' in so many words," even though there were several references to the word "person" in the Constitution.\(^{105}\) Nonetheless, Justice Blackmun wrote that even though "person" appeared in the Constitution many times, "the use of the word

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100. See UNIF. ANATOMICAL GIFT ACT § 1 (amended 1987), 8A U.L.A. 30 (1993). Section 1 of the Act defines a decedent as "a deceased individual [including] a stillborn infant or fetus." *Id.*

101. See, e.g., Bonbrest, 65 F. Supp. at 140-41; see also supra text accompanying note 98.

102. See, e.g., Justus v. Atchison, 565 P.2d 122, 132 (Cal. 1977) ("[W]hen the Legislature determines to confer legal personality on unborn fetuses for certain limited purposes, it expresses that intent in specific and appropriate terms; the corollary, of course, is that when the Legislature speaks generally of a 'person'... it impliedly but plainly excludes such fetuses.")., overruled on other grounds by Ochoa v. Superior Court, 703 P.2d 1, 9 (Cal. 1985).

103. 410 U.S. 113 (1973).

104. *Id.* at 158. Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.” The Court did recognize that states have a “compelling” interest in protecting a viable fetus, reasoning that a viable fetus could live outside the mother’s womb.107

Many courts deciding fetal wrongful death cases subsequent to the Roe decision either ignore the decision or find a way to distinguish it.108 The Roe Court stated that a court that disfavors the Roe rule regarding the definition of “person” could cite the Roe Court’s acknowledgement that other areas of law recognize the rights of the unborn.109 In fact, some jurisdictions use the holding in Roe as authority to protect viable unborn children.110 Courts have also argued that the holding in Roe excludes a fetus from the definition of “person” under the Fourteenth Amendment, but it does not control the definition of “person” in other areas of law.111 However, a few courts have relied on Roe as authority to assert that a fetus is not a “person” when denying legal status to a fetus.112

3. Fetal Recovery: Viability or Live Birth?

In 1946 the Bonbrest court established the “born alive” rule for recovery.113 Since then, only a minority of courts have adhered to the “born alive” rule and required that a fetus must be born alive to maintain a wrongful death action for prenatal injuries.114 In Allaire v. St. Luke’s Hospital,115 Justice Boggs, in a dissenting opinion, was the first

106. Id.
107. Id. at 163.
108. Snow, supra note 71, at 316.
109. See Roe, 410 U.S. 113. The Roe Court acknowledged that some jurisdictions allowed stillborn children to maintain an action for wrongful death. Id. at 162. The Court also recognized an unborn child’s right to inherit and right to a guardian ad litem. Id.
111. See Summerfield, 698 P.2d at 723 (stating that Roe “neither prohibits nor compels the inclusion of a fetus as a person for the purposes of other enactments”); O’Grady, 654 S.W.2d at 910 (opining that Roe “does not mandate the conclusion that the fetus is a legal nonentity”).
114. See supra note 86 and accompanying text.
115. 56 N.E. 638 (Ill. 1900).
to argue that the viability of the fetus at the time of injury, not the live birth of the fetus, should determine whether a wrongful death cause of action could be maintained.\textsuperscript{116} \textit{Verkennes v. Corniea}\textsuperscript{117} was the first case to allow a wrongful death recovery for an unborn viable fetus.\textsuperscript{118} Some courts dispense with the viability requirement altogether and allow a wrongful death cause of action regardless of whether the fetus was viable at the time of the injury.\textsuperscript{119}

Opponents of the viability requirement criticize the rule because it can be difficult to determine exactly when viability occurs, thus requiring courts to draw an arbitrary line.\textsuperscript{120} Those who disfavor the "born alive" rule argue that the viability requirement is a much more logical place to draw the line for recovery.\textsuperscript{121} A majority of jurisdictions permit a wrongful death action on behalf of a viable fetus.\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{116} See Gary A. Meadows, \textit{Wrongful Death and the Lost Society of the Unborn}, 13 J. Legal Med. 99, 106-07 (1992); see also supra note 64 and accompanying text.
\item \textsuperscript{117} 38 N.W. 2d 838 (Minn. 1949).
\item \textsuperscript{118} See id. at 840-41.
\item \textsuperscript{120} See, e.g., Justus v. Atchison, 565 P.2d 122, 134 (Cal. 1977), overruled on other grounds by Ochoa v. Superior Court, 703 P.2d 1, 9 (Cal. 1985).
\item \textsuperscript{121} See, e.g., Werling v. Sandy, 476 N.E.2d 1053, 1055 (Ohio 1985) (noting that the "born alive" rule would deny an action for a stillborn child, but allow an action where the child only survives for a few minutes after birth).
\item \textsuperscript{122} Aka v. Jefferson Hosp. Ass'n, 344 Ark. 627, 637 n.2, 42 S.W.3d 508, 515 n.2 (2001). A small number of jurisdictions still follow the "born alive" rule. \textit{Id.}, 42 S.W.3d at 515 n.2. In the \textit{Aka} decision, the court determined:

