IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

DCA NO. 9500949
CASE NO. 88,544

JAMES R. TANNER
Appellant

verses

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

Appellees

Appeal from the Second District Court of Appeal

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

Table of Cites - Continued

JURISDICTION

The review of the lower decision is within the Supreme Court's jurisdiction pursuant to Rule 9.030(a)(2)(A)(v), since the Second District Court of Appeal has certified the following question to be 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 ANOTHER?

This court also has jurisdiction of the remaining issues pursuant to Rule 9.030(a)(2)(A)(iv), due to direct conflict with the instant opinion of the Second District Court concerning the statute of limitations with decisions of other district courts of appeal in this state: *Peters v. Mitchel*, 423 So.2d 983 (Fla. 3rd DCA 1982); *Dye v. Houston, 421* So.2d 701 (Fla. 1st DCA 1982), and even the Second District Courts own previously filed opinions in *Handley v. Anclote Manor Foundation,* 253 So.2d 501 (Fla. 2d DCA 1971), cert. denied 262 So.2d 445 (Fla. 1972) and *Colandrea v. King,* 661 So.2d 1250 (Fla. 2d DCA 1995).

This court also has jurisdiction by virtue of the direct conflict with *Wilkie v.* Roberts, 109 So. 225 (1926); *Yordon* v. Savaae, 279 So.2d 844 (Fla. 1973) and *Hoffman v. Jones,* 280 So.2d 431 (Fla. 1973), on the issue of whether a father has legal rights in the fetus.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This case is before this court for the third time. Presumptively, it will be known as *"Tanner V."*[1]

In *Tanner v. Hartog*, 593 So.2d 249 (Fla. 2d DCA 1982), dismissal was affirmed based upon the statute of limitations. *(Tanner I)*. However, this court quashed the opinion in *Tanner* v. *Hartog*, 618 So.2d 177 (Fla. 1993) *(Tanner II)* and held that the statute of limitations begins to run when there is not only knowledge of an injury, but knowledge that there is a reasonable possibility that the injury was caused by medical malpractice.

In *Tanner v. Hartog*, *630 So* 2d 1136 (Fla. 2d DCA *1993) (Tanner III)*, review denied, 632 So.2d 1028 (Fla. 1994), the Second District on remand from the Supreme Court, held as follows:

1. The complaint stated a cause of action on behalf of PHYLLIS TANNER, relying upon *Singleton v. Ranz*, *534* So.2d 847 (Fla. 5th DCA 1988), review denied, 542 So.2d 1334 (Fla. 1989);

2. The complaint did not state or recognize a cause of action for wrongful death of the fetus, citing *Stern v.* Miller, 348 So.2d 303 (Fla. 1977).

Thereafter, the Second District remanded this case to the trial court for further proceedings.

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[1]The Second District Court in its current decision numerically labeled each Tanner decision. (Appendix A - *Tanner v. Hartog*, ___ So.2d ___, 20 F.L.W. D1515 (June 26, 1996). The decision being appealed from the Second District would most likely be known as TANNER **IV,** while this court's decision would be presumptively known as *"Tanner V."*

On February 22, 1995, the trial court dismissed Count I without prejudice*, denied the Motion as to Count II; dismissed Count III with prejudice on the basis of *Stern v. Miller,* 348 So.2d 303 (Fla. 1977); dismissed Count IV, PHYLLIS TANNER's consortium claim with prejudice since it was derivative of Count III and dismissed Count V, JAMES TANNER's consortium claim with prejudice based upon the statute of limitations, specifically holding that it did not relate back to the filing date of the original complaint. (R. 173-176).

JAMES TANNER appealed from both orders of September 26, 1994, and February 22, 1995, to the Second District Court. PHYLLIS TANNER did not join in this appeal and is currently proceeding in the lower court to trial.

On the current appeal, the Second District Court has held that even though the amendment involves the same occurrence and same parties, the loss of consortium claim pled in the Second Amended Complaint following the appellate process after *Tanner III* was barred by the statute of limitations since it did not relate back to the date of filing of the original complaint. The court concluded that in applying the test in *Tanner II,* JAMES TANNER brought his loss of consortium claim after the statute had run and therefore, dismissal with prejudice was affirmed.

On the claim brought by JAMES TANNER in Count III, Second Amended Complaint, alleging that the fetus was also his living tissue, the court affirmed the dismissal of this cause of action and held that "the tort is not committed on that living tissue, but rather

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[2]PHYLLIS TANNER has since filed a Fourth Amended Complaint.

upon the mothers body." (Appendix A, p.6) Therefore, the dismissal with prejudice was affirmed.

