IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

GWENDOLYN GOLDEN YOUNG, as Personal Representative of WILLISHA GOLDEN YOUNG, Deceased,

Petitioner,

vs. Case No. 85,707

ST. VINCENT'S MEDICAL CENTER, INC., d/b/a ST. VINCENT'S MEDICAL CENTER; and/or d/b/a FAMILY MEDICAL CENTER,

Respondent.

AMICUS CURIAE BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION ON BEHALF OF THE RESPONDENT

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STATEMENT OF THE CASE AND FACTS

For the purposes of this brief, the amicus accepts the statement of the case and facts set forth in the respondent's answer brief filed in the First District Court of Appeal.

SUMMARY OF THE ARGUMENT

The trial court held that Young's claims were barred as a matter of law because there was no live birth. Summary judgment was therefore granted in favor of St. Vincent's Medical Center, Inc. The First District affirmed based on the well-established law in Florida.

This Court has held on no less than four (4) separate occasions that no cause of action exists under Florida's Wrongful Death Act for the death of a stillborn fetus. *Hernandez v. Garwood*, 390 So.2d 357 (Fla. 1980); *Duncan v. Flynn*, 358 So.2d 178 (Fla. 1978); *Stern v. Miller*, 348 So.2d 303 (Fla. 1977); *Stokes v. Liberty Mutual Insurance Company*, 213 So.2d 695 (Fla. 1968). A wrongful death cause of action is purely a creature of statute. There is nothing in the legislative history to demonstrate an attempt by the legislature that an unborn fetus be embraced within the scope of the statute. Such conclusion is in no way dependent upon whether a fetus is a person in the philosophical, theological, or scientific sense. This Court must remember that learned philosophers and theologians cannot create a right of action at law, for this is the job of the legislature.

As compelling as the arguments may be as set forth by the amicus and the petitioner, this Court has held that it is not at liberty to re-write Florida's Wrongful Death Act. Only the legislature is so empowered. "We are confined to a determination of the legislature's intent." *Stern v. Miller, supra*, 348 So.2d 307. Consequently, the issue before this Court remains the same:

It is the legislature that makes the laws and the courts that enforce or interpret the laws. The law in Florida is now and should remain as that set forth by the Florida legislature in Florida's Wrongful Death Act.

ISSUE PRESENTED

THIS COURT SHOULD AFFIRM THE LEGAL PRINCIPLES SET DOWN BY IT IN *HERNANDEZ, DUNCAN, STERN AND STOKES*

The *amicus curiae*, Academy of Florida Trial Lawyers, as well as numerous other courts across the nation have committed legal gyrations and circuitous arguments in order to establish a cause of action with the wrongful death of a stillborn child. However, the issue requires a simple solution and analysis as aptly set forth by the Texas supreme court in *Witty v. American General Capital Distributors, Inc.*, 727 S.W.2d 503 (Tex. 1987). In fact, the *Witty* court relied on this Court's decision in *Stern v. Miller*, 348 So.2d 303 (Fla. 1977), for its holding that only the legislature is empowered to re-write a wrongful death statute.

The wrongful death statute in Texas is similar to Florida's. Section 768.16 *et. seq.*, Florida Statutes. Although Florida's wrongful death statute is remedial and must be liberally construed, the statute should not by judicial construction be extended to include rights of actions that are not within the law-making intent as shown by the language used. *Lattimer v. Sears, Roebuck & Company*, 285 F.2d 152 (5th Cir. 1961). Further, although the *amicus curiae*, Academy of Florida Trial Lawyers takes issue with this principle of law, it has been held that at common law there was no right of action for wrongful death. *Eppes v. Covey*, 141 So.2d 747 (Fla. 1st DCA 1962); *Chamberlain v. Florida Power Corporation*, 144 Fla. 719, 198 So. 486 (1940); *Nolan v. Moore*, 81 Fla. 594, 88 So. 601 (1921). Therefore, because a wrongful death cause of action is a creature of statute, this Court has held that

it is without authority to do by statutory construction that which the legislature has not intended. *Stern v. Miller, supra*, 348 So.2d at 308.

In *Stern*, the respondents were involved in an automobile accident allegedly caused by the petitioners' negligence. At the time of the accident, Mrs. Miller was seven (7) months pregnant. Her child was subsequently stillborn. It was her contention that at the time of the accident the unborn child was viable and would have survived but for the accident. The Millers brought an action for wrongful death pursuant to section 768.19, Florida Statutes (1993), which read:

> When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or water craft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the persons injured, although death was caused under circumstances constituting a felony.

The trial court had ruled that a viable fetus was not a "person" within the meaning of section 768.19 and dismissed the Millers' complaint for failure to state a cause of action. The Fourth District Court of Appeal reversed, holding that a viable, unborn child is a person for purposes of the Wrongful Death Statute, notwithstanding subsequent stillbirths. *Miller v. Highlands Insurance Company*, 336 So.2d 636 (Fla. 4th DCA 1976). The district court then certified its decision to this Court to decide questions of great public interest.

The exact same procedure has been followed in this instant case and one can only ponder how many times will this question be posed before parties in the state of Florida acknowledge this Court's rulings in *Stokes, Stern, Duncan* and *Hernandez*. How many times must this Court answer the same question.

In view of the common law rule that the rights of a fetus were contingent upon live birth, had there been the legislative intention to create a wrongful death action for an unborn fetus, the legislature would have specifically so stated. Neither the petitioner nor the *amicus curiae*, Academy of Florida Trial Lawyers have directed this Court's attention to any evidence of legislative intent to include an unborn fetus within the scope of Florida's Wrongful Death Act. The reason being is that there is none.

