No.126074

IN THE SUPREME COURT OF ILLINOIS

MONIQUE THOMAS, Individually and as Special Administrator of the Estate of Baby Doe and CHRISTOPHER MITCHELL, Individually and as Special Administrator of the Estate of Baby Doe,

Plaintiffs-Appellees,

vs.

EDGARD KHOURY, M.D. and ROBERT KAGAN, M.D.,

Defendants-Appellants.

Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-19-1052
There Heard on Appeal from the Circuit Court of Cook County, Illinois
County Department, Law Division, No. 18 L 001059.
The Honorable John Ehrlich, Judge Presiding

ILLINOIS TRIAL LAWYERS ASSOCIATION'S *AMICUS* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES, MONIQUE THOMAS AND CHRISTOPHER MITCHELL

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INTEREST OF *AMICUS CURIAE*

The Illinois Trial Lawyers Association ("ITLA") is a statewide organization comprised of more than 2,000 trial lawyers who represent injured parties in civil litigation. Those represented by members of ITLA are often severely injured or the families of deceased individuals. The First District Appellate Court decision in *Thomas v. Khoury*, 2020 IL App (1st) 191052, has far reaching implications for the rights of families, and pregnant women in particular, in terms of the protection of unborn children from injury and death as a result of medical negligence.

STATEMENT OF FACTS

Amicus Curiae, ITLA, adopts the Statement of Facts of the plaintiffs.

STATUTE AT ISSUE

> 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.

P.A. (Pub. Act 81 -- 946, § 1, eff. Jan. 1, 1980.) 740 ILCS 180/2.2 (West 2018)

ISSUES PRESENTED FOR REVIEW

I. Does the Illinois Wrongful Death Act, 740 ILCS 180/2.2 bar a cause of action against a physician for wrongful death of a fetus due to a consensual abortion as the result of medical negligence which caused harm to the fetus?

II. If paragraph 2 of the Illinois Wrongful Death Act, 740 ILCS 180/2.2 is interpreted to bar all causes of actions against negligent physicians leading to a decision to terminate a pregnancy, is paragraph 2 improper special legislation?

ARGUMENT

Illinois law establishes a cause of action for wrongful death based on negligence in causing the death of a fetus. The exception found in Paragraph 2 of Section 2.2 of the Wrongful Death Act bars a cause of action against a physician performing an abortion, but does not bar a cause of action against a negligent physician who causes harm to the fetus resulting in a decision to terminate the pregnancy. If the statute is interpreted as urged by defendants it would violate the Special Legislation clause of the Illinois Constitution. Therefore, the Illinois Trial Lawyers Association respectfully requests that this Court affirm the First District Appellate Court decision and remand this matter to the Circuit Court of Cook County for further proceedings.

I. Both the Trial and Appellate Courts Properly Determined that The Illinois Wrongful Death Act, 740 ILCS 180/2.2 Does Not Bar the Instant Action

Plaintiffs filed the instant medical negligence and wrongful death against defendants for their failure to determine whether Monique Thomas was pregnant at the time defendants performed an elective surgery on her. Plaintiffs' allege that defendants' deviation from the standard of care injured the fetus during the surgery, leading plaintiff to the decision to terminate the pregnancy. At issue is the trial court's denial of defendants' motion to dismiss plaintiffs' First Amended Complaint, pursuant to 735 ILCS 5/2-

619(a)(9), asserting that 740 ILCS 180/2.2 barred the cause of action. The trial court denied the motion to dismiss and defendants filed a permissive interlocutory appeal under Illinois Supreme Court Rule 308, certifying the 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?"

In affirming the trial court's denial of the motion to dismiss, the Appellate Court held that 740 ILCS 180/2.2 did not bar the claim at issue. In so holding, the Court correctly stated that the merits of plaintiff-appellee's claims "had no relevance to our determination." *Thomas v. Khoury,* 2020 IL App (1st) 191052, ¶ 15.

As the instant matter is before this Court on appeal from the denial of a motion to dismiss pursuant to 735 ILCS 2-619, the facts pleaded are taken as true for purposes of the motion and this Court's standard of review is *de novo*. *Cooney v. Rossiter,* 2012 IL 113227, ¶ 17. When considering a section 2-619 motion, a court must accept as true all well-pleaded facts in the complaint, as well as any inferences that may reasonably be drawn in plaintiff's favor. *Sandholm v. Kuecker,* 2012 IL 111443, ¶ 55.

