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New Jersey Demands More from Eyewitnesses

State v. Henderson[1]

by Shyler Engel

On November 2, 2011, the Supreme Court of the United States heard arguments in *Perry v. New Hampshire*, where it will determine whether a court is required to exclude eyewitness identification evidence whenever the identification was made under circumstances that make the identification unreliable because they tended to suggest that the defendant was responsible for the crime, or only when the police are responsible for the circumstances that make the identification unreliable.

Court watchers need look no further than the New Jersey Supreme Court for hints on where eyewitness jurisprudence is headed. In *State v. Henderson*, New Jersey's highest court unanimously revised its thirty-four-year-old legal standard for assessing eyewitness identification evidence, citing a disconnect between eyewitness jurisprudence and modern scientific studies and empirical research.[2] The court concluded that the old standard, the *Manson/Madison* test, did not offer an adequate measure of reliability, did not sufficiently deter inappropriate police conduct, and relied too heavily on the jury's ability to evaluate identification evidence.[3]

The decision involved the murder of Rodney Harper on January 1, 2003. Mr. Harper and James Womble had been drinking champagne and smoking crack cocaine before two men forcibly entered the apartment. Womble knew one of the intruders as George Clark, but the other man was a stranger. While Harper and Clark went to a different room, the stranger pointed a gun at Womble and told him not to move. Meanwhile, Womble overheard Clark and Harper argue and eventually heard a gunshot. As he left, Clark warned Womble that if he were to talk to the police there would be repercussions. Harper would die from the gunshot wound to his chest ten days later. Fearing retaliation, Womble fabricated the details of the evening in his first interview with investigators. After the investigators pressed Womble further, he led the investigators to Clark, who would identify his accomplice as Larry Henderson.

Thirteen days after the incident, investigators had Womble sit down to perform an identification through a

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Duties to the Unborn: Alabama Supreme Court Deems Viability Irrelevant to Fetal Wrongful-Death Actions

by Jonathan Berry

April Mack sued to recover for the wrongful death of her unborn child, who miscarried after a car accident. The Alabama Supreme Court ultimately vindicated her right to recovery, despite her having miscarried her child before the point of viability. In order to do so, the court found that viability made no sense as a prerequisite to wrongful-death recovery, holding an unborn child's gestational age irrelevant as a matter of law. Conspicuously, the court never saw fit to even mention

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Duties to the Unborn: Alabama Supreme Court Deems Viability Irrelevant to Fetal Wrongful-Death Actions

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the U.S. Supreme Court's abortion jurisprudence and its treatment of viability.

The Story

On September 13, 2007, April Mack was twelve weeks pregnant with "Baby Mack," her unborn child.[1] That day, Mack and her fiancé, Baby Mack's father, paid Thomas Carmack to drive them to a grocery store in Birmingham, Alabama. On the way, Carmack made an illegal left turn at a red light, on the belief that he could do so safely. Another driver struck their car on the passenger side, sending Mack and her fiancé to the hospital. Five days later, while recovering from her injuries in the hospital, Mack suffered a miscarriage that resulted in Baby Mack's death.

Two months later, Mack and her fiancé sued Carmack and the other driver, alleging negligence and wantonness. Mack also filed a wrongful-death claim on behalf of Baby Mack. The parties settled all claims, save the wrongful-death claim. The trial court granted Carmack's motion for summary judgment on that claim, finding that the Alabama Wrongful Death Act does not allow claims on behalf of a nonviable fetus. Mack appealed to the Alabama Supreme Court.

Fetal Wrongful-Death Actions

The court began its analysis by reviewing three cases it decided in the 1970s involving fetal injuries that ended in the child's death. In *Huskey v. Smith*,[2] the Alabama Supreme Court considered the case of a woman who was seven-and-a-half months pregnant when her car was struck by another. Her child was born alive five days later but died a few days after. The *Huskey* court held that Alabama's wrongful-death statute's reference to a "minor child" included an unborn child "who was viable at the time of a prenatal injury, who thereafter was born alive, but who later died."[3] In reaching that holding, the court expressly overruled its earlier ruling in *Stanford v. St. Louis-San Francisco Railway*, where it had barred recovery for all prenatal injuries on the belief that "a child before birth is, in fact, a part of the mother and is only severed from her at birth,"[4] observing that *Stanford* was grounded in "outdated medical opinion."[5] The *Huskey* opinion noted that the facts before it did not necessitate a ruling on whether personal-injury or wrongful-death actions were available for a child injured before viability.[6]