In reference to Count III of the Third Amended Complaint where TANNER alleged a cause of action for mental pain and anguish unaccompanied by impact or physical injury, i.e., his pain and suffering incurred in witnessing the negligent care and treatment of his wife and the stillbirth of their child, the Second District recognized that in those jurisdictions, similar to Florida, which do not recognize the fetus as a "person" for the purpose of the Wrongful Death Act, those jurisdictions do recognize a cause of action on behalf of both parents for medical malpractice which causes a stillbirth.

After reviewing other jurisdictions which permit both parents to recover damages resulting from a stillbirth, the Second District cautiously held that TANNER's action was barred by the impact rule.

However, the Second District "in abundance of caution" affirmed the dismissal of Count III and 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 ANOTHER?

This timely appeal followed.

SUMMARY OF THE ARGUMENT

Since the statute of limitations was tolled upon timely filing of the original complaint, the lower court has erred in holding that JAMES R. TANNER's claim in the Second Amended Complaint was barred, TANNER's claim for loss of consortium and other claims are all based on the same conduct and the same parties. Therefore, it relates back to the filing of the original complaint.

This court should hold that a stillbirth of a viable fetus gives rise to a cause of action based upon physical injury, i.e., the destruction of living tissue of both mother and father. The lower court has erred in holding that a viable fetus is the living tissue of only the mother. This conclusion results in a departure from the common law, which recognizes a child as the economic asset of both parents, and further results in unequal treatment of father and mother, since the fetus is comprised of both of their bodily cells.

Finally, this court should recognize, that the tort of "negligent stillbirth" is not barred by the impact rule and affirm the certified question based on similar decisions in other jurisdictions and this court's decision in *Kush* v. *Lloyd*, 616 So.2d 415 (Fla. 1992).

ARGUMENT

I. TANNER'S LOSS OF CONSORTIUM CLAIM DOES RELATE BACK TO THE FILING OF THE ORIGINAL COMPLAINT AND IS THEREFORE NOT BARRED BY THE STATUTE OF LIMITATIONS.

JAMES TANNER was an original party Plaintiff in the first complaint filed against the doctors and hospital. Upon filing the Complaint, the statute of limitations was tolled as to all claims. Peters *v. Mitchel*, 423 So.2d 983 (Fla. 3rd DCA 1982); *Dye V. Houston,* *421* So.2d 701 (Fla. 1st DCA 1982); *Handley v. Anclote* Manor Foundation, 253 So.2d 501 (Fla. 2d DCA 1971), cert. denied, 262 So.2d 445 (Fla. 1972).

Regardless of legal theory, where the claim asserted in an amended complaint arises out of the same conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the new claim relates back to the date of the original complaint as provided in Fla.R.Civ.Proc., Rule 1.190(c). Peters at 983 and *Colandrea* v. *King*, 661 So.2d 1259 (Fla. 2d DCA 1995).

In *Handley*, the decedent's son's claim was filed after the statute had run and the Second District held that it related back to the filing of the original complaint.

The decision in Tanner *IV* holding that TANNER's loss of consortium claim, while a separate and derivative claim, does not relate back to the filing of the original complaint, directly conflicts with the above decisions, including that of the Second District Court in *Handley* and *Colandrea*,.

The type of injuries being claimed by TANNER for loss of consortium is the same or similar type of injury, if not identical, as part of the damages he claimed in the original

and amended complaint prior to the first appeal. These are the same types of emotional damages he sought as a survivor under the original complaint for wrongful death. The loss of consortium claim in the Second Amended Complaint simply refines the precise nature of the pain and suffering damages alleged in the original complaint.

TANNER's loss of consortium claim involves the same parties and the same occurrence, i.e., the stillbirth. In Peters, the appellant as the personal representative of the decedent's estate, filed a complaint within the statute of limitations. After the statutory period had run, a claim for the minor son of the decadent was asserted. It was dismissed on the basis that the statute of limitations had already run before filing his claim. The Third District reversed that decision since the minor son's claim arose out of the same occurrence or conduct that was set forth or attempted to be set forth in the original pleading.

The Third District in *Peters* held that the minor son's claim was permitted, even though he was not a party when the original complaint was filed since his claim involved the same occurrence or conduct as set forth in the original pleading,

What is even more interesting is that the Third District pointed out the conflict in the Second District between the decisions in *Handley*, with that in Cox v. *Seaboard Coastline Railroad Company*, *360* So.2d 8 (Fla. 2d DCA 1978) cert. denied, 367 So.2d 1123 (Fla. 1979), where in *Cox* the amendment to the pleadings asserted the minor's own personal injuries in a suit for the wrongful death of his father and the court dismissed the claim stating that it did not relate back to the filing of the original complaint.

