IN THE SUPREME COURT OF FLORIDA

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.
_____/

REPLY BRIEF FOR THE PETITIONER

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

BROWN, TERRELL, HOGAN, ELLIS,
McCLAMMA & YEGELWEL, P.A.
James T. Terrell, Esq.
Florida Bar No.: 106212
Annette J. Ritter, Esq.
Florida Bar No.: 823181
Michael S. Sharrit, Esq.
Florida Bar No.: 936073
804 Blackstone Building
Jacksonville, FL 32202
904/632-2424
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. THIS COURT HAS AUTHORITY TO RECOGNIZE A CAUSE OF ACTION FOR THE WRONGFUL DEATH OF AN UNBORN CHILD.

A. Legislative silence has never precluded Florida courts from participating in the shaping of our wrongful death law.

This court has traditionally played a paramount role in the evolution of Florida's wrongful death law. On this occasion, though, the Respondent seeks to tie the hands of this Court. The Respondent has equated legislative silence with an intent to preclude recovery on behalf of the stillborn Plaintiff. Judge Mickle of the First DCA put "legislative silence" in proper prospective. Like the majority of other foreign courts which have interpreted the meaning of "person", he was unable to ascribe any discernible meaning to legislative silence. Young v. St. Vincent's Medical Center, Inc., 653 So.2d 499, 506 (Fla. 1st DCA 1995).

The North Carolina Supreme Court was recently faced with a similar "legislative silence" argument. In DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (N.C. 1987), the court overturned previous judicial interpretations to the contrary, and recognized a cause of action for the wrongful death of a viable, unborn child. As in Florida, the state legislature reenacted the applicable statutory provisions, leaving former court decisions intact. The North Carolina Supreme Court refused to equate "legislative silence" with legislative approval, stating:

> We must be leery . . . of inferring legislative approval of appellate court decisions from what is really legislative silence. Legislative inaction has been called a "weak reed upon which to lean" and a "poor beacon to follow" in construing a statute. [It is] impossible to assert with any degree of assurance that [legislative inaction] represents (1) approval of the status quo as opposed to, (2) inability to agree on how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice. We cannot assume that our legislators spend their time pouring over appellate decisions so as not to miss one they might wish to correct.

Young at 506 (Mickle, J. concurring), (quoting DiDonato).

The reasoning of the North Carolina Supreme Court is compelling. Rather than blindly assuming our lawmakers believe 8 1/2-month-old, viable yet unborn children are not people, are not valuable or have no rights, it is more plausible to believe they have not seriously considered the issue or are apprehensive about taking a stand.

Because this appeal is concerned with plaintiffs who are killed prior to birth, many, including the media, have seized the opportunity to improperly link it to the "abortion debate". Undoubtedly, our legislators would be cognizant of the public perception which could potentially attach to this issue. From a lawmaker's prospective, to take a stand on this narrow wrongful death issue might, in the public's eye be tantamount to aligning oneself on one side or the other of the "abortion debate". Under the circumstances, legislative silence might be viewed as the only politically safe, politically correct course to follow. In light of the potential political ramifications, it is not surprising neither the proposed House or Senate amendment cited

by Respondent could generate enough interest to warrant a floor vote.

Given our Legislature's inability or unwillingness to consider the issue, this Court has the opportunity to further define the meaning of "person"; and do so without the pressures of the political process. The words of this Court written almost forty years ago are equally true today:

> The courts should be alive to the demands of justice. We can see no necessity for insisting on legislative action ... the time has arrived to face this matter squarely in the interest of justice and place the responsibility for wrongs where it should be . . . 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) (Extending liability to Florida Municipalities for wrongful death).

Unlike the legislature, the Florida Supreme Court has no political agenda; and its decisions are governed by what is fair and just, not by what is deemed to be, or not to be politically correct. A favorable decision for Gwen and Willisha Young would not only be the equitable result, it would be in keeping with this Court's fundamental role in serving the people of Florida.

B. The Florida Legislature does not intend to exclusively occupy the wrongful death field.

In its brief, Respondent suggests the legislature, by its former actions, intended to exclusively occupy the field of wrongful death to the exclusion of the judiciary. In the absence

of explicit legislative direction that would foreclose judicial consideration of the meaning of "person", we submit the process of defining that term remains a proper judicial function. Young at 506 (Mickle, J., concurring). As was the case in Arizona, it appears more likely our legislature merely intended to codify a wrongful death action, leaving its administration and construction to the courts. Summmerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985).

