IN THE SUPREME COURT OF FLORIDA

JAMES R. TANNER,

Petitioner,

v.

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

Respondents.

Case No. 88,544

Discretionary Review of a Certified Question of Great Public Importance from the Second District Court of Appeal of Florida

RESPONSE BRIEF OF ALBERT0 DUBOY, M.D., and HARTOG & DUBOY, P.A.

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STATEMENT OF THE CASE AND FACTS

A. The Original and First Amended Complaints

On August 1, 1990, the plaintiffs, Phyllis Kaye Tanner and her husband, James R. Tanner, filed a complaint (R 1) that was amended days later (R 23). In the amended complaint, they stated that Mrs. Tanner saw Drs. Hartog and Duboy at their office on March 31, 1988, for her overdue pregnancy (R 25). Mrs. Tanner was sent to Lakeland Regional Medical Center (LRMC) for testing to determine the fetus' condition (R 25). There, the nurses started performing NST testing and allegedly experienced some difficulty in the monitoring of the FHT baseline (R 25) . A nurse called Dr. Duboy at his office, who gave instructions to have Mrs. Tanner consume orange juice and walk around to assist the monitoring (R 25). Shortly thereafter, after further monitoring, the fetus was declared stillborn (R 26).

The amended complaint alleged five counts against Dr. Hartog, Dr. Duboy, Hartog & Duboy, P.A., and LRMC: Count I -- negligence; Count II -- res ipsa *loquitur* (negligence); Count III -- wrongful death; Count IV -- res *ipsa loquitur* (wrongful death); and Count V -- breach of contract (R 23-45). Count I alleged a direct cause of action on behalf of the Tanners based on the stillbirth and called it: "the death of the minor child, James R. Tanner, II" (R 26).

> 12. As a direct and proximate result of the negligence and gross negligence of the Defendants, Dr. Hartog, Dr. DuBoy and hospital, as alleged above, resulting in the death of the minor, James R. Tanner, II, the decedent's mother, Phyllis K. Tanner, incurred physical damage, personal injury and has in the past endured and will in the future endure, great mental pain and suffering as a result of the death of her minor child.
>
> 13. As a direct and proximate result of the negligence of the Defendants, Dr. Hartog, Dr. DuBoy and hospital, as alleged above, resulting in the death of the minor, James R. Tanner, II, the decedent's father, James R. Tanner,

has incurred in the past and will incur in the future, great mental pain and suffering.

¶ 12-13, First Amended Complaint (R 26).

Count II is titled "res ipsa loquitur (negligence)" and stated the same allegations alleged in Count I. Count III alleged a claim for wrongful death of the fetus and is the same as Counts I and II, except that it sought "the loss of the net accumulation beyond the death of James R. Tanner, II" (R 32). Count IV is titled "res ipsa loquitur (wrongful death)" and is the same as Count III (R 33-34). Last, Count V included the same allegations in Counts I through IV, but labeled the claim a breach of contract (R 36).

B. The Original Motion to Dismiss and Order of Dismissal

Dr. DuBoy and Hartog & DuBoy, P.A., moved to dismiss the first amended complaint on grounds that there existed no cause of action for wrongful death of the fetus (R 46). They also moved to dismiss Mr. Tanner's personal claim because Florida law recognized no cause of action "for personal injury and mental pain and suffering that he suffered" (R 50). The motion states:

> Mr. Tanner has no claim for personal injury. No legal right of Mr. Tanner was invaded by either of these defendants. The allegations show that only Mrs. Tanner was a patient of the defendant physicians. No medical services were rendered to Mr. Tanner by the defendants. Mr. Tanner can recover, if at all, only because of injuries sustained by his wife or the fetus. It is clear that Mr. Tanner can collect no damages whatsoever as a result of the death of the fetus. (Henderson, supra, pg. 489).
>
> Likewise, Mr. Tanner is not entitled to any damages for injuries sustained by his wife. He has not alleged any discernable bodily injury to him or any clearly discernable physical impairment to him that would permit him to recover damages for his injuries or his mental pain and suffering in the absence of physical impact on him. See, Champion v. Grey 478 So.2d 17 (Fla. 1985) and Brown v. Cadillac Motor Division, 468 So.2d 903 (Fla. 1985).

(R 50).

After a hearing, the Honorable E. Randolph Bentley granted the defendants' several motions to dismiss (R 66). In his order, the judge ruled that the plaintiffs' claim was barred by the statute of limitations for medical malpractice; that the plaintiffs 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). As noted by the trial judge, the plaintiffs' action included merely "a claim for the actual physical injury, pain and mental suffering of Mrs. Tanner, and a claim for the wrongful death of the stillborn fetus." (R 67). This order of dismissal was reduced to a judgment (R 74) and the Tanners timely filed a notice of appeal (R 77).

C. The Tanners' Appeals

On appeal, the district court affirmed the trial court's order and held that the claims were barred by the statute of limitations. Tanner v. Hartog, 593 So.2d 249 (Fla. 2d DCA 1992). Given that it resolved the entire case on this one issue, it did not address the plaintiffs' issues regarding their actions based on the stillbirth. On rehearing, a question of great public importance was certified to this court on the statute of limitations. Tanner v. Hartog, 17 Fla. L. Weekly D433 (Fla. 2d DCA Jan. 31, 1992). On review of the certified question, this court reversed the Second District's decision as it related to when the Tanners knew, or should have known, when their cause of action accrued. With regard to the method used to calculate the tolling periods, however, this court approved the Second District's decision. Tanner v. Hartog, 618 So.2d 177 (Fla. 1993). It then remanded the case to the Second District to address the issues that were not decided in the underlying appeal.

On remand from this court, and in accordance with this court's opinion, the Second District reversed the dismissal of the amended complaint based on the statute of limitations. With respect to the issues surrounding the stillbirth, it "reversed the 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), review denied, 632 So.2d 1028 (Fla. 1994). It 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." Tanner, 630 So.2d at 1136. The Tanners did not seek rehearing or clarification of the opinion. They did, however, request discretionary review of the opinion, which this court summarily denied for lack of a direct and express conflict between the Second District's opinion and this court's opinion in Stern v. Miller, 348 So.2d 303 (Fla. 1977). See Tanner v. Hartog, 632 So.2d 1028 (Fla. 1994).

D. The Second Amended Complaint

After the supreme court denied review, the defendants renewed their motions to dismiss based upon the appellate rulings (R 96). Before any ruling on the motions, the Tanners sought leave of court to file a second amended complaint, which was granted pursuant to the agreement of all counsel (R 105). The second amended complaint is far different from the first amended complaint. In the second amended complaint, the Tanners alleged four counts against the same defendants: Count I - Negligence Claim of Phyllis K. Tanner; Count II - Negligence Claim of James R. Tanner; Count III - Loss of Consortium of Phyllis K. Tanner; and Count IV - Loss of Consortium of James R. Tanner (R 108). The second amended complaint dropped the

res ipsa loquitur and breach of contract counts and added loss of consortium claims for both of the Tanners (R 108).

The defendants moved to dismiss on several grounds. As to 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 (R 116). Further, they moved to dismiss count II on grounds that Mr. Tanner did not allege any discernable bodily injury or discernable physical impairment to him that would allow him to recover for any purported mental pain and suffering in the absence of any "physical impact." As to Mrs. Tanner's loss of consortium claim (count III), they moved to dismiss on 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 118). Last, as to Mr. Tanner's loss of consortium claim (count IV), the defense moved to dismiss on grounds that this claim was barred by the statute of limitations because it was never pled in any of the previous complaints and thus was "beyond the scope of the mandate." (R 120) .

E. The Order Dismissing the Second Amended Complaint

After a hearing, the Honorable Oliver L. Green, Jr., dismissed Mr. Tanner's direct cause of action (count II) "with prejudice" and ruled:

> Count II of the Plaintiffs' Second Amended Complaint fails to state a cause of action against all Defendants because Florida law does not recognize a cognizable action by a father as a result of a stillbirth. See Stern v. Miller, 348 So. 2d 303 (Fla. 1977); Tanner v. Hartog, 630 So. 2d 1136 (Fla. 2d DCA 1993). This Court specifically rejects the Plaintiff, James R. Tanner's, negligence claim based upon his theory that the stillbirth of his wife's fetus amounted to the destruction of his living tissue. Since Mr. Tanner suffered no discernable bodily

> injury or physical impairment to himself, he clearly has no claim for any purported mental pain and suffering.

(R 134). In addition, the trial court dismissed Mrs. Tanner's loss of consortium claim "with prejudice." (R 134). The court held 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).

Moreover, the court dismissed Mr. Tanner's loss of consortium action without prejudice on grounds that the statute of limitations had run. (R 135). It stated that: "In 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 the decisions of 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). (R 135). The dismissal was without prejudice because the trial court felt that Mr. Tanner was entitled to an opportunity to plead facts to possibly avoid the statute of limitations.

