IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 14 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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

Petitioner,

v.

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.
_____/

BRIEF FOR THE PETITIONER

On Review from the District Court of Appeal, First District State of Florida

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MISCELLANEOUS:

CERTIFIED QUESTION

Whether there is a right of recovery under the Florida Wrongful Death Act, §768.19 - 768.27, Florida Statutes (1989), on behalf of a stillborn child who died as a result of injuries received while in her mother's womb?

QUESTIONS PRESENTED

1. Is a viable, eight and one-half month-old, unborn child, who dies due to negligence a "person" within the context of Florida's Wrongful Death Statute?

If not,

2. Does the common law of Florida provide a remedy for the wrongful death of a viable, eight and one-half month-old, unborn child who dies due to negligence?

STATEMENT OF THE CASE

On March 24, 1993, the Plaintiff-Petitioner, Gwendolyn Young, as personal representative of the estate of her deceased daughter, Willisha Young, filed her amended complaint against the Respondent, St. Vincent's Medical Center. (R. 115). The complaint alleged negligent prenatal care and resulting wrongful death of her unborn daughter, Willisha Young. (R. 119-122).

On April 15, 1993, St. Vincent's Medical Center filed its motion for final summary judgment and alternative motion to dismiss the amended complaint. (R. 124). On May 27, 1993, Judge Virginia Beverly of the Fourth Judicial Circuit in and for Duval County granted summary final judgment in favor of St. Vincent's Medical Center. (R. 140). Gwendolyn Young appealed the Circuit Court's final summary judgment order. (R. 143).

On November 29, 1994, the First District Court of Appeal entertained oral arguments. The Court filed its opinion on April 24, 1995. The First District affirmed the Circuit Court's ruling but certified the question (See, p. 1) to the Florida Supreme Court as being of great public importance. Gwendolyn Young filed a Notice to Invoke Discretionary Jurisdiction of Supreme Court on May 8, 1995. This Court postponed its decision on jurisdiction but requested briefs on the merits.

STATEMENT OF THE FACTS

On June 30, 1989, Gwendolyn Young discovered she was pregnant with twins (R. 117). She chose St. Vincent's Medical Center for her prenatal care and for the delivery of her children (R. 117). From November 1 through November 23, 1989, Gwendolyn experienced premature labor pains (R. 118). She was hospitalized at St. Vincent's and given medications to stop her labor (R. 118). Throughout this time, Gwendolyn felt regular, strong and consistent movement by both of her babies (R. 118). As of November 23, 1989, both babies were normal and healthy (R. 118).

On November 23, 1989, Gwendolyn was admitted to St. Vincent's for continued premature labor (R. 118). An amniocentesis was recommended to determine lung maturity of both babies (R. 118).[1]

A doctor-in-training twice attempted to withdraw amniotic fluid. On both attempts he erroneously stuck the needle into either Willisha's placenta or into Willisha herself (R. 118). Because of these puncture wounds, bleeding began. When the doctor-in-training withdrew his needles, they were full of blood (R. 118). These bloody needles were observed by Gwendolyn and later by a nurse on duty (R. 118).

Having failed to successfully perform the test, the amniocentesis procedure was turned over to and completed by a fully-trained attending physician (R. 118). The amniocentesis

[1]An amniocentesis is performed by inserting a long needle into the mother's abdomen near her navel and withdrawing and testing fluid from the sack surrounding the baby. Under normal circumstances, this fluid is clear in appearance. This procedure must be performed separately on twins.

results, returned that same day, showed both babies' lungs were mature and indicated both babies would survive if delivered promptly (R. 118). No testing was performed to see if Willisha was bleeding due to the needle sticks (R. 120). Instead of having a Cesarean section delivery immediately following the amniocentesis, as the physicians had informed Gwendolyn they were going to do, Gwendolyn was transferred out of labor and delivery and discharged home (R. 118).

On November 25, 1989, the day after her discharge, Gwendolyn Young began to have labor pains again (R. 118). She returned to St. Vincent's. During labor, both babies were placed on fetal monitors. These were the same fetal monitors used two days previously during the amniocentesis. Although one of the two monitors had been tagged as "not functioning properly" during the amniocentesis, (R. 121) it was applied to Willisha throughout labor (R. 120). Hours later, St. Vincent's employees realized Willisha's heart monitor was non-functional and she had no heart rate (R. 121).

An emergency Cesarean section was then performed, and the twins were delivered (R. 118). Both babies' gestational ages were 34 weeks (8 1/2 months) (R. 119). In 1989, babies with a 34-week gestational age had a survival rate of approximately 98% in Jacksonville or similar communities (R. 119).[2] Willisha Young was

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[2]Dr. Maclyn E. Wade, in his affidavit, testified Willisha was a person capable of independent survival outside her mother's womb on November 25, 1989 (i.e. viable) and would have survived but for the negligence of her health care providers (R. 20).

a viable, perfectly-formed, fully-developed baby and was a person (R. 119), but she did not experience a "live birth" due to her medical providers' negligence. Her smaller twin sister, Jessica, was and is healthy, hearty and active, and will soon celebrate her sixth birthday (R. 119).[3]

Gwendolyn Young selected St. Vincent's because it had promulgated, publicized and advanced its views as a Catholic hospital that life begins at conception; all persons, born and unborn, have the same rights; and it opposed sterilization and abortion (R. 117).[4] It was Gwendolyn's understanding she and her children would be treated with dignity as human beings before and after birth; her children would be afforded all reasonable and available medical and hospital care; and all persons, born or

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[3]Jessica's birth weight was five pounds, eight ounces. Willisha weighed five pounds, twelve ounces (R. 119).