Plaintiffs' First Amended Complaint alleges that the fetus was injured and subjected to serious health risks as a result of the surgery at issue. (C. 188 at ¶ 11.) Plaintiffs' further alleged that Ms. Thomas' physician advised her to terminate the pregnancy as it was unlikely that the fetus would survive to full term. (C. 188 at ¶ 11.) Accepting these allegations as true, the issue before this Court is whether intrauterine injury to a fetus due to medical negligence, which results in the decision to terminate the

pregnancy, gives rise to a cause of action for wrongful death against the allegedly negligent physician.

A. The Wrongful Death Act Applies to Unborn Children

As this Court has previously stated "The [Wrongful Death] Act alone is the source of the right to sue. The legislature, having conferred a cause of action for wrongful death, has determined who shall sue and the conditions under which the suit may be brought." *Williams v. Manchester*, 228 Ill. 2d 404, 419 (2008); *citing Wilson v. Tromly*, 404 Ill. 307 at 310 (1949); *accord Hall v. Gillins*, 13 Ill. 2d 26, 29 (1958). The *Williams* Court further observed, "An injury resulting from the wrongful act, neglect, or default of another gives the victim, if she survives the injury, a right of action; if the victim dies, the Act transfers the right of action to the victim's personal representative." *Williams v. Manchester*, 228 Ill. 2d 404, 421.

There is no dispute that the Wrongful Death Act is in derogation of common law and must be strictly construed. There is likewise no reasonable dispute that the Act creates the right to bring an action for wrongful death based on the facts alleged in this case. 740 ILCS 180/1 (West 2018). Defendants recognized plaintiffs' cause of action, having filed a motion to dismiss pursuant to 735 ILCS 5/2-619 and not 735 ILCS 5/2-615, thereby admitting the existence of a well-pleaded cause of action but asserting that the action is barred by affirmative matter – in this case paragraph 2 of Section 2.2. Thus, the sole issue before this Court is whether the Plaintiffs' otherwise valid cause of action for wrongful death is barred by Section 2.2 of the Act.

i. Baby Doe Would Have a Cause of Action for Injuries Suffered Had Baby Doe Survived the Occurrence at Issue

It is settled that a cause of action for injuries suffered by a fetus while *in utero* exists under Illinois law. *See e.g. Sana v. Brown,* 35 Ill. App. 2d 425 (1962) (child entitled to bring cause of action after birth for injury occurring *in utero* regardless of viability at time of injury); *Daley v. Meier*, 33 Ill. App. 2d 218 (1961) (surviving infant may bring action for injuries occurring before birth). In *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348 (1977), this Court recognized the right of a child injured by medical negligence occurring prior to conception to bring a cause of action for those injuries against the mother's health care providers, despite the lack of a direct physician-patient relationship. The right of a child injured *in utero* due to negligence, medical or other, to bring a cause of action to recover damages for those injuries is well established in Illinois.

ii. A Cause of Action Would Lie for Wrongful Death Had Baby Doe Died After Birth as a Result of the Occurrence at Issue

In *Amann v. Faidy*, 415 Ill. 422 (1953), this Court recognized a right of action under the Wrongful Death Act for the death of an infant who sustained a prenatal injury when his mother was in a motor vehicle accident, causing the death of the child after being born alive. Thereafter, in *Chrisafogeorgis v. Brandenberg*, 55 Ill. 2d 368 (1973), this Court held that a wrongful death action could be maintained for a stillborn child who sustained injuries while a viable fetus. The *Chrisafogeorgis* Court found that allowing a cause of action if the child briefly survived, while not allowing a cause of action if the child were stillborn, would lead to incongruous results. The Court examined decisions from other states on the issue and quoted from the decision in *Stidam v. Ashmore*, 109 Ohio App. 431 (1959), as an

example of incongruous results which would be reached under such a holding. The *Stidam* court observed:

> The wrongful death statute, Section 2125.01 Revised Code, grants a derivative right. The test of the existence of that right is that the injury 'would have entitled the party injured to maintain an action and recover damages if death had not ensued.' If death had not ensued, the child in our present case would have been entitled to maintain an action. We are unable to reconcile the two propositions, that if the death occurred after birth there is a cause of action, but that if it occurred before birth there is none. * * *
>
> Such a distinction could lead to bizarre results. Suppose, for example, viable unborn twins suffered simultaneously the same prenatal injury of which one died before and the other after birth. Shall there be a cause of action for the death of the one and not for that of the other? Surely logic requires recognition of causes of action for the deaths of both, or for neither."
> 109 Ohio App. 431, 434.