In fact, a review of legislative amendments supports the respondent's position. In 1968 when this Court held in *Stokes* that the phrase "minor child" did not include an "unborn child," the legislature had an opportunity at that point to amend the wrongful death act to so define a minor child to include an unborn child. However, four (4) years later when the legislature revised the state's wrongful death laws incorporating multiple statutes to a single one, the lawmakers chose to limit recovery of damages to parents of children born alive by preserving the language which had been held to exclude the viable but unborn child. Section 768.21(1) and (4), Fla. Stat.

Despite this Court's clear and unequivocal constructions of the statute, the legislature has taken no action to alter the

statute or even imply dissatisfaction with the meaning given the terms "person" and "minor child." That a legislature is so empowered is made abundantly clear in *Certification of Question of Law from United States District Court*, 387 N.W.2d 42 (S.D. 1986). South Dakota's wrongful death statute was amended to include the language of "an unborn child." Specifically, the statute was amended to read:

> Whenever the death or injury of a person, *including an unborn child*, shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereto, if death had not ensued, then and in every such case, the corporation which, or the person who, would have been liable, if death had not ensued, or the administrator or executor of the estate of such person as such administrator or executor, shall be liable, to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony; and when the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person. *However, an action under this section involving an unborn child shall be for the exclusive benefit of the mother or the lawfully married parents of the unborn child.*

As set forth by the South Dakota supreme court, the italicized portion of this statute expressed the amendments to the statute.

Although the South Dakota supreme court declared that the clear, overwhelming, and growing majority of jurisdictions in this country, permit wrongful death actions to be maintained for the death of a viable unborn child, the law as to this issue is best set forth by the Texas supreme court in *Witty*. "The question presented by this case is 'not a matter of evolution in the common law, but rather a question of the legislative intent.'" *Witty v.*

American General Capital Distributors, Inc., *supra*, 727 S.W.2d at 505-506, *quoting Egbert v. Wenzel*, 199 Neb. 573, 260 N.W.2d 480, 482 (1977).

The Texas supreme court also noted 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. The Texas court declared that what the cases actually reflect is an honest difference of opinion among the state courts as to the effect to be given similar statutory provisions. But since the cause of action for wrongful death is based upon statute, the Texas supreme court agreed with the California supreme court that little would be gained from an analysis of the decisions of other jurisdictions. *Id.* at 505, *citing to Justus v. Atchison*, 19 Cal. 3d 564, 139 Cal.Rptr. 97, 106, 565 P.2d 122, 131 (1977). Choosing to deny the cause of action, the *Justus* court recognized that:

> When the last word shall have been said in such a consideration, the paramount fact will still remain that rights under our ... [Wrongful Death Act] are to be defined not by what other courts have said touching their own statutes, but from the meaning and intent of our own law from a reading of it.

The argument set forth by the *amicus curiae*, Academy of Florida Trial Lawyers and the petitioner would be relevant only if this Court was called upon to decide whether Florida should adopt the proposed cause of action as a matter of judge-made law. However, as declared by the Texas supreme court and the California supreme court, the arguments are not persuasive when, as here, the cause of action for wrongful death in Florida is a pure creature of statute.

As far back as 1977 in *Stern*, this Court noted that the weight

of authority is *contra* to a ruling that an unborn viable fetus is not a "person" for purposes of the wrongful death statute. *Stern v. Miller, supra*, 348 So.2d at 305. This Court noted that a majority of the states that have considered the issue of whether if a child survives he will be permitted to maintain an actual personal injury received while a fetus, the Florida legislature has chose not to.

This Court in *Stern* also noted that the reasons for recovery are compelling as a viable fetus is a human being, capable of independent existence outside the womb; a human life is there for destroyed when a viable fetus is killed; it is wholly irrational to allow liability depending on whether death or fatal injury occurs just before or just after birth; it is absurd to allow recovery for pre-natal injuries unless they are so severe as to cause death; such a situation favors the wrongdoer who causes death over the one who merely causes injury, and so enables the tortfeasor to foreclose his own liability. *Id.* at 306. Those are precisely the same arguments that are set forth by the *amicus* and the petitioner. This Court, however, answered those compelling reasons for recovery by acknowledging that the Florida legislature has recognized the legal personality of an unborn child in certain situations.

For instance, in section 782.09, Florida Statutes (1975), the Florida legislature provided for criminal penalties for the willful killing of an unborn child by any injury to the mother of that child. Further, section 458.22, Florida Statutes 91975), provided that an abortion may not be performed on any human being in the

last trimester of pregnancy unless certain definite and specific requirements were met.

However, the legislature in enacting Florida's Wrongful Death Act has repeatedly failed to include a viable fetus as a "person."

> As compelling as these arguments may be, however, we are not at liberty to decide what is wise, appropriate, or necessary in terms of legislation. Only the legislature is so empowered. We are confined to a determination of the legislature's intent.

The *amicus*, Florida Defense Lawyers Association respectfully requests that this Honorable Court declare one more time that it has met what it has held on numerous previous occasions and that is that the question of whether a viable fetus is a person within Florida's Wrongful Death Act is a question for the legislature, not a question for this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: James T. Terrell, Esq., 804 Blackstone Building, Jacksonville, Florida 32202; William E. Kuntz, Esq., 225 Water Street, Suite 1800, Jacksonville, Florida 32202; and Edna L. Caruso, Esq., 1615 Forum Place, West Palm Beach, Florida 33401, this 5th day of September, 1995.

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