\begin{quote}
Thirty-two jurisdictions permit a wrongful death action on behalf of a viable fetus. (Of those thirty-two jurisdictions, four permit an action for an unviable fetus (Connecticut, Missouri, South Dakota, and West Virginia)). Four jurisdictions permit an action, even for unviable fetuses, but have a live birth or stillbirth requirement (Louisiana, Maryland, Oklahoma, and Pennsylvania). One jurisdiction permits an alternative remedy by allowing an action for damages resulting in stillbirth caused by negligence (Florida). One jurisdiction noted in dicta that a wrongful death action might be permitted but declined to reach the merits on procedural grounds (Utah). Three jurisdictions prohibit an action for an unborn nonviable fetus but have not reached the issue of whether a viable fetus may maintain an action (Alaska, Oregon, and Rhode Island). Four jurisdictions have no case law on the issue (Colorado, Guam, Puerto Rico, and Wyoming).
\end{quote}

\textit{Id.}, 42 S.W.3d at 515 n.2.
D. The Legal Status of a Fetus in Arkansas

Prior to Aka, the Arkansas Supreme Court had the opportunity to touch upon the issue of whether a fetus was included within the definition of “person.” Three cases, Carpenter v. Logan, Carpenter v. Bishop, and Meadows v. State, all involved the protection of fetal rights outside wrongful death law. In 1988 Arkansas voters supported the protection of fetal rights by passing Amendment 68, which declared that the public policy of Arkansas was to protect the rights of an unborn child to the extent allowed by the federal Constitution. The Arkansas Supreme Court was finally asked to determine whether a fetus was a person under the wrongful death statute in Chatelain v. Kelley.

1. Carpenter v. Logan

Sheryl Carpenter was eight to eight and one-half months pregnant when she was killed in an automobile accident. Investigating officers located the dead fetus outside Carpenter’s body and concluded that the impact of the crash had forced the fetus through Carpenter’s abdominal wall. Sheryl Carpenter’s widower, Cary Carpenter, filed a petition in probate court requesting an administrator for the estate of the fetus. The probate court held that it did not have the authority to order the administration of the estate of a fetus. Mr. Carpenter appealed the decision of the probate court and asked the Arkansas Supreme Court to determine whether a fetus harmed by negligent acts had a cause of action against the tortfeasor. The Arkansas Supreme Court affirmed the order of the probate court, noting that unborn children were not

123. 281 Ark. 184, 662 S.W.2d 808 (1984).
124. 290 Ark. 424, 720 S.W.2d 299 (1986).
126. ARK. CONST. amend. 68, § 2.
128. Logan, 281 Ark. at 185, 662 S.W.2d at 809.
129. Id., 662 S.W.2d at 809.
130. Id., 662 S.W.2d at 809. The petition was granted, but the probate court later vacated its order because it had been issued “for a dead fetus.” Id., 662 S.W.2d at 809. Subsequently, Cary Carpenter filed a second and third petition for the appointment of an administrator. Id., 662 S.W.2d at 809.
131. Id. at 185-86, 662 S.W.2d at 809.
132. Id. at 186, 662 S.W.2d at 810. The appellant's issue was “whether an unborn viable fetus or a viable fetus born dead as a direct result of trauma caused by negligence or willful and wanton misconduct has a cause of action against the tortfeasor.” Id., 662 S.W.2d at 810.
mentioned in the constitutional provision concerning probate. The court explained that the wrongful death statute would determine whether there was a right to maintain an action for the death of an unborn child, but the court declined to interpret the wrongful death statute in an ex parte probate proceeding.

2. Carpenter v. Bishop

In Bishop, Mr. Carpenter, as father and next friend, filed suit against the estate of his wife Sheryl Carpenter, alleging that her negligence caused the death of the fetus. The court held that it was not necessary to decide whether a viable fetus born dead was considered a "person" who had a cause of action under the wrongful death statute because the action was barred by the parental immunity doctrine.

133. Id., 662 S.W.2d at 810 (citing ARK. CONST. art. VII, § 34 (amended 1938); ARK. STAT. ANN. § 62-2004(b) (Bobbs-Merrill Repl. 1971)). Because the probate court did not have specific authority to extend the probate code to unborn children, any attempt to do so would be void. Id., 662 S.W.2d at 810 (citing Poe v. Case, 263 Ark. 488, 565 S.W.2d 612 (1978)).