The Alabama Supreme Court took the next step a year after *Huskey*, when it ruled in *Wolfe v. Isbell*[7] that a father could maintain a wrongful-death action for his child who "sustained injuries in the accident before he was viable, and . . . died as a result of those injuries shortly after being born three months later, postviability."[8] Against the defendants' contention that they owed no duty to a previability fetus under the wrongful-death statute, the court responded: "[M]edical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law."[9] Medicine also gave no support to viability as a legally-meaningful distinction:

> [T]he more recent authorities emphasize that there is no valid medical basis for a distinction based on viability, especially where the child has been born alive. These proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother.[10]

For the court, "the important fact was that the child was born alive, not the point in the pregnancy at which the fetus was injured."[11]

The next year, the Alabama Supreme Court extended wrongful-death actions further with its *Eich v. Town of Gulf Shores* decision.[12] There, a woman eight-and-a-half months pregnant gave birth to a stillborn child due to a car accident. The *Eich* court rejected the position that the wrongful-death statute requires a live birth, on two related grounds, even though the position "provides a bright line for matters of proof of causation."[13] First, a live-birth rule would frustrate "the pervading public purpose of our wrongful death statute, which is to prevent homicide through punishment of the culpable party and the determination of damages."[14] Second, a live-birth rule would defy the logic of tort law: "To deny recovery where the injury is so severe as to cause the death of a fetus subsequently stillborn, and to allow recovery where injury occurs during pregnancy and death results therefrom after a live birth, would only serve the tortfeasor by rewarding him for his severity in inflicting the injury."[15] (On the question of proof of causation, the *Wolfe* court had earlier dismissed the issue: "[I]f, as is undoubtedly the case there are injuries as to which reliable medical proof is possible,

it makes no sense to deny recovery on any such arbitrary basis.")[16]

While each of these cases removed an obstacle to recovery, the children in each all died post-viability. That common fact proved critical in *Gentry v. Gilmore*[17] and *Lollar v. Tankersley*,[18] decided together twenty years later. In both cases, a doctor's alleged malpractice caused women to miscarry at the end of the first trimester, before viability. The *Lollar* opinion read the *Huskey-Wolfe-Eich* trilogy as treating fetal viability as "decisive."[19] The *Gentry-Lollar* rule thus held that "a cause of action for death resulting from a pre-natal injury requires that the fetus attain viability either before the injury or before death results from the injury."[20]

Viability and Legal Change

Having reviewed its modern jurisprudence on fetal wrongful death, the Alabama Supreme Court next gave two grounds for its decision to overrule *Gentry-Lollar* and extend *Huskey-Wolfe-Eich*: the legal irrelevance of viability and the trend toward wrongful-death coverage for the previable unborn, in Alabama and beyond.

As a descriptive matter, viability simply was not a controlling issue in the *Huskey-Wolfe-Eich* cases, whose "principles established . . . [that] neither viability at the time of injury, nor live birth, is a prerequisite to recovery for the wrongful death of a fetus."[21] More importantly, as a legal matter, "[t]hese same principles are no less compelling when both the injury and the death occurred before viability . . . . [V]iability is an arbitrary, artificial, and varying standard that is illogical when considered against this Court's recognition in *Wolfe* of the biological separateness of mother and child from the moment of conception."[22] Biological separateness entails legal existence for the unborn child, the court reasoned, and

> [v]iability of course does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty, and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and logic is in favor of ignoring the stage at which the injury occurs. With the recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether.[23]

Having found viability irrelevant to wrongful-death actions, the court examined the *Gentry-Lollar* cases' sole remaining support: at the time, "Alabama's homicide statutes applied only to persons 'who had been born and [were] alive at the time of the homicidal act.'"[24] Since the legislature passed a fetal homicide law in the interim, however, the case for *Gentry-Lollar* thus collapsed completely. While the fetal homicide law[25] is a criminal statute, the court found its inclusion of unborn life properly applicable to wrongful-death actions, as "it would be 'incongruous' if 'a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly.'"[26]

The Alabama Supreme Court found it "unfair and arbitrary" to draw a line between unborn children who die before and after viability.[27] The viability criterion, it held, "unfairly distracts from the well established fundamental concerns of this State's wrongful-death jurisprudence, *i.e.*, whether there exists a duty of care and the punishment of the wrongdoer who breaches that duty."[28]

With viability rejected as an "unfair and arbitrary" distinction, the Alabama Supreme Court reversed the summary judgment in favor of Carmack and remanded to the lower court.

