IN THE SUPREME COURT OF TEXAS

NO. 02-1061

FORT WORTH OSTEOPATHIC HOSPITAL, INC., D/B/A/ OSTEOPATHIC MEDICAL CENTER OF TEXAS, CRAIG SMITH, D.O., AND REID CULTON, D.O., PETITIONERS,

v.

TARA REESE AND DONNIE REESE, INDIVIDUALLY AND AS LEGAL REPRESENTATIVES OF THE ESTATE OF CLARENCE CECIL REESE, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued October 8, 2003

JUSTICE SMITH, dissenting.

This medical malpractice case arises from treatment provided to Tara Reese and her unborn child, named Clarence Reese by the parent-plaintiffs, who died in utero on May 12, 1998. Citing *Witty v. American General Capital Distributors, Inc.*, 727 S.W.2d 503 (Tex. 1987), the defendants assert that health care providers owe no legal duty of reasonable care to a human fetus who dies before birth. In response, the plaintiffs request that we overrule *Witty* and recognize a cause of action under both the wrongful death statute and the survival statute for negligence that causes the prenatal death of a viable fetus.

The wrongful death statute provides: "An action for actual damages arising from an injury

that causes an *individual's* death may be brought if liability exists under this section." TEX. CIV. PRAC. & REM. CODE § 71.002(a) (emphasis added). The survival statute provides: "A cause of action for personal injury to the health, reputation, or person of an injured *person* does not abate because of the death of the injured person . . . ." *Id*. § 71.021(a) (emphasis added).

The initial question presented in this case is whether the words "individual" and "person" include a viable fetus who dies before birth. Relying on "legislative acquiescence" and stare decisis, the Court concludes that they do not. I disagree.

I

The Texas Wrongful Death Act was enacted by the 8th Legislature[1] and the Texas Survival Act was enacted by the 24th Legislature.[2] Before the plaintiffs' causes of action accrued, no relevant parts of those enactments had been substantively amended.[3] Therefore, in resolving this case, the Court must ascertain and effectuate the intent of the enacting Legislatures. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000) ("The primary rule in statutory interpretation is that a court must give effect to legislative intent."); *Manry v. Robison*, 56 S.W.2d 438, 447 (Tex. 1932) ("[I]n the absence of some specific amendment we should give [a statute] the meaning which it had at the time of its enactment.").

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[1] *See* Act approved Feb. 2, 1860, 8th Leg., R.S., ch. 35, 1860 Tex. Gen. Laws 32 (current version at TEX. CIV. PRAC. & REM. CODE §§ 71.001-71.020).

[2] *See* Act approved May 4, 1895, 24th Leg., R.S., ch. 89, 1895 Tex. Gen. Laws 143 (current version at TEX. CIV. PRAC. & REM. CODE §§ 71.021-71.030).

[3] In 2003, after the plaintiffs' causes of action accrued, the wrongful death statute was amended. *See* Act approved June 20, 2003, 78th Leg., R.S., ch. 822, 2003 Tex. Gen. Laws 2607. The Act became effective on September 1, 2003. Among other changes, the Legislature provided, for the first time, a definition of "individual" in the statute. "'Individual' includes an unborn child at every stage of gestation from fertilization until birth." *Id*. § 1.01, sec. 71.001, 2003 Tex. Gen. Laws 2608. The new statutory definition and the other amendments to the wrongful death statute "apply only to a cause of action that accrues on or after the effective date of [the] Act." *Id*. § 1.04, 2003 Tex. Gen. Laws 2608. Therefore, this case "is governed by the law as it existed immediately before the effective date of [the] Act." *Id*.

In my view, when adopting the wrongful death act and the survival act, neither the 8th Legislature nor the 24th Legislature intended to exclude a viable human fetus who dies before birth. In addition, when construing a statute, a court should not draw any inference regarding the intent of the enacting legislature from the inaction of subsequent legislatures. My position regarding what is commonly referred to as "legislative acquiescence" is consistent with the majority of jurisdictions. *See, e.g.*, *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940) ("To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities."). Finally, I believe that the Court is not constrained in this case by its prior decisions. An analysis of the factors traditionally considered by courts establishes that *Witty* and its progeny are weak precedent. Moreover, the initial question presented in this case is too important to be resolved solely on the basis of stare decisis.