[4]St. Vincent's was managed, operated and controlled by the Daughters of Charity, an order of Catholic nuns, and had widely publicized its affiliation with the Catholic Church. (R. 116). On June 28, 1974, Pope Paul VI ratified an order in which it was written: ". . . respect for human life is called for from the time this process of generation begins. From the time the ovum is fertilized, a life has begun which is neither that of the father nor of the mother; it is rather the life of a new human being . . ." (R. 116).

St. Vincent's is now taking a position diametrically opposed to its well-known and well-publicized religious tenets that life begins at conception. This Catholic dogma would oblige St. Vincent's to acknowledge Willisha was a person with all the rights vested at all times material to this action. The hospital has admitted:

(1) Willisha, as of the date of conception, was a person who had not yet been born.
(2) Willisha, as of the date of the amniocentesis of November 23, 1989, was a person who had not yet been born.
(3) Willisha, as of November 25, 1989, at 1:00 p.m., was a person who had not yet been born (Attached to R. 128-139).

unborn, would be afforded equal rights (R. 117).

SUMMARY OF ARGUMENT

The Petitioner, Gwendolyn Young, should be permitted to pursue a wrongful death action on behalf of her daughter, Willisha.

Florida is now in the dwindling minority of states (seven) which have failed to interpret the word "person," as used in the Wrongful Death Act, to include a viable, unborn child. Thirty-seven sister states have systematically overruled old, outdated decisions which precluded wrongful death actions for unborn children. Five states have not addressed the issue but arguably would be persuaded by the logic that has prevailed in the above thirty-seven states. "The recognition of a fetus as a person is most consistent with current human experience and knowledge concerning fetal development and the ability of the fetus to survive independently of the mother." Young v. St. Vincent's Medical Center, Inc., 20 FLW D1020 (Fla. 1st DCA 1995).

Both our medical and legal communities recognize that prior to birth, mother and child are two separate beings. Each is treated as a separate patient, and a duty of reasonable care is owed to each. As technology advances, a child is capable of life independent of the mother at an increasingly younger age. Medical experts can determine the age at which a child can sustain life. If a child is capable of sustaining life independently, the arbitrary legal prerequisite of a live birth before a wrongful death action will lie, has no rationale, and must be abandoned.

The current Florida interpretation of the word "person" as it relates to the Wrongful Death Act directly conflicts with the

overall legislative goal of protecting the unborn child, as evidenced by other laws. Specifically, with regard to criminal manslaughter, an unborn child qualifies as a "person" in Florida, and rights of the unborn are evident in the statutory laws of probate. Ironically, under present Florida law, a child may have a cause of action for injuries received while in the womb, yet no remedy if the ultimate injury ... death ... occurs. The tortfeasor who kills a child before delivery is immune from suit but held accountable if an injured child survives, if only for a moment.

This Honorable Court has the ability and duty to shape the common law. Wrongful death actions are a fundamental part of the common law, and this Court is empowered to recognize a cause of action for the wrongful death of an unborn child.

It has long been erroneously assumed that since the legislature created the wrongful death action, this Court does not have the authority to make modifications. In recent decisions, the United States Supreme Court and other courts have pointed out the fallacy of this assumption. These courts have recognized the remedy of wrongful death to be a common law right, and have extended the remedy to the unborn. Moreover, the Florida Legislature did not intend to preclude judicial intervention in the field of wrongful death. Florida courts have previously defined rights and parties under the Act.

ARGUMENT

I. MODERN LAW AND MEDICINE RECOGNIZE A VIABLE UNBORN CHILD IS A PERSON.

> It seems to me that it is a violation of the living spirit of the law to adhere to an ancient rule which has no pragmatic application to the realities of today. A precedent in law, in order to be binding, should appeal to logic and a genuine sense of justice. What lends dignity to the law founded on precedent is that, if analyzed, the particularly cited case wields authority by the shear force of its self-integrated honesty, integrity and rationale. A precedent . . . should not control if its strength depends alone on the fact that it is old, but may crumble at the slightest probing touch of instinctive reason and natural justice.
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> Bosley v. Andrews, 393 Pa. 161, 183, 142 A.2d 263, 274 (1958)(Musmanno, J., dissenting).

