IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 85,707

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

Petitioner,

-vs-

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 ACADEMY OF FLORIDA TRIAL LAWYERS ON BEHALF OF THE PETITIONER

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SUMMARY OF ARGUMENT

This Court should follow Judge Mickle's recommendation in his concurring opinion, and revisit the issue of whether there is a right of recovery under the Wrongful Death Act on behalf of a stillborn child who dies as a result of injuries received while in her mother's womb. While this Court has previously determined that the legislature's failure to specifically include such a party within the definition of the term "person" for purposes of the Wrongful Death Act must be construed as excluding them, that reasoning is faulty. This Court has reached that conclusion based on the fact that it previously held under a different cause of action that the term "minor child" does not include a stillborn child, without any consideration of its viability. In view of the historical development of the wrongful death statute, that case did not address the issue now before this Court, and the legislature's silence should not be construed as adopting its definition with regard to a different statutory term in a provision addressing a different cause of action. Therefore, this Court should construe the statutory term "person" in accordance with the overwhelming weight of authority in this country, and should not consider itself bound by either a prior inapposite decision or the failure of the legislature to explicitly address this issue. For these reasons, this Court should answer the certified question in the affirmative, and remand the cause to the trial court for reversal of the order granting Final Summary Judgment.

QUESTION PRESENTED

THIS COURT SHOULD RECOGNIZE A CAUSE OF ACTION FOR THE WRONGFUL DEATH OF A STILLBORN CHILD WHO DIES AS A RESULT OF INJURIES RECEIVED WHILE SHE WAS A VIABLE FETUS.

ARGUMENT

In this case, the First District's panel opinion concluded that it was bound by prior precedent of this Court precluding a wrongful death action on behalf of a viable, unborn child, YOUNG v. ST. VINCENT'S MEDICAL CENTER, INC., 20 F.L.W. D1020 (Fla. 1st DCA 1995). Judge Mickle wrote an extensive specially concurring opinion, suggesting that it is appropriate for this Court to reconsider the issue, and to recognize a cause of action for wrongful death by the estates of stillborn children for fatal injuries they received while viable children in ventre sa mere, YOUNG, supra, 20 F.L.W. D1020-24. The Academy joins in this recommendation, and is filing this brief to provide an historical perspective to this Court's decision.

As this Court's opinions and the decisions of other jurisdictions have explained, an analysis of the scope of wrongful death acts inevitably requires a review of the history of such causes of action. An historical review is particularly helpful in this case because it demonstrates why it is appropriate for this Court to revisit and reconsider this issue.

At common law, there was no civil cause of action for tortious conduct resulting in the death of another person. As explained in MORAGNE v. STATES MARINE LINES, INC., 90 S.Ct. 1772 (1970), the only basis for that omission in common law was

the felony-merger doctrine. That doctrine did not allow civil recovery for an act that constituted both a tort and a felony on the premise that the tort was less important than the offense against the crown and, therefore, was merged into the felony, 90 S.Ct. at 1778. The application of that theoretical doctrine was also justified as a practical matter because the punishment for the felony was the death of the felon and the forfeiture of all the felon's property to the crown, Ibid. Therefore, after the crime had been punished, there was no property which could be subject to a civil action and, therefore, such a claim would have been futile.

In discussing the lack of a cause of action for wrongful death in the common law, the United States Supreme Court in MORAGNE made the following observations, which apply with equal force to the issue now before this Court (90 S.Ct. at 1778):

> One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as "barbarous." [Emphasis supplied.]

When Florida became a state, it adopted the common law as it existed in England prior to 1776 as the law of this state, except as modified by statute to the extent it conflicted with the constitution, and federal and state statutes, see Fla. Stat. §2.01. However, the historical justification for the preclusion of a civil action for wrongful death

never existed in the United States or in Florida, since only vestiges of the felony-merger doctrine were ever adopted, and at no time did the punishment for a felony include the forfeiture of property, see MORAGNE, supra, 90 S.Ct. at 1779.

In 1899, the Florida Legislature adopted three statutes creating causes of action for wrongful death.[1] Those statutes remained the law of Florida, with minor revisions, until the current Wrongful Death Act was originally promulgated in 1972, see Ch. 72-35, Laws of Florida. Section 3145 (later designated Fla. Stat. §768.01) provided for a claim for death caused by the negligence of another, and §3146 (later designated Fla. Stat. §768.02), addressed the appropriate party to bring the action which was created by §3145. The latter section provided for the action to be brought by a widow, husband, or child(ren) and, in the absence of such parties, the action could be brought by an executor or administrator of the person killed.

