TORTS—SURVIVING PARENTS HAVE A CLAIM UNDER RULE 8 OF THE IOWA RULES OF CIVIL PROCEDURE FOR DAMAGES RESULTING FROM DEPRIVATION OF AN UNBORN CHILD'S COMPANIONSHIP, SOCIETY, AND SERVICES.—*Dunn v. Rose Way, Inc.*, (Iowa 1983).

On June 11, 1980, Donna Dunn and her two year-old daughter Emily were traveling west on a Des Moines freeway.[1] Donna was seven and a half months pregnant at the time,[2] and the unborn infant she carried was believed to be healthy and viable.[3] As Donna drove along in the family automobile, she suddenly observed two other automobiles stopped directly ahead in the center lane.[4] The two vehicles had apparently been involved in a minor collision just prior to Donna's arrival;[5] and though neither had been disabled,[6] both were parked in the path of oncoming traffic.[7] The drivers, defendants Plasencia and Davis, had alighted from these vehicles to inspect for damage.[8]

It is not altogether clear whether Donna slowed to a complete stop behind the parked vehicles at this point,[9] but suddenly a tractor-trailer driven by defendant Smith slammed into the rear of the Dunn automobile.[10] The impact turned Donna's car into a fiery "deathtrap" and rammed it into one of the parked vehicles.[11] As a result, Donna, Emily and the unborn child were killed.[12]

Michael Dunn, the surviving husband and father, brought actions in tort on behalf of Donna, Emily, the viable yet unborn infant, and himself.[13] Named as defendants were: Plasencia and Davis (owners of the parked vehicles), Smith (driver of the tractor-trailer), Rose Way, Inc. (owner of the tractor-trailer), and Ford Motor Co. (manufacturer of the Dunn automobile, a 1979 Mercury Capri).[14] Among the numerous claims against each of the defendants were three counts brought under the survival statute[15] seeking re-

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1. Dunn v. Rose Way, Inc., 333 N.W.2d 830, 831 (Iowa 1983).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Brief for Appellants at 12, Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983).
12. 333 N.W.2d at 831.
13. *Id.*
14. *Id.*
15. *Id.* IOWA CODE § 611.20 (1983), which provides: "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same."

covery for the unborn child's estate and three counts under the Rule 8 of the Iowa Rules of Civil Procedure[16] to recover damages for deprivation and loss of "the unborn child's companionship, society, and services."[17]

Defendants moved to dismiss the claims pertaining to the unborn child[18] asserting that such claims failed to state a cause of action upon which relief could be granted under Iowa law.[19] The trial court granted defendants' motions,[20] and plaintiff appealed.[21] The Iowa Supreme Court *held*, affirmed in part, reversed in part and remanded with instructions.[22] Surviving parents have a claim under Rule 8 of the Iowa Rules of Civil Procedure "for damages resulting from deprivation of an unborn child's companionship, society, and services." *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 834 (Iowa 1983).

At first glance the *Dunn* decision appears conceptually difficult; while it adheres to earlier decisions which held that a fetus is not a "person" within the meaning of the survival statute,[23] it also establishes that an unborn child is a "minor child" within the meaning of Rule 8 or the Iowa Rules of Civil

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16. IOWA R. CIV. P. 8, provides: "A parent, or the parents, may sue for the expense and actual loss of services, companionship and society resulting from injury to or death of a minor child." For a comprehensive historical review of Rule 8, *see* Note, *Iowa Rule of Civil Procedure 8: Recent Developments*, 24 DRAKE L. REV. 203 (1974).

17. 333 N.W.2d at 831.

18. Only defendants Ford, Rose Way, and Smith moved for dismissal on plaintiff's claim under Rule 8 and Iowa Code section 611.20. Brief for Appellants at 9-10, Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983).

19. Brief for Appellants at 32-35 app., Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983). Defendants relied on *McKillip v. Zimmerman*, where the Iowa Supreme Court held that a non-viable fetus was not a "person" within the meaning of the survival statute, Iowa Code section 611.20. 191 N.W.2d 706, 709 (Iowa 1971). Plaintiff resisted the motions relying heavily on the clear weight of authority of other jurisdictions allowing rights of action for the death of a viable fetus. Brief for Appellant at 35-41 app., Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983).