134. Logan, 281 Ark. at 186, 662 S.W.2d at 810 (citing ARK. STAT. ANN. §§ 27-906 to -910 (Bobbs-Merrill Repl. 1979)).

135. Id., 662 S.W.2d at 810. The court noted that the appellant did have the right to raise the tort issue in an adversary proceeding. Id. at 187, 662 S.W.2d at 810.

136. 290 Ark. 424, 425, 720 S.W.2d 299, 299-300 (1986). The court took the factual allegations of the complaint as true that Sheryl Carpenter negligently drove her car into a bridge abutment, killing herself and the fetus. Id., 720 S.W.2d at 299-300. Mr. Carpenter also filed a derivative suit on behalf of himself and the unborn child's siblings. Id., 720 S.W.2d at 300.

137. Id., 720 S.W.2d at 300 (citing ARK. STAT. ANN. §§ 27-906 to -910 (Bobbs-Merrill Repl. 1979)). In jurisdictions recognizing parental immunity, a parent is immune from liability for a negligence suit brought by his or her child. See Spears v. Spears, 339 Ark. 162, 3 S.W.3d 691 (1999) (upholding parental immunity doctrine and announcing intention to reexamine doctrine given appropriate opportunity); Thomas v. Immon, 268 Ark. 221, 594 S.W.2d 853 (1980) (reaffirming doctrine regarding unintentional torts and extending the doctrine to those acting in the place of parents); Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938) (holding that an unanticipated minor had no cause of action against a parent for an unintentional tort); BLACK'S LAW DICTIONARY 754 (7th ed. 1999). But see Atwood v. Estate of Atwood, 276 Ark. 230, 633 S.W.2d 366 (1982) (holding that doctrine did not apply to father who intentionally got drunk and wrecked his car, causing injury to his child); Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939) (holding that parental immunity doctrine did not apply to father who intentionally poisoned his son).
3. Meadows v. State

In 1987 the Arkansas Supreme Court considered whether an unborn viable fetus was a “person” within the manslaughter statute. In Meadows, an intoxicated Robert Keith Meadows crashed his car, killing the unborn viable fetus of a passenger riding in his car. Meadows was convicted of manslaughter for killing the unborn fetus. In his appeal, Meadows argued that the manslaughter statute did not include the reckless killing of a fetus. The court found merit in this argument, noting that the manslaughter statute referred to recklessly causing the death of another “person,” and that the statute did not include a definition of a “person.” The court held that it must look to common law when construing undefined terms, and because an unborn fetus was not included within the definition of “person” at common law, an unborn fetus could not be included within the definition of “person” in the manslaughter statute. In addition, the court noted that an early feticide statute, which allowed a manslaughter charge for the killing of an unborn fetus, had been expressly repealed, indicating that the legislature had not intended to include fetus within the definition of “person” in the manslaughter statute.

The court pointed to fundamental policy reasons that made it appropriate to defer to the legislative branch. The court reasoned that the General Assembly had the primary authority to create new crimes, and because General Assembly members were elected at frequent

139. Id., 722 S.W.2d at 585. Robert Keith Meadows crossed the center line of the highway and struck a car driven by Randy Waldrip. Id., 722 S.W.2d at 585. Waldrip was also killed in the accident. Id., 722 S.W.2d at 585. The appellant was convicted of manslaughter in the death of Waldrip. Id., 722 S.W.2d at 585.
140. Id., 722 S.W.2d at 585.
141. Id., 722 S.W.2d at 585.
142. Id., 722 S.W.2d at 585.
143. Id. at 107-08, 722 S.W.2d at 585. The State urged the court to alter the common law and create a new common law crime. Id. at 108, 722 S.W.2d at 585. The court declined to create a new common law crime, noting that the court’s practice was to defer to the General Assembly’s creation of crimes. Id. at 109, 722 S.W.2d at 586.
144. Meadows, 291 Ark. at 111, 722 S.W.2d at 587 (citing ARK. STAT. ANN. § 41-2223 (Bobbs-Merrill Repl. 1964)). The repealed statute provided that “the willful killing of an unborn, quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be adjudged manslaughter.” ARK. STAT. ANN. § 41-2223 (Bobbs-Merrill Repl. 1964); see Tiner v. State, 239 Ark. 819, 826, 394 S.W.2d 608, 613 (1965) (upholding the defendant’s manslaughter conviction for killing an unborn child after defendant repeatedly struck a pregnant woman with his car).
145. Meadows, 291 Ark. at 109, 722 S.W.2d at 586.
intervals, they were more representative of the public will than was the court. Also, the General Assembly would be able to conduct hearings to anticipate all factual situations which may occur, while the court, if it created a new common law crime, would be limited to making a ruling based solely on the facts of the proceeding before it. Thus, the court reversed Meadow's manslaughter conviction for killing the unborn fetus.

