

CHENAULT V. HUIE¹: DENYING THE EXISTENCE OF A LEGAL DUTY BETWEEN A MOTHER AND HER UNBORN CHILD

“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.”²

I. INTRODUCTION

When an unborn child is injured by its mother, and subsequently born alive, who should be protected? The Court of Appeals of Texas, in *Chenault v. Huie*,³ feared the slippery slope,⁴ and gave deference to the mother when it denied the existence of a legal duty between mother and fetus.⁵ Few cases⁶ have directly addressed a child’s tort action against her mother for prenatal substance abuse that resulted in injuries sustained while *en ventre sa mere*.⁷

This Note discusses the general background of a child’s right to sue for fetal injury and the liability of the individuals that cause the fetal harm. Specifically, this Note focuses on the fallacy of the Texas court’s⁸ refusal to establish a legal duty arising from the relationship of a mother to her unborn child.

II. BACKGROUND

Like the fetus who develops within her mother’s womb until she reaches

¹ 989 S.W.2d 474 (Tex. App. 1999, no writ).

² *Bonbrest v. Kotz*, 65 F.Supp. 138, 142 (D.D.C. 1946) (quoting Justice McGuire). “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.* (completing Justice McGuire’s thoughts).

³ 989 S.W.2d 474 (Tex. App. 1999, no writ).

⁴ *Chenault v. Huie*, 989 S.W.2d at 478. “[T]he recognition of a general legal duty of care owed by a pregnant woman to her fetus, which is a necessary prerequisite to imposing any tort liability on Huie, has far broader implications than simply holding drug-abusing mothers civilly liable to their later born children.” *Id.*

⁵ *Id.* “We conclude, therefore, that current law in Texas relating to negligent and grossly negligent conduct does not impose or encompass a general legal duty owed by a mother to her fetus.” *Id.*

⁶ See discussion *infra* Part IV. See also *State v. Gray*, 584 N.E.2d 710 (Ohio 1992). Gray, the mother, was indicted for child endangerment since she had given birth to a cocaine-addicted baby. *Id.* The Ohio Supreme Court denied the existence of the parent-child relationship since Gray “did not become a parent until the birth of the child.” *Id.* at 710-11. See generally Deborah Ann Bailey, Comment, *Maternal Substance Abuse: Does Ohio Have an Answer?* 17 U. DAYTON L. REV. 1019 (1992) (discussing the magnitude of the maternal substance abuse problem, as well as detailing maternal use of cocaine and the effects of that usage).

⁷ “In its mother’s womb.” BLACK’S LAW DICTIONARY 534 (6th ed. 1990).

⁸ *Chenault v. Huie*, 989 S.W.2d 474 (Tex. App. 1999, no writ).

maturity, the law concerning prenatal torts is also developing but has not yet matured. *Chenault*⁹ is the most recent case¹⁰ to consider whether a child may sustain a cause of action against a mother for prenatal injury.¹¹ To put this case in perspective, the following areas of law are discussed in relation to the elements within *Chenault*¹²: The Fetus as a Person; Parental Immunity; Third-Party Liability for Fetal Injury; Criminal Punishment for Fetal Abuse; and Public Policy.

A. *The Fetus as a Person*

Three different theories have evolved surrounding a child's right to sue based on a prenatal injury: Entity Theory,¹³ Viability Theory,¹⁴ and Biological

⁹ *Id.*

¹⁰ *Chenault* was decided on April 15, 1999.

¹¹ *Chenault*, 989 S.W.2d at 474. "In this case of first impression, we address the question of whether a woman may be held civilly liable for conduct engaged in while pregnant that causes injury to her later born child." *Id.*

¹² *Id.*

¹³ "[T]he unborn child was a part of the mother at the time of the injury." *Dietrich v. Northampton*, 138 Mass. 14, 17 (1884). See also Ron Beal, "Can I Sue Mommy?" *An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive*, 21 SAN DIEGO L. REV. 325, 327-31 (1984). Beal addresses the importance of the mother's body to pregnancy and its importance to the judiciary:

[T]he issue that will confront the courts is to determine when, once the medical community can find the causal relationship between the injuries of the child and the acts of a woman after conception and during prenatal development, a woman's responsibility should extend to such a result as a matter of public policy.

The crux of this decision will be whether the courts will hold as a matter of public policy that a woman should be held to a standard of conduct *toward her own body* long before the actual duty arises due to her continuing ability to conceive. Because of the fictional relationship that will be imposed between a woman and a "being" inside of her own body, the problem of knowledge of the existence of that being will be paramount.

Id. at 364 (emphasis in original).

¹⁴ A viable child is "one capable of living outside of the womb." *Bonbrest v. Kotz*, 65 F.Supp. 138, 140 (D.D.C. 1946). The *Bonbrest* court further states that a human being "has, if viable, its own bodily form and members, manifests all of the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems and is capable now of being ushered into the visible world." *Id.* at 141. See also Judith Kahn, Note, *Of Woman's First Disobedience: Forsaking a Duty of Care to her Fetus--Is this a Mother's Crime?*, 53 BROOK. L. REV. 807, 810-15 (1987) (discussing the legal status of the fetus). Kahn further describes the dilemma facing the judiciary: "[t]oday, scientific advancements indicate that using viability as the sole determinant of the potentiality of human life is medically

Theory.¹⁵ Entwined within these theories is the “born alive” doctrine.¹⁶

1. Entity Theory

The first case to consider whether a child could sustain an action for prenatal injury occurred in 1884,¹⁷ and was argued before the esteemed Justice Oliver Wendell Holmes.¹⁸ The case involved a pregnant woman who miscarried after falling on a defect in the highway.¹⁹ Since the injury occurred to the mother, Holmes found no cause of action allowable from the fetus.²⁰

unsound. Doctors and medical experts agree that viability is an indeterminate, fluid and shifting concept.” *Id.* at 812.

¹⁵ See James Andrew Freeman, Comment, *Prenatal Substance Abuse: Texas, Texans and Future Texans Can’t Afford It*, 37 S. TEX. L. REV. 539, 564-66 (1996) (discussing the development of fetal rights under the common law). Freeman reconciled the three theories: “[T]he ‘biological theory’ which made no distinction between viability and nonviability, but instead triggered liability if the fetus was born alive regardless of when the fetal injury occurred.” *Id.* at 564.

¹⁶ See *id.* at 567. (“[T]he first prerequisite to fetal rights is the necessity for the child to be born alive.”). See also *Dietrich v. Northampton*, 138 Mass. 14 (1884). The long history of the born-alive doctrine is evidenced by Holmes’ opinion, in which he states, “Lord Coke’s rule requires that the woman be quick with child, which, as this court has decided, means more than pregnant, and requires that the child shall have reached some degree of quasi independent life at the moment of the act.” *Id.* at 16. See also *Hughes v. State*, 868 P.2d 730 (Okla. Crim. App. 1994). The *Hughes* court chastises the history of the doctrine by stating:

[T]he antiquity of a rule is no measure of its soundness. “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past” . . . Medical science now . . . provide[s] competent proof as to whether the fetus was alive at the time of a defendant’s conduct and whether [her] conduct was the cause of [the injury]

Id. at 733.

¹⁷ *Dietrich v. Northampton*, 138 Mass. 14 (1884).

¹⁸ Oliver Wendell Holmes (1841-1935) served on the Massachusetts Supreme Judicial Court from 1882-1902, and he wrote nearly one thousand opinions before President Theodore Roosevelt appointed Holmes to the United States Supreme Court. Sheldon M. Novick, *Introduction to the Dover Edition of OLIVER WENDELL HOLMES, THE COMMON LAW* iii, xx-xxi (General Publishing Company, Ltd. 1991).

¹⁹ *Dietrich*, 138 Mass. at 14-15. “There was testimony, however, based upon observing motion in its limbs, that it did live for ten or fifteen minutes.” *Id.* at 15. It is interesting to note this sentence, since it validates the strong history of the born-alive doctrine and the impact of Holmes’ decision on fetal rights.