20. Dunn v. Rose Way, Inc., No. 93-68019 (D. Polk County Iowa Dec. 14, 1981) (order granting motions to dismiss).

21. Brief for Appellants at 50 app., Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983). The Iowa Supreme Court ruled that the order granting dismissal was not a final judgment appealable as a matter of right, but allowed an interlocutory appeal pursuant to Rule 2 of the Iowa Rules of Appellate Procedure. Dunn v. Rose Way, Inc., No. 93-68019 (Iowa Aug. 16, 1982) (order granting interlocutory appeal from dismissal of claims). Rule 2 allows appeal from a pretrial order when it is determined that "such ruling or decision involves substantial rights and will materially affect the final decision and that a determination of its correctness before trial on the merits will better serve the interests of justice." IOWA R. APP. P. 2.

22. 333 N.W.2d at 830. The court ruled that the trial court had not erred in dismissing the claims under Iowa Code section 611.20, but that the order granting dismissal of the Rule 8 claims must be reversed. *Id.* at 834.

23. *Id.* at 831. As noted earlier, *McKillip v. Zimmerman* established that a non-viable fetus is not a "person" within the meaning of Iowa Code section 611.20. *See supra*, note 19 and accompanying text. In *Weitl v. Moes*, the court denied recovery under section 611.20 for death of a viable fetus. 311 N.W.2d 259, 273 (Iowa 1981). Thus, so long as the child remains a fetus, no action can arise under Iowa Code section 611.20. *Id.* at 271.

Procedure.[24] Prior to *Dunn*, the wrongful or negligent death of a minor child gave rise to two causes of action in Iowa;[25] one under the survival statute for injuries personal to the decedent,[26] and another under Rule 8 for the losses suffered by the child's parents.[27] The construction given the term "minor child" by the *Dunn* majority modifies the rule: now, two causes of action arise for the wrongful or negligent death of a minor child *only* where the "child" is also deemed to be a "person" by virtue of a live birth;[28] in cases where the "minor child" is a fetus, only the Rule 8 claim will arise from such death.[29]

Justice Harris wrote for the *Dunn* majority;[30] and once having stated the scope of review for the issues to be decided,[31] he quickly disposed of the claim brought by plaintiff under the survival statute.[32] He noted that in two earlier decisions, *McKillip v. Zimmerman*,[33] and *Weitl v. Moes*,[34] the Iowa Supreme Court had clearly established that the word "person" as used in the survival statute did not include the unborn child, whether viable or not.[35] He merely added that a majority of the court (himself not included) continues to support this view.[36] Thus, "the trial court had not erred in dismissing the wrongful death claim of the unborn child under Iowa Code § 611.20."[37]

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24. 333 N.W.2d at 833. The reasoning underlying this distinction will be set forth later in this Case Note. *See infra* text accompanying notes 47-79.

25. Wardlow v. City of Keokuk, 190 N.W.2d 439, 442-43 (Iowa 1971) (action brought by administrator for wrongful death of an unborn child allegedly due to defendant's negligent operation of a motor vehicle).

26. *Id.* Compensable losses include services, society, companionship, medical expenses, and cost of burial. *Id.* at 442.

27. *Id.*

28. 333 N.W.2d at 831.

29. *Id.* at 833.

30. *Id.* at 831. All justices concurred in the disposition of the section 611.20 claim, except Reynoldson, C.J., Larson, J., and LeGrand, Senior Judge, who dissented. *Id.* at 834. All justices concurred as to the majority holding on the Rule 8 claim, except McGiverin, J., Uhlenhopp, J., McCormick, J., and Schultz, J. J., who dissented. *Id.*

31. *Id.* at 831. The court quoted from *Peffers v. City of Des Moines*, where the appropriate scope of review was set forth: "[a] motion to dismiss admits, and is decided solely upon, all facts well pleaded. It is only sustainable when it appears to a certainty the pleader has failed to state a claim on which relief can be granted." 299 N.W.2d 675, 677 (Iowa 1980) (citations omitted).