F. The Third Amended Complaint

The plaintiffs served a third amended complaint, which alleged five counts (R 137). Count I alleged negligence by the hospital's nurses and count II alleged negligence against the doctors (R 139). Essentially, counts I and II of the third amended complaint broke down count I of the second amended complaint (R 139). Count III of

the third amended complaint realleged Mr. Tanner's direct cause of action that had previously been dismissed "with prejudice" (R 146). Count IV of the third amended complaint restated Mrs. Tanner's loss of consortium action that had also been dismissed "with prejudice" (R 148). Last, count V of the third amended complaint restated Mr. Tanner's loss of consortium claim. (R 149) . The third amended complaint contained no facts to establish an avoidance of the statute of limitations (R 137-151).

G. The Order Dismissing the Third Amended Complaint

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). Again, the court 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). Next, the court again dismissed Mrs. Tanner's loss of consortium action with prejudice on grounds that she did not have a derivative cause of action (R 173). Finally, the court dismissed with prejudice Mr. Tanner's derivative loss of consortium action based on Daniels v. Weiss and Cox v. Seaboard Coast Line Railroad (R 174). The order expresses the reasoning for the dismissal of Mr. Tanner's loss of consortium action with prejudice at this stage of the proceedings:

> 4. Count V of Plaintiffs' Third Amended Complaint is a claim by Mr. Tanner for loss of consortium. As noted by the Defendants' earlier motions to dismiss, this claim was not pled in the First Amended Complaint nor was it ever alleged prior to the Plaintiffs' appeal. This Court in its prior Order dismissed this claim without prejudice to allow Mr. Tanner an opportunity to amend this claim by stating allegations showing the inapplicability of the statute of limitations. The Plaintiffs' Third Amended Complaint fails to allege any new facts sufficient to make this showing. Based on the allegations appearing within the Complaint now before the Court, it is clear that the loss of consortium count by Mr. Tanner against

> all Defendants is barred by the applicable statute of limitations since said count was never pled until the Plaintiffs' filed their Second Amended Complaint and because paragraph 16 of the Third Amended Complaint indicates that Plaintiffs' retained expert notified the Plaintiffs on December 29, 1989, that the alleged injuries were the result of the actions or inactions of the Defendants. The Plaintiffs must have known by at least that date that they had a possible cause of action. In Florida, the law is well established that 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. Daniels v. Weiss, 385 So. 2d 661 (Fla. 3d DCA 1980); Cox v. Seaboard Coast Line R.R. Co., 360 So. 2d 8 (Fla. 2d DCA 1978). Although a claim for loss of consortium is a derivative cause of action, it nevertheless is separate action. Daniels v. Weiss. In the instant case, the applicable statute of limitations had already run at the time this loss of consortium claim was filed.

(R 175) (emphasis supplied). This order concluded the entire case as to Mr. Tanner. He timely filed a notice of appeal (R 186).

H. Mr. Tanner's Appeal

In his appeal, Mr. Tanner contested the order dismissing count II of the second amended complaint on grounds that he had no direct cause of action arising from the stillbirth and the order dismissing count V of the third amended complaint on grounds that his loss of consortium claim arising from his wife's personal injury action was time barred. The Second District affirmed both orders and then certified a question of great public importance. Tanner v. Hartog, 21 Fla. L. Weekly D1515 (Fla. 2d DCA, June 26 1996). Mr. Tanner timely filed a notice to invoke discretionary jurisdiction.

SUMMARY OF ARGUMENT

As to the first issue on appeal, the Second District correctly decided that Florida law provides no direct cause of action to the father as a result of the mother's stillbirth. The court's opinion is consistent with a long line of cases from this court which hold

that the Florida Wrongful Death Act provides no cause of action for wrongful death of a fetus. The Second District's decision is also consistent with the common law, which never recognized any cause of action for the wrongful of a person, much less that of the unborn. No Florida statute or decision has ever recognized a father's right to maintain a personal cause of action arising from a stillbirth.

This court should not create a personal injury cause of action for negligent stillbirth. The Legislature has twice addressed the issue and have expressly declined to create such a right. Thus, in deference to the Legislature, the court should likewise decline to create such a right at this time. There are many collateral issues that need to be addressed for the creation of such a right; issues that are best addressed by the legislative process. Indeed, if the court were not careful, it could create a common law right for the wrongful death of a fetus which is greater than the statutory right for the wrongful death of a person. This would be an embarrassing anomaly.

Aside from the deference owed to the Legislature, the court is obligated under the doctrine of stare *decisis* to adhere to its own decisions. The court has consistently held that Florida recognizes no cause of action for the wrongful death of a fetus. Indeed, the court has reaffirmed this holding within the past year. If it were to now create a new cause of action for the same damages under the guise of the common law, it would contradict its own prior holdings and undermine the binding precedential effect that is owed to case law. Coming off the heels of its opinion in Young v. St. Vincent's Medical Center, Inc., 673 So.2d 482 (Fla. 1996), the creation of a personal injury action would appear to be intellectually dishonest.

Further, to create such a right, the court would have to carve additional exceptions into the impact rule and the privity requirement for maintaining a professional malpractice claim. Clearly, at some point, these case-by-case exceptions will debilitate both the impact rule and privity requirement to the point where they have no meaningful application to the law. This court has recently carved major exceptions into both the impact rule and the privity requirement and there is simply no justification for it to carve out more exceptions.

Finally, if this court were to subordinate Florida law to that of other jurisdictions, it should decline any suggestion to follow New Jersey law and should instead follow Arkansas law. In the most recent opinion to address this precise issue, the Arkansas Supreme Court held that it would not interpret Arkansas' Wrongful Death Act in a manner that could be contrary to legislative intent. Rather, it exercised judicial restraint, showed respect to the legislative process, and allowed the Arkansas legislature to determine whether its citizens wanted a change in the law. This court has repeatedly held that while it has the power to change the common law, it will exercise that power cautiously and only when justified. The record in this case does not justify a change in the law.

As to the second issue on appeal, this court should decline to address the issue since it is not certified as a question of great public importance and does not directly and expressly conflict with any decision of this court or another district court. Indeed, the Second District followed the rulings in West Volusia Hosp. Auth. v. Jones, 668 So.2d 635 (Fla. 5th DCA 1996) , and Daniels v. Weiss, 385 So.2d 661 (Fla. 3d DCA 1980). Until a district court hands down a

decision to the contrary and explains some reasons disagreeing with these three decisions, the announced rule of law should stand. If this court addresses the issue, it will find that the relation back doctrine does not bring Mr. Tanner's derivative loss of consortium claim within the statute of limitations.

As to the third issue on appeal, Dr. Duboy and Hartog & Duboy, P.A., maintained in the courts below that Mr. Tanner's claims were beyond the scope of the mandate and thus are barred by the doctrine of *res* judicata. The Second District did not decide the appeal on this issue, but it is clear that Mr. Tanner's claims were barred on this ground. After the first appeal, the Second District reversed solely as to Mrs. Tanner. As such, Mr. Tanner's claims fell beyond the scope of the mandate. We respectfully ask the court to decide the issue, or in the alternative, to instruct the district court to address the issue on remand.

ARGUMENT

ISSUE I

FLORIDA RECOGNIZES NO CAUSE OF ACTION FOR "WRONGFUL DEATH OF A FETUS" REGARDLESS OF HOW THE CLAIM IS WORDED.

A. There is No Statutory Cause of Action.

This court has repeatedly held that the Florida Wrongful Death Act does not provide a cause of action to the parents based on the alleged wrongful death of a fetus. See Young v. St. Vincent's Med. Center, Inc., 673 So.2d 482 (Fla. 1996); Hernandez v. Garwood, 390 So.2d 357 (Fla. 1980); Duncan v. Flynn, 358 So.2d 178 (Fla. 1978); Stern v. Miller, 348 So.2d 303 (Fla. 1977); Stokes v. Liberty Mut. Ins. Co., 213 So.2d 695 (Fla. 1968). Likewise, the district courts have also held that there is no cause of action for wrongful death

of a fetus. Young v. St. Vincent's Medical Center, Inc., 653 So.2d 499 (Fla. 1st DCA 1995); Henderson v. North, 545 So.2d 486 (Fla. 1st DCA 1989); Tanner v. Hartog, 630 So.2d 1136 (Fla. 2d DCA 1993), review denied, 632 So.2d 1028 (Fla. 1994); McGeehan v. Parke-Davis, a Division of Warner-Lambert Co., 573 So.2d 376 (Fla. 2d DCA 1991); Bombalier v. Lifemark Hosp. of Florida, 661 So.2d 849 (Fla. 3d DCA 1995); Abdelaziz v. A.M.I.S.U.B. of Fla., Inc., 515 So.2d 269 (Fla. 3d DCA 1987); Styles v. Y.D. Taxi Corp., Inc., 426 So.2d 1144 (Fla. 3d DCA 1983); Hilsman v. Winn Dixie Stores, Inc., 639 So.2d 115 (Fla. 4th DCA 1994); Singleton v. Ranz, 534 So.2d 847 (Fla. 5th DCA 1988). Thus, as the decisions make clear, Florida law provides no wrongful death action for a negligent stillbirth.

