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JURISDICTIONAL STATEMENT

In the instant wrongful death action, plaintiff Robert Lesage sought to recover for the death of his putative unborn child as a result of the robbery and murder of the unborn child's mother at the store of defendant Dirt Cheap Cigarettes and Beer. Plaintiff moved for a posthumous determination of paternity, the appointment of a next friend, and the appointment of a plaintiff/petitioner ad litem. Defendant moved to dismiss plaintiff's case on the basis that plaintiff lacked standing to bring the wrongful death action. On December 3, 2001, the Honorable Margaret M. Neill issued her Order and Judgment, denying plaintiff's Petition For Determination Of Paternity and his Motion To Appoint Plaintiff/Petitioner Ad Litem and granting Defendant's Motion to Dismiss. Judge Neill dismissed plaintiff's wrongful death action with prejudice for lack of standing. On January 8, 2002, plaintiff filed his timely Notice of Appeal.

On October 15, 2002, the Missouri Court of Appeals, Eastern District, issued its Opinion, affirming the ruling of the trial court. Therein, the Court of Appeals held that the Uniform Parentage Act (UPA) was the exclusive procedure for adjudicating paternity, that it required the child who was the subject of the paternity action to be made a party, and that no provision of the UPA authorized the bringing of an action to determine paternity after the death of the child. The Court of Appeals ruled that the trial court did not err in finding that Plaintiff lacked standing to bring a wrongful death action because, based upon the undisputed facts before the trial court, he could not establish that he was the father of the unborn child in order to bring himself within the class of persons entitled to file a wrongful death action. Further,

the Court of Appeals held that the trial court did not err in dismissing Plaintiff's wrongful death action with prejudice because a determination that he lacked standing to file the wrongful death action was not a ruling on the merits and, consequently, would not operate to preclude the prosecution of a subsequent wrongful death action by appropriate class members.

Because of the general interest and importance of the issue of whether the putative father of a deceased unborn child could file an action under the Wrongful Death Act and in light of the language in *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89, 93 (Mo. banc 1995) that, under Section 537.080(1), a "**person**" within the Wrongful Death Statute included an unborn child, even prior to viability and that the parents of the child were not required to be married to bring a wrongful death action but, "an unmarried father must prove paternity," the Court of Appeals transferred the instant cause to the Supreme Court pursuant to Rule 83.02 of the Missouri Rules of Civil Procedure.

This Court has jurisdiction to entertain appeals on transfer from the Court of Appeals pursuant to Article V §3, and Article X of the Missouri Constitution (1945) (as amended 1982). Therefore, jurisdiction of the Court is invoked pursuant to Article V §3 and Article X of the Missouri Constitution (1945) (as amended 1982).

STATEMENT OF FACTS

Introduction

In *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89, 92 (Mo.banc 1995) the Supreme Court held that a nonviable unborn child was a “person” for whose death a parent could state a claim under the Wrongful Death Act, RSMo. §537.080. While the Supreme Court recognized that the parents of the unborn child did not have to be married to bring a wrongful death claim, it declared that “an unmarried father must prove paternity.” *Connor*, 898 S.W.2d at 90 n.3. *Connor* did not address the issue of how an unmarried putative father of a nonviable fetus was to establish paternity so as to place him within the class of persons entitled to bring a wrongful death action. It is this issue that the Court must resolve in the case at bar. Namely, can the unmarried putative father of a nonviable fetus establish the paternity necessary to give him standing to bring a wrongful death action where he does not file a paternity action until after the fetus is deceased?

Procedural History and Relevant Facts

On August 6, 2001, plaintiff Robert Lesage filed his Amended Petition against defendant Dirt Cheap Cigarettes and Beer, Inc. (hereinafter “defendant” or “Dirt Cheap”). (L.F. 7-9).¹ Therein, plaintiff alleged that he was the father of the unborn child of Brandi Roussin who was employed by Dirt Cheap, that Brandi Roussin and the child were killed during a

¹ Matters referred to herein which are contained in the Legal File shall be designated as (L.F. ____).

robbery taking place on October 29, 2000, that the death of the unborn child was caused by the negligence of defendant in failing to provide adequate security to Brandi Roussin and her unborn child and that, due to defendant's negligence, plaintiff had been deprived of the comfort, support, services and companionship of his unborn child. (L.F. 7-9). In its Answer to Plaintiff's Amended Petition, defendant, *inter alia*, denied that plaintiff was the father of the unborn child of Brandi Roussin and that it was negligent in failing to protect plaintiff's putative unborn child or provide Brandi Roussin and the unborn child with adequate security. (L.F. 10-15).

Thereafter, on September 26, 2001, plaintiff filed his Petition For Determination Of Paternity And Suggestions In Support Thereof. (L.F. 16-27). In his Petition, Plaintiff alleged that, at the time of her death, Brandi Roussin was five months pregnant with his child. (L.F. 16). Because plaintiff and Brandi Roussin were not married, no man was presumed to be the father of the child pursuant to RSMo. §210.822. (L.F. 16). Asserting that there were no other interested or proper parties to the determination of paternity, plaintiff alleged that he was the father of the unborn child and sought a declaration of paternity from the court. (L.F. 16-18). In his Suggestions In Support and Affidavit, plaintiff alleged that he had sexual intercourse with Brandi Roussin during the possible time of conception. (L.F. 17, 22). As "other relevant evidence" of paternity, plaintiff referred to a statement of Brandi Roussin, allegedly made to her treating physician, wherein she identified plaintiff as the father of her unborn child. (L.F. 17).

Defendant filed its Suggestions In Opposition To Plaintiff's Petition For Determination

Of Paternity on October 5, 2001. (L.F. 28-32). Therein, defendant alleged that the Uniform Parentage Act, RSMo. §210.817 to §210.852, was the exclusive method to determine paternity in Missouri, that under the UPA, a child born out of wedlock and the alleged father were the appropriate parties to an action for paternity, and that defendant was not a proper party for the determination of plaintiff's status as the father of an unborn child. (L.F. 28-32). Defendant alleged further that plaintiff's Affidavit was self-serving and unsupported by any scientific testing and that the medical record naming plaintiff as the father of the unborn child was inadmissible hearsay and speculation. (L.F. 28-32). It asked that the trial court deny plaintiff's Petition For Determination of Paternity. (L.F. 31).

On October 16, 2001, Judge Neill issued her Order, dismissing plaintiff's Petition For Determination Of Paternity for lack of jurisdiction, since plaintiff's alleged decedent was not and could not be made a party to the action. (L.F. 34-37). Judge Neill found that among the procedural requirements of the UPA was that the child at issue be made a party to any paternity action brought thereunder. (L.F. 36). However, the fetus at issue died before its birth, before any marriage or attempt to legitimate plaintiff's relationship with the child, and before any support obligation or relationship arose between plaintiff and the unborn child. (L.F. 36). Since the deceased fetus of Brandi Roussin was not and could not be represented through an estate, next friend, or guardian, it could not be made a party to a paternity action under the UPA in the context of the instant wrongful death action. (L.F. 36-37).

Plaintiff, on October 29, 2001, filed his Second Petition For Determination Of Paternity and Suggestions In Support Thereof. (L.F. 38-55). Therein, plaintiff alleged that, by

his next friend, Baby Lesage was a party to the action for paternity, that all proper parties were before the Court pursuant to RSMo. §210.830, and that he was the father of Baby Lesage. (L.F. 38-39). In his Suggestions, plaintiff asserted that the appointment of a next friend was necessary to bring the unborn child before the court as a party and that Lisa Sigmund, by virtue of her appointment by the court as next friend of Baby Lesage or as plaintiff ad litem, would bring all proper parties before the court. (L.F. 40-41).

On October 31, 2001, plaintiff filed a Motion To Appoint Plaintiff/Petitioner Ad Litem. (L.F. 54-55). Therein, plaintiff requested the appointment of Lisa Sigmund as the Plaintiff/Petitioner Ad Litem for Baby Lesage, a deceased individual. (L.F. 54-55). Relatedly, plaintiff filed a Petition For Appointment Of Next Friend, wherein he requested that the court appoint Lisa Sigmund as Baby Lesage's Next Friend for the purpose of commencing and prosecuting the wrongful death action. (L.F. 56-57).

Defendant filed its Motion To Dismiss on October 31, 2001. (L.F. 58). Therein, defendant alleged that plaintiff lacked standing to bring the instant wrongful death action. (L.F. 58).

Judge Neill issued her Order and Judgment on December 3, 2001. (L.F. 59-63). Therein, Judge Neill denied plaintiff's Second Petition For Determination Of Paternity and his Motion To Appoint Plaintiff/Petitioner Ad Litem. (L.F. 63). She granted defendant's Motion To Dismiss, dismissing plaintiff's wrongful death action with prejudice for lack of standing. (L.F. 53).

Judge Neill reasoned that the proceeding for which plaintiff sought the appointment of

a plaintiff ad litem was not one for the fetus' lost chance of recovery or survival, but for a paternity action, an action not contemplated by either RSMo. §537.020 or RSMo. §537.021. (L.F. 61). Moreover, plaintiff did not attempt to initiate a paternity action until after the death of the fetus and, insofar as the fetus was not a party to the action at the time of its death, there was no action that could have survived. (L.F. 61). The rationale for requiring a child to be made a party to a paternity action was to protect the rights of the child involved. (L.F. 61-62). But the rights of the deceased fetus were never at issue since the fetus, at all relevant times, had been dead. Rather, the only interests at issue were those of the putative father to recover for the fetus' death. (L.F. 62). Even if the appointment of a plaintiff ad litem was authorized by statute, such an appointment would not represent any rights of the deceased unborn child and would be contrary to the underlying purposes of the UPA. (L.F. 62). Absent a showing of paternity, and thus, a showing that he was within the class of surviving persons who could bring a wrongful death action, plaintiff lacked standing to bring the instant action. (L.F. 62).

On January 8, 2002, plaintiff filed his Notice Of Appeal, appealing from the Order and Judgment of the trial court entered on December 3, 2001. (L.F. 64-66).

On October 15, 2002, the Missouri Court of Appeals, Eastern District, issued its Opinion (authored by the Honorable Mary K. Hoff, with Judges Dowd and Draper concurring).² Therein, the Court of Appeals observed that the underlying action was one for wrongful death and that, to state a wrongful death claim, the facts alleged in the petition must demonstrate that Plaintiff was authorized to bring an action under the statute. (Opinion, 4-5). Section 537.080.1

² A copy of the Court of Appeals' Opinion is contained in the Appendix, *infra*.

provided that a wrongful death action could be brought by the spouse or children or the surviving lineal descendants of any deceased child, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adopted. (Opinion, 5).