Conclusion

Perhaps the most striking aspect of the Alabama Supreme Court's thoroughly researched opinion was the viability jurisprudence it never mentioned: the United States Supreme Court's abortion cases, especially *Roe v. Wade*[29]/*Doe v. Bolton*[30] and *Planned Parenthood v. Casey*.[31] *Casey* in particular made much of viability's significance as the point at which a woman must be allowed to obtain an abortion "without undue interference from the State."[32] Since this case did not implicate the abortion right, of course, the Alabama Supreme Court was not required to follow *Casey* et al. But the fact that the court did not feel compelled to even mention such well-known and controversial case law suggests that those cases have not been influential in their adoption of viability.[33] *Mack v. Carmack* reflects one more state supreme court's decision to discard viability as medically or legally relevant to the treatment of the unborn child, in criminal and tort law unshaped by the U.S. Supreme Court.

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Endnotes

1 All facts in the case are taken from Mack v. Carmack, No.

1091040, 2011 Ala. LEXIS 141, at *1-*4 (Ala. Sept. 9, 2011) (per curiam).

2 265 So. 2d 596 (Ala. 1972).

3 *Mack*, 2011 Ala. LEXIS 141, at *11 (quoting *Huskey*, 265 So. 2d at 596).

4 Stanford v. St. Louis-S.F. Ry., 108 So. 566, 567 (Ala. 1926) (citation omitted).

5 *Mack*, 2011 Ala. LEXIS 141, at *12 (citation and internal quotation mark omitted).

6 *See id.*, n.5 at *11-*12.

7 280 So. 2d 758 (Ala. 1973).

8 *Mack*, 2011 Ala. LEXIS 141, at *14.

9 *Wolfe*, 280 So. 2d at 760 (citations to medical jurisprudence treatises omitted).

10 *Id.* at 760-61.

11 *Mack*, 2011 Ala. LEXIS 141, at *20.

12 300 So. 2d 354 (Ala. 1974).

13 *Mack*, 2011 Ala. LEXIS 141, at *21.

14 *Eich*, 300 So. 2d at 358.

15 *Id.* at 355.

16 Wolfe v. Isbell, 280 So. 2d 758, 761 (Ala. 1973) (citation omitted).

17 613 So. 2d 1241 (Ala. 1993).

18 613 So. 2d 1249 (Ala. 1993).

19 *Id.* at 1252.

20 *Id.*

21 Mack v. Carmack, 2011 Ala. LEXIS 141, at *28 (quoting 613 So. 2d at 1249 (Maddox, J., dissenting)).

22 *Mack*, 2011 Ala. LEXIS 141, at *28 (quoting 613 So. 2d at 1249 (Maddox, J., dissenting)).

23 *Mack*, 2011 Ala. LEXIS 141, at *32 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 55, at 369 (5th ed. 1984)).

24 *Mack*, 2011 Ala. LEXIS 141, at *38 (quoting Ala. Code § 13A-6-1(2) (1975)).

25 Ala. Code § 13A-6-1(3) (2011).

26 *Mack*, 2011 Ala. LEXIS 141, at *41 (quoting Huskey v. Smith, 265 So. 2d 596, 597-98 (Ala. 1972)).

27 *Mack*, 2011 Ala. LEXIS 141, at *41.

28 *Id.* at *42.

29 410 U.S. 113 (1973).

30 410 U.S. 179 (1973).

31 505 U.S. 833 (1992).

32 *Id.* at 846.

33 *See, e.g.*, Randy Beck, Gonzales, Casey *and the Viability Rule*, 103 Nw. U.L. Rev. 249, 251 (2009) ("The continuing discord over viability reflected in *Gonzales* highlights an issue that remains unsettled thirty-six years after *Roe*: Why a state may protect the life of a fetus after it reaches viability, but not before.").