32. 333 N.W.2d at 834. *See* IOWA CODE § 611.20 (1983).

33. 191 N.W.2d 706 (Iowa 1971).

34. 311 N.W.2d 259 (Iowa 1981).

35. 333 N.W.2d at 831.

36. *Id.* Justice Harris, in reference to the *Weitl* holding, said "[i]t would unduly extend this opinion and yield little of precedential value to repeat the views of the majority and dissenting opinions in *Weitl*. A majority of the members of this court, not including the author of this opinion, continue to support the majority *Weitl* holding." *Id.*

37. *Id.*

Justice Larson wrote for the dissenters.[38] He used the opportunity to launch another assault on the *Weitl* majority opinion.[39] He said:

> From a purely legal standpoint, the *Weitl* rule lacks any substantial support. From a common-sense standpoint, it is absolutely indefensible. All religious and philosophical considerations aside, who but lawyers and judges could argue, in *any* context, that an unborn infant capable of life on its own is neither a 'person' nor a 'child' under the law?[40]

He went on to note that the real reason some courts deny recovery for wrongful death of a fetus is fear that loss of the "bright line" birth provides for determining when a recovery may be had will inevitably draw them into a debate as to when life begins in the legal sense.[41] Unconcerned with such a prospect, he proclaimed, "[d]rawing lines is a part of judging, and we do it all the time."[42] He called for use of "viability" as the proper determining factor, asserting that it would be more fair and more sensible, particularly since the legislature had provided a statute which clearly defines viability.[43]

Justice McGiverin concurred in the majority holding as to the wrongful death claim.[44] Like the majority, he relied upon the earlier construction given the word "person" under the survival statute as meaning "only those born alive,"[45] but then added another argument. He pointed out that the legislature had not changed the wording of the survival statute in the twelve years since that holding, and thus concluded that the interpretation should not be disturbed.[46]

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38. *Id.* at 835. *See supra*, note 30.

39. *Id.* Justice Larson had also written a dissenting opinion in *Weitl* in which he roundly criticized the majority for committing "Iowa to what is undeniably the minority rule at a time when the recognition of claims on behalf of unborn children is so rapid and pronounced that courts and writers alike have noted the phenomenon." Weitl v. Moes, 311 N.W.2d 259, 275 (Iowa 1981) (Larson, J., dissenting).

40. 333 N.W.2d at 835 (emphasis in the original).

41. *Id.*

42. *Id.*

43. *Id.* Justice Larson referred to Iowa Code section 702.20, which provides:

> '*Viability*' is that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life support systems. The time when viability may be achieved will vary with each pregnancy and the determination of whether a particular fetus is viable is a matter of responsible medical judgment.

IOWA CODE § 702.20 (1983). *See* Dunn v. Rose Way, Inc., 333 N.W.2d at 835 (Larson, J., concurring in part and dissenting in part).

44. 333 N.W.2d at 834.

45. McKillip v. Zimmerman, 191 N.W.2d at 709.

46. 333 N.W.2d at 834. Justice McGiverin cited to *Cover v. Craemer*, to support this position. In *Cover*, an action was brought by the Treasurer of Linn County to recover taxes on a property omitted from taxation for years 1956 through 1959. 258 Iowa 29, 30, 137 N.W.2d 595, 599 (1965). The trial court granted defendant's motion to dismiss relying primarily on the construction given "the tax ferret law" nearly sixty years prior in Shearer v. Citizens' Bank of Washington Co., 129 Iowa 564, 105 N.W. 1025 (1906). 258 Iowa at 30, 137 N.W.2d at 597. The

The more significant issue (in terms of precedent) raised by the appeal was the applicability of Rule 8[47] to cases where an unborn child has died due to the wrongful or negligent acts of another, a question of first impression for the Iowa Supreme Court.[48] Though it might seem somewhat paradoxical in light of the court's adherence to the earlier construction given the word "person,"[49] the majority concluded that the fetus, in this case a viable one, is a "minor child" for purposes of a Rule 8 claim.[50]