Additionally, the Court of Appeals noted that in *Connor v. Monkem*, 898 S.W.2d 89, 93 (Mo. banc 1995), the Supreme Court held that a non-viable child was a “person” for whose death a parent could state a claim under the Wrongful Death Act. In *Connor*, the Supreme Court found that there was no requirement under Section 537.080(1) that the parents be married to bring a wrongful death claim, but declared that “an unmarried father must prove paternity.” (Opinion, 5). As the Court of Appeals correctly observed, *Connor* did not address the question of how the putative father of a deceased child could posthumously establish paternity so as to bring himself within the class of persons entitled to file suit under the Wrongful Death Act. (Opinion, 5). The Court concluded that, in order to have standing under the Wrongful Death Act, Plaintiff Lesage was required to prove that he was the father of the deceased unborn child. (Opinion, 6).

The Court of Appeals found that the UPA was the exclusive procedure for adjudicating paternity in Missouri. Under the UPA, it was mandatory that the child be made a party to the paternity proceeding. (Opinion, 6). No provision of the UPA authorized the bringing of an action to determine paternity after the death of the child. Neither Section 210.830 nor any other provision of the UPA authorized or permitted the substitution for a child by a next friend, personal representative, or plaintiff/petitioner ad litem if the child was deceased and a paternity action was filed subsequent to its death. (Opinion, 6-7). Finding that the UPA did not allow a

putative parent to bring a paternity action after the death of the unborn child, the Court of Appeals held that Plaintiff could not establish that he was the father of the unborn child under current Missouri law. Because Plaintiff could not bring himself within the class of persons permitted to sue under the Wrongful Death Act, he had no standing to proceed and the trial court properly granted Defendant's Motion To Dismiss. (Opinion, 9).

Further, the Court of Appeals held that the trial court did not err in dismissing Plaintiff's wrongful death action with prejudice. A determination that Plaintiff lacked standing to file the wrongful death action was not a ruling on the merits of the action and, therefore, would not operate to preclude the prosecution of a subsequent wrongful death action by appropriate class members. (Opinion, 10-11).

In its Opinion, the Court of Appeals rejected Plaintiff's equal protection claim. Plaintiff failed to raise his equal protection claim in his pleadings or otherwise present the issue to the trial court. Thus, the trial court was never given an opportunity to address the issue and never ruled upon it. Because Plaintiff failed to raise the constitutional issue before the trial court, he did not preserve the issue and it was waived for appellate review. (Opinion, 11).

Finally, the Court of Appeals rejected Plaintiff's argument that the trial court erred in failing to engage in a joinder analysis under Rule 52.04 of the Missouri Rules of Civil Procedure. Under the UPA and relevant case law, the child was an indispensable party to the paternity proceeding. Because the underlying action was a wrongful death action, a statutorily created action, only the legislature could supply an adequate remedy. The Court of Appeals refused to create a remedy through Rule 52.04 where one did not exist under the relevant

statutes. (Opinion, 12-13).

Because of the general interest and importance of the issue of whether a putative father of a deceased unborn child could file an action under the UPA, and in light of the language in *Connor*, the Court of Appeals transferred the instant cause to the Supreme Court pursuant to Rule 83.02. (Opinion, 13).

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN DISMISSING WITH PREJUDICE PLAINTIFF'S WRONGFUL DEATH ACTION, SEEKING TO RECOVER FOR THE DEATH OF HIS PUTATIVE UNBORN CHILD, FOR LACK OF STANDING FOR THE REASONS THAT THE FETUS WAS NOT A PARTY TO THE PATERNITY ACTION, AS REQUIRED BY SECTION 210.830 OF THE UPA; THE UPA DOES NOT PROVIDE FOR A POSTHUMOUS DETERMINATION OF PATERNITY; THE ACTION FOR PATERNITY DID NOT SURVIVE THE DEATH OF THE FETUS; AND ABSENT A SHOWING OF PATERNITY AND, THEREFORE, A SHOWING THAT HE WAS WITHIN THE CLASS OF SURVIVING PERSONS WHO COULD BRING A WRONGFUL DEATH ACTION UNDER RSMO. §537.080, PLAINTIFF LACKED STANDING TO BRING THE INSTANT CAUSE. FURTHER, ANY FAILURE OF THE TRIAL COURT TO ENGAGE IN A JOINDER ANALYSIS UNDER RULE 52.04 WAS NOT ERRONEOUS, SINCE THE FETUS WAS AN INDISPENSABLE PARTY TO THE PATERNITY ACTION AS A MATTER OF LAW PURSUANT TO SECTION 210.830 OF THE UPA, RENDERING SUCH AN ANALYSIS UNNECESSARY.

Connor v. Monkem Co., Inc., 898 S.W.2d 89 (Mo.banc 1995)

Richie v. Laususe, 950 S.W.2d 511 (Mo.App.E.D.1997)

Switzer v. Hart, 957 S.W.2d 512 (Mo.App.E.D.1997)

Gonzales v. Cowen, 884 P.2d 19 (Wa.App.1994)

J. L. v. C.D., 9 S.W.3d 733 (Mo.App.S.D.2000)

Akers v. Johnson, 10 S.W.3d 581 (Mo.App.E.D.2000)

Andrews v. Neer, 253 F.S.W.3d 1052 (8th.Cir.2001)

Bremen Bank & Trust Co. of St. Louis v. Muskopf, 817 S.W.2d 602 (Mo.App.E.D.1991)

Buchanan v. Kirkpatrick, 615 S.W.2d 6 (Mo. banc 1981)

Budding v. SSM Health Care, 19 S.W.3d 678 (Mo.banc 2000)

Burley v. Johnson, 658 P.2d 8 (Wash.App.1983)

Call v. Heard, 925 S.W.2d 840 (Mo.banc 1996)

Campbell v. Callow, 876 S.W.2d 25 (Mo.App.S.D.1994)

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Cobb v. State Security Ins. Co., 576 S.W.2d 726 (Mo. banc 1979)

D.E.W. v. T.R.W., 6 S.W.3d 181 (Mo.App.S.D.1999)

Farmers & Merchants Bank & Trust v. Dir. of Revenue, 896 S.W.2d 30 (Mo. banc 1995)

Flanagan v. G.L. DeLapp, 533 S.W.2d 592 (Mo. banc 1976)

Fort v. Chester, 731 S.W.2d 520 (Mo.App.E.D.1987)

Frazier v. Treasurer of Mo., 869 S.W.2d 152 (Mo.App.E.D.1993)

Glasco v. Fire & Casualty Ins. Co., 709 S.W.2d 550 (Mo.App.W.D.1986)

Glick v. Ballentine Produce, Inc., 396 S.W.2d 609 (Mo.1965)

Glonn v. American Guaranty & Liability Ins., 391 U.S.73 S.Ct.1515, 20L.Ed.2d 441 (1968)

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Kapper v. Natl. Engineering Co., 685 S.W.2d 617 (Mo.App.E.D.1985)

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Miss Kitty's Saloon, Inc. v. Mo. Dept. of Revenue, 41 S.W.3d 466, 467 (Mo. banc 2001)

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Perez v. Dept. of Health, 138 Cal.Rptr. 32 (Cal.App.1977)

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Rundquist v. Dir. of Revenue, 62 S.W.3d 643 (Mo.App.E.D.2001)

Saidawi v. Giovanni's Little Place, Inc., 987 S.W.2d 501 (Mo.App.E.D.1999)

Shannon v. Hines, 21 S.W.3d 839 (Mo.App.E.D.1999)

Smith v. Tang, 926 S.W.2d 716 (Mo.App.E.D.1996)

Snead v. Cordes, 811 S.W.2d 391 (Mo.App.W.D.1991)

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St. ex rel. S.O. v. S.O., 725 S.W.2d 601 (Mo.App.E.D.1987)

St. Louis County v. B.A.P., Inc., 25 S.W.3d 629 (Mo.App.E.D.2000)

State ex rel. S.O. v. S.O., 725 S.W.2d 601 (Mo.App.E.D.1987)

State ex rel. State of Illinois v. Schaumann, 918 S.W.2d 393 (Mo.App.E.D.1996)

State of Missouri v. Dodd, 961 S.W.2d 865 (Mo.App.S.D.1998)

Sullivan v. Carlisle, 851 S.W.2d 510 (Mo.banc 1993)

Switzer v. Hart, 957 S.W.2d 512 (Mo.App.E.D.1997)

Travis v. Contico International, Inc., 928 S.W.2d 367 (Mo.App.E.D.1996)

Welch v. East Wind Care Center, 890 S.W.2d 395 (Mo.App.W.D.1995)

Williams v. City of Kansas City, 841 S.W.2d 193 (Mo.App.W.D.1992)

II.

THE TRIAL COURT DID NOT ERR OR VIOLATE PLAINTIFF'S RIGHT TO EQUAL PROTECTION UNDER THE MISSOURI AND U.S. CONSTITUTIONS IN DENYING PLAINTIFF'S PETITION FOR DETERMINATION OF PATERNITY AND DISMISSING HIS WRONGFUL DEATH ACTION FOR THE REASONS THAT PLAINTIFF HAS WAIVED HIS EQUAL PROTECTION CLAIM FOR PURPOSES OF THE INSTANT APPEAL, SINCE HE FAILED TO PRESERVE THE ISSUE FOR APPELLATE REVIEW IN THAT HE DID NOT PRESENT THE ISSUE TO THE TRIAL COURT; THE TRIAL COURT'S RULING DID NOT VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION IN THAT UNWED NATURAL MOTHERS AND UNWED NATURAL FATHERS ARE NOT SIMILARLY SITUATED FOR PURPOSES OF CHILDBIRTH AND PROOF OF PATERNITY; AND THE TRIAL COURT'S RULING DID NOT EVISCERATE THE RULING IN *CONNOR V. MONKEM*, THAT THE UNMARRIED PUTATIVE FATHER OF AN UNBORN CHILD MAY BRING A WRONGFUL DEATH ACTION FOR ITS DEATH, IN THAT THE TRIAL COURT FOLLOWED THE DICTATE OF *CONNOR* THAT THE UNMARRIED PUTATIVE FATHER MUST PROVE PATERNITY.

