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

DCAAPI'EALNO.9500949
CASE NO. 90-2030

JAMES Ii. TANNER
Appellant

verses

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

Appellees

Appeal from the Second District Court of Appeal

REPLY BRIEF OF APPELLANT

KENNAN GEORGE DANDAR, ESQ.
DANDAR & DANDAR, P.A..
Post Office Box 24597
Tampa, Florida 33623-4597
813-289-3858
Florida Bar No. 289698

Attorney for
James R. Tanner

TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

ARGUMENT

I. NEGLIGENT STILLBIRTH DOES NOT REQUIRE A DEPARTURE FROM THE COMMON LAW NOR AN EXPANSION OF THE DEFINITION OF "PERSON" UNDER THE WRONGFUL DEATH STATUTE.

The Appellees have spent an inordinate amount of argument in their Answer Briefs to talk about the legislative intent in precluding a claim under the Florida Wrongful Death Statute, Florida Statutes, §768.19, to include a viable fetus, as well as discussions of the common law in not permitting a death action for adults or children.

These arguments have no applicability to the issue involved in this case as to whether or not a father and mother can recover for a negligent stillbirth.

Quite simply, the argument is whether a person is entitled to recover for the permanent loss of that person's bodily tissue. There is simply no claim for wrongful death in this action.

Article I, §21 of the Florida Constitution guarantees access to a potential remedy for wrongs. Kinney *System, Inc. v. Continental Insurance Co., 674* So.2d 86, 93 (Fla. 1996). A stillbirth is a permanent and definite loss of living tissue, as any other personal injury, it is governed by tort law and guaranteed by Article I, §21 of the Florida Constitution.

The fetus is undeniably the living tissue of both the mother and father. Although it is unique living tissue, it remains simply living tissue. Therefore, there is absolutely no claim for wrongful death and consequently, there can never be any award for wrongful death damages. The parents are left to make a claim for their own pain and suffering as a result of the loss of their own living tissue

Therefore, contrary to the Appellees' contentions, there is not any need to expand or abrogate the common law nor is there any need to change the precedent of Stern v. Miller, 348 So.2d 303 (Fla. 1977), which holds that the death of the fetus does not entitle one to claim damages under Florida's Wrongful Death Statute.

What we are left with is whether the husband's and wife's loss of this living tissue, as a result of negligence, is a tort much like losing any other living tissue of the body, such as a finger, toe or kidney. This then establishes a physical injury out of which flows pain and suffering and emotional damages.

The same rationale that was used by this court to render its decision in Champion v. Gray, 358 So.2d 17 (Fla. 1985) and more particularly in Kush v. Lloyd, 616 So.2d 415 (Fla. 1992) should govern this court's decision in answering the certified question in the affirmative.

Just as there was no impact to the parents in Kush, the parents were still entitled to recover their pain and suffering damage for the wrongful birth of their deformed child. The negligence in that case occurred prior and during pregnancy in the physician's failure to properly inform the parents of the probability that the child would be deformed as a result of a genetic imbalance of the mother. The damages allotted to the parents for the pain and suffering were not the pain and suffering damages to be experienced by the child as it ages, but the emotional damage of the parents.

The Appellees recognize that according to this court's decision Kush, at 423, footnote 5, the wrongful birth is a tort directly against the mother and father. Therefore,

a negligent stillbirth as a result of the healthcare provider's negligence is a tort directly against the mother and father.

The argument raised in the Amicus Brief on page 13 that the court should answer the certified question in the negative because of the woman's abortion rights has no applicability in this instance. We are not concerned with an abortion and the woman's right to choose. What we are concerned with are the damages that naturally flow to both parents when the fetus dies as a result of the negligence by a healthcare provider. To make an analogy to abortion rights is the same futile effort that those who wish to have the viable fetus considered a person under the Wrongful Death Statute argue in trying to compare the liability flowing from the willful killing of a fetus as manslaughter under Florida Statute, 5782.09 (1971). Although the argument is logical that if someone can be charged for manslaughter in killing a fetus under Florida Statute, $782.09, then healthcare providers should also be liable for the death of a fetus as a result of malpractice under Florida's Wrongful Death Statute, this court harmonized both statutes" Since both statutes have been declared by this court to be harmonious, then it is likewise illogical to argue that a woman's right to choose to have an abortion forecloses the parent's claim for damages naturally flowing from negligence resulting in a stillbirth.