Some authors and judges have criticized this court's decisions on this issue. In fact, Judge Mickle wrote a very lengthy opinion in Young v. St. Vincent's Medical Center, Inc., 653 So.2d 499 (Fla. 1st DCA 1995), wherein he eloquently set out the criticisms of the decisions. Nevertheless, this court's decisions in Stern v. Miller and Hernandez v. Garwood have withstood the test of time. At this point, it is settled law that Florida's Wrongful Death Act does not recognize a cause of action for the negligent death of a fetus.

Whether the Legislature's decision is wise or not, it is not the prerogative of a court to second-guess the Legislature on this point. White v. Clayton, 323 So.2d 573 (Fla. 1975). By its very nature, the Wrongful Death Act involves a balancing of interests and thus the appellate courts have held that it is more appropriate for the Legislature to create such rights after thoroughly studying the issue than for the judiciary to create rights based on incomplete data. As the Second District stated, "any refinement in the

law should be made by the legislature, not by judicial interpretation." King v. Font Corp., 612 So.2d 662, 663 (Fla. 2d DCA 1993).

B. There is No Common Law Cause of Action.

Equally as clear is the fact that Florida's common law has not recognized a cause of action for the wrongful of a fetus. Indeed, the common law recognizes no cause of action for the wrongful death of a person. Stern v. Miller, 348 So.2d 303 (Fla. 1977). We note that in Stern, the court stated: "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, 348 So.2d at 307. This ruling was consistent with the court's prior opinion in Stokes v. Liberty, 213 So.2d 695 (Fla. 1968), wherein this court addressed the issue and stated: "It is agreed that the Stokes must recover, if at all, on the right of action created by § 768.03" the Wrongful Death of Minors Act. Stokes, 213 So.2d at 697. Clearly, Florida's common law has never recognized a cause of action for the wrongful death of a fetus.

C. The Court Should Not Create a New Cause of Action.

1. Judicial Deference to Legislature Authority

This court should not create a personal injury cause of action for negligent stillbirth. The Legislature has twice addressed the issue and have expressly declined to create such a right. Thus, in deference to the Legislature, the court should do what the Legislature has declined to do. There are many collateral issues that need to be addressed for this right that are best resolved by the legislative process. Indeed, if uncareful, the court may create a right for the death of a fetus greater than the statutory right for the death of a person. This would be an embarrassing anomaly.

a. **No Great Social Upheaval**

As noted in the First District's addressing this issue, Young v. St. Vincent's Medical Center, 653 So.2d 499 (Fla. 1st DCA 1995), the Legislature has addressed this issue on at least two different occasions and elected not to create a cause of action for this type of injury. This court must respect the Legislature's choice. The democratic process has been invoked and the citizens, through their elected representatives, have decided. The court should not usurp the Legislature's authority in this case.

Although the court "may alter a rule of law where great social upheaval dictates its necessity," Walt Disney World Co. v. Wood, 515 So.2d 198, 201 (Fla. 1987), it does so "with hesitation" and in "justified instances." Hoffman v. Jones, 280 So.2d 431, 435 (Fla. 1973). In so doing, the court looks to whether the Legislature has acted on the issue. Walt Disney. In Walt Disney, this court had before it the issue of modifying the judicially created doctrine of joint and several liability. While it declined to do so, it made clear that the Legislature could enact such changes. Several years later, the Legislature did so and this court has expressly stated that it will respect the Legislature's intent. Fabre v. Marin, 623 So.2d 1182 (Fla. 1993).

In the case at hand, there is no evidence of any "great social upheaval." In fact, to the contrary, Judge Webster stated that it was incorrect for the Fifth District to certify a question of great public importance to this court in Young:

> I concur in affirmance of the summary final judgment appealed. However, I dissent from the decision to certify a question to the supreme court. While much may have changed since our supreme court decided Hernandez v. Garwood, 390 So.2d 357 (Fla. 1980), I am of the opinion that

> one thing clearly has not -- whether to permit recovery under Florida's Wrongful Death Act on facts such as those presented by this appeal is a question for legislative, rather than for judicial, resolution. As Judge Mickel points out, repeated efforts in recent years to amend the Act to permit recovery on facts such as those presented by this appeal have met with no success. 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 an answer.

Young, 653 So.2d at 507.

We note that the Second District in this case did not remotely intimate that there was any great social upheaval that justified a change in the common law. Indeed, had it addressed this issue, the court would have reached the precise opposite conclusion and found that the Legislature had enacted tort law reforms in recent decades to obviate the medical malpractice crisis--especially with respect to obstetricians and gynecologists. This crisis was severe and, if anything, the "great social upheaval" in this case supports a rule of law prohibiting parents from recovering damages from a physician arising from an allegedly negligent stillbirth. See University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993).

The Legislature has continuously addressed the problems facing the costs of medical malpractice insurance and its effect upon the affordability, accessibility, and quality of health care. A review of the Florida statutes clearly shows that the Legislature has on several occasions studied the issues and taken various measures to correct problems and help alleviate the increase in health care costs and unavailability of medical care. We note that the Legislature has an enormous interest at stake because the state spends

millions of dollars on public health care through various programs. In recent years, the problems of providing health care at a reasonable cost became pronounced. Accordingly, the Legislature created the Academic Task Force to review the health care system and make recommendations. After receiving the Task Force's report, the Legislature decided that there was a "financial crisis in the medical liability insurance industry." Ch. 88-1, Preamble, Laws of Fla. Also, the Legislature made several other findings that showed many serious problems with the health care industry.

> WHEREAS, the Legislature finds that there is in Florida a financial crisis in the medical liability insurance industry, and
>
> WHEREAS, it is the sense of the legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their noneconomic losses, and
>
> WHEREAS, the people of Florida are concerned with the increased cost of litigation and the need for a review of the tort and insurance laws, and
>
> WHEREAS, the Legislature believes that, in general, the cost of medical liability insurance is excessive and injurious to the people of Florida and must be reduced, and
>
> WHEREAS, the Legislature finds that there are certain elements of damage presently recoverable that have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily measured on a monetary basis or reflect ultimate monetary loss, and
>
> WHEREAS, the Legislature desires to provide a rational basis for determining damages for noneconomic losses which may be awarded in certain civil actions, recognizing that such noneconomic losses should be fairly compensated and that the interests of the injured party should be balanced against the interests of society as a whole, in that the burden of compensating for such losses is ultimately borne by all persons, rather than by the tortfeasor alone, and

WHEREAS, the Legislature created the Academic Task Force for Review of the Insurance and Tort Systems which has studied the medical malpractice problems currently existing in the state of Florida, and

WHEREAS, the Legislature has reviewed the findings and recommendations of the Academic Task Force relating to medical malpractice, and

WHEREAS, the Legislature finds that the Academic Task Force has established that a medical malpractice crisis exists in the state of Florida which can be alleviated by the adoption of comprehensive legislatively enacted reforms, and

WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action,

Ch. 88-1, Preamble, Laws of Fla.

As a result, the Legislature enacted sweeping legislation that attempted to resolve, or at least help alleviate, the problems that existed for medical malpractice claims. Some of the statutes contain statements of legislative findings and intent:

766.201 Legislative findings and intent. -

(1) The legislature makes the following findings:

(a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians.

(b) The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.

(c) The average cost of defending a medical malpractice claim has escalated in the past decade to the point where it has become imperative to control such cost in the interests of the public need for quality medical services.

(d) The high cost of medical malpractice claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations

on damages, while preserving the right of either party to have its case heard by a jury.

(e) The recovery of 100 percent of economic losses constitutes overcompensation because such recovery fails to recognize that such awards are not subject to taxes on economic damages.

§ 766.201, Fla. Stat. (1993) (created through Ch. 88-1, § 48, Laws of Fla.). In the very next year, the Legislature again addressed the problems of increasing health care costs. Ch. 89-530, Laws of Fla. It found that "health care costs are not equitably distributed among those paying for health care services and that health care providers are inequitably burdened by the costs of providing services for which they receive inadequate or no reimbursement." Ch. 89-530, § 1, Laws of Fla.

