IN THE SUPREME COURT OF FLORIDA

JAMES R. TANNER,

Petitioner.

v. Case No. 88,554

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

Respondents.
_____/

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION FROM THE FLORIDA SECOND DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT, LAJSELAND REGIONAL MEDICAL CENTER, INC.

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PRELIMINARY STATEMENT

In this Answer Brief, Plaintiff/Petitioner, JAMES R. TANNER, will be referred to as "Petitioner" or "Petitioner Mr. Tanner". Defendant/Respondent, LAKELAND REGIONAL MEDICAL CENTER, INC., will be referred to as "Respondent LRMC. " References to the Record on Appeal will be designated by the symbol "R" followed by the appropriate page number.

Petitioner's brief addresses the question certified to this Court in his second point. While answer briefs should ordinarily follow the same outline as the initial brief, it seems most appropriate that the certified question be dealt with first. Whether the impact rule limits the application of any answer which might be given to the certified question will be considered secondly, and Petitioner's tag-on argument regarding the relation back doctrine will be considered last. Any other ordering unnecessarily sacrifices coherence in considering the issues presented.

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts in the Petitioner's Initial Brief does not adequately apprise the Court of "the nature of the case, the course of the proceedings, and the disposition in the lower tribunal" with requisite completeness as to matters pertinent to this proceeding. See Florida Rule of Appellate Procedure 9.210(b)(3). Accordingly, Respondent LRMC presents this separate Statement of the Case and Facts pursuant to Florida Rule of Appellate Procedure 9.210(c).

This case has a long tortuous history, with trips back and forth through the Florida Second District Court of Appeal and this Court. This litigation ensued on August 1, 1990, when the Petitioner and his wife, Phyllis Tanner ("Mrs. Tanner"), filed a medical malpractice action against Mrs. Tanner's treating obstetricians Ellie M. Hartog, M.D. ("Dr. Hartog"), Alberto Duboy, M.D. ("Dr. Duboy"), the physicians' professional association, and Respondent LRMC in connection with the stillbirth of Mrs. Tanner's fetus (R 1-22). Days later an Amended Complaint was filed wherein Mrs. Tanner sought damages individually and Petitioner sought damages individually and as the personal representative of the child's estate (R 23-45). According to the Amended Complaint, the doctors examined Mrs. Tanner on March 31, 1988, and then sent her to the hospital (LRMC) for testing. The following morning the fetus was delivered stillborn at the hospital. The Amended Complaint alleged that in light of the testing and Mrs. Tanner's condition, the doctors and Respondent LRMC were negligent in failing to promptly perform a delivery by cesarean section at a time when the child could have been saved. The Amended Complaint alleged that the Tanners neither knew nor should have known "that the

actions and inactions of the defendants fell below the standard of care recognized in the community" until December 29, 1989.'

All defendants moved to dismiss the Amended Complaint on several grounds including that the Tanners' claims, however worded, were for the wrongful death of a stillborn child for which there existed no cause of action (R 46-53, 56-57, 58-61, 62-63). The defendants also asserted that the medical malpractice statute of limitations had run on the face of the Amended Complaint. The trial court granted the motions to dismiss, holding that the Tanners' claims were barred by the statute of limitations for medical malpractice, that the Tanners failed to state a cause of action for the wrongful death of a fetus, and that Mrs. Tanner had disguised a personal injury claim for the wrongful death of a fetus and thus had not stated a cause of action (R 66-68). This dismissal was reduced to a final order (R 74-75) and the Tanners appealed to the Florida Second District Court of Appeal, which affirmed the trial court's ruling based upon the statute of limitations. Tanner v. Hartog, 593 So.2d 249 (Fla. 2d DCA 1992) ("Tanner I"). Because the court resolved the entire case on this issue, it did not address the issues regarding whether the complaint stated a cause of action. On rehearing, a question of great public importance was certified to the Florida Supreme Court on the statute of limitations. Tanner v. Hartog, 17 Fla.L.Weekly D433 (Fla. 2d DCA Jan. 31, 1992).

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1 The Tanners' Firet Amended Complaint contained five (5) counts. Count I was *a count for negligence and alleged a direct cause of action on behalf of Mr. and Mrs. Tanner from the stillbirth and described it as "the death of the minor child, Jamee R. Tanner, II" (R 26). Count II was titled "res ipsa loquitur (negligence)" and stated the same allegatione alleged in Count I (R 27-30). Count III alleged a claim for wrongful death of a fetua (R 30-33). Count IV was titled "res ipsa loquitur (wrongful death)" and contained the identical allegations se Count III (R 33-36). Finally, Count V raised the same allegationa as Counts I through IV, but couched them in terms of a breach of contract (R 36-39).

On review of the certified question, this Court in Tanner v. Hartog, 618 So.2d 177 (Fla. 1993) ("Tanner II") quashed Tanner I with respect to when the statute of limitations began to run and reinterpreted Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976) to ease its sometimes harsh results. Tanner II held that "the knowledge of the injury as referred to in the rule as triggering the statute of limitations means not only knowledge of the injury but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice." 618 So.2d at 181. This Court then remanded the rest of the case to the Second District Court of Appeal for a determination as to whether the complaint stated a cause of action under the law of this state.

On remand, the Second District Court of Appeal reversed the order dismissing the Amended Complaint on the statute of limitations to comply with this Court's mandate. Regarding the stillbirth, the Second District Court of Appeal "reversed that portion of the trial court's order which dismisses the complaint for failure to state a cause of action for personal injury to the mother." Tanner v. Hartog, 630 So.2d 1136 (Fla. 2d DCA 1993) (emphasis supplied) ("Tanner III"). The Court also went on to "affirm that portion of the trial court's order finding that the complaint fails to state a cause of action for the wrongful death of the fetus." 630 So.2d at 1136. The Tanners subsequently sought review of the Second District Court of Appeal's decision by this Court, which declined to accept jurisdiction. Tanner v. Hartog, 632 So.2d 1028 (Fla. 1994) ("Tanner IV"),

After this Court denied review, the Tanners on May 26, 1994 filed in the trial court a Second Amended Complaint in four counts (R 108-114). In Count I, Mrs. Tanner asserted a claim for negligent stillbirth and the destruction of her living tissue. In Count II, Petitioner Mr.

Tanner attempted to duplicate Mrs. Tanner's claim, asserting that the fetus was also his living tissue. Counts III and IV were respective loss of consortium claims. The Defendants moved to dismiss the Second Amended Complaint on several grounds (R 116-121, 122-126, 127-133). As to Petitioner Mr. Tanner's direct cause of action for the stillbirth (Count II), the defense maintained that Florida does not recognize a father's cause of action for a stillbirth, and that Count II failed to allege any discernable bodily injury or disccrnable physical impairment to Mr. Tanner which would allow him to recover any purported mental pain and suffering in the absence of any "physical impact" (R 118-119, 124-125, 128-130). As to Mrs. Tanner's loss of consortium claim (Count III), the Defendants moved to dismiss on the grounds that she could not maintain a loss of consortium action where Mr. Tanner has no legal cause of action because such actions are derivative in nature (R 119, 125, 129). Last, as to Petitioner Mr. Tanner's loss of consortium claim (Count IV), the Defendants moved to dismiss on the grounds that this claim was barred by the statute of limitations because it was never pled in any of the previous complaints and was "beyond the scope of the mandate" (R 119, 125, 130).

After a hearing, the trial court on September 26, 1994, dismissed the Second Amended Complaint (R 134-136). The trial court specifically rejected the concept that the fetus was Petitioner Mr. Tanner's living tissue. In addition, the trial court dismissed Mrs. Tanner's loss of consortium claim "with prejudice" (R 134). The court ruled that:

> Count III of Plaintiffs' Second Amended Complaint fails to state a cause of action for the loss of consortium by Mrs. Tanner against all Defendants because said cause of action is a derivative claim allegedly based on Mr. Tanner's claim for personal injuries. Since Mr. Tanner has no cognizable legal cause of action for personal injuries to himself, Mrs. Tanner has no derivative cause of action for loss of consortium.

(R 135).

Further, the trial court dismissed Petitioner Mr. Tanner's loss of consortium action on the grounds that the statute of limitations had run (R 135). The court stated that "[i]n the instant action, based on the facts as presently alleged, it would appear that the applicable statute of limitations had already run at the time the Plaintiffs filed their Second Amended Complaint." (R 135). The court based its ruling on Daniels v. Weiss, 385 So.2d 661 (Fla. 3d DCA 1980), and Cox v. Seaboard Coast Line R.R., 360 So.2d 8 (Fla. 2d DCA 1978), cert. denied, 367 So.2d 1123 (1979) (R 135). This dismissal was without prejudice to allow Mr. Tanner an opportunity to plead facts which might avoid the statute of limitations.

On October 6, 1994, the Tanners filed a Third Amended Complaint which alleged five counts (R 137-151). Counts I and II restated Mrs. Tanner's claim for negligence and simply separated the doctors from Respondent LRMC (the hospital) into separate counts (R 138-143). In Count III, Petitioner Mr. Tanner attempted to assert a claim for mental pain and anguish damages on a theory of negligent stillbirth and having witnessed the stillbirth of the fetus. He eliminated his claim that the fetus was his living tissue (R 143-144).

