

Senate Fiscal Agency  
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**SFA****BILL ANALYSIS**

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Senate Bill 346 (as enrolled)  
Sponsor: Senator William Van Regenmorter  
Committee: Judiciary

Date Completed: 9-21-01

### **RATIONALE**

Legislation enacted in the past few years established civil and criminal liability for conduct against a pregnant woman that causes miscarriage or stillbirth, or injures the embryo or fetus. In particular, Public Act 211 of 1998 amended the Revised Judicature Act (RJA) to provide that a person who commits a wrongful or negligent act against a pregnant woman is liable for damages if the act results in miscarriage, stillbirth, or physical injury to her embryo or fetus. Similarly, Public Act 238 of 1998 amended the Michigan Penal Code to prescribe criminal penalties for certain criminal or grossly negligent acts committed against a pregnant woman that cause her miscarriage or stillbirth or physical injury to her embryo or fetus. Subsequently, a case in Oakland County raised concerns among some people that those 1998 laws might not be broad enough.

In the Oakland County case, in 2000, a man was convicted of killing his wife, who was in the early stages of pregnancy. The Oakland County Circuit Court ruled, however, that the man could not be charged with the death of his wife's embryo under Public Act 238, because his actions did not technically result in either a miscarriage or a stillbirth since the embryo was not expelled from the woman's body. In response, Public Act 2 of 2001 (Senate Bill 71), which took effect on June 1, 2001, amended the Michigan Penal Code to extend the criminal penalties enacted in 1998 to conduct causing the death of an embryo or fetus. Some people believe that the civil liability provision in the RJA also should include a wrongful or negligent act against a pregnant woman that causes the death of her embryo or fetus.

### **CONTENT**

The bill would amend the Revised Judicature Act to provide that a person who committed a wrongful or negligent act against a pregnant woman would be liable for damages if the act resulted in the death of the woman's embryo or fetus. Currently, liability attaches if a person commits a wrongful or negligent act against a pregnant woman and the act results in miscarriage, stillbirth, or physical injury to her embryo or fetus. The bill would add death of the embryo or fetus to that provision.

The liability provision does not apply to any of the following:

- An act committed by the pregnant woman.
- A medical procedure performed by a physician or other "licensed medical professional" within the scope of his or her practice and with the pregnant woman's consent or the consent of a person who may lawfully provide consent on her behalf, or without consent as required by a medical emergency. (The bill would change "licensed medical professional" to "licensed health professional".)
- The lawful dispensation, administration, or prescription of medication.

MCL 600.2922a

### **BACKGROUND**

Before Public Act 238 of 1998 was enacted, several decisions of the Michigan Supreme Court and the Michigan Court of Appeals demonstrated the state of the law concerning the death of or injury to a fetus. In deciding whether a fetus was a "person" for purposes of wrongful death actions and criminal prosecutions, the courts had based their decisions on whether the fetus was viable or

"born alive".

According to a June 26, 1997, order of the Michigan Supreme Court, "Since at least 1975 it has been held that a non-viable fetus is not a 'person' within the meaning of the Wrongful Death Act" (*Estate of Baby Girl McDowell, et al. v Stubbs*). In this case, the plaintiff had delivered twins of approximately 20 weeks' gestation who had heartbeats briefly after they were born. The plaintiff did not dispute that the twins were not viable at the time of delivery, but focused on her claim that they were born alive. The circuit court granted the defendant's motion for summary disposition, concluding that the wrongful death act did not apply because it "...is intended to apply to a life which, absent some wrongful act, goes on, and will go on and can be assumed to go on."

The Court of Appeals reversed (*Thomas v Stubbs*, 218 Mich App 46) based on 1980 and 1995 decisions in which the appellate court had adhered to the "born alive" rule. In the 1995 case (*People v Selwa*, 214 Mich App 451), the Court concluded, "...[A] child is 'born alive' and thus a 'person' under the negligent homicide statute if, following expulsion or extraction from the mother, there is *lacking* an irreversible cessation of respiratory and circulatory functions or brain functions" (emphasis in original).