The Court should abandon the interpretation of sections 71.002 and 71.021 of the Civil Practice and Remedies Code first announced in *Witty*.[4] Instead, we should construe "individual" and "person" to include a fetus, as urged by Justice Kilgarlin in his *Witty* dissent, which was joined by Chief Justice Hill and Justice Ray. *Witty*, 727 S.W.2d at 506-12. Similarly, we should adopt the reasoning of Justice Gonzalez's dissents in *Krishnan v. Sepulveda*, 916 S.W.2d 478, 483-89 (Tex. 1995) and *Edinburg Hospital Authority v. Treviño*, 941 S.W.2d 76, 85-92 (Tex. 1997), which assert

[4] In *Witty*, the Court noted: "The recent codification of the Wrongful Death Act provides recovery for 'damages arising from an injury that causes an *individual's* death.' TEX. CIV. PRAC. & REM. CODE ANN. § 71.002(b) (emphasis added). Prior to the codification, the Act provided recovery of 'damages on account of the injuries causing the death of any *person*.' TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1941-1985) (emphasis added). The legislature did not intend any substantive change in the Act by substituting the word 'individual' for the word 'person' in the recodification. TEX. CIV. PRAC. & REM. CODE ANN. § 10, 1985 Tex. Sess. Law Serv. 7219 (Vernon)." *Witty*, 727 S.W.2d at 504. The wrongful death statute did not define "individual" until after the Reeses' causes of action accrued. The survival statute uses "person" throughout rather than "individual," and has never defined "person."

that a fetus falls within the definitions of "individual" and "person."[5]

Given my view of the proper interpretation of "individual" and "person" in the wrongful death and survival statutes, I do not reach the substantial constitutional issues raised in this case because the plaintiffs' causes of action would be statutorily recognized.[6] I also do not reach the issue regarding whether Tara Reese, the mother, raised a fact issue on her own claim for medical malpractice. Finally, because of my concern about the Court's analysis regarding whether a viable human fetus is a "person" under the equal protection provisions of the United States Constitution and the Texas Constitution, I do not join any part of the Court's opinion.

II

I recognize the importance of stare decisis and acknowledge that precedent must not be lightly discarded. However, "*[s]tare decisis* is not an inexorable command; rather, 'it is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

Recognizing that the doctrine of stare decisis is not absolute, this Court has previously overruled itself in this specific area of the law. In *Treviño*, Justice Gonzalez noted:

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[5] In his *Treviño* concurrence, Justice Abbott stated: "I would be inclined to overrule *Witty* and allow recovery for the wrongful death of a fetus. However, the Treviños have not made any argument to this Court that *Witty* should be overruled." *Treviño*, 941 S.W.2d at 85 (Abbott, J., concurring).

[6] Under the federal supremacy clause, we are bound by *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. However, the resolution of this case is not controlled by that line of cases. *Roe v. Wade* does not foreclose state law remedies for negligent medical treatment that, without the consent of the mother, causes the death of a human fetus. *See, e.g.*, *Summerfield v. Superior Court*, 698 P.2d 712, 723 (Ariz. 1985) ("*Roe v. Wade* balances the rights of the fetus against the rights of its mother and concludes that the latter's right to privacy outweighs the former's right to life in the first trimester of pregnancy; it 'neither prohibits nor compels' the inclusion of a fetus as a person for the purposes of other enactments.") (citation omitted); *O'Grady v. Brown*, 654 S.W.2d 904, 910 (Mo. 1983) ("*Roe v. Wade*, while holding that the fetus is not a 'person' for purposes of the 14th amendment, does not mandate the conclusion that the fetus is a legal nonentity. 'The abortion issue involves the resolution of the mother's rights as against the child when the two are in conflict. Whatever may be the determination of the rights in that context, this special relation gives a third-party tortfeasor no comparable rights.'") (citation omitted).

> In *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820, 821 (Tex. 1967), this Court held that parents of a viable infant born alive have a cause of action under the Wrongful Death Statute if the baby later dies from injuries inflicted while in utero. In the process, we overruled *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W.2d 944 (1935), citing one legal writer who remarked that "[s]eldom in the law has there been such an overwhelming trend in such a relatively short period of time as there has been in the trend towards allowing recovery for prenatal injuries to a viable infant." *Leal*, 419 S.W.2d at 822.