In *Dye*, the decedent's widow was joined in a wrongful death action after the statute of limitation period had run. The First District held that her claim related back to the date of the original complaint.

The Statute of Limitations should not be applied against James Tanner for asserting his derivative claim for loss of consortium for the same reasons that it did not apply in the case of *Rubenstein* v. *Burleigh House,* Inc., 305 So.2d 311 (Fla. 3rd DCA 1974), where the court held that the defendant was not prejudiced by the amendment adding a proper class representative even though it may have been beyond the running of the Statute of Limitations, because the defendant knew from the filing of the original complaint who the proper parties were and the extent of the claim that was being asserted.

The purpose of the statute of limitations was addressed by Justice Holmes in New York Central and *H.R.R.* Co. *v.* Kinney, 260 U.S. 340, 43 S.Ct. 122, 67 L.Ed. 294 (1922), who said:

> [W]hen a defendant had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied.

As cited in *Okeelanta Corporation v. Bygrave*, 656 So.2d 1316 (Fla.4th DCA 1995).

The reasoning that the statute of limitations did not apply in *Kinney* nor *Rubenstein* nor *Okeelanta* are the same reasons that it should not apply in this case. The Appellees had notice from the beginning that the TANNERs were setting up and trying to enforce a claim against them because of the specified conduct of medical malpractice in the delivery

of their child. The first complaints alleged wrongful death and negligence, all concerning the destruction of the fetus as a result of the breach of the standard of care by Appellees.

In the instant action, the Second District is clearly wrong in holding that TANNER's claim for loss of consortium did not relate back to the filing of the original complaint.

Since the statute is tolled upon filing the original complaint and the amendment involves the same conduct, the claim should be held to relate back to the original complaint,

II. A FATHER DOES HAVE A CAUSE OF ACTION EQUAL TO THE MOTHERS FOR DAMAGES RESULTING FROM A STILLBIRTH.

Tanner urges this court to hold that the fetus is the living tissue of both father and mother. If so, then its destruction is physical injury to the parents, thus the impact rule is not involved.

By holding that the father has no cause of action for a stillbirth, a direct conflict exists with the following cases which hold that a mother and father each have the same rights in their child: *Wilkie v.* Roberts, 109 So. 225 (1926); *Yordon v.* Savage, 279 So.2d 844 (Fla. 1973) and *Hoffman v.* Jones, 280 So.2d 431 (Fla. 1973),

TANNER's claim for the destruction of the fetus does duplicate his wife's claim. It is based upon the unrefuted scientific knowledge that the fetus is the product of both mother and father. In the opinion below, the Second District relied upon its decision in *McGeehan v.* Parke-Davis, 573 So.2d 376, 377 (Fla. 2d DCA), reviewed denied, 583 So.2d 1036 (Fla. 1991), by stating that the loss of the fetus is a bodily injury to the woman whose

body suffered the loss. The court concluded that since TANNER cannot argue that the fetus was part of his body, he has no loss. However, is the fetus part of the woman's body or is it living tissue of the mother and father, temporarily occupying the mother's womb? The latter is more accurate.

Since the fetus is a living organism, much like a leg or finger (only because this court declines without legislative action to recognize the fetus as a "person" under the Wrongful Death Act), then the destruction of this living tissue gives rise to a cause of action for damages as recognized in *McGeehan, Singleton v. Ranz*, 534 So.2d 847 (Fla. 5th DCA 1988), review denied 542 So.2d 1334 (Fla. 1989), *Bombalier v. Lifemark Hospital of Florida*, 661 So.2d 849, 853 (Fla. 3rd DCA 1995) and *Hilsman v. Winn-Dixie Stores. Inc.*, 639 So.2d 115 (Fla. 4th DCA 1994). However, this cause of action should not be defined as only a bodily injury to the mother as if the mother had lost a finger or a leg. It should be recognized as unique living tissue which is the product of both the mother and the father, who, upon its destruction, have equal legally defined rights of recovery. In *In Rer T.W.*,551 So.2d 1186 (Fla. 1989), this court held that after the first trimester, i.e., after the fetus is no longer considered a "highly specialized set of cells that is entirely dependent upon the mother for sustenance," the fetus becomes viable, "capable of meaningful life outside the womb," and the state "may protect its interest in the potentiality of life." At 1194.

