No. 126074

In the
Supreme Court of Illinois

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 – Appellees,

v.

EDGARD KHOURY, M.D. and ROBERT T. 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 H. Ehrlich, Judge Presiding

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BRIEF OF PLAINITFFS – APPELLEES, MONIQUE THOMAS AND CHRISTOPHER MITCHELL

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TABLE OF POINTS AND AUTHORITIES

ARGUMENT

I. Defendants' arguments fail to appreciate the difference under the Wrongful Death Act of the injury to the person and the death of the person.

Despite numerous efforts at explication by the plaintiffs and the lower courts, the defendants in this case continue their flawed and purposeful misquoting and misunderstanding of Section 2.2 of the Wrongful Death Act (the "Act"). Numerous briefs have been filed in the trial court and the appellate court and multiple orders have been entered by the lower courts addressing this issue; yet the defendants continue to leave out important words in their quotations and make misstatements of the law. The defendants must feel that the only way to convince this court that their position has legal merit is to misstate the law and misquote the relevant statute. Fortunately, these tactics can and should be seen through by this court.

A. Defendants fundamentally misunderstand the language contained in Section 2.2 of the Wrongful Death Act.

The underlying courts clearly understood, based on the facts of this case, that the legislative intent of 740 ILCS 180/2.2 was to allow causes of action on behalf of a fetus when there is malpractice on the part of a physician that causes, at least in part, the death of that fetus. The Legislature, in enacting this section, meant to protect fetuses from the actions or inactions of physicians that lead to the wrongful death of that fetus. Clarifying language explaining that a lawful abortion performed with requisite consent is not, in and of itself, an actionable harm does not change that fundamental truth. The Legislature just as clearly meant to protect the physicians that performed a lawful abortion from wrongful

death claims on behalf of the fetus. The legislature did not intend to protect a physician that causes injury to a fetus, as in this case, from all causes of action simply because the actual cause of death was a subsequent abortion. As discussed below, the injury to the fetus is the actionable element of a wrongful death claim, not the death itself. It is with this background in mind that the outcome of this case becomes clear.

Rather than work within the confines of the clear law set forth by this court with regards to the interpretation of the Wrongful Death Act, the defendants choose to misstate and misquote the law. The opening sentence of defendants' argument demonstrates the defendants fundamental misunderstanding of the Act. "In creating a cause of action for wrongful death of a fetus, regardless of its gestational age, the General Assembly determined that a lawful, consensual abortion is not a wrongful death." App. Brief at page 7. By reviewing the actual words of Section 2.2, the legislative intent on this becomes clear.

Paragraph 2 of Section 2.2 states as follows:

> 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.

740 ILCS 180/2.2. Contrary to the defendants reading, this paragraph does not state that a lawful, consensual abortion is not a wrongful death. This paragraph, when read properly, states that a "**wrongful** death of a fetus **caused by** an abortion where the abortion was permitted by law and the requisite consent was lawfully given" shall not create a cause of action under the Wrongful Death Act. Id. (emphasis added) In order for this paragraph to apply, it is necessary that the *wrongful* death itself be caused by the abortion; not merely

any death.

The defendants continued misreading of this section is shown in several places in their brief. For example, on page 9 of their brief, the defendants insert a quote which leaves out the most important word in the Wrongful Death Act – "wrongful." The defendants state as follows:

> First, the statute precludes a wrongful death action against a physician for the "death of a fetus caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully given."

Whether it is happenstance, mistake, or willful misquoting to leave out the word "wrongful" from this quote is unknown; however, leaving out the word wrongful is the only way the defendants can support their argument. Unless they argue that the death itself is caused by an abortion, their entire argument falls apart. So, rather than try to explain why "wrongful death caused by an abortion" is contained within this paragraph, they simply ignore that word and subsequently ignore the argument that is at the crux of this case – what is a *wrongful* death under the Act.

One might argue that this was simply a misquoting of the Act; however, that ignores the fact that the defendants have made numerous arguments in their brief premised on this exact misunderstanding. What follows are just a few examples.