4. Amendment 68

Arkansas voters passed Amendment 68 in 1988, reflecting "the stated public policy of Arkansas." Amendment 68 provides that "[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution." Abortion providers challenged the constitutionality of Amendment 68, arguing that the Amendment was inconsistent with the Hyde Amendment of 1994. The United States District Court for the Eastern District of Arkansas agreed and enjoined the enforcement of Amendment 68 in its entirety. The Eighth Circuit affirmed, but the United States Supreme Court reversed the "blanket invalidation" of Amendment 68. Thus, Amendment 68 could stand as long as it did not violate federal law.

146. Id., 722 S.W.2d at 586.
147. Id., 722 S.W.2d at 586.
148. Id. at 111, 722 S.W.2d at 587.
150. ARK. CONST. amend. 68, § 2.
152. Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 476 (1996). However, the United States Supreme Court accepted as correct the district court's interpretation of the Hyde Amendment. Id.
153. Dalton, 60 F.3d at 503.
5. Chatelain v. Kelley

In an issue of first impression in Arkansas, the Chatelain court was asked to determine whether the death of a fetus could be considered the "death of a person" in the context of the state's wrongful death statute. In Chatelain, the plaintiff was admitted to a hospital to deliver her child. Dr. Lawrence A. Kelley performed an emergency C-section, and the child was stillborn. The plaintiff and her husband sued the hospital for wrongful death, alleging that the child was stillborn due to Dr. Kelley's delay in operating. Citing prior cases, the court reasoned that to include a fetus within the definition of "person" for the purpose of the wrongful death statute would create an inconsistency with the criminal and probate codes of the State. Therefore, the court held that an unborn fetus was not included within the definition of "person" for the purposes of the Arkansas wrongful death statute.

IV. REASONING

A. Majority Opinion

In Aka v. Jefferson Hospital Ass'n the Arkansas Supreme Court broke with precedent and determined that a viable fetus is included within the definition of "person" in the Arkansas wrongful death statute. The majority began by examining the court's prior holding in Chatelain v. Kelley.

existence outside his or her mother's womb, even if only in an incubator." BLACK'S LAW DICTIONARY 1556 (6th ed. 1990).

157. Id. at 517, 910 S.W.2d at 215.
158. Id. at 518, 910 S.W.2d at 215.
159. Id., 910 S.W.2d at 215.
160. Id. at 525, 910 S.W.2d at 219.
161. Id. at 518, 910 S.W.2d at 215 (citing ARK. CODE ANN. § 16-62-102 (Michie Supp. 1993)).
162. 344 Ark. 627, 42 S.W.3d 508 (2001).
163. See id. at 641, 42 S.W.3d at 518. Chief Justice Arnold wrote the majority opinion, in which Justices Glaze, Corbin, and Hannah joined. Id. at 632, 42 S.W.3d at 512. Justice Imber wrote a concurring opinion. Id. at 649, 42 S.W.3d at 523. Justice Brown wrote an opinion dissenting in part and concurring in part, which Justice Thornton joined. Id. at 652, 42 S.W.3d at 525.
164. Id. at 637, 42 S.W.3d at 515.
In *Chatelain*, the court held that a viable fetus was not a "person" within the wrongful death statute.\(^\text{165}\) The court revisited three specific cases that were discussed or relied upon in *Chatelain*.\(^\text{166}\) Citing *Carpenter v. Logan*,\(^\text{167}\) *Carpenter v. Bishop*,\(^\text{168}\) and *Meadows v. State*,\(^\text{169}\) the *Chatelain* court held that including a fetus within the definition of "person" would "create an inconsistency in the laws of this State by holding ‘person’ included viable fetus for the purpose of the wrongful death statute when we have reached the contrary conclusion in the criminal law and the law of probate."\(^\text{170}\)

However, the *Aka* court recognized that the *Chatelain* decision "invited a legislative response" concerning the definition of "person."\(^\text{171}\) In addition, the *Aka* court noted that the General Assembly responded by adding "unborn child" to the definition of "person" under the criminal code.\(^\text{172}\) The *Aka* court deemed the legislature's new statutory definition to be especially relevant to the instant case because prior decisions that did not afford protection to a viable fetus were based heavily on the lack of a statutory definition of "person."\(^\text{173}\) Because the General Assembly had acted, the *Aka* court was "no longer constrained by the common-law definition of person."\(^\text{174}\)

Next, the court addressed the public policy of Arkansas as stated in Amendment 68 of 1988, opining that the new statutory definition of "person" was consistent with the amendment.\(^\text{175}\) Section 2 of Amend-

\(^{165}\) *Chatelain*, 322 Ark. at 525, 910 S.W.2d at 219; *see supra* Part III.D.5.

