SUPREME COURT OF FLORIDA
Tallahassee, Florida

Appeal No: 88,544

JAMES R. TANNER

Petitioner,

vs.

ELLIE M. HARTOG, M.D., ALBERT0 DUBOY, M.D., HARTOG & DUBOY, P.A., and LAKELAND REGIONAL MEDICAL CENTER

Respondents.

On Appeal from the Second District Court of Appeal

ANSWER BRIEF OF *AMICUS* CURIAE

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PRELIMINARY STATEMENT

In this *amicus curiae* brief, Plaintiff/Petitioner, James R. Tanner, will be referred to as "Petitioner" or his given name and Phyllis Tanner will be referred to by her given name. Defendants/Respondents, Alberto Duboy, M.D., Hartog & Duboy, P.A., and Lakeland Regional Medical Center, Inc., will be referred to as "Respondents". *Amicus* Curiae, Florida Defense Lawyers Association, will be referred to as "FDLA".

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

FDLA adopts as its statement of the case and statement of the facts the statements of Respondents.

ISSUE PRESENTED

WHETHER AN EXPECTANT FATHER AND MOTHER CAN MAINTAIN A CAUSE OF ACTION FOR EMOTIONAL DAMAGES RESULTING FROM A STILLBIRTH CAUSED BY THE NEGLIGENT ACT OF ANOTHER.

SUMMARY OF THE ARGUMENT

Petitioner seeks to circumvent the established law of this State which fails to recognize a cause of action for the expectant parents' emotional distress resulting from a stillbirth. The attempt to plead an action for negligent infliction of emotional distress is a thinly disguised effort to recover for the injuries flowing from the loss of an expected child. Such injuries were not recognized at common law. The public policy of this state as expressed by the Wrongful Death Act and this court's judicial interpretations does not support the Petitioner's claims. Any contention that Petitioner's allegations bring him within an exception to Florida's Impact Rule is so factually implausible as to be rejected on its face. The question certified by the Second District should accordingly be answered in the negative.

ARGUMENT

I. An Expectant Father And Mother Cannot Maintain a Cause of Action for Emotional Damages Resulting from a Stillbirth Caused by The Negligent Act Of Another

A. Florida's Wrongful Death Act Does Not Permit Recovery Bv Parents For Stillbirth Of A Fetus.

It is clear that Petitioner's injuries arise out of the emotional distress caused by the loss of an unborn child. Thus, Petitioner's claim for negligent infliction of emotional distress is nothing more than a thinly disguised effort at recovering for the wrongful death of an unborn child. The procedural history of the case demonstrates that Petitioner's efforts at repleading a cause of action are nothing more than devices attempting to circumvent an established proposition of Florida law. This boundary of Florida law finds its origin at common law and continues valid despite repeated efforts to have this court reexamine the proposition and to have the legislature amend Florida's Wrongful Death Act.

The common law did not recognize a cause of action for wrongful death. Our legislature created a cause of action by enacting the Wrongful Death of Minors Act. In Stokes v. Libertv Mutual Insurance Co,, 213 So.2d 695 (Fla. 1968), this court first interpreted this statute as not including a stillborn child as a "person" within the meaning of the Act. This court has reaffirmed this rule of law under the applicable Act on four subsequent occasions. Young v. St. Vincent's Medical Center, 673 So.2d 482 (Fla. 1996); Hernandez v. Garwood, 390 So.2d 178 (Fla. 1978); Duncan v. Flvnn, 358 So.2d 178 (Fla. 1978); Stem v. Miller, 348 So.2d 303 (Fla. 1977).

In Young, this court was asked to reassess the meaning of the statute in the context of modern scientific understanding of viability and in light of several foreign jurisdictions which had interpreted similar acts as including a viable fetus within the meaning of a "person". The jurisdiction of this court was vested by virtue of the First District Court of Appeal certifying the issue as presenting a question of great public importance. Young v. St. Vincent's Medical Center, 653 So.2d 499 (Fla. 1st DCA 1995). In an extensive special concurrence, Judge Mickel recounted the history of this court's interpretation of the Florida Wrongful Death Act which superseded the Wrongful Death of Minor's Act, the preceding Wrongful Death Act, and the Survival Act and created one general action for the wrongful death of any person. Id. at 500-503. This special concurrence further points out that the legislature has been presented with two separate opportunities to amend the statute to add the term "unborn child" to the definition of "person" and "minor children" in §768.19. The legislature has rejected these proposed amendments. Id. at 503, fn 10. Thus, as recently as this year, this court has taken the opportunity to explicitly consider whether Florida recognizes a cause of action for the wrongful death of an unborn child and rejected this proposition. Young, supra, appear that this court has properly determined that any such expansion of the legislatively created remedies afforded under Florida's Wrongful Death Act are more properly deferred to the legislature.'