On page 11, the defendants' argument again fails to understand that it is a "wrongful death caused by an abortion" that is at issue. They state: "The trial court found no ambiguity in the second paragraph, which bars a wrongful death action against physicians and medical institutions **for a fetal death resulting from a lawful, consensual abortion** as occurred here." App. Brief at p. 11 (emphasis added). On pages 7 – 8, the defendants state:

> The trial court construed the third paragraph of section 2.2, which bars a cause of action where a physician did not know, and had no reason to know of a pregnancy, as permitting all causes of action for fetal death where a defendant knew or should have known that a fetus existed. (C 401.) With this errant statutory construction, the trial court in effect deleted the second paragraph of section 2.2. By the trial court's illogical reasoning, a wrongful death action could be permitted even against a physician who performs a lawful, consensual abortion given that, under such circumstances, the physician necessarily would know of the pregnancy.

In both examples, the defendants' argument can only be successful if the death itself is caused by an abortion, rather than the wrongful death being caused by an abortion. For the second paragraph of Section 2.2 of the Act to apply, the abortion must be the wrongful death, not just the death, of the fetus. If the legislature intended that any death of a fetus caused by a lawful, consensual abortion to be excluded from the Act, then the legislature simply could have removed the word "wrongful" from paragraph 2. Unfortunately for the defendants, that is not the language used by the legislature.

B. The legal definition of a wrongful death is that the injury that leads to the death is the precursor to a wrongful death cause of action.

The Defendants' entire argument focuses directly on the cause of the death of the fetus in question, rather than the injury which lead to the death, as is required by the Illinois Supreme Court. Based on their misperception of this legal question, the Defendants have built an argument focused solely on the second paragraph of Section 2.2; however, the interpretation urged by Defendants here, which focuses on the death of the fetus as determinative of whether a cause of action exists under the Act, is precisely the interpretation that was rejected by this Court in *Williams v. Manchester*, 228 Ill. 2d 404, 422- 23 (2008). The *Williams* Court stressed that the entire reason the Illinois Appellate Court had gone astray in its analysis was that "[t]he appellate court

misapprehended the injury in this case for which the Wrongful Death Act provides a right of action . . . the court expressly identified the 'injury' in plaintiffs wrongful-death claim as Baby Doe's death. " Id. This led to an erroneous outcome, because the court was looking at the entirely wrong injury. The Illinois Supreme Court agreed with the dissent from the appellate court and quoted it at length, where it was explained that, though named the "Wrongful Death Act," the injury that is at the center of a claim under the Act is not the death, but rather "an actionable injury to the fetus with recoverable damages that could have been maintained had death not intervened." *Id.* quoting Cahill, J., dissenting at 372 Ill.App.3d at 250-51. Based on this, the judgment of the appellate court was reversed, and the summary judgment of the trial court sustained, as the record showed that there was no evidence that the fetus had incurred any actual cognizable injury prior to its death. *Williams*, 228 111. 2d at 415.

The arguments of Defendants here are burdened by the same misapprehension identified by the Illinois Supreme Court in *Williams*. Defendants urge this Court to adopt an interpretation of the Act that focuses solely on the death of the fetus, and Defendants' contention that the cause of death was an elective abortion within the meaning of the Act. This is the exact misapprehension rejected by this Court in *Williams*, and it must be rejected here as well.

Defendants continued misapprehension is shown within their analysis of the *Williams* opinion. At page 19 of their brief, the Defendants state:

> The appellate court concluded its discussion of *Williams* with the observation that its interpretation of the Wrongful Death Act permitted a cause of action for injury to the fetus regardless of the cause of death. Opinion, ¶ 22. The appellate court provided no explanation or basis for its wayward conclusion that causation of a fetus' death is irrelevant in a wrongful death action.

In making such an argument, Defendants continue to express ignorance as to the difference between death and wrongful death; whether such ignorance is feigned or actual is immaterial insofar as the proper outcome of this case.

Defendants' entire brief is devoid of any analysis of this key issue, which was addressed in detail by the trial court and by the appellate court. Defendants fail to explain how the Plaintiffs' pleading of an injury to the fetus, caused by the misconduct of those Defendants, does not create a viable cause of action. Defendants have not tried to argue that the pleading is insufficient, or that the allegations do not support application to paragraph 3 or make any other argument to explain why the facts of this case would not support a finding as made by the lower courts. Instead, they argue, in essence, "the death was caused by an abortion, *ipso facto*, we win."

