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 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.

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS, EDGARD KHOURY, M.D. and ROBERT KAGAN, M.D.

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NATURE OF THE ACTION

This Supreme Court Rule 308 appeal, in a medical negligence action, calls for this Court's interpretation of section 2.2 of the Wrongful Death Act (the "Act"), 740 ILCS 180/2.2. The statute prohibits an action against a physician for the death of a fetus caused by a legal abortion with requisite consent.

Plaintiffs claim that, prior to plaintiff Monique Thomas proceeding with elective surgery, she was misled regarding the results of pre-surgical pregnancy testing. According to plaintiffs, Ms. Thomas was told she was not pregnant and the surgery could safely proceed, despite test results allegedly consistent with a pregnancy of less than four weeks duration. Plaintiffs allege that, after the surgery, Ms. Thomas learned she was pregnant and terminated the pregnancy based on concerns of the effects on the fetus of anesthesia, medications, and an infection associated with the surgery.

The trial court initially dismissed plaintiffs' wrongful death claims. Later, the court reversed its decision *sua sponte*. The court held that the converse of an inapplicable provision in section 2.2 established an exception to the provision barring wrongful death claims for a fetus terminated by a voluntary abortion. Recognizing its novel reading of the statute, the trial court certified a question for review.

The appellate court, First District, accepted defendants' Rule 308 application. The First District did not analyze *Light v. Proctor Community Hospital*, 182 Ill. App. 3d 563 (3d Dist. 1989), a closely analogous Third District decision, which has not generated any legislative correction in 31 years, that upheld dismissal of a wrongful death claim for a fetus' death resulting from a lawful abortion based on the controlling paragraph of section 2.2. Instead, citing wrongful death cases not involving an abortion, the First District held that plaintiffs' wrongful death count could proceed.

JURISDICTION

In an April 26, 2019 Memorandum Opinion and Order denying the defendants' motions to dismiss, the trial court certified a question for interlocutory appeal pursuant to Supreme Court Rule 308. (A 9-21; C 393-405.) The trial court recognized as "quite evident" that "a substantial ground for difference of opinion" called for appellate review. (C 404.) On that basis and because an adverse ruling on review could significantly narrow the scope of discovery and the triable issues, the trial court certified an issue for immediate interlocutory appeal pursuant to Rule 308. On May 24, 2019, defendants filed a timely application for interlocutory appeal, which the appellate court granted on July 12, 2019. (A 22; C 416.)

The appellate court filed its decision, *Thomas v. Khoury*, 2020 IL App (1st) 191052 ("Opinion"), on March 31, 2020. (A 23-32.) Defendants did not seek rehearing. On June 9, 2020, defendants timely filed a petition for leave to appeal in accordance with the extended deadline for petitions for leave to appeal. (M.R. 30370 - *In re*: Illinois Courts Response to COVID-19 Emergency - Supreme Court Filing Deadlines.) This Court granted leave to appeal on September 30, 2020.

STATUTE INVOLVED

"740 ILCS 180/2.2 [Fetal death; abortion; pregnancy unknown]

> 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."

ISSUE PRESENTED FOR REVIEW

The trial court certified the following question:

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

STATEMENT OF FACTS

The trial court twice addressed defendants' motions to dismiss pursuant to 740 ILCS 180/2.2. The original complaint, with Monique Thomas as the sole plaintiff, contained one count for medical malpractice. (C 15-17.) Plaintiffs Monique Thomas and Christopher Mitchell filed an "Amended Complaint at Law" on March 19, 2018. (C 30-34.) In their three-count amended complaint, plaintiffs alleged that Dr. Kagan, Dr. Khoury and the treatment team at Alexian Brothers Medical Center breached the standard of care when they advised Ms. Thomas that elective surgery on March 18, 2016 was safe, notwithstanding urine and blood tests that, plaintiffs claimed, were "clear evidence" of a pregnancy. (C 32 at ¶ 17.) After the surgery, Ms. Thomas was evaluated for pain allegedly resulting from an infection. Plaintiffs alleged that, in the course of her post-

surgical medical treatment, Ms. Thomas' pregnancy was confirmed, and she was advised to terminate the pregnancy based on "serious health risks and damage" to the fetus. (C 31 at ¶¶ 11-12.) In all three counts of the amended complaint, plaintiffs alleged that defendants breached the standard of care in failing to review Ms. Thomas' medical history, the test results and ultrasound reports before informing Ms. Thomas that she was not pregnant and the surgery could proceed. (C 31-32 at ¶¶ 14-18.)