Unless this court will abandon an ancient rule which has ". . . no pragmatic application to the realities of today . . ." Id., a child in Florida, capable of independent survival but not yet born, is not a "person".[5] A tortfeasor, including an attending physician, can cause its death with no civil responsibility. This illogical and unjust precedent leaves Florida in the dwindling minority of states (seven) still clinging to the notion a live birth is the defining point for being a person.[6]

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[5]Stokes v. Liberty Mutual Insurance Company, 213 So.2d 695 (Fla. 1968); Davis v. Simpson, 313 So.2d 796 (Fla. 1st DCA 1975); Stern v. Miller, 348 So.2d 303 (Fla. 1977); Duncan v. Flynn, 358 So.2d 178 (Fla. 1978); Hernandez v. Garwood, 390 So.2d 357 (Fla. 1980).

[6]Thirty-four state courts have judicially created a cause of action permitting recovery for the death of a stillborn child. Three state legislatures have created a statutory cause of action.

Florida's refusal, to date, to recognize a viable, unborn child is a person under the Wrongful Death Act is one of the ancient artifacts Judge Musmanno criticized. That legal position flies in the face of the weight of modern authority,[7] it ignores modern medical realities, and defies the legislative intent as set out in the Act.[8]

A. Thirty-seven states recognize the right to recover for the wrongful death of a viable, unborn child.

In his concurring opinion in the case at bar, Judge Mickle summarizes the reasoning which led thirty-seven states to acknowledge a viable, unborn child is a person:

> Recognizing that actions are almost universally allowed for prenatal injuries, foreign courts have concluded that it would be irrational to prohibit recovery for a more severe injury causing the death of a fetus. Developing in these foreign jurisdictions is the notion that the recognition of a fetus as a person is most

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Five states have not passed on the matter. Seven states, of which Florida is one, remain in the minority, adhering to the rule denying recovery. See generally T.A. Borowski, Jr., Comment, No Liability for the Wrongful Death of Unborn Children - The Florida Legislature Refuses to Protect the Unborn, 16 Fla.St.U.L.Rev. 835, (1988), 84 A.L.R.3d 411, 422-425 §§3[a]-3[b] (1978 and Supp. 1994).

[7]"The previous observation of the Florida Supreme Court in Stokes v. Liberty Mutual Insurance Co., that there exists a number of ***equally*** strong and persuasive decisions denying recovery for the wrongful death of a viable unborn child is of questionable validity since the weight of modern authority appears to favor recovery for the wrongful death of a child *in utero*". Donald L. Gibson, The Conditional Liability Rule - A Viable Alternative for the Wrongful Death of a Stillborn Child, 28 U.Fl.L.Rev. 187, 197 (1975).

[8]Fla. Stat. §768.19-768.27(1989).

> consistent with current human experience and knowledge concerning fetal development and the ability of the fetus to survive independently of the mother. In short, numerous foreign courts have dispelled the notions upon which our Supreme Court based its holdings in Stern, Duncan and Hernandez.

Young v. St. Vincent's Medical Center, Inc., 20 FLW D1020 (Fla. 1st DCA 1995).

Thirty-four states have judicially recognized such a cause of action.[9] These include Arizona, Massachusetts, Pennsylvania and

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[9]**Alabama:** Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So.2d 354 (1974); **Arizona:** Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985); **Connecticut:** Gorke v. LeClerc, 23 Conn. Supp 256, 181 A.2d 448 (Super. Ct. 1962); **Delaware:** Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); **District of Columbia:** Simmons v. Howard Univ., 323 F. Supp. 529 (D.D.C. 1971); **Georgia:** Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (Ct. App. 1955); **Idaho:** Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982); **Illinois:** Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Ill Rev. Stat. Ch. 70, para. 2.2 (1985); **Indiana:** Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (Ct. App. 1971); **Kansas:** Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); **Kentucky:** Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); **Maryland:** State *ex rel* Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); **Massachusetts:** Mone v. Greyhound Lines, 368 Mass. 354, 331 N.E.2d 916 (1975); **Michigan:** O'Neill v. Morse, 385 Mich. App. 130, 188 N.W.2d 785 (Ct. App. 1971); **Minnesota:** Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); **Mississippi:** Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954); **Missouri:** O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983); **Nevada:** White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); **New Hampshire:** Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); **New Mexico:** Salazar v. St. Vincent Hosp., 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980); **North Carolina:** DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987); **North Dakota:** Hopkins v. McBane, 359 N.W.2d 862 (N.D.1984); **Ohio:** Werling v. Sandy 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985); **Oklahoma:** Evans v. Olson, 550 P.2d 924 (Okla. 1976); **Oregon:** Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (1974); **Pennsylvania:** Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085 (1985); **Rhode Island:** Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976); **South Carolina:** Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); **South Dakota:** Farley v. Mount Marty Hosp. Ass'n, 387 N.W.2d 42 (S.D. 1986); S.D. CODIFIED LAWS ANN. §21-5-1 (1987); **Tennessee:** TENN. CODE ANN. §20-5-106 (1980); **Vermont:** Vaillancourt v. Medical Center Hosp., 139 Vt. 138, 425 A.2d 92 (1980); **Washington:** Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975); **West Virginia:** Baldwin v. Butcher, 155 W.Va. 431, 184 S.E.2d 428 (1971); **Wisconsin:** Kwaterski v. State

New Hampshire, which overruled longstanding decisions to the contrary. See generally, Summerfield, 698 P.2d at 712; Amadio, 501 A.2d at 1085; Mone, 331 N.E.2d at 916; Poliquin, 135 A.2d at 249. Three states have recognized the cause of action legislatively. See Footnote 9. Five states have not addressed the issue but arguably would be persuaded by the logic that has prevailed in the above delineated thirty-seven states. Florida can take comfort with only six other states which cling to an old and outdated rule.