This Court must also be cognizant of the procedural posture of this case. This case addresses the denial of a 2-619 motion to dismiss filed by the Defendants. In this case, the Plaintiffs' operative complaint focuses on the injury incurred by the fetus. See C187, ¶ 26, 27, and 28. It is this injury to Baby Doe which is the precipitating injury for the Wrongful Death Act claim contained in the First Amended Complaint. Where, as here, there are allegations of an actual, recoverable injury to a fetus, the Act provides that cause of action remains after the death of the fetus. The appellate court fully understood this when it stated:

> We find the third paragraph does not bar a claim for wrongful death based on negligent medical care under the facts alleged in the first amended complaint. The Wrongful Death Act allows for a wrongful death action where a plaintiff can establish an actionable injury to the fetus without regard to an abortion being the ultimate cause of death.

Op. at p. 6. The Defendants contend that the appellate court was mistaken in its analysis on this point; however, Defendants only do so by focusing on the cause of the fetus's death, and not the actual injury to the fetus as the basis for the wrongful death cause of action at issue in this case. In framing the question incorrectly, Defendants' necessarily arrive at conclusions that are equally incorrect.

II. The Plaintiffs' cause of action is clearly allowed under the Wrongful Death Act.

Section 2.2 provides for a cause of action in derogation of the common law, while simultaneously creating exceptions to that right of action. Plaintiffs do not contest that the *Light v. Proctor* case, as cited by the Defendants, held that the facts of that case did not allow for a cause of action against the physicians. In this Court, the outcome of the *Light* case is irrelevant as this court is not bound by the decision of the Third District in the *Light* case and the standard of review for the issue at bar is a *de novo* review. Even if the *Light* decision was binding on this Court's analysis, the facts of this case are distinguishable from the *Light* case.

A. The facts of *Light v. Proctor Comm. Hosp.* are distinguishable from the facts of this case.

In the *Light* case, the physicians were not alleged to have known, in any way, that the plaintiff was pregnant prior to the procedure. Nor was it alleged that the physicians had any reason to know that the plaintiff was pregnant. As stated above, the injury to the fetus is the essence of the Wrongful Death Act claim. In Light, the court essentially held that the second paragraph of Section 2.2 applied as the only claimed injury to the fetus was the death itself, which was caused by an abortion. *Light v. Proctor Community Hospital*, 182 Ill. App. 3d 563 (3d Dist. 1989). To the contrary, in the case at bar, the

plaintiffs have alleged not only that the defendants performed tests to determine if the plaintiff was pregnant but, after seeing positive results in those tests, proceeded with the surgery that led to the injuries to the fetus. C188. The allegation in *Light* was simply that the defendant physician failed to take any steps to determine if the plaintiff was pregnant.

Furthermore, the plaintiff in *Light* never argued any applicability of paragraph 3 of Section 2.2. Granted, the court held that, under the facts of *Light*, the wrongful death claim was barred by the second paragraph of Section 2.2; however, that ruling does not automatically preclude any wrongful death claim just because the facts are similar. As the lower courts correctly ruled in this case, the facts of each case must be analyzed, and the law reviewed as a whole.

Contrary to the facts of *Light*, the Plaintiffs here have alleged that the Defendants had actual knowledge that the Plaintiff was pregnant, yet still proceeded with the Plaintiff's elective surgery. The Plaintiffs have further alleged that the procedure performed caused direct injury to the fetus (C187-C191, ¶11, 26-28), and that the injury to the fetus made it more likely than not that the fetus would not have survived to term. C187-Cl91, ¶11. As stated in the *Williams* case, the injury to Baby Doe is the "actionable injury to the fetus with recoverable damages that could have been maintained had death not intervened." *Williams*, 228 Ill. 2d at 422-23. Accordingly, the *Light* case, although similar in some facts, does not and cannot control the outcome of this case.

Oddly, the Defendants argue that the *Light* case should apply when they acknowledge that the *Light* case did not involve any analysis of paragraph 3 of Section 2.2. However, the Defendants attempt to distinguish the *Williams* case on the basis that the *Williams* Court was not analyzing paragraph 2 of Section 2.2. It is this dichotomy of

arguments that again shows the Defendants' failure to understand the injury that precedes the death as the basis of a Wrongful Death Act claim.