Chrisafogeorgis, 55 Ill. 2d 368, 374 (1973).

In order to address the possibility that the state of viability of the fetus at the time of the injury could be raised as a defense to a cause of action for wrongful death as was raised in *Chrisafogeorgis*, the legislature amended The Wrongful Death Act adding Section 2.2. (P.A. 81- eff. 1980) 740 ILCS 180/2.2. Thereafter, in *Seef v. Sutkus*, 145 Ill. 2d 336 (1991), this Court recognized the right of parents of a stillborn child to recover damages under the Wrongful Death Act against medical providers whose negligence was alleged to have caused the child's death. *See also Riley v. Koneru*, 228 Ill. App. 3d 883 (1992) (parents of stillborn may recover for medical negligence occurring during pregnancy).

iii. A Cause of Action For Wrongful Death would lie had Baby Doe Died *in utero* as a Direct Result of Defendants' negligence

If Baby Doe had died during or after the surgical procedure performed by defendants in the instant case the plaintiffs would have a cause of action for wrongful death. In *Jones v. Karraker*, 98 Ill. 2d 487 (1983), this Court recognized a presumption of

pecuniary injuries for the wrongful death of a viable fetus who died *in utero* as a direct result of the negligence of the defendant physician. *Jones v. Karraker*, 98 Ill. 2d 487, 494 (1983). *See also Smith v. Mercy Hospital & Medical Center*, 203 Ill. App. 3d 465, 479 (1990) (loss of a stillborn child's society is an element of pecuniary injury under the Act for which parents may recover damages). In holding that the parents of the stillborn child could recover for loss of society the *Smith* court observed "[t]o be sure, it was because of the intolerably cruel disincentive fostered by the common law 'that it was more profitable for the defendant to kill the plaintiff than to scratch him,' that Lord Campbell's Act, the precursor of our Wrongful Death Act, was adopted in England." W. Prosser, Torts § 127, at 902 (4th ed. 1971).

Therefore, having concluded that the parents of a fetus who dies *in utero* due to medical negligence have a cause of action for wrongful death, the only issue remaining is whether the decision to terminate the pregnancy due to injuries suffered by the fetus breaks the causal chain. This issue has not been raised in the instant case but has been raised in other cases involving voluntary abortions following fetal injuries.

B. The Wrongful Death Act Allows for a Cause of Action Resulting from an Abortion Following Injury to the Fetus

i. A Cause of Action for Wrongful Death Exists Where There is an Injury to Baby Doe *in utero* Due to Non-Medical Negligence Leading to the Decision to Terminate the Pregnancy

Having established that an action for the wrongful death of a fetus may be brought regardless of either the state of viability at the time of the injury or whether the death occurs *in utero* or after birth, the role of the decision to terminate the pregnancy must be examined. In *Williams v. Manchester*, 228 Ill. 2d 404 (2008), this Court reinstated the trial court's grant of summary judgment in favor of defendants in an automobile accident case, which

had been reversed by the First District Appellate Court. The *Williams* plaintiffs had alleged that the automobile accident caused injury to the fetus resulting in the decision to terminate the pregnancy. *Id.* at 408. Holding that the entry of summary judgment by the trial court was appropriate and reversing the appellate court, the *Williams* Court examined the requirements of a wrongful death action and reiterated the requirement of an injury to the decedent fetus preceding death. *Id*. at 421-422.

The *Williams* Court next examined the record and found that the medical records and testimony of physicians established that the evidence failed to raise a genuine issue of material fact as to whether the fetus suffered any injury in the collision or as a result of the accident itself. *Id.* at 424. As the case was before the Court on appeal from the grating of a motion for summary judgment, it was the plaintiffs' burden to elicit evidence raising a genuine issue of fact on this issue. Finding that there was insufficient evidence in the record to support a finding of injury to the fetus, the *Williams* Court held that the plaintiffs had failed to raise a genuine issue of material fact on a necessary element of their claim and reinstated the trial court's grant of summary judgment. *Id.* at 427.

In their opening brief, defendants assert that the *Williams* decision supports their interpretation of the Wrongful Death Act, while also incongruously arguing that *Williams* does not address the specific issue now before this Court. In fact, *Williams* does not address the issue before this Court as there were no allegations of medical negligence and no physician was a defendant. Rather, the sole issue decided by this Court in *Williams* was whether sufficient evidence was contained in the record to raise a genuine issue of fact regarding injury to the fetus.