If the state has an interest once viability is reached, then for the purposes of the issues in this case, the father should likewise have a protected interest in the event of the stillbirth of his viable fetus,

It is certain that the Appellees, the physicians and hospital, will argue that the living tissue cause of action is a thinly disguised wrongful death claim. That is absurd! Limiting the stillbirth claim for damages associated with the loss of a body part, i.e., emotional, greatly diminishes the scope of recoverable damages. This unequal treatment of mother and father unconstitutionally deprives the father of entitlement to recover the loss of his rights in his living tissue. This court should hold 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.

III. THIS COURT SHOULD AFFIRM THE CERTIFIED QUESTION AND HOLD THAT THE IMPACT RULE DOES NOT BAR A CLAIM FOR "NEGLIGENT STILLBIRTH."

The Second District certified the following question to this court:

> 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?

This question should be answered in the affirmative.

If the question is answered in the affirmative then Argument No. II in this case would be moot since it would necessarily be encompassed in the tort known as "negligent stillbirth."

For the same reason espoused by the Second District below, this court should affirm that both TANNERs have a cause of action for negligent stillbirth. For example, both parents can recover emotional pain and suffering damages for negligence in losing the body of the stillborn baby. *Correa* v. *Maimonides Medical* Center, Case No. 15-543/92, N.Y. Sup.Ct., Kings Co., June 5, 1995.)

The common law changes to vindicate fundamental rights. The court is not bound by the failure of the legislature to act. U.S. *v. Dempsey*, 635 So.2d 961 (Fla. 1994), citing with approval, *Zorzos v. Rosens*, 467 So.2d 305 (Fla. 1985). If both parents can recover for loss of companionship and society when a child is severely injured, both parents should recover for negligent stillbirth. U.S. *v. Dempsey*. The common law holds that a child is the father's economic asset. *Wilkie v.* Roberts, 109 So. 225 (1926). This was later amended to include the mother having the same rights as the father. *Yordon v.* Savage, 279 So.2d 644 (Fla. 1973) and *Hoffman v. Jones,* 280 So.2d 431 (Fla. 1973). Therefore, when the mother and father experience the same loss, they should each be entitled to their respective damages.

> We conclude that the medical malpractice causing an infant stillbirth constitutes a tort against the parents, entailing the direct infliction of injury, their emotional distress and mental suffering for which they are entitled to recover compensatory damages.. .
>
> Medical malpractice causing a stillbirth results in infliction of a direct injury to the mother, as well as to her unborn child. Even without any permanent physical harm, the mother suffered severe and genuine injuries in the form of emotional distress and mental anguish occasioned by her baby's stillbirth. This suffering is experienced, also, by the father of the infant. Thus, in a case such as this, the injury suffered by the mother and the father on the stillbirth of their eagerly expected first child is palpable and predictable.

Giardina v. Bennett, 545 A.2d 139, 139-40 (N. J. 1988).

The Supreme Court in *Giardina* was "satisfied that our common law has evolved to a point that would recognize a valid cause of action for the emotional injuries suffered by parents in this kind of case." *545* A.2d at 142. *Accord Carey v. Lovett*, *622* A.2d 1279

(N.J. 1994). See also, *Abdallah* v. *Callender*, 1 F.2d 141 (3rd Cir. 1993), (where a father has a claim for severe emotional and mental distress as a result of a stillbirth); *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85 (N.C. 1990); *Moline v. Kaiser* Found. *Hosps.*, 616 P.2d 813 (Cal. 1980); and Sesma *v. Cueto*, 181 Cal.Rptr. 12 (Cal. Ct.App. 1982).

As the Second District below acknowledged, the only impediment to recognizing a cause of action for the negligent stillbirth in Florida is the impact rule. As in most other jurisdictions, it should be abolished in Florida.

This court has carved out several exceptions to this rule. In *Champion v. Gray*, 478 So.2d 17, 18 (Fla. 1985), this court recognized that there is a cause of action for negligent infliction of emotional distress under limited circumstances when there is "death or significant discernible physical injury when caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person."

The case more directly on point is this courts decision in *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992), where this court recognized the tort of "wrongful birth."