²⁰ *Id.* at 17. Holmes reasoned:

If it should be argued that an action could be maintained in the

Holmes considered the fetus to be part of the mother²¹ and did not regard the fetus as a person.²² Therefore, the child had no standing to sue.²³ It would be more than sixty years after Holmes' decision before the judiciary finally recognized a cause of action for prenatal injury.²⁴ The viability theory was born.²⁵

2. Viability Theory

In order to defeat Holmes' entity theory, it was necessary to recognize

case supposed, and that, on general principles, an injury transmitted from the actor to a person through his own organic substance, or through his mother, before he became a person, stands on the same footing as an injury transmitted to an existing person through other intervening substances outside him, the argument in this general form is not helped, but hindered . . . For, apart from the question of remoteness, the argument would not be affected by the degree of maturity reached by the embryo at the moment of the organic lesion or wrongful act.

Id. at 16.

²¹ It is interesting to note that Holmes' father was a well-respected physician and lecturer at Harvard Medical School. See Sheldon M. Novick, *Introduction to the Dover Edition of OLIVER WENDELL HOLMES, THE COMMON LAW* at iv (1991).

²² *Dietrich*, 138 Mass. at 14.

If a woman, between four and five months advanced in pregnancy, by reason of falling upon a defective highway, is delivered of a child, who survives his premature birth only a few minutes, such child is not a "person," within the meaning of the [law], . . . for the loss of whose life an action may be maintained against the town by his administrator.

Id.

²³ *Dietrich v. Northampton*, 138 Mass. 14, 16 (1884). Holmes concluded:

[T]he unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning; and have not found it necessary to consider the question of remoteness or the effect of those cases which declare that the statute liability of towns for defects in highways is more narrowly restricted than the common law liability for negligence.

Id. at 17.

²⁴ See *Bonbrest v. Kotz*, 65 F. Supp. 138, 143 (D. D. C. 1946). Bette Gay Bonbrest was removed from her mother's uterus through the professional malpractice of J. Kotz. *Id.* at 139. Justice McGuire addressed the slippery slope argument by stating "[t]hat a right of action in cases of this character would lead to others brought in bad faith and might present insuperable difficulties of proof—a premise with which I do not agree—is no argument." *Id.* at 142-43.

²⁵ So to speak.

the fetus as a separate being from the mother.²⁶ The perception of the fetus as its own person was predicated upon the born-alive doctrine.²⁷ Although the fetus was within the womb, it became viable when it was capable of living outside of the uterus.²⁸ Scientific advancements have progressively reduced the point of viability such that some jurisdictions are willing to legislate the exact week a child is viable.²⁹ The measure of viability is extremely important with regard to a cause of action for fetal injury, since a viable child is generally considered a person.³⁰ Unless the fetus is legally recognized as a person, they

²⁶ See *Bonbrest*, 65 F. Supp. at 140-42. The *Bonbrest* court attacked Holmes' entity theory:

As to a viable child being 'part' of its mother—this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extra-uterine life—and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a 'part' of the mother in the sense of a constituent element—as that term is generally understood. Modern medicine is replete with cases of living children being taken from dead mothers.

Id. at 140.

²⁷ See *supra* note 16 and accompanying text. See also Teresa Foley, *Dobson v. Dobson: Tort Liability for Expectant Mothers?* 61 SASK. L. REV. 177 (1998). This article offers a discussion on Canadian law, with respect to tort liability of mothers, through an analysis of the *Dobson* case. Cynthia Dobson was negligently operating a motor vehicle and caused fetal injury to her son Ryan. *Id.* at 178. The *Dobson* court needed to determine whether Ryan had the legal capacity to sue his own mother for his prenatal injuries. *Id.* Before holding that the legislature should decide, the Court reasoned that “[w]hen the unborn child becomes a living person and suffers damage as a result of prenatal injuries caused by the fault of the negligent motorist the cause of action is completed.” *Id.* at 179 (quoting [1972] 2 O.R. 686, 702 (Ont.H.C.)).

²⁸ *Bonbrest*, 65 F. Supp. at 140. The court recognized that fetal dependence on sustenance did not automatically mean that the fetus was part of the mother. *Id.* See also Bailey, *supra* note 6. Bailey states “that the unborn viable fetus was a child under the provision of Ohio’s child abuse statute.” *Id.* at 1025 (citing *In re Ruiz*, 500 N.E.2d 935, 938 (Ohio C. P. 1986)).

²⁹ See, e.g., H.B. 1947, 82nd Reg. Sess. (Ark. 1999) (amends code to change presumption of viability from the 25th week to 24th week of pregnancy).

³⁰ According to the Ohio 1999 Session Law Service, an adopted resolution that alters Ohio Revised Code section 2901.01(B)(1)(a) defines a person to “include all of the following: (i) An individual, corporation, business trust, estate, trust, partnership, and association; (ii) An unborn human who is viable.” 1999 Ohio Laws 15. The enactment further defines:

(i) “Unborn human” means an individual organism of the species *homo sapiens* from fertilization until live birth. (ii) “Viable” means the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support.

Id.

have no standing within the courts to bring suit.³¹

3. Biological Theory

The biological theory mirrors the viability theory except that a child³² may bring a cause of action for injuries sustained from the moment of fertilization.³³ This theory applies primarily to third-party liability for fetal injury.³⁴

B. Parental Immunity

Parental immunity is a means by which a parent may avoid legal liability based solely on the existence of a relationship between parent and child.³⁵ Virtually all jurisdictions³⁶ have abrogated parental immunity to varying degrees.³⁷ In a surprising opinion,³⁸ the *Chenault* court contended that

³¹ “‘Standing to sue’ means that party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.” BLACK’S LAW DICTIONARY 1405 (6th ed. 1990).

³² The child must be born alive. *See supra* note 16 and accompanying text.

³³ *See Freeman, supra* note 15, at 564. *See also* *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960). Sean Smith was injured in an automobile accident while in his mother’s womb. *Id.* at 498. As a result of the injury, Sean was born with deformities in his legs and feet. *Id.*

The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress.

Id. at 504.

³⁴ *See* discussion *infra* Part II.C.

³⁵ BLACK’S LAW DICTIONARY 1114 (6th ed. 1990).

³⁶ Louisiana is the only state to retain parental immunity. *See Bondurant v. Bondurant*, 386 So.2d 705 (La. Ct. App. 1980) (retaining parental immunity as proscribed by LA. REV. STAT. ANN. § 571 (West 1999)).

³⁷ Current status of parental immunity throughout the United States:

ALABAMA, *Hurst v. Capitell*, 539 So.2d 264, 266 (Ala. 1989) (creating an exception to parental immunity for sexual abuse).

ALASKA, *Hebel v. Hebel*, 435 P.2d 8, 15 (Alaska 1967) (creating an exception to parental immunity for negligent driving).

ARIZONA, *Broadbent v. Broadbent*, 907 P.2d 43 (Ariz. 1995) (abrogating parental immunity).

ARKANSAS, *Robinson v. Robinson*, 914 S.W.2d 292 (Ark. 1996) (creating an exception to parental immunity for willful tort committed by parent).

CALIFORNIA, *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971) (abrogating parental immunity).

COLORADO, *Terror Min. Co., Inc. v. Roter*, 866 P.2d 929 (Colo. 1994) (creating an

exception to parental immunity for negligence committed by parent in the pursuit of business or employment activities).

CONNECTICUT, *Ascutto v. Farricielli*, 711 A.2d 708 (Conn. 1998) (creating exceptions to parental immunity for negligence committed by parent in the pursuit of business or employment activities and for sexual abuse).

DELAWARE, *Williams v. Williams*, 369 A.2d 669 (Del. 1976) (creating an exception to parental immunity for negligence committed by parent to the limits of parental automobile liability insurance coverage).

D.C., *Rousey v. Rousey*, 528 A.2d 416 (D.C. 1987) (declining to adopt doctrine of parental immunity).

FLORIDA, *Herzfeld v. Herzfeld*, 732 So. 2d 1102 (Fla. Dist. Ct. App. 1999), review granted Aug. 23, 1999 No. 95,054 (creating exceptions to parental immunity for negligence committed by parent to the limits of parental liability insurance coverage and for sexual abuse).