Based on the provision contained in 740 ILCS 180/2.2 barring claims for wrongful death following a lawful abortion with requisite consent, and pursuant to 735 ILCS 5/2-619, the defendants moved to dismiss the wrongful death claims in the amended complaint. (C 120-27, 148-52, 201-04.) The trial court granted defendants' motions and dismissed, with prejudice, Counts II and III of the amended complaint, as well as a paragraph in Ms. Thomas' medical malpractice count (Count I) in which she sought recovery for the death of the aborted fetus. (C 185.) The court permitted plaintiffs to file an amended complaint. (*Id*.)

At issue in this appeal is plaintiffs' October 25, 2018, "First Amended Complaint at Law" ("First Amended Complaint").[1] In the three-count First Amended Complaint, plaintiffs alleged that, before her elective breast reduction and belt lipectomy surgery, Ms. Thomas' healthcare providers performed standard presurgical testing, including a

[1] The complaint filed on October 25, 2018 should have been entitled "Second Amended Complaint at Law."

pregnancy screening test, that showed a positive HCG result. (C 187 at ¶ 5; C 372.)[2] In addition, an ultrasound was performed that did not show an intrauterine pregnancy; plaintiffs alleged, however, that the ultrasound was consistent with a pregnancy of less than four weeks gestation. (C 188 at ¶ 6.) Plaintiffs claimed Ms. Thomas received assurances that she was not pregnant (C 188 at ¶ 7) and the elective procedure could safely proceed (C 189 at ¶ 16), when in fact she was pregnant (C 188 at ¶ 10). Dr. Kagan performed the scheduled surgery under anesthesia administered by Dr. Khoury. (C 188 at ¶ 9.)

After the March 18, 2016 surgery, Ms. Thomas presented to the emergency room. (C 188 at ¶ 10.) According to plaintiffs, by this time, the fetus was injured and subjected to serious health risks. (C 188 at ¶ 11.) Plaintiffs alleged that Ms. Thomas' physician advised her to terminate the pregnancy as "it was probable that the fetus would not survive to term." (C 188 at ¶ 11.)

In an "Amended 2-622 Affidavit" plaintiffs filed on April 2, 2019, plaintiffs' consulting physician acknowledged the voluntary abortion. (C 372-74.) Based on a review of Ms. Thomas' medical records, the consultant stated: "Ms. Thomas terminated the pregnancy *** [and] [i]f not for the teratogenic effects of the medications, and the surgery, and subsequent infection associated with her surgery, she would not have ended the pregnancy." (C 374.)

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[2] A test positive for hCG can indicate a pregnancy; however, another recognized factor for a positive test result is weight loss medication Ms. Thomas was taking at the relevant time. (C 378, 385.) Answering a request to admit, Dr. Khoury attested that Ms. Thomas "stated she had not had sex for three months and that her last menstrual period was March 7, 2016" (C 385), less than two weeks before the surgery (C 31).

Count I of the First Amended Complaint asserted a cause of action on Ms. Thomas' behalf for medical malpractice. Although the trial court had dismissed the wrongful death counts with prejudice, in Count I, plaintiffs included an allegation regarding Ms. Thomas' pain and anguish resulting from injury to the fetus. (C 189, ¶¶ 19, 20.) In Count II, plaintiffs asserted a cause of action under the Wrongful Death Act for the fetus; in Count III, plaintiff Christopher Mitchell, Baby Doe's father, claimed mental and emotional damages, including grief and loss of society, as a result of the alleged personal injuries and death of Baby Doe. (C 189-90.)