Count IV realleged Mrs. Tanner's loss of consortium action which had previously been dismissed "with prejudice" (R 144-145). Count V of the Third Amended Complaint realleged Petitioner Mr. Tanner's loss of consortium claim (R 145). The Third Amended Complaint contained no additional facts to demonstrate an avoidance of the statute of limitations for Mr. Tanner's loss of consortium action (R 137-15 1).

All of the Defendants moved to dismiss the Third Amended Complaint on the same grounds they raised in their motions to dismiss the Second Amended Complaint (R 155-158, 159-163, 164-171). On February 22, 1995, the trial court again dismissed Mr. Tanner's direct

cause of action for a stillbirth with prejudice on the basis that Florida law recognizes no such claim (R 173-174). Next, the court again dismissed Mrs. Tanner's loss of consortium action with prejudice on the grounds that she did not have a derivative cause of action (R 174). Lastly, the court dismissed with prejudice Petitioner Mr. Tanner's derivative loss of consortium action based on the statute of limitations, finding that the claim first appeared in the Second Amended Complaint and did not relate back to the filing date of the original Complaint (R 174-175).

Petitioner Mr. Tanner appealed from both the orders of September 26, 1994, and February 22, 1995, to the Florida Second District Court of Appeal (R 186). Mrs. Tanner was not a party to this appeal. On June 26, 1996, the Florida Second District Court of Appeal entered its opinion affirming the lower court orders. Tanner v. Hartog, 678 So.2d 1317 (Fla. 2d DCA 1996) ("Tanner V").

The Second District Court of Appeal held that Petitioner Mr. Tanner brought his loss of consortium claim after the statute of limitations had run. As to the claim brought by Petitioner Mr. Tanner in Count III of the Second Amended Complaint, alleging that the fetus was also his living tissue, the Court held that:

> While the fetus may be the living tissue of the mother, the tort is not committed on that living tissue but rather upon the mother's body. We explained in McGeehan v. Parke-Davis, a Division of Warner-Lambert Co., 573 So.2d 376, 377 (Fla. 2d DCA), review denied 583 So.2d 1036 (Fla. 1991), that "[a]s Singleton recognized, the wrongfully caused loss of a fetus is a legally cognizable bodily injury to the woman whose body suffers the loss." While Tanner may argue that the fetus is his living tissue, he cannot argue that it is part of his body; thus, we affirm the dismissal of this claim with prejudice.

678 So.2d at 1319.

In reference to Count III of the Third Amended Complaint where Petitioner Mr. Tanner attempted to allege a cause of action for mental pain and anguish, unaccompanied by impact or physical injury, resulting from the negligent care and treatment of his wife, which resulted in the stillbirth, the Second District Court of Appeal held that Mr. Tanner's cause of action was barred by the impact rule. However, the Court "in an abundance of caution" certified the following question to the supreme court as of great public importance:

> DOES THE LAW OF THIS STATE SUPPORT A CAUSE OF ACTION FOR EMOTIONAL DAMAGES OF AN EXPECTANT FATHER AND MOTHER RESULTING FROM A STILLBIRTH CAUSED BY THE NEGLIGENT ACT OF ANOTHER7

On or about July 19, 1996, Petitioner Mr. Tanner filed his Notice to Invoke Discretionary Jurisdiction of the Supreme Court to review the decision of the Florida Second District Court of Appeal. This Court on July 23, 1996, entered an order postponing its decision on jurisdiction and directing the parties to file briefs on the merits. Respondent Dr. Hartog subsequently **filed** a notice of dismissal pursuant to Florida Rule of Appellate Procedure **9.350(b)** and Mr. Tanner's Petition for Review as to Dr. Hat-tog was dismissed by Order of this Court dated October 3, 1996.

SUMMARY OF ARGUMENT

The question certified asks whether the long standing rule that there is no tort claim for negligently caused stillbirth should be revoked, and whether such a fundamental change in law should be made by the judicial, rather than the elected branches of government. This Court has repeatedly rejected entreaties to create such tort liability, and Petitioner does not present a sufficiently compelling case for this Court to reverse itself or to use its power to unsettle established law.

Even if the rule should be changed to create a cause of action in favor of an expectant mother, the tort should not extend to an expectant father. First, the theory that the fetus is the bodily tissue of the mother, for injury to which she might sue for damages, does not cover Petitioner because of the clear separation between his body and the fetus. Moreover, even if the common law should be set aside to allow a claim by an expectant mother, it should not be disregarded again to create an action for Petitioner. Finally, the impact rule bars any claim by an expectant father.

Petitioner's request for reinstitution of his loss of consortium claim is without merit. The trial court correctly relied on controlling authority to hold that this late-added claim was a new cause of action, and so Petitioner could not rely on the relation back doctrine to circumvent the statute of limitations. Moreover, the claim was otherwise subject to dismissal because there are no permanent physical injuries to Petitioner's spouse.

ARGUMENT

Point One

THERE IS NO CAUSE OF ACTION FOR NEGLIGENCE IN FAVOR OF AN EXPECTANT FATHER (OR MOTHER) OF A STILLBORN FETUS

The question certified by the Second District Court of Appeal -- "DOES THE LAW OF THIS STATE SUPPORT A CAUSE OF ACTION FOR EMOTIONAL DAMAGES OF AN EXPECTANT FATHER AND MOTHER RESULTING FROM A STILLBIRTH CAUSED BY THE NEGLIGENT ACT OF ANOTHER" -- returns attention to familiar territory. This Court has repeatedly been asked to revoke established Florida law that there is no such cause of action. The consistent reply has been that such a fundamental unsettling of established law is the province of the elected branches of government, and that a sufficiently compelling showing has not been made for the judicial branch to change what has always been the law of the State. Hernandcz v. Garwood, 390 So.2d 357 (Fla. 1980); Duncan v. Flynn, 358 So.2d 178 (Fla. 1978); Stokes v. Liberty Mutual Ins. Co,, 213 So.2d 695 (Fla. 1968). This Court was required to again decline the invitation to expand tort law in this direction as recently as March of this year. Young v. St. Vincent's Medical Center, 673 So.2d 482 (Fla. 1996).

In again asking for creation of a cause of action to recover for emotional damages suffered from a stillbirth, Petitioner relies on recent intrepid rulings by the Fifth and Second District Courts of Appeal, which depart from Young, Hcrnandez, Duncan, and Stokes by imposing liability where this Court has repeatedly held none to exist. McGeehan v. Parke-Davis, 573 So.2d 376 (Fla. 2d DCA 1991), review denied, 583 So.2d 1036 (Fla. 1991);

Singleton v. Ranz, 534 So.2d 847 (Fla. 5th DCA 1988), review denied, 542 So.2d 1332, 1334 (Fla. 1989).[2] McGeehan and Singleton theorize that if the fetus is not a person within the meaning of the Wrongful Death Act, then it must be the tissue of the mother, and that damages should be recovered for injury to this tissue just as for any other body part that is tortiously injured.

Petitioner asks that Singleton be approved and extended to provide a cause of action to an expectant father. He contends that "the fetus is the living tissue of both mother and father, who each have a separate cause of action for its destruction in tort."[3] His arguments fail for at least three reasons.

To begin, even if this Court should be persuaded to approve McGeehan and Singleton (and disapprove Stern, Henderson, and A.M.I.S.U.B.) Singleton's rationale does not suggest that an expectant father has a cause of action to recover for his purely emotional damages. There is a physical separation between the fetus and the expectant father which presents an insurmountable obstacle to the claim that the fetus is part of the father's body. Since physical

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2. See also Tanner v. Hartog, 678 So.2d 1317 (Fla. 2d DCA 1996); Waddell v. Shoney's. Inc., 664 So.2d 1134 (Fla. 5th DCA 1995); Hilsman v. Winn Dixie Stores, 639 So.2d 115 (Fla. 4th DCA 1994), review denied, 649 So.2d 236 (Fla. 1994); Tanner v. Hartop, 630 So.2d 1136 (Fla. 2d DCA 1993). The First and Third District Courts of Appeal remain faithful to the principle that there is no cause of action for a negligently caused fetal death. Young v. St. Vincent's Medical Ctr., 653 So.2d 499 (Fla. 1st DCA 1995), aff'd, 673 So.2d 482 (1996); Henderson v. North, 545 So.2d 486, 488 (Fla. 1st DCA 1989)("trial judge correctly found that Count III was a thinly disguised claim for the wrongful death of the fetus and the plaintiffs' mental pain and suffering associated therewith and granted summary judgment"); Abdelaziz v. A.M.I.S.U.B., 515 So.2d 269, 272 (Fla. 3d DCA 1987), review denied, 525 So.2d 876 (Fla. 1988)(claim for negligent infliction of emotional distress through medical malpractice resulting in stillbirth "is clearly not cognizable under the wrongful death statute and should not, we conclude, be indirectly recoverable under a simple negligence claim"); Styles v. Y.D. Taxi Corn, 426 So.2d 1144, 1145 (Fla. 3d DCA 1983) (expectant mother "should not be able to recover indirectly for [a stillbirth] as a 'permanent injury' to her absent a showing of some objective signs of injury resulting from the loss of the fetus"); cf., Globe Security v. Pringle, 559 So.2d 720 (Fla. 1st DCA 1990)(rejecting argument that unborn fetus was integral part of mother who was injured on the job so that prenatal injuries would also be covered by workers compensation). But see Bombalier v. Lifemark Hosp., 661 So.2d 849,853 (Fla. 3d DCA 1995), review denied, 666 So.2d 901 (Fla. 1996) (following Singleton without acknowledging A.M.I.S.U.B. or Styles).