Importantly, the *Williams* Court did not find that an abortion resulting in the death of the fetus following an injury was a break in the chain of proximate cause. The *Williams* Court neither examined nor ruled on that issue. However, in its decision the First District Appellate Court extensively analyzed the issue of proximate cause under the circumstances and found that the plaintiff's decision to terminate her pregnancy was a foreseeable consequence of the tortfeasor's negligence. *Williams v. Manchester,* 372 Ill.App.3d 211, 238 (2007). In reaching this conclusion, the *Williams* appellate court reviewed cases from other jurisdictions upholding the right of action for the death of the fetus due to an abortion as a result of injury to the fetus as a foreseeable consequence of the tort. *Citing Shirley v. Bacon,* 154 Ga. App. 203, 267 S.E.2d 809 (1980); *Rottman v. Krabloonik,* Inc., 834 F.Supp. 1269 (D. Colo. 1993); *Coveleski v. Bubnis,* 535 Pa. 166, 634 A.2d 608 (1993); *McGeehan v. Parke-Davis*, 573 So. 2d 376, 377 (Fla. App. 1991).

In reversing *Williams* and reinstating the trial court's granting of summary judgment, this Court did not find that the decision to terminate the pregnancy was a break in the chain of causation as was urged by appellants in that case. *Williams,* 228 Ill. 2d at 404. Rather, the *Williams* Court held that the evidence presented failed to raise a genuine issue of material fact that the occurrence at issue caused an injury to the fetus, a necessary element in the Wrongful Death claim. *Williams,* 228 Ill. 2d at 404, 424. This Court did not address the issue of whether the decision to terminate the pregnancy broke the chain of causation between the alleged tort and the death of the fetus. *Ibid.*

No Illinois case has directly addressed the issue of whether a cause of action for wrongful death exists when there is an injury to the fetus leading to the decision to terminate the pregnancy. However, the basis of this Court's decision in *Williams,* along

with a review of the history of wrongful death claims involving *in utero* injury to a fetus, makes clear that a cause of action exists for the wrongful death of a fetus following a consensual abortion due to injury to the fetus.

ii. The Legislature Has Not Acquiesced in the *Light* Decision

Defendants assert that the legislature's failure to amend the Wrongful Death Act following the Third District Appellate Court's decision in *Light v. Proctor Community Hospital*, 182 Ill. App. 3d 563 (3d. Dist. 1989) "strongly signals that the judicial decision conforms to the legislative intent." Brief at pg. 17. This statement is both a mischaracterization of the applicable principle and belies defendants' position with regard to the statute at issue.

Defendants assert that Section 2.2 is unambiguous. However, the principle of acquiescence is only applied to attempt to interpret the legislative intent in a court's attempts to resolve ambiguity within a statute. *Ready v. United/Goedecke Servs.*, 232 Ill. 2d 369 (2008). The *Ready* Court explained "[w]here a statute is ambiguous, 'courts may look to tools of interpretation to ascertain the meaning of a provision.'" [citations omitted]. One such aid to construction is the principle that, where the legislature chooses not to amend a statute after a judicial construction, it is presumed that the legislature has acquiesced in the court's statement of the legislative intent. *Ready*, 232 Ill. 2d at 379-380.

This so called "legislative-inaction rule" has not generally been extended to decisions by appellate courts but has been limited to decisions of this Court. See e.g. *Kobylanski v. Chicago Board of Education*, 63 Ill. 2d 165 (1976) (Goldenhersh, J., dissenting, joined by Ward, C.J., and Schaefer, J. (dissenting opinion). Justice Goldenhersh opined:

> This newly discovered method for determining legislative intent is quaint, intriguing, but legally unsound. A much more sensible interpretation of legislative inaction, and one far more flattering to the General Assembly, is that being reasonable individuals they waited to see whether this court would resolve the conflict.

Ibid.; *See also In Re Marriage of O'Neill*, 138 Ill. 2d 487 (1990), (J. Samos dissenting) (reliance on the rule unreasonable unless there is no other evidence of legislative intent).