This court explains in *Kush*, as it should also in this case, why the impact rule should not apply to a wrongful birth case:

> ...The impact doctrine is also generally inapplicable to recognized torts in which damages often are predominately emotional, such as defamation or invasion of privacy. Restatement (Second) of Torts, §§569, 570, 652H. cmt. b (1977). This conclusion is entirely consistent with Florida Law, For example, it is well settled that mental suffering constitutes recoverable damages in cases of negligent defamation, e.g.,

> *Miami Herald Publishing Co. v. Brown*, 66 So.2d 679, 681 (Fla. 1953), or invasion of privacy. See *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944). Accord Restatement (Second) of Torts §§ 569, 570, 652H, cmt. b (1977). If emotional damages are ascertainable in these contexts, then they also are ascertainable here.
>
> There can be little doubt that emotional injury is more likely to occur when negligent medical advice leads parents to give birth to a severely impaired child than if someone wrongfully calls them liars, accuses them of unchastity, or subjects them to any other similar defamation. A defamation may have little effect, may not be believed, might be ignored, or could be reversed by trial publicity. But the fact of a child's serious congenital deformity may have a profound effect, cannot be ignored, and at least in this case is irreversible. Indeed, these parents went to considerable lengths to avoid the precise injury they now have suffered. We conclude that public policy requires that the impact doctrine not be applied within the context of wrongful birth claims. Accordingly, in this respect the result reached by the district court is affirmed.

616 So.2d at 422-23 (footnotes omitted).

Logic and common sense would dictate that emotional damages sustained in "wrongful birth" cannot be distinguished from those suffered in "negligent stillbirth." While a wrongful birth claim would have substantial economic damages, the negligent stillbirth claim also has economic damages associated with the emotional damages, i.e., the economic damages that Mr. and Mrs. Tanner suffered for funeral expenses.

The Second District stated that based upon *Singleton v. Ranz*, 534 so.2d 847 (Fla. 5th DCA 1988) and *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992), one would reasonably be led to conclude that Florida is ripe for the recognition of the tort of negligent stillbirth even though the only damages sustained are emotional.

> If the mother is permitted to make such a claim, then logic and reason tells us that the father who has sustained identical

> damages from the same negligent act should not be precluded from recovery by the impact rule. The same reliability of emotional damages as described in *Kush* could appear to be present on behalf of both parents, in a case of "negligent stillbirth," assuming a close relationship of the father to the mother and the unborn child.

(Appendix A, p. 11).

The Second District was concerned with this court's recent decision concerning negligent diagnosis of HIV, *R.J. v. Humana Florida. Inc.,* 652 So.2d 360 (Fla. 1995) with the rational in *Kush v. Lloyd.* The Second District expressed that TANNER's claim for "negligent stillbirth" "falls somewhere between the rational of *Kush,* the wrongful birth case and *R.J.,* the negligent HIV misdiagnosis case." (Appendix A, p. 12).

"Like the birth of a deformed child, a stillbirth naturally results in an emotional trauma to the parent; thus, the impact rule's purpose preventing fraudulent claims should be satisfied." *(Tanner IV: Tanner v. Hartog,* , ____ So.2d 20 F.L.W. D1515 (Fla. 2d DCA - June 26, 1996), Appendix A, p. 13.

The Second District correctly pointed out that the TANNER case of negligent stillbirth can be distinguished from *R.J.* "in that a negligent stillbirth results from irreparable trauma and thus has some guarantee of genuineness."

Since the damages are irreparable in the negligent stillbirth case and therefore there is some guarantee of genuineness, and based upon the similar decisions in other jurisdictions, this court should answer in the affirmative the certified question and hold that Florida does recognize a cause of action for negligent stillbirth as the court recognized the cause of action for wrongful birth in *Kush.*

CONCLUSION

Based on the foregoing arguments, TANNER requests reversal of the lower opinion by this court holding that

(1) The loss of consortium claim relates back to the filing of the original complaint;

(2) A father has equal rights to that of the mother for a stillbirth resulting from the negligent act of another; **and**

(3) The impact rule does not bar the parents' claim for negligent stillbirth.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 6th day of September, 1996, to THOMAS M . HOELER and JERRY L. NEWMAN&Q., (DuBoy & H&D) Post Office Box 2378, Tampa, Florida 33601; KEVIN C. KNOWLTON&Q. (Lakeland Regional), Post Office Box 24628, Lakeland, Florida 33802-4628

KENNAN

Appendix

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAMES R. TANNER,

Appellant,

v.

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

Appellees.

Case No. 95-00949

Opinion filed June 26, 1996.

Appeal from the Circuit Court for Polk County; Oliver L. Green, Jr., Judge.

Kennan George Dandar of Dandar & Dandar, P.A., Tampa, for Appellant.

Philip D. Parrish of Stephens, Lynn, Klein & McNicholas, P.A., Miami, for Appellees Ellie M. Hartog, M.D., and Hartog and Duboy, P.A.