Interestingly, not one state's legislature has redrafted its legislation to alter or change a judicial interpretation of "person". Not one legislature has declared a viable, unborn child not to be a person pursuant to its wrongful death statute (including Florida). Standing with the majority is not a judicial goal in and of itself, but when the rule embraced by the majority best serves justice and is based on sound public and legal policy, it should be adopted. Summerfield at 722.

In Mone, the Massachusetts Supreme Court held an unborn, viable fetus is "a person for purposes of our wrongful death statute." Mone at 920. In that case, a viable 8 1/2 month fetus was injured in a car/bus collision. The mother and child were taken to an emergency room. During surgery, the unborn child was found to be dead, the uterus and placenta having been lacerated. Id. at 917.

Despite having considered the same issue on numerous occasions, the Massachusetts Supreme Court took jurisdiction and

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Farm Mut. Auto Ins. Co., 34 Wis.2d 14, 148 N.W.2d 107 (1967).

overruled its previous holdings. Id. The court held: (1) there was a sound body of precedent in support; (2) it was unnecessary for the court to wait for a legislative change; and (3) damages would be no more speculative than those for the wrongful death of a child who had lived only an hour or a day. See id. The court found "a clear majority of jurisdictions having considered the question have chosen viability over live birth as the determinative factor for deciding whether a right of action for wrongful death will be allowed". Id. at 918.

The Massachusetts Court reasoned that requiring a live birth produced illogical results. Id. at 920. For instance, if a tortfeasor inflicts enough trauma to kill the unborn child, the tortfeasor has no civil liability. But if the tortfeasor inflicts less trauma, allowing the unborn child to survive, there would be civil liability. Likewise, if a tortfeasor fatally injures the unborn child immediately, there would be no liability. But if the tortfeasor fatally injures the child and yet death is protracted by a few hours or even a few minutes beyond birth, a claim can succeed. "[T]he graver the harm, the better the chance of immunity". Mone at 920, quoting to Todd v. Sandidge Constr. Co., 341 F.2d 75, 77 (4th Cir. 1964). The Court concluded "[w]hile we recognize that 'a ruling fixing survival as the determinant, rather than viability . . . has the appeal of simplicity,' we agree with the court in Todd that such a rule 'might aid the judiciary but hardly justice'". Id.

The Pennsylvania Supreme Court in Amadio expressly overruled its precedents and held there was a right of recovery for the wrongful death of stillborn children. Id. at 1085. The Pennsylvania Court expressly held an unborn child is ". . . an individual with the right to be free of prenatal injury". Id. at 1087. After analyzing Pennsylvania's previous construction, the Court found limiting the recovery to children born alive was too narrow. It perpetuated illogical results making it ". . . more profitable for the defendant to kill the plaintiff than to scratch him". Amadio at 1088, quoting to Prosser Law of Torts, §127 (4th Ed. 1971). The court felt these actions should proceed to trial where the ". . . orderly production of evidence by the adversaries [will] prove or disprove causation, injury and damages in each case." Amadio at 1087.

In Summerfield, the Arizona Supreme Court concluded statute and precedent had combined to produce a cause of action for the death of an unborn child. Id at 718. The court applied principles of statutory construction to conclude a "person" included viable, unborn children. They made note of the legislative goal to protect the unborn child in other areas of the law (i.e. manslaughter and property law).

> . . . an overall legislative policy of compensation and protection militates in favor of construing the wrongful death statute to give parents a remedy when their viable child is negligently killed. . . . It seems preferable, in other words, to construe the statute in light of the evil(s) it was designed to remedy.

Summerfield at 721, quoting to O'Grady v. Brown, 654 S.W.2d. 904,

910 (Mo. 1983). The Arizona Court took comfort in the knowledge its definition of person, which included unborn children, placed them in the majority of jurisdictions.[10]

Thirty-seven sister states have found the results of the old rule to be illogical, and have held unborn children are people under their respective wrongful death acts.[11] The weight of authority favors recovery for the wrongful death of an unborn child. It is time for Florida to acknowledge and adopt the logical and better reasoned position of the thirty-seven states that have recognized a cause of action for the negligent death of an unborn child, and allow Gwendolyn Young to proceed with her claim.

B. In the years since *Stokes* (27 years), *Stern* (18 years), *Duncan* (17 years) and *Hernandez* (15 years) were decided, medical technology has progressed so an unborn child is considered a patient distinct from its mother.

Medicine, like the law, changes and evolves as society changes and evolves. There have been many significant advances in medicine, specifically regarding unborn children, since this issue was first entertained over a quarter century ago and last entertained fifteen years ago by this Court. Today, it is accepted

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[10]At that time, thirty-two jurisdictions recognized such a cause of action for the wrongful death of a fetus.