1. Where the legislature has deemed it appropriate, it has enacted laws encompassing unborn children. See e.g. §782.09 Florida Statutes (1971)(willful killing of unborn quick child is manslaughter).

B. The Established Public Policy Of This State Should Not Be Contravened By Allowing An Exception To The Impact Rule Under Circumstances Of A Stillbirth,

As early as International Ocean Telegraph Company v. Saunders, 32 FL 434, 446-47, 14 So. 148, 151-52 (1893), this court has expressed concern with the difficulty in valuing mental anguish for damages purposes. Thus, Florida follows the Impact Rule which requires that the emotional distress suffered must flow from physical injuries the Plaintiff sustained in an impact. R.J. v. Humana of Florida, Inc., 652 So.2d 360, 362 (Fla. 1995). There are a number of sound policy reasons for the restrictions to recovery imposed by the Impact Rule. Such reasons have been recognized by this court as reducing fictitious or speculative claims, that psychic injury is "spiritually intangible" and thus better dealt with through legislative action than judicial decisions, and protecting the foreseeability element of the duty imposed upon a Defendant. Id. at 362, 363.

This court has created two exceptions to the Impact Rule. In Champion v. Gray, 478 So.2d 17 (Fla. 1985) this court first announced a willingness to modify the Impact Rule, but emphasized that it was unwilling to permit a cause of action for purely subjective and speculative damages for psychic trauma alone. Reaffirming the need for boundaries, this court states:

> Because we are dealing with an unusual and non-traditional cause of action in allowing damages caused by psychic injury following an injury to another, however, public policy comes into play and some outward limitations need to be placed on the pure foreseeability rule.

Id. at 20. The court limited the exception to the Impact Rule to those circumstances involving a significant discemable physical injury arising out of the psychic injury, direct involvement by

the injured party in the event causing the original injury, and a close personal relationship to the directly injured person. Id. at 20.[2]

The role of the Impact Rule in placing boundaries upon tort recovery consistent with the public policy of this state was confirmed by this court in R.J. v. Humana of Florida, 652 So.2d 360 (Fla. 1995). R.J. was misdiagnosed as being HIV positive. Id. at 361. Plaintiff lived with the belief that he suffered a terminal illness and underwent treatment for the disease for eighteen months before a retest revealed that he did not have HIV. Id. Plaintiff alleged that the involved health care providers were negligent in misdiagnosing him to be HIV positive. Id. R.J. 's complaint was dismissed based upon the Impact Rule and the question of whether the Impact Rule would apply to a claim for damages from a negligent HIV diagnosis was certified to be one of great public importance. by the Fifth District Court of Appeal. Id.

R.J.'s request that the Impact Rule be abolished was rejected by this court:

> We reaffirm today our conclusion that the Impact Rule continues to serve its purpose of assuring the validity of claims for emotional or psychic damages, and find that the Impact Rule shall remain part of the law of the state.

Id. at 363.

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2. In the companion case of Brown v. Cadillac Motorcar Division, 468 So.2d 903 (Fla. 1985) this court emphasized the need for the presence of a significant discernable physical injury. Plaintiff, due to a defect in the accelerator of his automobile, caused his mother's death as she had just alighted from Plaintiffs vehicle. This court found Plaintiff's claim legally deficient in that he failed to assert psychological trauma causing a demonstrable physical injury such as death, paralysis, muscular impairment, or similar objectively discernable physical impairment before a cause of action may exist. Id. at 904. Thus, this court emphasized the need to have discernable and objective evidence of the emotional distress as a method of curbing the potential of fraudulent claims and placing some boundaries on the indefmite and unmeasurable psychic claims.

This court distinguished pure psychic injury from foreseeably caused unnecessary medical care and treatment. This court describes invasive medical care and treatment to suffice the Impact Rule. Id. at 364. Such invasive care and treatment of the erroneously diagnosed condition is contrasted with the touching of a patient by a doctor and the taking of blood for ordinary testing which do not qualify as "physical impact". Id. Therefore, R.J. was permitted to amend his complaint to assert the expenses of any unnecessary medical care and treatment and any bodily injuries caused by the unnecessary treatment. Perhaps the R.J. decision is best described as precluding recovery for the psychic injuries resulting from the erroneous advice of a life-threatening disease, as contrasted with the economic losses and any bodily injury caused by what retrospectively was unnecessary care and treatment.

