Torts - Negligence - Eighth Circuit Recognizes an Infant's Cause of Action Under Missouri Law for a Preconception Negligent Act. *Bergstreser v. Mitchell,* 577 F.2d 22 (8th Cir. 1978).

On February 22, 1972, Drs. Mitchell and Richardson performed a Caesarian section on Sherry Bergstreser at the Saint Francis Hospital in Washington, Missouri.[1] Mrs. Bergstreser later became pregnant with her son, Brian.[2] On October 22, 1974, ten weeks prior to expected delivery, Mrs. Bergstreser suffered an occult rupture of the uterus.[3] The rupture eventually resulted in Brian's premature delivery by emergency Caesarian section.[4] During the emergency delivery, Brian allegedly "suffered a period of hypoxia and/or anoxia which caused him serious injury, including brain damage."[5]

On November 29, 1976, the Bergstresers filed a diversity action in federal district court[6] seeking damages caused by defendants' alleged negligent performance of the Caesarean section performed on Mrs. Bergstreser in 1972.[7] Mrs. Bergstreser brought Brian's individual claims as his natural guardian.[8] The parents claimed individually and jointly for Brian's medical expenses and their own injuries.[9] Defendant doctors and hospital filed motions for summary judgment and for dismissal.[10] They contended that Brian had failed to state a cause of action and that the Missouri statute of limitations barred plaintiffs' claims.[11]

In a memorandum opinion the district court ruled that the

1. Bergstreser v. Mitchell, 577 F.2d 22, 24 (8th Cir. 1978).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* The court noted that "hypoxia is a deficiency of oxygen reaching the body; anoxia is severe hypoxia resulting in permanent damage." *Id.* at 24 n.1.
6. The plaintiffs were Colorado residents, defendants were Missouri residents, and the amount in controversy exceeded $10,000. The district court noted diversity jurisdiction under 28 U.S.C. § 1332 (1976). Bergstreser v. Mitchell, 448 F.Supp. 10, 12 (E.D. Mo. 1977), *aff'd,* 577 F.2d 22 (8th Cir. 1978).
7. Bergstreser v. Mitchell, 577 F.2d 22, 24 (8th Cir. 1978). The plaintiffs alleged: (1) defendants performed the first Caesarean section negligently; (2) defendants did not inform Mrs. Bergstreser of the subsequent weakened condition or her uterus; and (3) defendants' negligence caused the later uterine rupture and resulting emergency delivery during which Brian was injured. Bergstreser v. Mitchell, 448 F. Supp. 10, 13 (E.D. Mo. 1977), *aff'd.,* 577 F.2d 22 (8th Cir. 1978).
8. Bergstreser v. Mitchell, 577 F.2d 22, 24 (8th Cir. 1978).
9. *Id.* Mrs. Bergstreser claimed individually for her injuries. Mr. Bergstreser claimed individually for loss of consortium and for his wife's medical expenses. The parents claimed jointly for the loss of Brian's services and for his medical expenses. *Id.*
10. *Id.*
11. *Id.*

Missouri statute of limitations barred the parents' claims and sustained the defendants' motion for summary judgment on those claims.[12] The court denied the motion for summary judgment on Brian's individual claims.[13] Applying Missouri law, the district court held that a child, born alive, could bring an action for preconception negligent conduct.[14] The court further held that the statute of limitations did not bar Brian's claims.[15] The district court explained that Missouri courts had not previously decided whether a child could maintain a cause of action for preconception negligent acts and that consideration of the issue was further complicated because apparently more than the two-year limitation period separated the alleged negligent act and Brian's conception.[16] Because of this "substantial ground for differences of opinion" the court granted either party leave to make application for an interlocutory appeal.[17]

On appeal defendants renewed their claims that Brian had not stated a cause of action under Missouri law and that, even if a cause of action did exist, the statute of limitations barred the claim.[18] The Eighth Circuit Court of Appeals rejected the defendants' contentions and affirmed the trial court decision.[19] The court held that the courts of Missouri would permit an infant, born alive, to bring an action for injuries arising out of preconception negligent conduct[20] and that the Missouri statute of limitations did not bar Brian Bergstreser's claims.[21]

In *Bergstreser v. Mitchell*,[22] the Eighth Circuit Court of Appeals

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12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. Bergstreser v. Mitchell, 488 F. Supp. 10, 15 (E.D. Mo. 1977), *aff'd*, 577 F.2d 22 (8th Cir. 1978).
17. *Id.* The court granted leave to appeal under the provision of 28 U.S.C. § 1292(b) (1976), which provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . .

Id.
18. Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978).
19. *Id.* at 27.
20. *Id* at 25, 26.
21. *Id* at 26.
22. 577 F.2d 22 (8th Cir. 1978).

addressed two principal issues. The first issue was whether an infant plaintiff, under Missouri law, could bring a cause of action for injuries caused by negligence occurring prior to conception.[23] The court observed that the question of whether preconception negligence was actionable was a case of first impression under Missouri law.[24] Chief Judge Gibson, writing the panel opinion, agreed with the trial court that the issue should be resolved by looking to the opinions of the courts of Missouri on the question of prenatal injury.[25] Because Missouri courts had expressly recognized a cause of action for *prenatal* negligence causing injury to a viable child born alive,[26] the circuit court reasoned that Missouri courts would also recognize a cause of action for *preconception* negligence causing injury to a child later born alive.[27] The court justified this conclusion by stating that the Missouri Supreme Court had previously "refused to be bound by outmoded common law and [had] declined to allow an injury to be suffered without a remedy."[28] The circuit further observed that only three courts had recently addressed the question of whether a child had a cause of action for injuries caused by preconception negligence, and that in each case the court had recognized the action.[29]

The circuit court then considered whether Brian Bergstreser's

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23. *Id.* at 25.

24. *Id.*

25. *Id.* The distinction between "preconception" negligence and "prenatal" negligence as used by the court and this note is that "prenatal" negligence has been commonly used to refer to acts occurring after conception but prior to birth. "Preconception" negligence refers only to acts occurring prior to conception that later cause injury to the child. While all states now recognize a cause of action for prenatal torts which injure a child, preconception torts have not been so recognized. Alabama was the last state to recognize a cause of action for prenatal torts. Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 337-38 (4th ed. 1971) (hereinafter referred to as PROSSER). The development of the law in this area is discussed beginning at note 36 *infra.*

26. Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978), *citing* Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953).

27. Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978).

28. *Id.* The circuit court relied upon the leading Missouri decision in Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953), which recognized a cause of action for negligence causing prenatal injury (auto accident) to a viable fetus later born alive. The Missouri Supreme Court justified its decision to recognize the action by stating, *inter alia*, " 'If a child after birth has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy. . . .' " 258 S.W.2d at 581, *citing with approval* Montreal Tramways v. Leveille, 4 D.L.R. 337, 345 (Can. 1933).

29. Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978). The circuit court cited Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973); Renslow v. Mennonite Hospital, 67 Ill.2d 348, 367 N.E.2d 1250 (1977); Park v. Chessin, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977).

action should nevertheless be barred by the Missouri two-year statute of limitations governing medical malpractice against physicians and hospitals.[30] The court rejected the defendant's assertion that the provision tolling the statute for minors should not apply because Brian was not a being *in esse* when the alleged negligent act occurred.[31] The court stated that Brian was not "the recipient of defendants' allegedly negligent conduct . . ." until he came into being and that this fact was sufficient to invoke the tolling statute.[32] The court agreed with the trial court that it was not necessary to deter-

30. Bergstreser v. Mitchell, 577 F.2d 22, 26 (8th Cir. 1978). The parents did not appeal the trial court dismissal of their claims. *Id.* at 24.