GEORGIA, *Yates v. Lowe*, 348 S.E.2d 113 (Ga. Ct. App. 1986) (creating an exception to parental immunity for negligence committed by parent to the limits of parental liability insurance coverage).

HAWAII, *Petersen v. City and County of Honolulu*, 462 P.2d 1007 (Haw. 1969).

IDAHO, *Farmer's Ins. Group v. Reed*, 712 P.2d 550 (Idaho 1985) (creating an exception to parental immunity for negligence committed by parent to the limits of parental automobile liability insurance coverage).

ILLINOIS, *Nudd v. Matsoukas*, 131 N.E.2d 525 (Ill. 1956) (creating exception for willful and wanton misconduct by the parent).

INDIANA, *Fager v. Hundt*, 610 N.E.2d 246 (Ind. 1993) (creating exception for intentional felonious act of parent).

IOWA, *Frideres v. Schiltz*, 540 N.W.2d 261 (Iowa 1995) (creating an exception to parental immunity for sexual abuse).

KANSAS, *Nocktonick v. Nocktonick*, 611 P.2d 135 (Kan. 1980) (creating an exception to parental immunity for negligence in operation of motor vehicle).

KENTUCKY, *Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. 1970) (creating exceptions for reasonable expressions of parental authority and for parental discretion over care of the child).

LOUISIANA, *Bondurant v. Bondurant*, 386 So.2d 705 (La. Ct. App. 1980) (retaining parental immunity as proscribed by LA. REV. STAT. ANN. § 571 (West 1999)).

MAINE, *Black v. Solnitz*, 409 A.2d 634 (Me. 1979) (creating an exception to parental immunity for negligence committed by parent to the limits of parental insurance coverage).

MARYLAND, *Hatzinicolos v. Protopapas*, 550 A.2d 947 (Md. 1988) (creating an exception to parental immunity for negligence committed by parent in the pursuit of partnership business or employment activities).

MASSACHUSETTS, *Sorensen v. Sorensen*, 339 N.E.2d 907 (Mass. 1975) (parental immunity for negligence committed by parent to the limits of parental automobile liability insurance coverage).

MICHIGAN, *Plumley v. Klein*, 199 N.W.2d 169 (Mich. 1972) (limiting parental immunity to reasonable expressions of parental authority and for parental discretion over care of

the child).

MINNESOTA, *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980) (abrogating parental immunity and creating the reasonable parent standard).

MISSISSIPPI, *Glaskox v. Glaskox*, 614 So.2d 906 (Miss. 1992) (creating an exception to parental immunity for negligent operation of motor vehicle).

MISSOURI, *Hartman v. Hartman*, 821 S.W.2d 852 (Mo. 1991) (abrogating parental immunity and creating the reasonable parent standard).

MONTANA, *Transamerica Ins. Co. v. Royle*, 656 P.2d 820 (Mont. 1983) (creating an exception to parental immunity for negligent operation of motor vehicle).

NEBRASKA, *Clasen v. Pruhs*, 95 N.W. 640 (Neb. 1903) (creating an exception to parental immunity for inhuman and cruel treatment).

NEVADA, *Rupert v. Stienne*, 528 P.2d 1013 (Nev. 1974) (declining to adopt doctrine of parental immunity).

NEW HAMPSHIRE, *Briere v. Briere*, 224 A.2d 588 (N.H. 1966) (creating an exception to parental immunity for negligence committed by parent to the limits of parental insurance coverage).

NEW JERSEY, *France v. A.P.A. Transport Corp.*, 267 A.2d 490 (N.J. 1970) (creating an exception to parental immunity for negligent operation of motor vehicle).

NEW MEXICO, *Guess v. Gulf Ins.*, 627 P.2d 869 (N.M. 1981) (abrogating parental immunity).

NEW YORK, *Gelbman v. Gelbman*, 245 N.E.2d 192 (N.Y. 1969) (creating an exception to parental immunity for nonwillful tort committed by parent).

NORTH CAROLINA, *Carver v. Carver*, 314 S.E.2d 739 (N.C. 1984) (creating an exception to parental immunity for negligent operation of motor vehicle).

NORTH DAKOTA, *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. 1967) (abrogating parental immunity).

OHIO, *Kirchner v. Crystal*, 474 N.E.2d 275 (Ohio 1984) (abrogating parental immunity).

OKLAHOMA, *Unah v. Martin*, 676 P.2d 1366 (Okla. 1984) (creating an exception to parental immunity for negligence committed by parent to the limits of parental automobile liability insurance coverage).

OREGON, *Chaffin v. Chaffin*, 397 P.2d 771 (Or. 1964) (creating exception for willful and wanton misconduct by the parent).

PENNSYLVANIA, *Falco v. Pados*, 282 A.2d 351 (Pa. 1971) (abrogating parental immunity).

RHODE ISLAND, *Silva v. Silva*, 446 A.2d 1013 (R.I. 1982) (creating an exception to parental immunity for negligent operation of motor vehicle).

SOUTH CAROLINA, *Elam v. Elam*, 268 S.E.2d 109 (S.C. 1980) (abrogating parental immunity).

TENNESSEE, *Broadwell v. Holmes*, 871 S.W.2d 471 (Tenn. 1994) (limiting parental immunity to reasonable expressions of parental authority, to parental discretion over care of the child, and to parental supervision).

TEXAS, *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971) (limiting parental immunity to reasonable expressions of parental authority, to parental discretion over care of the child).

UTAH, *Elkington v. Foust*, 618 P.2d 37 (Utah 1980) (creating an exception to parental

parental immunity presupposes the existence of a duty, and therefore, an absence of duty precludes the need to consider parental immunity.

C. Third-Party Liability for Fetal Injury

Third-party liability was first recognized in *Bonbrest v. Kotz*.³⁹ The Bonbrest child⁴⁰ was negligently removed from her mother's womb through professional malpractice.⁴¹ The court allowed a right of action for a child, born alive, to sue the negligent third party, regardless of the gestational stage that the injury occurred.⁴²

immunity for sexual abuse)

VERMONT, *Wood v. Wood*, 370 A.2d 191 (Vt. 1977) (declining to adopt doctrine of parental immunity).

VIRGINIA, *Smith v. Kauffman*, 183 S.E.2d 190 (Va. 1971) (creating an exception to parental immunity in automobile accident cases).

WASHINGTON, *Chhuth v. George*, 719 P.2d 562 (Wash. 1986) (creating an exception to parental immunity for willful and wanton misconduct by the parent).

WEST VIRGINIA, *Courtney v Courtney*, 413 S.E.2d 418 (W. Va. 1991) (creating exceptions to parental immunity for negligence committed by parent to the limits of parental automobile liability insurance coverage and for willful misconduct by the parent).

WISCONSIN, *Goller v. White*, 122 N.W.2d 193 (Wis. 1963) (limiting parental immunity to exercises of parental authority and parental discretion over care of the child).

WYOMING, *Dellapenta v. Dellapenta*, 838 P.2d 1153 (Wyo. 1992) (abrogating parental immunity in cases of ordinary negligence in the operation of a motor vehicle).

³⁸ Nearly one-third of Appellant's Brief is dedicated to the inapplicability of parental immunity. See Brief for Appellant at 23-31, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV).

The Doctrine of Parental Immunity was not intended to protect the type of wil[ly]ful, intentional, and foreseeable injury to result to a child at the hands of its parents, and then provide protection to the parent. Even in the unlikely event that the court were to hold that Appellee's actions fall within the intended scope of the Parental Immunity Doctrine, her actions are still not immune since they fall within a specific exception previously established and recognized by the Texas courts.

Id. at 31. (referring to *Liberty Mut. Ins. Co. v. Soignet*, 1994 WL 720014, at *11 (Tex. App. 1994, judgment set aside) (holding that willful conduct is the "result of conscious indifference to the rights, safety or welfare of the person affected by it.").

³⁹ 65 F.Supp. 138, 143 (D.D.C. 1946).