WHEREAS, health care costs continue to rise faster than the rate of inflation, and

WHEREAS, the consumer price index rose 3.6 percent in 1987, while medical care costs rose 6.6 percent in 1987, and

WHEREAS, spending on health care in the United States rose 7.9 percent from 1984 to 1985, 8.7 percent from 1985 to 1986, and 9.8 percent from 1986 to 1987, and

WHEREAS, government programs paid 41 percent of all health care bills nationally in 1987, and

WHEREAS, government health expenditures between 1982 and 1987 grew by an average of 8.9 percent per year, and

WHEREAS, government purchasing of health care services and health insurance coverage is fragmented, and

WHEREAS, health care providers are burdened with increasing levels of uncompensated care, and

WHEREAS, health care providers are increasingly unable to shift costs for uncompensated care to paying patients, and

WHEREAS, in 1986, 17.8 percent of the nation's population had no health insurance, while 23.2 percent of this state's population had no health insurance, and

WHEREAS, in 1986, only five states had a higher percentage of their population lacking health insurance than Florida, and

WHEREAS, the pool of people in Florida who are adequately covered by health insurance is shrinking, and

WHEREAS, in 1986, nearly 88 percent of Americans under 65 years of age who lacked health insurance were employed or were spouses or children of workers, and

WHEREAS, 40 percent of Florida's workers had wages below the federal poverty level in 1987, and

WHEREAS, more than half of all uninsured workers in the United States in 1986 were employed in retail trade and services, and

WHEREAS, the largest employment category and the fastest growing employment sector in this state is the service sector, and

WHEREAS, the third fastest growing job sector in this state is trade employment.

Ch. 89-530, Preamble, Laws of Fla.

In 1992, the Legislature reaffirmed the findings that it made in the past:

408.002 Legislative findings and intent.--

(1) The Legislature finds that Florida's health care delivery system requires major reform. Health care costs are increasing at an unacceptably high rate and access to health care services is declining. At least 2.5 million Floridians are uninsured and many more of our citizens are underinsured, discovering that the insurance they have purchased is often not enough when illness occurs. The Legislature recognizes that unemployed, part-time, and seasonal workers are commonly excluded from employer-based health insurance coverage.

408.005. Legislative findings and intent.--

(1) The legislature finds that health care inflation, a deteriorating health care delivery system, reduced state revenues, changing demographics, and the erosion of private health insurance have converged to create a crisis of reduced access to health services for the poor and the uninsured. The legislature recognizes that the problem of the health access crisis cannot be solved with the simple expansion of existing programs, but requires major reform of the health care delivery system.

> (2) It is the intent of the Legislature to create The Florida health Plan in order to provide a vehicle for health reform. The Florida Health Plan shall represent a comprehensive approach to health care reform and shall be composed of multiple strategies. The legislature intends that The Florida health Plan address specific goals related to access to basic health services, insurance reforms, data collection and analysis, cost containment, and reforms in regulatory programs that are provided for in this chapter.

§§ 408.002, 408.005, Fla. Stat. (1993) (created through Ch. 92-33, §§ 3, 6, Laws of Fla.). See also Ch. 90-295, § 1, Laws of Fla.; Ch. 85-175, Laws of Fla.; Ch. 75-9, Preamble, Laws of Fla.

Given the numerous legislative factual findings, public policy statements, and the precedent on statutes that address the problem of unaffordable and unavailability of health care, it is clear that the Legislature's decision not to extend the Wrongful Death Act to include a fetus as a "person" should be given great deference. The Legislature acted well within its authority in taking measures to control health care expenses. The court must give great weight and deference to legislative findings and public policy statements:

> Indeed, legislative findings and declarations of policy are presumed to be correct. Thus, great respect should be accorded to legislative findings of fact in enacting police regulations and every reasonable presumption favors their correctness, The determination of facts upon which the validity or constitutionality of statutes may depend is primarily a legislative question, the general rule being that the courts will abide by the legislative decision unless it is clearly erroneous, arbitrary, or wholly unwarranted.

LO Fla.Jur.2d Constitutional Law § 73 (1979). This court confirmed that "the Legislature has the final word on declarations on public policy and the courts are bound to give great weight to legislative determinations of facts." Echarte, 618 So.2d at 196; see American Liberty Ins. Co. v. West & Convers Architects & Engr's, 491 So.2d 573 (Fla. 2d DCA 1986). "Legislative determinations of public pur-

pose and facts are presumed correct and entitled to deference, unless clearly erroneous." Echarte, 618 So.2d at 196; see also State v. Division of Bond Fin., 495 So.2d 183 (Fla. 1986).

b. Limited Cause of Action

Aside from the fact that the Legislature twice decided against modifying the Florida Wrongful Death Act to include a fetus within the definition of a person, it should also be noted that the Legislature did so at a time when it expanded the Wrongful Death Act to allow adult children to recover damages for wrongful death if their parent died without being survived by a spouse. Due to increasing medical costs and rising malpractice insurance, however, the Legislature did not expand this new change in the Wrongful Death Act to actions for medical malpractice. If it is in the best interest of Florida to create a right in non-medical malpractice actions only, e.g., automobile accidents and slip-and-falls, the Legislature can enact a limited cause of action. Alternatively, it can create the new right with a lower standard of care, i.e., reckless disregard. The Legislature can also limit the amount of damages for new causes of actions. These factors, all or which are pertinent, have to be addressed by the Legislature in deciding whether to create a cause of action for negligent stillbirth.

The 1990 amendment statutorily modified sections 768.21(3) and 768.21(4), and created section 768.21(8). It states in part:

> Be It Enacted by the Legislature of the State of Florida:
>
> Section 1. Subsection (1) of section 168.18, Florida Statutes, is amended to read:
>
> 768.18. Definitions. -- As used in ss. 768.16-768.27:
>
> (1) "Survivors" means the decedents spouse, minor children, parents, and, when partly or wholly dependent

on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the child born out of wedlock of the mother, but not the child born out of wedlock of the father unless the father has recognized a responsibility for the child's support.

Section 2. Subsections (3) and (4) of section 768.21, Florida Statutes, are amended, and subsection (8) is added to said section to read:

768.21. Damages. -- All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

(3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover forlostparentalcompanionship, instruction, and guidance and for mental pain and suffering from the date of injury.

(4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.

(8) The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by s.766.106(1).

Ch. 90-14, Laws of Fla. (underlining indicates additions, redlining indicates deletions).

The 1990 amendment expands the scope of recoverable damages of the Wrongful Death Act to include "all children of the decedent if there is no surviving spouse." Whereas the prior law provided that only children who were younger than 25 years could recover damages; adult children can recover damages in some circumstances under the 1990 amendment to the Wrongful Death Act. There is no dispute that these damages were not recoverable by a decedent's adult children before the 1990 amendment. Capiello v. Goodnight, 357 So.2d 225 (Fla. 2d DCA 1978); Henderson v. Ins. Co. of N.A., 347 So.2d 690

(Fla. 4th DCA 1977). As part of the amendment, however, the Legislature declined to extend the damages to medical malpractice suits.

By not expanding the Wrongful Death Act to actions for medical malpractice, the Legislature, directly and indirectly, increased the potential for more people to have better access to health care. Both the increased access to health care and increased quality of health care are legitimate state "objectives." The courts have repeatedly held that the Legislature may differentiate medical malpractice actions from non-medical malpractice actions. Throughout time, the Florida Supreme Court and district courts have ruled that the importance of health care and treatment clearly constitutes a "reasonable" ground for differentiatingmedicalmalpractice actions from other types of actions. Univ. of Miami v. Echarte, 618 So.2d 189 (Fla. 1993) (the medical malpractice arbitration statute is not unconstitutional); Coy v. Florida Birth-Related Neurological Injury Comp. Plan, 595 So.2d 943 (Fla. 1992); Pearlstein v. Malunnev, 500 So.2d 585 (Fla. 2d DCA1986) (prefiling notice requirements are not invalid since there is a legitimate legislative reason in insuring the protection of public health); Pohlman v. Mathews, 440 So.2d 681 (Fla. 1st DCA 1988) (attorney's fees for medical malpractice cases does not violate due process or equal protection clauses); Florida Patient's Comp. Fundv. Von Stetina, 474 So.2d 783 (Fla. 1985) (the payment of future medical expenses and future lost wages pursuant to section 768.51 is not unconstitutional); Florida Medical Center, Inc. v. Von Stetina, 436 So.2d 1022 (Fla. 4th DCA 1983) (attorneys fees), reversed in part on other grounds 474 So.2d 783 (Fla. 1985); McCarthy v. Mensch, 412 So.2d 343 (Fla. 1982) (admission of conclusion of medical mediation in evidence did not violate due process);