Connor v. Monkem Co., Inc., 898 S.W.2d 89 (Mo. banc 1995)

Richie v. Laususe, 950 S.W.2d 511 (Mo. App. E.D. 1997)

Callier v. Director of Revenue, 780 S.W.2d 639 (Mo. banc 1989)

City of Chesterfield v. Director of Revenue, 811 S.W.2d 375 (Mo. banc 1991)

S.L.J. v. R.J., 778 S.W.2d 239 (Mo.App.E.D. 1989)

Cooper v. Missouri Board of Probation and Parole, 866 S.W.2d 135 (Mo.banc 1993)

Akers v. Johnson, 10 S.W.3d 581 (Mo.App.E.D.2000)

Dark v. MRO Mid-Atlantic Corp., 876 S.W.2d 714 (Mo.App.E.D.1994)

In the interest of T.E., J.E., J.F., S.F. and A.R.F. v. J.F. and L.F.,

35 S.W.3d 497 (Mo.App.E.D. 2001)

J.L. v. C.D., 9 S.W.3d 733 (Mo.App.S.D.2000)

Lewis v. Department of Social Services, 61 S.W.3d 248 (Mo.App.W.D. 2001)

People v. Morrison, 584 N.E.2d 509 (Ill.App.3rd 1991)

Smith v. Wohl, 702 S.W.2d 905 (Mo.App.E.D.1986)

State v. Champ, 477 S.W.2d 81 (Mo.1972)

State v. Lieurance, 844 S.W.2d 81 (Mo.App.S.D. 1992)

State ex rel. Emcasco Ins. Co. v. Rush, 546 S.W.2d 188 (Mo.App.E.D.1977)

III.

THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFF'S WRONGFUL DEATH ACTION WITH PREJUDICE FOR LACK OF STANDING FOR THE REASONS THAT THE TRIAL COURT PROPERLY DISMISSED THE ACTION USING THE ANALYSIS SET FORTH IN *SWITZER V. HART*, SINCE THE PETITION FOR WRONGFUL DEATH, THE SECOND PETITION FOR DETERMINATION OF PATERNITY AND THE UNDISPUTED FACTS SHOWED THAT PLAINTIFF COULD NOT ESTABLISH HIS PATERNITY OF THE FETUS SO AS TO BRING HIMSELF WITHIN THE CLASS OF PERSONS ENTITLED TO FILE A WRONGFUL DEATH ACTION UNDER SECTION 537.080; THE TRIAL COURT DID NOT TREAT DEFENDANT'S MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT; AND THE TRIAL COURT'S DISMISSAL WITH PREJUDICE WAS NOT ERRONEOUS OR OVER BROAD, SINCE A DETERMINATION THAT PLAINTIFF LACKED STANDING TO FILE THE WRONGFUL DEATH ACTION WAS NOT A RULING ON THE MERITS, AND, CONSEQUENTLY, DID NOT BAR THE PROSECUTION OF A SUBSEQUENT WRONGFUL DEATH ACTION BY APPROPRIATE CLASS MEMBERS.

Switzer v. Hart, 957 S.W.2d 512, 514 (Mo.App.E.D.1997)

Champ v. Poelker, 755 S.W.2d 383 (Mo.App.E.D.1988)

Gowen v. Cote, 875 S.W.2d 637 (Mo.App.S.D.1994)

Williams v. City of Kansas City, 841 S.W.2d 193 (Mo.App.W.D.1992)

Saidawi v. Giovanni's Little Place, Inc., 987 S.W.2d 501 (Mo.App.E.D.1999)

STANDARD OF REVIEW

Plaintiff appeals the dismissal of his wrongful death action for lack of standing. The Court reviews whether plaintiff has standing to pursue his wrongful death claim *de novo* and does not defer to the order of the trial court. *Switzer v. Hart*, 957 S.W.2d 512, 514 (Mo.App.E.D. 1997); *Homebuilders Assn. of Greater St. Louis v. City of Wildwood*, 32 S.W.3d 612, 614 (Mo.App.E.D. 2000). It determines standing as a matter of law on the basis of plaintiff's petition and the undisputed facts. *Homebuilders*, 32 S.W.3d at 614.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN DISMISSING WITH PREJUDICE PLAINTIFF'S WRONGFUL DEATH ACTION, SEEKING TO RECOVER FOR THE DEATH OF HIS PUTATIVE UNBORN CHILD, FOR LACK OF STANDING FOR THE REASONS THAT THE FETUS WAS NOT A PARTY TO THE PATERNITY ACTION, AS REQUIRED BY SECTION 210.830 OF THE UPA; THE UPA DOES NOT PROVIDE FOR A POSTHUMOUS DETERMINATION OF PATERNITY; THE ACTION FOR PATERNITY DID NOT SURVIVE THE DEATH OF THE FETUS; AND ABSENT A SHOWING OF PATERNITY AND, THEREFORE, A SHOWING THAT HE WAS WITHIN THE CLASS OF SURVIVING PERSONS WHO COULD BRING A WRONGFUL DEATH ACTION UNDER RSMO. §537.080, PLAINTIFF LACKED STANDING TO BRING THE INSTANT CAUSE. FURTHER, ANY FAILURE OF THE TRIAL COURT TO ENGAGE IN A JOINDER ANALYSIS UNDER RULE 52.04 WAS NOT ERRONEOUS, SINCE THE FETUS WAS AN INDISPENSABLE PARTY TO THE PATERNITY ACTION AS A MATTER OF LAW PURSUANT TO SECTION 210.830 OF THE UPA, RENDERING SUCH AN ANALYSIS UNNECESSARY.

Standing To Bring Suit

Standing is an antecedent to the right to relief. *Sommer v. City of St. Louis*, 631 S.W.2d 676, 679 (Mo.App.E.D.1982). Generally, standing requires that the party seeking relief has a legally cognizable interest in the subject matter and a threatened or actual injury. *Shannon v.*

Hines, 21 S.W.3d 839, 841 (Mo.App.E.D.1999). To have standing, the party must be sufficiently affected by the subject matter so as to ensure that a justiciable controversy is presented to the court. *Id.* Thus, to possess standing, the party must have some actual, justiciable interest susceptible of protection through litigation. *Id.*; *Metro Auto Auction v. Dir. of Revenue*, 707 S.W.2d 397, 400 (Mo. banc 1986).

The question of standing deals with the authority of the court to entertain the action and is separate from the merits of the action. *Gowen v. Cote*, 875 S.W.2d 637, 639 n.3 (Mo.App.S.D.1994); *City of Eureka v. Litz*, 658 S.W.2d 519, 523 (Mo.App.E.D.1983) (question of a person's legal standing to apply for judicial relief does not touch the merits of the suit, but merely the authority of the court to entertain the action); *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. banc 1981) (standing is an aspect of justiciability that focuses on the party, rather than the issues he wishes to have adjudicated). Regardless of the merits of the parties' claims, without standing, the trial court cannot entertain the action. *Champ v. Poelker*, 755 S.W.2d 383, 387 (Mo.App.E.D.1988). Where a party is found to lack standing sufficient to maintain the action, the court does not have jurisdiction of the question presented and may not enter a judgment on that question for or against any of the parties. *Bremen Bank & Trust Co. of St. Louis v. Muskopf*, 817 S.W.2d 602, 608 (Mo.App.E.D.1991); *Shannon*, 21 S.W.3d at 842 (if a party is found to lack standing, the trial court necessarily does not have jurisdiction on the question presented).

Wrongful Death Actions

Plaintiff's underlying action is one for wrongful death. (L.F.7-9). Wrongful death is a statutory cause of action. *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo.banc 1993); *Glick v. Ballentine Produce, Inc.*, 396 S.W.2d 609, 615 (Mo.1965) (since the legislature created a wrongful death action where none existed before, it may condition the right as it sees fit). A wrongful death claim does not belong to the deceased. *Sullivan*, 851 S.W.2d at 515; *Campbell v. Callow*, 876 S.W.2d 25, 26 (Mo.App.S.D.1994). The right of action is neither a transmitted right nor a survival right, but is created and vests in the survivors at the moment of death. *Id.*

By enacting the Wrongful Death Act, the legislature declared the nature of the action, the conditions for the maintenance thereof, the damages recoverable, and the parties entitled to sue thereunder. *Campbell*, 876 S.W.3d at 28. The manifest purpose of the Wrongful Death Act is to provide, *for a limited class of plaintiffs*, compensation for the loss of the companionship, comfort, instruction, guidance, counsel and support of one who would have been alive but for the defendant's wrong. RSMo. §537.090; *O'Grady v. Brown*, 654 S.W.2d 904, 908 (Mo.banc 1983).

A party suing under the wrongful death statute must bring himself in his pleadings and proof strictly within the statutory requirements. *Call v. Heard*, 925 S.W.2d 840, 850 (Mo.banc 1996); *Nelms v. Bright*, 299 S.W.2d 483, 487 (Mo. banc 1957). To state a wrongful death claim, the facts alleged in the petition must demonstrate that the plaintiff is authorized to bring

an action under the statute. *Call*, 925 S.W.2d at 850. Section 537.080.1 defines who may bring a wrongful death action. *Sullivan*, 851 S.W.2d at 512-513. It states, in relevant part, as follows:

“(1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adopted.” RSMo. §537.080.1.

The wrongful death statute makes no reference to the marital status as between the parents. *Higgins v. Gosney*, 435 S.W.2d 653, 657 (Mo.1969). Nor does the statute delineate the circumstances under which a biological parent can commence a wrongful death action on behalf of his illegitimate child. *Glasco v. Fire & Casualty Ins. Co.*, 709 S.W.2d 550, 554 (Mo.App.W.D.1986).

In his wrongful death action, plaintiff alleged that he was the father of Brandi Roussin’s unborn child. (L.F.7-9). By this allegation, plaintiff sought to place himself within the class of persons permitted to sue under Section 537.080.1(1). Since, as plaintiff admitted, he and Brandi Roussin were not married at the time of her death, as a matter of law, plaintiff was not presumed to be the father of the fetus. (L.F.16). RSMo. §210.822.1(1). In an attempt to establish paternity for the fetus, plaintiff filed a Second Petition for Determination of Paternity³, along with a Motion to Appoint Plaintiff/Petitioner Ad Litem and a Petition for

³A paternity action can be joined with an action for support. RSMo. §210.829.1.