\(^{166}\) *Aka*, 344 Ark. at 638, 42 S.W.3d at 515-16.

\(^{167}\) 281 Ark. 184, 662 S.W.2d 808 (1984). In *Logan*, the court declined to hold that an unborn or stillborn fetus was a "person" as defined in the probate code. *Id.* at 186, 662 S.W.2d at 810; *see supra* Part III.D.1.

\(^{168}\) 290 Ark. 424, 720 S.W.2d 299 (1986). The *Bishop* court did not address whether a fetus was a "person" because the suit was barred by the parental-immunity doctrine. *Id.* at 425, 720 S.W.2d at 300; *see supra* Part III.D.2.

\(^{169}\) 291 Ark. 105, 722 S.W.2d 584 (1987). The court held that a fetus was not a "person" under manslaughter law, and it noted that because the court had to rely on the common law definition of "person." *Id.* at 107-08, 722 S.W.2d at 585; *see supra* Part III.D.3.

\(^{170}\) *Aka*, 344 Ark. at 638, 42 S.W.3d at 516 (quoting *Chatelain*, 322 Ark. at 525, 910 S.W.2d at 219).

\(^{171}\) *Id.* at 639, 42 S.W.3d at 516 (citing *Chatelain*, 322 Ark. at 525, 910 S.W.2d at 219).

\(^{172}\) *Id.* at 639, 42 S.W.3d at 516. Specifically, the General Assembly amended section 5-1-102 of the Arkansas Code, adding that a "‘person’ also includes an unborn child in utero at any stage of development." ARK. CODE ANN. § 5-1-102(13)(B)(i)(a) (LEXIS Supp. 2001).

\(^{173}\) *Aka*, 344 Ark. at 639-40, 42 S.W.3d at 517.

\(^{174}\) *Id.* at 640, 42 S.W.3d at 517.

\(^{175}\) *Id.*, 42 S.W.3d at 517.
ment 68 states that Arkansas’s public policy is to “protect the life of every unborn child to the extent permitted by the Federal Constitution.” The court recognized the challenge to Amendment 68, but it noted that the United States Supreme Court held that it would enjoin Amendment 68 only if it conflicted with federal law. The Aka court recognized Amendment 68 as a “compelling expression of Arkansas’s public policy ‘to the extent’ it [did] not violate federal law.”

Stressing the importance of avoiding inconsistency in the law and citing the current legislative intent, the court noted that following the submission of the appeal in the instant case, the Arkansas General Assembly amended section 16-62-102(a) of the Arkansas Code to include a viable fetus within the definition of “person” for wrongful death actions. The court also recognized that the General Assembly included a deceased viable fetus within the definition of “decedent” under the probate code.

In addition, the court held that the decision to overrule Chatelain applied retroactively to the instant appellant and prospectively to causes of action arising after the instant case. The court stated that it generally presumes that the legislature intends that statutes and amendments be applied prospectively, but in the case of remedial legislation the presumption did not ordinarily apply. The court wrote that a majority of jurisdictions have held that wrongful death statutes are remedial statutes that require liberal interpretation in order to deter harmful conduct and compensate injured persons. The court cited earlier decisions where it held that retroactive application was appropriate for remedial statutes when such application did not disturb rights or create new obligations, but supplied a more appropriate

177. Aka, 344 Ark. at 640, 42 S.W.3d at 517 (citing Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 476 (1996) (holding that “state law is displaced only ‘to the extent that it actually conflicts with federal law’”); Little Rock Family Planning Servs. v. Dalton, 60 F.3d 497 (8th Cir. 1995) (enjoining the enforcement of Amendment 68 and holding it unconstitutional because the provision prohibiting the use of public funds to pay for abortions, except to save the life of the mother, violated the Hyde Amendment of 1994)).
178. Id. at 641, 42 S.W.3d at 517 (quoting Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 476 (1996)).
179. Id. at 641 n.4, 42 S.W.3d at 518 n.4.
180. Id., 42 S.W.3d at 518 n.4.
181. Id. at 643, 42 S.W.3d at 519.
182. Id. at 641-42, 42 S.W.3d at 518.
183. Aka, 344 Ark. at 642, 42 S.W.3d at 518.
remedy to an existing right or obligation. The court held that retroactive application was an appropriate way to reward the appellant for "bring[ing] about a needed change in the law." Thus, the court overruled Chatelain v. Kelley and held that a viable fetus was a "person" within the meaning of Arkansas's wrongful death statute.  

