IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Monique Thomas, individually and as special administrator of the estate of Baby Doe; Christopher Mitchell, individually and as special administrator of the estate of Baby Doe,	)	
Plaintiffs,	)	No. 18 L 1059
v.	)	
Robert Kagan, M.D.; Edgard Khoury, M.D.; and Alexian Brothers Medical Center,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Section 2.2 of the Wrongful Death Act bars a cause of action for fetal death resulting from a lawful abortion conducted with requisite consent. The same section does not bar a cause of action for fetal death if the defendant knew or should have known of the pregnancy. The section does not indicate whether a cause of action for fetal death is barred if the defendant knew or should have known of the pregnancy and the death resulted from a lawful abortion conducted with requisite consent. To permit a cause of action in that scenario would prevent an unjust result; consequently, the defendants' motion to dismiss must be denied. Yet the seeming internal inconsistency of section 2.2 prompts this court to certify a question for interlocutory review.

Facts

On March 18, 2016, Alexian Brothers Medical Center admitted Monique Thomas for an elective bilateral mammoplasty reduction and a belt lipectomy. That morning, Monique's urine and human chorionic gonadotropin (hCG) blood samples tested

positive for a pregnancy. A subsequent ultrasound that immediately followed did not definitively indicate an intra-uterine pregnancy, but was consistent with one of less than four weeks. Monique was told not to worry and was assured that she was not pregnant.

The surgery proceeded on March 18, performed by Dr. Robert Kagan, with Dr. Edgard Khoury providing the general anesthesia. Later the same day, doctors in the emergency room evaluated Monique for pain secondary to an infection. At that time, doctors confirmed Monique's pregnancy.

Monique consulted with her physician who told her that the anesthesia administered during surgery and the medications administered during and after it would result in the fetus not surviving to term. The physician recommended that Monique terminate her pregnancy. Monique accepted the recommendation and consented to and underwent a lawful abortion of the fetus.

On October 25, 2018, Monique and Christopher Mitchell, the fetus's father, filed a three-count, first-amended complaint against the defendants.[1] Count one presents Monique's medical malpractice cause of action against the defendants. She claims that Kagan and Khoury breached standards of care by: failing to review or consider the significance of the urine and blood tests and the ultrasound; prescribing antibiotics and analgesics; informing Monique that she was not pregnant and proceeding with an elective surgery; and failing to refer Monique to an obstetrician to verify her pregnancy status before proceeding with the surgery.

Count two presents Monique and Christopher's claim under the Wrongful Death Act, *see* 740 ILCS 180/0.01 – 2.2, against the defendants for the death of Baby Doe. The count alleges that the defendants failed to treat Monique with reasonable care given the potential existence of Baby Doe. The count further alleges that

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[1] On October 11, 2018, this court granted the defendants' motions to dismiss with prejudice as to counts two and three of a previous complaint.

the defendants breached standards of care by proceeding with a surgery that they knew or should have known would injure or cause the death of Baby Doe. The defendants' conduct is alleged to have resulted in irreversible injury to Baby Doe that "ultimately caused" its death.

Count three is styled as a negligence claim on Christopher's behalf. He alleges that the defendants owed him a duty of care as the father of Baby Doe. He further claims that the defendants breached standards of care by proceeding with the surgery despite knowing of the potential existence of Baby Doe. Christopher claims his damages arise from the personal injuries to and eventual death of Baby Doe.

On August 14, 2018, Monique and Christopher voluntarily dismissed Alexian Brothers Medical Center; therefore, the case proceeded against Khoury and Kagan only. On December 3, 2018, Kagan filed a motion to dismiss the first-amended complaint and for sanctions. On December 17, 2018, Khoury filed a motion to join Kagan's motion, which this court granted.

The defendants' motion argues that counts two and three and paragraph 19 of count one improperly seek recovery under the Wrongful Death Act since section 2.2 bars a cause of action for fetal death resulting from a lawful abortion conducted with requisite consent. *See* 740 ILCS 180/2.2. The defendants also seek sanctions against the plaintiffs pursuant to Illinois Supreme Court Rule 137 for re-pleading counts two and three and paragraph 19 of count one, which this court had previously dismissed with prejudice. *See* ftn. 1. The defendants also argue that the first-amended complaint fails to meet the minimum pleading requirements in a medical malpractice case. *See* 735 ILCS 5/2-622.

In response, Monique and Christopher argue that the first-amended complaint focuses not on Baby Doe's death, but on the injuries to it negligently inflicted by the defendants. According to Monique and Christopher, the Wrongful Death Act's prohibition

against causes of action for fetal death resulting from a lawful abortion conducted with requisite consent is inapplicable as the defendants' alleged malpractice proximately caused Baby Doe's injuries. According to Monique and Christopher, since Baby Doe's death was not caused by an abortion but was inevitable because of the defendants' injurious conduct, section 2.2 authorizes the filing of their first-amended complaint. *See* 740 ILCS 180/2.2.