3. Initial brief at 12.

union between the fetus and the expectant mother was the essential foundation of Singleton and McGeehan, and since an expectant father does not share this physical union, the rationale of these cases does not extend to provide a cause of action to Petitioner.

Secondly, both Singleton and McGeehan represent marked departures from common law. Any extension of these cases would mark further deviation from common law. The creation of new causes of action should be undertaken only by the Legislature, or, in rare cases, by this Court. Petitioner has failed to demonstrate that this is the rare situation requiring a judicial alteration of core common law principles. Accordingly Singleton and McGeehan should be disapproved, and the rulings of the First and Third District Courts of Appeal, as well as the rulings of this Court on the issue, confirmed. At the very least, even if this Court should be persuaded to create a cause of action in favor of an expectant mother, respect for the common law and the proper role of the judiciary indicates that the line should stop there, and not be stretched further to include an expectant father.[4]

I

In Singleton, as here, the plaintiffs alleged that a stillbirth had resulted from medical malpractice. At the time the decision was rendered there was no Florida decisional law indicating that such allegations would give rise to a cause of action.[5] However, the Fifth District Court of Appeal applied the following syllogistic reasoning in recognizing the claim:

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4. The third reason to reject Petitioners argument is that his proposed expansion of tort law is blocked by the impact rule. This is addressed under point two of this brief.

5. On the contrary, as discussed infra at pages 14 - 16, Florida decisional law prior to Singleton consistently directed that there could not be a claim by either parent in connection with a negligently caused stillbirth in the absence of physical injury to the mother independent of the stillbirth.

> An unborn fetus is either a new and separate human being or "person, " temporarily residing within the womb of the host mother, OR it is a part of the mother's body, OR both. The Florida Supreme Court has held that, in legal contemplation, an unborn fetus is not a person for the wrongful death of whom a tortfeasor is liable to its survivors for damages under the Wrongful Death Act (§ 768.19, Fla. Stat.); therefore, it is living tissue of the mother for the negligent or intentional tortious injury to which the mother has a legal cause of action the same as she has for a wrongful injury to any other part of her body.

Singleton, 534 So.2d at 847-48. adopted by the Second District Court of Appeal: "As Singleton recognized, the wrongfully caused loss of a fetus is a legally cognizable bodily injury to the woman whose body suffers the loss." McGeehan, 573 So.2d at 377.

Nothing in Singleton or McGeehan carries any suggestion that a stillbirth may be sued upon by the expectant father. Even so, Petitioner argues that Singleton should be extended so that the expectant father will have a claim for damages: "This court should hold that the fetus is the living tissue of both the mother and father, who each have a separate cause of action for its destruction in tort."[6]

Petitioner's argument should be rejected for the reason that the circumstances accompanying an expectant father depart sharply from the factual moorings to which the holdings in Singleton and McGeehan were tethered. Roth Singleton and McGeehan reasoned that a fetus is part of the mother's body so that physical injury to the fetus is physical injury to the expectant mother.

Petitioner asks the Court to conclude that the fetus is also part of his body because it is "the product of both mother and father. "[7] While this is no doubt a biological truth in the sense of genetic contribution, there is nothing in either Singleton or McGeehan to suggest that the

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6. Initial brief at 12.

7. Initial brief at 10.

cause of action there allowed was founded upon the mother's genetic contribution. Rather, the logic sprang from a finding that the fetus is physically included within the definition of the mother's body. This is a claim that an expectant father will never be able to credibly make. Accepting the argument that the expectant father's genetic contribution permits him to share in a cause of action because of that genetic contribution would open doors to liability never before contemplated in the law.

There is no decisional authority to support Petitioner's proposed cause. of action. Singleton and its progeny do not assist Petitioner because these cases were based on the circumstance that the fetus is physically located inside and connected with the expectant mother's womb in such an integral manner as to be a part of the mother's body. There is at no time a physical joining between a fetus and the expectant father. There is an undeniable physical separation between an expectant father and a fetus which presents an insurmountable obstacle to any claim of physical connexity comparable to that between the fetus and the expectant mother. The factual foundation for the claims allowed in Singleton and McGeehan are not present for an expectant father, and it follows that the rationale of these cases does not provide a cause of action in favor of Petitioner. Accordingly, the certified question should be answered in the negative with respect to any claim by an expectant father. Compare Krishnan v. Sepulveda, 916 S.W.2d 478, 482 ex. 1995) (creating cause of action for expectant mother on reasoning comparable to Singleton, but finding that expectant father does not share in this claim),

II

The same answer should be given with respect to any claim by an expectant mother. Respondent LRMC respectfully submits that the Singleton conclusion that there is a cause of action in favor of an expectant mother for alleged medical malpractice resulting in stillbirth is incorrect. This Court has never so ruled, and the expansion of tort law exemplified by Singleton is now proper for this Court to review.

Singleton stands in marked contrast to common law, which did not extend liability in favor of an expectant mother for a stillbirth unless she suffered injury independent of the stillbirth. E.g., Stern v. Miller, 348 So.2d at 307. Allowing recovery to an expectant mother for a negligently caused stillbirth is a clear departure from common law, and the question now presented is whether a compelling case has been made for this Court to exercise its power to change the common law in this manner. Because no such case has been made, and because the common law's position on this issue stands contrary to McGeehan and Singleton, those opinions should be disapproved, and the decisions in Stern v. Miller, Henderson v. North, Abdelaziz v. A.M.I. S.U.B., and Styles v. Y.D. Taxi Corp., reaffirmed. At the very least, the common law stands as a strong barrier to any further expansion of tort liability to allow suit by an expectant father except insofar as the elective bodies of government may provide.

Most decisional law in Florida on the subject of liability for a stillbirth is devoted to considering liability under the Wrongful Death Act, and, before that Act, the Wrongful Death of Minors Act. See Young v. St. Vincent's Medical Center; Hernandez v. Garwood; Duncan v. Flynn; Stern v. Miller; Stokes v. Liberty Mutual Ins. Co. Plaintiffs in such cases focussed

on statutory arguments because it was so clear that there was no liability at common law for a negligently caused stillbirth (absent physical injury beyond the stillbirth). As this Court stated:

> The common law as adopted by Florida did not provide a remedy for the tortious killing of a human being, adult, or child. **The universally accepted rule of law until 1953 was to the effect that no recovery in damages could be had for injuries suffered by an unborn child.**

Stern v. Miller, 348 So.2d at 307 (emphasis supplied). See also Henderson v. North, 545 So.2d at 488; Abdelaziz v. A.M.I.S.U.B., 515 So.2d at 272; Styles v. Y.D. Taxi Corp., 426 So.2d at 1145; Miller v. Highlands Ins. Co., 336 So.2d 636, 638 (Fla. 4th DCA 1976), quashed on other grounds, 348 So.2d 303 (Fla. 1977)("An action for wrongful death is entirely a creature of statute, being unknown to common law. If [plaintiffs] have a cause of action for the wrongful death of their unborn, viable child it must be based on § 768.19"); Simon v. United States, 438 F.Supp. 759, 761 n.2 (S.D. Fla. 1977).[8]

The common law of England as it existed on the date our Nation declared independence is the binding law of the State pursuant to Florida Statutes Section 2.01, which provides in part as follows:

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8. That such an action was unknown to the common law is further confirmed by Restatement (Second) of Torts § 869 (1979), which provides as follows:

> **Harm to Unborn Child.**
>
> **(1) One who tortiously causes harm to au unborn child is subject to liability for the harm if the child is born alive,**
>
> **(2) If the child is not born alive, there is no liability unless the applicable wrongful death statute so provides.**

See also Kuhnke v. Fisher, 210 Mont. 114, 683 P.2d 916, 918 (1984) ("action for the wrongful death of a fetus was unknown to the common law"); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229,231 (1951). Cf. State v McCall, 458 So.2d 875 (Fla. 2d DCA 1984) (Grimes, J.) (reviewing common law's "requirement that a fetus must born alive to become a human being who can be the victim of a crime").

> The common and statute laws of England which are of a general and not a local nature . . . down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

Thus, unless the rules of the common law are altered by legislative enactment, or are repugnant to constitutional principles, they remain the law of this State. This includes the rule that there is no cause of action in negligence for a stillbirth.[9]

This Court has the power to change the common law. Hoffman v. Jones, 280 So.2d 431, 435 (Fla. 1973). However, such alterations are "rarely entertained or allowed" and not lightly undertaken. In re T.A.C.P., 609 So.2d 588, 594 (Fla. 1992). "[T]he rule we follow is that the common law will not be altered or expanded unless demanded by public necessity, or where required to vindicate fundamental rights. " Id. (citations omitted). Petitioner invites this Court to apply its power to reverse the common law rule and expand tort liability by creating a new cause of action in favor of both the expectant mother and father for stillbirths allegedly caused by negligence. There are many reasons why this invitation should be declined.