From the outset the majority sought to make clear the distinction between claims brought under the survival statute,[51] and those arising under Rule 8.[52] Reliance was placed upon the case of *Wardlow v. City of Keokuk*, in which the court said:

> The elements of damage recoverable under the code section and rule 8 are distinct. The rule purports to encompass all damages recoverable by a father acting in his own right and 'expense' has been interpreted as having reference to 'the reasonable cost incurred for medical attendance, nursing, and the like, including that of a suitable burial.' Carnego v. Crescent Coal Co., 164 Iowa 552, 554, 146 N.W. 38, 39.
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> On the other hand the survival statute relates to damages recovered for the minor's estate by an administrator or other legal representative. These latter damages are then distributed among decedent's heirs according to intestate laws.[53]

The court noted that Rule 8 "is remedial and should be construed 'in light of current social conditions,' "[54] and that "the gist of a rule 8 action is

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Cover court found that the legislature had not changed the relevant provisions of the statute regarding minimum notice and statute of limitations since *Shearer*, and concluded:

> [w]e are not inclined to overrule Shearer v. Citizens' Bank. It was decided almost 60 years ago and the construction given section 1374 (sections 443.12 and 443.13 since 1924) has evidently met the approval of each successive legislature, and under such circumstances we should not change it.
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> The rule of stare decisis is controlling here. We decline to change the meaning given the statute for almost 60 years.

258 Iowa at 34, 137 N.W.2d at 599 (citations omitted).

47. *See supra*, note 16 for the wording of Iowa R. Civ. P. 8.
48. Dunn v. Rose Way, Inc., 333 N.W.2d at 831.
49. *See supra*, notes 33-37, and accompanying text.
50. 333 N.W.2d at 832-34.
51. Iowa Code § 611.20 (1983).
52. Iowa R. Civ. P. 8.
53. 190 N.W.2d 439, 442 (Iowa 1971). *Wardlow* was an action brought against the City of Keokuk for damages resulting from the wrongful deaths of plaintiffs' minor children. *Id.* at 440.

Justice Harris also noted that in *Wardlow*, " 'loss of services' was construed to include companionship and society," and that the legislature had shown agreement by including such language by amendment to Rule 8, citing 1973 Iowa Acts ch. 316. Dunn v. Rose Way Inc., 333 N.W.2d at 832.

54. 333 N.W.2d at 832 (citations omitted). Justice Harris drew from *Wardlow*, *supra*, to support this view. *Id.* He also cited to *Irlbeck v. Pomeroy*, where the court held that the guest statute provided no defense to a Rule 8 claim against the negligent driver of an automobile in

'a wrong done to the parent in consequence of injury to his child by the actionable negligence of another.' "[55] The majority concluded, "[t]he survival statute and rule 8 serve different functions and compensate different people for different wrongs";[56] therefore, "neither *McKillip* nor *Weitl* is precedent for the trial court holding on the rule 8 claims."[57]

A number of arguments were advanced by defendants in support of the trial court's dismissal of the Rule 8 claims.[58] Each was addressed in turn by the majority. First, defendants relied on longstanding authority that the unborn child has no status under Iowa law.[59] In response, the majority deemed this to be "an argument that overlooks the fact that a parent does" have legal status in Iowa.[60] Next, defendants asserted that attempts to approximate or infer damages under Rule 8 would be purely "speculative and conjectural,"[61] and that causation problems would arise since alleged injuries to a fetus "are not readily apparent or ascertainable."[62] Defendants urged the court to require a live birth before liability would attach[63] in order to maintain that "bright line" of demarcation.[64] The majority summarily dismissed this argument saying, "any general denial of liability is easy to apply.[65] Whatever could be said in this regard against the claim of an unborn child could be said as well against the claim of a two-month-old child."[66]

Finally, the defendants offered a linguistic argument, citing to various dictionary definitions, and asserted that the term "minor child" was not meant to include an unborn child.[67] The majority said, "[t]he difficulty with

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which plaintiff's daughter was killed. 210 N.W.2d 831, 834 (Iowa 1973). In *Irlbeck*, the court said Rule 8 should be "liberally construed in furtherance of its objects." *Id.* at 833.