B. Paragraph 2 and Paragraph 3 of Section 2.2 both have potential applicability to the facts of this case.

As the Defendants argue, and the *Light* case held, the second paragraph of Section 2.2 has potential applicability to the facts of this case. The Plaintiffs herein have never argued that the second paragraph does not have potential applicability to this case. What is also abundantly clear is that the third paragraph is applicable to the facts of this case.

In derogation of the common law, the first paragraph of Section 2.2 allows for wrongful death claims on behalf of a fetus "arising from the death of a human being caused by wrongful act, neglect or default." 740 ILCS 180/2.2. The third paragraph of Section 2.2 creates an exception to the grant of a cause of action contained in the first paragraph of Section 2.2, by restricting causes of action against physicians based on their misconduct where the physician "did not know" nor had "medical reason to know" of the pregnancy. *Id.* Clearly, this exception only applies if the facts were to show that the physician did not know or had no reason to know of the pregnancy. By its clear language, if the physician knew of the pregnancy or, at the very least, had reason to know of the pregnancy, the exception does not apply, and a wrongful death claim can be brought against the physician "based on the alleged misconduct of the physician." *Id.* The plaintiffs herein have plead exactly this cause of action. As such, the exception of the third paragraph does not apply and a wrongful death act claim is valid under these facts.

C. The Legislature clearly intended that the exception of the third paragraph applied in limited circumstances.

What is also clear is that the Legislature intended that this exception only apply in

certain circumstances. If the Legislature intended that physician malpractice cases could not apply to injuries and deaths to fetuses, the Legislature could have ended the third paragraph after "physician or medical institution." The legislature did not do so. By adding the additional language, the Legislature clearly intended that physicians would only be excused from their "alleged misconduct" which injured a fetus if the physician did not know or had no reason to know that the mother was pregnant. The Legislature's clear intent was to allow for wrongful death claims on behalf of a fetus if the physician's misconduct caused injury or death to a fetus.

More importantly, the third paragraph of Section 2.2 contains vastly different language as compared to paragraph 2. As stated above, the second paragraph discusses a "wrongful death caused by an abortion." 740 ILCS 180/2.2. In contrast, the third paragraph of that section discusses a "wrongful death of a fetus based on the alleged misconduct of the physician . . ." *Id.* Again, this shows that the Legislature was fully aware of the basis of a wrongful death action and that the distinction between the injury and the death is relevant in determining whether a wrongful death cause of action can exist.

D. This Court can read the second and third paragraphs of Section 2.2 in harmony and without finding that an ambiguity exists.

Plaintiffs believe that a detailed reading of Section 2.2 does not necessarily lead to any ambiguity within the statute; however, the statute as applied to the facts of this case could lead to an ambiguity if both the second paragraph and the third paragraph of Section 2.2 were to apply. This Court can and should conclude that the language in the second paragraph only applies in situations where there is no allegation of injury to the

fetus alleged prior to the abortion. Without an allegation of an actionable injury to the fetus, prior to a lawful, consensual abortion, the prohibition of a cause of action in the second paragraph of Section 2.2 would apply. This is due to the use of the phrase "wrongful death" rather than simply "death" in the second paragraph. Clearly, the Act requires an actionable injury to enable a cause of action in the first instance.

Similarly, the third paragraph applies when there are allegations of injury to a fetus because of alleged misconduct of the physician which created an actionable cause of action in the fetus prior to the abortion. Then, as stated by the appellate court, "the representative's right of action depends on the existence, in the decedent at the time of death, of a right of action to recover for the injury; 'the statutory requirement of an injury to decedent confers the right of action in the first place.'" Opinion ¶ 20. Additionally, as clearly and cogently explained by the appellate court,

> "[o]ur 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). To find otherwise would enable physicians and medical institutions to deflect allegations of medical malpractice whenever an abortion follows alleged medical misconduct that injures a fetus and they knew and, under the applicable standard of good medical care, had medical reason to know of the pregnancy."

Opinion ¶ 22.

This reading of the Act would also provide an explanation as to why the Legislature has not taken action with regards to the *Light* decision. If the Legislature reads the *Light* decision to say that because there was no allegation of an actionable injury to the fetus prior to the abortion there was no valid cause of action under the Act, then the Legislature would have no reason to take action to correct such an opinion. Such an outcome is wholly consistent with both the text of Section 2.2 and the jurisprudence

explaining that any claim under the Wrongful Death Act must be predicated on an actionable injury with recoverable damages that could have been maintained had death not intervened.