To begin, it is necessary to review the accumulated wisdom that there are reasons of fundamental importance why this or any court should be exceedingly hesitant to change established legal principals. This is outside the normally accepted domain of the judiciary, which is generally understood to be concerned with interpretation and application of the law,

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9. Also pertinent to mapping the common law's borders in this area is the supreme court's opinion in Wilkie v. Roberts, 91 Fla. 1064, 109 So. 225 (1926), which states:

> **The common law recognized no right of civil action for causing the death of a human being; such right, as it now exists in the various states of the Union, being purely statutory, and is not based on the father's rights to the child's services.**

Id. at 227. If the common law provided no action for the death of a minor child, it easily follows that there was no civil action for the stillbirth of an expected child.

rather than making law.[10] Making law, in a representative democracy, is generally understood to be the province of the elected branches of government. While there is a sense that the common law is judge made, and so may be judge unmade," there must also be respect for the principles inherited from judicial forebears. Fidelity to these principles is further strengthened by recognition that if established law is contrary to public ideals, it might be repaired by the legislature.

The issue is brought into focus by the oft-told parable concerning an exchange between Justice Holmes and Judge Learned Hand. To paraphrase, when Judge Hand encouraged Justice Holmes while leaving his company to "do justice," he was reminded that the Judge's role, even for a Justice of the United States Supreme Court, was not to see that justice was done, but to apply the law, and hope that justice might follow.[12]

Petitioner's claim raises one of the central and most ancient debates of jurisprudence. His position, that an unelected judiciary might readily change the law solely on arguments that the current rule is flawed, traces back at least as far as the philosopher king postulated by Plato in The Republic. Respondent LRMC's position, that changes in the law should generally be the result of a democratic process, also traces at least as far back as the ancient Greeks. Indeed, Socrates' teachings that a wise king was preferable to democratic rule was so heretical in Athens of 399 B.C. as to result in his trial, conviction, and death sentence. I.F. Stone, The Trial of Socrates (1988).

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10. This is true despite accepted notions that the common law is marked by evolving doctrines, as these permissible advancements are built upon and from precedent, rather than against it, as proposed by Petitioner.

11. This tenet is strongest with respect to alterations of common law evolutions which postdate July 4, 1776, as common law rules developed after that date are not within the imprimatur of Florida Statutes § 2.01.

12. For numerous versions of this story, see Michael Herz, "Do Justice!": Variations of a Thrice-Told Tale, 82 Va. L. Rev. 111 (1996).

The disputation between those who prefer rule by the unelected branches and those who prefer the elected representatives of the people continues to this day. There are any number of articles building from the express or implied assumption that representative democracy comes with too many flaws to allow best governance, and so the courts should not hesitate to employ their authority to make better law.[13] Much ink has also been dedicated to the sense that the established law should not be materially changed by a judicial body, whose authority is more properly applied to interpreting and enforcing the law as set by the elective branches.[14, 15]

Mainstream contemporary jurisprudence, as best exemplified by Professor Dworkin, attempts to synthesize these ancient and opposing positions into a coherent philosophy of law in which judges venture beyond precedent only if there are compelling reasons which allow doing so, and which are sufficiently powerful as to overcome the puissant gravitational force of precedent. R. Dworkin, Law's Empire (1986). This view recognizes that, like most forced dichotomies, the choice between judge as "knight-errant, roaming at will in pursuit of his own

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13. See, e.g., Cornelius J. Peck, Mason Ladd Lecture: Comments on Judicial Creativity, 69 Iowa L. Rev. 1 (1983); Cornelius J. Peck, The Role of the Courts and Legislatures in the Reform of Tort Law, 48 Minn. L. Rev. 265 (1963); Guido Calabresi, A Common Law for the Age of Statutes (1982); Gary T. Schwartz, The Beginning and the Possible End of the Rise of Modem American Tort Law, 26 Ga. L. Rev. 601 (1992); Fred C. Zacharias, The Politics of Torts, 95 Yale L.J. 698 (1986).

14. Alexander Bickel, The Least Dangerous Branch (1962); Robert Bork, The Tempting of America (1990); 1 W. Blackstone, Commentaries *69-71; Charles D. Breitel, The Lawmakers, 65 Colum.L.Rev. 749 (1965); Samuel Estreicher, Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age, 57 N.Y.U.L.Rev. 1126 (1982); Hans A. Linde, Monsanto Lecture. Courts and Torts: "Public Policy" without Public Politics?, 28 Val.L.Rev. 821 (1994).

15. Much of the writing on this subject is in the thornier area of constitutional interpretation. While there is considerable weakness in the argument that constitutional interpretation must be frozen to original intent, these do not translate into the question of judicial rejection of the common law. The interpretation of a constitution is necessarily entrusted to the courts because there is no other forum available. Perceived needs to change common law principles, on the other hand, are easily and constantly taken to the legislature.

ideal of beauty or goodness"[16] and judge as legal pharmacist, filling prescriptions written by the legislature, [17] is a false one. The judicial role properly lies somewhere between the two poles (but much closer to the latter than the former).

The strongest rejoinder to those who prefer the courts to the legislature for the advancement of law is that the view is inconsistent with bedrock principles of representative democracy:

> By reason of relative judicial independence judges are not responsible to the electorate. Even with an elected judiciary it is a truism that the role of the electorate is all but an unconscious one without significant influence. The lifetime commitment or opportunity of the judicial career provides a guarantee of independence; it also becomes a denial of political responsibility expressed by standing for periodical re-election. A body of men thus chosen and thus responsible is not the proper organ for lawmaking on the molar scale in a democratically organized society. They may do well, to be sure; they may even do better, conceivably, than other available alternatives, as Plato's philosopher-kings would. It should be recognized, however, that such a system does not produce or become a democratic structure.

Breitcl, supra note 14, at 770-771.[18] As Justice Ginsberg stated during her Senate confirmation: "Most urgently needed is a clear recognition by all branches of government that

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16. Benjamin N. Cardozo, The Nature of the Judicial Process 141 (1925).

17. Judith S. Kaye, Brennau Lecture. State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions, 70 N.Y.U.L. Rev. 1, 27 (1995) ("state judges construing statutes are more than pharmacists filling prescriptions written by the Legislature: often they are involved in treating the ailment"). But see, e.g., Francis Bacon, Novum Organum, Aphorism 46 (1620) ("That law is beat which relies least on the discretion of the judge; that judge is best who relies least on his own judgment. "); Francis Bacon, Essays of Judicature (Mod. Lib. ed. 1955) ("judges ought to remember that their office is jus dicere and not jus dare; to interpret law and not to make law or give law").

18. See also Atlee v. Laird, 347 F.Supp. 689, 707 (E.D. Pa. 1972), aff'd, 411 U.S. 911, 93 S.Ct. 1545, 36 L.Ed.2d 304 (1973) ("One critical line of legal thought discernible from Thayer through Holmes, from Brandeis through Frankfurter, has urged that courts serve democracy best by leaving the principle issuer confronting the citizenry for decision to the political branches of the government"). An unelected judiciary is the result mainly of pragmatic concerns that the nature of judicial office makes it impracticable to select judges though elections. The Federalist Nos. 78-81 (Alexander Hamilton). This was of no great concern because "the judiciary is beyond comparison the weakest of the three departments of power. . The Federalist No. 78 (Alexander Hamilton). See generally Lawrence H. Tribe, American Constitutional Law § 1-8 (2d ed. 1988). To the extent that a court assumes the power to legislate, this necessary breach in our democratic system is unnecessarily widened.

in a representative democracy important policy questions should be confronted, debated, and resolved by elected officials. "[19] While this Court has occasionally side-stepped these concerns, their validity does not appear to have been questioned, and the reticence with which this Court has undertaken alterations of common law assuredly is in some measure a product of the sense that there is much wisdom in these sentiments.

When the issue now presented was previously before the Court, it was fidelity to democratic governance which led to the ruling:

> [W]e are not at liberty to decide what is wise, appropriate, or necessary in terms of legislation. Only the legislature is so empowered. We are confined to a determination of the legislature's intent.

Stern v. Miller, 348 So.2d 303. The foregoing passage directs the outcome today just as much as it did then.[20]

This Court's decisions recognize that the power to "do justice" while reversing established principals of law must necessarily be confined to those instances where an exceptionally strong showing has been made that the experiences which shaped the development of the common law rule are no longer relevant, and have been supplanted by momentous social changes which mandate the deployment of new societal norms, and the revocation of former standards. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).[21] The issue presented in Hoffman

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19. Linde, supra note 14 at 854.

20. "It seems to me that, in light of the legislature's refusal to act, the action requested by appellant would constitute an impermissible incursion by the judicial branch into the powers of government vested by our constitution in the legislature. Therefore, while the question may be one 'of great public importance,' by certification, the wrong branch of government is being asked to provide au auswer." Young v. St. Vincent's Medical Center, 653 So.2d at 507 (Webster, J., concurring in part and dissenting in part).