Thomas M. Hoeler and Jerry L. Newman of Shear, Newman, Hahn & Rosenkranz, P.A., Tampa, for Appellees Alberto Duboy, M.D., and Hartog and Duboy, P.A.

Kevin C. Knowlton and Stephen R. Senn of Peterson, Myers, Craig, Crews, Brandon, & Puterbaugh, P.A., Lakeland, for Appellee Lakeland Regional Medical Center, Inc.

PATTERSON, Judge.

This litigation ensued when Phyllis Tanner experienced a stillbirth during her forty-first week of pregnancy. Her husband, James Tanner, appeals from the dismissal of his claims with prejudice for the destruction of his living tissue, negligent stillbirth, and loss of consortium. We affirm the trial court, but certify to the Florida Supreme Court the question of whether Florida law allows a cause of action for emotional damages resulting from a stillbirth caused by the negligent act of another.

On August 1, 1990, the Tanners filed a medical malpractice action against the physicians and hospital involved in the stillbirth. Phyllis Tanner sought damages individually. James Tanner sought damages individually and as the personal representative of the child's estate. In their complaint, they alleged: "Not until December 29, 1989, did the Plaintiffs know or should have known that the actions and inactions of the Defendants fell below the standard of care recognized in the community.11 All defendants moved to dismiss, asserting that the medical malpractice statute of limitations had run on the face of

the complaint. The trial court granted the motions with prejudice. This court affirmed in Tanner v. Hartog, 593 So. 2d 249 (Fla. 2d DCA 1992) (Patterson, J., dissenting with opinion) (Tanner I).

In Tanner v. Hartog, 618 So. 2d 177 (Fla. 1993) (Tanner II), the supreme court quashed Tanner I with respect to when the statute of limitation began to run and interpreted 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 (footnote omitted). The supreme court remanded to this court for a determination as to whether the complaint stated a cause of action under the law of this state.

We addressed that issue in Tanner v. Hartog, 630 So. 2d 1136 (Fla. 2d DCA 1993) (Tanner III), review denied, 632 So. 2d 1028 (Fla. 1994), and held:

1. The complaint stated a cause of action on behalf of Phyllis Tanner, citing Singleton v. Ranz, 534 So. 2d 847 (Fla. 5th DCA 1988), review denied, 542 So. 2d 1334 (Fla. 1989).
2. The complaint did not state a recognized cause of action for the wrongful death of the fetus, citing Stern v. Miller, 348 So. 2d 303 (Fla. 1977).

We then remanded to the trial court for further proceedings.

On May 26, 1994, the Tanners filed a second amended complaint in four counts. In count I, Phyllis Tanner asserted a claim for negligent stillbirth and the destruction of her living tissue. In count II, James Tanner attempted to duplicate Phyllis' claim, asserting that the fetus was also his living tissue. Counts III and IV were respective loss of consortium claims. On motion of the defendants, the trial court dismissed that complaint on September 26, 1994. In the order of dismissal, the trial court specifically rejected the concept that the fetus was James Tanner's living tissue.

On October 6, 1994, the Tanners filed a third amended complaint in five counts. Counts I and II restated Phyllis' claim and simply separated the doctors from the hospital in separate counts. In count III, James Tanner attempted to assert a claim for mentai 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. Counts IV and V restated the respective loss of consortium claims. All defendants moved to dismiss. On February 22, 1995, the trial court:

- dismissed count I (Phyllis) without prejudice;
- denied the motion as to count II (Phyllis);
- dismissed count III (James) with prejudice, citing Stern v. Miller, 348 So. 2d 303 (Fla. 1977);

- dismissed count IV (consortium claim of Phyllis) with prejudice as being derivative of count III; and
- dismissed count V (consortium claim of James) with prejudice 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.

James Tanner (Tanner) appeals from both the orders of September 26, 1994, and February 22, 1995. Phyllis Tanner is not a party to this appeal.

TANNER'S LOSS OF CONSORTIUM CLAIM

Tanner first pleaded his loss of consortium claim in the second amended complaint. As a new and separate cause of action, it does not relate back to the date of the filing of the original complaint. See West Volusia Hosp. Auth. v. Jones, 668 so. 2d 635 (Fla. 5th DCA 1996); Daniels v. Weiss, 385 So. 2d 661 (Fla. 3d DCA 1980). Applying the test set out in Tanner II for determining when the medical malpractice statute of limitations is triggered, Tanner brought his loss of consortium claim after the statute had run. We therefore affirm the dismissal of that claim with prejudice.