⁴⁰ Bette Gay Bonbrest. Available in WL synopsis of *Bonbrest v. Kotz*, 65 F.Supp. 138 (D.D.C. 1946).

⁴¹ *Id.* at 139.

⁴² *Id.* at 141.

D. Criminal Punishment for Fetal Abuse

The prosecution of pregnant women for substance abuse helps women to find treatment and protects the health of the fetus.⁴³ All jurisdictions punish the use of controlled substances,⁴⁴ and the delivery of controlled substances to an unborn child is punishable in some jurisdictions.⁴⁵ One Michigan appellate court held that prenatal use of drugs is probative of future child neglect.⁴⁶ In addition, there is a trend, for criminal purposes, to include unborn humans within the definition of a person.⁴⁷ *In re Ruiz*⁴⁸ was decided at the Ohio trial court level. *Ruiz* held that a viable fetus qualifies as a child for the purposes of child abuse statutes.⁴⁹ As discussed *supra*, parental immunity does not protect a parent from willful misconduct.⁵⁰

⁴³ See Tiffany M. Romney, Comment, *Prosecuting Mothers of Drug-Exposed Babies: The State's Interest in Protecting the Rights of a Fetus Versus the Mother's Constitutional Rights to Due Process, Privacy and Equal Protection*, 17 J. CONTEMP. L. 325 (1991). "Advocates of prosecution propose that the creation of crimes that punish women who endanger their fetuses would educate the public through 'the publicity of the trial, conviction, and sentencing.'" *Id.* at 329 (quoting Thompson, *The Criminalization of Maternal Conduct During Pregnancy: A Decision-Making Model for Lawmakers*, 64 IND. L.J. 357, 367 (1989)).

⁴⁴ It is beyond the scope of this Note to detail the plethora of crimes and penalties available throughout the United States for the use of controlled substances.

⁴⁵ See e.g., *Johnson v. State*, 578 So.2d 419 (Fla. Dist. Ct. App. 1991), *decision quashed by* 62 So. 2d 1288 (Fla. 1992) (finding, for the first time, a woman guilty of gestational substance abuse). See also Christina von Cannon Burdette, Note, *Fetal Protection – An Overview Recent of State Legislative Response to Crack Cocaine Abuse by Pregnant Women*, 22 MEM. ST. U. L. REV. 119 (1991) (discussing the delivery of drugs to minors). See also Catherine A. Kyres, Note, *A "Cracked" Image of my Mother/Myself? The Need for a Legislative Directive Proscribing Maternal Drug Abuse*, 25 NEW ENG. L. REV. 1325 (1991) (discussing maternal drug abuse in relation to child welfare statutes). "Absent an express statutory definition, courts have had to determine whether the terms 'neglected,' 'abused,' or 'dependent' encompass children born exposed to drugs *in utero*." *Id.* at 1332.

⁴⁶ *Matter of Baby X*, 293 N.W.2d 736, 739 (Mich. Ct. App. 1980). "Since a child has a legal right to begin life with a sound mind and body, it is within this best interest to examine all prenatal conduct bearing on that right." *Id.* See also Mary J. Pizzo, Comment, *Prenatal Substance Abuse: A Call for Legislative Action in Maryland*, 22 U. BALT. L. REV. 329 (1993) (discussing the criminal liability of the mother for prenatal abuse).

⁴⁷ A person includes "an unborn human who is viable." See, e.g., OHIO REV. CODE ANN. § 2901.01 B(1)(a)(ii) (West 1999).

⁴⁸ 500 N.E.2d 935 (Ohio C.P. 1986). See generally Deborah Ann Bailey, Comment, *Maternal Substance Abuse: Does Ohio Have an Answer?*, 17 U. DAYTON L. REV. 1019 (1992) (commenting on the problems facing Ohio courts when dealing with maternal substance abuse).

⁴⁹ *Ruiz*, 500 N.E.2d at 939. Luciano Ruiz was born positive for cocaine and heroin from a drug-addicted mother. *Id.* at 936.

⁵⁰ See Alison M. Leonard, Note, *Fetal Personhood, Legal Substance Abuse, and Maternal*

E. Public Policy

According to the GAO,⁵¹ each drug-impaired child costs the United States economy approximately one million dollars.⁵² In order to abate the problem, there is a trend to protect fetal rights.⁵³ These proposals pertain to

Prosecutions: Child Protection or "Gestational Gestapo", 32 NEW ENG. L. REV. 615 (1998) (exploring the issues surrounding prosecution of women for injuries sustained by their fetus as a result of their substance abuse). See also *Whitner v. State*, No. 24468, 1996 WL 393164 (S.C. Sup. Ct. July 15, 1996) opinion withdrawn and superceded on rehearing by *Whitner v. State*, 492 S.E. 2d 777 (S.C. 1997) (finding *Whitner* guilty of child neglect after giving birth to a cocaine-positive baby).

⁵¹ General Accounting Office.

⁵² Victoris J. Swenson, et al., *Pregnant Substance Abusers: A Problem that Won't Go Away*, 25 ST. MARY'S L.J. 623, 631 (1994).

⁵³ A sample of proposed legislation for some states in 1998 & 1999:

ARKANSAS, H.R. 1014 requests a study to determine the age at which unborn babies begin to feel pain; H.R. 1014, 82nd Leg., (Ark. 1999) (enacted). H.B. 1947 amends code to change presumption of viability from 25th week to 24th week of pregnancy H.B. 1947, 82nd Leg. (Ark. 1999). H.B. 1613 creates prenatal and early childhood nurse home visitation program. H.B. 1613, 82nd Leg. (Ark. 1999).

CALIFORNIA, A.B. 1071 allocates 5% of funds from tobacco settlement for health care to uninsured children and prenatal care. A.B. 1071, 1999-00 Leg. (Cal. 1999).

COLORADO, H.B. 1018 provides prenatal care for undocumented aliens. H.B. 1018, 62nd Leg., 1st Reg. Sess. (Colo. 1999) (enacted).

CONNECTICUT, H.B. 5718 provides prosecution for crime of violence against unborn child. H.B. 5718, 1999 Leg. (Conn. 1999).

DELAWARE, S.B. 156 requires insurance coverage for prescription strength prenatal vitamins. S.B. 156, 140th Leg. (Del 1999).

HAWAII, H.B. 1346 creates offense of endangering the welfare of a fetus and imposes probation for 6-9 months for the mother. H.B. 1346, 20th Leg. (Haw. 1999).

ILLINOIS S.B. 739 allows for reckless homicide of an unborn child by the operation of snow-mobiles or water craft. S.B. 739, 91st Leg. (Ill. 1999) (enacted).

KANSAS, H.B. 2319 concerns humane treatment of the fetus. H.B. 2319, 78th Leg. (Kan. 1999).

KENTUCKY, H.B. 292 includes an unborn child in utero in the definition of human being. H.B. 292, 1998 Leg., Reg. Sess. (Ky. 1998). H.B. 293 allows for prosecution of wrongful death of an unborn child without regard for gestational stage. H.B. 293, 1998 Leg., Reg. Sess. (Ky. 1998).

LOUISIANA, S.B. 225 relates to the civil rights of an unborn child. S.B. 225, 1999 Leg. (La. 1999).

MAINE, H.P. 805 creates categories for crimes against unborn children. H.P. 805, 119th Leg., 1st Reg. Sess. (Me. 1999).

MASSACHUSETTS, H.B. 816 defines viability of a fetus, H.B. 816, 181st Leg., 1999 Reg. Sess. (Mass. 1999); S.B. 270 establishes family outreach for children prenatal

social policy as well as all the areas of law discussed *supra*.⁵⁴ States such as Ohio have established substance abuse assessment and treatment referral

through age five, S.B. 270, 181st Leg., 1999 Reg. Sess. (Mass. 1999); H.B. 780 provides public information for improvement of prenatal care, H.B. 780, 181st Leg., 1999 Reg. Sess. (Mass. 1999); S.B. 456 provides pregnant women with information for improved prenatal care, S.B. 456, 181st Leg., 1999 Reg. Sess. (Mass. 1999).