21. The showing need not be so strong where constitutional concerns mandate legal retailoring, or where the Legislature passes statutes which undercut a common law rule, Waller v. First Savings & Trust Co., 103 Fla. 1025, 138 So. 780 (1931), but Petitioner has not made a constitutional or statutory challenge to the common law principles he

v. Jones was whether the contributory negligence rule should be replaced with comparative negligence. Florida Statutes Section 2.01 was not binding, as the common law had not identifiably jelled on the contributory negligence rule until 1809, and so the rule was not included in the statutory adoption of the common law as it existed in 1776.[22] The Court had previously found that when the common law is plain, it must be observed, Duval v. Thomas, 114 So.2d 791,795 (Fla. 1959), but moved beyond this limitation in Hoffman to a more flexible standard: "this Court may change the [rules of common law] where great social upheaval dictates." Hoffman v. Jones, 280 So.2d at 435.

There is least flexibility for judicial renovation of common law principles which were firmly established as of July 4, 1776:

> As a general rule, that part of the common law codified by section 2.01 should be changed through legislative enactment and not by judicial decision. Only in very few instances and with great hesitation has this Court modified or abrogated any part of the common law enacted by section 2.01, and then only where there was a compelling need for change and the reason for the law no longer existed.

Raisen v. Raisen, 379 So.2d 352, 353-54 (Fla. 1979), cert. denied, 449 U.S. 886, 101 S.Ct. 240, 66 L.Ed.2d 111 (1980).[23] While the highest level of respect is given to those rules which predate 1776, even subsequently developed common law principles are not set aside lightly. In re T.A.C.P., 609 So.2d at 594 ("[a]lterations of the common law, while rarely entertained or allowed, are within this Court's prerogative , . , [if] . . . demanded by public necessity . . .

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challenges. Petitioner's argument is solely that the law is unjust aud so should be changed.

22. Having found that the common law as it existed in 1776 was unclear, it was unnecessary to determine whether a principle of common law which was clear prior to 1776 might be revoked simply because a different rule was believed more suitable to modem times.

23. This is the only example we have found of this Court claiming the authority to determine statutory mandates invalid based solely on policy views, rather than constitutional principles.

or . . . required to vindicate fundamental rights"). See also Waite v. Waite, 618 So.2d 1360, 1361 (Fla. 1993) ("common law will not be altered or expanded by this Court unless demanded by public necessity or to vindicate fundamental rights"); Walt Disnev World Co, v. Wood, 515 So.2d 198, 200 n.3 (Fla. 1987).

Additional grounds for adherence to precedent lie in the wisdom that today's judges should not lightly disregard the decisions of their predecessors:

> Precedent is important for reasons other than the desire that likes be treated alike, so that decisions can be called law. . . . The stock of precedents is produced by generations of judges wrestling with hard questions. They study the problems and record their conclusions, as traders of coal study its qualities and make their bids. Like the price of coal, the system of precedent may incorporate more wisdom than any single trader or judge possesses. Precedent decentralizes decision making and allows each judge to build on the wisdom of others. In a world where questions arise faster than the information necessary to supply answers, this is a boon. Precedent not only economizes on information but also cuts down on idiosyncratic conclusions by subjecting each judge's work to the test of congruence with the conclusions of those confronting the same problem. This increases both the chance of the court's being right and the likelihood that similar cases arising contemporaneously will be treated the same by different judges.

Prank H. Easterbrook, Stability and Reliance in Judicial Decisions, 73 Cornell L.Rev. 422,422-23 (1988). See also Breitel, supra note 14. Deference to this inherited wisdom is further indicated on the grounds that, if it were so out of step, the legislature would have changed it."

That the common law should be revoked only in extraordinary cases also is supported by separation of powers principals. When the legislature has encroached upon judicial territory, this Court has not hesitated to say so. Similarly, and more pertinent here, this Court has

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24. Estreicher, supra note 14, at 1163: "In general, courts will not overrule prior decisions precisely because of the availability of legislative correction. Courts will overrule precedent only in exceptional cases, where the legislature has not entered the area and a prior decision is so out of step with subsequent developments that it work8 great practical harm, or threatens to undermine the coherence of the body of decisional law."

invalidated legislation which was overly vague on reasoning that the interpretation of an overly vague law becomes judicial lawmaking, and that the courts are barred from such activity by Article II, Section 3 of the Florida Constitution. State v. Wershow, 343 So.2d 605, 607 (Fla. 1977) ("we conclude that the subject statute is so vague and overbroad that it is not amenable to such saving construction unless the court is willing to invade the province of the legislature and virtually rewrite it"). See also In re Advisory Opinion to the Governor, 509 So.2d 292, 311 (Fla. 1987); Brown, 358 So.2d 16, 20 (Fla. 1978); State v. Egan, 287 So.2d 1 (Fla. 1973); Ervin v. Collins, 85 So.2d 852, 855 (Fla. 1956). While this Court unassailably is the supreme interpreter of statutes and the Florida Constitution, and does not trespass on the other branches of government when construing these sources of law, Locke v. Hawkes, 595 So.2d 32, 36 (Fla. 1992), this case does not broach an issue of interpretation, but of alteration. Since "[u]nder our constitutional system, courts cannot legislate," Wershow, 343 So.2d at 607, Petitioner has brought his submission to the wrong forum.

The question of when the judicial branch should act to change the law where the elected branches have stayed their hand raises a plethora of exceedingly complex issues, which have inspired much scholarly and judicial discourse. To varying degrees, there is general agreement that following precedent is a good thing, and that the courts should be very careful before revoking long settled principles of law. Complete coverage of this weighty area of legal philosophy is beyond the ambition of this brief, which will be limited to consideration of those factors which strongly weigh against the extraordinary step of judicial alteration of the law as sought by Petitioner.

To begin, it cannot be argued that the Florida Legislature has been neglectful of the areas

of health care or tort law. The Legislature has been particularly attentive to tort reform and medical malpractice reform for over the last two decades.[25] From the Medical Malpractice Reform Act of 1975,[26] through the Comprehensive Medical Malpractice Reform Act of 1985,[27] the Tort Reform and Insurance Act of 1986,[28] the Health Care Reform Act of 1992,[29] and the Health Care and Insurance. Reform Act of 1993[30] (to highlight just a few), the Legislature has been regularly visiting the subject, tuning and retuning the tort laws in a general direction of reduced rather than expanded liability. The reforms have often been designed to help hedge against the spiralling cost and diminishing availability of health care and insurance.[31] Inasmuch as we no longer hear of tort or malpractice crises, it might be concluded that the Legislature deserves credit for a measure of success in its efforts.

This history precludes any finding that the elected branches have disregarded the need to review the law of medical malpractice. On the contrary, the Legislature has been particularly interested in both health care and tort law reform for well over twenty years. Compare Waite,

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25. Indeed, the subject has become so thoroughly political on a national scale as to become a featured subject of presidential politics. See, e.g., Linde, supra note 14, at 837.

26. Ch. 75-9, 1975 Fla. Laws 13. See John French, Florida Departs from Tradition: The Legislative Response to the Medical Malpractice Crisis, 6 Fla. St. U.L. Rev. 423 (1978); Note, The Florida Medical Malpractice Reform Act of 1975, 4 Fla. St. U.L. Rev. 50 (1976).

27. Ch. 85-175, 1985, Ra. Laws 1180. See F. Townsend Hawkes, The Second Reformation: Florida's Medical Malpractice Law, 13 Fla. St. U.L. Rev. 747 (1985).

28. Ch. 86-160 1986 Fla. Laws 695. See Pamela Burch Fort, et al., Florida's Tort Reform: Response to a Persistent Problem, 14 Fla. St. U.L. Rev. 505 (1986).

29. Ch. 92-33, 1992 Fla. Laws 238.

30. Ch. 93-129, 1993 Fla. Laws 657, See Bruce D. Platt, A Summary of the Health Care and Insurance Reform Act of 1993: Florida Blazes the Trail, 21 Fla. St. U.L. Rev. 483 (1993).

31. See generally Platt, supra note 30; and B. Richard Young, Comment, Medical Malpractice in Florida: Prescription for Change, 10 Fla. St. U.L. Rev. 593 (1983).

618 So.2d at 1360 (McDonald, J., concurring) (waiver of spousal immunity for negligence was improper because Legislature had recently waived spousal immunity for battery and so could have completely abolished this immunity if it wished). Moreover, the actions by the elected branches have been generally in a direction toward reducing liability and minimizing health care costs. These policy goals are directly contrary to the predictable effects of the relief sought by Petitioner.[32]

Petitioner's proposed cause of action would predictably effect societal changes -- including an inevitable increase in health care cost, likely decrease in health care and insurance availability, and further increase in cesarean deliveries and other forms of defensive medicine -- which are at cross purposes to work the Legislature has been about for decades. These concerns weigh heavily against the judicial expansion of tort liability sought by Petitioner. Compare U.S. v. Dempsey, 635 So.2d 961,967 (Fla. 1995) (Grimes, J., concurring) (creation of new causes of action should normally be left to the legislature but, 'because we are doing no more than following the lead of the legislature in recognizing the severity of the loss suffered by a person whose loved one is permanently and totally disabled, I am willing to concur" in decision to allow loss of consortium claim to parents for disabling injuries to child).[33]

Also weighing against judicial renovation of this area of law is the reality that the judicial view of a legal issue is always encumbered by its limitation to the facts of the dispute at hand,

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32. Even the most enthusiastic proponents of judicial activism do not disagree with the premise that judicial lawmaking should not contravene policy pursuits of the legislature. See, e.g., Peck, supra note 13, at 9: "It is in the areas of legislative inactivity that the judiciary may safely perform a creative role. Inactivity leaves the common law untouched, and the courts may move with little fear that their activity will put them in conflict with the legislature."