Treviño, 941 S.W.2d at 88 (Gonzalez, J., dissenting). Like *Magnolia Coca Cola Bottling Co. v. Jordan*, *Witty* was wrongly decided and should be overruled. *Cf. Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983) (overruling *March v. Walker*, 48 Tex. 372, 375 (1877)—"It is time for this court to revise its interpretation of the Texas Wrongful Death statutes . . . .").

Texas courts have recognized several factors that weaken the precedential value of an opinion. For example, the Court of Criminal Appeals utilizes the following factors when determining whether to overrule precedent: 1) the original decision was flawed from the outset, due to flawed reasoning, lack of authority, or misplaced reliance upon cited authorities; 2) the decision conflicts with other precedent; 3) the decision has been undercut by the passage of time; 4) the decision produces inconsistency and confusion in the law; and 5) the decision consistently creates unjust results. *Hammock v. State*, 46 S.W.3d 889, 892-93 (Tex. Crim. App. 2001). The foregoing factors are present in this case, as are additional considerations that undermine the precedential value of *Witty* and its progeny.

A

Witty was wrongly decided—its reasoning was flawed and it lacked authority. Rather than replicate verbatim the lengthy and eloquent dissents authored by Justices Kilgarlin and Gonzalez, I adopt by reference their reasoning concerning the proper interpretation of "individual" and "person" in the wrongful death and survival statutes. The dissents in *Witty*, *Krishnan*, and *Treviño*

demonstrate that the common law definition of "person" during the period when the wrongful death act and the survival act were enacted treated a human fetus as a legal person and that other historical evidence indicates the enacting Legislatures intended to include a fetus within the meaning of "person" for purposes of those acts.

Justices Kilgarlin and Gonzalez conducted an extensive examination of the common law concerning legal personhood, dating to its eighteenth century English origins, and produced persuasive evidence that a fetus was regarded as a legal person under the common law during the last half of the nineteenth century.[7] The majority in *Witty* did not dispute or otherwise directly address the dissent's historical evidence regarding the common law definition of "person" and failed to consider how the common law informed the understanding and intent of the enacting Legislatures.

In his dissent in *Witty*, Justice Kilgarlin also stated:

> In Chapter IX of that Code, entitled "Of Homicide," the legislature provided "[t]he person upon whom the homicide is alleged to have been committed, must be in existence by actual birth." Tex. Pen. Code art. 545 (1856); Oldham & White, *Digest, Laws of Texas* 425 (1859); Paschal, *Digest of the Laws of Texas*, Vol. I, article 2206. If the legislature found it necessary to limit persons upon whom a homicide could be committed to those born alive, can we not infer two things? One, is there not another category of "persons" than those in existence by actual birth? If so, that is a concession that a fetus was a person, but that the legislature did not intend to follow "the antient law," and make it the subject of a homicide. Two, if the legislature found it necessary in the 1856 Penal Code to qualify "person" to one born alive, why did not the Wrongful Death Act contain the same qualification? Law of February 2, 1860 ch. 35, 1860 Tex. Gen. Laws 32, 4 H. Gammel, *Laws of Texas* 1394 (1898). Can it not be argued that had the legislature intended a similar limitation on "person," it would have said so, contrary to the assertion by the court "that the legislature did not intend the words 'individual' or 'person' to be construed to include an unborn fetus." 727 S.W.2d at 504.

Witty, 727 S.W.2d at 510.

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[7] In concluding that Arizona's wrongful death statute provided a cause of action for a viable fetus who dies before birth, the Arizona Supreme Court provided a scholarly analysis of the relevant common law. *See Summerfield*, 698 P.2d at 715-21.

It is also significant that the Legislature criminalized abortion in 1854.[8] The Texas law outlawing abortion was part of a national movement that began in the mid-nineteenth century. By 1860, twenty of the thirty-three states had outlawed abortion by statute. By 1880, abortion was illegal in every state. *See* EVA R. RUBIN, ABORTION, POLITICS, AND THE COURTS: ROE V. WADE AND ITS AFTERMATH 13-15 (1987). The relevance of the 1854 enactment outlawing abortion to the understanding and intent of the Legislature that adopted the wrongful death act in 1860 is clear: it is unlikely that only three regular sessions later, the Legislature had fundamentally altered its view regarding whether a fetus should be recognized as a legal person. In addition, when the survival act was adopted in 1895, the 1854 abortion enactment remained in effect.