E. If there is an ambiguity within Section 2.2 of the Wrongful Death Act, then the legislative history of the Act clearly shows that the Plaintiffs here have a valid cause of action.

It is the Plaintiffs' position that the third paragraph of Section 2.2 allows for this cause of action to proceed; however, the Plaintiffs also recognize the precedent of *Light* as to the second paragraph. As explained *supra*, it is the position of Plaintiffs here that, as applied to the facts of this case, the statute can be read in a manner where no ambiguity exists. However, if the Court were to conclude, as Defendants urge, that the differing paragraphs within Section 2.2 could lead to different results on identical facts, or, assuming *arguendo* that the differing paragraphs would compel different outcomes to the facts of this case, an ambiguity exists which requires this court to look beyond the language of the statute itself. The Illinois Supreme Court has stated that:

> [t]he fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent. The best indication of legislative intent is the statutory language, given its plain and ordinary meaning. Where the language is clear and unambiguous, we must apply the statute without reso1i to further aids of statutory construction. If the statutory language is ambiguous, however, we may look to other sources to ascertain the legislature's intent.

Krohe v. City of Bloomington, 204 III. 2d 392, 395, 789 N.E.2d 1211, 1213 (2003) (internal citations omitted). The *Krohe* Court went on to explain what could lead to a finding that a statute is ambiguous and stated "[a] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more different ways." Id.

In the facts at bar, as plead in the First Amended Complaint1, both defendants knew "of the pregnancy" of Ms. Thomas or, at a minimum, "under the applicable standard of good medical care," had reason to know of the pregnancy of Ms. Thomas. Even with such knowledge, constructive or actual, the physicians proceeded with a surgery on Ms. Thomas. That surgery caused injury to, and the ultimate death of, the fetus. Under the third paragraph of Section 2.2 of the Act, a claim can be maintained against the physicians due to the injury to the fetus based on the allegation that the Defendants had the requisite knowledge of Ms. Thomas' pregnancy. Reading only the second paragraph of Section 2.2 and with the analysis of the *Light* court, no such cause of action would exist. This factual scenario creates a potential for ambiguity within the statute as the same facts can lead reasonably well-informed people to come to different conclusions as to the outcome if read in this limited way.

If an ambiguity is identified, "a statute's legislative history and debates are '[v]aluable construction aids in interpreting an ambiguous statute.'" *Krohe*, 204 Ill. 2d at 398, citing *Advincula v. United Blood Services*, 176 Ill.2d 1, 19, (1996). The legislative history for this statute is contained at C34l-C369. The original bill only contained the first paragraph of Section 2.2. Senator Rhoads was the sponsor of this bill and spoke in support of the bill on May 17, 1979. Senator Rhoads explained that the current state of the law under the Wrongful Death Act created a gap in time under the Wrongful Death Act, from the point of conception to the point of viability, and that wrongful death causes of action might be validly pursued only once a fetus had reached viability. C366. Senator

[1] Plaintiffs agree with Defendants that the operative complaint should have been titled the Second Amended Complaint at Law.

Rhoads explained "Let's say a . . . a pregnant woman in her fourth or fifth or sixth week of pregnancy is harmed through the 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." C361. After further questioning as to whether the intent of this bill was to prevent otherwise legal abortions, Senator Rhoads stated, "it isn't aimed at a doctor who lawfully performs an abortion." C362. After this debate, SB756 was passed by the Illinois Senate.

SB756 was then transferred to the House for its review. The House introduced several amendments to SB756. Those amendments eventually became paragraphs 2 and 3 of Section 2.2. As Senator Cullerton stated on June 21, 1979, "[t]his 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 the woman was pregnant." C345. The amendment was passed and SB756 passed the House and was returned to the Senate.

On June 28, 1979, Senator Rhoads again spoke on behalf of SB756 and discussed the House amendments and urged the Senate to concur with the House amendments. In discussing the amendment, Senator Rhoads restated the purpose of the amendment and stated "[n]ow, you certainly can still go after them under malpractice or negligence or any of those types of causes of action." C342. Senator Rhoads certainty of the meaning of the bill he introduced is now called into question by Defendants.