Lower Fla. Keys Hosp. Dist. v. Skelton, 404 So.2d 832 (Fla. 1981) (reduction of judgment by collateral sources in medical malpractice cases does not violate due process); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So.2d 365 (Fla. 1981) (reduction of final judgment by collateral sources in medical malpractice cases does not violate due process); Hernandez v. Garwood, 390 So.2d 357 (Fla. 1980) (the two-year statute of limitations for medical malpractice claims does not encroach upon the constitution); Carter v. Sparkman, 335 So.2d 802 (Fla. 1976) (medical liability mediation panel statute does not violate constitution) ; see also Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979) . Thus, it is clear that Legislature may treat claims for medical malpractice different from other claims.

c. Imperfect Remedy

Under the common law, there existed no cause of action for the wrongful death of a person. Nissan Motor Co. Ltd. v. Phlieser, 508 So.2d 713 (Fla. 1987); Stern v. Miller, 348 So.2d 303 (Fla. 1977); White v. Clayton, 323 So.2d 573 (Fla. 1975); Stokes v. Liberty Mut. Ins. Co., 213 So.2d 695 (Fla. 1968); McPhail v. Jenkins, 382 So.2d 1329 (Fla. 1st DCA 1980); Henderson v. Ins. Co. of N.A., 347 So.2d 690 (Fla. 4th DCA 1977). To alleviate the inequities attributed to wrongful deaths, the Legislature enacted various acts throughout time, including the present version of the Wrongful Death Act. See §§ 768.16--768.27, Fla. Stat.; Stern. This court and the district courts have upheld the validity of the acts. Martin v. United Sec. Serv., Inc., 314 So.2d 765 (Fla. 1977).

Like the wrongful death acts of many other states, the Florida Wrongful Death Act creates a cause of action for deaths caused by the wrongful acts or omissions of other persons. Section 768.21

permits the recovery of defined "damages" to the decedent's estate and "survivors." The Act statutorily defines "survivors" for the purpose of wrongful death in section 768.18(a). The "damages" that a "survivor" may recover depend entirely upon the relation of the "survivor" to the decedent and the existence, or nonexistence, of other "survivors." Not all damages are recoverable and not all the decedent's family are survivors. Since the creation of the current Act in 1972, the Legislature has expanded the scope of recoverable damages on at least three different occasions. See Chs. 81-183, 85-260, 90-14, Laws of Fla.

Any rights afforded to people derive solely from the Wrongful Death Act, an act created from the discretion of the Legislature. It may replace the Wrongful Death Act with another set of rights in its place. Simply stated, people do not have the right to bring a wrongful death action nor do they have the right to be a statutory "survivor" if the Legislature has not designated them a "survivor." Instead, they have a "privilege." White v. Clayton, 323 So.2d 573 (Fla. 1975).

Many courts have upheld the limitations of recovery under the Wrongful Death Act to statutorily designated "survivors," even when the result seems harsh. As an example, in King v. Font Corp., 612 So.2d 662 (Fla. 2d DCA 1993), the Second District recently rejected the argument that adult children should be entitled to recover for their pain and suffering for their father's death. The court ruled that the adult children's mother was a "surviving spouse" pursuant to the Wrongful Death Act even though she lived for only 10 minutes after the father died and both of them died in the same accident. Since the father left behind a "surviving spouse," be it for a mere

ten minutes, the adult children could not recover damages for pain and suffering. The Second District recognized that this result may seem harsh, but ruled that it was a legislative function to modify the Wrongful Death Act.

In an earlier Second District case, Capiello v. Goodnisht, 357 So.2d 225 (Fla. 2d DCA 1978), (Judge Grimes authoring), the court addressed and upheld the validity of section 768.21(6) (a), Florida States. There, the adult children of a decedent attacked the statute on grounds that it did not permit non-dependent adult children to recover the decedent's "net accumulations." The district court rejected that argument on the reasoning of White v. Clayton, 323 So.2d 573 (Fla. 1975), and restated the supreme court's ruling that "changes in the elements of damage or the standards by which they are recovered . . . is a legislative prerogative." Capiello, 357 So.2d 225 at 228; see also Bassett v. Merlin, Inc., 335 So.2d 273 (Fla. 1976).

d. Other Jurisdictions

Other state supreme courts have deferred to their legislatures on this issue. Recently, the Arkansas Supreme Court ruled that it would not encroach upon the role of the legislature by interpreting its wrongful death act in a manner that could be inconsistent with the legislative intent. Chatelain v. Kelley, 910 S.W.2d 215 (Ark. 1995). In a wrongful death suit against a physician, the claimants alleged that their child was stillborn due to a delay in performing an emergency Caesarean section. The trial court concluded that an unborn fetus was not a "person" for purposes of the Arkansas wrongful death statute, Ark.Code.Ann § 16-62-102, and granted a summary judgment in favor of the physician.

In a case of first impression, the Arkansas Supreme Court held that the trial court was correct and thus affirmed. It noted that a majority of states that had addressed the question of whether the death of a fetus was the death of a person had interpreted **similar** legislation to hold that the death of a fetus equated to the death of a person. A common thread of these opinions was that the action for wrongful death was "remedial" and was interpreted liberally to fulfill its purposes of compensating injured persons and deterring harmful conduct.

The court, however, found that several minority jurisdictions that had concluded to the contrary. These cases held that a live birth must occur to support a separate and independent "existence" from the mother. Other minority cases had considered legislative enactments in other areas that treated injuries to fetuses different from injuries to infants. Still other courts expressed concern over the measurement of the recovery and the difficulty in moving the line for recovery from live birth to viability. Also, courts had considered the different situations of the stillborn fetus and the child who survived birth and had to live with the injuries.

The court noted prior decisions in other contexts in which it had ruled that a fetus was not a person. For example, Arkansas courts were without power to order the administration of the estate of an unborn fetus, and a fetus was not a "person" as that term was used in the manslaughter statute. The court held that the legislature was particularly suited to make the sort of policy decision involved in this case. Despite its obvious ability to do so, the legislature had not seen fit to expand the definition of "person" beyond the common law limits found in the manslaughter and probate

contexts. The court concluded by noting its reluctance to create an inconsistency in the laws of the state by holding that "person" included a viable fetus for purposes of the wrongful death statute when it had reached the contrary conclusion in the criminal law and the law of probate.

Similarly, other state supreme courts have rendered decisions on the same rationale:

> In the face of these judicial interpretations, the Legislature has not been silent. In 1967, the Legislature added non-pecuniary damages for the death of a child by inserting the following language:
>
> > "and in addition thereto, where the deceased was a minor child at the time of the injury which resulted in death, damages not exceeding $5,000 may be recovered on behalf of the parents of said deceased minor for the loss of comfort, society and companionship of said minor"
>
> P.L.1967, ch. 369 (P.L.1969, ch. 266 raised limit to $10,000). The terminology of this amendment is entirely inconsistent with the notion that a wrongful death action could be brought on behalf of a stillborn, viable fetus. The deceased must be "a *minor child at the time of the injury* which resulted in death," damages were to be recovered only on behalf of the parents, not heirs, and "for the loss of comfort, society and companionship of said minor." P.L. 1967, ch. 369 (emphasis added). These words utilized by the Legislature in 1967 influence our interpretation of the word "person" first utilized in the wrongful death statute in 1891. It is important to note that the language of the 1967 amendment was adopted 21 years after Bonbrest v. Katz, 65 F.Supp. 138 (D.D.C. 1946), 18 years after Ferkennes v. Corniea, 38 N.W. 2d 838 (1949), and after 11 other jurisdictions had allowed an action to be brought on behalf of a stillborn, viable fetus.

Milton v. Cary Med. Center, 538 A.2d 252 (Me. 1987) (emphasis original).

> We conclude from the foregoing that when the Legislature determines to confer legal personality on unborn fetuses for certain limited purposes, it expresses that intent in specific and appropriate terms; the corollary, of course, is that when the Legislature speaks generally of a "person," as in section 377, it impliedly but plain-

> ly excludes such fetuses. We are not so naive as to believe that the Legislature entertained any intent at all with respect to fetuses when it first addressed the question of recovery for wrongful death in 1862 and 1872. (Cf. Britt v. Sears (1971) supra, 150 Ind.App. 487, 277 N.E.2d 20, 24-25; Kwaterski v. State Farm Mut. Automobile Ins. Co. (1967) supra, 34 Wis.2d 14, 148 N.W.2d 107, 111.) But we may fairly infer that if at any time during the ensuing century the Legislature had meant to include fetuses among the class of victims described in section 377, it could easily have so provided by amending the statute in either of the ways in which, as we have seen, it amended Penal Code sections 187 and 270 for the very same purpose. We decline to promulgate such an amendment ourselves.

Justus v. Atchison, 139 Cal.Rptr. 97, 565 P.2d 122 (Cal. 1977).