When *Estate of Baby Girl McDowell, et al. v Stubbs* reached the Michigan Supreme Court, the Court reversed the judgment of the Court of Appeals and reinstated the decision of the circuit court. In its order, the Supreme Court cited a 1975 Court of Appeals case (*Toth v Goree*, 65 Mich App 296) as holding that a nonviable fetus is not a person for purposes of wrongful death actions. The Supreme Court did not issue an opinion, and subsequently denied a motion for reconsideration.

## **ARGUMENTS**

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

### **Supporting Argument**

Before the passage of Public Acts 211 and 238 of 1998, it was difficult if not impossible to hold a person civilly or criminally accountable for actions that led to the loss of a pregnant woman's unborn child. Under a body of Michigan case law, in deciding a fetus's status

as a "person" for purposes of wrongful death actions and criminal prosecutions, decisions were based on whether a fetus was viable or "born alive". Proponents of Public Acts 211 and 238 hoped to circumvent the courts' "born alive" rule legislatively by enacting civil and criminal penalties that apply when someone injures a pregnant woman through assault, gross negligence, or drunk or reckless driving in a manner that terminates the pregnancy or injures the embryo or fetus.

The Oakland County Circuit Court's decision to dismiss the charge against a man for killing his wife's embryo when he killed his wife, because she did not technically experience a miscarriage or stillbirth, pointed out an unforeseen consequence of the 1998 legislation, which based civil and criminal liability on conduct against a pregnant woman. Essentially, that ruling was said to have created a new "born dead" rule: Unless the miscarried or dead fetus or embryo was expelled from the pregnant woman's body, no charge could be brought under the criminal penalty provisions of Public Act 238. Presumably, the same interpretation would apply to a civil action under Public Act 211 of 1998. Public Act 2 of 2001 closed this loophole in the law regarding criminal cases, and the bill would do so with respect to civil actions.

### **Opposing Argument**

During deliberation of the 1998 legislation, it was determined that, in order to avoid any conflict with abortion rights granted under Federal case law, the legislation should focus explicitly on actions against a pregnant woman that harmed her fetus or embryo or caused her to suffer a miscarriage or stillbirth, rather than basing sanctions on the death of a fetus or embryo. Many people were concerned that language specifically referring to the death of an embryo or fetus could promote a new body of law affording an embryo or fetus rights comparable to those held by individuals. They suggested that such provisions would be subject to constitutional challenge because both *Roe v Wade* and *Planned Parenthood v Casey*, landmark U.S. Supreme Court cases dealing with abortion, have held that a nonviable fetus is not a person, so states are not free to characterize a fetus as a person. By referring to a pregnant woman's miscarriage or stillbirth, rather than an unborn child's death, the

language enacted in 1998 does not assert equal legal rights for fetuses. Senate Bill 346 (S-1), however, proposes to enact language that was discarded in 1998. Extending civil liability to actions that caused the death of an embryo or fetus could be interpreted as attempting to secure full rights as a person for a nonviable fetus or embryo. The language adopted in 1998 should not be altered.

**Response:** The bill is in line with the revisions to the Penal Code that were enacted earlier this year by Public Act 2. The bill also is consistent with the *Roe* decision and all of its Federal court progeny, including *Casey*, as well as with Public Act 211. Those cases, while upholding a woman's right to choose to have an abortion, also consistently have reiterated that the state has an interest in protecting potential human life. In addition, the bill would not change the focus of Public Act 211 from actions against a pregnant woman to actions against a fetus or embryo. The underlying basis of a civil action still would have to be a wrongful or negligent act in which a pregnant woman was harmed. The bill does not mention an action aimed specifically against a fetus or embryo.

Legislative Analyst: P. Affholter

### **FISCAL IMPACT**

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: B. Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.