In *Alvis v. Ribar,* 85 Ill. 2d 1 (1981) this Court replaced the concept of contributory negligence with pure comparative negligence. *Id.* at 23. In rejecting the argument of *Amicus* Illinois Defense Counsel that any change in the law should be left to the legislature given the passage of amendments to statutes incorporating the contributory negligence defense the *Alvis* Court stated:

> We believe that the proper relationship between the legislature and the court is one of cooperation and assistance in examining and changing the common law to conform with the ever-changing demands of the community. There are, however, times when there exists a mutual state of inaction in which the court awaits action by the legislature and the legislature awaits guidance from the court. Such a stalemate is a manifest injustice to the public. When such a stalemate exists and the legislature has, for whatever reason, failed to act to remedy a gap in the common law that results in injustice, it is the imperative duty of the court to repair that injustice and reform the law to be responsive to the demands of society.

Id., 23-24.

An examination of the *Light* decision and its progeny reveals that, unlike the numerous contrary decisions regarding the statute at issue therein cited by the *Ready* Court, *Light* has sparsely been cited, and never for the issue presented in this matter. *See Mercado v. Mount Sinai Hosp. Med. Ctr*., 382 Ill. App. 3d 913 (1989) (distinguished *Light* as not having addressed the meaning of "requisite consent"); *Rallo v. Crossroads Clinic, Inc.*, 206 Ill. App. 3d 676 (1990) (cited for proposition that the intent of the legislature must be determined from the plain language of the statute); *Smith v. Mercy Hosp. & Medical*

Center, 203 Ill. App. 3d 465 (1990) (cited for proposition that defendant could present evidence that mother intended to obtain an abortion in case brought for wrongful death of fetus).

Moreover, a review of the decision in *Light* reveals that it was wrongly decided. For the reasons set forth *infra.*, it is clear that paragraphs 2 and 3 of Section 2.2 cannot be reconciled if paragraph 2 is read to bar all causes of action for wrongful death against physicians who cause an injury to a fetus which results in a decision to terminate the pregnancy. The *Light* Court failed to analyze, or even refer to, paragraph 3, failed to examine the legislative history or purpose of Section 2.2, and failed to determine if Section 2.2 was unconstitutional special legislation (see Section III. *infra*.) As such, this Court must overturn the Third District decision in *Light*.

II. Section 2.2 of The Wrongful Death Act is ambiguous and unclear

Defendants- assert that the section is unambiguous, arguing that this precludes resorting to the legislative history in order to determine the intent of the legislature. This assertion is without basis and cannot be supported when attempting to reconcile paragraphs 2 and 3 of Section 2.2 as set forth *supra*. This ambiguity requires that this Court examine the legislative history surrounding the amendment.

A. Rules of Statutory Construction Require Examination of the Intent of the Legislature

As this Court has observed "[t]he primary goal of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the intention of the legislature." *Jackson v. Bd. of Election Comm'rs,* 2012 IL 111928, ¶ 48. Where statutory language is clear and unambiguous, it will be given effect without resort to other aids of

construction. *Kunkel v. Walton*, 179 Ill. 2d 519, 534 (1997). However, when interpreting a statute which is unclear, "the court may consider the purpose behind the law and the evils the law was designed to remedy." *Palm v. Holocker*, 2018 IL 123152, ¶21; *citing Gruszeczka v. Illinois Workers' Compensation Comm'n*, 2013 IL 114212, ¶ 12.

In describing its role in interpreting the meaning of a statute, this Court has repeatedly held that "[t]he statute should be read as a whole and construed so as to give effect to every word, clause, and sentence; we must not read a statute so as to render any part superfluous or meaningless." *Palm*, 2018 IL 123152, ¶21; *citing People ex rel. Department of Corrections v. Hawkins*, 2011 IL 110792, ¶ 23. "Words and phrases must be interpreted in light of other relevant provisions of the statute and must not be construed in isolation." *Palm*, 2018 IL 123152, ¶21, *citing People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 279-80 (2003). The *Palm* Court further observed "[w]e have an obligation to construe statutes in a manner that will avoid absurd, unreasonable, or unjust results that the legislature could not have intended." *Ibid.*; *citing People ex rel. Alvarez v. Gaughan*, 2016 IL 120110, ¶ 19.

Defendants argue that Section 2.2 is unambiguous and, by its terms, prohibits the instant action and that the trial and appellate courts misinterpreted the statute. In support of this argument defendants-appellants rely heavily on the First District Appellate Court analysis in *Miller v. Am. Infertility Group of Ill.*, 386 Ill. App. 3d 141(2008). However, *Miller* does not support defendants' position in this matter.