The defendant physicians moved to dismiss the wrongful death claims contained in the First Amended Complaint based on section 2.2, the same authority supporting the trial court's dismissal, with prejudice, of the wrongful death claims in the prior version of plaintiffs' complaint. (C 194-98.) After briefing was completed, the trial court *sua sponte* vacated its October 11, 2018 order dismissing the wrongful death counts with prejudice. The court ordered the parties to file supplemental briefs addressing the legislative intent of section 2.2. (C 260, 396.) As directed, on March 28, 2019, plaintiffs and both defendants filed supplemental briefs. (C 276, 291, 332.)

In a Memorandum Opinion and Order dated April 26, 2019, the trial court denied the defendants' motion to dismiss the First Amended Complaint. (A 9-21; C 393-405.) The court explained that it perceived a conflict between the second and third paragraphs in section 2.2 and ruled that plaintiffs should be permitted to proceed with their claims to avoid an unjust result. (*Id*.)

Based on the acknowledgment that the Memorandum Opinion identified "a question of law over which there exists a substantial ground for difference of opinion as

to the scope and application of paragraphs two and three of section 2.2," the trial court requested guidance from the appellate court. (C 404.) The trial court reasoned that an appellate decision calling for dismissal of the wrongful death claims could "substantially affect the scope of discovery," "narrow the factual and legal issues for trial, and materially advance the ultimate termination of this litigation." (*Id*.) Accordingly, in addition to denying the defendants' motion to dismiss, the trial court *sua sponte* certified the question set forth above as the "Issue Presented" for immediate appeal pursuant to Supreme Court Rule 308(a).

ARGUMENT

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. The plain language of paragraph two applies to the circumstances the trial court described in the certified question: a claim for fetal death where the defendant allegedly "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." (C 404.)

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.

The appellate court employed a similarly faulty statutory analysis. It noted plaintiffs' allegations falling within the ambit of the second paragraph of section 2.2: the procedure was legal and voluntary, and an abortion was the cause of death. Opinion, ¶¶ 1, 4. But the opinion omits any analysis of this paragraph. Instead, despite the statutory limitation, the appellate court concluded that physicians should not be permitted "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. The appellate court thus construed section 2.2 based on the panel's determination of what the provision *should* say, rather than what it *does* say.

The appellate court also omitted meaningful analysis of the Third District's reasoning in *Light v. Proctor Community Hospital*, a 1989 appellate decision that cannot be factually distinguished. 182 Ill. App. 3d 563. In *Light*, the appellate court held that "certain and unambiguous" language in section 2.2 required dismissal of a wrongful death claim brought on behalf of an aborted fetus. *Id*. at 566. The plaintiff in *Light* alleged that a radiologist committed medical malpractice in failing to determine whether the plaintiff was pregnant before a thyroid scan procedure and failed to warn her that, if she were pregnant, she should not undergo the scan. *Id.* at 565. Here, the appellate court did not reconcile its analysis with the Third District's holding, distinguish the facts of *Light*, or acknowledge legislative acceptance of the Third District's interpretation of section 2.2.

I. The Plain Language of Section 2.2 Bars Any Action Against a Physician for the Death of a Fetus Caused by a Lawful Voluntary Abortion and Required Dismissal of Plaintiffs' Wrongful Death Claims.

This Court should review the lower courts' rulings *de novo*, the standard of review applicable to the legal question before the Court: construction of a statute. See *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 21. Pursuant to 735 ILCS 5/2-619(a)(9), the trial court should have dismissed the two counts of plaintiffs' "First Amended Complaint at Law" (C 187) in which plaintiffs asserted wrongful death claims for the death of a fetus plaintiff Monique Thomas elected to abort. Contrary to the lower courts' analysis, reading the statute as a whole demonstrates that section 2.2 contains no ambiguity. (A 17; C 401; Opinion, ¶¶ 17-18.)

The statute creates a wrongful death action for a fetus, regardless of the state of gestation, subject to two exceptions. 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." 740 ILCS 180/2.2. The second exception to the statutorily created action does not involve an abortion; rather, it precludes an action against a physician where the physician does not know and, under the standard of care, "had no medical reason to know of the pregnancy." *Id*.