[11]See generally, Eich v. Town of Gulf Shores, 293 Ala. 95; Chrisafogeorgis v. Brandenberg, 55 Ill.2d 368; State *ex rel* Odham v. Sherman, 234 Md. 179; Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E. 2d 106 (Ohio App. 1959) (if viable twin fetuses suffered same simultaneous prenatal injury, but only one was born alive, it would be illogical to allow one to recover and not the other), Amadio, 501 A.2d at 1085.

by law and medicine that before birth, mother and child are separate beings. The leading authority on obstetrics, even as long ago as 1980, stated:

> Happily we have entered an era in which the fetus can rightfully be considered and treated as our second patient . . . [f]etal diagnosis and therapy have now emerged as legitimate tools the obstetrician must possess. Moreover, the number of tools the obstetrician must employ to address the needs of the fetus increases each year . . . Who would have dreamed--even a few years ago--that we could serve the fetus as physician? Or, that the well-being of the fetus could be monitored accurately and that the status of fetal health could be addressed? . . . In the last two decades, knowledge of fetal development, function and environment has increased remarkedly. As an important consequence, the fetus has acquired the status of a patient who should be given the same care by the physician that we have long given the pregnant woman.

Williams on Obstetrics, p. vii and p. 169 (J. Pritchard and P. MacDonald, 16th Edition. 1980). In the 1989 edition, the authors incorporated "exciting new findings relevant to the recently distinguished science of maternal fetal medicine. . . [and made] extensive revisions and additions." [12]

Today, competent health-care providers keep smaller and smaller newborn and premature babies alive,[13] and are able to diagnose congenital and neural-tube deficiencies in children long before they are born.[14] Today's doctors are able to ascertain

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[12]Williams on Obstetrics, p. vii (J. Pritchard and P. MacDonald, 18th edition 1989).

[13]Id. at 745, quoting to Prognosis for Infants Born at 23 to 28 Weeks Gestation, British Medical Journal 293:1200 (Loke H.L. YUVYH and Asssociates, 1986).

[14]Williams, 18th edition at 582, 585.

whether an unborn child's heart is malfunctioning,[15] and even do corrective surgery in utero.

Modern physicians implant fertilized eggs and create an otherwise impossible pregnancy. Physicians can now control and decide if and when birth will occur. They can protract, or prevent, premature labor; they can prevent miscarriages due to incompetent cervixes by performing surgery; they can induce labor at prearranged times once viability has been established.[16]

Based on today's prevailing medical and legal reasoning, Willisha Young was a separate person from her mother. She possessed all the characteristics of a separate, living human being (R. 119).

Since a child in the womb is an individual at the time of its injury, Id. then it follows the child is an individual when those injuries cause its death. It should make no difference whether the child dies of the injuries just prior to, or just after, birth. Amadio at 1087. Moreover, the moment of birth is no longer necessarily determined by nature. The advances of medical science have given the physician the power to determine when, or if, birth will occur. Summerfield at 712.

No justification exists for failing to recognize an action for the death of a living child simply because the voyage down the birth canal had not been completed before the defendant's negligence caused her death. Why draw an arbitrary line at the

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[15]Id. at 611.

[16]See generally, Williams, 18th edition.

moment of birth? Why not recognize a cause of action for the viable, unborn child while maintaining the substantial burden of proving causation in each case? Amadio at 1087. The live birth requirement is an illusory legal certainty; it puts form over substance in the name of reduced caseloads. Todd at 77.

One of the most egregious examples of the injustice associated with the live birth requirement is Duncan v. Flynn, 358 So.2d 178 (Fla. 1978). A mother was hospitalized for the birth of her fifteen pound child. When the defendant physician attempted to deliver the child vaginally, the baby's head emerged but the shoulders were too wide for further passage. After concluding the child could not be delivered alive, the doctor decapitated her and took the remains by Caesarean section. Despite the gross negligence of the physician, the plaintiff's wrongful death complaint did not survive a summary judgment ruling. Had the child been expelled, and died the following instant, the plaintiff could have pursued her rights. However, since the baby died in the midst of delivery, the physician and hospital staff performing the delivery were immune from suit.

Duncan illustrates the callous, illogical results of Florida's "live birth" requirement. Today Florida should not require a child's feet and toes be expelled and the umbilical cord severed, before recognizing a separate, viable life.

Willisha Young's case is similar to Duncan. In both, the babies had reached the point of separate existence and viability (R. 119). Just as the physician in Duncan had a clear opportunity

to prevent the death of the Duncan child, St. Vincent's could have prevented Willisha's death. Tragically, like Duncan, Willisha's family suffers a second injury. Under the outdated interpretation of the law, no remedy is available for the malpractice which took her life. Gwendolyn Young simply requests an opportunity to present competent proof Jessica's twin sister would be alive today were it not for St. Vincent's negligence.

II. THIS HONORABLE COURT DOES HAVE AUTHORITY TO RECOGNIZE A CAUSE OF ACTION FOR THE WRONGFUL DEATH OF AN UNBORN CHILD.

A. "Person" does not exclude viable, unborn children in Florida Legislature's Wrongful Death Act.

> Florida Statute §768.17: **Legislative intent** - It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. §768.16 through §768.27 are remedial and shall be liberally construed.