Clearly the purpose of SB756, which eventually became Section 2.2 of the Wrongful Death Act, was not to provide unqualified immunity for medical malpractice

where the harm caused to the fetus is so severe that death results, wherein if the fetus were simply injured, a cause of action would still lie. The exceptions that are contained within the second and third paragraphs of Section 2.2 are simply to clarify that the first paragraph was not intended to outlaw abortion. These exceptions were added to SB756 to clarify that the first paragraph was not intended to be a back-door mechanism to outlaw abortion. The second paragraph of Section 2.2 was only added to protect the physician who actually performed the abortion from being sued for the wrongful death of that same aborted fetus. The third paragraph was added to clarify that a physician who was unaware of the pregnancy of the mother should also not be sued in wrongful death. These are the only two scenarios which the Illinois legislature chose to exclude from the broad authorization to bring wrongful death lawsuits on behalf of an unborn fetus, regardless of gestational age, under the first paragraph of Section 2.2.

The manner in which the facts of this case may fall between the second and third paragraph of Section 2.2 show both that the *Light* decision does not control the outcome here, and that any ambiguity that may exist in Section 2.2 justifies the use of legislative history to interpret that Section. As explained above, the legislative history makes clear that Section 2.2 was never meant to provide immunity for medical negligence so severe that the pregnancy is no longer viable. Accordingly, based on the facts plead in the amended complaint, Section 2.2 of the Wrongful Death Act cannot act as a bar to the plaintiffs' claims against the Defendants and that the Defendants' motion to dismiss should be denied.

F. The negative implication canon is useful to ascertain the legislative intent.

In interpreting the third paragraph of Section 2.2 as it applies to this case, it is

useful to note the legal maxim *exceptio probat regulam de rebus non exceptis*, which Black's Law Dictionary (11th Ed.) translates as “An exception proves a rule concerning things not excepted." The third paragraph of Section 2.2 provides that no claim exists under the Act "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. In excepting such a claim, that Section impliedly "proves the rule concerning things not excepted," and thus shows that a claim *does* exist under the Act where the defendant did know, or under the applicable standard of good medical care, had medical reason to know of the pregnancy of the mother of the fetus.

The defendants would have this court disregard this rule of statutory construction on the basis that this maxim is only used to resolve ambiguities, not to determine whether an ambiguity exists. Despite their valiant effort to avoid the implications of this maxim, the case law to which the defendants cite supports the plaintiffs reading of the third paragraph. As the *Bridgestone/Firestone* court noted,

> We recognize that the principle that the expression of one thing in a statute excludes any other thing is only a rule of statutory construction, not a rule of law. It is merely a rule that courts use to help them ascertain the intent of the legislature where such intent is not clear from the statute's plain language. The maxim is applied only when it appears to point to the intent of the legislature, not to defeat the ascertained legislative intent. The rule may be overcome by a strong indication of legislative intent.

Bridgestone/Firestone, Inc. v. Aldridge, 179 Ill. 2d 141, 153- 54 (1997).

As stated above, there is a potential ambiguity that exists in examining paragraphs two and three as they apply to the facts of this case. As reasonable people may be able to come to different conclusions on the same set of facts, the statute is potentially ambiguous. Accordingly, the maxim *exceptio probat regulam de rebus non exceptis* is

useful in determining the intent of the legislature and, when consulted, clearly indicates that Plaintiffs' claims here survive, as all lower courts have ruled.

III. Properly analyzing a statute is the judiciary's job, not invading the province of the Legislature.

Defendants claim that the appellate court's rationale invaded the province of the Legislature. This is patently absurd. The appellate court undertook a diligent review of the statute in question and made legal conclusions as to the applicability of that law to the facts of this case. A close review of both the appellate court decision and, importantly, the oral argument prior to the decision, shows that the appellate court was rightly concerned that the logical implications of Defendants' position would create an outcome that is not only absurd but directly contrary to other provisions of Section 2.2. Oral Argument at 18:52 to 20:04, *Thomas v. Khoury* (2020 IL App (1st) 191052) (No. 1-19-1052), *https://multimedia.illinois.gov/court/AppellateCourt/Audio/2020/1st/021920_1-19-1052.mp3*

