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Medical Malpractice Update

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Thomas v. Khoury: Has the Illinois Appellate Court Expanded the Cause of Action and Damages for the Death of a Fetus?

Senator Claypool: *How pregnant is your ex-wife?*
Toby Ziegler: *As I understand pregnancy, it's a binary state. You either are or you aren't.*
—The West Wing, Season 4 Ep 11 (Dec 11, 2002)

Contrary to Toby Ziegler's assertion that pregnancy is a "binary state," or the commercials for over the counter pregnancy tests, in the earliest weeks of pregnancy the state of pregnancy is, more often than not, "maybe." This issue of liability for the death of a fetus at the very early days of pregnancy was taken up by the appellate court in *Thomas v. Khoury*, 2020 IL App (1st) 191052.

Underlying Facts of the *Thomas* Decision

Monique Thomas (Thomas) was admitted to Alexian Brothers Medical Center for an elective surgery. *Thomas*, 2020 IL App (1st) 191052, ¶ 6. As part of the surgical preparation, Thomas underwent pregnancy testing, which demonstrated elevated levels of human chorionic gonadotropin (hCG), a hormone produced by cells that surround a growing embryo and eventually will form the placenta after successful implantation of the embryo. *Id.* However, the hormone can also be present as a result of some cancerous tumors. The level of hCG increases over time in a successful pregnancy. An ultrasound was also performed: it did not show a definite intra-uterine pregnancy, but could have shown a pregnancy of less than four weeks. *Id.* The doctors told Thomas she was not pregnant, and the elective surgery was performed. *Id.* Subsequently, Thomas presented to the emergency department for treatment of an infection, at which time testing confirmed a pregnancy. *Id.* .7 ¶ Due to the medications provided, including anesthetics, there was a concern that the fetus could have malformations and Thomas chose to terminate the pregnancy. *Id.* She subsequently filed a lawsuit for medical malpractice on her own behalf, and on behalf of the fetus.

A motion to dismiss was filed pursuant to 2-619(a)(9) arguing that the Wrongful Death Act, 740 ILCS 180/2.2 prohibited the plaintiffs' cause of action because the termination of the pregnancy by legal abortion precluded the cause of action. The trial court noted a "substantial ground for difference of opinion as to the scope and application of the second and third paragraphs of section 2.2 of the Wrongful Death Act" and certified a question on the issue to the appellate court. *Thomas*, 2020 IL App (1st) 191052, ¶ 2.

The provision of the Wrongful Death Act, section 2.2, at issue in *Thomas* reads as follows:

> 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 or the fetus.
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> 740 ILCS 180/2.2 The certified question submitted to the appellate court queried the following:
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> Whether section 2.2 of the Wrongful Death Act, 740 ILCS 180/2.2 bars a cause of action against a defendant physician or medical institution 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.

Thomas, 2020 IL App 191052, ¶ 2. The appellate court held that the cause of the fetus' death was a legal abortion, but that decision "arose out of the defendants' alleged medical misconduct when they knew and, 'under the applicable standard of good medical care, had medical reason to know of the pregnancy.'" *Id.* ¶ 4. Therefore, the cause of action was allowed to proceed.

Was *Thomas* an Expansion of the Wrongful Death Act?

Multiple legal commentators concluded that *Thomas* in some way heralded a new direction in what causes of action could be filed under the Wrongful Death Act. However, an examination of the language of the Wrongful Death Act, and the amendment to the act adding Section 2.2 casts this decision in a different light.

Historically, tort law did not provide a cause of action for injury or death of a fetus as "it did not recognize the fetus as a separate entity from the mother until the birth took place." William D. Brejcha, "Torts – The Illinois Wrongful Death Act Held Inapplicable to a Viable Fetus," 3 Loy U Chic Law J 402 (1972) (citing *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884)). The Illinois Wrongful Death Act, enacted in 1853, allows a deceased family member's personal representative to sue on behalf of the spouse or next of kin for "pecuniary injuries" where negligence was the cause of the death. *Smith v. Mercy Hospital and Medical Center*, 203 Ill. App. 3d 465, 468 (1st Dist. 1990). As a derogation of common law, the exact scope of the Wrongful Death Act defines the limits to which recovery can be made. The act "explicitly recognized the legal right of *survivors* to be compensated for *their* loss resulting from the victim's death." *Smith*, 203 Ill. App. 3d at 481-82.