Since the statute's enactment, the Florida legislature made relatively few modifications, largely related to identifying beneficiaries. Young at 506 (Mickle, J., concurring). Aside from these revisions, the legislature has not occupied the field so fully as to preclude judicial development. Rather, Florida courts have historically been active. By way of illustration, our courts have defined the recovery rights of illegitimate children[1], adopted children[2] and remarried spouses[3]. These judicial determinations would have been inappropriate if the legislature had intended to preclude judicial initiative in this area. Id. at 505. Therefore, this Court has the authority to make an equitable determination and recognize a wrongful death action on behalf of Willisha Young.

---

[1]Whitefield v. Kainer, 369 So.2d 684 (Fla. 4th DCA 1979)

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

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

II. WRONGFUL DEATH ACTIONS ON BEHALF OF STILLBORN CHILDREN SHOULD BE LIMITED TO TORTIOUS CONDUCT OF THIRD PARTIES.

In its brief, the Respondent speculates by recognizing a cause of action on behalf of an unborn child, this Court will open a Pandora's box of unanticipated litigation. Not only are their concerns unwarranted, they have no practical basis. Respondent has contrived far-fetched examples of what could happen, and at the same time has overlooked the reality of what has occurred in thirty-seven other states who now recognize the remedy. Respondents are unable to point to any other jurisdiction where a physician has been sued for performing a legal abortion, or a mother for insufficient prenatal care. The practical reality is the vast majority of these hypothetical actions never come to fruition since there is no reason for the representative parents to file an action against themselves or the physician they hired to perform an abortion.

There is a simple solution to these fabricated dilemmas. Out of an abundance of caution, this Court could recognize a cause of action on behalf of a stillborn, and limit its holding to those instances where a third party tortfeasor is at fault. In so doing, any potential of a mother being sued by the estate of her stillborn child would be eliminated, and her privacy rights with regard to procreation would be safeguarded.

III. FLORIDA SHOULD RECOGNIZE A CAUSE OF ACTION FOR THE WRONGFUL DEATH OF A VIABLE FETUS.

A. "Viability" is a better test than "live birth" to establish whether the right to pursue a wrongful death claim exists.

The Respondent argues the moment of viability is an arbitrary event and therefore would not be a good substitute for the live birth requirement for a wrongful death action. While viability may not be a milestone we traditionally celebrate, it has far-reaching significance in the field of obstetrics and establishes a statistically sound expectation of a healthy child. Viability is superior to the live birth requirement. It accurately represents the realities of modern medical science as well as elements of fairness.

To hold a wrongdoer accountable for a child who dies within minutes of being born, yet hold him harmless if the child dies even one minute before birth, is a rule which cannot be logically supported in medicine or law. It should make no difference in liability whether the child dies of the injuries just prior to or just after birth. Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085, 1087 (1985). Gwendolyn Young is not asking this Court to engage in the emotionally-charged debate as to when life begins. She is simply asking for the opportunity to present competent proof her daughter would be alive today but for the negligence of the Respondent.

The Respondent contends the live birth requirement is "objective, definite and easier". In other words, convenience,

ease and absolute certainty are preferable to truth and equity. The live birth requirement may be simple, but its logic is flawed. With modern technology, the moment of birth is no longer necessarily determined by the forces of nature. Today's physician routinely accelerates, delays or otherwise manipulates the birthing process. Summerfield at 698. "The live birth requirement is an illusory certainty, whose only benefit is a reduced caseload for the judicial system". Todd v. Sandidge Constr. Co., 341 F.2d 75, 77 (4th Cir. 1964). The current standard "might aid the judiciary, but hardly justice." Id.

Respondent relies on reasoning which has been abandoned by a majority of high courts throughout the country. In the past, it has been held that extending a cause of action to the estate of a stillborn child would present insurmountable problems in proving causation and damages.[4] The fallacy of this argument lies in the fact that any difficulties in proving causation and damages cannot be deemed to be greater or different than those associated with the case of an injured child who survives delivery for a few minutes, hours or days. Amadio, at 1088. Moreover, actions involving post-delivery death have been a part of the law for some time, and the experience gained from handling proof problems in these matters has matured the judiciary to the point where it can now extend the application of these cases to situations where the child is born dead due to pre-delivery injury. Id.

---

[4]See e.g., Scott v. Kopp, 494 P.A. 487, 216 A.2d 502 (1966).

Throughout this appeal, the Respondent has continuously overlooked one of the most important considerations of all: Any additional difficulties in proving causation or damages at trial will be the plaintiff's burden. In the present case for example, a favorable ruling from this Court would still leave Gwendolyn Young with the arduous task of proving each of the elements of medical negligence, including the allegation St. Vincent's negligence was the proximate cause of Willisha's death. Gwendolyn Young deserves the opportunity to pursue a wrongful death claim on behalf of her deceased daughter.