In describing the public policy underlying preclusion of recovery for psychic harm, Justice Kogan provides the following quotation in his special concurrence in R.J.:

> One judge described the underlying policy in the following terms:
>
> > There must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.
>
> Stewart v. Gilliam, 271 So.2d 466 (477) (Fla. 4th DCA 1972)(Read C. J., dissenting), quashed 291 So.2d 593 (Fla. 1974).

In its recent opinion of Zell v. Meek, 665 So.2d 1048 (Fla. 1996), this court again reaffirmed the viability of the Impact Rule as precluding claims for emotional distress in the absence of an impact causing bodily injury. In Zell, Gaylynn Meek witnessed her father's death at the hands of an anonymous bomber at her father's apartment. Id. at 1049. She alleged that the owners and managers of the apartment complex were on notice of bomb threats, but failed to take reasonable efforts to warn residents, or otherwise protect tenants and invitees from

foreseeable criminal conduct. Id. Ms. Meek and her husband alleged a cause of action for negligent infliction of emotional distress. Id. The principal issue before this court was whether the onset of physical manifestation of the emotional distress had to be a "short time" after the distressing event in order to meet the exception to the Impact Rule announced in Champion v. Gray, 478 So.2d 17 (Fla. 1985). Id. at 1053. This court receded from the statement in Champion that imposed a rigid temporal proximity requirement. Id. held that the temporal relationship between a physical injury and psychic injury is but an element to be considered by the fact finder in deciding legal cause. Id. Importantly, the Zell decision chronicles the evolution of the Impact Rule as a part of Florida law and again affirms its important function in Florida jurisprudence.

The second exception to the Impact Rule exists in the context of "wrongful life". In Kush v. Lloyd, 616 So.2d 415, 423 (Fla. 1992) this court recognized that parents of a genetically deformed child should be permitted to recover for their emotional injuries, in addition to the economic consequences of the birth defects. Mr. and Mrs. Lloyd parented a child born with deformities. Id. at 417. They sought the advice of health care providers as to whether the deformities were caused by the parents' genetic make-up. Id. Being assured that there was no genetic cause to the first child's deformity, the couple proceeded to have a second child. Id. This child was likewise born with deformities that were later determined to be a genetic abnormality inherited from the mother. Id.

Mr. and Mrs. Lloyd sought to recover damages for the alleged mental anguish caused by the birth of the second deformed child. Id. This court questioned whether the Impact Rule was ever intended to be applied under the unique facts of wrongful birth. Id. at 422.

Recognizing the personal injury torts that permit recovery for predominantly emotional damages, this court found that the Impact Rule is inapplicable. Id. The facts of the case were particularly compelling in that the parents went to considerable lengths to avoid the precise injury they have suffered. Id. at 423. Kush is clearly a fact specific and unique category of tort. Id. at fn 5. Thus, Kush should not be viewed as diminishing the vitality of the Impact Rule in the present context. Furthermore, the tort of wrongful birth is viewed as committed directly against the mother and father. Id.

1. The Stillborn Fetus Cannot Be The "Other Person" Whose Direct Injury Permits Application of the Champion Exception.

In the instant case, it is intellectually dishonest to view the Petitioner's injuries as other than resultant from the emotional distress at the loss of an expected child. These psychic injuries are barred by the Impact Rule. The Champion exception to the Impact Rule is inapplicable under the facts of a stillborn child.

At least two Florida intermediate appellate courts have rejected efforts by Plaintiffs to disguise claims for the wrongful death of an unborn child as emotional distress. In Henderson v. North, 545 So.2d 486 (Fla. 1st DCA 1989), Mrs. Henderson contended that a negligently performed biopsy resulted in a miscarriage. The court limited Mrs. Henderson to physical pain, mental anguish and expense of hospital admission, admission tests, and surgical procedures that were only rendered necessary by the negligently performed biopsy. Roth Mr. and Mrs. Henderson were directed that there shall be no allegations or evidence adduced as to the death of the fetus or any injury damages claimed by Mr. and Mrs. Henderson for the death of the fetus. Id. at 488.