Appointment of Next Friend. (L.F.38-53, 54-55, 56-57). It is undisputed that the fetus was never made a party to the paternity action, since it died before plaintiff filed his first Petition for Determination of Paternity with the trial court on September 26, 2001. (L.F.16-27).

Recovery For The Wrongful Death Of An Illegitimate Or Unborn Child

Under common law, an illegitimate child was considered to be the child of no one. *Cobb v. State Security Ins. Co.*, 576 S.W.2d 726, 733 (Mo. banc 1979). In *Glonn v. American Guaranty & Liability Ins. Co.*, 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968), the United States Supreme Court held that a mother could recover for the wrongful death of her illegitimate child.

In *Cobb*, 576 S.W.2d at 735, the Missouri Supreme Court held that where the biological father of an illegitimate child had openly acknowledged the child as his own, had exercised custody and shouldered responsibility with respect to supervision, support, protection and care of the child, the father had a right to maintain a wrongful death action for the death of that child. *Cobb*, 576 S.W.2d at 735. *Glasco v. Fire & Casualty Ins. Co.*, 709 S.W.2d at 554, concluded that the natural father was no less a parent than the natural mother for purposes of the Wrongful Death Act. Thus, the failure of a natural father to take affirmative steps to legitimize a child and shoulder responsibility with respect to the child's upbringing did not preclude a wrongful death

Since the damages for wrongful death include the loss of support, a paternity determination can be properly joined with a wrongful death action. RSMo. §537.090; *Snead v. Cordes*, 811 S.W.2d 391, 395 (Mo.App.W.D.1991).

action on behalf of the child, where the father was shown to have openly acknowledged the child as his daughter. *Id.*

In *State of Missouri ex rel. Hardin v. Sanders*, 538 S.W.2d 336, 338 (Mo. banc 1976), the Missouri Supreme Court ruled that a wrongful death action could not be maintained for the death of an unborn child. It held that, until there has been a live birth, a fetus was not a “person” within the meaning of Section 537.080. *Id.* The Supreme Court overruled *Hardin* in *O’Grady*, 654 S.W.2d at 910. *O’Grady* held that the term “**person**,” as used within the Wrongful Death Act, included a human fetus *en ventre sa mere*. *Id.* Thus, Section 537.080 provided a cause of action for the wrongful death of a viable fetus. *O’Grady*, 654 S.W.2d at 911. In so ruling, the Supreme Court limited its holding to the facts before it and did not decide “whether the same action would lie for the death of a non-viable fetus.” *Id.*

Connor v. Monkem

In *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89, 93 (Mo.banc 1995), the Missouri Supreme Court recognized that a non-viable unborn child was a “person” for whose death a parent could state a claim under the wrongful death statute. *Connor*, 898 S.W.2d at 93. Therein, the father of a non-viable unborn child, who was killed along with the child’s mother in an auto accident involving a tractor trailer, brought an action for wrongful death of the child against the employer of the driver of the tractor trailer. *Connor*, 898 S.W.2d at 89-90. The employer moved to dismiss the action for failure to state a claim. *Connor*, 898 S.W.2d at 90. While the trial court dismissed the action, the Court of Appeals determined that a claim existed and that

the dismissal should be reversed. *Id.*

On transfer, the Supreme Court held that a claim existed under the Wrongful Death Act for the death of a non-viable unborn child. *Connor*, 898 S.W.2d at 93. While the Supreme Court observed that there was no requirement under RSMo. Section 537.080(1) that the parents be married to bring a wrongful death claim, it declared that “an unmarried father must prove paternity.” *Connor*, 898 S.W.2d at 90 n.3.

The precise question before the Supreme Court was whether a “nonviable unborn child is a ‘person’ capable of supporting a claim for wrongful death pursuant to Section 537.080.” *Connor*, 898 S.W.2d at 90. In answering this question, the Supreme Court found Section 1.205 to be dispositive. *Connor*, 898 S.W.2d at 92. That statute provided that the life of each human being begins at conception and that the natural parents of unborn children have protectable interests in the life, health and well being of their unborn children. *Connor*, 898 S.W.2d at 91 n.6. Reading Section 1.205 *in pari materia* with Section 537.080, the Supreme Court held that the legislature intended that Missouri courts interpret a “**person**” within the wrongful death statute to allow a natural parent to state a claim for the wrongful death of his or her unborn child, even prior to viability. *Id.*

In its Opinion, the Supreme Court recognized that there were many “obvious difficulties” associated with the type of claim before it. *Connor*, 898 S.W.2d at 93. One “difficulty” associated with a wrongful death claim for the death of a non-viable fetus is the question presented by the instant case: if the putative father of the fetus is not married to its mother and

fails to file a paternity action naming the fetus as a party before the death of the fetus occurs, can the putative father posthumously establish paternity under the UPA so as to bring himself within the class of persons entitled to file suit for wrongful death under Section 537.080?

Connor did not address the question of how paternity was to be established in such circumstances. Nor has any other reported Missouri decision. Defendant respectfully submits that the answer to this question is that plaintiff cannot posthumously establish paternity under the UPA and, therefore, the trial court did not err in dismissing his wrongful death action.

Determination Of Paternity Under The UPA

It is axiomatic that the Uniform Parentage Act is the **exclusive** procedure for adjudicating paternity in Missouri. RSMo. §210.826; *Akers v. Johnson*, 10 S.W.3d 581, 582 (Mo.App.E.D.2000); *Richie v. Laususe*, 950 S.W.2d 511, 514 (Mo.App.E.D.1997). *State of Missouri v. Dodd*, 961 S.W.2d 865, 868 (Mo.App.S.D.1998). In a paternity action brought under the UPA, the best interests of the child are of paramount importance. *Fort v. Chester*, 731 S.W.2d 520, 522 (Mo.App.E.D.1987). *State ex rel. S.O. v. S.O.*, 725 S.W.2d 601, 603 (Mo.App.E.D.1987).

The UPA states that the parent and child relationship between the child and the natural father may be established under the provisions of Sections 210.817 to 210.852. RSMo. §210.819. Section 210.826 states, in relevant part, that a man alleging himself to be the father of a child may bring an action for the purpose of declaring the existence of a father-child relationship. RSMo. §210.826.1. If an action is brought under this section before the birth of the child, all proceedings are to be stayed until after the birth, except the service of process and

taking of depositions to perpetuate testimony. RSMo. §210.826.4.

Pursuant to the Uniform Parentage Act, the child who is the subject of a paternity action must be made a party to the case. RSMo. §210.830; *J. L. v. C.D.*, 9 S.W.3d 733, 735 (Mo.App.S.D.2000); *State ex rel. State of Illinois v. Schaumann*, 918 S.W.2d 393, 396 (Mo.App.E.D.1996); *Richie*, 950 S.W.2d at 514.⁴ Section 210.830 states:

“The child shall be made a party to any action commenced under Sections 210.817 to 210.852.” RSMo. §210.830.

As used in Section 210.830, “**shall**” is mandatory and not permissive. *See, for example,*

⁴ Other states adopting the 1973 version of the UPA likewise hold that the child must be made a party to the paternity proceeding. *See, for example, Burley v. Johnson*, 658 P.2d 8, 11 (Wash.App.1983) (minor child was indispensable party to an action to determine the issue of paternity under the UPA and the child must be made a party plaintiff); *In re the Marriage of Burkey*, 689 P.2d 726, 727 (Colo.App.1984) (child is an indispensable party to a paternity proceeding, and unless he or she can be made a party, the trial court is without jurisdiction to resolve any matters pertaining to the paternity suit); *RAJ v. LBV*, 817 P.2d 37, 41 (Ariz.App.1991) (child was a necessary party in a paternity action brought by the putative father); *Kieler v. CAT*, 616 N.E.2d 34, 37 (Ind.App.1993) (children are necessary parties to a paternity action); *Perez v. Dept. of Health*, 138 Cal. Rptr. 32, 34 (Cal.App.1977) (children in question were indispensable parties to a paternity action brought by a man claiming to be their father).

Welch v. East Wind Care Center, 890 S.W.2d 395, 397 (Mo.App.W.D.1995) (the use of “shall” in a statute is indicative of a mandate to act; use of shall is mandatory and not permissive); *State ex rel. Dreer v. Public School Retirement System*, 519 S.W.2d 290, 296 (Mo.1975) (use of the word “shall” in a statute is indicative of a mandate). Therefore, under the UPA, it was mandatory that the unborn child of Brandi Roussin be made a party to the paternity proceeding.⁵ RSMo. §210.830; *J. L.*, 9 S.W.3d at 735; *Schaumann*, 918 S.W.2d at 396;

⁵ In his Brief, Plaintiff asserts that the word “shall” as used in Section 210.830 is directory, and not mandatory, since the statute does not include a sanction for failure to act as the statute requires. (Plaintiff’s Brief, 15-16). This argument must be rejected. It is contrary to the cardinal rule of statutory construction, which requires that words be given their plain and ordinary meaning. *Metro Auto Auction v. Dir. of Revenue*, 707 S.W.2d 397, 401 (Mo. banc 1986). Also, the presence or absence of a penalty provision is but one method for determining whether a statute is directory or mandatory; the absence of a penalty provision does not automatically override other considerations. *Southwestern Bell Telephone Co., Inc. v. Mahn*, 766 S.W.2d 443, 446 (Mo. banc 1989). Herein, the provision at issue - Section 210.830 - is a part of a statute which provides a cause of action to certain individuals for the purpose of establishing the paternity of a child. Section 210.830 sets forth a prerequisite to maintaining a paternity action. As such, it relates to the essence of the thing to be done, and compliance with the provision is essential to the validity of the paternity proceeding. *State ex rel Ellis Brown*, 33 S.W.2d 104, 107 (Mo.

Richie, 950 S.W.2d at 515; *D.E.W. v. T.R.W.*, 6 S.W.3d 181, 183 (Mo.App.S.D.1999) (failure to make the child a party to a paternity action brought under the UPA is reversible error).

It is undisputed that plaintiff did not bring a paternity action until after the death of the non-viable fetus. At no time prior to the fetus' death was it made a party to any paternity proceeding, as Section 210.830 required. *Id.*

Plaintiff Could Not Bring A Paternity Action Under The UPA

After The Death Of The Fetus In Question

Under the UPA, the child must be a party to any paternity proceeding. RSMo. §210.830; *J.L.*, 9 S.W.3d at 735; *Richie*, 950 S.W.2d at 514; *Schaumann*, 918 S.W.2d at 396. Section 210.830.1 declares that the child is an indispensable party in a paternity action. *Richie*, 950 S.W.2d at 515, Pudlowski, J., dissenting; *Mich. Dept. of Social Services ex rel. D.H. v. K.S.*, 875 S.W.2d 597 (Mo.App.E.D.1994).