Section 3147 (later designated Fla. Stat. §768.03), created a right on the part of the parents of a minor child who was killed to bring an action for loss of support, and mental pain and suffering. That cause of action was personal to the parents, and was separate and distinct from the cause of action created in §3145, which could be brought on behalf of a minor child either by the parents in a representative capacity or by an administrator, see PENSACOLA ELECTRIC CO. v. SODERLIND, 53 So. 722 (Fla.

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[1]/Florida's original Wrongful Death Act was passed in 1833, see DUVAL v. HUNT, 15 So. 876, 878 (Fla. 1894).

1910); see also, BOWDEN v. JACKSONVILLE ELECTRIC CO., 41 So. 400 (Fla. 1906).

The structure of the wrongful death actions created in 1899 is significant in determining the scope and application of this Court's decision in STOKES v. LIBERTY MUTUAL INSURANCE CO., 213 So.2d 695 (Fla. 1968). The only issue in that case was whether a stillborn fetus, prenatally injured by negligence, was a minor child within the contemplation of the parents' personal cause of action for the death of a minor child under Fla. Stat. §768.03 (1965). This Court made it abundantly clear that there was no issue regarding the definition of the term "person" or "party" under the general wrongful death provision (213 So.2d at 697, 698):

> Similarly, the Stokes do not claim under Fla. Stat. §768.01, F.S.A., our general "death by wrongful act" statute. Conceivably this would be possible if they could; (1) establish a stillborn fetus as "any person" under the statute; and (2) have someone appointed administrator of this so-called "person" so as to be able to bring the action in the order of priority fixed by Fla. Stat. §768.02, F.S.A.
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> * * *
>
> We are not here called upon to determine whether the stillborn fetus is a "person" or a "party" under the last two cited sections. [Fla. Stat. §768.01 and §768.02] The Stokes, rather, insist that a fetus qualifies as a "minor child" under §768.03.

This Court noted that the parents of a minor child were statutorily authorized to have a personal cause of action for the minor child's death because (213 So.2d at 700):

> In 1899, a minor child's services to the family were considered to have substantial value. Fla. Stat. §768.03, F.S.A. was, therefore, originally enacted to give a parent a right to redress a personal wrong based on the death of a child.

In STOKES, this Court determined that the parents did not have a cause of action for the death of a stillborn fetus, stating (Ibid):

> In view of the peculiar language of §768.03, allowing recovery for the wrongful death of a "minor child," we hold that a stillborn fetus is not within the statutory classification. Conversely, we hold that a right of action for wrongful death can arise only after the live birth and subsequent death of the child.

The latter sentence, however, must be considered in light of this Court's repeated statements that there was no issue in STOKES regarding the general wrongful death statute, i.e., Fla. Stat. §768.01, since the only issue was the parents' personal right to bring a wrongful death action on the part of a minor child under Fla. Stat. §768.03. Moreover, it is important to note that after briefly discussing relevant policy considerations, this Court stated (Ibid):

> All of these views have some merit, but our judgment is concluded primarily by the particular language of the Florida Statute in the light of its historical background.

In 1972, the Florida Legislature adopted a new Wrongful Death Act (Ch. 72-35, Laws of Florida). It is important to note that in adopting that Act, the legislature eliminated the parents' personal rights to damages for the death of a minor child, and provided that a wrongful death action could be brought solely by the estate of the

decedent on behalf of the survivors, see Fla. Stat. §768.20 (1972). It is also important to note that in addition to eliminating the parents' personal cause of action, the legislature also eliminated the parents' entitlement to compensation for the minor child's services, except in a situation in which they were partly or wholly dependent on the decedent for support or services, see Fla. Stat. §768.18(1); §768.21(4). As a result, the justifications for this Court's decision in STOKES, i.e., the particular language of the statute and its historical background, no longer applied under the 1972 Wrongful Death Act.

It is also important to note that in drafting the 1972 Florida Wrongful Death Act, the legislature retained certain language similar to that which was contained in Fla. Stat. §768.01, which was not in the provision authorizing the parents' personal right to bring an action for a minor child's death. The relevant language is contained within Fla. Stat. §768.19, and is underlined in the following quotation:

> **768.19 Right of action**.--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 watercraft 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 person injured, although death was caused under circumstances constituting a felony.