B. Minority Opinions

Justice Imber agreed with the result in the majority opinion, but she disagreed with the majority's interpretation of legislative intent in the amended homicide statute. She noted that the amended homicide statute was passed three years after the death of Baby Boy Aka, and that the amended statute contained no provision for retroactive application. In addition, Justice Imber wrote that the majority was relying on the legislative intent of a criminal code, not a remedial source. She argued that the majority improperly "bootstrap[ped] the legislative intent in the definition of 'person'" under the criminal code to the definition of "person" in the wrongful death statute. Justice Imber concluded by stating that the more "compelling" reason for overruling the holding in Chatelain was the public policy stated in Amendment 68. She reasoned that the majority could have relied on the purpose of Amendment 68—to protect fetal life from conception until birth to the extent allowed by federal law—to justify including a viable fetus within the definition of "person."
Justice Brown also agreed with the overruling of *Chatelain*, but he disagreed with the retroactive application of the decision to the *Aka* case. He wrote that the majority opinion rendered the *Chatelain* decision effective for only six days, thus two cases with comparable facts could be treated differently within a six-day time period. Justice Brown opined that without legal stability, the court would be forced to render opinions on a case-by-case basis.

Justice Brown criticized the majority's explanation of the change in the public policy of Arkansas. He cited the majority's reference to four different events indicating a change in public policy: (1) Amendment 68 as passed in 1988; (2) Amendment 68 as interpreted by the United States Supreme Court; (3) Act 1273 of 1999, which included unborn children of twelve weeks or greater within the definition of "person" for purposes of homicide law; and (4) Act 1265 of 2001, which included a viable fetus within the definition of "person" for purposes of wrongful death actions. Justice Brown questioned why the majority applied the decision only to the *Aka* case and all future decisions if the state's public policy changed as early as 1988.

Justice Brown disagreed with the majority’s decision to apply the *Aka* holding retroactively to only one case. He stated that none of the authorities cited in the majority opinion allowed the "overruling of a case earlier than the date that the legislative act that changed the State’s public policy became effective." In addition, Justice Brown did not agree with the majority’s reasoning that the plaintiff should be rewarded for his part in overruling *Chatelain*. In Justice Brown’s opinion, the General Assembly, not the

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194. *Id.* at 652, 42 S.W.3d at 525 (Brown, J., dissenting in part, concurring in part).
195. *Id.*, 42 S.W.3d at 526 (Brown, J., dissenting in part, concurring in part). The *Chatelain* decision became final on December 7, 1995, and Baby Boy Aka was stillborn on December 13, 1995. *Id.* at 653, 42 S.W.3d at 526 (Brown, J., dissenting in part, concurring in part). "The *Chatelain* case must hold the record in the history of jurisprudence as the case with the shortest life span." *Id.*, 42 S.W.3d at 526 (Brown, J., dissenting in part, concurring in part).
196. *Id.*, 42 S.W.3d at 526 (Brown, J., dissenting in part, concurring in part). Brown wrote that the lack of precedent "flies in the face of the whole notion of the common law and *stare decisis*." *Id.*, 42 S.W.3d at 526 (Brown, J., dissenting in part, concurring in part).
197. *Id.*, 42 S.W.3d at 526 (Brown, J., dissenting in part, concurring in part).
198. *Id.*, 42 S.W.3d at 526-27 (Brown, J., dissenting in part, concurring in part).
199. *Aka*, 344 Ark. at 654, 42 S.W.3d at 527 (Brown, J., dissenting in part, concurring in part).
200. *Id.*, 42 S.W.3d at 527 (Brown, J., dissenting in part, concurring in part).
201. *Id.*, 42 S.W.3d at 527 (Brown, J., dissenting in part, concurring in part).
202. *Id.* at 655, 42 S.W.3d at 527 (Brown, J., dissenting in part, concurring in part).
FETAL RIGHTS AND WRONGFUL DEATH

Aka case, changed the public policy of the state through legislative acts. In conclusion, Justice Brown wrote that he would apply the instant decision only from the date the General Assembly amended the wrongful death statute to include fetuses within the definition of "person."

V. SIGNIFICANCE

By allowing fetal recovery under the Arkansas wrongful death statute, the Arkansas Supreme Court has given a viable fetus the legal rights of a person. While the holding in Aka v. Jefferson Hospital Ass'n only applies to wrongful death actions in Arkansas, the court's willingness to recognize a fetus as a "person" may foreshadow changes in other areas of Arkansas law regarding fetal rights. Currently, Arkansas regards an unviable fetus as a "person" under the criminal code and a viable fetus as a "person" under the probate code and the wrongful death statute. However, Arkansas's abortion statute regards neither an unviable fetus nor a viable fetus as a "person." In effect, a fetus has multiple identities, and the personhood status of a fetus varies, depending on where it is addressed in the Arkansas Code.