The UPA contemplates that an action to determine paternity thereunder may be brought before the birth of the fetus in question. RSMo. §210.826.4. If a paternity action is brought

banc 1930). Thus, Section 210.830 is mandatory and not permissive. *Id. Farmers & Merchants Bank & Trust Co. v. Dir. of Revenue*, 896 S.W.2d 30, 33 (Mo. banc 1995); and *Rundquist v. Dir. of Revenue*, 62 S.W.3d 643, 646 (Mo.App.E.D.2001), relied on by Plaintiff, are distinguishable. These decisions address the performance of an act by a public official within a specified time. Such statutes are considered to be directory and not mandatory. *Farmers & Merchants*, 896 S.W.2d at 33.

after the child is born and while the child is a minor, the child may be represented by a next friend appointed for him. RSMo. §210.830. However, no provision of the UPA authorizes the bringing of an action to determine paternity after the death of the child.

If the legislature had intended that such a posthumous paternity action be brought, it would have included a provision to that effect in the UPA. The absence of such a provision is evidence that the legislature did not intend paternity actions under the UPA to be initiated after the death of the child or fetus for whom a determination of paternity is sought. *Frazier v. Treasurer of Mo.*, 869 S.W.2d 152, 156-157 (Mo.App.E.D.1993). Defendant respectfully submits that the Court cannot supply what the legislature has omitted from the UPA. *State ex rel. Mercantile Natl. Bank at Dallas v. Rooney*, 402 S.W.2d 354, 362 (Mo. banc 1966); *Gorman v. Easley*, 257 F.3d 738, 746 n. 6 (8th Cir. 2001) (where a statute expressly provides a particular remedy, a court must be chary of reading others into it).

Such a result is consistent with the public policy underlying the enactment of the UPA in Missouri. The purpose of the UPA is to establish a uniform method for determining paternity that will protect the rights of all parties involved, especially the child. *Snead*, 811 S.W.2d at 395; *Piel v. Piel*, 918 S.W.2d 373, 375 (Mo.App.E.D.1996); *Dodd*, 961 S.W.2d at 867. The primary concern in a paternity case is the protection of the child's welfare; the best interests of the child are of utmost importance. *S.O.*, 725 S.W.2d at 603; *Fort*, 731 S.W.2d at 522. Further, the UPA is intended to afford children born out of wedlock with the same welfare and support afforded to children born of a marriage. For this reason, the UPA permits the court to

enter orders regarding the custody and support of the child once a determination of paternity is made thereunder. *See*, 21 Missouri Practice §16.1; RSMo. §210.841. When a fetus dies before a paternity action is brought, the issues of custody and support become moot - no liability under the Act could attach to the putative father - and a determination of paternity under those circumstances would not serve or advance any purpose for which the UPA was enacted.

Id.

It is undisputed that plaintiff did not marry Brandi Roussin prior to her death. Nor had plaintiff taken any action to establish his paternity of the fetus or to legitimize their relationship prior to that time. Plaintiff failed to file an action for a determination of paternity prior to the death of the fetus.

To permit plaintiff to secure a determination of paternity for the fetus after its death would not and could not protect or advance any interest of that unborn child. *Piel*, 918 S.W.2d at 375; *Fort*, 731 S.W.2d at 522. Clearly, the *sole* purpose of plaintiff's request for a determination of paternity is to permit him to bring a wrongful death action to recover damages for the fetus' death. In that this is not a purpose for which the UPA was enacted and in that the UPA does not authorize a putative parent to bring a paternity action after the death of the fetus in question, the trial court did not err in dismissing plaintiff's Second Petition For Determination of Paternity.

Under The UPA, A Paternity Action Does Not Survive

The Death Of The Child

The UPA provides that a minor child made a party to a paternity action may be

represented by a next friend appointed for him for that action or the child's mother or father may represent the child as next friend. RSMo. §210.830. This provision contemplates the joinder of a live child, whether born, or unborn. *Id.*

By its terms, the UPA provides that a paternity action survives the death of the putative mother or father. Section 210.826 states, in relevant part:

“An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 210.822 may be brought by the child, the mother, ... the personal representative or a parent of the mother if the mother has died, a man alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.” RSMo. §210.826.2.

See also, Akers, 10 S.W.3d at 382 (where the putative father has died, the proper person to represent the decedent in a paternity action is the personal representative of his estate).

In contrast, no provision of the UPA states that a paternity action survives the death of the child for which a determination of paternity is sought. Neither Section 210.830, nor any other provision of the UPA, authorizes or permits the substitution for a child by a next friend, personal representative, or plaintiff/petitioner ad litem if the child is deceased or a paternity action is filed subsequent to that child's death. In that the UPA did not authorize the trial court to appoint a next friend or plaintiff/petitioner ad litem in the instant circumstances, the trial court did not err in denying plaintiff's Motions To Appoint Plaintiff/Petitioner Ad Litem and

his Petition For Appointment Of Next Friend.

As Judge Neill found, the ruling of the Washington Court of Appeals in *Gonzales v. Cowen*, 884 P.2d 19, 22 (Wa.App.1994), is instructive. (L.F. 62). Christopher Gonzales died after suffering a severe reaction to a DPT vaccination. After his mother filed a claim pursuant to the National Childhood Vaccine Injury Act, and a Special Master awarded \$250,000.00 to Christopher's estate, Christopher's putative father, Carlos Cowen, claimed the right to one-half of the award. *Gonzales*, 884 P.2d at 20. Mr. Cowen never saw Christopher prior to the child's death and provided no financial support for either Christopher or his mother. *Id.*

On cross-motions for summary judgment, the trial court held that Mr. Cowen was not entitled to share in the distribution of Christopher's estate because he had not established paternity prior to Christopher's death. It reasoned that Mr. Cowen's failure to establish his paternity prior to Christopher's death was fatal to the claim of paternity, and, relatedly, any right to inherit from the child's estate. *Gonzales*, 884 P.2d at 21. On appeal, the Court of Appeals affirmed. *Gonzales*, 884 P.2d at 22.

The issue before the Washington Court of Appeals was whether Mr. Cowen, as Christopher's putative father, was entitled to a one-half share of Christopher's intestate estate even though he did not establish his paternity prior to the child's death. *Gonzales*, 884 P.2d at 21. In answering that question in the negative, the court observed that the Washington laws of descent and distribution did not address the issue of whether a putative father, who had not established paternity prior to the child's death, could inherit from that child's estate. *Id.* The

Uniform Parentage Act, which Washington had adopted, however, addressed those issues in detail. Washington courts had recognized the propriety of resolving paternity issues in accordance with the UPA in the context of probate proceedings. *Id.*

In applying the UPA to the facts before it, the Court observed that the primary goal of the Act was the equalization of the rights of all children, whether born legitimate or not. *Gonzales*, 884 P.2d at 21. As the Court found, “the purpose of the UPA is to further the interests of children, not their putative fathers.” *Gonzales*, 884 P.2d at 22. Like RSMo. §210.830, the Washington UPA mandated that the child be made a party to any action to establish paternity. *Id.* The requirement that a child be made a party to a paternity action was jurisdictional. A minor child was an indispensable party to any paternity action under the Washington UPA. *Id.*

While the Washington UPA provided that a child could be represented by a general guardian or a guardian ad litem if the child was a minor, the Act made no provision for a substitution for the child by a personal representative or similar party if the child was deceased. *Id.* This was in contrast to a section of the Washington UPA providing that a child could bring an action pursuant to that statute against the estate of a putative father, if that putative father was deceased. *Id.* Consequently, because Christopher could not be made a party to the paternity action, Mr. Cowen could not establish paternity after the child’s death. *Id.*

The Court of Appeals rejected Cowen’s argument that his action to establish paternity could be brought at any time, even after Christopher’s death. In making this argument, Mr.

Cowen relied on language in the Washington UPA, stating that a man alleging himself to be the father may bring an action “at any time for the purpose of declaring the existence or non-existence of the father and child relationship.” *Gonzales*, 884 P.2d at 22. This language was required to be read consistently with the provision of the Washington UPA which required that a child be made a party to the case. *Id.* Reading both provisions together in light of the purpose of the UPA, the court found that a paternity action could be brought “at any time,” as long as the child could be made a party to the action - that is, before he or she dies. *Id.* Since Mr. Cowen did not establish paternity prior to Christopher’s death, under the UPA, his claim for paternity necessarily failed. *Gonzales*, 884 P.2d at 22.

The reasoning in *Gonzales* applies with equal force to the instant case. Like the Washington UPA applied therein, Section 210.830 mandates that a child be made a party to any action to establish paternity. RSMo. §210.830; *Gonzales*, 884 P.2d at 22. And, like the Washington UPA, Section 210.830 provides that a child is to be represented by a next friend if the child is a minor. *Id.* Lacking in the Missouri UPA, as in the Washington UPA applied in *Gonzales*, is any provision for the substitution for the child by a personal representative, next friend, or plaintiff ad litem if the child is deceased. *Id.* The absence of such a provision stands in contrast to Section 210.826.2, providing that a putative father can be represented in a paternity action by his parent or personal representative if that putative father dies. RSMo. §210.826; *Gonzales*, 884 P.2d at 22. Because the fetus could not be made a party to the paternity action since it was deceased, plaintiff could not establish paternity for the fetus

following its death. *Gonzales*, 884 P.2d at 22; RSMo. §§210.826, 210.830.

Section 210.826.1, providing that a man alleging himself to be the father of a child may bring an action “at any time” for the purpose of declaring the existence of the father and child relationship, does not require a different result. Section 210.26.1 must be construed and harmonized with Section 210.830, mandating that a child be made a party to any paternity action. *Gonzales*, 884 P.2d at 22; *St. Louis County v. B.A.P., Inc.*, 25 S.W.3d 629, 631 (Mo.App.E.D.2000) (provisions of an entire legislative act must be construed together and harmonized); *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo.banc 2000) (the statute as a whole must be looked at in construing any part of it). Construing Section 210.826.1 together with Section 210.830, in light of the purpose of the UPA to protect the best interests of the *child*, a paternity action can be brought by a putative father “at any time” so long as the child in question can be made a party to the action - that is, before the child dies. *Gonzales*, 884 P.2d at 22; *St. Louis County*, 25 S.W.3d at 631; *Fort*, 731 S.W.2d at 522. In that plaintiff failed to establish his paternity of the fetus prior to its death, his paternity action necessarily fails. *Gonzales*, 884 P.2d at 22; RSMo. §210.830.