The Missouri statute of limitations in effect at the time of the alleged negligent performance of the first Caesarean section (February, 1972) stated that actions "against physicians, surgeons, . . . [and] hospitals . . . for damages for malpractice, error, or mistake shall be brought within two years from the date of the act complained of. . . ." MO. ANN. STAT. § 516.140 (Vernon 1952). Prior to the Bergstresers filing their action on November 29, 1976, this statute was replaced with provisions stating the same two-year limitation and extending this period to "within two years from the date of discovery of such negligence, or from the date on which the patient in the exercise of ordinary care should have discovered such alleged negligence, whichever date first occurs. . . ." MO. ANN. STAT. § 516.105 (Vernon Supp. 1976) (Current version § 516.105 Vernon Supp. 1979). The trial court noted that the parents' claims, presented more than two years after Brian's birth and more than four years after Mrs. Bergstreser's operation, were barred under either statute and declined to determine which statute applied. Bergstreser v. Mitchell, 448 F. Supp. 10, 13-14 (E.D. Mo. 1977), *aff'd*, 577 F.2d 22 (8th Cir. 1978). The trial court then gratuitously stated that "[t]hese claims [the parents'] became stale in February 1974." 448 F. Supp. at 14. This statement implies that the first statute, stating a strict two-year limitation, applied. Mrs. Bergstreser probably could not have reasonably "discovered" her condition until the rupture of her uterus occurred on October 22, 1974. If allowed the benefit of the tolling provision in the second statute, the parents' claims would have become stale in October, 1976, extending the time period two-and-one-half years beyond the period stated by the trial court. The trial court may have correctly barred the parents' claims (filed in November, 1976), but it is probably that under either statute the Missouri courts would have found the parents' claims not barred until October, 1976, two years after plaintiffs could have reasonably discovered the alleged negligence. *See* Note, *Medical Malpractice: When Does the Statute of Limitations Begin to Run?*, 35 Mo. L. REV. 559, 562-65 (1970) and the cases cited therein.

Defendants did not appeal the trial court ruling that under Missouri law an infant could sue represented by a parent as natural guardian. The defendants had argued that Mrs. Bergstreser lacked capacity to represent Brian without being duly appointed a next friend or guardian ad litem by the court. Bergstreser v. Mitchell, 448 F. Supp. 10, 15 (E.D. Mo. 1977), *aff'd.*, 577 F.2d 22 (8th Cir. 1978).

31. Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978). Defendants argued that Brian could not claim the benefit of the tolling provision for minors because he was not even conceived until more than two years after the alleged negligence occurred. *Id.* This argument was not discussed in the trial court opinion. The trial court reasoned that because being born alive was a "condition precedent" to bringing a prenatal tort action, the same condition should apply to preconception tort actions. Thus, Brian's action accrued at birth (when the precedent condition had been met) and the tolling provision for minors then applied. Bergstreser v. Mitchell, 448 F. Supp. 10, 15 (E.D. Mo. 1977), *aff'd*, 577 F.2d 22 (8th Cir. 1978).

32. Bergstreser v. Mitchell, 577 F.2d 22, 26 (8th Cir. 1978).

mine whether the old or new Missouri limitation statute applied because the result under either was that Brian's minority tolled the two-year limitation.[33] Thus, the circuit court affirmed the decision of the trial court.[34]

The Eighth Circuit Court of Appeals decision in *Bergstreser v. Mitchell*[35] furthered a nascent trend towards recognition of an infant's cause of action for injuries resulting from an act of negligence occurring prior to conception.[36] Historically, courts had refused to recognize the right of a child to recover for a tort that occurred prior to birth for several reasons.[37] First, tort theory originally extended protection only to persons in being, and the lack of precedent for a cause of action in favor of the unborn was an inherently sufficient reason to deny recovery.[38] A second, and closely related, reason was that the unborn child was not a separate entity capable of bringing suit.[39] Third, the courts were unwilling to find any duty owed to the unborn.[40] Finally, the courts refused to allow recovery to the unborn child because medical knowledge could not provide sufficient proof of a causal connection between the action of the alleged tortfeasor

33. *Id.* The statute in effect at the time of the alleged negligence and Brian's birth tolled the limitation until the minor plaintiff reached twenty-one. MO. ANN. STAT. § 516.170 (Vernon 1969). The statue in effect when the suit was filed states that a minor under age ten years has until his or her twelfth birthday to bring an action. MO. ANN. STAT. § 516.105 (Vernon Supp. 1979).

34. Bergstreser v. Mitchell, 577 F.2d 22, 27 (8th Cir. 1978).

35. 577 F.2d 22 (8th Cir. 1978).