This court scheduled a February 28, 2019 ruling on the defendants' motion, but chose not to for three reasons. First, Monique and Christopher's re-stated allegations and claims in their first-amended complaint and their arguments in response to the defendants' motion to dismiss made it plain that the locus of their case is not Baby Doe's death, but the injuries caused by the defendants' alleged malpractice that made inevitable the subsequent abortion. This court explained that this more nuanced argument raised a legitimate dispute as to the scope of section 2.2. As a result, this court vacated *nunc pro tunc* its October 11, 2018 order that had dismissed with prejudice counts two and three and paragraph 23 (now paragraph 19) of count one. This court denied the defendants' request for sanctions for the same reason.

Second, this court indicated that the plaintiffs needed to file a proper physician's report as required by the Code of Civil Procedure. The defendants had correctly pointed out that the plaintiffs' physician's report had failed to indicate that the physician practices or has practiced within the last six years in the same area of health care at issue in this case. *See* 735 ILCS 5/2-622(a)(1). The plaintiffs mooted that issue on April 2, 2019 by filing a sufficient amended physician's report.

Third, this court indicated that paragraphs two and three of section 2.2 appeared to conflict. This court explained that this dilemma had prompted a review the legislative history of section 2.2, which none of the parties had cited or relied on. As a result, this court supplied the relevant citations and requested that each party submit a supplemental brief addressing the section's

legislative history. On March 28, 2019, the parties filed their supplemental briefs.

Analysis

The focal dispute between the parties involves the statutory construction of section 2.2 of the Wrongful Death Act, particularly the interplay between paragraphs two and three. Section 2.2 is comprised of three paragraphs and states, in full:

> The state of gestation or development of a human being when an injury is caused, when an injury takes effect, or at death, shall not foreclose maintenance of any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default.
>
> There shall be no cause of action against a physician or a medical institution for the wrongful death of a fetus caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully given. Provided, however, that a cause of action is not prohibited where the fetus is live-born but subsequently dies.
>
> There shall be no cause of action against a physician or a medical institution for the wrongful death of a fetus based on the alleged misconduct of the physician or medical institution where the defendant did not know and, under the applicable standard of good medical care, had no medical reason to know of the pregnancy of the mother of the fetus.

740 ILCS 180/2.2.

To interpret a statute, a court is to rely on the rules of statutory construction, the cardinal rule of which is to "ascertain and effectuate the legislature's intent. . . ." *McElwain v. Illinois*

Sec'y of State, 2015 IL 117170, ¶ 12. The primary source from which to infer this intent is the statute's language. *See id.* "If the language of the statute is clear, the court should give effect to it and not look to extrinsic aids for construction." *Bogseth v. Emanuel*, 166 Ill. 2d 507, 513 (1995); *see also Bettis v. Marsaglia*, 2014 IL 117050, ¶ 13. It is also plain that a court may not, "depart from plain statutory language by reading into [a] statute exceptions, limitations, or conditions not expressed by the legislature." *McElwain*, 2015 IL 117170, ¶ 12. If, however, the statutory language makes an enactment's meaning unclear, the court may look beyond the language used and consider the purpose behind the law and the evils the law was designed to remedy. *See Bettis*, 2014 IL 117050, ¶ 13.

A statute is also to be viewed as a whole, construing words and phrases in light of other relevant statutory provisions. *See Chicago Teachers Union v. Board of Ed.*, 2012 IL 112566, ¶ 15 (citing cases). Words, clauses, and sentences are to be given a reasonable meaning and not rendered superfluous. *See id.* (citing cases). In construing a statute, a court may consider, "the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Id.* If the plain language contained in one statute or one portion of a statute conflicts with the plain language, a court must use other means to determine the legislature's intent. *See Moore v. Green*, 219 Ill. 2d 470, 479 (2006). In these instances, a court should attempt to construe the provisions together, *in pari materia*, if it is reasonable to do so, *see id.*, keeping in mind that a court is to presume that the legislature did not intend to create absurd, inconvenient, or unjust results. *See Price v. Phillip Morris, Inc.*, 2015 IL 117687, ¶ 30.

It is quite easy to conclude that the language of paragraph two of section 2.2 is plain and unambiguous. The paragraph bars causes of action under the Wrongful Death Act for fetal death resulting from a lawful abortion conducted with requisite consent. The paragraph contains no explicit exceptions and does not imply any others. In short, if paragraph two were the only provision

governing this dispute, the defendants' motion to dismiss would be granted.