The Appellees also argue endlessly that this court should deny relief in this instance in order that the legislature may act. The court refused to do that in *Champion v. Gray*, 478 So.2d 17 (1985), and *Kush* v. *Lloyd*, 616 So.2d 415 (Fla. 1992), and should likewise also summarily deny the Appellees' request in this instance.

The Appellees also claim that if parents can claim for a negligently induced stillbirth, then this will create another medical malpractice crisis. These are all issues never addressed below and there is no evidence in the record to even suggest that these issues remain viable in today's society.

What this court can readily ascertain is that if this court announces there is no cause of action for a negligently induced stillbirth, then a healthcare provider, who is guilty of negligence that may cause stillbirth, will have a very real motive to do nothing to save the fetus rather than take emergency action, For if the child is born alive with medical complications resulting from the negligence, the healthcare provide is then subject to liability, but if the healthcare provider simply waits and permits the fetus to die in the womb, then the healthcare provider can walk away without any responsibility.

Appellee, DUBOY, raises an interesting issue for the first time, i.e., that there is no patient/physician relationship and therefore, JAMES TANNER, as the father, cannot recover against this physician. If indeed the fetus is the living tissue of JAMES TANNER, and the physician, DUBOY, was treating this living tissue, then of course this argument is obviously meritless. Since this issue was never raised below, this argument has also been waived. Appellee, DUBOY, urges the court not to use as precedent this court's decision of *Pate* v. *Threlkel*, 661 So.2d 278 (Fla. 1995), which held that the physician's duty to warn not only flowed to his patient, the mother, but also to the patient's child, despite the lack of privity to the children who suffered from the genetic defect that the mother carried. As this court held in *Pate* not only does the physician's duty flow to the patient in privity, but

the duty is also recognized to flow to identified third party beneficiaries, therefore there is no need for privity. (At 281.)

Therefore, since the fetus is the living tissue of both mother and father, the physician's duty flows to both of them, i.e., the duty to maintain the well-being of the fetus.

II. THE HUSBAND'S LOSS OF CONSORTIUM CLAIM IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

In order for the Appellees to present a position that forecloses JAMES TANNER's loss of consortium claim due to the statue of limitations the Appellees totally ignore the fact that JAMES TANNER was an original party to the timely filed original complaint. Once he filed his claim for damages in the original complaint, the statute of limitations was tolled as to all causes of action that JAMES TANNER had against the negligent healthcare providers. Peters v. *Mitchell*, 423 So.2d 983 (Fla. 3rd DCA 1982); *Dye* v. *Houston*, 421 So.2d 701 (Fla. 1 st DCA 1982) and *Hanley* v. *Anclote* Manner *Foundation*, 253 So.2d 501 (Fla. 2d DCA 1971), cert. denied 262 So.2d 445 (1972). All Appellees fail to distinguish these cases from the decision in the instant matter.

Further, the Appellees ignore the decision of the Second District Court in *Colandrea* v *King*, 661 So.2d 1250 (Fla. 2d DCA 1995) which is indeed precedent that his loss of consortium claim, if this court holds was not alleged in the original complaint as part of his general claim for damages, related back to the filing of the original complaint since it arises out of the same conduct set forth or attempted to be set forth in the original pleading. Fla.R.Civ.Proc., Rule 1.190(c).

Appellees also fail to distinguish the cases of *New York Central and H.R.R. Co. v. Kinney,* 260 U.S. 340, 43 S.Ct. 122, 67 L.Ed. *194 (1922); Rubenstein v. Burleigh House, Inc.*, 305 So.2d 311 (Fla. 3rd DCA 1974) and *Okeelanta Corporation v. Bygrave*, 656 So.2d 1316 (Fla. 4th DCA 1995), all of which show that the Appellees' statute of limitations argument is without merit.

CONCLUSION

In conclusion, Appellant, JAMES R. TANNER, requests that the certified question be answered in the affirmative and that the court rule that his loss of consortium claim be not barred by the statute of limitations

Respectfully submitted,

KENNAN G. DANDAR, ESQ.
DANDAR & DANDAR, P.A.
1009 North O'Brien Street
Post Office Box 24597
Tampa, Florida 33623-4597
813-289-3858/FAX: 813-287-0895
Florida Bar No. 289698
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 25th day of November, 1996, to THOMAS M . HOELER and JERRY L. NEWMAN, ESQ., (DuBoy & H&D) Post Office Box 2378, Tampa, Florida 33601; KEVIN C. KNOWLTON, ESQ. (Lakeland Regional), Post Office Box 24628, Lakeland, Florida 33802-4628

KENNAN G. DANDAR, ESQ.