Miller addressed the first paragraph of Section 2.2 in answering the certified question of whether the Act allowed a cause of action for "loss of an embryo created by in vitro fertilization that has not been implanted into the mother?" *Id.* at 143. The *Miller* court

found the relevant clause of the statute to be ambiguous as to this issue and, therefore, examined the legislative history behind the amended section. *Id*. at 145.

As neither paragraphs 2 or 3 of section 2.2 were relevant to its analysis, the *Miller* Court did not address either paragraph in its decision. However, the *Miller* Court extensively reviewed and summarized the legislative history of the entirety Section 2.2. First, the *Miller* Court set out the chronology of Senate Bill 756, later passed as Pub. Act 81 – 946 (eff. 1980), in first being introduced in the Illinois Senate, then consisting of only paragraph 1, with paragraphs 2 and 3 being added in the Illinois House of Representatives before the amended bill was passed by the Senate. *Miller*, 386 Ill. App. 3d at 146-150.

In examining the purpose of Section 2.2, the *Miller* Court observed that Senator Rhoads, the original sponsor of the bill, stated that it was to close the gap between conception and viability. *Id.* at 150. Senator Rhoads then gave examples of what would constitute wrongful death, including:

> 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, this bill would let the representative of that fetus bring a cause of action for wrongful death under the Wrongful Death Act**."

Miller, at 147 quoting 81st Ill. Gen. Assem., Senate Proceedings, May 17, 1979, at 169 (statements of Senator Rhoads) (Emphasis added).

Although this was not an issue in *Miller*, it is clear that Senator Rhodes statement contemplates a wrongful death action when the fetus is harmed, but not killed at that time. Indeed, the last sentence of paragraph 2 contemplates this circumstance when the child is born alive following an attempted abortion. The *Miller* Court then turned to the addition of paragraphs 2 and 3 when Senate Bill 767 was then taken up by the Illinois House of

Representatives, finding that various amendments were defeated but that the addition of paragraph 2 "would assure that a wrongful death action could not be brought on behalf of an aborted fetus when the abortion was lawful and lawfully performed by a doctor" and that the addition of paragraph 3 would "protect the doctor who may have caused a fetal death when he had no reason to know the woman was pregnant." *Miller*, 386 Ill. App. 3d at 148-149; *citing* 81st Gen. Assem., House Proceedings, June 21, 1979, at 131 (statements of Representative Cullerton).

Defendants' assertion that "[t]he debates do not contain any reference to permitting causes of action following a lawful, voluntary abortion" is inaccurate. Examination of the House Second Reading of the House amendment which added paragraphs 2 and 3 to Senate Bill 756, reveals that Representative Cullerton introduced the bill stating:

> Thank you, Mr. Speaker, Ladies and Gentlemen of the House. **This Amendment assures that in a wrongful death action that one 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 that the woman was pregnant.** This Amendment is supported by the Illinois Medical Society. It's also been approved by various right to life groups as well as the American Civil Liberties Union. I would ask for its adoption.

(Emphasis added) 81st Gen. Assem., House Proceedings, June 21, 1979, at 131 (statements of Representative Cullerton).

The amendments were passed out of the House and the bill was returned to the Senate. During the final debate in the Illinois Senate following the addition of the House amendments adding paragraphs 2 and 3 Senator Ozinga asked: "Question, would this bar an action for a schlock operator doctor?" To which Senator Rhoads responded:

> No Senator Ozinga I don't think so. The amendment goes on to say…There shall be no cause of action against the physician or medical providers 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 can certainly still go after them under malpractice or negligence or any of those types of cause of action.**

(Emphasis added) (81st Ill. Gen. Assem., Senate Proceedings, June 28, 1979, at pg. 53).

A reading of all of the relevant legislative history reveals the purpose of the amendments adding paragraphs 2 and 3. No action for wrongful death may be brought against a physician who lawfully performs an abortion and no action may be brought against a physician for causing a fetal death when, through the exercise of appropriate medical care, have no reason to know that the mother was pregnant. However, reading Section 2.2 as a whole, it is clear that a physician who does not exercise appropriate care in determining that the mother is pregnant and who negligently injures the fetus may be liable for wrongful death whether that fetus dies *in utero* or following birth.