MONTANA, H.B. 600 adopts standards to protect children from prenatal exposure to pollutants. H.B. 600, 56th Leg., Reg. Sess. (Mont. 1999).

NEBRASKA, L.B. 111 allows for prosecution of wrongful death of an unborn child without regard for gestational stage. L.B. 111, 96th Leg., 1st Reg. Sess. (Neb. 1999).

NEW JERSEY, A.B. 2524 allows for prosecution of murder of a fetus. A.B. 2524, 208th Leg. (N.J. 1998).

NEW MEXICO, H.B. 844 provides prenatal care to uninsured residents. H.B. 844, 44th Leg., 1st Reg. Sess. (N.M. 1999).

NEW YORK, A.B. 6654 allows for prosecution of assault of an unborn child without regard for gestational stage. A.B. 6654, 222nd Leg. (N.Y. 1999).

PENNSYLVANIA, S.B. 608 requires health practitioners to disclose prenatal diagnosis policy. S.B. 608, 183rd Leg., 1999-00 Reg. Sess. (Pa. 1999).

SOUTH CAROLINA, H.B. 3863 includes unborn child in the definition of a person for certain crimes. H.B. 3863, 113th Leg. (S.C. 1999).

TEXAS, H.B. 181 establishes the beginning of life to be the moment of fertilization; H.B. 181, 76th Leg. (Tx. 1999). H.B. 682 relates to the death or injury of an unborn child; H.B. 682, 76th Leg. (Tx. 1999). S.B. 1725 establishes a neonatal and prenatal care outreach project for Medicaid recipients. S.B. 1725, 76th Leg. (Tx. 1999).

VERMONT, H.B. 357 establishes crimes against human fetus. H.B. 357, 65th Biennial Sess. (Vt. 1999).

VIRGINIA, H.J.R. 196 allows funding for prenatal care, H.J.R. 196, 1998 Sess. (Va. 1998); S.B. 198 allows for prosecution of murder of a fetus. S.B. 198, 1999 Sess. (Va. 1999).

WASHINGTON, S.B. 5390 provides prenatal care to increase healthy births. S.B. 5390, 56th 1st Reg. Sess. (Wash. 1999).

⁵⁴ See Rebekah R. Arch, Comment, *The Maternal-Fetal Rights Dilemma: Honoring a Woman's Choice of Medical Care During Pregnancy*, 12 J. CONTEMP. HEALTH L. & POL'Y 637 (1996). Arch discusses the reasons that women refuse recommended medical treatment, including religious convictions and fear. *Id.* at 642. "Physicians should regard any woman's refusal to consent to the treatment they recommend as a serious medical-legal dilemma and not as an occurrence which serves to merely prompt acquisition of a court order." *Id.* at 643. Arch concludes with:

As technological advances in fetal diagnosis and therapy continue, health care providers and health care institutions should also continue to create positively focused alternative methods of optimizing the outcome and minimizing the risk to patients whose ethics or moral values will not allow them to participate in every treatment that is recommended by their physician.

Id. at 673.

programs,⁵⁵ while states such as Texas have proposed prenatal outreach programs. While these programs enhance the chances that a child is born healthy, there is a long way to go before a uniform system is in place.⁵⁶

⁵⁵ Ohio Revised Code § 5111.017 provides:

The department of human services shall establish a program for substance abuse assessment and treatment referral for recipients of medical assistance under this chapter who are pregnant and are required by statute or rule of the department to receive medical services through a managed care organization. Each such pregnant woman shall be screened for alcohol and other drug use at her first prenatal medical examination.

The department of human services shall require each managed care organization providing services to medical assistance recipients pursuant to a contract with the department of human services to inform persons who will provide prenatal medical services to a pregnant recipient about the requirements of this section. The department also shall require persons providing prenatal medical services to a pregnant recipient pursuant to the managed care organization's contract with the department to do both of the following if the person providing prenatal medical services, following screening, determines the recipient may have a substance abuse problem: (A) Refer the recipient to an organization certified by the department of alcohol and drug addiction services for assessment; (B) Inform the recipient of the possible effects of alcohol and other drug use on the fetus.

OHIO REV. CODE ANN. § 5111.017 (West 1999).

⁵⁶ See Bonnie I. Robin-Vergeer, Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745 (1990). Robin-Vergeer opines about the state of legislation that is still accurate today, a decade later:

Unless legislation clearly delineates when officials may consider drug-exposed infants neglected and explicitly mandates reporting in such cases, there is no assurance that the children who are in real need of intervention will be protected. Because counties have been forced to grapple with increasing numbers of drug-exposed infants without comprehensive guidance from the state legislature, a child in need of protection may be ignored in one county, while a child with a fully functional family may be removed from his home in another. Moreover, without statutory guidelines, hospitals are free to either under- or over-report instances of maternal drug use and neonatal drug exposure. Screening and county intervention currently pivot on the luck of the draw. Action depends upon which side of the county line one lives and upon which hospital door is opened. Only a coherent and principled vision of when intervention on behalf of the drug-exposed infant is appropriate will result in like infants being treated alike.

III. STATEMENT OF THE CASE

A. *Statement of Facts*

Adeline Mary (Mattie) Huie was born on October 8, 1993 with cocaine and alcohol in her blood.⁵⁷ Molly Ann Huie, Mattie's mother, had used cocaine and other illegal narcotics throughout Mattie's prenatal development.⁵⁸ From her birth, Mattie experienced medical problems attributed to Huie's drug use, including cerebral palsy and other developmental problems.⁵⁹ Melissa Chenault, Huie's sister, was appointed as Mattie's managing conservator, and filed suit, as next friend,⁶⁰ to compensate Mattie for Huie's conduct.⁶¹

B. *Procedural History*

Chenault initiated this suit, as Mattie's conservator, in the 191st Judicial District Court in Dallas County, Texas.⁶² She named Molly Ann Huie, the mother, and Michael Anthony Riley, the putative father,⁶³ as parties to the

Id. at 755.

⁵⁷ *Chenault v. Huie*, 989 S.W.2d 474, 475 (Tex. App. 1999, no writ).

⁵⁸ *Id.* See also Brief for Appellant at 2, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV) (citing R. at 222.).

⁵⁹ *Chenault*, 989 S.W.2d at 475. See also Brief for Appellant at 3, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV) (citing R. at 222.).

⁶⁰ "One acting for benefit of infant, or other person not *sui juris* (person unable to look after his or her own interests or manage his or her own lawsuit), without being regularly appointed guardian." BLACK'S LAW DICTIONARY 1043 (6th ed. 1990).

⁶¹ *Chenault*, 989 S.W.2d at 475. "Chenault sought damages for past and future medical care, special education, physical and occupational therapy, loss of earning capacity, disfigurement, physical impairments, and past and future pain and suffering. She also sought punitive damages." *Id.* See also Brief for Appellant at 3-4, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV) (citing R. at 227.). "Even as she wields the shield of social conscience and the sword of moral indignation, Appellant unabashedly admits this case is about money, specifically Appellee's trust fund." Brief for Appellee at 20-21, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV). "Molly's trust money should be used for the damages to her child and should not be available to buy crack cocaine or to pay lawyers to file motions seeking judicial approval of maternal crack cocaine abuse." Brief for Appellant at 3, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV).

⁶² Brief for Appellant at 1, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV) (Hon. David K. Brooks presiding). "Appellant brought this suit for the real party in interest, Adeline Mary (Mattie) Huie, a minor, for permanent injuries caused by Molly Ann Huie, Mattie's mother[] . . ." *Id.* at 2 (citing R. at 222.).

⁶³ "The alleged or reputed father of a child born out of wedlock." BLACK'S LAW DICTIONARY 1237 (6th ed. 1990).

suit.⁶⁴ In response, Huie filed a motion for summary judgment⁶⁵ with a supporting brief.⁶⁶ After a hearing, the trial court granted the summary judgment without explanation.⁶⁷ Chenault nonsuited⁶⁸ the father and appealed.⁶⁹

⁶⁴ Brief for Appellant at 2, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV).