The defendants argue this is the proper result and is mandated by the decision in *Light v. Proctor Community Hospital*, 182 Ill. App. 3d 563 (3d Dist. 1989). In that case, Light underwent a thyroid scan during which, or afterwards, she learned of her pregnancy. *See id.* at 564. The radiologist later recommended that Light terminate her pregnancy, which she did. *See id.* at 564-55. Light then sued the hospital and radiologist for failing to confirm her pregnancy before the scan and to warn her against having it given her status. *See id.* at 565. She later filed a motion seeking leave to file an amended complaint to bring a cause of action on behalf of her fetus for its wrongful death. *See id.* The circuit court denied that request and granted the defendants' motions to dismiss each of the plaintiff's Wrongful Death Act counts. *See id.*

On appeal, Light argued that the second paragraph of section 2.2 "was intended only to provide immunity to physicians and medical institutions who perform an abortion, as permitted by law; its intent was not to protect doctors or hospitals from negligent acts that lead to a wrongful death." *Id.* The court rejected Light's argument because the Wrongful Death Act is in derogation of the common law and must, therefore, be strictly construed. *See id.* Since the second paragraph's language was "certain and unambiguous, the only legitimate function of this court is to enforce the law as it is enacted by the legislature." *Id.* at 565-66.

The court then clarified that a cause of action for medical negligence cannot support a cause of action on behalf of a fetus under the Wrongful Death Act. *See id.* at 566. As the court explained:

> While the plaintiff may have received substandard medical care at the time that the thyroid scan was administered, the existence of her fetus was

> terminated as the result of her subsequent voluntarily consensual legal abortion. The consequence of the scanning procedure may have been a potential increase in risk to the well being of the fetus. The result of the abortion procedure was the actual termination of the plaintiff's pregnancy. Under the subject provision of the Wrongful Death Act, the unborn fetus may not maintain a separate cause of action against the same defendants and base it upon the same tortious acts which furnish the basis for the plaintiff's medical malpractice cause.

Id.

Light is useful by providing context to the application of paragraph two. *Light* does not, however, analyze paragraph three, and there is no indication that Light argued that portion of the statute in response to the defendants' motion to dismiss. Even if she had, it is doubtful the result would have changed. The reason is that Light learned of her pregnancy, "[i]n the course of or subsequent to the procedure. . . ." *Id.* at 564. As discussed below, that presents a distinct factual scenario to the one addressed by paragraph three.

In contrast to paragraph two, the language of paragraph three is more ambiguous in at least two ways. First, the paragraph does not mention abortion. Without that limitation, paragraph three is far broader than paragraph two by authorizing causes of action under the Wrongful Death Act for fetal death regardless of how the death occurred. Second, and at the same time, paragraph three is narrower than paragraph two. Paragraph three bars causes of action for fetal death if the defendant did not know or did not have reason to know of a pregnancy before the alleged malpractice occurred. That is a scenario distinct from that presented in *Light*. Further, one of the maxims of statutory construction, *expressio unius est exclusio alterius,* makes the implied converse also true. In other words, paragraph three authorizes causes of action for fetal death if the

defendant knew or had reason to know of a pregnancy before the alleged malpractice occurred. *See Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶ 17 (applying the principle).

With the differences between paragraphs two and three brought into relief, the conundrum they present is plain: whether paragraph three authorizes the plaintiffs' cause of action because, regardless of how Baby Doe died, the defendants' knew or should have known of its existence before Monique's operation, or whether paragraph two bars the plaintiffs' cause of action because Baby Doe's death resulted from a lawful abortion to which Monique consented. Since the answer is not found in section 2.2, it is incumbent to look for direction elsewhere. To that end, it is prudent to refer to the legislative history of section 2.2 and cases interpreting it.

One court has written that the purpose of section 2.2, "was simply to eliminate the distinction between a viable and a nonviable fetus." *Miller v. American Infertility Group of Ill.*, 386 Ill. App. 3d 141, 150 (1st Dist. 2008). That much is apparent from the section's first paragraph. Yet the plain language of the second and third paragraphs makes it equally apparent that the purpose of section 2.2 was far more than just legal gap filling. There is indication that the legislature understood the interplay between paragraphs two and three. For example, during the second reading of the bill, one member of the House of Representatives invoked both paragraphs by stating that:

> This Amendment assures that . . . a wrongful death action . . . cannot be brought on behalf of an aborted fetus when the abortion was lawful and when it was lawfully performed by a doctor. It also protects the doctor who may have caused a fetal death when he had no reason to know the woman was pregnant.