To ascertain the intent of a statute, the purpose behind its enactment must be considered. In Florida Statute §768.17 the Legislature codified "the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." Does the preclusion of an action for the wrongful death of a viable, unborn child further that goal?[17] It does not.

Previous Florida decisions have rested on the presumption the legislature, and not the judiciary, was the body with the power to change the Court's definition of "person" to include unborn children. See generally, Stern, 348 So.2d. 303; Duncan, 358 So.2d. 178; and Hernandez, 390 So.2d. 357. The fallacy is the legislature has never defined "person" to exclude unborn children.[18]

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[17]The Conditional Liability Rule, supra, at 192.

[18]In 1988, the House and the Senate had identical bills filed that would have added the term "unborn children" to the definition of "person" in §768.19. The House bill was defeated in the judiciary committee for unknown reasons; the Senate bill did not have enough support to reach a floor vote. See, T.A. Borowski, Jr., supra, at 839. An identical bill was unsuccessfully

In Amadio, when the court was faced with interpreting the legislature's intent; the court concluded the lack of an express intent in the Pennsylvania act "proves too much." Id. at 1099. As in Pennsylvania, Florida's Wrongful Death Act does little more than generally create a cause of action and designate the beneficiaries. Whether an unborn child is a person is nowhere reflected in the statute's language.

> The solution to this problem cannot be found in a methodology which requires us to assume or divine a legislative intent on an issue which most probably was never considered. Rather, the solution must be found in a study of the statute, the best method to further the general goal of the legislature in adopting such a statute, and common law principals governing its application.

Id., quoting to Summerfield at 720.

The legislative goal of protecting unborn children has been evidenced in Florida's homicide and probate statutes.[19]

> If . . . homicide statutes are enacted for the protection of society, they must be predicated on the theory that an [unborn child] is sufficiently important to be entitled to protection. "[If] the wrongful act which constitutes a crime may constitute also a tort, and if the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it is difficult to see why it should not also recognize its separate existence for the purpose of redressing the tort." The logic of this position has the appeal of consistency, "a consideration which ought to carry some weight in the making of judicial decisions." To allow a wrongful death action where the child is injured and is subsequently born alive, and yet to deny it where the child is killed and subsequently delivered

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introduced in the House in 1989. Id, at 861.

[19]Florida Statute, §782.09; Florida Statute, §731.303(3)(c).

> stillborn, produces the incongruous result of granting immunity to the tortfeasor whose negligence produce the severer consequences.[20]

Historically, Florida courts have not been content with passive application of the Wrongful Death Statute. In 1957, the Supreme Court of Florida retreated from its longstanding rule of sovereign immunity and extended liability for wrongful death to Florida municipalities. The passion and reasoning of that decision is applicable to this case:

> The courts should be alive to the demands of justice. We can see no necessity for insisting on legislative action in a matter which the courts themselves originated. ... [T]he time has arrived to face this matter squarely in the interest of justice and place the responsibility for wrongs where it should be. In doing this, we are thoroughly cognizant that some may contend that we are failing to remain blindly loyal to the doctrine of stare decisis. However, we must recognize that the law is not static. The great body of our laws is the product of progressive thinking which attunes traditional concepts to the needs and demands of changing times.

Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).

The courts have frustrated the legislative intent of shifting the losses in a wrongful death case by not allowing an unborn child a cause of action. Now is the time for this Honorable Court to reconsider and reverse prior holdings. This will not usurp legislative rule. It is not "a confrontation with another branch of state government, but an effort at unity in order to promote the ends of justice." Eich, 300 So.2d at 357. Gwendolyn Young simply

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[20]The Conditional Liability Rule, supra, at 191, quoting to Montreal Tramways v. Leveille, 4 D.L.R. 337, 344 (1933) and Panagopoulous v. Martin, 295 F.Supp. 220, 226 (S.D. W.Va. 1969).

requests she be allowed to present competent proof Willisha would be alive today were it not for St. Vincent's negligence.

B. Wrongful death actions are a fundamental part of the common law; this Court is free to recognize a cause of action for the wrongful death of an unborn child, independent of the legislature.

This Court has previously declined to recognize a cause of action for the wrongful death of an unborn child stating only the Legislature is empowered to do so. See generally, Stern, 348 So.2d 303. This erroneous and dated notion was perpetuated by courts throughout the country for many years. Justice now requires former decisions be revisited. Better reasoned holdings from a majority of other jurisdictions now recognize wrongful death actions to be of common law origin.

In the course of determining they indeed have authority to recognize a wrongful death action on behalf of an unborn child, other state high courts have been guided by the United States Supreme Court and its detailed historical analysis of wrongful death actions relative to the common law. Moragne v. State Marine Lines, Inc., 398 U.S. 375 (1970).[21] In Moragne, the United States Supreme Court noted the first explicit statement of the common law rule against recovery for wrongful death came from the opinion of Lord Ellenborough in Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep.