A contrary construction of Section 210.826.1 and Section 210.830 would lead to an absurd result. Namely, a putative unmarried father could seek a determination of paternity after the death of a fetus, even though any potential liability of the putative father for custody or support of that fetus ceased at the time of its death. This result does not effectuate any purpose for which the UPA was enacted and, therefore, it must be rejected. *In the Interest of J.B.*, 58

S.W.3d 575, 578 (Mo.App.E.D.2001) (a court will not construe a statute so as to work an unreasonable, oppressive, or absurd result).

The Survival Statutes Do Not Authorize The
Appointment Of A Plaintiff/Petitioner Ad Litem To Represent
The Deceased Fetus In The Paternity Action

Along with his Second Petition For Determination Of Paternity, plaintiff filed a Motion To Appoint Plaintiff/Petitioner Ad Litem pursuant to Section 537.021. (L.F.54-55). The Survival Statutes, Sections 537.020 and 537.021, authorize the survival of tort claims - such as assault, battery, and false imprisonment - that arise from non-fatal personal injuries to the personal representative of the injured party, where the injured party later dies of unrelated causes. *Gray v. Wallace*, 319 S.W.2d 582, 584 (Mo. 1958); *Andrews v. Neer*, 253 F.3d 1052, 1057 (8th.Cir.2001); *Smith v. Tang*, 926 S.W.2d 716, 719 (Mo.App.E.D.1996).

By their terms, the survival statutes apply to causes of action for personal injury, not paternity actions. RSMo. §537.020; 537.021; *Gray*, 319 S.W.2d at 584. Neither Section 537.020 nor Section 537.021 address actions for the determination of paternity. Neither statute expressly, or impliedly, states that a paternity action survives the death of the child for which a determination of paternity is sought. Consequently, the survival statutes did not authorize the appointment of a plaintiff/petitioner ad litem or next friend for the deceased fetus in the paternity action, as plaintiff sought below. *Id.*

Further, since the UPA is the exclusive means of determining paternity in Missouri, *J.L.*, 9 S.W.3d at 734, its provisions regarding the appointment of personal representatives will

control over those set forth in Sections 537.020 and 537.021.1. *See, for example, Travis v. Contico International, Inc.*, 928 S.W.2d 367, 370 (Mo.App.E.D.1996), holding that a trial court erred when it relied on Section 537.021 as authority for appointing a defendant ad litem to represent a deceased putative father in a paternity action. The scope of Section 537.021 was narrow and in no way authorized a defendant ad litem to represent a decedent in a paternity action. *Id.* Instead, the proper party under Section 210.826.3 to represent the deceased putative father against an action for paternity was the personal representative of the decedent's estate. *Id.* As *Travis* demonstrates, the UPA is dispositive in determining whether a person could be appointed in a representative capacity to protect the interests of the deceased fetus. *Id.*

Connor Does Not Permit A Posthumous Determination Of Paternity

In his Brief, plaintiff asserts that *Connor*, 898 S.W.2d at 90, did not require that paternity be established prior to the fetus' death, implying the propriety of a posthumous determination of paternity. (Plaintiff's Brief, 13). *Connor* does not so hold.

At issue in *Connor* was whether a non-viable unborn child was a "person" capable of supporting a claim for wrongful death pursuant to 537.080. *Connor*, 898 S.W.2d at 90. Nowhere in its Opinion did the Supreme Court address the issue of how or when the paternity of an unborn child was to be proven. Rather, the Court simply declared that an unmarried father

“must prove paternity.” *Connor*, 898 S.W.2d at 90 n.3.

Under Missouri law, paternity must be proven through the mechanism of the UPA, which mandates that the child be made a party to the action. RSMo. §210.830; *J.L.*, 9 S.W.3d at 733. By its express terms, *Connor* does not hold that paternity may be established subsequent to the death of a non-viable fetus. And, to the extent that such a holding could be implied from the terms of the decision, it must be rejected as being contrary to the clear and unambiguous language of the UPA. RSMo. §210.830. Apart from his misreading of *Connor*, plaintiff provides no other “authority” permitting a putative unmarried father of a non-viable fetus to bring a posthumous action for paternity.

In that the legislature has spoken on the subject of when and how a paternity action can be brought, that legislative statement is public policy and defendant respectfully submits that the Court must defer to that policy determination. *See, Budding v. SSM Health Care*, 19 S.W.3d 678, 682 (Mo.banc 2000) (when the legislature has spoken on a subject, the court must defer to its determination of public policy). The Court must follow the UPA as it is written. Any change to the Act must come from the legislature and not the Court. *Kapper v. Natl. Engineering Co.*, 685 S.W.2d 617, 619 (Mo.App.E.D.1985); *St. v. Burns*, 978 S.W.2d 759, 761 (Mo.banc 1998); *Flanagan v. G.L. DeLapp*, 533 S.W.2d 592, 600 (Mo. banc 1976) (although the administration proviso of the dead man’s statute was inflexible, the Court’s obligation was to apply the clear language of the statute and any relief could only come by legislative action).

Plaintiff is asking the Court to remove 210.830 from the UPA. At the same time, Plaintiff seeks to have the Court engraft a provision onto the UPA, whereunder a putative parent can seek a posthumous determination of paternity after the child in question has died. However, the legislature and not the Court is to determine the wisdom and social desirability of the policy underlying the UPA. *Miss Kitty's Saloon, Inc. v. Mo. Dept. of Revenue*, 41 S.W.3d 466, 467 (Mo. banc 2001). The Court must enforce the UPA as it has been enacted by the Missouri legislature and may not enlarge its provisions; the Court may not read into the statute a legislative intent contrary to the intent made evident by the UPA's plain language, even if the Court may prefer a policy different from that enunciated by the legislature. *Keeney v. Hereford Concrete Products, Inc.*, 911 S.W.2d 622, 624 (Mo. banc 1995); *Flanagan*, 533 S.W.2d at 600.

Plaintiff Presented No Competent Or Substantial Evidence Of Paternity

Plaintiff contends that the trial court refused to consider his "evidence of paternity" in ruling on defendant's Motion to Dismiss for lack of standing. (Plaintiff's Brief, 14). Since the issue of standing is separate from the merits of the action, *Gowen*, 875 S.W.2d at 639 n.3, and since plaintiff did not possess standing to pursue his wrongful death action as a matter of law based on the pleadings and undisputed facts, such an evidentiary examination was not required. *Switzer v. Hart*, 957 S.W.2d 512, 514 (Mo.App.E.D.1997). Accordingly, the trial court did not err in declining to consider plaintiff's "evidence of paternity."

Had the trial court considered plaintiff's "evidence of paternity," it would not have changed its ruling on defendant's Motion To Dismiss. Section 210.836 addresses evidence relating to paternity. It provides that such evidence may include evidence of sexual intercourse between the mother and alleged father during the possible time of conception, an expert's opinion regarding the probability of the alleged father's paternity of the child based upon the duration of the mother's pregnancy, blood test results, and medical or anthropological evidence relating to the alleged father's paternity based on tests performed by experts. RSMo. §210.836; *K.R. v. Breasher*, 841 S.W.2d 754, 756 (Mo.App.E.D.1992) (blood testing is conclusive evidence of paternity if the results so indicate). Also, a signed acknowledgment of paternity form pursuant to Section 193.215, acknowledging paternity of a child born out of wedlock is considered evidence of paternity under the UPA. RSMo. §210.823.

It is undisputed that plaintiff did not secure an expert's opinion regarding the probability of paternity, blood testing, or medical evidence relating to paternity based on tests performed by experts. RSMo. §210.836. Nor did plaintiff sign an acknowledgment of paternity form pursuant to Section 193.215 naming himself as the fetus' biological father. RSMo. §210.823.

Instead, the only "evidence of paternity" offered by plaintiff is an affidavit wherein he states that he had intercourse with Brandi Roussin during the possible time of conception and a "statement of Brandi Roussin to her treating physician identifying plaintiff as the father of her child." (L.F.40-41, 51, 52-53). These documents do not establish plaintiff's paternity of the fetus in question.

While plaintiff states in his Affidavit that he had intercourse with Brandi Roussin during

the possible time of conception (L.F.51), there is no evidence to show that he had *exclusive* access to Ms. Roussin during the period in which the fetus was conceived. *See, S.O.*, 725 S.W.2d at 603 (when paternity of a child born out of wedlock is disputed, petitioner in an action to establish paternity must ordinarily produce evidence from which the trier of fact could reasonably conclude, without resort to speculation, that at or near the time the child was conceived, the mother engaged in sexual intercourse with the putative father, and no one but the putative father). *Compare, Roberts v. Alford*, 832 S.W.2d 331, 332 (Mo.App.E.D.1992) (evidence that the putative father had exclusive access to the mother during the period when her two children were conceived, acknowledged paternity of the first child by paying support, together with scientific evidence pointing to him as the father, was sufficient to support a judgment finding him to be the father of the two children). The trial court was not required to accept plaintiff's Affidavit asserting that he was the father of the fetus. *Lonning v. Leonard*, 767 S.W.2d 577, 580 (Mo.App.E.D.1988).

Further, the Christian Hospital Prenatal Record identifying plaintiff as the father of Brandi Roussin's unborn child (L.F.53), was not competent or substantial evidence of paternity. The Record is undated. It is not signed by Brandi Roussin. (L.F.53). There is no indication of who filled out the Record. While the Prenatal Record lists "Robert C. Lesage" as the "baby's father," there is nothing in the Prenatal Record, or the Legal File for that matter, to substantiate that bald statement of parentage. No blood or DNA testing was performed to verify that plaintiff was, in fact, the father of the fetus.