⁶⁵ *Id.* (citing R. at 39.). Summary Judgment was filed on July 19, 1995. *Id.* Chenault filed her response on August 30, 1995. *Id.* (citing R. at 92.).

⁶⁶ Brief for Appellee at 2, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV) (asserting that Texas does not recognize a cause of action against a mother for prenatal injury, and if Texas did recognize the cause of action, parental immunity would bar the claim). *Id.* at 2-3.

⁶⁷ Brief for Appellant at 6, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV). “Judge Brooks did not clearly specify the ground upon which he was granting summary judgment, therefore, Appellant must and will attack all theories advanced in the motion for summary judgment.” *Id.*

⁶⁸ “A term broadly applied to a variety of terminations of an action which do not adjudicate issues on the merits.” BLACK’S LAW DICTIONARY 1058 (6th ed. 1990). *See also* Brief for Appellant at 2, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV).

⁶⁹ Chenault identifies three points of error: 1. “The trial court erred in granting Appellee’s Motion for Summary Judgment . . .” Brief for Appellant at 2, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV). 2. “The trial court erred in granting Appellee’s Motion for Summary Judgment on the grounds that Texas has not recognized civil liability on the part of a mother for negligence causing prenatal injury to her child . . .” *Id.* 3. “The trial court erred in granting Appellee’s Motion for Summary Judgment on the grounds that Appellee’s actions were legally privileged under the Parental Immunity Doctrine . . .” *Id.* at 3.

Huie answers with two reply points: 1. “The trial court correctly granted Appellee’s Motion for Summary Judgment because there is no cause of action against a mother for prenatal injuries to her child.” Brief for Appellee at 2, *Chenault v. Huie*, 989 S.W.2d 474 (Tex. 1999) (No. 05-96-00279-CV). 2. “The trial court correctly granted Appellee’s Motion for Summary Judgment because the doctrine of parental immunity would bar the cause of action which Appellant seeks to create.” *Id.*

IV. ANALYSIS

The *Chenault* court spuriously refused to establish a legal duty⁷⁰ that would parallel the prevailing views⁷¹ of a child's right to sue for prenatal injury. A duty⁷² is the first element to a cause of action for negligence.⁷³ The term is closely related to, and sometimes used in conjunction with, the standard of care.⁷⁴ Foreseeability is inextricably associated with the standard of care.⁷⁵ To deny the existence of a duty from mother to fetus, the *Chenault*⁷⁶ court attacked three points of view with respect to foreseeability.⁷⁷

A. *Prior to Conception*

It is possible to find a party liable for prenatal injury years before the child was conceived.⁷⁸ This concept is on the slipperiest of slopes.⁷⁹ Every woman who could bear a child would be required to maintain a healthy

⁷⁰ "In negligence cases [duty] may be defined as an obligation, to which law will give recognition and effect, to comport to a particular standard of conduct toward another, and the duty is invariably the same, one must conform to legal standard of reasonable conduct in light of apparent risk." BLACK'S LAW DICTIONARY 505 (6th ed. 1990). Standard of care is further defined as "that degree of care which a reasonably prudent person should exercise in same or similar circumstances. If a person's conduct falls below such standard, he may be liable in damages for injuries or damages resulting from his conduct." BLACK'S LAW DICTIONARY 1404-5 (6th ed. 1990).

⁷¹ See discussion *supra* Part II and accompanying notes.

⁷² "A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164 (5th ed. 1984).

⁷³ "Negligence . . . is simply one kind of conduct." KEETON, *supra* note 72, § 30, at 164.

⁷⁴ Once again, the wisdom of Prosser and Keeton:

A failure on the person's part to conform to the standard required: a breach of the duty. These two elements go to make up what the courts usually have called negligence; but the term quite frequently is applied to the second alone. Thus it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.

Id.

⁷⁵ "If one could not reasonably foresee any injury as the result of one's act, or if one's conduct was reasonable in the light of what one could anticipate, there would be no negligence, and no liability." KEETON, *supra* note 72, § 43, at 280.

⁷⁶ *Chenault v. Huie*, 989 S.W.2d 474 (Tex. App. 1999, no writ).

⁷⁷ See *Chenault*, 989 S.W.2d at 477-8.

⁷⁸ See *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250 (Ill. 1977). The court found Mennonite Hospital liable for transfusing incompatible blood to Renslow eight years prior to her pregnancy, since it was foreseeable that a woman might become pregnant. *Id.* at 1253.

⁷⁹ *Chenault v. Huie*, 989 S.W.2d 474 (Tex. App. 1999, no writ).

reproductive condition, since it is reasonable to assume that a woman may get pregnant.⁸⁰ However, the facts of this case do not concern what could go wrong prior to conception. It is the *Chenault* court that takes it upon itself to speculate.⁸¹

B. *The Moment of Fertilization*

The *Chenault* court argues that a woman may be unaware she is pregnant,⁸² which would saddle her with the obligation to monitor her lifestyle *just in case* she is pregnant.⁸³ Consequently, her right to privacy would be infringed.⁸⁴ Ironically, this lack of awareness poses no barrier to third-party liability.⁸⁵ The *Chenault*⁸⁶ court described the “unique relationship”⁸⁷ between a

⁸⁰ *Chenault*, 989 S.W.2d at 477.

⁸¹ *See id.* “No duty currently imposed under Texas law has such far reaching ramifications on matters involving day to day personal decisions.” *Id.* at 477.

⁸² *Id.* at 477.

A woman’s knowledge of her pregnancy may depend on varying factors such as her health, general physical condition, and emotional state. In many cases a woman may not be aware she is pregnant until long after damage to the fetus has been done. Furthermore, a woman’s initial awareness of her pregnant condition may depend upon whether the pregnancy was intentional or unintentional. We perceive no justifiable reason for treating women who intended to become pregnant differently from those who did not.

Id.

⁸³ *Id.*

⁸⁴ *See generally* *Roe v. Wade*, 410 U.S. 113 (1973) (finding that a woman’s right to privacy is weighed against the compelling state interests to protect the unborn child and identifying viability as the moment that the state’s interest becomes compelling). *See also* Krista L. Newkirk, Note, *State-Compelled Fetal Surgery: The Viability Test is Not Viable*, 4 WM. & MARY J. WOMEN & L. 467 (1998). Newkirk discusses the potentially conflicting view of fetal surgery. *Id.* at 482. Does the state have a compelling interest to insure the healthiest newborns possible at the expense of *Roe*? *Id.*

It may be argued that the state has an economic interest in trying to guarantee that the healthiest children possible are born within its borders. This argument fails under the [biological theory] because it is in opposition to the argument opposing abortion. It would be inconsistent for the state to argue for the birth of children that are not wanted by their mothers, therefore posing an economic hardship on the state, while arguing that the state’s economic interest in preventing the cost of malformed children warrants violating a woman’s fundamental right of privacy.

Id. *See, e.g.,* *Griswold v. Connecticut*, 381 U.S. 479, 491 (1965) (recognizing the fundamental right of privacy in marriage).

⁸⁵ *See* discussion *supra* Part II.C.

mother and her unborn child beginning at the moment of conception for both Texas case law⁸⁸ and Texas proposed statutes.⁸⁹ The court's reasoning is a contradiction in terms. The court followed the biological theory⁹⁰ to extol the virtues of the unique relationship, but the court would not recognize that a duty exists because of that relationship.⁹¹

The court in *Bonte v. Bonte*⁹² concurs with the unique relationship between mother and fetus.⁹³ However, this relationship does not preclude the mother from being held to the same standard of care as attributed to her for children already born.⁹⁴ In a similar case,⁹⁵ the Texas Supreme Court held that

⁸⁶ *Chenault v. Huie*, 989 S.W.2d 474 (Tex. App. 1999, no writ).