33. Also supportive of the argument in text is the equity of the statute doctrine, which proposes that statutes express public policy and that these policy statements properly are turned to for guidance in areas the legislature has not directly addressed. Harlan Fiske Stone, The Common Law in the United States, 50 Harv.L.Rev. 4 (1936). See also Moragne v. States Marine Lines. Inc., 398 U.S. 375, 390-393, 90 S.Ct. 1772, 1782-83 (1970).

and further blindered by the rules of procedure and evidence designed to streamline resolution of legal disputes:

> [P]rocedurally, courts are limited to viewing the problem as presented in a litigated case within the four corners of its record. A multiplication of cases will broaden the view because of the multiplication of records, but the limitation still persists because the records are confined by the rules of procedure, legal relevance, and evidence. Even the judge, by reasons of the canons of ethics and the isolation of his position, is precluded from a factual inquiry and consideration of legitimate popular consensus beyond the official submissions to him. While in the particular case, the judge may come equipped to grasp the situation, in Llewellyn's term, by use of his situation-sense, this is no substitute for what is required for wise and broad legislating. For legislation, opportunities for unlimited external investigation are required and are substantially available.

Breitel, supra note 14, at 770.[34] The judicial process does not generally allow for the massive gathering of information on an across the State basis in order to measure the scope of a perceived problem, and the merits of various possible responses to the problem.[35] Nor does litigation facilitate the study of how the echoes of a proposed change in law might ripple through society. Moreover, the limited remedial tools with which the judiciary has to operate hampers its ability to satisfactorily resolve societal problems.[36]

Because the issue is presented in a lawsuit rather than a legislative commit&, we are without staff reports showing the rate of incidence of stillbirth, expert analysis of how many of

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34. See also Murphy v. American Home Products Corn., 58 N.Y.2d. 293,448 N.E.2d 86, 89 (1983) ("Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected or in any event critically interested, and to investigate and anticipate the impact of imposition of such liability"); Linde, supra note 14.

35. Linde, supra note 14, at 20. Compare Alexander M. Bickel & Harvey H. Wellington, Legislative Process and the Judicial Process: The Lincoln Mills Case, 71 Harv.L.Rev.1, 25 (1957).

36. Bickel & Wellington, supra note 35 at 25. Schwartz, supra note 13, at 609: "Courts could assume that legislatures can do a better job of gathering facts, rendering judgments that are validated by the political process, and adopting a full package that includes not only the primary new doctrine but also a host of subsidiary details."

these might be traceable to negligence, and learned appraisals of how a change in law might impact society. Given the absence of such data, we may only imagine what societal changes might be wrought if there were to be created a new cause of action for negligent stillbirth.[37] One that is fairly easy to predict is that there will be an increase in cesarean delivery. While this might avoid some stillbirths, it would undeniably present its own arena of complications.[38] Obstetric care might also become even more rationed, as malpractice insurance for these professionals in Florida would surely increase.[39] Obstetric care might become especially limited as to poorer Floridians. [40] The costs of medical care, across the board, would also predictably increase Who knows what successive effects these results may have, or what other effects have been overlooked.[41] All of these complications are best considered by the

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37. Schwartz, supra note 13 at 691.

38. Already, there are more cesareans performed in the United States than are medically indicated. From the 1950s through the 1980s cesarean deliveries rose from 5% to over 25%. Among the reasons for this increase was fear of litigation. The problem is that cesarean delivery is a major surgical procedure. There is a twenty to forty percent risk of infection or other complications. Also, the mother faces a longer and more painful convalescence. Finally, cesarean delivery brings a 2 to 4 magnitude increase in the risk of death to the mother. Mortimer Rosen & Lillian Thomas, The Cesarean Myth (1989); Kelly F. Bates, Cesarean Section Epidemic: Defining the Problem -- Approaching Solutions, 4 B.U. Pub. Int. L.J. 389 (1995)

39. The earlier medical malpractice crisis had just this effect, as older physicians decided to retire, and younger physicians settled out of state or shied away from high risk practice areas. See generally Platt, supra note 30; Young, supra note 3 1. See also Gail A. Robinson, Midwifery and Malpractice Insurance: A Profession Fights for Survival, 134 U. Pa. L.Rev. 1011 (1986); Stephen D. Sugarman, Taking Advantage of the Torts Crisis, 48 Ohio St.L.J. 329,334 n.24 (1987) ("over 12% of obstetricians nationwide have stopped delivering babies"). On this point, it should also be recognized that the expense of litigation works a multiplier effect on the cost of insurance: "Insurance premiums depend in large measure on the size of tort recoveries and the heavy administrative costs associated with litigation. Recoveries typically include sums for pain and suffering, psychological harm, and attorneys' fees that far exceed the losses for which customers would voluntarily insure themselves." Zacharias, supra note 13, at n.41.

40. See Robert Pear, Health Clinics Cut Services as Cost of Insurance Soars, N.Y. Times, Aug. 21, 1991, at Al; which is quoted by Schwartz, supra note 13 at note 464 for the proposition that "[a]bsent the cost of liability insurance, these health centers could provide services to 500,000 additional patients nationwide."

41. Madden v. Creative Serv., Inc., 84 N.Y.2d 738, 746, 646 N.E.2d 780,783 (1995) (while common law allows for expansion of tort liability, courts must "exercise that responsibility with care, mindful that a new cause of action will have foreseeable and unforeseeable consequences, most especially the potential for vast uncircumscribed liability").

legislative body, which is better suited to compile the information and determine on behalf of all of us whether these problems are outweighed by any benefits from the creation of a cause of action to recover for emotional damages suffered from a stillbirth.

Against the potential downside of the cause of action proposed (in more expensive medical care, reduced availability of medical care, greater incidence of defensive medicine, and unforeseeable additional side effects) must be weighed the harm to be compensated. Certainly expectant parents suffer emotional anguish as a result of miscarriage or stillbirth at any stage of pregnancy. But these are purely emotional injuries. There is no physical injury or economic loss. The law has only recently come to allow recovery for emotional trauma divorced from physical injury, and has taken great care to strictly confine such claims to only the most blameworthy defendants who have intentionally caused severe emotional distress by condemnably outrageous actions.[42] There continues to be no cause of action in Florida for negligent infliction of emotional distress absent physical impact[43] but this is just what Petitioner proposes.[44] It will be difficult to restrain Petitioner's claim for negligently inflicted emotional distress to its facts, and the barrier against recovery of purely emotional damages absent impact or intentionally outrageous conduct could hardly survive Petitioner's success. The common law's reduced protections for emotional distress damages are mirrored by many modern proposals for tort reform, which either cap damages on pain and suffering or even dispense with them entirely

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42. Eastern Airlines. Inc. v. King, 557 So.2d 574 (Fla. 1990); Metropolitan Life Ins. Co, v. McCarson, 467 So.2d 277 (1985).

43. See cases cited in Point Two, infra.

44. Of course, if there were physical injury beyond the normal rigors of childbirth (which would necessarily be suffered in any event) there would without controversy be a cause of action to the physically injured party. No such physical injuries are presented here.

in the absence of permanent physical disability.[45]

It is, of course, within the domain of the Legislature to make such revisions to the common law as the democratically elected representatives deem appropriate. Gentile Bros. v. Florida Industrial Comm'n, 151 Fla. 857, 10 So.2d 568,570 (1942). Indeed, the specific subject of creating a new cause of action for a negligently caused stillbirth has previously been raised in the Legislature and rejected. T.A. Borowski, Jr. 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). See also Young v. St, Vincent's, 653 So.2d at 503 n.10 (Mickle, J., concurring). The fact that the Legislature has specifically considered and determined not to alter the common law in this matter is also persuasive that the Courts should not make the change the Legislature has considered and rejected. Cf. Stern v. Miller, 348 So.2d at 307; Young v. St, Vincent's, 653 So.2d at 507 (Webster, J., concurring and dissenting).& Absent a reason of constitutional dimension, which has not been proffered here, this Court should be exceedingly loathe to reject the Legislative decision not to create the cause of action championed by Petitioner.

The cause of action sought by Petitioner was unknown at common law, and Petitioner has not made a sufficiently compelling showing that this Court should exercise its extraordinary power to change established legal principles. The cause of action first recognized in Singleton should be disapproved. At the very least, even if persuaded by Singleton, the common law

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45. See generally Sugarman, supra note 39.

46. Also pertinent to this point is In re T.A.C.P., 609 So.2d at 593, where the Court noted the committee demise of a bill which would have defined "death" to include anencephaly. The Court held this end of the bill showed that there was no legislative consensus on the subject of whether anencephalics were alive or dead, and, in the absence of such consensus, it would be improper to alter the common law definition of death to include anencephalics. Id. at 595. See also Linde, supra note 14 at 846.

should not be further undone by creating a cause of action in favor of both the expectant mother and expectant father.