In 1980 the Wrongful Death Act was amended, adding Section 2.2, and addressing causes of action for the death of a fetus, as well as providing protection to medical providers and institutions for providing medical services for the lawful termination of pregnancy. The 1980 amendment was a codification of the Illinois Supreme Court's decision in *Chrisafogeorgis v. Brandenberg*, 55 Ill. 2d 368 (1973). In *Chrisafogeorgis*, a woman who was 36 weeks pregnant, was

walking in a crosswalk when she was struck by a vehicle. *Chrisafogeorgis*, 55 Ill.2d at 368. It was determined that the accident caused the pregnancy to end with a stillborn baby. As of 1973, the Wrongful Death Act did not specifically recognize a cause of action for a viable fetus that was stillborn as the result of the negligence of someone or something else. The Illinois Supreme Court noted that "[a]mong the principal reasons advanced for allowing a right of action for the wrongful death of a viable, but stillborn child is that the fetus has an existence separate and independent of its mother." *Id.* at 372. The Illinois Supreme Court also recognized that a logical fallacy would occur if a cause of action was allowed for "an injured child" who "survives delivery for even the briefest time," but would deny a cause of action for a viable fetus "who does not survive delivery." *Id.* at 373. The court ultimately determined that viability was the more realistic and reasonable line of demarcation for a cause of action to be allowed. *Id.* at 374. "It is the time at which a child is capable of being delivered and remaining alive separate from and independent of the mother. This can be said to be the critical stage of a 'person' within the meaning of the Wrongful Death Act's language …." *Id.*

The enactment of Section 2.2 took the court's decision in *Chrisafogeorgis* recognizing a cause of action for a viable fetus that was stillborn and expanded it to "the state of gestation or development of a human being when an injury is caused" not serving as an impediment. A long line of Illinois case law has steadily established the boundaries for the death of a fetus. Under this analysis, *Thomas* does not represent an expansion or recognition of a new cause of action. Since 1980, the Wrongful Death Act has recognized a cause of action for the death of a fetus, regardless of the stage of gestation or if the fetus was viable outside of the uterus. *See e.g. Smith v. Mercy Hosp. and Medical Center*, 203 Ill. App. 3d 465 (1st Dist. 1991) (seeking recovery for medical malpractice action for alleged negligent care of the mother which caused the stillbirth of the baby); *Seef v. Sutkus*, 145 Ill. 2d 336 (1991) (seeking recovery for medical malpractice on behalf of a 38-week-old viable fetus who died allegedly due to failure to properly monitor and timely perform a caesarean section); and *Mercado v. Mount Sinai Hosp. Medical Center of Chicago*, 382 Ill. App. 3d 913 (1st Dist. 2008) (answering via certified question whether an alleged misdiagnosis of an ectopic pregnancy that resulted in the lawful termination could be brought under section 2.2 of the Wrongful Death Act).

Is *Thomas* Consistent with the Illinois Supreme Court's Decision in *Williams v. Manchester*?

In *Williams v. Manchester*, 228 Ill. 2d 404 (2008), the Illinois Supreme Court was confronted with a negligence action brought on behalf of a nonviable fetus outside of a medical malpractice setting. The plaintiff, Williams, who at the time was 10.5 weeks pregnant, was a passenger in a vehicle struck by Manchester's vehicle. *Williams*, 228 Ill. 2d. at 407. As a result of the accident, Williams suffered a broken hip and pelvis. However, treatment of her injuries, including x-rays and surgical repair, was complicated by her pregnancy. She was presented with four options: 1) undergo immediate surgical repair and wait to see what happened with the pregnancy; 2) terminate of the pregnancy and then undergo surgical repair of her fractures; 3) wait until the second trimester of the pregnancy (she was a few weeks away from the beginning of the second trimester) and then undergo surgery to repair her fractures; or 4) wait until the birth of the fetus and then undergo repair surgery. *Id.* at 411. Ultimately, Williams chose the second option. She then filed suit against the driver of the other vehicle for her own injuries, and a Wrongful Death Action claim for the loss of the nonviable fetus.