B

Another factor undermining *Witty* is that it conflicts with other, more recent precedent. In *Brown v. Shwarts*, 968 S.W.2d 331 (Tex. 1998), the Court concluded that, in a wrongful death suit involving a child who died the day after birth, limitations began to run from the time the prenatal injury occurred.[9] The test to determine when the statute of limitations begins to run on a tort action is whether the act causing the damage constitutes a legal injury. *See, e.g.*, *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967). *Shwarts* conflicts with *Witty* because, under *Witty*, there is no legal injury giving rise to a wrongful death or survival cause of action until the child is born alive. Based on *Witty*, any legally recognized injury is merely hypothetical until birth occurs—potentially many

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[8] *See* Act approved Feb. 9, 1854, 5th Leg., ch. 49, § 1, 1854 Tex. Gen. Laws 58. The sentence for aborting a fetus was "confinement to hard labor in the Penitentiary not exceeding ten years." *Id*.

[9] In resolving *Shwarts*, the Court concluded that a fetus was a "patient" with a "doctor-patient" relationship. *Shwarts*, 968 S.W.2d at 334. In a concurrence, Justice Gonzalez noted that every definition of "patient" contained in a Texas statute referred to a "person" or "individual." *Id*. at 336-37 (Gonzalez, J., concurring). The conclusion in *Witty* that a fetus is neither an "individual" nor a "person" is therefore inconsistent with the conclusion in *Shwarts* that a fetus is a "patient."

months after limitations begin to run under *Shwarts*. *Witty* cannot be reconciled with *Shwarts* in light of well-established limitations principles.

Witty is also in tension with some of this Court's earlier jurisprudence that remains good law. In *Nelson v. Galveston, Harrisburg & San Antonio Railway Co.*, 14 S.W. 1021 (Tex. 1890), the Court concluded that a pregnant mother could bring wrongful death and survival actions against her deceased husband's employer on behalf of their unborn child, relying in part on the common law:

> Perhaps no case, when it was decided in 1798, involved more important rights than that of *Thellusson v. Woodford*, 4 Ves. 319. Counsel and judges of high authority engaged in its discussion and decision. Replying to the contention that an unborn child was a nonentity, and, in that case, the limitation was therefore void, Mr. Justice Buller said: "Let us see what the nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may have an injunction, a guardian."

Id. at 1022. The *Nelson* Court further noted: "We think, also, that the plaintiff in this case, although unborn at the time of his father's death, was in being, and one of his surviving children." *Id*. at 1023. The majority in *Witty* acknowledged that *Nelson* remained good law. *See Witty*, 727 S.W.2d at 505.

C

Witty has been undercut by the passage of time. The majority in *Witty* stated that "by a ratio of better than two to one, the majority of states have ruled in favor of permitting a wrongful death action on behalf of an unborn fetus . . . ." *Id.* The dissent clarified that thirty-five states and the District of Columbia had ruled in favor of permitting those actions and only eight states had ruled against. *Id*. at 512.

At the time *Witty* was decided, Montana and North Carolina were included among the eight states that did not "allow this type of recovery." *Id*. at 512 n.3. Both states have since recognized

a wrongful death action for a viable fetus who dies before birth. *See Strzelczyk v. Jett*, 870 P.2d 730, 733 (Mont. 1994) (holding that a "full-term fetus should be considered a 'person'"); *DiDonato v. Wortman*, 358 S.E.2d 489, 491 (N.C. 1987) (holding that "the word 'person' in the Wrongful Death Act includes a viable fetus"). Arkansas has also since recognized an action for a viable fetus who dies before birth. *See Aka v. Jefferson Hosp. Ass'n, Inc.*, 42 S.W.3d 508, 512 (Ark. 2001) (overruling Arkansas Supreme Court precedent that a "viable fetus is not a 'person' within the meaning of Arkansas's wrongful-death statute").

Although not unanimous, an overwhelming majority of jurisdictions continues to recognize a wrongful death action for negligent conduct that causes the prenatal death of a viable fetus.