In the absence of any evidence substantiating the statement of parentage contained in the

Prenatal Record, that statement must be excluded in that it is nothing more than speculation. *See, Trimble v. Pracna*, 51 S.W.3d 481, 503 (Mo.App.S.D.2001); *Schubiner v. Oppenheimer Industries*, 675 S.W.2d 63, 78 (Mo.App.W.D.1984) (liability cannot be based upon speculation, conjecture, or guesswork). Nor was the statement of paternity in the Prenatal Record *prima facie* evidence of plaintiff's paternity of the fetus. *See, Williams v. Williams*, 609 S.W.2d 456, 459 (Mo.App.W.D.1980) (in an action brought on behalf of a child for declaration of paternity and support, statements in a birth certificate that the defendant was the father of the child were not *prima facie* evidence, much less conclusive evidence, where at the time the child was born, the plaintiff and defendant were not husband and wife and had been divorced for about two years). It necessarily follows that the statement in the Prenatal Record naming plaintiff as the father of the fetus could not support a finding of paternity. *Schubiner*, 675 S.W.2d at 78 (court may not supply missing evidence or give a party the benefit of unreasonable, speculative or forced inferences in making a finding of liability).

The Trial Court Was Not Required To Engage In A Joinder

Analysis Under Rule 52.04, Since The Fetus Was An Indispensable Party To The Paternity Action As A Matter Of Law

In his Brief, plaintiff asserts that the trial court erred in failing to engage in the two step analysis required under Rule 52.04 of the Missouri Rules of Civil Procedure. (Plaintiff's Brief, 16-18, 20-21). He contends that, while the trial court found that the non-viable fetus was a necessary party, it did not declare the fetus to be an indispensable party and the court's failure to continue the analysis was an abuse of discretion. (Plaintiff's Brief, 18). This argument must

be rejected in that it ignores the clear and unambiguous terms of the UPA that render a child an indispensable party in any action to establish the child's paternity.

Generally, an action may proceed absent joinder of a necessary party, but not absent joinder of an indispensable party. *Smith v. Wohl*, 702 S.W.2d 905, 910 (Mo.App.E.D.1986). The presence of an indispensable party is a jurisdictional requirement. *Dark v. MRO Mid-Atlantic Corp.*, 876 S.W.2d 714, 717 (Mo.App.E.D.1994). Under Rule 52.04, the first step is the determination of whether the absent party should be joined if feasible under the criteria of the Rule. *State ex rel. Emcasco Ins. Co. v. Rush*, 546 S.W.2d 188, 195 (Mo.App.E.D.1977). The second step is to determine whether the action may proceed in the absence of the nonjoined party or is required to be dismissed. *Emcasco*, 546 S.W.2d at 196. It was unnecessary for the trial court to engage in the analysis under Rule 52.04, as plaintiff contends. As a matter of law, the fetus was an indispensable party. *See*, RSMo. §210.830; *Richie*, 950 S.W.2d at 515. Section 210.830 of the UPA declares that the child for whom a determination of paternity is sought is an indispensable party in a paternity action. *Id.* Where the child is not joined as a party in a paternity action, the action must be dismissed. *Richie*, 950 S.W.2d at 515. In that the fetus was an indispensable party by virtue of the clear and unambiguous terms of the UPA, and the case law thereunder, it was not necessary for the trial court to engage in the two step analysis under Rule 52.04. Plaintiff's contention to the contrary must be rejected. The Plaintiff cannot use Rule 52.04 to provide him with a cause of action whereunder he can secure a posthumous determination of paternity, where the UPA does not provide him with such a

remedy.

II.

THE TRIAL COURT DID NOT ERR OR VIOLATE PLAINTIFF'S RIGHT TO EQUAL PROTECTION UNDER THE MISSOURI AND U.S. CONSTITUTIONS IN DENYING PLAINTIFF'S PETITION FOR DETERMINATION OF PATERNITY AND DISMISSING HIS WRONGFUL DEATH ACTION FOR THE REASONS THAT PLAINTIFF WAIVED HIS EQUAL PROTECTION ISSUE FOR PURPOSES OF THE INSTANT APPEAL, SINCE HE FAILED TO PRESERVE THE ISSUE FOR APPELLATE REVIEW IN THAT HE DID NOT PRESENT THE ISSUE TO THE TRIAL COURT; THE TRIAL COURT'S RULING DID NOT VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION IN THAT UNWED NATURAL MOTHERS AND UNWED NATURAL FATHERS ARE NOT SIMILARLY SITUATED FOR PURPOSES OF CHILDBIRTH AND PROOF OF PATERNITY; AND THE TRIAL COURT'S RULING DID NOT EVISCERATE THE RULING IN *CONNOR V. MONKEM*, THAT THE UNMARRIED PUTATIVE FATHER OF AN UNBORN CHILD MAY BRING A WRONGFUL DEATH ACTION FOR ITS DEATH, IN THAT THE TRIAL COURT FOLLOWED THE DICTATE OF *CONNOR* THAT THE UNMARRIED PUTATIVE FATHER MUST PROVE PATERNITY.

**Plaintiff Has Waived His Constitutional Argument Since He
Has Failed To Preserve It For Appeal**

In his Brief, plaintiff contends that the trial court violated his right to equal protection under the United States and Missouri Constitutions by denying his Second Petition For Determination Of Paternity and dismissing his wrongful death action because he had not been declared the father of Brandi Roussin's unborn child. (Plaintiff's Brief, 23-25). The trial court's ruling, plaintiff argues, results in "unequal treatment" of "unwed fathers." (Plaintiff's Brief, 23-25). Defendant respectfully submits that the Court may not consider this constitutional issue, since plaintiff has failed to preserve it for appeal.

To preserve a constitutional question for appellate review, a litigant must: 1) raise the question at the first available opportunity; 2) designate specifically the constitutional provision claimed to be violated; 3) state the facts showing the violation; and 4) preserve the constitutional question throughout the proceedings. *Callier v. Director of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989); *Lewis v. Department of Social Services*, 61 S.W.3d 248, 254 (Mo.App.W.D. 2001). A constitutional question must be presented to and passed on by the trial court or it is not preserved for appeal. *S.L.J. v. R.J.*, 778 S.W.2d 239, 242 (Mo.App.E.D. 1989); *State v. Lieurance*, 844 S.W.2d 81, 83 (Mo.App.S.D. 1992) (constitutional questions that were never raised before the trial court in properly filed pleadings were not cognizable on appeal). A constitutional question that is not properly raised is waived. *Lewis*, 61 S.W.3d at 254; *City of Chesterfield v. Director of Revenue*, 811 S.W.2d 375, 378 (Mo. banc 1991).

A review of the record demonstrates that plaintiff failed to raise his equal protection question in his pleadings or to otherwise present the question to the trial court. (L.F. 7-9, 16-27, 38-57). The trial court was never given an opportunity to determine the equal protection

issue and, thus, it made no ruling on that question. (L.F. 34-37, 59-63). Having failed to raise the constitutional issue before the trial court, plaintiff has waived that issue for appellate review. *S.L.J.*, 778 S.W.2d at 242; *Callier*, 780 S.W.2d at 641.

Plaintiff seeks to excuse his failure to raise the equal protection claim before the trial court, asserting that he “had no opportunity to make a constitutional challenge” because the trial court dismissed his wrongful death action for lack of standing without an evidentiary hearing, thereby preventing him from raising the issue. (Plaintiff’s Brief, 23-24). This assertion is *de hors* the record and must be rejected.

What Plaintiff fails to acknowledge is that he had ample opportunity to raise the constitutional issue before the trial court. Plaintiff filed his Amended Petition For Wrongful Death against Defendant on August 6, 2001 and his First Petition For Determination Of Paternity on September 26, 2001. (L.F. 7-9, 16-27). On October 16, 2001, Judge Neill dismissed Plaintiff’s Petition For Determination Of Paternity for lack of jurisdiction, since the fetus was not and could not be made a party to the action. (L.F. 34-37).

Following the trial court’s dismissal, Plaintiff failed to raise his constitutional challenge in any pleading filed with the trial court. While he filed a Second Petition For Determination Of Paternity and Suggestions In Support on October 29, 2001, Plaintiff failed to raise his equal protection issue therein. (L.F. 38-55). Nor did he raise the constitutional claim in any responsive pleading to Defendant’s Motion To Dismiss. Clearly, Plaintiff had several opportunities to raise his equal protection challenge after the trial court’s dismissal of his first Petition For Determination Of Paternity. Despite this fact, Plaintiff failed to raise the

constitutional issue to the trial court and, as a result, he failed to preserve the equal protection question for this Court's review. *City of Chesterfield*, 811 S.W.2d at 378; *Lewis*, 61 S.W.3d at 254.

Plaintiff contends that the Court has authority to determine the constitutional issue, even though it was not properly preserved, "when the public interest is involved." (Plaintiff's Brief, 24). As this Court has noted, the viability of the public interest exception to the rule regarding preservation of constitutional claims is highly doubtful. *City of Chesterfield*, 811 S.W.2d at 378. Even if the public interest exception still retained any viability, it has no application in the instant case. This case is not an original proceeding involving an extraordinary writ, such as the proceedings in which the public interest exception has previously been utilized. *Id.* Consequently, the public interest exception does not operate to excuse Plaintiff's failure to properly preserve his equal protection claim. As a result, that constitutional issue is waived. *Id.*

The Trial Court's Ruling Does Not Eviscerate Connor v. Monkem

The trial court's ruling does not eviscerate *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89 (Mo.banc 1995), as claimant contends. (Plaintiff's Brief, 23). *Connor* ruled that a non-viable unborn child is a "person" for whose death an unmarried putative father may state a claim under the Wrongful Death Act. *Connor*, 898 S.W.2d at 93. Below, the trial court did not challenge this holding in *Connor* or seek to limit it in any fashion. To the contrary, the action of the trial court was an attempt to follow the dictate in *Connor* that for an unmarried father to bring such

a claim, he must “prove paternity”. *Connor*, 898 S.W.2d at 90 n.3. Absent in *Connor* is any guideline or procedure for how an unwed putative father of a non-viable fetus is to establish paternity of that fetus for the purpose of placing himself within the class of individuals entitled to bring a wrongful death action under 537.080. The decision in *Connor* leaves the question of the method for establishing paternity unanswered.