Suffice it to say, what takes place in other states depends in large part on the nature of the wrongful death acts, the expressed legislative intents, the problems that the states are encountering, and their legislative agendas. It does not appear that there is a state that had their legislature address this issue on two separate occasions and decline to amend the wrongful death act to allow it to include a claim for negligent stillbirth. This is precisely the case in Florida. Had this occurred in those states, the court may have been reluctant to interpret their wrongful death act.

2. public Policy Considerations

The simplest way for Florida to create a cause of action based upon the wrongful death of a fetus is to modify the Wrongful Death Act. Significantly, the clear majority of states have created such rights in this manner. In so doing, the Legislature addresses all of the public policy questions that need to be answered whenever an action is created for wrongful death. The questions are difficult and many. What is the law if Mrs. Tanner has a legal abortion over Mr. Tanner's objection? What is the law if the fetus was going to be put up for adoption? What is the law if the fetus was conceived

illegitimately and the father had refused to provide support? The Florida Wrongful Death Act resolves the latter point in the case of a live birth, but the common law is silent on the issue.

There are other equally difficult and important questions: Who may recover under this new common law wrongful death action? That is, are the damages limited to the parents or can a recovery be had by siblings and grandparents? What are the damages? That is, are they limited to mental anguish or are pecuniary damages recoverable as well? See Yordan v. Savage, 279 So.2d 844 (Fla. 1973). Should there be a limit on the amount of damages? Should there be a cause of action in all cases or just non-medical malpractice cases. Will the cause of action allow a woman to have an abortion, but make her compensate the man for damages if he objects to the abortion? May parents bring loss of consortium claims in addition to their direct claims for mental pain and suffering? And most important, if this court recognizes a common law cause of action for wrongful death of a fetus, what will become of the Florida Wrongful Death Act? Will people be permitted to sue for the wrongful death of their fiances, cousins, uncles, aunts, close friends, neighbors, and pets? These claims are not cognizable under the Wrongful Death Act, but one can only wonder what the developing common law will entail. Florida's courts have avoided this quagmire and should continue to do so; the questions are best addressed by the Legislature.

In addition to amending the Wrongful Death Act the Legislature can also amend its current no-fault remedy with respect to medical malpractice suits. To help solve the problem with lawsuits against obstetricians and gynecologists, the Legislature created a unique plan called the "Florida Birth-Related Neurological Injury Compen-

sation Plan." § 766.301-.316, Fla. Stat. (1995). Ch. 88-1, Laws of Fla. (1988). It provides for a no-fault recovery for the death of qualifying infants in some instances. This plan may easily be modified to alleviate negligent stillbirth claims. This, however, is a legislative function. Thus, it is also one other reason why the Legislature is in the best entity to address the issue.

The economic impact on Florida that would result from creating such a right is another factor that the court must consider in its decision. Obviously, if the court rules against the defendants, it will result in additional lawsuits and increased health care costs. In 1980, there were 33,353 fetal deaths in the United States, which translated into a 9.2 fetal death ratio (deaths per 1,000 births). Williams, Obstetrics, p. 4 (1987) . "One half or more of perinatal deaths are stillbirths." Id. "In a proportion of deaths in utero, there may be no obvious explanation." Id. Clearly, the creation of this claim, in and of itself, may lead to lawsuits even when there is little evidence of a physician's negligence.

> In the United States perinatal injury usually tops the list for large monetary awards in the settlement of malpractice claims. Most of these claims fall into one of two categories: (1) birth injury to a child's brain, or (2) the wrongful death of a fetus or neonate. After reading the records associated with several hundred of these claims, it seems to me that their origin falls into several categories. The most frequent is the inability of a family to cope with a child's impairments. Many malpractice actions are initiated to obtain funds to purchase services for an impaired child and to buy for parents some time away from the responsibilities imposed by living with a severely handicapped child. Another frequent reason for malpractice claims is poor communication between health system personnel and the parents of impaired or dead children. Some of these parents have had conflicts with medical personnel, but more often they are not satisfied with the information they have received about the cause of a child's impairments or death. A death that is sudden and unexpected is particularly likely to generate malpractice claims. Finally, there are

> instances in which families have logical reasons to think that health system personnel mismanaged obstetric or medical care.

Naeye, Disorders of the Placenta, Fetus, and Neonate, p. 360-361 (1992).

3. *Stare Decisis*

Aside from the deference owed to the Legislature, the court is obligated under the doctrine of *stare decisis* to adhere to its own decisions. The court has consistently held that Florida recognizes no cause of action for the wrongful death of a fetus. Indeed, the court has reaffirmed this holding within the past year. If it were to now create a new cause of action for the same damages under the guise of the common law, it would contradict its own prior holdings and undermine the binding precedential effect that is owed to case law. Coming off its very recent decision in Young, the creation of a common law personal injury action in favor of Mr. Tanner at this time would almost appear to be intellectually dishonest,

This court and two district courts have ruled that parents may not recover damages for the wrongful death of a fetus. It is also clear that a parent may not seek an indirect recovery for the death of a fetus since it is essentially a direct recovery for the death of a fetus. Henderson v. North, 545 So.2d 486 (Fla. 1st DCA 1989); Abdelaziz v. A.M.I.S.U.B. of Florida, Inc., 515 So.2d 269 (Fla. 3d DCA 1987); Styles v. Y.D. Taxi Corp., Inc., 426 So.2d 1144 (Fla. 3d DCA 1983). These district court opinions applied Stokes to prevent a "thinly disguised" action for the wrongful death of a fetus. See Henderson; Abdelaziz; Davis v. Simpson, 313 So.2d 796 (Fla. 1st DCA 1975). Given its past rulings, and the doctrine of *stare decisis,* the court should follow its long-standing precedent and affirm.

In Styles, the claiman!.. attempted to show that she suffered a "permanent injury" under the Florida Motor Vehicle No-Fault Law by the death of a fetus. The Third District adopted the trial court's order which, after noting that the loss of a fetus was not covered under the Wrongful Death Act, held: "If a [would-be] mother cannot recover directly for the death of an unborn fetus, it would appear that she should not be able to recover indirectly for such death as a 'permanent injury' to her absent a showing of some objective signs of injury resulting from the loss of the fetus.' Styles, 426 So.2d at 1145 (emphasis supplied). Thus, the Third District made a clear distinction between injuries suffered by a would-be mother evidenced by "some objective signs" and an injury that consists of nothing more than the death of a fetus. It follows that only the "mother" can sustain an "objective injury" from the loss of a fetus since only she carries it.

In Abdelaziz, the plaintiffs asserted that the mother suffered physical injuries and emotional distress because of the stillbirth of her eight-month-old fetus. They readily conceded, however, that the mother had "sustained no physical injuries to herself" and that their sole claim was for mental pain and suffering arising from the death of the fetus. The Third District again rejected such a claim and stated:

> we must reject it because the claim for negligent infliction of mental distress through medical malpractice . . . is, in essence, a claim for the wrongful death of the fetus and the plaintiffs' mental suffering associated therewith. Such a claim is clearly not cognizable under the wrongful death statute, and should not, we conclude, be indirectly recoverable under a simple negligence claim as alleged in the second amended complaint.

Abdelaziz, 515 So.2d at 27%. The Third District's holding is based on the distinction between a claim for physical injuries sustained directly by the mother and a claim arising indirectly from a death of the fetus. The latter has been continuously rejected regardless of the manner in which it is framed.

In Henderson, the plaintiffs brought suit for negligence based on a misdiagnosis resulting in physical pain, mental anguish, and hospitalization expenses, admission tests, andunnecessary surgical procedures. The court reversed the summary judgment against the plaintiffs on that claim on the ground that it contained "no claim for any injury or damage resulting from the death of the fetus." Henderson, 545 So.2d at 488. The plaintiffs, however, also claimed negligence resulting in the death of the fetus and "great physical, emotional and mental pain and suffering." The summary judgment on these claims was affirmed:

> The trial judge correctly found that [each such claim] was a thinly disguised claim for the wrongful death of the fetus and plaintiffs' mental pain and suffering associated therewith and granted final summary judgment as Florida does not recognize a cause of actio for the wrongful death of the fetus.

Henderson, 545 So.2d at 488.