55. Dunn v. Rose Way, Inc., 333 N.W.2d at 832. This portion was taken from *Handeland v. Brown*, where the court said, "[a]ctions brought under rule 8 are not for the injury to the child but for injury to the father as a consequence of the injury to the child." 216 N.W.2d 574, 578 (Iowa 1974). *Handeland* held that "a child's contributory negligence, not the sole and proximate cause of his injury, is not a defense to a parental claim under rule 8 for the expense and actual loss of services, companionship and society resulting from the injury to or death of the child." 216 N.W.2d at 579.

56. Dunn v. Rose Way Inc., 333 N.W.2d at 832.

57. *Id.*

58. Brief for Appellees at 11-17, Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983).

59. *Id.* at 11-13.

60. 333 N.W.2d at 832-33.

61. Brief for Appellees at 14, Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983).

62. *Id.* This appears to be true, at least as it applies to damages, because damages measured under the Rule are always somewhat speculative. For example, a parent may recover for the loss of the child's services under Rule 8. *Id.* Obviously, one can never be certain as to the amount of services the child would have provided, if any, had he or she lived to attain majority.

63. *Id.* at 15.

64. 333 N.W.2d at 833.

65. *Id.* The majority characterized this argument as "a general criticism of rule 8 . . . not limited to the facts here." *Id.*

66. *Id.*

67. Brief for Appellees at 16-17, Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983).

this argument is that is depends upon which dictionary is used."[68] *Webster's New International Dictionary*, where child is defined as "an unborn or recently born human being; fetus; infant; baby," was cited by the court.[69] The majority added, "[t]his plain definition is not changed by addition of the word 'minor'. A *minor person* is simply one who has not yet reached majority, a category which certainly includes *unborn persons*."[70]

The court also cited to the case of *Volk v. Baldazo*,[71] where the Supreme Court of Idaho had previously construed the term "minor child" as it is used in Idaho's wrongful death statute:[72]

> The trial court held, and it is contended here, that the cause of action authorized by I.C. § 5-310 for the death of a 'minor child' does not extend to nor include a viable, unborn fetus which died of injuries, and hence was never born alive. We disagree. We hold rather, that the term 'minor child' marks the upper age limit beyond which a parent's cause of action may not extend under I.C. § 5-310. Parents, under I.C. § 5-310, have a right of action only if their child suffers wrongful death before reaching the age of eighteen. We hold that a lower age limit is neither implied nor necessary. An unborn viable child traditionally has legal existence and rights and is easily considered within the meaning of the term 'minor child."[73]

Setting aside these arguments, the majority found dispositive the purpose of Rule 8, compensation of the *parent* for the deprivation of "antici-

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68. 333 N.W.2d at 833.

69. *Id.*

70. *Id.* (emphasis added). This might seem to be a somewhat peculiar choice of wording in light of Division I of the majority opinion which clearly upheld the construction of the word "person" as not including the unborn. *Id.* at 831. Of course, that construction only applies to "person" as it is used in the survival statute, Iowa Code section 611.20. *Id.*

71. 103 Idaho 570, 651 P.2d 11 (1982). In *Volk*, action was brought in part for damages from the wrongful death of an unborn child. 103 Idaho at ____, 651 P.2d at 12. A partial summary judgment was granted and the sole issue on appeal was whether a fetus was a "person" or "child" within the meaning of the wrongful death statute. 103 Idaho at ____, 651 P.2d at 12. On appeal, the Idaho Supreme Court held that a wrongful death action could be maintained by parents of a viable unborn fetus who died of injuries sustained in an automobile accident. 103 Idaho at ____, 651 P.2d at 15.