36. This note will discuss only actions for preconception negligence causing injury to the child at or after birth. See note 25 *supra*. This note will not discuss the related problem of actions for "wrongful birth." In a wrongful birth action the infant seeks to recover for the act of being born itself, or parents seek a derivative recovery for birth defects on the theory that had the probability of birth defect been known they would have either not conceived or terminated the pregnancy. Generally, courts have refused to allow recovery in wrongful birth actions because the plaintiff is seeking a judicial determination that he should not have been born, public policy against abortion, and the inability to measure damages. *See* Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L. J. 140, 145 (1976). Some courts have allowed recovery in wrongful birth actions. *See, e.g.*, Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1976)(parents recovered damages for child's birth defects); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (damages for birth of a child born after parent's sterilization). For an excellent comparison between actions for "preconception negligence," "prenatal injury," and "wrongful birth," *see* Comment, *Preconception Torts: A Look at Our Newest Class of Litigants*, 10 TEX. TECH L. REV. 95 (1978). *See also*, Note, *Torts Prior to Conception: A New Theory of Liability*, 56 NEB. L. REV. 706, 706-07 (1977).

37. *See, e.g.*, Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Northampton, 138 Mass. 14 (1884). *See generally* PROSSER, *supra* note 25, § 55, at 335 n.13.

38. Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638, 640 (1900).

39. Dietrich v. Northampton, 138 Mass. 14 (1884).

40. Magnolia Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935); *See also* Dietrich v. Northampton, 138 Mass. 14 (1884).

and the alleged injury.[41]

Courts continued to deny recovery for injuries to the unborn for the reasons noted above until the 1946 decision of *Bonbrest v. Kotz*.[42] In *Bonbrest* the infant sought to recover for injuries sustained by "being taken from its mother's womb through professional malpractice. . . ."[43] The court rejected the reasoning of prior cases which had denied recovery.[44] Noting that the common law of crimes and property recognized an unborn child as a separate entity,[45] the court reasoned that tort law should also recognize the unborn, especially because to do otherwise would result in a "wrong inflicted for which there is no remedy. . . ."[46] The infant was allowed to recover if he was injured directly, if he survived birth, and if he was viable at the time of injury.[47]

Bonbrest began a trend towards recognition of a cause of action for prenatal injury to a viable fetus that was later born alive.[48] The *Bonbrest* requirement that the fetus must be viable in order to be injured lasted until 1956, when the Georgia Supreme Court, in *Hornbunkle v. Plantation Pipe Lines*,[49] held that a child injured any time after conception could maintain an action if later born alive.[50] The *Hornbunkle* decision inferred that advancements in medical science and new decisions by the Court were redefining when "viability" occurred. The decision in *Hornbunkle* reflected the Court's opinion that the viability requirement was merely an arbitrary determination that the defendant did not owe a legal duty to the prospective plaintiff until a particular stage of fetal development.[51] Subsequent cases that addressed the issue generally rejected

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41. Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926).

42. 65 F. Supp. 138 (D.D.C. 1946).

43. *Id.* at 139.

44. *Id.* at 140-43. See notes 38-41 *supra* and accompanying text.

45. Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946). *See* Note, *Torts Prior to Conception: A New Theory of Liability*, 56 NEB. L. REV. 706, 706-08 (1977).

46. Bonbrest v. Kotz, 65 F. Supp. 138, 141 (D.D.C. 1946), *citing* Montreal Tramways v. Leveille, 4 D.L.R. 337, 345 (Can. 1933). This "wrong without a remedy" justification has continued vitality. See note 28 *supra* and accompanying text.

47. Bonbrest v. Kotz, 65 F. Supp. 138, 141-42, (D.D.C. 1946).

48. *See, e.g.*, Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951), providing an excellent example of the typical reasoning courts used to justify following the trend. All fifty states now allow some form of action to recover for prenatal injuries. See note 25 *supra*. Alabama was the last state to recognize this cause of action. Huskey v. Smith, 289 Ala. 52, 256 So. 2d 596 (1972). *See generally* Note, *The Impact of Medical Knowledge on the Law of Prenatal Injuries*, 110 U. PA. L. REV. 554, 556 (1962).

49. 212 Ga. 504, 93 S.E.2d 727 (1956).