The driver of the other vehicle filed a summary judgment motion arguing that the claim for damages on behalf of the nonviable fetus failed under the Wrongful Death Act because the fetus was terminated through a lawful abortion, not through any negligence on the part of the driver. *Id.* at 413. The trial court granted summary judgment, finding that the evidence established that there was no injury to the fetus as a result of the motor vehicle accident, and the pregnancy was terminated by a lawful abortion. On appeal, the Illinois Appellate Court First District reversed the summary judgment on

the basis of proximate cause. *Id.* at 415 (holding that "we cannot agree that, as a matter of law, it would be unforeseeable that a pregnant woman, injured through a person's negligence, would agree to endure the medical consequences to herself, or the fetus for that matter, regardless of their severity, simply for the sake of maintaining the pregnancy").

The Illinois Supreme Court rejected the appellate court's proximate cause reasoning, and instead turned to the Wrongful Death Act. "If the decedent had no right of action at the time of his or her death, the personal representative has none under the Wrongful Death Act. *Id.* at 421. Thus the 'injury' that the personal representative alleges caused the decedent's death must be the same 'injury' that the decedent suffered prior to his or her death." *Id.* In other words, for the Wrongful Death Act to apply there must have been an injury that caused the death, rather than a decision to terminate the pregnancy.

> In summary, a wrongful-death action is a statutory, independent cause of action that does not arise until after death. However, the action is derivative of the injury to the decedent and is grounded on the same wrongful act of defendant, whether it was prosecuted by the injured party during [their] lifetime or by a representative of the estate. The representative's right of action depends upon the existence, in the decedent, at the time of his or her death, of a right of action to recovery for such injury.

Id. at 426. Herein lies the problem with the *Thomas* decision and with classifying it as an expansion of the reach of the Wrongful Death Act. The appellate court's analysis in *Thomas* is limited to the certified question:

> Whether section 2.2 of the Wrongful Death Act, 740 ILCS 180/2.2 bars a cause of action against a defendant physician or medical institution 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.

Thomas, 2020 IL App (1st) 191052, ¶ 2 (emphasis added). The *Thomas* decision enunciated its limitations: "Our interpretation of the statute gives Thomas the opportunity to plead and **attempt to prove** medical malpractice that injured the fetus (third paragraph) **without regard to the death ultimately having been through an abortion** (second paragraph)." *Id.* ¶ 22 (emphasis added). Under the framework recognized in *Williams*, in order to survive a summary judgment, the plaintiff must be able to provide evidence that the fetus suffered an actual injury that made the fetus nonviable prior to the lawful termination of the pregnancy. It is unclear from the decision whether the term "nonviable" is being used in a legal sense (presumably able to continue to gestate) or medical (presence of a heartbeat). Again, given the very early stage of the pregnancy, evaluation of any injury to a fetus following a pregnancy termination may be difficult.

In the face of a "Possible" Pregnancy, the Damages Analysis for Fetal Death Is Undermined

Putting aside the question of whether the standard of care would have required that a reasonable physician be able to ascertain whether or not Thomas was pregnant based upon the pregnancy test and ultrasound findings, allowing a cause of action to proceed on behalf of a nonviable fetus creates a presumption that the fetus would have been viable. Such a presumption is incongruous with the known medical data about early pregnancy. Medical texts indicate that approximately 10 to 20 percent of known pregnancies end in miscarriage. *Miscarriage-Symptoms and Causes-The Mayo*

Clinic (last visited August 17, 2020) https://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/symptoms-causes/syc-20354298. However, some medical scientists theorize that the rate of pregnancy termination is even higher in the early weeks of pregnancy because many miscarriages occur so early in pregnancy that a woman does not realize that she is pregnant. In a retrospective study, the rate of miscarriage increases both with age and with history of a previous miscarriage. Cohain, Buxbaum & Mankuta, "Spontaneous first trimester miscarriage rates per woman among parous women with 1 or more pregnancies of 24 weeks or more" 17 BMC Pregnancy and Childbirth 437 (Dec 2017).