The plain language in section 2.2 compelled dismissal. Section 2.2 contains three straightforward paragraphs:

- The **first paragraph** creates a wrongful death action for the death of a fetus subject to qualification by the two subsequent paragraphs in the same section. It provides that the state of gestation of a human being does not foreclose a

cause of action for the death of a human being arising from wrongful act or neglect. 740 ILCS 180/2.2.

- The **second paragraph** of section 2.2, an exception to the first paragraph, precludes a cause of action against a physician "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." *Id*. This provision requires dismissal of plaintiffs' wrongful death claims.
- The **third paragraph** of section 2.2, a second exception to the first paragraph, bars a cause of action against a physician for the wrongful death of a fetus "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." *Id*. Paragraph three of section 2.2 has no application here.

As a first step in analyzing a statute, a court seeks to glean the legislature's intent from the words used in the provision. See *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 235 (2007). Where a statute is clear and unambiguous, a court determines legislative intent from the statutory language, according to its plain and ordinary meaning. See *Orlak v. Loyola University Health System*, 228 Ill. 2d 1, 8 (2007). A court then should give effect to the words in a statute without resorting to other aids of construction. *People v. Woodard*, 175 Ill. 2d 435, 443 (1997). Terms not included should not be inferred; the legislature knows how to use terms or phrases it intends to include. See *Brucker v. Mercola*, 227 Ill. 2d 502, 532 (2007).

Both lower courts failed to apply the plain language of the applicable provision of the statute and failed to strictly construe the Act, which creates actions in derogation of the common law. See *Williams v. Manchester*, 228 Ill. 2d 404, 418, 420 (2008); *Miller v. American Infertility Group of Illinois*, 386 Ill. App. 3d 141, 144 (1st Dist. 2008). Rather than recognizing that section 2.2 contains a provision permitting a wrongful death claim for the death of a fetus, followed by two straightforward exceptions, the lower courts impermissibly broadened the scope of the statute by reading the third paragraph independently as if the first and second paragraphs were not there. Opinion, ¶¶ 4, 17.

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. (C 399-400.) The trial court stated "[i]t is quite easy to conclude that the language of paragraph two of section 2.2 is plain and unambiguous." (C 398.) The court also acknowledged that "if paragraph two were the only provision governing this dispute, the defendants' motion to dismiss would be granted." (C 398-99.) Yet, despite the clear legislative mandate contained in section 2.2, the trial court found a statutory ambiguity creating a "conundrum" that ultimately caused the court to deny defendants' motion to dismiss plaintiffs' claims for the wrongful death of a fetus resulting from a consensual abortion. (C 401.) The court held that the third paragraph of section 2.2, which does not mention abortion, and which precludes a wrongful death action against a physician where the defendant had no reason to know of a pregnancy, conflicts with the prior paragraph pertaining to voluntarily terminated pregnancies. (C 400-01.) The trial court construed the statute to permit causes of action for all fetal deaths where a physician knew or should

have known of a pregnancy; thus, the court not only construed paragraph three to conflict with the statutory bar against a wrongful death action in the circumstance of an abortion, the court's reasoning eliminated that provision altogether.

Like the trial court, the appellate court read section 2.2 expansively; it construed the third paragraph of section 2.2 as though the second paragraph does not exist. The appellate court found that plaintiffs' allegations, "in a literal sense," fall within the second paragraph. Opinion ¶ 4. The appellate court acknowledged the language of the second paragraph "bar[ring] a cause of action against a physician or medical institution for the wrongful death of a fetus 'caused by' a legal and consensual abortion" and that the cause of death here was an abortion. Opinion, ¶ 17. Nonetheless, the court concluded that the second paragraph "does not nullify" the cause of action. Opinion, ¶ 4. Omitting consideration of the second paragraph, the appellate court focused on the third paragraph of section 2.2. Opinion, ¶¶ 4, 17, 18. The court failed to read the statute as a whole and failed to determine legislative intent by construing all of the material parts of the legislation together. See *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 184 (2007).