⁸⁷ *Chenault*, 989 S.W.2d at 475. See Gerard M. Bambrick, Note, *Developing Maternal Liability Standards for Prenatal Injury*, 61 ST. JOHN'S L. REV. 592 (1987) (discussing maternal liability with respect to the civil context). Bambrick's discussion is the precursor to the *Chenault* decision: "Holding a mother to the same standard of conduct as a third person, while representing a mechanically correct convergence of current law regarding parental immunity and recovery for prenatal injury, fails to account for the uniqueness of the fetal-maternal relationship." *Id.* at 604. Compare Carolyn L. Andrews, Comment, *Parent-Child Torts in Texas and the Reasonable Prudent Parent Standard*, 40 BAYLOR L. REV. 113 (1988).

⁸⁸ See *Yangdell v. Delgado*, 471 S.W.2d 569, 570 (Tex. 1971) (holding that a child born alive may recover for damages without regard for the stage of gestation). See also Sam S. Kepfield, *Perinatal Substance Abuse: The Rhetoric and Reality of "Rights," and Beyond*, 1 CARDOZO WOMEN'S L.J. 49 (1993) (discussing maternal rights of privacy, autonomy, and integrity). "[Roe] balanced Texas' assertion that life began at conception and [Roe's] contention that the right to terminate a pregnancy should be unrestricted." *Id.* at 53.

⁸⁹ See generally H.B. 1382, 76th Leg. (Tex. 1999) (defining an individual to include "an unborn child at every stage of gestation in the uterus of the mother from fertilization until birth.")

⁹⁰ See discussion *supra* Part II.A.3.

⁹¹ *Chenault*, 989 S.W.2d at 478.

⁹² 616 A.2d 464 (N.H. 1992) (holding that a child born alive may bring suit against his or her mother for prenatal injury caused by the mother's negligence). "While we recognize that the relationship between mother and fetus is unique, we are not persuaded that based upon this relationship, a mother's duty to her fetus should not be legally recognized." *Id.* at 466.

⁹³ *Id.* The *Bonte* court summarizes:

We disagree that our decision today deprives a mother of her right to control her life during pregnancy; rather, she is required to act with the appropriate duty of care, as we have consistently held other persons are required to act, with respect to the fetus. The mother will be held to the same standard of care as that required of her once the child is born.

Id.

⁹⁴ The *Bonte* court reasoned:

If a child has a cause of action against his or her mother for negligence that occurred after birth and that caused injury to the child, it is neither logical, nor in accord with our precedent, to

a child may sue his parents for unreasonable exercise of parental authority for injuries received in an automobile accident.⁹⁶ The *Chenault* court still denied the duty.⁹⁷ “The life of the law has not been logic . . .”⁹⁸

The following public policy concerns set out in *Stallman v. Youngquist*⁹⁹ and followed by the *Chenault* court attest to the court’s predicament.

A legal right of a fetus to begin life with a sound mind and body assertable against a mother would make a pregnant woman the guarantor of the mind and body of her child at birth. As legal duty to guarantee the mental and physical health of another has never before been recognized in law. Any action which negatively impacted on fetal development would be a breach of the pregnant woman’s duty to her developing fetus. Mother and child would be legal adversaries from the moment of conception until birth.¹⁰⁰

The court further states that a mother will not disclose substance abuse or neglect for fear of liability.¹⁰¹ This assertion is ridiculous, since this case will

disallow the child’s claim against the mother for negligent conduct that caused injury to the child months, days, or mere hours before the child’s birth.

Id.

⁹⁵ See generally *Jilani v. Jilani*, 767 S.W.2d 671 (Tex. 1988) (reasoning that the action will not threaten parental authority or discretion (referring to parental immunity parameters set forth in *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971) (holding that a parent is immune from suit for the discharge of parental authority))).

⁹⁶ See *Jilani*, 767 S.W.2d at 673.

⁹⁷ *Chenault*, 989 S.W.2d at 478.

⁹⁸ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (General Publishing Company, Ltd. 1991) (1881).

⁹⁹ 531 N.E.2d 355 (Ill. 1988) (finding no cause of action by a fetus, born alive, against its mother for unintentional infliction of prenatal injuries from an automobile accident). See also, *Cullotta v. Cullotta*, 678 N.E.2d 717 (Ill. App. Ct. 1997) (holding that no cause of action may be brought against a mother for prenatal negligence).

¹⁰⁰ *Stallman*, 531 N.E.2d at 359.

¹⁰¹ *Chenault*, 989 S.W.2d at 478. “Fearing civil liability, some pregnant women may never reveal critical facts about their conduct to their physicians, resulting in less than adequate prenatal care.” *Id.*

allow a mother to abuse her fetus and take no responsibility for her actions.¹⁰²

In the Matter of W.A.B., the Texas court of Appeals recognized that “[a] mother’s use of drugs during the pregnancy is conduct which endangers the physical and emotional well-being of the child.”¹⁰³ *W.A.B.*¹⁰⁴ recognized the breach of duty and subsequently terminated the mother’s parental rights.¹⁰⁵ Amazingly, the *Chenault* court did not give credence to this finding.¹⁰⁶

The first case to consider the reasonableness¹⁰⁷ of parental discretion was *Grodin v. Grodin*.¹⁰⁸ *Grodin* applied a balancing test that measured the reasonableness of the risk of harm in terms of the utility of a parent’s conduct in relation to the magnitude of the risk created. In the event the conduct was unreasonable, parental immunity would be unavailable.¹⁰⁹ If the conduct were reasonable, then immunity would be available.¹¹⁰

Chenault offered an overbroad balancing test¹¹¹ that successfully dodged¹¹² the issue of establishing a standard of care,¹¹³ even though this court acknowledged “that Huie’s conduct would likely, if not unquestionably, be found unreasonable under any standard of care.”¹¹⁴ The court missed the irony of its own opinion. The primary reason the court denied the duty is based on the broad implications in establishing a standard of care,¹¹⁵ yet the court had no trouble recognizing unreasonable behavior.¹¹⁶

C. Actual Knowledge

In the event that a mother has actual knowledge¹¹⁷ of her pregnancy,

¹⁰² See discussion *supra* Part II.B.

¹⁰³ *In the Matter of W.A.B.*, 979 S.W.2d 804 (Tex. App. 1998, no writ).

¹⁰⁴ *Id.* at 806.

¹⁰⁵ The court based their findings on the mother’s criminal history, imprisonment, and illegal drug use during and after pregnancy. *Id.* at 807.

¹⁰⁶ See *Chenault*, 989 S.W.2d at 478.

¹⁰⁷ The court borrowed the term from *Plumley v. Klein*, 199 N.W.2d 169, 169 (Mich. 1972).

¹⁰⁸ 301 N.W.2d 869 (Mich. Ct. App. 1980). The child brought suit against his mother for damage to his teeth as a result of mother’s use of medication during pregnancy. *Id.* at 869.

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ *Chenault*, 989 S.W.2d at 478. The court weighs “the ‘social utility,’ the burden of guarding against injury, and the consequences of placing a legal burden on a pregnant woman.” *Id.*

¹¹² “These matters are uniquely within the legislature, not the judiciary.” *Id.*

¹¹³ See *id.*

¹¹⁴ *Id.*

¹¹⁵ See *id.*

¹¹⁶ See *supra* note 87

¹¹⁷ See Joseph S. Badger, Note, *Stallman v. Youngquist* “No You Can’t Sue Mommy in

logic dictates that she take care of her body in a reasonable manner in order to maximize the health of the child.¹¹⁸ However, “the life of the law has not been logic . . .”¹¹⁹ The reasonable parent standard has been adopted by several jurisdictions.¹²⁰ This standard measures whether a mother has acted as a prudent pregnant woman would act given the circumstances of her pregnancy. This is the point at which the *Chenault* court¹²¹ is unwilling to venture.¹²² The legislature has clearly established standards of behavior with respect to drug abuse and child abuse.¹²³ The legislature has further established outreach programs to enable uninsured mothers an opportunity to access prenatal care.¹²⁴ The lawmakers are setting a higher standard for childcare out of a concern for the next generation, but *Chenault’s*¹²⁵ decision has gone against current logic,¹²⁶ because *Chenault* rejected the reasonable parent standard.¹²⁷

Illinois;” *The Illinois Supreme Court Rejects Maternal Prenatal Civil Liability*, 11 N.ILL. U. L. REV. 409 (1991) (detailing the *Stallman* decision). “If . . . the standard imposed a duty of care on a woman only when she had actual knowledge of her pregnancy . . . a woman could act with impunity towards her fetus at precisely the same time where the fetus is most susceptible to injury.” *Id.* at 435. *See also* Beal, *supra* note 13. “A standard which assumes a woman knows when she has conceived may result in the imposition of a duty on a woman to use care in the treatment of her body long before conception actually occurs.” *Id.* at 364-5. *See supra* note 79 for a reminder of this can of worms.