B. The Entire Third Paragraph of Section 2.2 Would Be Superfluous if Defendants' Argument is Accepted

Defendants' position is that paragraph 2 prohibits a cause of action for wrongful death against any physician, no matter what injury a negligent physician or medical institution inflicts on the fetus, when there is a decision to terminate the pregnancy. Accepting this interpretation would allow a cause of action for wrongful death if the fetus was injured *in utero* and was stillborn or died shortly after birth (*See e.g. Seef, Riley,* and *Renslow*) while not allowing a cause of action for the same negligent conduct when there is a decision to terminate the pregnancy based on the injury having occurred *in utero*. Such

a result would be as harsh as the ills intended to be corrected by Lord Campbell's Act. This, clearly, was not the intent of the legislature in passing Section 2.2.

Moreover, if paragraph 2 were a complete bar to a cause of action against a negligent physician, then paragraph 3 would have no meaning or purpose. Ascribing the prohibition in paragraph 2 to all physicians and medical institutions would render paragraph 3 completely superfluous to the section as a whole. No scenario could exist in which paragraph 3 would be applicable, as paragraph 2 would bar any and all causes of action against physicians for wrongful death for injuries occurring *in utero* and leading to a decision to terminate the pregnancy, regardless of the negligence of a physician causing harm to a fetus. Indeed, the exception contained in paragraph 2, allowing for a cause of action for wrongful death in the event of an unsuccessful abortion and live birth and subsequent death, illustrates the absurdity of defendants' position.

Reading the section as whole, giving meaning to each word and phrase and construing the statute to "avoid absurd results that the legislature could not have intended," the result is clear. Paragraph 2 was intended to bar causes of action for wrongful death against physicians who performed abortions due to the concern that extending the cause of action regardless of viability was an attempt to circumvent *Roe v. Wade* 410 U.S. 113 (1973). *See e.g. Doe v. Planned Parenthood,* 956 N.E.2d 564 (1st Dist. 2011)

As it is clear that paragraph 2 bars a cause of action for a consensual abortion against the physician or medical provider performing the abortion, the purpose of paragraph 3 must be examined. Paragraph 3 makes clear that no cause of action lies if the physician does not have reason to know of the pregnancy under the applicable standard of care but injures the fetus, later resulting in an abortion. As the trial and appellate courts

noted, the corollary is also true: that a physician who knows or should have known of the pregnancy under the applicable standard of care who injures the fetus leading to a decision to terminate the pregnancy is subject to a cause of action for wrongful death of the fetus. Again, there would be no purpose is setting forth the exception to the cause of action for physicians that had no reason to know of the pregnancy if no cause of action first existed.

Stated differently:

- 740 ILCS 180/1 creates a cause of action for wrongful death for the death of the fetus under the facts plead in the instant case;
- Paragraph 1 of 740 ILCS 180/2.2 clarifies that the cause of action created by Section 1 lies regardless of the viability of the fetus;
- Paragraph 2 bars a cause of action against a physician performing a lawful abortion;
- Paragraph 3 clarifies that there shall be no cause of action against a physician who does not deviate from the standard of care in determining if the mother is pregnant and injures or kills the fetus.

In the instant case, plaintiffs have alleged that the defendants were negligent in interpreting a pregnancy test according to the applicable standard of care, thereby causing injury to the fetus during the surgical procedure performed on the plaintiff and leading to the decision to terminate the pregnancy. It is plaintiffs' burden to prove these allegations, but for purposes of the 735 ILCS 5/2-619 motion to dismiss they must be taken as true. As such, the instant action falls squarely within the intent of paragraph 3. There is simply no way to read paragraph 3 to have any meaning or purpose if paragraph 2 unconditionally bars all causes of action against physicians for fetal death resulting from a decision to terminate the pregnancy.

III. Section 2.2 Would be Unconstitutional Special Legislation if Interpreted as Defendants Urge

The argument defendants advance in this Court is not only directly contrary to the language of, and intent underlying, Section 2.2, but it fails for an even more fundamental

reason. Should defendants' arguments be adopted by this Court, it would make Section 2.2 impermissible special legislation under the Illinois Constitution.

Article 4, Section 13 of the Illinois Constitution of 1970 states "SPECIAL LEGISLATION - The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." Illinois Constitution, Art. 4, §13 (1970).

As this Court has often held, legislation which confers a benefit on one category or group to the exclusion of others similarly situated violates the special legislation clause and is, therefore, void. *Best v. Taylor Mach. Works,* 179 Ill.2d 367, 391 (1997). The *Best* Court held that the legislature's enactment of a cap on certain types of damages violated the special legislation clause and struck down that portion of the statute. The *Best* Court stated "[t]his court has consistently held that the purpose of the special legislation clause is to prevent arbitrary legislative classifications that discriminate in favor of a select group without a sound, reasonable basis." *Id.* at 394.