72. The statute construed in *Volk* provides:

> The parents may maintain an action for the injury or death of an unmarried minor child, and for the injury of a minor child who was married at the time of death and whose spouse died as a result of the same occurrence and who leaves no issue, and a guardian for the injury or death of his ward when such injury or death is caused by the wrongful act or neglect of another, but if either the father or mother be dead or has abandoned his or her family, the other is entitled to sue alone. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person.

IDAHO CODE § 5-310 (1982).

73. 103 Idaho at ____, 651 P.2d at 14 (citations omitted).

pated services, companionship, and society of the minor child."[74] The court said, "[t]he parent's loss does not depend on the legal status of the child; indeed the absence of the child is the crux of the suit."[75] Again the survival statute was distinguished:

> It is one thing for the legislature to say that a wrongful death recovery shall accrue to a person's estate. It is quite another to allow a parent to recover when they are deprived of the anticipated services, companionship, and society of a minor child. In the latter situation the deprivation does not necessarily relate to the child's birth. And the parents' loss certainly does not vanish because the deprivation occurred prior to birth. To the deprived parent the loss is real either way.[76]

Then, in an effort to forestall any suggestion that allowing recovery under Rule 8 for negligent or wrongful death of a fetus would in effect be a *de facto* overruling of the majority holding in *Weitl*, the court added, "[t]he wrongful death claim remains barred by the *Weitl* holding. The father's rule 8 claim calls for consideration of a different theory of recovery."[77] "It is not unknown for the interpretation of a rule to lead to a result that differs, at least superficially, from that expected by reason of a prior holding interpreting some other rule."[78] The judgement of the trial court dismissing the Rule 8 claims was, therefore, reversed.[79]

Justice McGiverin wrote for the dissenters as to the Rule 8 claims.[80] He criticized the majority's construction of the rule asserting, "[i]t ignores the plain meaning of the words used in rule 8."[81] Unlike the majority he relied upon *Black's Law Dictionary* to find the "plain meaning" of the term "minor child."[82] He noted that the majority had focused primarily "on the word 'child,' which he defined as an '[u]nborn or recently born human being.' "[83] However, he quickly pointed out, '[t]he legislature, however, modified the word 'child' with the adjective 'minor.' Thus a parent's right of recovery under rule 8 is restricted by the limitations which the adjective 'minor'

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74. 333 N.W.2d at 833.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* By way of example, Justice Harris cited *Fundermann v. Mickelson*, where the right to recover for alienation of affections was abolished. 304 N.W.2d at 790, 794 (Iowa 1981). He then cited *Van Meter v. Van Meter*, in which the refusal to dismiss a claim for intentional infliction of physical and emotional distress allegedly caused by defendant's seduction of plaintiff's former husband was affirmed. 328 N.W.2d 497, 498 (Iowa 1983). In *Van Meter*, the court said, "[w]e cannot conclude as a matter of law that no facts are conceivable under which a claim for intentional infliction of emotional distress could be maintained merely because it, like alienation claims, arises out of a failed marital relationship." *Id.*
79. Dunn v. Rose Way, Inc., 333 N.W.2d at 834.
80. *Id.* at 834-35. *See supra* note 30.
81. *Id.* at 834.
82. *Id.*
83. *Id.* [citing BLACK'S LAW DICTIONARY (rev. 5th ed. 1968)].

places on the word 'child.' "[84] He added, "[a] 'minor' has been defined as a 'person.' "[85]

Relying on the construction given the word "person" in *Weitl*, he said:

> The ordinary meaning of the word 'person' is a human being who has 'attained a recognized individual identity' by being born alive. I conclude therefore, that the modifier 'minor' was placed in rule 8 to limit a parent's recovery to the death or injury of a child who was born alive.
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> Consequently, the initial requirement of the parent's claim under rule 8 that injury or death occur to a 'minor child' is not met. The fetus here had not yet been born and there was no 'minor child.' The injury and death were suffered by a fetus, not a minor child. Thus, the parent could not have a claim under rule 8.[86]