D

Witty and its progeny have produced inconsistency and confusion in the law. One example is the different resolution of the mental anguish claims in *Treviño* and in this case. Relying on *Witty*, the Court in *Treviño* stated:

> Mora sought to prove mental anguish damages in part by presenting evidence that she had made preparations in expectation of the arrival of her baby: she had set aside a room in her home for the baby and purchased furniture for the room. She also testified that the loss of the fetus "still hurts [her] like it was yesterday," that she carries a clipping of the funeral service with her, and that her marriage deteriorated after the loss of the fetus. This evidence relates to the grief that Mora felt over the loss of the fetus as a separate individual and not as part of her own body. *Krishnan* and our decision today clarify that a woman can recover mental anguish damages resulting from negligent treatment that causes the loss of a fetus *as part of* the woman's body.

Edinburg Hosp. Auth. v. Treviño, 941 S.W.2d 76, 79 (Tex. 1997).

In this case, the Court attempts to distinguish Tara Reese's testimony from Shirley Mora's testimony. However, the testimony of the two women is in fact very similar. Reese's affidavit stated:

> On the morning of May 12, 1998, I was told that our baby had died. I was devastated. I had carried this baby for almost eight months and then that part of me was suddenly gone. When the baby died, a part of me died too.
>
> The feeling of carrying a part of me that was no longer living is difficult to describe. To make it worse, I had to go through a long and painful delivery, knowing our baby was dead. I will never forget that feeling as long as I live.
>
> Afterwards, I cried uncontrollably because of what happened to us. There were many nights when I could not sleep and had nightmares about our loss. My heart was broken.
>
> My husband and I received some counseling from our pastor, but I do not know if I will ever fully recover from what happened.

Reese's testimony is only semantically, not substantively, different from that given by Mora. Reese's statements express mental anguish above and beyond that resulting from the loss of a part of her body, such as a finger.

The Court's half-hearted and ultimately unconvincing attempt to distinguish Reese's testimony from Mora's testimony illustrates that the legal artifice constructed by *Witty*, which equates a viable human fetus with a finger or other part of a woman's body, is untenable. Indeed, this legal fiction is belied by the dichotomous biological reality wherein the fetus receives blood and nourishment from the mother through the umbilical cord and placenta, but possesses its own unique genetic makeup and organs. While a fetus is profoundly interconnected with the mother, it is at the same time growing and developing into a separate human being. A mother cannot reasonably parse the mental pain and anguish she feels, distinguishing between the effect of a miscarriage on her own body and the concomitant death of the fetus. As a result, the standard established by *Treviño* and applied by the majority in this case is simply a "magic words" test under which the mother must describe her mental anguish without making too numerous or too explicit references to the deceased fetus.

E

The rule announced in *Witty* continues to create unjust results. It produces the counterintuitive consequence, which was likely not intended by the enacting Legislatures, that "it is more profitable for the defendant to kill than to injure." *Witty*, 727 S.W.2d at 506-07 (Kilgarlin, J., dissenting).

Before *Witty*, the Alabama Supreme Court recognized this injustice:

> To deny recovery where the injury is so severe as to cause the death of a fetus subsequently stillborn, and to allow recovery where injury occurs during pregnancy and death results therefrom after a live birth, would only serve the tortfeasor by rewarding him for his severity in inflicting the injury. It would be bizarre, indeed, to hold that the greater the harm inflicted the better the opportunity for exoneration of the defendant. Logic, fairness and justice compel our recognition of an action, as here, for prenatal injuries causing death before a live birth.

Eich v. Town of Gulf Shores, 300 So.2d 354, 355 (Ala. 1974) (footnote omitted).

This year, New York's highest state court premised a decision on the same rationale. *See Broadnax v. Gonzalez*, 809 N.E.2d 645 (N.Y. 2004). In overturning its prior decision in *Tebbutt v. Virostek*, 483 N.E.2d 1142 (N.Y. 1985), which was similar to the Texas decision in *Krishnan*, the New York court stated:

> [W]e are no longer able to defend *Tebbutt*'s logic or reasoning.
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> As its dissenters recognized, the rule articulated in *Tebbutt* fits uncomfortably into our tort jurisprudence. Infants who are injured in the womb and survive the pregnancy may maintain causes of action against tortfeasors responsible for their injuries. Further, a pregnant mother may sue for any injury she suffers independently. A parent, however, cannot bring a cause of action for wrongful death when a pregnancy terminates in miscarriage or stillbirth.
>
> Injected into this common law framework, *Tebbutt* engendered a peculiar result: it exposed medical caregivers to malpractice liability for in utero injuries when the fetus survived, but immunized them against any liability when their malpractice caused a miscarriage or stillbirth. In categorically denying recovery to a narrow, but indisputably aggrieved, class of plaintiffs, *Tebbutt* is at odds with the spirit and

direction of our decisional law in this area.

