IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
OCT 10 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.
______________________________/

SUPPLEMENTAL 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.
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TABLE OF CONTENTS

Table of Authorities ii

Argument 1

I. **THE AUTONOMY AND PRIVACY RIGHTS OF THE MOTHER WOULD NOT BE AFFECTED BY RECOGNIZING A WRONGFUL DEATH ACTION ON BEHALF OF HER UNBORN CHILD** 1

II. **THE ACLU IS MISTAKEN WHEN IT ASSERTS GWENDOLYN YOUNG CAN BE COMPENSATED FOR HER LOSSES UNDER FLORIDA'S CURRENT INTERPRETATION OF ITS WRONGFUL DEATH STATUTE** .. 3

Conclusion 6

TABLE OF AUTHORITIES

Page

FLORIDA CASES:

Abdelaziz v. A.M.I.S.U.B. of Florida, Inc., 515 So.2d 269 (Fla. 3rd DCA 1987) 4

Henderson v. A. W. North, M.D., 545 So.2d 486, 488 (Fla. 1st DCA 1989) 5

Johnson v. State, 602 So.2d 1288 (Fla. 1992) 1

Singleton v. Rantz, 534 So.2d 847 (Fla. 5th DCA 1988) 3

State v. Gethers, 585 So.2d 1140 (Fla. 3rd DCA 1991) 1

I. THE AUTONOMY AND PRIVACY RIGHTS OF THE MOTHER WOULD NOT BE AFFECTED BY RECOGNIZING A WRONGFUL DEATH ACTION ON BEHALF OF HER UNBORN CHILD.

In its amicus brief, the ACLU speculates that by recognizing a cause of action for the wrongful death of an unborn child, this Court would open the door to causes of action against pregnant women in violation of their autonomy and privacy, pitting the rights of the unborn against those of the mother. However, the ACLU rightfully implies that hypothetical actions against the mother will in practicality not occur. The ACLU brief recognizes the use of fetal rights to punish women based on their actions during pregnancy have failed in the past. Johnson v. State, 602 So.2d 1288 (Fla. 1992); State v. Gethers, 585 So.2d 1140 (Fla. 3rd DCA 1991)(prosecution of woman charged with child abuse based on cocaine use during pregnancy properly dismissed).

Like the Respondent, the ACLU has contrived farfetched examples of "what if" scenarios; and at the same time has overlooked the reality of what has occurred in thirty-seven other states which now recognize wrongful death actions on behalf of unborn children. The ACLU is simply unable to cite any decision in any jurisdiction where the estate of an unborn child has successfully pursued a civil claim against his mother for insufficient prenatal care. The practical reality is these far-reaching actions never come to fruition since there is no reason for the representative parents to file an action against themselves.

Ultimately, on page 16 of its brief, the ACLU recognizes the easiest means of preventing the feared adversarial relationship between mother and fetus. Should this Court decide to recognize a cause of action on behalf of a stillborn, it could and should 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. Because the ACLU's fears with regard to protecting the mother's rights are unfounded, Gwendolyn Young should be afforded the opportunity to pursue a wrongful death action on behalf of her daughter.

II. <u>THE ACLU IS MISTAKEN WHEN IT ASSERTS GWENDOLYN YOUNG CAN BE COMPENSATED FOR HER LOSSES UNDER FLORIDA'S CURRENT INTERPRETATION OF ITS WRONGFUL DEATH STATUTE.</u>

The ACLU takes the position that a woman who delivers a stillborn child may recover damages for her physical and mental pain and anguish occasioned by malpractice and by the stillbirth of her child. Upon a close reading of the cases cited in its brief, it becomes apparent the ACLU argument is misplaced and has little application to the facts of this appeal. Ironically, the ACLU amicus does a disservice to the women whose interest it professes to represent. The amicus brief, in effect, attempts to equate emotional pain from bodily injury to the emotional trauma associated with the death and loss of a child.