Justice McGiverin offered longstanding precedent in support of his view.[87] In *Kansz v. Ryan*,[88] the Iowa Supreme Court held that a father of an unborn child could not recover for loss of services where a third-party had allegedly induced the mother to terminate her pregnancy.[89] In *State v. Beatty*,[90] the court said, "[n]ow, as the child was not born alive, there never was any person for whose maintenance defendant could be charged."[91] In light of this authority, and the "plain meaning" derived from the term "minor child,"[92] he concluded, "that the use of the modifier 'minor' was intended by the legislature as a requirement that a 'child' be born alive before it becomes a 'minor child' under rule 8;"[93] therefore, in his opinion, the trial court correctly dismissed the Rule 8 claims for death of the unborn child.[94]

One question left unresolved by the *Dunn* decision is whether a surviving parent must establish viability in order to maintain a cause of action

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84. *Id.*

85. *Id.* [citing BLACK'S LAW DICTIONARY, 899 (rev. 5th ed. 1968)].

86. 333 N.W.2d at 834.

87. *Id.* st 834-35.

88. 51 Iowa 232, 1 N.W. 485 (1879). In *Kausz*, plaintiff-father brought action for the deprivation of his unborn child after a doctor allegedly induced the mother to miscarriage. 51 Iowa at 232, 1 N.W. at 485.

89. 51 Iowa at 234, 1 N.W. at 487.

90. 61 Iowa 307, 16 N.W. 149 (1883). In *Beatty*, defendant-father was charged with bastardy prior to birth of a child alleged to have been his own. *Id.* Prior to judgement, the fetus died. *Id.* Thus, the court concluded, the proceeding must be dismissed. 61 Iowa at 308, 16 N.W. at 149.

91. *Id.* at 308, 16 N.W. at 149. Justice McGiverin also cited *Norman v. Murphy*, where it was held that an unborn child was not a "minor person" within the meaning of the California wrongful death statute, 124 Cal. App. 2d 95, 100, 268 P.2d 178, 179 (1954), and *Stern v. Miller*, where the Florida Supreme Court held that an action for wrongful death of a stillborn fetus had failed to state a cause fo action due to a prior construction given the wrongful death statute of that state, such that a fetus was neither a "person" nor a "minor child" within the meaning of that statute. 348 So. 2d 303, 307 (Fla. 1977).

92. *See supra* text accompanying notes 80-83.

93. 333 N.W.2d at 835.

94. *Id.*

under Rule 8. The fetus in *Dunn* reportedly was viable.[95] However, nothing in the court's holding suggests that viability must be proved before a fetus will be considered a "minor child" within the meaning of Rule 8. Indeed, the majority's rationale seems to indicate that such proof is not required, and it would certainly support a claim for the death of a non-viable fetus. The "parents' loss . . . does not vanish because the deprivation occurred prior to birth,"[96] and a death prior to viability can be equally damaging. As a practical matter though, a line of demarcation should, and probably will be drawn later. It is suggested that the statute which defines viability[97] be used in this regard.[98]

The *Dunn* holding indicates recognition by the Iowa Supreme Court of the tragic impact suffered by parents when they lose a child *in utero*. More significantly, *Dunn* ensures that a means exists by which those parents may be compensated when the loss is caused by the negligent or wrongful acts of another. A review of the history of Rule 8 reveals a steady tendency by the legislature and the Iowa Supreme Court to be somewhat "plaintiff oriented" in cases where a child is injured or killed.[99] One writer has suggested that recovery under Rule 8 is to some extent "virtually guaranteed."[100] With the advent of this latest construction given the Rule, it would appear that the observation is accurate.

Ronald Rankin

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95. *Id.* at 831.

96. *Id.* at 833.

97. IOWA CODE § 702.20 (1983). *See supra*, note 43 and accompanying text.

98. Justice Larson suggested that Iowa Code section 702.20 be used to mark the time as to when recovery might be allowed under the survival statute, Iowa Code section 611.20. *Id.* at 835.

99. *See* Note, *Iowa Rule of Civil Procedure 8; Recent Developments*, 24 DRAKE L. REV. 203, 212 (1974).

100. *Id.* at 212.