In the earlier case of Abdelaziz v. A. M. Isub of Florida. Inc., 515 So.2d 269,272 (Fla. 3d DCA 1987), a similar ploy was rejected by the court. Mrs. Abdelaziz' claimed physical injuries and emotional distress resulting from the stillbirth of her once viable eight month old fetus allegedly caused by medical malpractice. Id. at 270. Mrs. Abdelaziz conceded that she sustained no physical injuries to herself and that Mr. and Mrs. Abdelaziz' claim for mental pain and suffering resulted from the loss of the fetus. Id. at 271.

Relying upon Hernandez, Duncan, and Stem, the Abdelaziz' court rejected the Abdelaziz' wrongful death claim. Id. The court similarly rejected the negligent infliction of emotional distress claim reasoning that a claim clearly not recognizable under the Wrongful Death Act should not be indirectly recovered under a simple negligence claim. Id. at 272.[3]

In the instant case, there can be no genuine assertion that the psychic injury and any resultant bodily injuries flow from other than the grief at the loss of the unborn child. Just as the unborn child is not a "person" for purposes of the Wrongful Death Act, this court should not extend some separate tort identity to the fetus as would support application of the Champion exception. To do so would be entirely contrary to the prerogative of the legislature to have amended the wrongful death statute and fly in the face of the logic and reasoning of this court's decisions rejecting application of the Wrongful Death Act in the context of a stillbirth. This court has made it abundantly clear that it is deemed the prerogative of the legislature to further expand upon the rights and remedies available to expectant parents in the context of negligence causing stillbirth. This court should adhere to this long-standing and well-reasoned position.

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3. The Abdelaziz court cites Styles v. Y. D. Taxi Corp.. Inc., 426 So.2d 1144 (Fla. 3d DCA 1983) wherein the court held the loss of a fetus is not a permanent injury for purposes of the threshold requirement of Florida Statutes $627.737.

As the certified question appears to also involve the ability of the mother to also state an action for negligent infliction of emotional distress, it must be further pointed out that this is an oxymoron. The only way that a mother could sustain psychic trauma that results from the negligent injury to another would be to treat the fetus as a separate and distinct entity from the mother. To say that this creates a legal quagmire is an understatement. Such a recognition has the potential to create dire conflict with the existing body of law that recognizes a woman's right to an abortion. See Roe vs. Wade, 410 U.S. 113, 120 (1973); Planned Parenthood v. Casey, 112 S.Ct. 2791, 2830 (1992)(holding statute requiring spousal notification prior to abortion unconstitutional); Planned Parenthood v. Danforth, 428 U.S. 52, 69-71 (1976)(holding statute requiring of spousal consent prior to an abortion unconstitutional); In re: T.W., a Minor, 551 So.2d 1186 (Fla. 1989)(finding woman's right of privacy unconstitutionally impaired by parental consent statute).

2. The Risk Of Improper Awards For Noncompensable Injury Precludes Application Of The Champion Exception.

Furthermore, the risk of improperly assessing damages for the grief over the loss of the expected child is too great to even consider a Champion exception as plausible. This court has recently recognized the inherit difficulty in separating the grief from the loss of an unborn child with that occasioned by any other contemporaneous event. In Gonzalez v. Metropolitan Dade County Public Health Trust, 651 So.2d 673 (Fla. 1995). Mrs. and Mrs. Gonzalez brought an action for negligent affliction of emotional distress arising out of the alleged mishandling of burial services for an eight day old child. Id. at 673, 674. Relieving that the funeral home had buried their child on November 9, 1988, the couple was advised on January 9, 1989, that their

baby had not been buried and that the body was still in a refrigerator drawer at the hospital morgue. Id. at 674. A second funeral and burial were held on January 24, 1989. Id. The Gonzalez' conceded that they suffered no physical impact and that the hospital and funeral home's acts were not wilful. Id.

Once again, this court was asked to further abrogate or reject the Impact Rule. Realizing Florida to be in the minority view, the court reaffirmed that physical impact is required to bring a cause of action for negligent infliction of emotional distress. Id. at 674. This court was unwilling to permit recovery for the Gonzalez' mental pain and anguish unconnected with physical injury. Id. at 675. This court again cites to Judge Reed's dissent in Stewart v. Gilliam, where he states:

> There is more underlying the impact doctrine than simply problems of proof, fraudulent claims, and excessive litigation. The impact doctrine gives practical recognition to the thought that not every injury which one person may by his negligence afflict upon another should be compensated in money damages. There must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.

Id. (citations omitted).