50. 93 S.E.2d at 728.

51. *Id. See also* PROSSER, *supra* note 25, § 55, at 337 ("viability of course does not affect

the viability requirement but retained the requirement that the child be born alive.[52]

Although *Hornbunkle* and later cases rejected the viability requirement, claims for injuries resulting from preconception negligence continued to be rejected for the same reasons previously used to deny claims for negligence occurring prior to birth.[53] Infants' claims for preconception negligence were denied because of public policy,[54] lack of precedent allowing recovery,[55] difficulty in proving causal relationships,[56] and because the statute of limitations had run prior to the infant's conception.[57]

Rejection of preconception negligence claims ceased when the Tenth Circuit Court of Appeals, applying Oklahoma law, recognized an infant's cause of action for injuries caused by preconception negligence. In *Jorgensen v. Meade Johnson Laboratories, Inc.*,[58] the court addressed the problem of oral contraceptives administered to a woman who gave birth to twin mongoloid children as a question of proximate cause to be determined by competent proof.[59] The court recognized a cause of action for the infant plaintiffs and concluded that an action could be maintained for preconception injuries negligently inflicted.[60] The court justified its decision by observing that to deny the claim would render the injured infant unable to seek any remedy for the wrong allegedly inflicted.[61] The *Jorgensen*

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the question of the legal existence of the foetus [sic], and therefore of the defendant's duty . . ."); Note, *Infant May Maintain a Cause of Action for Prenatal Injuries Resulting From a Negligent Act Prior to Infant's Conception*, 9 TEX. TECH L. REV. 715, 717 (1978).

52. *See* PROSSER, *supra* note 25, § 55, at 337 n.31. Texas rejected the viability standard in Delgado v. Yandell, 471 S.W.2d 569 (Tex. 1971).

53. See notes 38-41 *supra* and accompanying text.

54. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1965)(denying recovery for preconception negligence of father and rejecting "wrongful life" claim of child born illegitimate).

55. Stewart v. Long Island College Hosp., 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972)(denying recovery for wrongful life claim for child born with defects).

56. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967)(denying wrongful life recovery for child born with defects).

57. Morgan v. United States, 143 F. Supp. 580, 584 (D.N.J. 1956)(denying claim under Federal Tort Claims Act for injury to child caused by blood transfusion given to mother).

58. 483 F.2d 237 (10th Cir. 1973).

59. *Id.* at 240. *See also* Note, *Infant May Maintain a Cause of Action for Prenatal Injuries Resulting From a Negligent Act Prior to Infant's Conception*, 9 TEX. TECH L. REV., 715, 717 (1978).

60. Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237, 240-41 (10th Cir. 1973). The plaintiffs' based their claims on alternative theories of strict liability in tort, negligence and breach of express and implied warranty. *Id.* at 238. The court was not clear upon which theory the plaintiff might ultimately succeed. *Id.* at 240 n.4, 241.

61. *Id.* at 240.

decision thus began the trend towards recognition of preconception torts, but its focus was upon a discussion of proximate cause and remedy.[62] This discussion obscured the basic issue of whether the precise time at which the tortious conduct was relevant to finding a legal duty to the unborn plaintiff.[63]

The Supreme Court of Illinois, in its decision in *Renslow v. Mennonite Hospital,*[64] reached the same result as *Jorgensen,* but differed in reasoning. In *Renslow* the issue was whether the minor plaintiff could sue for the preconception injury she sustained because a blood transfusion given to her mother resulted in her birth as a Rh baby.[65] The Illinois court recognized that a child had a right to be born free from injuries resulting from a breach of duty to the child's mother.[66] The court then extended the duty of reasonable care to the child not yet conceived and rejected the proximate cause rationale of the *Jorgensen* decision.[67]

Following the trend begun by *Jorgensen* and *Renslow,* the New York Supreme Court, in *Park v. Chessin,*[68] allowed the estate of a deceased child to bring an action for medical malpractice allegedly resulting in preconception injury to the child. In *Park* the defendant doctor had erroneously advised the parents that polycystic kidney disease was not hereditary.[69] The child conceived subsequent to this advice died from the disease two-and-one-half years after birth.[70] Though improperly categorizing the action as one for "wrongful life," the court correctly stated that the plaintiff had a fundamental right to be born as a whole, functioning being.[71] The court then justified its opinion and its failure to follow precedent denying re-

62. *Id.*

63. See note 51 *supra* and accompanying text.

64. 67 Ill.2d 348, 367 N.E.2d 1250 (1977).