S.B. 756, 81 Gen. Assembly, House Proceedings, Jun. 21, 1979, at 131 (Rep. John J. Cullerton). That statement suggests the converse to paragraph three is also true – that the statute

authorizes a cause of action for fetal death, regardless of how it is caused, if the defendant knew or had reason to know of the pregnancy.

The Senate debates suggest a similar interpretation. At one point the senator who introduced the bill explained that:

> Let's say a . . . a pregnant woman in her fourth or fifth or sixth week of pregnancy is harmed through neglect or through default or for some other reason and the unborn child, the fetus is harmed or killed[.] [T]his bill would let the representative of that fetus bring a cause of action for wrongful death under the Wrongful Death Act. I don't think I can say it any plainer than that. That's the intent of the bill.

S.B. 756, 81 Gen. Assembly, Senate Proceedings, May 17, 1979, at 169 (Sen. Mark Q. Rhoads). Later, during the Senate's concurrence to the House amendments, the following colloquy occurred:

> Senator Ozinga:
> Question, would this bar an action for a schlock operator [*sic*] doctor?
>
> * * *
>
> Senator Rhoads:
> No, Senator Ozinga I don't think so. The amendment goes on to say . . . [that] [t]here shall be no cause of action against the physician or medical institution for the wrongful death of a fetus, based on the alleged misconduct of the physician or Medical Institution where the defendant did not know under the applicable standard of good medical care, had no medical reason to know of the pregnancy of the mother or of the fetus. Now, you certainly can still go after them under malpractice or negligence or any of those types of cause [*sic*] of action.

S.B. 756, 81 Gen. Assembly, Senate Proceedings, Jun. 28, 1979, at 53 (Sens. Frank M. Ozinga & Mark Q. Rhoads).

These passages from the legislative debates support the conclusion that paragraph three does not bar a cause of action if the defendant knew or should have known of the pregnancy before the alleged malpractice occurred and regardless of how the fetus died. Yet, again, there is nothing in the legislative history indicating that the legislators contemplated the precise factual scenario that exists in this case. This lack of clarity sends this court back to one particular rule of statutory construction.

Courts are constrained to interpret a statute to avoid an unintended or unjust result. *See Price*, 2015 IL 117687, ¶ 30. It is patently unjust to bar a cause of action for fetal death caused by a lawful abortion with requisite consent if the defendant is alleged to have injured the fetus and made it non-viable. An opposite interpretation of section 2.2 would require a woman to carry a non-viable fetus to the point of a miscarriage simply to have a legal cause of action. Such a result is unconscionable.

To bar any cause of action in which fetal death results from a lawful abortion with requisite consent would also unreasonably shift the burden in the provision of medical care and treatment. The physician has the greatest knowledge, skill, and experience to judge and inform a patient of test results and present available options. To bar causes of action for alleged malpractice in circumstances as in this case would subvert the physician-patient relationship by permitting physicians to withhold information and recommend unnecessary or uncalled for treatment, knowing that they would be immune from liability.

To bar a cause of action in this case would also warp the concept of proximate causation. Causes of action exist under the Wrongful Death Act because a death occurred and are not dependent on how the death occurred. Here, the allegations are that the defendants' conduct injured Baby Doe to the point that it was a non-viable fetus that Monique consented to abort lawfully.

That scenario is no different than a physician who allegedly commits malpractice on a patient who dies at some later point as a result of the alleged malpractice. In such instances, death is the result, but the alleged malpractice is the proximate cause.

The rule of preventing an unjust result weighs in favor of denying the defendants' motion to dismiss. At the same time, it is quite evident to this court that there exists a question of law over which there exists a substantial ground for difference of opinion as to the scope and application of paragraphs two and three of section 2.2. Clarity by the appellate court on this subject would substantially affect the scope of discovery in this case, narrow the factual and legal issues for trial, and materially advance the ultimate termination of this litigation. For these reasons, although this court is denying the defendants' motion to dismiss, this court also believes that guidance from the appellate court is warranted. To that end, this court certifies for appellate review pursuant to Illinois Supreme Court Rule 308(a) the following question:

> Whether section 2.2 of the Wrongful Death Act, 740 ILCS 180/2.2, bars a cause of action against a defendant for fetal death if the defendant knew or had a medical reason to know of the pregnancy and the alleged malpractice resulted in a non-viable fetus that died as a result of a lawful abortion with requisite consent.

Conclusion

Based on the foregoing, it is ordered that:

1. the defendants' motion to dismiss is denied;
2. the question noted above is certified for appellate review pursuant to Illinois Supreme Court Rule 308(a); and

3. the May 13, 2019 case management conference scheduled for 9:30 a.m. in courtroom 2209 shall stand.

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John H. Ehrlich, Circuit Court Judge