The retention of that language is significant, because such language did not exist in the provision relating to the parents' personal cause of action and, thus, was not considered in this Court's decision in STOKES, supra.

The statutory language discussed above is directly relevant to the issue now before this Court because, as noted by Justice Zappala's concurring opinion in AMADIO v. LEVIN, 501 A.2d 1085 (Pa. 1985), similar language in wrongful death statutes has been the basis for many courts' determining that a cause of action exists for a stillborn child. Justice Zappala stated (501 A.2d at 1097-98, n.4):

> In many of the jurisdictions which have recognized a wrongful death action in the case of a stillborn child, the language of the statute providing for the action contained the key to this recognition, especially where an action by a child born alive for prenatal injuries was already recognized. These statutes patterned after Lord Campbell's Act, provide for an action for damages where the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof. [Emphasis in original. Citations omitted.]

Thus, for that additional reason, the legislature's promulgation of the Wrongful Death Act in 1972 should not be construed as having accepted, through its silence, the application of STOKES to the new statute. The language referred to above clearly addresses one of the major inequities which results from the STOKES decision, i.e., that a party that only injures a fetus can be responsible for damages, but if that party kills the fetus, he or she is entitled to immunity. As noted above, that language was never addressed in STOKES, since that provision was not contained in, nor relevant to, the parents' personal cause of action for the death of their minor child.

In STERN v. MILLER, 348 So.2d 303 (Fla. 1977), this Court held that since the legislature had not specifically provided in the 1972 Wrongful Death Act for the recovery

for the death of a viable fetus, it was presumed to have accepted the holding in STOKES as the governing law on the definition of the term "person" under that Act. This Court did so, despite noting that (348 So.2d at 306):

> The reasons for recovery are compelling: A viable fetus is a human being, capable of independent existence outside the womb; a human life is therefore destroyed when a viable fetus is killed; it is wholly irrational to allow liability to depend on whether death from fatal injuries occurs just before or just after birth; it is absurd to allow recovery for prenatal 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 injuries, and so enables the tortfeasor to foreclose his own liability.

In STERN, this Court noted that STOKES only addressed the definition of "minor child" not "person," and that there had been a stipulation in STOKES that the viability of the fetus was irrelevant, 348 So.2d at 307. Nonetheless, this Court ruled that STOKES stood for the proposition that a stillborn child was not a "person" entitled to bring an action for wrongful death, and the legislature's failure to specifically define "person" in the Act to include stillborn children had to be construed as acceptance and adoption of the STOKES holding.

It is respectfully submitted that this Court's analysis in STERN overlooks the fact that STOKES not only addressed the definition of a different statutory term, but also addressed a different statutory cause of action; one that was eliminated in the 1972 Wrongful Death Act. As a result, the essence of the STERN holding is that, by its silence, the legislature adopted the definition in STOKES as controlling with respect to

a different statutory term in a different cause of action. It is respectfully submitted that legislative silence has not previously been construed in such a manner by this Court, and that it is not logical under the circumstances of this case to do so. This is especially true since the result is that the law is logically inconsistent, clearly inequitable, and results in poor public policy, as this Court noted in STERN, supra, 348 So.2d at 306. If this Court will not construe express statutory provisions in a manner that is illogical or unreasonable, see CITY OF BOCA RATON v. GIDMAN, 440 So.2d 1277, 1281 (Fla. 1983), there is no reason for construing legislative silence in such a way as to achieve the same result.

For the reasons stated above, it is respectfully submitted that this Court should reconsider its decision in STERN, and hold that a wrongful death action can be brought on behalf of an unborn child that suffered fatal injuries while a viable fetus.

CONCLUSION

For the reasons stated above, this Court should recede from its prior decisions, and hold that an unborn, yet viable fetus is a person authorized to bring a wrongful death action under the Florida Wrongful Death Act, Fla. Stat. §768.16, et seq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to WILLIAM E. KUNTZ, ESQ., 225 Water St., Ste. 1800, Jacksonville, FL 32202; and BROWN, TERRELL, HOGAN, ELLIS, McCLAMMA & YEGELWEL, P.A., 804 Blackstone Bldg., Jacksonville, FL 32202, by mail, this 14th day of July, 1995.

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