[21]See, e.g. Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975).

1033 (1808). The rule derived from what was known as the "felony-merger doctrine." Moragne at 1778.[22] According to this doctrine, the common law did not allow civil recovery for an act that constituted both a tort and a felony. The tort was considered to be less important than the offense against the Crown and was merged into, or pre-empted by, the felony. Moragne at 1778.[23] The doctrine was justified since punishment for the felony was death of the felon AND forfeiture of his property to the Crown. Thus, nothing remained of the felon or his property against which to base a civil action. Since all intentional or negligent homicide was considered a felony, there was no need for a civil suit for wrongful death. Id.

The historical justification for this old English rule never existed in the United States. Felony punishment never included forfeiture of property, and not every homicide was a felony. Therefore, no practical reason ever existed to bar a subsequent civil suit in this country. Id. at 1779. The reason the English rule was originally and blindly adopted here is simply that it had the blessing of age. Moragne at 1780; Insurance Co. v. Brame, 95 U.S. 754 (1878). "Such nearly automatic adoption seems at odds with the general principal, widely accepted during the early years of our Nation, that while '[o]ur ancestors brought with them [the] general principals [of the common law] and claimed it as their

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[22]Citing Holdsworth, The Origin of the Rule in Baker v. Bolton, 32 L.Q.Rev. 431 (1916).

[23]Citing Smith v. Sykes, 1 Freem. 224, 89 Eng.Rep. 160 (K.B. 1677).

birthright; ... they brought with them and adopted only that portion which was applicable to their situation'". Moragne at 1780.[24] The early American courts never questioned whether this English rule was "applicable to their situation," and until recently, our courts have blindly followed those early decisions. This common law rule based on the antiquated felony-merger doctrine has no applicability in this country. Moragne at 1780.

Since no reasonable basis for the rule which prohibited civil recovery for wrongful death exists, every state in the union has enacted a wrongful death statute. Moragne at 1782.[25] In addition, the United States Congress has created wrongful death actions for railroad employees,[26] for merchant seamen,[27] for persons on the high seas[28] and for private persons.[29] These numerous and broadly applicable statutes, taken as a whole, evince universal rejection by lawmakers of the old English rule which disallowed recovery for wrongful death. Moragne at 1782.

This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. "The policy thus established has become itself a part of our law, to be

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[24]Citing Van Ness v. Pacard, 2 Pet. 137, 144, 7 L.Ed. 374 (1829).

[25]Citing to Smith, Wrongful Death Damages in North Carolina, 44 N.C.L.Rev. 402 (1966).

[26]Federal Employers' Liability Act, 45 U.S.C. §51-59.

[27]Jones Act, 46 U.S.C. §688.

[28]Death on the High Seas Act, 46 U.S.C. §761, 762.

[29]Federal Tort Claims Act, 28 U.S.C. §1346(b).

given its appropriate weight not only in matters of statutory construction but also in those of decisional law." Id. at 1782.

An appreciation of the broader role played by legislation in the development of the law reflects the practices of common law courts from the most ancient times. Much of what is ordinarily regarded as common law originated as legislative enactment. It has always been the duty of the courts to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common law principals - many of them deriving from earlier legislative exertions. Id.[30]

The Supreme Judicial Court of Massachusetts, in deliberating whether to allow a wrongful death action on behalf of an unborn child, embraced the reasoning of the United States Supreme Court in Moragne. Earlier, the Massachusetts high court had been influenced by the argument it would be more appropriate for the Legislature, rather than the court, to acknowledge a cause of action for the wrongful death of a fetus. Leccese v. McDonough, 361 Mass. 64, 279 N.E.2d 339 (1972) (upholding dismissal on grounds fetus not born alive). The same court has since reversed its decision. Mone, 331 N.E.2d at 920.

In so doing, the court relied on its prior opinion in which it examined the origin and developments of actions for wrongful death to determine whether state general tolling provisions would apply to such actions. Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d

[30]See, Landis, Statutes and Sources of the Law, Harvard Legal Essays 213, 226-227 (1934).

222 (1972). In Gaudette, the Massachusetts high court held "the law in this Commonwealth has evolved to the point where it may now be held that the right to recovery for wrongful death is of common law origin." Id. at 229. [31] The court further concluded:

> [t]o think of recovery for wrongful causing of death as something exceptional not to be treated as part of the general law but to be provided for specifically as to application to every item of recent legislative improvement of the law is an anachronism. Today we should be thinking of the death statutes as part of the general law.

Gaudette at 229.[32] The Gaudette Court further held that the Massachusetts wrongful death statutes will no longer be regarded as having "created the right" to recovery for wrongful death. Gaudette at 229.

In Amadio, the Pennsylvania Court endorsed the view that wrongful death actions are part of the common law. Id. at 1096-1097 (Zappala, J. concurring). Justice Zappala found that Baker v. Bolton could never have properly been considered a part of the common law binding on the courts of Pennsylvania since it was not decided until 1806. See, id. at 1097. The same conclusion was reached by the Arizona Supreme Court. They noted since it is not at all clear the common law prevalent in England in 1776 was as later stated in Baker v. Bolton, it can not be said the common law in this country precludes recovery for wrongful death. Summerfield at 712.