65. 367 N.E.2d at 1251.

66. *Id.* at 1255.

67. Id. at 1254. For an excellent discussion of the policy factors justifying a decision to recognize a preconception tort and whether this recognition should be founded upon a discussion of proximate cause or duty, see Comment, *Preconception Torts: A Look at Our Newest Class of Litigants,* 10 TEX. TECH L. REV. 95 (1978).

68. 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977).

69. 400 N.Y.S.2d at 111.

70. *Id.*

71. *Id.* at 114. The trial court correctly recognized the infant's claim as one for preconception negligence and not wrongful life: "The infant decedent does not seek damages for being born per se, but rather seeks damages for the pain suffered by her *after* birth based upon the tort committed prior to her conception." Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204, 209 (Sup. Ct. 1976), *aff'd,* 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977). See note 25 *supra* and accompanying text.

covery as being consistent with expanding technological, economic and social change.[72]

None of the decisions that have permitted preconception tort actions have directly addressed the limitations defense presented in *Bergstreser v. Mitchell.*[73] Other medical malpractice decisions, however, have shown a trend suggesting that a limitations defense will be unsuccessful against preconception negligence claims.[74] Courts have refused to bar malpractice claims because of the statute of limitations by ruling that the statute does not begin to run until the malpractice is discovered, that the malpractice is continued because the patient was not informed of the error, or that a tolling provision extends the limitation period.[75] Although one reported decision expressly rejected a preconception negligence claim because the statute of limitations ran prior to conception,[76] the reasoning in *Renslow v. Mennonite Hospital*[77] and *Jorgensen v. Meade Johnson Laboratories, Inc.*[78] rejected this precedent.

Prior case law indicates that *Bergstreser v. Mitchell*[79] correctly recongized a cause of action for preconception negligence and correctly resolved the limitations issue in favor of the infant plaintiff. The foundation of the *Bergstreser* decision is a logical extension of the Missouri Supreme Court's reasoning in *Steggall v. Morris.*[80] *Steggall* recognized an action for prenatal injury to a child arising from an auto collision.[81] The *Steggall* decision rejected precedent for denying recovery[82] and reached the conclusion that a duty of reasonable case was owed to the unborn plaintiff.[83] Later decisions recognizing preconception torts correctly reasoned that an injury-producing breach of this duty of reasonable care should create a

72. Park v. Chessin, 60 App. Div. 2d 80, 400 N.Y.S.2d 110, 114 (1977).

73. 577 F.2d 22 (8th Cir. 1978). See note 31 *supra* and accompanying text.

74. *See, e.g.*, Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277, 286 (1961); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967). *See also,* PROSSER, *supra* note 25, § 30, at 144 n.60; Comment, *Medical Liability and Insurance Improvement Act of Texas: The New Legislative Procedure for Amputation of Patients' Rights,* 30 BAYLOR L. REV. 481, 482-84 (1978).

75. *See* cases collected in PROSSER, *supra* note 25, § 30, at 144 nn.56-60.

76. Morgan v. United States, 143 F. Supp. 580 (D.N.J. 1956). See note 57 *supra* and accompanying text.

77. 67 Ill.2d 348, 367 N.E.2d 1250, 1255 (1977). (Court rejected stale claim defense).

78. 483 F.2d 237, 240 n.2 (10th Cir. 1973) (refusing to apply *Morgan v. United States,* 143 F. Supp. 580 [D.N.J. 1956]).

79. 577 F.2d 22 (8th Cir. 1978).

80. 363 Mo. 1224, 258 S.W.2d 577 (1953).

81. 258 S.W.2d at 578.