An answer to the question, however, can be found in the UPA, which Missouri courts recognize as the exclusive procedure for adjudicating paternity in Missouri. *Akers v. Johnson*, 10 S.W.3d 581, 582 (Mo.App.E.D.2000); *Richie v. Laususe*, 950 S.W.2d 511, 514 (Mo.App.E.D.1997). As discussed, *supra*, the UPA mandates that the child for whom paternity is to be determined be made a party to any paternity action. RSMo. §210.830; *J.L. v. C.D.*, 9 S.W.3d 733, 735 (Mo.App.S.D.2000); *Richie*, 950 S.W.2d at 514. The UPA does not provide for the survival of a paternity action upon the death of the child in question. Under the UPA, and in light of the purpose for which it was enacted - to protect the child’s best interests⁶ - the answer to the question left unanswered in *Connor* is clear: an unmarried, putative father of a non-viable fetus can only establish paternity of that fetus, for the purposes of a wrongful death action, when a paternity action is brought, in which the fetus is named as a party, prior to the death of that fetus. Once the fetus is deceased, no action for paternity lies under the UPA.

This result does not “eviscerate” *Connor*, since *Connor* did not address or delineate how paternity of the fetus was to be established. *Connor*, 898 S.W.2d at 90 n.3. Any contrary

⁶ See, *State ex rel. S.O. v. S.O.*, 725 S.W.2d 601, 603 (Mo.App.E.D.1987).

conclusion would effectively nullify Section 210.830 of the UPA. The trial court's ruling did not restrict the right of a putative, unmarried father of a non-viable fetus to recover for its wrongful death, as plaintiff implies. (Plaintiff's Brief, 23, 24-25). Rather, the trial court merely followed the dictate of *Connor* that the alleged father "must prove paternity." *Connor*, 898 S.W.2d at 90 n.3.

In requiring plaintiff to prove paternity, and in dismissing his wrongful death action for his failure to do so, the trial court did not deny plaintiff's right to equal protection. The trial court's ruling was entirely in keeping with the UPA and Missouri case law requiring an unmarried, putative father to prove paternity of a child in a paternity action. *S.O.*, 725 S.W.2d at 603.

Equal protection of the law does not require that things that are different in fact be treated in law as though they were the same. *State v. Champ*, 477 S.W.2d 81, 82 (Mo.1972). To prevail on an equal protection claim, plaintiff must show that he is similarly situated to those with whom he is comparing himself. *Cooper v. Missouri Board of Probation and Parole*, 866 S.W.2d 135, 137 (Mo.banc 1993).

As a matter of biology, a natural mother is not similarly situated to a natural father for the purposes of childbirth and proving paternity. The UPA recognizes this fact. Section 210.819 provides that a parent and child relationship between a child and its natural mother "may be established by proof of her having given birth to the child." RSMo. §210.819. Because he is physically incapable of giving birth to a child, a putative father must prove paternity under the methods set forth in Sections 210.817 to 210.852 - for example, using blood testing or an

acknowledgment of paternity under Section 193.215. In that women and men are not similarly situated in matters of child birth and paternity, the trial court did not violate plaintiff's right to equal protection by requiring him to prove his paternity of the fetus. *Champ*, 477 S.W.2d at 82; *Cooper*, 866 S.W.2d at 137. *See also, People v. Morrison*, 584 N.E.2d 509, 513 (Ill. App.3rd 1991), finding that under the Illinois UPA, a parent/child relationship is established between a natural mother and a child by proof of her having given birth to the child, while an unwed father could only establish a legal relationship with the child pursuant to the Illinois Parentage Act. The court reasoned that the "State's failure to grant the same measure of recognition of legal parentage at birth to an unwed father as that accorded an unwed mother is based merely upon the biological reality that motherhood is obviously more apparent and therefore more easily established." *Id.*

III.

THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFF'S WRONGFUL DEATH ACTION WITH PREJUDICE FOR LACK OF STANDING FOR THE REASONS THAT THE TRIAL COURT PROPERLY DISMISSED THE ACTION USING THE ANALYSIS SET FORTH IN *SWITZER V. HART*, SINCE THE PETITION FOR WRONGFUL DEATH, THE SECOND PETITION FOR DETERMINATION OF PATERNITY AND THE UNDISPUTED FACTS SHOWED THAT PLAINTIFF COULD NOT ESTABLISH HIS PATERNITY OF THE FETUS SO AS TO BRING HIMSELF WITHIN THE CLASS OF PERSONS ENTITLED TO FILE A WRONGFUL DEATH ACTION UNDER SECTION 537.080; THE TRIAL COURT DID NOT TREAT DEFENDANT'S MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT; AND THE TRIAL COURT'S DISMISSAL WITH PREJUDICE WAS NOT ERRONEOUS OR OVERBROAD SINCE A DETERMINATION THAT PLAINTIFF LACKED STANDING TO FILE THE WRONGFUL DEATH ACTION WAS NOT A RULING ON THE MERITS, AND, CONSEQUENTLY, DID NOT BAR THE PROSECUTION OF A SUBSEQUENT WRONGFUL DEATH ACTION BY APPROPRIATE CLASS MEMBERS.

The Trial Court Properly Dismissed The Action

Under The *Switzer v. Hart* Analysis

Plaintiff's argument that the trial court erred in treating defendant's motion to dismiss as a motion for summary judgment (Plaintiff's Brief, 27-30), must be rejected. Plaintiff posits that the trial judge erred in relying on *Switzer v. Hart*, 957 S.W.2d 512 (Mo.App.E.D.1997), in that the paternity of the fetus was a contested fact. (Plaintiff's Brief, 28-29). This argument misconstrues the analysis set forth in *Switzer* and ignores undisputed facts demonstrating the propriety of the dismissal of plaintiff's wrongful death action.

Switzer ruled that in determining whether a party has standing to bring an action, the trial court must consider not only the petition, but also any additional non-contested facts that the parties accepted as true at the time of the argument on the motion to dismiss for lack of standing. *Switzer*, 957 S.W.2d at 514. The trial court then engages in a "summary judgment mode of analysis" to determine whether standing is resolved as a matter of law on the basis of the undisputed facts. *Id.*

That the trial court uses a summary judgment mode of analysis to determine the issue of standing does not transfer a motion to dismiss for lack of standing into a motion for summary judgment, as plaintiff argues. *Switzer* did not so rule. *Switzer*, 957 S.W.2d at 514. Nor did *Switzer* hold that use of the summary judgment mode of analysis set forth therein required notice to the parties under Rule 55.27(b). *Id.*

That plaintiff alleged he was the father of the fetus in his wrongful death action will

not save that action from dismissal under *Switzer*. (Plaintiff’s Brief, 28). Plaintiff overlooks significant undisputed facts. It is undisputed that plaintiff placed his paternity of the fetus in issue by filing his Petitions For Determination Of Paternity. It is also undisputed that the fetus was not made a party to either plaintiff’s original Petition for Determination Of Paternity or his second Petition, as the UPA required. (L.F.16-18, 38-41). RSMo. §210.830. Given these undisputed facts, plaintiff could not establish his paternity as the father of the fetus so as to bring himself within the class of persons entitled to file a wrongful death action under Section 537.080. It necessarily follows that the trial court properly applied the *Switzer* analysis in dismissing plaintiff’s wrongful death action for lack of standing. *Switzer*, 957 S.W.2d at 514.

Plaintiff posits that the trial court failed to afford him an “opportunity to respond to the outside-the-record facts which the trial court considered in dismissing” his wrongful death action. (Plaintiff’s Brief, 30). This assertion is *de hors* the record. Upon reviewing the Order and Judgment, it becomes readily apparent that the trial court did not consider any facts outside of those contained in the Amended Petition, the Second Petition For Determination Of Paternity and related pleadings, and the undisputed facts that the paternity of the fetus was at issue and the fetus was not made a party to the plaintiff’s paternity action. (L.F.59-63). Thus, plaintiff’s argument must be rejected.

The Trial Court’s Dismissal With Prejudice Was Not Over Broad

Plaintiff argues that the trial court’s dismissal with prejudice is over broad in that it forecloses a wrongful death action against the defendant by other class members or by a plaintiff ad litem. (Plaintiff’s Brief, 30-31). This argument misses the mark.

The decision to dismiss a petition with or without prejudice rests within the sound discretion of the trial court. *Saidawi v. Giovanni's Little Place, Inc.*, 987 S.W.2d 501, 505 (Mo.App.E.D.1999). In dismissing plaintiff's wrongful death action with prejudice, Judge Neill did not abuse her discretion.

Plaintiff lacked standing to pursue an action under the Wrongful Death Act, since he could not demonstrate that he was the father of Brandi Roussin's unborn child, so as to place himself within the class of persons authorized to bring suit under RSMo. §537.080. A determination that plaintiff lacked standing to file a wrongful death action was not a ruling on the merits of the action and, therefore, would not operate to preclude the prosecution of a subsequent wrongful death action by appropriate class members. *Gowen v. Cote*, 875 S.W.2d 637, 639 n. 3 (Mo.App.S.D.1994); *Champ v. Poelker*, 755 S.W.2d 383, 387 (Mo.App.E.D.1988). For this reason, because plaintiff had the opportunity to amend his Petition For Determination Of Paternity, and because plaintiff could not, as a matter of law, secure a posthumous determination of the paternity of the fetus, the trial court's dismissal of his wrongful death action with prejudice was not erroneous. *See, for example, Williams v. City of Kansas City*, 841 S.W.2d 193, 198 (Mo.App.W.D.1992) (when the trial court concludes that pleadings do not state a cause of action and when an adequate opportunity to amend has been provided, it is not error for the trial court to dismiss with prejudice).

CONCLUSION

In dismissing plaintiff's wrongful death action for lack of standing, the trial court did not err or abuse its discretion. The fetus for whose death plaintiff sought to recover was not made a party to any paternity action, as Section 210.830 of the UPA requires. Under the UPA, no action for paternity could survive the death of the fetus and plaintiff could not secure a posthumous determination of paternity for that unborn child. Because plaintiff was unable, as a matter of law based on the undisputed facts, to place himself within the class of persons entitled to bring a wrongful death action under Section 537.080, the trial court properly dismissed his action for lack of standing. Defendant respectfully requests that the Supreme Court affirm the Order and Judgment of the trial court.

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CERTIFICATE OF SERVICE

A copy of the brief pursuant to Special Rule 1 has been mailed this _____ day of November, 2002, to: Spencer E. Farris, The S.E. Farris Law Firm, 734 North Harrison, St. Louis, Missouri 63122.

Mary Anne Lindsey

CERTIFICATE OF COMPLIANCE

This Brief complies with Special Rule 1 and contains 15,213 words. To the best of my knowledge and belief the enclosed disc has been scanned and is virus-free.

Mary Anne Lindsey