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[31]Holding based on the reasoning of the Morgane decision.

[32]Citing Cox v. Roth, 348 U.S. 207, 210 (1955).

Even if the rule was alive prior to July 4, 1776, the American Colonies only adopted that part of the common law which applied to them. Because the justification for the rule never existed in Florida (or any other state), the rule was never applicable in this country, and therefore was never a legitimate part of our common law. Consequently, the courts in Florida and throughout the country are free to reverse their former decisions which adhere to a misperceived common law rule against recovery for wrongful death. Amadio at 1097.

In the case at bar, this Court is again faced with the decision of whether to recognize an action for the wrongful death of an unborn child. In Stern, this Court found all of the policy and legal arguments (favoring the establishment of a wrongful death action for the unborn) compelling, but felt obligated to defer to the legislature based on its then interpretation of the common law. This popular misperception was once shared by the high courts of Massachusetts and Pennsylvania, and even by the Supreme Court of the United States. But, based on the reasoning of Moragne, each now holds the common law embraces the concept of recovery for wrongful death . . . and courts have the authority to shape common law.

Based on the sound reasoning of these and other courts, this Honorable Court is not compelled to defer to the legislature for action concerning wrongful death claims. As in Massachusetts and every other jurisdiction in this country, the law in Florida has evolved to the point where it may now be held that the right to

recovery for wrongful death is of common law origin. As a result, this Court has the power to allow Gwendolyn Young to proceed with her wrongful death action for the negligent death of her unborn child, Willisha.

C. This Court has never been precluded from participating in the shaping of Florida's Wrongful Death Act and is free to recognize a cause of action for the wrongful death of an unborn child.

In addition to recognizing an ability to establish a wrongful death action for an unborn child by way of the common law, the Arizona Supreme Court found nothing in the Arizona Wrongful Death Act to suggest the state legislature intended to occupy the field exclusively. Summerfield at 717. On the contrary, the Court held that Arizona statutes left room for such a judicial initiative. Id. In arriving at this conclusion, the Court chose not to follow the earlier example of the California Supreme Court. Justus v. Atchison, 19 Cal.3rd 564, 139 Cal. Rptr. 97, 565 P.2d 122 (1977)[33]

The situation in Florida is similar to that in Arizona. Just as the Arizona legislature has made a minimum number of modifications to its wrongful death act, so too has Florida's legislature. In large part, these revisions have concentrated on identifying beneficiaries of the action.[34] The only other

[33]Concluding that the California legislature intended to occupy the field because it had regulated the remedy in great detail over the years.

[34]Fla. Stat. Ann. §768.18.

significant change concerned minor additions to the damages section of the Act.[35] In total, the Florida legislature has made minor revisions to the Act on three separate occasions.[36] By way of comparison, the Arizona legislature has made four revisions to its Act. Summerfield at 717. The significance is the Florida Legislature has not occupied the field so fully as to preclude judicial development. As a result, this Court, like Arizona's court, is free to include unborn children within the definition of "person" as contemplated by the Wrongful Death Act.

The Arizona Supreme Court held the phrase "such damages as are fair and just"[37] invited the state courts to participate in not only the construction of the statutes, but in setting the parameters of the actions as well. Similarly, Florida's Wrongful Death Act allows each survivor to recover "the value of lost support and services."[38] Like Arizona's, the language of Florida's statute invites the courts to participate. Indeed, as in Arizona and other states, the Florida courts have entered the field in a variety of ways. For example, Florida courts have defined the rights of illegitimate children[39], adopted children[40] and remarried

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[35]Fla. Stat. Ann. §768.21.

[36]1977 Fla. Laws 121; 1977 Fla. Laws 468; 1981 Fla. Laws 183; 1985 Fla. Laws 260.

[37]Ariz. Rev. Stat. Ann. §12-613.

[38]Fla. Stat. §768.21 (1991).

[39]Whitefield v. Kainer, 369 So.2d 684 (Fla. 1979).

[40]Grant v. Sedco Corp., 364 So.2d 774 (Fla. 1978).

spouses.[41] These and other judicial clarifications illustrate Florida courts have not been content with passive application of the exact wording of the Wrongful Death Statute. Like the courts of Arizona, Massachusetts, Pennsylvania and other states, this Court is not restricted in its authority to define the rights of unborn children. This Court should include viable, unborn children within the definition of "person" and return this case to the trial court for proof of negligence, causation, viability and damages.

[41] Smyer v. Gaines, 332 So.2d 655 (Fla. 1st DCA 1976).

CONCLUSION

For the reasons set forth, Petitioner respectfully requests this Court reverse the trial court's order granting final summary judgment, reverse the First District Court of Appeal's affirmation, answer the certified question in the affirmative and remand this cause to the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been provided to William E. Kuntz, Esquire, 225 Water Street, Suite 1800, Jacksonville, Florida, 32202 and Edna L. Caruso, Esquire, 1615 Forum Place, West Palm Beach, Florida, 33401, by mail, this 19th day of July, 1995.

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