82. See notes 37-41 *supra* and accompanying text.

83. Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577, 586 (1953).

remedy regardless of when the breach occurred.[84] The recognition of a cause of action for either prenatal or preconception torts is logical and correct when it is viewed as a judicial acknowledgment of a duty owed to a plaintiff, who now is offered a chance to prove his case.[85] Because the *Bergstreser* court did not discuss the policy factors underlying its decision,[86] it is impossible to determine whether the court would agree with the above reasoning. A more satisfactory explanation of the decision may be that the *Bergstreser* court was unwilling to depart from what the opinion expressed as "overwhelming authority" agreeing that a cause of action for preconception torts should be recognized.[87]

If courts continue to follow the trend towards recognition of preconception torts, the most significant feature of the *Bergstreser* decision may be its ruling that the Missouri statute of limitation did not bar Brian Bergstreser's claim.[88] This conclusion, based solely on the provision tolling the statute for minors,[89] supports the trial court decision that the cause of action did not accrue until birth and then was tolled.[90] The result is consistent with either the trial court rationale that live birth is a condition precedent to beginning the limitation period[91] or the rationale of other courts that the statute does not begin to run until the injury is discovered.[92] Either theory is consistent with existing precedent[93] and results in an infant's ability to bring an action for preconception negligence at any time within the protective period of the applicable statute's minority

84. The reasoning used to justify recognition of prenatal tort actions and preconception tort actions is identical. *Compare* Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953) and Park v. Chessin, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977). *See* Comment, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 600 (1962); Comment, *Preconception Torts: A Look at Our Newest Class of Litigants*, 10 TEX. TECH L. REV. 95 (1978).

85. *See* Renslow v. Mennonite Hospital, 67 Ill.2d 648, 367 N.E.2d 1250, 1255-56 (1977); Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577, 580 (1953). For a scholarly discussion on whether the duty to the plaintiff should be justified by considerations of foreseeability, proximate cause, or a pure analysis of policy factors, *see* Comment, *Preconception Torts: A Look at Our Newest Class of Litigants*, 10 TEX. TECH L. REV. 95 (1978).

86. The court did recite a policy of adhering to the axiom "[w]here there is a right there is a remedy." Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978).

87. *Id.* at 25 n.4.

88. *Id.* at 26.

89. *Id.* See note 31 *supra*.

90. Bergstreser v. Mitchell, 448 F. Supp. 10, 15 (E.D. Mo. 1977), *aff'd*, 577 F.2d 22 (8th Cir. 1978). See note 33 *supra*.

91. *Id.*

92. *See* PROSSER, *supra* note 25, § 33, at 144 n.60.

93. *Id.* See note 74 *supra* and accompanying text.

provision, regardless of when the negligent act occurred.[94] Thus, if the *Bergstreser* rationale is followed, existing statutes of limitation should seldom bar a preconception tort action.

The Eighth Circuit Court of Appeals' decision in *Bergstreser v. Mitchell*[95] is significant both as an extension of the trend toward recognition of a cause of action for injuries caused by preconception negligence and as precedent for the application of limitations statutes to preconception negligence claims. The decision is soundly supported in both precedent and commentary[96] and will be cited frequently by future court decisions recognizing preconception tort actions.

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94. See note 31 *supra* and accompanying text. Texas practitioners should note that MO. ANN. STAT § 516.105 (Vernon Supp. 1979) allows a minor under age ten until age twelve to bring an action. The analagous Texas provision in the Medical Liability and Insurance Improvement Act allows a minor under age twelve until age fourteen to bring an action. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1978-79). The result under either statute, if *Bergstreser* is followed, is to allow a cause of action even where the negligence occurs more than two years prior to conception. Bergstreser v. Mitchell, 448 F. Supp. 10, 15 (E.D. Mo. 1977), *aff'd*, 577 F.2d 22 (8th Cir. 1978). *Contra*, Morgan v. United States, 143 F. Supp. 580 (D.N.J. 1956). *See also* Comment, *Medical Liability and Insurance Improvement Act of Texas: The New Legislative Procedure for Amputation of Patients' Rights*, 30 BAYLOR L. REV. 481, 482-91 (1978).

95. 577 F.2d 22 (8th Cir. 1978).

96. *See* Comment, *Preconception Torts: A Look at Our Newest Class of Litigants*, 10 TEX. TECH L. REV. 95 (1978).