¹¹⁸ *See* Pizzo, *supra* note 46 at 342. “Once a woman has decided to carry her pregnancy to term she assumes the duty to use reasonable care in ensuring the safety of the fetus.” *Id.* *See also* Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L. J. 1401 (1990) (discussing the insufficiency of prosecution for prenatal drug abuse). “[E]ven if the woman knew the hazards of cocaine, she does not actively intend to harm her child as does one who beats or molests a child. Addicts take cocaine because they are dependent on it, not because they want to hurt their fetuses.” *Id.* at 1435. *Compare* *Zimmerman v. Wisconsin*, No. 96-CF-525 (Wis. Cir. Ct. 1996) *rev’d* 596 N.W. 2d 490 (Wisc. App. 1999) (finding Zimmerman guilty of attempted first-degree intentional homicide and first-degree reckless homicide). Zimmerman was quoted as saying, “I’m going to go home and keep drinking and drink myself to death, and I’m going to kill this thing because I don’t want it anyways.” Don Terry, *In Wisconsin, A Rarity of a Fetal-Harm Case*, N.Y. TIMES, Aug. 17, 1996, at A6.

¹¹⁹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (General Publishing Company, Ltd. 1991) (1881).

¹²⁰ *See supra* note 37.

¹²¹ *Chenault v. Huie*, 989 S.W.2d 474 (Tex. App. 1999, no writ).

¹²² *See id.* “Inconsistent and unpredictable jury verdicts would render a ‘reasonable pregnant woman’ standard meaningless.” *Id.*

¹²³ *See supra* note 55.

¹²⁴ *See id.*

¹²⁵ *Chenault v. Huie*, 989 S.W.2d 474 (Tex. App. 1999, no writ).

¹²⁶ *See* Deborah M. Santello, Note, *Maternal Tort Liability for Prenatal Injuries*, 22 SUFFOLK U. L. REV. 747 (1988) (discussing the standard of care with regard to maternal liability to an unborn child). Santello sums up the flow of logic for determining an action for prenatal

When a child is injured *en ventre sa mere*¹²⁸ and subsequently born alive, the child potentially has recourse against only two sources: third parties¹²⁹ and parents. Virtually all jurisdictions, including Texas,¹³⁰ recognize a cause of action for negligence against third-parties for injuries to the fetus.¹³¹ With the exception of automobile accidents¹³² and sexual abuse,¹³³ or both,¹³⁴

injuries:

Those states abolishing parent-child tort immunity and recognizing third party liability for fetal injuries from the point of conception would be most receptive to the child's suit against its mother. Those jurisdictions partially abrogating the immunity doctrine and allowing an infant's action for prenatal injuries to stand may also be swayed by current social trends and permit a suit of maternal liability for prenatal injuries. Undoubtedly, states least apt to allow a child's cause of action against its mother for negligently inflicted prenatal injuries are those refusing both to abrogate the parent-child immunity doctrine and failing to recognize an action for prenatal injuries.

Id. at 776 (citations omitted).

¹²⁷ See Andrews, *supra* note 87 (summarizing a child's right to sue for prenatal injuries in the state of Texas). Andrews calls for the abolition of parent-child immunity "and free the otherwise uncompensated child tort-victims to bring their causes of action to a proper forum where they can be heard and adjudicated fairly, on the basis of the reasonable prudent parent standard, without regard to privilege or the shield of immunity." *Id.* at 127.

¹²⁸ "In its mother's womb." BLACK'S LAW DICTIONARY 534 (6th ed. 1990).

¹²⁹ Third-parties may include individuals as well as corporations. See *Ascutto v. Farricielli*, 711 A.2d 708 (Conn. 1998) (creating exceptions to parental immunity for negligence committed by parent in the pursuit of business or employment activities, i.e. respondeat superior); see also discussion *supra* Part II(C) and accompanying notes.

¹³⁰ See *Delgado v. Yandell*, 468 S.W.2d 475, 478 (Tex. 1971) (holding that "a cause of action does exist for prenatal injuries sustained at any prenatal stage provided the child is born alive and survives.") The case involved an automobile accident in which Isabel Delgado, six months pregnant, was a passenger. *Id.* at 475. As a result of the accident, Elizabeth Delgado was born with permanent and disabling injuries. *Id.*

¹³¹ While it is beyond the scope of this Note to detail the plethora of cases that fall into this category, the *Bonbrest* case signified the beginning of this recognition. See *Bonbrest v. Kotz*, 65 F.Supp. 138, 143 (D.D.C. 1946); see also discussion *supra* Part II(C) and accompanying notes.

¹³² See, e.g., *Black v. Solmitz*, 409 A.2d 634 (Me. 1979) (allowing a suit for negligence committed by parent to the limits of parental insurance coverage); *Silva v. Silva*, 446 A.2d 1013 (R.I. 1982) (creating an exception to parental immunity for negligent operation of motor vehicle).

¹³³ See *Hurst v. Capitell*, 539 So.2d 264, 266 (Ala. 1989) (creating an exception to parental immunity for sexual abuse).

¹³⁴ See *Yates v. Lowe*, 348 S.E.2d 113 (Ga. Ct. App. 1986) (creating exceptions to parental

very few jurisdictions recognize a cause of action against the parent for prenatal injuries.¹³⁵ Many jurisdictions stop short of attaching liability by applying the doctrine of parental immunity.¹³⁶ A court must acknowledge the existence of a legal duty before it may apply the parental immunity doctrine.¹³⁷ *Chenault* hid behind its inability to mandate a standard of care from mother to fetus, stepped backwards, and denied the existence of a duty between mother and child.¹³⁸

V. CONCLUSION

The Texas judiciary has limited parental immunity protection¹³⁹ and penalized third-parties for injuries to unborn children.¹⁴⁰ The Texas legislature seeks to mandate prenatal care to the uninsured,¹⁴¹ penalizes individuals for child abuse,¹⁴² and recognizes life to begin at the moment of fertilization.¹⁴³ The judiciary and the legislature created each of these laws, and each recognizes a certain standard of care for protection of the unborn.¹⁴⁴ Yet all these standards were not enough to protect Mattie's suffering.¹⁴⁵ For the court to state that a decision in favor of *Chenault* may actually have a negative impact on fetal health is absurd.¹⁴⁶ The judiciary must rethink its decision when the abuser has more protection than the abused.

Edward Sylvester¹⁴⁷

immunity for negligence committed by parent to the limits of parental liability insurance coverage and for sexual abuse).

¹³⁵ See *supra* note 37.

¹³⁶ See discussion *supra* Part II.B.

¹³⁷ See Andrews, *supra* note 87 at 129. Andrews postulates: “[The] failure to recognize a parental duty . . . is untenable. It is paradoxical to hold that other relationships create a duty . . . but that a parent does not have such a duty towards his own child.” *Id.* at 124-5 (citations omitted).

¹³⁸ See *Chenault*, 989 S.W.2d at 478.

¹³⁹ See *supra* note 37 and accompanying text.

¹⁴⁰ See *supra* note 131 and accompanying text.

¹⁴¹ See *supra* note 37 and accompanying text.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See discussion *supra* Part II and Part IV.

¹⁴⁵ Mattie died, at the age of five, just days after the Texas Appellate Court's decision of April 15, 1999. Telephone interview with Jennifer Austin, Legal Assistant to Attorney John R. Howie – Counsel for Appellant, (June 23, 1999).

¹⁴⁶ See *Chenault*, 989 S.W.2d at 478.

¹⁴⁷ **I want to thank my wife Karen. With her love and support, all things are possible.**