Broadnax, 809 N.E.2d at 648 (citations omitted).

F

In addition to the factors discussed above, the Court has recognized that, when determining whether to overrule precedent, we should "pause and consider how far the reversal would affect contracts and transactions entered into and acted upon under the law of the Court." *Thompson v. Kay*, 77 S.W.2d 201, 207 (Tex. 1934) (quoting *Sydnor v. Gascoigne*, 11 Tex. 449, 455 (1854)). The doctrine of stare decisis has been strictly followed by this Court in cases involving established rules of property rights. *Southland Royalty Co. v. Humble Oil & Ref. Co.*, 249 S.W.2d 914, 916 (Tex. 1952). Stare decisis "is never stronger than in protecting land titles, as to which there is great virtue in certainty." *John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 281 (Tex. 2002). In that area and others involving vested property or contract rights, reversing precedent may have the undesirable effect of "upsetting long-settled expectations." *See id*.

Overruling *Witty* will not upset existing economic arrangements based on long-settled expectations. Tortfeasors have no long-settled expectation of immunity from causes of action arising out of negligent conduct that results in the prenatal death of a viable fetus. *Cf. Moragne v. State Marine Lines*, 398 U.S. 375, 403-04 (1970) (overruling longstanding United States Supreme Court precedent and recognizing wrongful death action under general maritime law—"It can hardly be said that shipowners have molded their conduct around the possibility that in a few special circumstances they may escape liability for such a breach.").

III

The initial question presented in this case—whether the words "individual" in the wrongful

death statute and "person" in the survival statute include a viable human fetus who dies before birth—is sharply contested. The defendants argue: "The Reese fetus was not born alive. Therefore, Texas law prohibits any recovery under the wrongful death and survival statutes based on the 'death' of the Reese fetus." In response, the plaintiffs argue: "The time has come for this Court to re-examine and narrowly overrule *Witty* as it applies to viable unborn children, restore sanity to an area of jurisprudence that is morally and legally repugnant, and bring Texas into step with those states that recognize these claims."

In resolving this case, the Court does not assert that *Witty* was correctly decided in 1987. Rather, the Court concludes in summary fashion that the original 6-3 decision should not be overruled.[10] However, whether the words "individual" and "person" include a fetus who dies before birth is too important a question to be resolved in that manner.

Based on the analysis set forth in parts I and II above, *Witty* should be overruled. *Cf. Moragne*, 398 U.S. at 405 ("Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy. Respect for the process of adjudication should be enhanced, not diminished, by our ruling today.").

I would affirm the court of appeals' judgment. The Court reverses in part and affirms in part

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[10] For example, the Court incorrectly asserts that the Legislature has endorsed "the holding of *Witty*." ___ S.W.3d at ___. In fact, the Legislature rejected this Court's holding in *Witty* in 2003. *Witty* involved a workplace injury that caused the prenatal death of a viable fetus. *See Witty v. Am. Gen. Capital Distrib., Inc.*, 697 S.W.2d 636, 638 (Tex. App.—Houston [1st Dist.] 1985), *rev'd in part*, 727 S.W.2d 503 (Tex. 1987) (Kimberly Witty "alleged that while employed by defendant as a receptionist, she tripped over a utility outlet and fell with such force that her unborn baby was fatally injured."). In reversing the court of appeals, this Court specifically held that a fetus was not an "individual." *Witty*, 727 S.W.2d at 504. If the same set of facts occurred today, a similarly situated plaintiff would be entitled to bring a wrongful death action against her employer for the death of her unborn fetus. *See* TEX. CIV. PRAC. & REM. CODE §§ 71.001-71.020.

that judgment. Accordingly, I respectfully dissent.

Steven W. Smith
Justice

Opinion delivered: August 27, 2004