TANNER'S "LIVING TISSUE OF HIS BODY" CLAIM

In the second amended complaint, Tanner sought damages for mental pain and anguish, contending that the fetus was the living tissue of his body. In so doing, he attempts to emulate Phyllis Tanner's cause of action which we approved in Tanner III.

The court in Singleton v. Ranz, 534 So. 2d 847, 847-48 (Fla. 5th DCA 1988), described that cause of action:

> 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 (s 768.19, Fla. Stat); therefore it is living tissue of the body 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.

(Footnotes omitted.) Tanner argues that, as the biological father of the fetus, it is his living tissue as well as that of the mother. On that assumption, he concludes that he has an equal right of recovery under Singleton. It could be argued that, having pleaded these facts, dismissal was improper and the question of whether the fetus is his living tissue would be subject to expert testimony from the scientific community. In our view, he has misconstrued the nature of the tort upon which he seeks recovery. 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, 3'77 (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.

TANNER'S CLAIM FOR "NEGLIGENT STILLBIRTH"

In count III of the third amended complaint, Tanner attempts 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 of his child.

Several jurisdictions, which like Florida do not recognize a fetus as a "person" for the purpose of the Wrongful Death Act, recognize a cause of action on behalf of both parents for medical malpractice which causes a stillbirth. In Giardina v. Bennett, 545 A.2d 139 (N.J. 1988), Mrs. Bennett went into labor when she was three weeks past her delivery date, was admitted to the hospital, and her baby was stillborn. She and her husband sued her physician, contending that the stillbirth was the result of his negligent care and treatment during her pregnancy. In recognizing their cause of action for emotional damages, the Supreme Court of New Jeraey said:

> We conclude that the medical malpractice causing an infant stillbirth constitutes a tort against the parents, entailing the direct infliction of injury, their emotional distress and mental suffering, for which they are entitled to recover compensatory damages.
>
> . . .

> Medical malpractice causing a stillbirth results in infliction of a direct injury to the mother as well as to her unborn child. Even without any permanent physical harm, the mother suffers severe **and** genuine injuries in the form of emotional distress and mental anguish occasioned by her baby's stillbirth. This suffering is experienced, also, by the father of the infant. Thus, in a case such as this, the injury suffered by the mother **and** the father on the stillbirth of their eagerly expected first child is palpable and predictable.

545 A.2d at 139-40. The Giardina court was "satisfied that our common law has evolved to a point that would recognize a valid cause of action for the emotional injuries suffered by parents in this kind of a case." 545 A.2d at 142. Accord Carey v. Lovett, 622 A.2d 1279 (N.J. 1994). See also Abdallah v. Callender, 1 F.3d 141 (3d Cir. 1993) (father has claim for severe emotional and mental distress as a result of stillbirth); Johnson v. Ruark Obstetrics & Gynecology Assocs., 395 S.E.2d 85 (N.C. 1990); Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980); Sesma v. Cueto, 181 Cal. Rptr. 12 (Cal. Ct. App. 1982).

The impediment to recognizing a cause of action for negligent stillbirth in this jurisdiction is the impact rule. The impact rule requires 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." 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). Our

courts, however, have carved out several exceptions to the rule. In Champion v. Gray, 478 So. 2d 17, 18 (Fla. 1985), the supreme court recognized a cause of action for negligent infliction of emotional distress. under limited circumstances when there is "death or significant discernible physical injury, when caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person."

Later, in Kush v, Llovd, 616 So. 2d 415 (Fla. 1992), the court recognized the tort of "wrongful birth." In Kush, Mrs. Lloyd gave birth to a deformed child in 1976. She and her husband were referred for genetic testing. They were then prematurely advised that the "impairment was an accident of nature, not a genetic defect." 616 So. 2d at 417. In 1985, Mrs. Lloyd gave birth to another child suffering from the same deformities as the first child. Further tests revealed that both children suffered from the same genetic defect which they inherited from the mother. The Lloyds brought an action in part for "wrongful birth" which sought damages for the prospective costs of care of their deformed child and their individual emotional distress. In approving both classes of damages, the court explained why the impact rule should not apply:

> [W]e are not certain that the impact doctrine ever was intended to be applied to a tort such as wrongful birth. . , ,