A major reason for the Aka court's holding was the court's desire to avoid inconsistency in the law. However, the court's reliance on the legislative intent of the criminal code did not avoid inconsistency, and arguably, such reliance created additional inconsistency. When determining whether to overrule Chatelain, the Aka court could have limited its discussion to the recently amended wrongful death statute. Instead, the court relied heavily upon prior legislative intent to justify its decision. The court noted that it had invited a legislative response in Chatelain, and that the legislature responded by amending section 5-1-102 of the Arkansas Code to include an "unborn child" within the definition of "person" for the purposes of the criminal code. As Justice Imber points out in her concurring opinion, the amended definition of "person" in the criminal code "does little to support the majority's decision that the legislature intended personhood to begin at

203. Id., 42 S.W.3d at 527 (Brown, J., dissenting in part, concurring in part).
204. Id., 42 S.W.3d at 527 (Brown, J., dissenting in part, concurring in part).
205. 344 Ark. 627, 42 S.W.3d 508 (2001).
206. See ARK. CODE ANN. § 20-16-702(3) (LEXIS Repl. 2000). A viable fetus is defined as "a fetus which can live outside the womb." Id.
207. See Aka, 344 Ark. at 641, 42 S.W.3d at 518.
208. Id. at 639, 42 S.W.3d at 516.
viability.” Section 5-1-102 of the Arkansas Code grants personhood status to an “unborn child,” which is defined as a “living fetus of twelve (12) weeks or greater gestation.” The Aka court recognized a “viable fetus” as a “person,” and according to the Arkansas Code, a fetus becomes viable at the “end of the twenty-fifth week of pregnancy.” Thus, the Aka court relied on a statute that gives protection to an unviable fetus to justify its decision to give protection to a viable fetus.

While the court relies on legislative intent to avoid inconsistency, it does not address the blatant inconsistency remaining after Aka within the provisions of the Arkansas Code. The court’s call for consistency in the law could be used as an argument to make all statutory definitions of “person” consistent within the Arkansas Code. If so, a revision of the Arkansas abortion statute may be forthcoming.

Pro-choice advocates fear that the Aka decision will have an adverse effect on the reproductive rights of women. In Roe v. Wade, the United States Supreme Court held that a fetus did not have personhood status under the Fourteenth Amendment of the United States Constitution, but the Court did recognize that some states regarded a fetus as a person in other areas of the law. Abortion advocates argue that states giving personhood status to a fetus set up a conflict with the holding in Roe, and the conflict will provide abortion opponents with an argument to overrule Roe.

209. Id. at 649 n.5, 42 S.W.3d 523 n.5 (Imber, J., concurring).
211. Id. § 20-16-703 (LEXIS Repl. 2000).
212. After it discussed section 5-1-102 of the Arkansas Code, the court referred to Act 1265 of 2001 and explained that the court must follow “current expression of legislative intent.” Aka, 344 Ark. at 641, 42 S.W.3d at 518. It should be noted, however, that the court’s discussion of the “current expression of legislative intent” is limited to one footnote in the Aka decision, suggesting that the inclusion of the recent legislative amendment in the opinion was merely an afterthought. See id. at 641 n.4, 42 S.W.3d at 518 n.4.
215. See Vincent J. Schodolski, When Exactly Do Human Cells Become a Person? Science Reshapes the Struggle over Abortion and the Legal Status of the Unborn, CHI. TRIB., May 10, 2000, at I (citing Heather Boonstra, senior public policy associate at the Alan Guttmacher Institute). Heather Boonstra disagrees with giving a fetus legal status, noting that “[t]he purpose of ‘personifying’ the fetus . . . is to set up an inevitable conflict, conceptually and legally between a woman’s right to choose abortion, as defined by . . . Roe vs. Wade, and a fetus’ ‘right to life.’” Id.; see also William E.
Arkansas Right to Life, in an amicus curiae brief filed with the *Aka* court, argues that the term "person refers to all who share a common human nature" and that for "the legislature to use the word person to refer to some human beings but not others, it would be indulging in a fiction." Though the brief was filed to argue that *Chatelain v. Kelley* should be overruled, abortion opponents offer the same argument to support their view that *Roe* should be overruled.

Those who disfavor statutory definitions that give legal status to fetuses argue that such definitions are a "back-door method" to overruling *Roe* and that regarding a fetus as a "person" could have other effects on reproductive law. For example, if a state gives legal status to a fetus, it could follow that a state would give legal status to an embryo. If so, states may have a duty to protect frozen embryos.

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Buelow III, Comment, *To Be and Not To Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus*, 71 TEMP. L. REV. 963, 968 (1998) (stating that the Court’s finding that an unborn fetus was not a person was essential to the holding in *Roe*). Justice Blackmun acknowledged the importance of personhood status under the Fourteenth Amendment, noting that “[if this suggestion of personhood is established, the [argument that a woman has a right to an abortion], of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.” *Roe*, 410 U.S. at 156-57.