B. Advances in medical technology present compelling reason for change in the law.

Decisions of other state high courts and recent advances in the field of obstetrics demonstrate a legitimate basis for changing Florida's interpretation of its wrongful death law. Prenatal technology has progressed to the point where the inequities of former rulings are easily demonstrated. Today, it is well established by medical as well as legal authority mother and fetus are two separate patients. This truth has long been recognized by the majority of our state supreme courts:

> If the mother can die and the fetus live or the fetus die and the mother live, how can it be said there is only one life? If tortious conduct can injure one and not the other, how can it be said there is not a duty owing to each?

O'Neill v. Morse, 385 Mich. App. 130, 188 N.W.2d 785 (Ct. App. 1971).

The concept of two distinct lives and two separate duties is applicable in the present case. Willisha Young maintained her own vital functions, and like her twin sister, possessed all the characteristics of a separate patient. (R. 119). Moreover, the tortious conduct of the Respondent fatally injured Willisha, yet left her mother and sister physically unharmed. (R. 119). Modern medicine gave St. Vincent's the ability, and more importantly, the legal duty to monitor and treat Willisha as a separate, unique patient. In today's medical/legal climate, there can be no disagreement St. Vincent's owed Willisha a duty of professional care commensurate with what was owed their other patients. A breach of that duty should give rise to a recognizable remedy. Gwendolyn Young should be given the opportunity to present evidence in support of her daughter's wrongful death action.

C. Florida's wrongful death law should be interpreted so as to provide a suitable remedy to those who suffer the greatest harm.

Because viability represents the stage in development where it can be said that a child is capable of sustaing life independent of her mother, it makes no sense in medicine or law to wait until live birth to hold a tortfeasor responsible for his actions. To hold otherwise would be to "stack the deck" in favor of the offending party, particularly in cases like the present one, where the wrongdoer is in control of not only his action, but also the victims's remedy.

By analogy, it would be unthinkable to overlook the murderous act of a criminal who kills an 8 1/2 month old child, not yet born. Yet in the civil arena, for reasons of convenience, the Respondent is advocating immunity for the tortfeasor.

By not performing a Caesarean section, in what would have been the obvious means of saving Willisha's life (R. 18), St. Vincent's has, under the current law, saved itself from civil liability.

Judge Mickle's concern about Florida's current legal interpretation which allows a physician to escape repercussion (for a tortious act on a child before birth) by simply allowing the child to die before being expelled was more than prophecy or academic rhetoric. Young at 504. Unfortunately, the very same self-preserving scenario has occurred, and may continue to occur, in the State of Florida until a cause of action for the wrongful death of an otherwise healthy, viable child is recognized. Under the current law, medical practitioners such as those involved in the case at bar and the one discussed by the amicus are not encouraged to remedy or mitigate injuries caused by their mistakes. The law provides an incentive for inaction which allows the unborn child to die . . . along with his legal cause of action.

The legislative goal of protecting unborn children, as evidenced in Florida's homicide, abortion and probate statutes, strongly supports recognizing a civil, wrongful death action where a viable but not yet born child dies as a result of

negligence. Otherwise, a cause of action may exist for a child's injuries received in the womb, yet none lie if the ultimate injury - death - occurs. Under Florida' existing interpretation of the law, a tortfeasor who kills a child before delivery is immune, but held liable if the injured child survives birth, if only for a few seconds. The high court of Massachusetts, as well as other state Supreme courts across the country, have found this result to be particularly distasteful:

> [I]f the trauma is severe enough to kill the child, then there could be no recovery; but if less serious, allowing the child to survive, there might be recovery. Again, if the fatality was immediate, the suit could not prevail, but if death was protracted by a few hours, even minutes beyond birth, the claim would succeed. Practically, it would mean the greater the harm, the better chance of immunity.

Mone v. Greyhound Lines, 368 Mass. 354, 331 N.E.2d 916, (quoting Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964)).

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.

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,

BROWN, TERRELL, HOGAN, ELLIS,
McCLAMMA & YEGELWEL, P.A.

James T. Terrell, Esq.
Florida Bar No.: 106212
804 Blackstone Building
Jacksonville, FL 32202
904/632-2424
Attorneys for Petitioner

Annette J. Ritter, Esq.
Florida Bar No.: 823181
804 Blackstone Building
Jacksonville, FL 32202
904/632-2424
Attorneys for Petitioner

Michael S. Sharrit, Esq.
Florida Bar No.: 936073
804 Blackstone Building
Jacksonville, FL 32202
904/632-2424
Attorneys for Petitioner

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; Earl E. Googe, Esq., Jr., 1800 First Union Bank Tower, Jacksonville, Florida 32202; and Edna L. Caruso, Esquire, 1615 Forum Place, West Palm Beach, Florida, 33401, by mail, this 21ST day of September, 1995.

ANNETTE J. RITTER, ESQUIRE