The *Best* Court explained that it had found statutes to be impermissible special legislation "where they have an artificially narrow focus and which appear to be designed primarily to confer a benefit on a particular private group without a reasonable basis, rather than to promote the general welfare." *Id.* at 395; *citing In re Belmont Fire Protection District*, 111 Ill. 2d 373, 381-86 (1986); *Wright v. Central Du Page Hospital Ass'n*, 63 Ill. 2d 313, 325-30 (1976) (invalidating $ 500,000 limit on compensatory damages in medical malpractice actions); *Grace v. Howlett*, 51 Ill. 2d 478, 486-87 (1972) (invalidating a limit on recovery applicable to damages inflicted by commercial motorists, but not private motorists); *Skinner v. Anderson*, 38 Ill. 2d 455, 459-60 (1967) (invalidating a statute of

repose for construction-related injuries for architects and contractors, but not other potential defendants in the construction process). The *Best* Court further explained that "the hallmark of an unconstitutional classification is its arbitrary application to similarly situated individuals without adequate justification or connection to the purpose of the statute." *Best*, 179 Ill.2d at 395.

When faced with determining the meaning of a statute this Court has stated that "[a] statute capable of two interpretations should be given that which is reasonable and which will not produce absurd, unjust, unreasonable or inconvenient results that the legislature could not have intended." *Collins v. Board of Trustees*, 155 Ill. 2d 103, 110 (1993). An interpretation that renders a statute valid is always presumed to have been intended by the legislature. *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 363 (1986).

Turning to the statute at issue, the amendment adding Section 2.2 clarified that the state of gestation or development of a fetus would not be a defense to a wrongful death action on behalf of the fetus. Due to concerns that the amendment would subject physicians performing abortions to claims for the wrongful death of the fetus, paragraph 2 was added to protect those physicians from claims. While the classification is narrow and specific, (physicians performing consensual abortions) the justification and connection to the purpose of the statute is clear and reasonable. In the wake of *Roe v. Wade*, the legislature was careful that extending causes of action for wrongful death regardless of the viability of the fetus statute could not be used to discourage physicians performing lawful abortions. This was very clearly the purpose of the House amendments to the original bill introduced by Senator Rhoads.

This purpose would not be served by protecting physicians that negligently cause injury to a fetus which results in a decision to terminate the pregnancy. There is no indication, in either the plain language or the legislative history of Section 2.2, that the legislature intended to protect negligent physicians from the consequences of their negligence. Nor would such protection be constitutional as it would not protect negligent drivers, manufacturers or other similarly situated tortfeasors that cause injury to a fetus resulting a decision to terminate the pregnancy. Rather, the addition of paragraph 3 clarified that physicians who had no reason to know of the pregnancy, according to the applicable standard of care, were likewise protected from suit. No "justification or connection to the purpose of the statute" exists with regard to protecting physicians that negligently cause injury to a fetus resulting in a decision to terminate the pregnancy. If Section 2.2 is interpreted to bar the instant action, or by extension all claims involving a physician that negligently injures a fetus leading to an abortion, Paragraph 2 of Section 2.2 would be impermissible special legislation and could not survive as written.

As this Court must endeavor to interpret Section 2.2 as valid and not in violation of the Special Legislation clause, it is clear that the section cannot be read to protect negligent physicians from actions for wrongful death under the circumstances at issue. *Amicus Curiae* submits that the legislative purpose of Section 2.2 is served, and the validity of the section upheld, by interpreting it to bar causes of action against physicians performing abortions while allowing causes of action against negligent physicians causing injury to a fetus leading to a decision to terminate the pregnancy.

CONCLUSION

Amicus Curiae Illinois Trial Lawyers Association respectfully requests this Court affirm the trial and appellate courts' decisions in the instant matter and answer the certified question in the negative. In addition, this Court must overrule the Third District Appellate holding in *Light v. Proctor Community Hospital*, 182 Ill. App. 3d 563 (3d Dist. 1989) and find that Section 2.2 prohibits a cause of action for wrongful against physicians and medical institutions that perform an abortion but does not prohibit an action against a physician or medical institution that causes injury to a fetus which leads to a decision to terminate the pregnancy.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I, Richard J. Rosenblum, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 22 pages.

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