The claims made by Mr. Tanner in the instant case are even far more removed than the claims rejected in Henderson, Abdelaziz, and Styles. Originally, his claim was expressly made under the Florida Wrongful Death Act. There is no disputing that his claim is still in essence a wrongful death claim. Even in the cases of Singleton and McGeehan v. Parke-Davis, 573 So.2d 376 (Fla. 2d DCA 1991), that go beyond the holding in Henderson, Abdelaziz and Styles, there is no suggestion that the putative father has a direct cause of action

for the mother's living tissue. The only cause of action that has been recognized by some Florida appellate courts from a stillbirth is the mother's personal injury action for the alleged loss of "her living tissue" to "her body." As the court stated in McGeehan v. Parke-Davis, a Division of Warner-Lambert Co., 573 So.2d 376 at 377 (Fla. 2d DCA 1991), the "loss of a fetus is a legally cognizable bodily injury to the woman whose body suffers the loss." In fact, in Tanner III, the Second District let stand the dismissal of Mr. Tanner's claim and reversed only 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 III, 630 So.2d at 1136. There is not one case that supports Mr. Tanner's claim.

4. The Impact Rule

As referred to above, Mr. Tanner does not have a direct cause of action arising from his wife's stillbirth because he has not met the threshold of injury the impact rule. There is no dispute that the impact rule prevents a father's cause of action for mental pain and suffering resulting from the death of his living child in the absence of a discernable bodily injury to himself. See Champion v. Grey, 478 So.2d 17 (Fla. 1985). However, Mr. Tanner contends that the impact rule should be abrogated by this court to allow a father to bring an action for a stillborn fetus. Logic and common sense dictate that this argument should fail because a claim for a unborn fetus should not be greater than a claim for a living child.

In the absence of any physical impact, a party may not recover for mental pain and emotional distress caused by the negligence of another party. R.J. v. Humana of Fla., 652 So.2d 360 (Fla. 1995); Champion v. Gray 478 So.2d 17 (Fla. 1985); Dovle v. Pillsbury Co.,

476 So.2d 1271 (Fla. 1985); Brown v. Cadillac Motor Car Div., 468 So.2d 903 (Fla. 1985). To maintain a cause of action for negligent infliction of mental distress, Florida's impact doctrine requires an impact that causes an "ascertainable physical injury" which then causes the emotional distress. Without a physical injury, impact in and of itself does not support any claim for negligent infliction of emotional distress. R.J., 652 So.2d at 363. The Fourth District has recently stated 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 sustains in an impact." Reynolds v. State Farm Auto. Ins. Co., 611 So.2d 1294, 1295 (Fla. 4th DCA 1992).

The supreme court in R.J. recognized that one rationale behind the impact rule is that by barring recoveries for purely emotional distress in most circumstances, it keeps closed the flood gates for the fictitious and speculative lawsuits. R.J., 652 So.2d at 362. Further, without the impact requirement, defendants might be unsure of whom they injured or where they may have injured a person, thus paralyzing the ability to adequately defend themselves. R.J., 652 So.2d at 363. The court also stated that compensatory damages for mental distress are "spiritually intangible," are beyond the limits of judicial action and should be addressed through the legislative action rather than judicial decisions. R.J.. The court noted that it has repeatedly upheld the impact rule since the underlying basis for the rule still exists and "no new reason was shown to justify overruling" its decisions. R.J., 652 So.2d at 363. It stated:

> Without question, allowing compensation for emotional distress in the absence of a physical injury under the circumstances of this case would have a substantial im-

> pact on many aspects of medical care, including the cost of providing that care to the public. Were we to create such an exception, we would, of necessity, also be allowing a claim for emotional distress for any misdiagnosis made from negligent medical testing. We could not limit an exception for negligent misdiagnosis to cases specifically involving the HIV virus while excluding other terminal illnesses. Moreover, it would be exceedingly difficult to limit speculative claims for damages in litigation under such an exception. Given that the underlying policy reasons for the impact rule still exist, we find that no special exception is justified under the circumstances of this case.

R.J., 652 So.2d at 363. See also Gilliam v. Stuart, 291 So.2d 593 (Fla. 1974) (individual whose injuries were allegedly caused by her physical fright suffered when an automobile struck her house could not recover because she had failed to show physical impact), Brown (driver of a defective automobile that struck and killed driver's mother could not recover for mental distress because he incurred no physical injury), Doyle, 476 So. 2d 1271 (Fla. 1985).

A claim for negligent infliction of mental distress consists of the following elements: (1) the plaintiff must suffer a physical injury; (2) the plaintiff's physical injury must be caused by the psychological trauma; (3) the plaintiff must be involved in some way in the event causing the negligent injury to another; and (4) the plaintiff must have a close personal relationship to the directly injured person. Zell v. Meek, 665 So. 2d 1048 (Fla. 1995). The major element that must be established is that there has been "impact." Crane v. Loftin, 70 So. 2d 574 (Fla. 1954). The impact element provides a means of insuring that damages are not awarded unless there is evidence of actual trauma.

In Reynolds, the Fourth District held that a plaintiff's claim for emotional distress she sustained when her fiance was killed in an automobile accident in which she too was physically injured was

barred by the impact rule. The court decided that the impact rule bars the recovery of damages for negligent infliction of emotional distress unless the distress arises directly from physical injuries the plaintiff sustains in an impact. Here, the plaintiff's mental distress was not the result of her own physical injury, but rather from her fiance's death. Further, the plaintiff and her fiance did not have the required familial relationship to overcome the impact rule under Champion.

In Squros v. Biscayne Recreation Devel., 528 So.2d 376 (Fla. 3d DCA 1988), the plaintiff owned a motorized sailboat docked at the defendant's marina. While the plaintiff and her husband were sleeping, intruders boarded the boat and started the engine due to the defendant's negligent failure to provide ample security. The husband awakened, attempted to cut off the fuel line below decks, and suffered a fatal heart attack without actually confronting the intruders. The Third District held that the plaintiff's wrongful death action against defendant marina operator alleging negligence was barred under the impact doctrine.

Last, in Arcia v. Altagracia Corp., 264 So.2d 865 (Fla. 3d DCA 1972), the plaintiff was a tenant in the defendant's apartment complex. While she was in her bathroom, the ceiling collapsed, nearly striking her. Although the ceiling did not strike the plaintiff, she allegedly suffered severe mental distress. The district court summarily held that since there was no physical impact and that the defendant could be guilty of only simple negligence in maintaining the premises, there was no liability for emotional distress.

In the case at hand, the trial judge correctly ruled that Mr. Tanner never alleged sufficient facts to avoid the impact doctrine.

Based upon the earlier complaints, there can be no mistake that Mr. Tanner was still attempting to make a claim for the wrongful death of the fetus, that has been repeatedly rejected. Mr. Tanner failed to allege sufficient ultimate facts demonstrating an ascertainable personal injury and failed to allege sufficient ultimate facts that demonstrated a connection between any purported physical injury to himself and the stillbirth. Mr Tanner's allegations are similar to the allegations in R.J., which were determined to be insufficient. The R.J. claimant alleged that he suffered "bodily injury including hypertension, pain and suffering, mental anguish, loss of capacity for enjoyment of life, and the reasonable expense for medical care and attention." R.J., 652 So.2d at 364. In view of the closeness of the allegations between the instant case and the R.J. case, the judge was correct in dismissing his claim with prejudice. Further, Mr. Tanner did not have a "relationship" with the fetus.

Mr. Tanner's reliance upon Kush v. Lloyd, 616 So.2d 415 (Fla. 1992), is misplaced. There, the court stated that the impact rule should not be applied to wrongful birth claims since the emotional damages are the "'parasitic' consequence of conduct that itself is freestanding tort." Kush, 616 So.2d at 422. The court explained its decision was limited to wrongful birth claims and even alluded to Justice Alderman's concurrence in Champion to make clear that its decision was intended only to "modify to a limited extent our previous holdings on the impact doctrine." Kush, 616 So.2d at 423. The Kush court reaffirmed the appropriateness of the impact rule in the majority of circumstances and carefully limited the Kush decision to this narrow exception. Kush should not be read in a manner to make it the rule rather than the exception of the impact rule.

5. No Patient-Physician Relationship

"To prevail in a medical malpractice action, a plaintiff must identify the standard of care owed by the physician, produce evidence that the physician breached the duty to render medical care in accordance with the requisite standard of care, and establish that the breach proximately caused the injury alleged." Moisan v. Frank K. Kriz, Jr., M.D., P.A., 531 So.2d 398 (Fla. 2d DCA 1988); see also Gooding v. University Hosp. Bldg., Inc., 445 So.2d 1015 (Fla. 1984). It is settled that there must be a patient-physician relationship to maintain a claim for medical malpractice. See Hill v. Kokosky, 463 N.W.2d 265 (Mich.App. 1990); St. John v. Pope, 901 S.W.2d 420 (Tex. 1995); Oliver v. Brock, 342 So.2d I (Ala. 1977); Cintron v. New York Med. College Flower and Fifth Ave. Hosp., 597 N.Y.S.2d 705 (A.D. 1993). In Florida, only one exception has been permitted for the privity element. Pate v. Threlkel, 661 So.2d 278 (Fla. 1995). To date, this court has not expanded Pate any further than its limited facts and should not do so in this case.