Point Two

THE TRIAL COURT AND DISTRICT COURT OF APPEAL CORRECTLY HELD THAT ANY CLAIM BY PETITIONER IS BARRED BY THE IMPACT RULE

In his third point, Petitioner argues that the impact rule does not bar his attempt to recover damages for mental distress resulting from the stillbirth. Florida's impact rule provides that "before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact." R.J. v. Humana of Florida, 652 So.2d 360, 362 (Fla. 1995) (quoting Reynolds v. State Farm Mut. Auto. Ins, Co,, 611 So.2d 1294, 1296 (Fla. 4th DCA 1992), review denied, 623 So.2d 494 (Fla. 1993). See also Doyle v. Pillsbury Co,., 476 So.2d 1271 (Fla. 1985); Brown v. Cadillac Motor Car, 468 So.2d 903 (Fla. 1985); Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974).

Among the purposes of the impact rule is to guard against the flood of lawsuits for purely emotional harms which would be filed in the absence of such a rule. R.J, 652 So.2d at 362-363. However, the rule serves additional policy interests:

> 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 inflict 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.

Gonzalez v. Metropolitan Dade Countv Public Health Trust, 651 So.2d 673, 675 (Fla. 1995) (quoting Stewart v. Gilliam, 271 So.2d 466,477 (Fla. 4th DCA 1972), quashed, 291 So.2d 593 (Fla. 1974) (Reed, C.J., dissenting)).

The impact rule, applied according to its terms, normally will bar any claim by an expectant father for mental distress from a stillbirth because there will generally be no physical impact to the father in such an instance. Tanner, 678 So.2d at 1320. The question presented is, then, whether there exists an exception to the impact rule within which Petitioner's claims might find protection. Petitioner contends that such an exception is provided by Kush v. Lloyd, 616 So.2d 415 (Fla. 1992), where the Court held that the impact rule does not apply against a claim for wrongful birth of a genetically impaired child.

The facts of Kush v. Lloyd involved negligently performed genetic testing which failed to disclose that the plaintiff mother's genetic makeup was abnormal. As a result of this negligent testing, the plaintiffs conceived and bore a child with genetic physical deformities. This Court found that the tort of wrongful birth was a proper cause of action regardless of whether the plaintiffs suffered any physical injuries, and so the additional parasitic emotional damages should be allowed. The Court further held that the impact doctrine should not generally be applied to otherwise proper tort claims, such as wrongful birth, negligent defamation, or invasion of privacy, in which the nature of the tort is such that the predominant damages are emotional. Id. at 422.

Petitioner also seeks assistance from Champion v. Gray, 478 So.2d 17 (Fla. 1985), in which a plaintiff was allowed to recover for emotional distress suffered when she saw the dead body of her daughter, who had just been run over by a drunk driver. The mother was "so overcome with shock and grief that she collapsed and died on the spot." Id. at 18. These facts justified an exception to the impact rule, the parameters of which are described in the following passage:

> We now conclude . . . that the price of death or significant discernible physical injury, when caused by physical trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, is too great a harm to require direct physical contact before a cause of action exists. We emphasize the requirement that a causally connected clearly discernible physical impairment must accompany or occur within a short time of the psychic injury.

Id. at 19 (footnotes omitted). Since the plaintiff died as a result of viewing her daughter's death, the Court held that this physical consequence allowed an exception to the impact rule. The Court made clear, however, that "[m]ental distress unaccompanied by such physical consequences . . . should still be inadequate to support a claim; nonphysical injuries must accompany and flow from direct trauma before recovery can be claimed for them in a negligence action.' Id. at n.1.[47]

In a recent discussion of Kush v. Lloyd and Champion v. Gray, this Court characterized these cases as follows:

> More recently, in Kush v. Lloyd . . . we held that the impact rule should not be applied to actions for wrongful birth where emotional damages are the "'parasitic' consequence of conduct that itself is a freestanding tort." In carving these exceptions to the impact rule in both Champion and Kush, we nevertheless reaffirmed the appropriateness of the impact rule in most circumstances and carefully restricted the exceptions.

R.J., 652 So.2d at 363. Thus, this Court has not adopted, as Petitioner suggests, a fast and loose approach to the impact rule. Rather, the Court has specifically declared that the impact rule remains a vigorous part of Florida's tort law. Id. The rule is intended to present a barrier to claims for mental distress unaccompanied by physical impact or injury, and the exceptions to the rule remain narrow and carefully restricted.

It is clear that Petitioner's circumstances do not fall within the ambit of the exceptions

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47. See also id. at 20, n.4 ("[w]e reiterate that a claim for psychic trauma unaccompanied by discernible bodily injury when caused by injuries to another and not otherwise specifically provided for by statute, remains nonexistent").

described in either Kush v. Lloyd or Champion. Petitioner does not claim to have suffered any physical injury similar to the plaintiff in Champion, who died from the shock of witnessing her daughter's vehicular homicide. Instead, Petitioner's case is controlled by Brown v. Cadillac Motor Car, 468 So.2d 903 (Fla. 1985), where the impact rule was applied to bar an action by a plaintiff who struck and killed his own mother as a result of a defectively designed accelerator pedal. The Court held that recovery for psychological trauma is only proper where accompanied by "demonstrable physical injury such as death, paralysis, muscular impairment, or similar objectively discernible physical impairment." Id. at 904. See also Zell v. Meek, 665 So.2d 1048 (Fla. 1995) (questions of fact presented regarding applicability of the impact rule where plaintiff suffered numerous physical ailments after watching her father die from a bomb explosion); M.M. v. M.P.S., 556 So.2d 1140 (Fla. 3d DCA 1989), review denied, 569 So.2d 1279 (Fla. 1990) (parents could not, due to impact rule, recover for mental distress suffered when defendant told parents he had sexually abused their daughter from the time she was 8 until she was 23, and that during this same time period defendant's wife was giving daughter illegal drugs); Crenshaw v. Sarasota County Public Hosp., 466 So.2d 427 (Fla. 2d DCA 1985) (mother of stillborn could not recover for mental distress suffered when hospital staff mutilated body of stillborn by negligently running it through hospital washing machine); Selfe v. Smith, 397 So.2d 348 (Fla. 1st DCA 1981), review denied, 407 So.2d 1105 (Fla. 1981) (impact rule prevented mother from recovering for her mental distress arising from severe facial injuries to infant son); Woodman v. Dever, 367 So.2d 1061 (Fla. 1st DCA 1979) (impact rule barred claim for mental distress suffered by minor who watched her mother be sexually assaulted and robbed due to inadequate

hotel security) .[48]

Nor does Petitioner hold a freestanding tort claim which exists whether or not there is emotional trauma, as was the case in Kush v. Lloyd. As is demonstrated in point one, Petitioner does not have any tort claim at all. At any rate, it should be clear enough that he has no tort claim which would exist regardless of the existence of emotional harm.

Despite Petitioner's arguments, his claim does not fall within any exception to the impact rule. Accordingly, and unless the impact rule is to be discarded entirely, that rule must be applied to bar Petitioner's claims. Accord Simon v. I . ? -, 438 F.Supp. 759 (S.D. Fla. 1977) (in action brought due to malpractice by government medical personnel, under Florida law, expectant father of stillborn child cannot recover for mental pain since father suffered no physical injury); see also R.J., 652 So.2d at 364-366 (Kogan, J., specially concurring).[49]

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48. Although Respondent LRMC does not wish in any way to minimize the emotional pain allegedly suffered by Petitioner, it is appropriate to point out that the circumstances of Petitioner's distress are no more traumatic than those suffered by the plaintiffs in Brown v. Cadillac, or many of the other cases cited in text.

49. Justice Kogan's concurrence was primarily devoted to expressing dissatisfaction with the robust version of the impact rule described in the majority opinion. In the course of his opinion, however, he stated:

> One of the more frequent fact patterns in the case law was of pregnant women who suffered a fright and then miscarried some time later. In the early days of the impact doctrine, the courts in England and the United States seemed quite uniform in denying liability in these cases, based on the impact doctrine. W. Page Keeton, et al., Prosser and Keeton on the Law of Torts §54 at 363 (5th ed. 1984).

R.J., 652 So.2d at 364-265.

Point Three

PETITIONER'S CLAIM FOR ALLEGED LOSS OF CONSORTIUM WAS PROPERLY DISMISSED

In his first point, Petitioner challenges the trial court's dismissal of his claim for loss of consortium. The consortium count was added to this case for the first time by the Second Amended Complaint, which was filed well after the expiration of the two year statute of limitations applicable to actions alleging damages from medical malpractice. Fla. Stat. § 95.11(4)(b). The only argument made by Petitioner in support of his contention that the statute of limitations does not bar the loss of consortium claim is that his late filing should be excused under the relation back doctrine provided by Rule 1.190(c) of the Florida Rules of Civil Procedure.