As is common for oral argument, the appellate court posed several hypothetical situations to Defendants' counsel to test the bounds of the position they were urging the court to adopt. *Id.* at 14:10 to 20:10. The appellate court specifically posed the questions to Defendants about whether, if the appellate court agreed with defendants, there would ever be a circumstance where a claim could be brought on behalf of a fetus under the Wrongful Death Act for harm that was caused to the fetus *in utero* unless the fetus was ultimately born alive. The following colloquy is found beginning at 18:52 of the audio recording,: –

> Q: And based on your understanding of the statute if the pregnancy had not been terminated and went to term and the baby actually because of the injury was subsequently born dead, there would be no recovery because the baby was not born alive. That's where you take this. That's exactly where -
>
> A: No, that's not what I'm saying. I'm….
>
> Q: - you take this. You said the baby has to be born alive. That's how you interpret the statute.
>
> A: I don't interpret the statute….
>
> Q: But that's…. Okay then read it. You read it and tell me how you're interpreting it differently. That's what you just said.
>
> A: I'm not following … I'm not following your question.
>
> Q: You're saying that – Justice Hyman asked you earlier "what's the exception?" because under the theory that Justice Hyman believed you were moving forward, is that a doctor is never liable unless the baby is born alive, correct? That's what you said earlier?
>
> A: Not "never liable," your Honor. There's not a Wrongful …
>
> Q: Unless, well, one of the exceptions is that the baby is born alive. But if the baby is not born alive, then there's no recovery.
>
> A: There's not a Wrongful Death action recovery.
>
> Q: There's no … Correct. There's no Wrongful Death action unless the baby is born alive. That's your argument.

Id. at 18:52 to 20:10.

Defendants argue that the appellate court was engaging in policy making in reaching its decision and attempting to avoid an outcome that the court felt was bad policy. This is not the case. Defendants' argument regarding the meaning of the second and third paragraphs of Section 2.2, as framed by Defendants and repeatedly confirmed, is in direct contradiction to the first paragraph of Section 2.2. The first paragraph 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.

740 ILCS 180/2.2 Note that this paragraph does not talk of "the state of gestation or development of a *fetus*," but rather of a "human being." Defendants argument seeks to add a requirement to this language, "so long as the baby is later born alive." But the Legislature did not enact such a requirement. Rather, the Legislature spoke clearly that it intended the opposite: that state of gestation or development is immaterial in determining whether a cause of action exists under the Wrongful Death Act, whether in reference to "when an injury is caused, when an injury takes effect, or at death". This cannot possibly be squared with Defendants position. Removing some of the alternative clauses from the first paragraph makes this position even more plain: "The state of gestation or development of a human being … 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." 740 ILCS 180/2.2.

The appellate court pointing out the absurd results required by the Defendants' position is not the court making legislative determinations. Rather, it is showing that the logical implications of Defendants' requested reading of the second and third paragraph of Section 2.2 would serve to directly contradict the plain language of the *first* paragraph of that Section. In reaching a ruling that avoids such a result, the appellate court was not engaged in the enactment of public policy; it was engaged in the fundamental work of construing statutes with an eye toward giving effect to all of the statutory language.

CONCLUSION

Section 2.2 of the Wrongful Death Act clearly allows for the cause of action as pled by the Plaintiffs to proceed. There is no need for this Court to correct any action taken by the trial court or the appellate court as both courts properly determined that the Section 2.2 does not bar the instant cause of action.

WHEREFORE, for the reasons set forth herein, plaintiffs Monique Thomas and Christopher Mitchell, request this court to answer the certified question in the negative and rule that Section 2.2 of the Wrongful Death Act does not bar the instant causes of action.

Respectfully Submitted,

By: /s/ Edward K. Grasse
Attorney for Plaintiffs-Appellees, Monique Thomas and Christopher Mitchell

Certificate of Compliance

I 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 twenty (20) pages.

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In the Supreme Court of Illinois

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 – Appellees,

v.

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

Defendants – Appellants.

CERTIFICATE OF SERVICE

I, Edward K Grasse, an attorney, certify that on January 13, 2021, I filed with the Clerk's Office by electronic means and caused to be served a copy of Appellees Response Brief, upon the following individual(s), electronically via the Case Management/Electronic Case Filing System ("ECF").

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements in this instrument are true and correct

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