In <u>Singleton v. Rantz</u>, 534 So.2d 847 (Fla. 5th DCA 1988), the distinction is clear. In <u>Singleton</u>, the court permits the mother of a stillborn child to recover damages (presumably emotional as well as physical) in a very limited sense. The <u>Singleton</u> court considered the fetus to be living tissue of the mother. Therefore, where the fetus is injured, the court held the mother has a cause of action the same as she has for injury to "any other part of her body." In other words, a mother, in an action on her own behalf, is entitled to seek damages for injury to her fetus in the same manner she could if someone caused injury to her appendix. As is the case with Gwen Young, those damages are likely to be small, since rarely would an injury to the fetus have a lasting effect on the mother in the same sense as an injury to her appendix or spleen.

Unlike an injury to a nonessential body part, the death of a child, whether or not born alive will likely cause severe emotional trauma to both parents. Ms. Young should be allowed to seek damages for the loss of a child; not for injury to a body part. Gwendolyn Young is not suffering emotionally because of an injury to her body; but she has experienced severe emotional trauma over the death of her stillborn daughter.

The distinction between wrongful death damages and damages associated with injury to the mother is further clarified by Abdelaziz v. A.M.I.S.U.B. of Florida, Inc., 515 So.2d 269 (Fla. 3rd DCA 1987). In Abdelaziz, the plaintiff mother conceded she sustained no physical injuries to herself after the death of her fetus. The court considered the mothers claim for negligent infliction of emotional distress resulting from the death of her fetus to be, in substance "an attempt to circumvent existing case law holding that the Wrongful Death Statute does not provide for recovery of damages for loss of a stillborn fetus."

Like the Abdelaziz mother Gwendolyn Young did not herself sustain significant injuries, but because of the respondent's actions, she has suffered severe mental anguish over the loss of her daughter. She is seeking compensation for those damages associated with the loss of a child, which are currently unavailable under Florida's interpretation of the law. The ACLU erroneously suggests that Gwendolyn Young is entitled to seek all her damages in a negligence action on her own behalf. As the law currently stands, any attempt by Ms. Young to claim damages for the emotional pain associated with the death of her stillborn

daughter in a malpractice action would have been viewed as a "thinly disguised claim for the wrongful death of the fetus". Henderson v. A. W. North, M.D., 545 So.2d 486, 488 (Fla. 1st DCA 1989). Therefore, without a change to the existing interpretation of Florida's Wrong Death Law, Gwendolyn will be denied her opportunity to prove her daughter's demise was caused by St. Vincent's malpractice, and that she has suffered as a result.

The ACLU argument is an illusory mischaracterization of a mother's damages, and does not even consider the emotional injuries suffered by a father. A favorable decision to Gwendolyn Young would rightfully allow her to seek damages as a survivor of her daughter's estate.

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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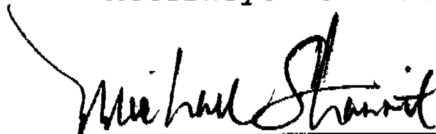

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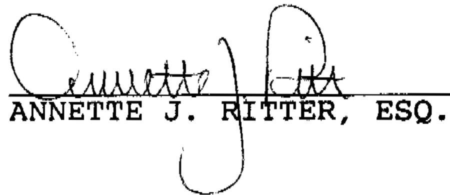
CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been provided to William E. Kuntz, Esquire, 225 Water Street, Suite 1800, Jacksonville, Florida, 32202; Edna L. Caruso, Esquire, 1615 Forum Place, West Palm Beach, Florida, 33401; Sharon Lee Stedman, Esquire, 1516 East Hillcrest Street, #108, Orlando, Florida, 32803; Andrew H. Kayton, Esquire, 225 N.E. 34th Street, #102, Miami, Florida, 33137; Rocio L. Cordoba, Esquire, 132 West 43rd Street, New York, New York, 10036 and Caitlin F. Borgmann, Esquire, 450 Lexington Avenue, New York, New York, 10017, by mail, this 9th day of October, 1995.



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