The trial court correctly held that the relation back doctrine does not protect Petitioner's late-filed consortium claim from the statute of limitations. The trial court's decision in this regard was mandated by Daniels v. Weiss, 385 So.2d 661 (Fla. 3d DCA 1980), and by Cox v. Seaboard Coast Line R. Co., 360 So.2d 8 (Fla. 2d DCA 1978), cert. denied, 367 So.2d 1123 (Fla. 1979). These cases each stand for the proposition that an amendment to the pleadings does not relate back to the date of the original complaint to the extent that the amended pleading brings a new cause of action. See also Gates v. Foley, 247 So.2d 40 (Fla. 1971); Livingston v. Malever, 103 Fla. 200, 137 So. 113, 117-118 (1931).

In Cox v. Seaboard Coast Line, a minor filed suit for the wrongful death of his mother. Three years after filing, the plaintiff moved to amend his complaint to add a cause of action for personal injury suffered by the plaintiff in the same wreck. The trial court denied this motion,

ruling that the amendment would not relate back and so the claim for the plaintiff's own personal injuries was barred by the statute of limitations. Id. at 9. On review, the District Court of Appeal found that the personal injury action was a different cause of action from the originally pled wrongful death action, and the amendment would thus introduce new issues and vary the grounds for relief. The trial court's decision was thus affirmed, with the following analysis:

> The trial court, sub judice, did not abuse its discretion in ruling that the proposed amendment would present a different cause of action, new issues, and varied grounds for relief. Consequently, the trial court's ruling that the amendment would not relate back to the date of filing the wrongful death complaint was proper, as was denial of leave to file the proposed amendment.
>
> We are aware of the liberality to be accorded a motion for leave to amend the pleadings and the liberal construction of "cause of action" to permit relation back of the amendment. However, we do not see that this rule should be so liberally construed as to allow a plaintiff to circumvent the statute of limitations on the plaintiffs separate cause of action which could have been asserted by separate suit brought at any time within the statutory period.

Id at 9-10 (citations omitted). The same analysis was correctly applied by the trial court and the Second District Court of Appeal against Petitioner, whose separate claim for loss of consortium could have been asserted well within the statutory period. Just as the plaintiff in Cox, Petitioner should not be permitted to circumvent the statute of limitations by amending his pleading to add this new claim. Given Cox, the dismissal of Petitioner's late filed consortium count was required, and certainly not an abuse of discretion.

In Daniels v. Weiss, the trial court allowed a consortium claim by Mr. Daniels' wife to be added to the pleadings by amendment after the applicable statute of limitation had expired. The Court of Appeal held that the addition of the consortium claim by amendment after the statute had run was improper, and should not have been permitted by the trial court:

> An amendment to the pleadings does not relate back to the date the original complaint was filed if the amendment states a new cause of action or adds a new party. Cox v. Seaboard Coast Line R. Co, 360 So.2d 8 (Fla. 2d DCA 1978); Doyle v. Shands Teaching Hospital and Clinics '369 So.2d 1020 (Fla. 1st DCA 1979). Although a claim for loss of consortium is a'derivative cause of action, it nevertheless is a separate action. See: Gates v. Foley 247 So.2d 40 (Fla.1971). The applicable two-year statute of limitations . . . having already run at the time Odie Daniels filed the complaint seeking damages for loss of consortium, the trial court erred in denying Oper's motion for summary judgment as to said claim.

Id. at 663. This holding -- that a consortium claim is a separate action and so not protected by the relation back doctrine -- is directly on point with and precisely contrary to the argument made by Petitioner. Accordingly, the trial court's order and the affirmance thereof by the Second District Court of Appeal were correct and indeed required by Daniels v. Weiss and Cox.

Also on point is the recent ruling in West Volusia Hosp. Auth. v. Jones, 668 So.2d 635, 636 (Fla. 3d DCA 1996) where the trial court allowed the relation back of an amendment adding claims by an accident victim's father for loss of filial consortium. The District Court of Appeal held that this was error:

> Mr. Jones' claim for loss of consortium is separate and distinct from that possessed by his wife, so that permitting the amendment impcrmissibly allows the addition of a new and distinct cause of action.

Id. at 636. There does not appear to be any contrary authority.

In an effort to avoid the result mandated by Daniels, Cox, and Jones, Petitioner has argued that his consortium claim has been pled all along, and that the Second Amended Complaint, which added his consortium count for the very first time, was merely a better and more distinct statement of the consortium claim which was obscured, but present, in earlier pleadings. The Second District Court of Appeal properly rejected this view in affirming the ruling of the trial court.

An action for loss of consortium is an action to recover for the loss of the benefits attendant to marriage, including "the conjugal fellowship of husband and wife and the right of each to the company, cooperation and aid of the other in every conjugal relation." Lithgow v. Hamilton, 69 So.2d 776, 778 (Fla. 1954); see also Gates v. Folev, 247 So.2d 40, 43 (Fla. 1971); Propst v. Neilv, 467 So.2d 398, 399 (Fla. 4th DCA 1985). The lengthy and factually detailed multi-count pleadings filed before the Second Amended Complaint never made any reference whatsoever to any deterioration in the relations between Petitioner and his wife. A mere reading of these pleadings belies the argument that such damages were within the terms of the earlier pleadings. Any suggestion that the claim for loss of consortium was pled prior to the Second Amended Complaint is utterly without merit, as the prior pleadings do not even hint at a claim for damages for harm to marital relations.

The trial court's dismissal of the consortium claim was correct as the claim was added after the statute of limitations had expired. The relation back doctrine does not allow Petitioner to avoid the statute of limitations because the consortium claim was a new cause of action never before pled in the case.

In any event, this Court should not here exercise its authority to reverse the law as it has developed in the District Courts of Appeal as Petitioner's claim for loss of consortium was also dismissible under the rule that an action for loss of consortium only exists in favor of a plaintiff whose spouse has suffered permanent physical injuries. Hunter v. U n i t -, 739 F.Supp. 569 (M.D. Fla. 1990); Fossler v. Blair, 90 F.Supp. 577 (S.D. Fla. 1950); 25 Fla. Jur.2d Family Law § 469 (1992). Viewing all pleadings in a light most favorable to Petitioner, there has never been any suggestion that Mrs. Tanner has suffered any physical injury other than the in utero

death of her fetus, and so Petitioner's claim for loss of consortium was dismissible for this separate reason.

In the event that this Court is persuaded by Respondent LRMC's argument and answers the certified question in the negative as to a claim by an expectant mother, then Petitioner's claim fails for an additional reason. "Loss of consortium is a derivative claim, and cannot stand alone." 25 Fla. Jur.2d Family Law § 470 (1992). What this means is that, if there is no cause of action in favor of an expectant mother for stillbirth, then there cannot be a cause of action in favor of her spouse for loss of consortium as a consortium claim is dependent upon a viable cause of action by the allegedly injured spouse. See Faulkner v. Allstate Insur, Co., 367 So.2d 214, 217 (Fla. 1979); Bombalier v. Lifemarlc Hosp., 661 So.2d 849 (Fla. 3d DCA 1995), review denied, 666 So.2d 901 (1996); Commercial Clean-Up Enterprises v. Holmquist, 597 So.2d 343, 344 (Fla. 2d DCA 1992); Habelow v. Travelers Insur. Co., 389 So.2d 218 (Fla. 5th DCA 1980).

CONCLUSION

If this Court should exercise its authority to decide the question certified by the Florida Second District Court of Appeal, it faces the difficult task of balancing public policy views of the individual Justices against the proper limitations on the power of the judiciary in our democratic system. An expansion of tort liability has repercussions far beyond the parties in this case, and could predictably carry unpredictable ramifications involving the quality and cost of health care generally, and the availability, cost, and procedures followed in obstetric care specifically.

These kinds of decisions are best left to the elected representatives of the citizenry. This Court has repeatedly so stated on this specific issue. Petitioner has not met the exceedingly heavy burden of demonstrating that this Court should reverse its prior rulings and fundamentally alter the common law by creating a tort cause of action for a stillbirth allegedly caused by malpractice. The certified question should be answered in the negative.

Respectfully submitted,

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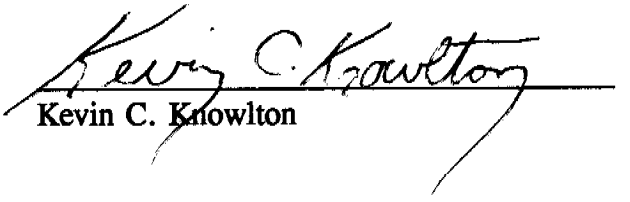
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by regular United States Mail this 1st day of November, 1996, to: Kennan George Dandar, Esquire, Dandar & Dandar, P.A., Post Office Box 24597, 1009 North O'Brien Street, Tampa, FL 33623-4597 (Counsel for Plaintiff/ Petitioner Mr. Tanner); Thomas M. Hoeler, Esquire and Jerry L. Newman, Esquire, Shear, Newman, Hahn & Rosenkranz, P.A., Post Office Box 2378, Tampa, FL 33601-2378, (Counsel for Co-Defendants/Respondents Alberto DuBoy, M.D. and Hartog & Duboy, P.A.); and Ike D. Gunn, IV, Esquire, Gunn, Ogden & Sullivan, P.A., 100 North Tampa Street, Suite 2900, Post Office Box 1006, Tampa, FL 33601-1006 (Counsel for Amicus Curiae FDLA).



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