> Similarly, the impact doctrine also generally is inapplicable to recognized torts in which damages often are predominately emotional, such as defamation or invasion of privacy. Restatement (Second) of Torts §§ 569, 570, 652H cmt. b (1977). This conclusion is entirely consistent with existing Florida law. For example, it is well settled that mental suffering constitutes recoverable damages in cases of negligent defamation, e.g., Miami Herald Publishing Co. v. Brown, 66 So.2d 679, 681 (Fla.1953), or invasion of privacy. See Cason v. Baskin, 155 Fla. 198, 20 So.2d 243 (1944). Accord Restatement (Second) of Torts §§ 569, 570, 6528, cmt. b (1977). If emotional damages are ascertainable in these contexts, then they also are ascertainable here.
>
> There can be little doubt that emotional injury is more likely to occur when negligent medical advice leads parents to give birth to a severely impaired child than if someone wrongfully calls them liars, accuses them of unchastity, or subjects them to any other similar defamation. A defamation may have little effect, may not be believed, might be ignored, or could be reversed by trial publicity, But the fact of a child's serious congenital deformity may have a profound effect, cannot be ignored, and at least in this case is irreversible. Indeed, these parents went to considerable lengths to avoid the precise injury they now have suffered. We conclude that public policy requires that the impact doctrine not be applied within the context of wrongful birth claims. Accordingly, in this respect 'the result reached by the district court is affirmed.

616 So. 2d at 422-23 (footnotes omitted).

While not an explicit exception, the tort recognized in Singleton v. Ranz, 534 So. 2d 847 (Fla. 5th DCA 1988), is a clever mechanism to satisfy the impact rule using the concept of

damage to the living tissue of the mother. A reading of Singleton and Kush together could lead us to conclude that our jurisdiction is ripe for the recognition of the tort of "negligent stillbirth" when the only damage sustained is emotional. If a mother is permitted to make such a claim, then logic and reason tell us that a father who has sustained identical damages from the same negligent act should not be precluded from recovery by the impact rule. The same reliability of emotional damage as described in Kush could appear to be present, on behalf of both parents, in a case of "negligent stillbirth," assuming a close relationship of the father to the mother and the unborn child.

However, we hesitate to reach such a conclusion because of the more recent decision in R.J. v. Humana of Florida, Inc., 652 So. 2d 360 (Fla. 1995). R.J.'s complaint alleged that in 1989 he obtained a blood test through Humana which, he was told, indicated that he was HIV positive. He was then treated for that condition until a subsequent blood test nineteen months later revealed that he was not infected with the HIV virus. He contended that his belief that he had the HIV virus caused "him to suffer bodily injury including hypertension, pain and suffering, mental anguish, loss of capacity for the enjoyment of life, and the reasonable expense of medical care and attention." 652 So. 2d at 362. The trial court dismissed the action with prejudice based on the impact rule and the Fifth District Court of Appeal affirmed and certified the question to the supreme court. In

affirming, the court explained why the impact rule precluded recovery :

> We reaffirm today our conclusion that the impact rule continues to serve its purpose of assuring the validity of claims for emotional or psychic damages, and find that the impact rule should remain part of the law of this state. Consequently, we reject R.J.'s request that we abolish the impact rule. We also reject R.J.'s argument that, as a matter of public policy, this Court should create a limited exception to the impact rule for a negligent HIV diagnosis.
>
> without question, allowing compensation for emotional distress in the absence of a physical injury under the circumstances of this case would have a substantial impact 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 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.

652 So. 2d at 363-64. In our view, Tanner's claim for "negligent stillbirth," an area our highest court has yet to address, falls somewhere between the rationale of Kush, the wrongful birth case, and R.J., the negligent HIV misdiagnosis case.

In Kush, the parents had ascertainable damages for the child's extraordinary medical expenses. The court characterized

the emotional damages as "an additional parasitic consequence" to the freestanding tort of wrongful birth. 616 So. 2d at 422. Here, Tanner has no damages such as the ascertainable medical expenses in Kush. Yet, in Kush, the court noted that the parents' emotional injuries arising from the wrongful birth of a deformed child are natural and that the injury is far greater than in other torts having primarily emotional damages, such as defamation and invasion of privacy, to which the impact rule does not apply. Like the birth of a deformed child, a stillbirth naturally results in emotional trauma to the parents; thus, the impact rule's purpose of preventing fraudulent claims should be satisfied. In R.J., the court was concerned that an exception to the impact rule for negligent medical misdiagnosis would make it difficult to limit speculative claims. This case can be distinguished from R.J. in that a negligent stillbirth results in irreparable trauma and thus has some guarantee of genuineness.

However, in an abundance of caution, we affirm the dismissal of count III of the third amended complaint and certify to the supreme court as of great public importance the following question:

> 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?**

THREADGILL, C.J., and **WHATLEY, J., Concur.**