ISSUE II

MR. TANNER'S DERIVATIVE LOSS OF CONSORTIUM CLAIM BASED ON HIS WIFE'S PERSONAL INJURY WAS TIME BARRED.

As to the second issue on appeal, this court should decline to address the issue since it is not certified as a question of great public importance and does not directly and expressly conflict with any decision of this court or another district court. Indeed, the Second District followed the rulings in West Volusia Hosp. Auth. v. Jones, 668 So.2d 635 (Fla. 5th DCA 1996), and Daniels v. Weiss, 385 So.2d 661 (Fla. 3d DCA 1980). Until a district court hands down a decision to the contrary, the announced rule of law should stand.

If the court does address the issue, it will discover that the relation back doctrine does not bring Mr. Tanner's derivative loss of consortium action within the statute of limitations. The Second District correctly held that Mr. Tanner's loss of consortium claim was barred by the statute of limitations under West Volusia as well as Daniels. In Daniels, the Third District reversed a denial of a motion for summary judgment concerning Ms. Daniels' action for loss of consortium on the basis that the statute of limitations expired. The court relied upon the rule that "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." Daniels, 385 So.2d at 663. In support of this position, the Third District cited this court's decision in Cox v. Seaboard Coast Line Ry. Co., 360 So.2d 8 (Fla. 2d DCA 1978), and the First District's holding in Doyle v. Shands Teaching Hospital and Clinics, 369 So.2d 1020 (Fla. 1st DCA 1979). It held that "although a claim for loss of consortium is **a** derivative cause of action, it nevertheless is a separate action." Daniels, 385 So.2d at 663. In so ruling, the Third District relied on this court's decision in Gates v. Foley, 247 So.2d 40 (Fla. 1971).

The Court then turned to the facts of the case and held that since Ms. Daniels had not filed her complaint seeking damages for loss of consortium until after the two-year statute of limitations had run for medical malpractice claims, the trial court erred in denying Dr. Oper's motion for summary judgment. Accordingly, the court necessarily found that this issue **was** a question of law for the court to resolve. It vacated Ms. Daniels' $90,000.00 verdict for loss of consortium claim as to Dr. Oper.

In the case at hand, the trial judge correctly ruled that Mr. Tanner did not bring a loss of consortium claim until after the two year statute of limitations had run for medical malpractice claims. Contrary to the assertions in the initial brief, it is clear that the original and first amended complaint did not allege a claim for Mr. Tanner's alleged loss of consortium. Instead, it is clear that Mr. Tanner consistently asserted that the death of the fetus was a separate and distinct claim that could be brought under the Florida Wrongful Death Act. We vehemently object to any claim that these latter complaints have merely attempted to clarify the damages that Mr. Tanner sought in his earlier complaints since it is clear that his earlier complaints, in no way, attempted to allege a claim for loss of consortium. Because an action for loss of consortium is a separate and distinct cause of action, see Gates, it must be plead separately and must be pled within the statute of limitations.

ISSUE III

MR. TANNER'S CLAIM FOR NEGLIGENT STILLBIRTH WAS BARRED BY *RES JUDICATA*.

In the previous Tanner appeal, the Second District let stand that part of the order dismissing Mr. Tanner's claims and reversed only "the 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), review denied, 632 So.2d 1028 (Fla. 1994) (emphasis added). Clearly, the court rejected any claim that Mr. Tanner may have had because he does not have a direct cause of action for any personal injury to his wife. The holding in this prior appeal is consistent with the court's previous holdings. As this court held in McGeehan

v. Parke-Davis, Division of Warner-Lambert Co., 573 So.2d 376, 377 (Fla. 2d DCA 1991), "the wrongfully caused loss of a fetus is a legally cognizable bodily injury to the woman whose body suffers the loss." (emphasis supplied). Plantv. Decker, 486 So.2d 37 (Fla. 2d DCA 1986). See also Simon v. United States, 438 F.Supp. 759 (1977) (father of stillborn child is not entitled to recover damages under Florida law for mental pain and suffering resulting from the death of his wife's fetus) .

Mr. Tanner's third amended complaint was rightfully dismissed beyond the scope of the Second District's decision in Tanner III, which affirmed the dismissal of his initial claims. As the judge stated in his order dismissing the loss of consortium claim with prejudice, Mr. Tanner never asserted a loss of consortium action prior to his loosing his appeal in this court. Thus, once he lost his appeal, he could not return to the trial court and amend his complaint to state a new and different cause of action. "After an appeal in which the law of the case is decided on the basis of the pleadings at that point, the plaintiff may not thereafter file an amended complaint setting forth a new and different basis for relief." 3 Fla.Jur.2d, Appellate Review § 410. As further stated:

> Where an appellate court affirms a decree of a trial court, or when such decree is modified on appeal, either as to questions of law or fact necessarily involved, with directions for further proceedings consistent with the opinion, the trial court has no authority to open the case or to enter any other judgment than that directed to be entered, unless authority to do so is expressly given by the appellate court. The judgment and mandate of the appellate court must be obeyed. The authority of the trial court's judgments depends on its jurisdiction, not on the question as to whether its judgments are right or wrong.

3 Fla.Jur.2d, Appellate Review § 405.

In a prior appeal of this case, this court affirmed the trial court's final judgment of dismissal with the exception of the statute of limitations issue and Mrs. Tanner's personal injury claim. At that point, the final judgment became the law of the case as to Mr. Tanner and any claim that he could have asserted in the trial court but did not assert was forever lost. "The law of the case is a principle adhered to by courts to avoid reconsideration of points of law which were, or should have been, adjudicated in a former appeal of the same case; its purpose is to lend stability to judicial decisions, to avoid piecemeal appeals, and to bring litigation to an end as to expeditiously as possible." Valsecchi v. Proprietors Ins. Co., 502 So.2d 1310 (Fla. 3d DCA 1987); Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965). "It is not necessary that the legal point raised in the latter appeal be presented precisely as it was in the former appeal; the law of the case principle is also applied where the issue could have been but was not raised." See Valsecchi, 502 So.2d at 1311.

In Airvac, Inc. v. Ranger Ins. Co., 337 So.2d 476 (Fla. 1976), the Florida Supreme Court held that the trial court, after remand, was prohibited from allowing amendments to pleadings in order to allow the defendant to assert a new defense, particularly when that same defense was sought to be employed prior to the initial trial, but was rejected and never assigned as error or made subject to the first appeal. Airvac, 330 So.2d at 469. The court stated:

> It is clear that in the initial trial Respondent sought to amend its answer, but that amendment was denied; that denial could have been assigned as error in the first appeal of this case, but it was not. On retrial, the lower court was bound by the Appellate Court's decision; and, since the fraudulent conveyance issue was neither a matter of record upon which the appeal was decided nor

> was it a matter to be determined by the trial court on remand, the trial court had no authority on remand to permit Respondent to amend its answer to interject that issue into the cause. The trial court's erroneous order granting Respondent leave to amend was properly remedied by its vacating said order.

Airvac, 330 So.2d at 469. The Airvac decision has been relied upon by the Second District and other district courts for this position. Wroton v. Wash-Bowl, Inc., 456 So.2d 967 (Fla. 2d DCA 1984); Wood v. Manatee Bay Corp., 386 So.2d 320 (Fla. 2d DCA 1980); Flood v. Ware, 326 So.2d 46 (Fla. 2d DCA 1976); Marine Midland Bank Central v. Cote, 384 So.2d 658 (Fla. 5th DCA 1980). Accordingly, the trial judge had no discretion but to dismiss Mr. Tanner's claims because Mr. Tanner should not have been involved in the case at all because of the affirmance of the final judgment against his claims.

CONCLUSION

Based on their argument, the respondents, Alberto DuBoy, M.D., and Hartog & Duboy, P.A., respectfully request this Court to answer the certified question in the negative, approve the decision of the Second District Court of Appeal, and to disapprove of all decisions to the extent that they conflict with the ruling of the Court

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to Kennan George Dandar, Esquire, Dandar & Dandar, P.A., Post Office Box 24597, 1009 North O'Brien Street, Tampa, FL 33623-4597 (Attorney for Plaintiff Mr. Tanner) by Overnight Delivery; and to Kevin C. Knowlton, Esquire, and Stephen Senn, Esquire, Peterson & Myers, P.A., Post Office Box 24628, Lakeland, FL 33802 (Attorney for LRMC); Lee D. Gunn, IV, Esquire, Gunn, Ogden & Sullivan, P.A., 100 North Tampa Street, Suite 2900, Post Office Box 1006, Tampa, FL 33601-1006 (Attorney for Amicus Curiae FDLA) by U.S. Mail; on this 4th day of November, 1996.

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