Further, this court recognizes the inherent inability to segregate the grief from the loss of the unborn child and any mental anguish arising out of the mishandling of the corpse:

> While we recognize the cases involving negligent mishandling of corpses entail real and palpable injury to feelings, and it may even be true that the 'special circumstances' guarantee the authenticity of the claim, there is no accurate method of separating the natural grief resulting from the death of a loved one from the additional grief suffered as a result of mishandling of the body.

Id. at 676. Thus, even if a Champion exception could somehow be argued to result from the father's observation of non-stillbirth related direct injury to the mother, the risk of improper

awards for the wrongful death of an unborn child are tw great to warrant its application in this context.[4]

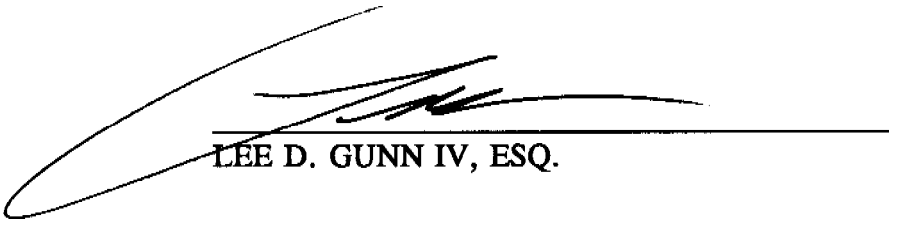
4. Although the claims of Phyllis Tanner are not before the court, the consortium claim of Petitioner may require the court to assess whether it is appropriate to allow a cause of action for a stillbirth as "loss of tissue" and thus bodily injury of the mother. Bombalier v. Lifemark Hospital of Florida 661 So.2d 849 (Fla. 3d DCA 1995)(implicitly recognizing right of parents to recover for stillborn twin as bodily injury to mother); Tanner v. Hartog, 630 So.2d 1136 (Fla. 2d DCA 1993)(on record from this court, Mrs. Tanner permitted to assert cause of action for stillbirth as her bodily injury), accord McGesham v. Parke-Davis, 573 So.2d 376 (Fla. 2nd DCA 1991); Singleton v. Ranz, 534 So.2d 847 (Fla. 5th DCA 1988). This line of cases appear to conflict with Styles v. Y.D. Taxi Corn, 426 So.2d 1144 (Fla. 3d DCA 1983)(loss of fetus not a permanent injury); and Abdelaziz v. 'A. M. Isub of Florida. Inc., 515 So.2d 269 (Fla. 3d DCA 1987).

Under the circumstances of a negligently caused stillbirth, the bodily injury to the mother is the fact of stillbirth not a compensable injury to her body in the traditional contemplation of the common law. For the reasons stated above, any expansion of traditional tort recovery is best left to the legislature. Thus the stillbirth of the fetus without more is itself legally insufficient to support a claim. Of course, that does not preclude the woman's claim for any bodily injuries beyond the stillbirth. For example, if the tortfeasor negligently caused traumatic scarring to the woman's reproductive system such injury remains compensable. Such a distinction between the psychic injury associated with the stillbirth and any separate and direct injury caused by the negligence is in accord with this Court's reasoning in R.J. vs. Humana of Florida. Inc., 652 So.2d 360 (Fla. 1995).

CONCLUSION

Petitioner's effort to state a claim for negligent infliction of emotional distress is but a thinly disguised effort to request a judicially created cause of action for the wrongful death of an unborn child. This court has repeatedly and appropriately restrained itself from judicially creating a cause of action that should be deferred to the legislature. This court is respectfully requested to answer the certified question in the negative.

Respectfully submitted,



LEE D. GUNN IV, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 31st day of October, 1996, to: **KENNAN G. DANDAR, ESQ.** (Counsel for Tanner), Dandar & Dandar, P.A., 1009 N. O'Brien Street, P.O. Box 24597, Tampa, FL 33623-4597; **THOMAS M. HOELER and JERRY L.** NEWMAN, **ESQ.** (Counsel for Duboy and **Hartog &** Duboy), Shear, Newman, Hahn, & Rosenkranz, 201 E. Kennedy Boulevard, Suite 1000, P.O. **Box 2378,** Tampa, Florida 33601-2378; **KEVIN C. KNOWLTON,** ESQ. (Counsel for Lakeland Regional), Peterson, Myers, Craig, Crews, Brandon & Puterbaugh, P.A., 100 E. **Main** Street, **P.O. Box 24628, Lakeland,** Florida 33802-4628.

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