219. See Jefferson, supra note 213, at B3 (citing Rose Mimms, director of Arkansas Right to Life). Mimms stated that the *Aka* ruling supports Right to Life’s argument that *Roe* should be overthrown. *Id.* Noting the different definitions of “person,” Mimms said: These laws just help underscore the fact that this is a human being. This country is very conflicted. We say [a fetus] is a person. It can be a victim of a crime. But if a woman wants to go have that child killed, she has a right to go and do that. If it’s a person, it should be protected. Someday, maybe our country will come to grips with that and reverse Roe vs. Wade.


221. See Schodolski, supra note 216, at 1 (citing Gloria Banks, Associate Professor of Law at Widener University).

222. *Id.* Professor Banks discussed potential effects on reproductive law, asking, “Would [embryos] become wards of the state? Would the state have to provide care and protection for the embryos?” *Id.* Professor Banks argued that states that give legal status to a fetus "are diminishing the rights of the pregnant women and increasing the rights of a two-cell entity. You are putting them on the same level.” *Id.*
This scenario may become reality if courts continue to broaden the statutory definition of "person."

Some scholars and lawmakers disagree with the notion that fetal protection statutes threaten the holding in *Roe.* However, abortion opponents are encouraged by laws that define a fetus as a "person," arguing that the states’ recognition of a fetus as a person "will weaken and ultimately overthrow *Roe.*" With the election of Republican George W. Bush to the presidency in 2000 and the possibility that President Bush could nominate one or more United States Supreme Court justices during his term in office, abortion opponents are particularly encouraged about a *Roe* reversal. Anti-abortion groups are aware of a potential change in the makeup of the Supreme Court, and they are working to change state laws that define "person." They hope to "define personhood as beginning the moment an egg is fertilized."

Changes in the statutory definition of "person" could upset the United States Supreme Court’s holding in *Roe.* If a survey of the

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223. See Robbins, **supra** note 99, at 95-96; Gerth, **supra** note 220, at 1B (quoting Republican Senator Elizabeth Tori, who supported a Kentucky bill in favor of allowing wrongful death actions for fetuses, stating, "I really believe it's a stretch to say it's a foot in the door to overturning Roe vs. Wade"). Arkansas Representative Chaney Taylor, the sponsor of the house bill to allow wrongful death actions on behalf of viable fetuses, stated that his bill had "nothing to do with abortion." Michael R. Wickline, *Bill Defines Viable Fetus as Person in Some Suits,* ARK. DEMOCRAT-GAZETTE, Jan. 5, 2001, at B2 (quoting Representative Chaney Taylor). Rita Sklar, the Executive Director of the Arkansas chapter of the American Civil Liberties Union, agreed that Taylor’s bill would likely not pose a threat to legal abortions in Arkansas, but she explained that the ACLU always opposes legislation granting personhood status to a fetus because it is viewed as an attempt to provide "legal rights for a fetus that could be asserted against the mother." *Id.* (quoting Rita Sklar, Executive Director of the Arkansas chapter of the ACLU). Morgan Welch, attorney for Philip Aka, did not view the Aka case as one having any bearing on abortion rights in Arkansas. *Hannity & Colmes: Battle Zone: Is Killing a Fetus Murder?* (Fox News television broadcast, May 17, 2001), available at 2001 WL 5076082. Welch, who stated that he is "basically pro-choice," acknowledges that regarding a fetus as a "person" in some areas creates inconsistencies in the law, but notes that "law and people, hopefully, are growing things and can adapt." *Id.*

224. Schodolski, **supra** note 216, at 1 (quoting David O’Steen, Executive Director of the National Right to Life Committee).

225. *Id.* David O’Steen stated:

I firmly believe that the day will come when there will be a majority of at least five intellectually honest justices on the Supreme Court who will recognize that there is nothing in the Constitution to prohibit states from regulating abortion and strike Roe and return this matter to the people. *Id.* (quoting David O’Steen).

226. *Id.*

227. *Id.*

228. Kim Gandy, President of the National Organization for Women, believes that
states' laws reveals that a majority of states define a fetus as a "person," the Court may decide to redefine the meaning of "personhood" under the Fourteenth Amendment of the United States Constitution. Thus, the *Aka* decision could ultimately play a role in eroding a woman's right to choose.

Stressing the need for consistency, the court redefined "person" under the Arkansas wrongful death statute and thereby created an inconsistency with Arkansas's abortion statute. If the court continues to work toward consistency regarding the definition of "person," a woman's right to choose may soon be in jeopardy.

Raina Weaver*

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* J.D. expected May 2002. B.S.E. in English, University of Central Arkansas.