Damages for Pecuniary Loss

It is axiomatic under Illinois law that "[d]amages must be proved to be recovered." *Chrysler v. Darnall*, 238 Ill. App. 3d 673, 680 (1st. Dist. 1992). Illinois courts have also recognized that proving damages as a result of the death of a child or infant, let alone a fetus, is difficult. There is little or no information regarding what the relationship would have been, what the loss of affection, companionship, support and love might have been. In *Bullard v. Barnes*, 102 Ill. 2d 505 (1984), which involved an underage child who was killed in a motor vehicle accident, the Illinois Supreme Court recognized that the parents of a wrongfully killed minor child are entitled to a presumption of injury for the loss of the child's society. The holding in *Bullard* was extended to an unborn fetus in *Seef v. Sutkus*, 145 Ill. 2d 336 (1991), and confirmed in *Smith v. Mercy Hosp. and Medical Center*, 203 Ill. App. 3d 465, 468 ("We are persuaded that permitting parents to recover for the loss of their stillborn child's society and entitling them to a presumption thereof is a natural and logical outgrowth of existing law in Illinois.").

The court in *Smith v. Mercy Hosp.* provided further insight and offered insight into the various evidentiary matters that **could** be used to rebut the presumption of pecuniary loss to the family:

> We perceive numerous ways of rebutting the presumption. For example, defendant may present evidence that irrespective of defendant's negligence, "the child was unhealthy, or unlikely to live beyond minority"; that the child was unlikely to live beyond birth; that the child would not have lived because the mother intended to obtain an abortion; that prior to the child's birth the parents decided to place the child for adoption; or that prior to the child's birth the parent claiming injury abandoned the family.

Id. at 477-48 (internal citations omitted). However, in the situation of a fetus lost before the mother was even certain of pregnancy, the possible rebuttal evidence simply does not exist.

In *Smith*, the appellate court addressed the defense arguments on damages that asking a jury to determine the loss of a stillborn fetus's society "are unduly speculative as a matter of law and that a jury charged with calculating an award essentially holds a blank check, making the damages potentially punitive in nature." *Id.* at 478. The court reasoned that there was little difference in asking a jury to evaluate damages for the death of a two-year-old child compared with an unborn fetus. *Id.* However, such reasoning ignores that with a two-year-old child, a historical relationship existed, as well as, a medical history. With an unborn fetus, no such information is available.

There is no doubt the presumption of pecuniary loss is less warranted in the case of a fact pattern like that in *Thomas* where the woman was not even aware of her pregnancy at the time of the alleged injury to the fetus. The mother was not aware of any expectancy of parenthood at the time of the alleged injury. Therefore, the logical underpinnings of a parent's expectation of a relationship are absent.

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Damages for Loss of Services and Support

In *Bullard*, the Illinois Supreme Court rejected a presumption that a parent suffered the loss of the child's services and support at death. But, the damages can be claimed, "in the rare case where the child earned income that was used to support the family," provided those damages have been established. *Bullard*, 102 Ill. 2d at 505. It would seem nearly impossible to establish damages for loss of service and support. However, the appellate court in *Smith v. Mercy Hospital*, when addressing this same issue noted that "we do not read this language as precluding other means of proof. The limitation in *Bullard* clearly pertains to the *presumption* of substantial loss, not whether the damages for loss of services and support can be recovered if proved." *Smith*, 201 Ill. App. 3d at 480. The *Smith* court went on to reject the position that parents of a stillborn infant should still be allowed the opportunity to prove and seek for the loss of a stillborn infant's services and support and financial contribution he or she "could have been expected to make *had he [or she] lived."* *Smith* at 480 (italics in original).

Conclusion

To fully understand if the appellate court expanded wrongful fetal death, *Thomas* must be placed both within the legal framework of the status at the time of the appellate opinion (answering a certified question) and within the factual framework (an extremely early pregnancy where the woman was not aware of pregnancy and the decision to terminate the pregnancy was made before a determination of an injury to the fetus). Within that framework, the holding in *Thomas* does not widen the door of liability to medical providers beyond the opening previously in existence since the 1980 amendment to the Wrongful Death Act. In the continued litigation, the *Thomas* case may provide an opportunity to undermine the presumption of pecuniary loss for putative parents, in particular when the pregnancy is not quite in a "binary" state as the *Thomas* plaintiff.

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