The appellate court substituted its wisdom for the public policy decision of the legislature concerning the circumstances that should support the legislatively-created cause of action for the death of a fetus. According to the appellate court, plaintiffs should have the opportunity to proceed with an action pursuant to the third paragraph "without regard to the death ultimately having been through an abortion (second paragraph)." Opinion, ¶ 22. Other than offering the unfounded conclusion that physicians would use paragraph two to ward off medical malpractice lawsuits, the court cited no language in

the statute or other basis demonstrating that the appellate court was discerning legislative intent rather than expressing the court's idea of good public policy.

A. Neither the First District nor the trial court meaningfully addressed *Light v. Proctor,* a 31-Year-Old Third District decision the legislature has not disturbed.

The appellate court in *Light* reached the opposite conclusion of the First District and the trial court in this case. The Third District held that section 2.2 bars actions against physicians where their allegedly negligent acts lead to the voluntary termination of a pregnancy. See *Light*, 182 Ill. App. 3d at 565. The plaintiff in *Light* underwent a thyroid scan and, either during or subsequent to the procedure, learned that she was pregnant. *Id*. at 564. The plaintiff terminated her pregnancy pursuant to the recommendation of a radiologist and then sued the radiologist on the theory that he negligently failed to discover the plaintiff's pregnancy prior to the scan and failed to warn against the scan given her condition. *Id*. at 564-65. The plaintiff argued that her decision to undergo the abortion was proximately caused by the physician's negligence, and the second paragraph of section 2.2 was not intended to protect doctors from negligent acts that lead to a wrongful death. *Id*. at 565.

In *Light*, the Third District rejected the plaintiff's interpretation of the Act and observed that the legislative intent should be gleaned from the language in the statute. *Id*. at 565-66. The appellate court further observed that, where the language of a statute is certain and unambiguous, as is section 2.2 of the Act, "the only legitimate function of the court is to enforce the law as it is enacted by the legislature." *Id*. Rejecting the plaintiff's attempts to avoid the application of section 2.2 where a defendant physician's alleged negligence prompted the plaintiff to consent to an abortion, the appellate court found that

the fetus was "terminated as the result of [plaintiff's] subsequent voluntarily consensual legal abortion." *Id*. at 566. Under the plain language of section 2.2, the appellate court held that, even where a plaintiff alleges that a physician's negligence proximately caused her to end her pregnancy, the statute prohibits a wrongful death action. *Id*. While observing that the scanning procedure may have increased health risks to the fetus, the appellate court nonetheless found that the "result of the abortion procedure was the actual termination of the plaintiff's pregnancy." *Id*. The appellate court determined that the alleged breach of the defendant hospital's and radiologist's duty to exercise reasonable medical care could not support a wrongful death action for the plaintiff's fetus. Section 2.2 applied regardless of whether the physician performed the abortion; if an abortion actually terminated the pregnancy, the second paragraph foreclosed a wrongful death claim. *Id*. at 564-65.

Here, the trial court erroneously concluded that plaintiffs' allegations invoked application of the third paragraph of section 2.2 because plaintiffs claimed defendants knew or should have known of a pregnancy before the alleged malpractice occurred; in the court's view, *Light* presented a "distinct factual scenario," where the plaintiff "learned of her pregnancy, '[i]n the course of or subsequent to the procedure' " at issue. (C 400 (quoting *Light*, 182 Ill. App. 2d at 564.)) *Light*, however, cannot accurately be distinguished on that basis. Similar to plaintiffs here, the plaintiff in *Light* claimed the defendant radiologist should have known she was pregnant before performing the thyroid scan when he negligently "fail[ed] to determine if she was pregnant prior to the thyroid scan procedure." *Light*, 182 Ill. App. 3d at 565. The trial court, therefore, had no basis to reject *Light*, which was binding precedent and supports the opposite ruling—that the

plain language of paragraph two bars a wrongful death claim premised on a death resulting from a lawful abortion. See *id.*

The appellate court barely acknowledged *Light*. It only noted defendant's citation to the case and briefly summarized plaintiffs' attempt to distinguish its facts where "[t]he alleged negligence of the hospital and the radiologist involved failing to determine a pregnancy before a thyroid scan." Opinion, ¶ 19. The appellate court seemingly accepted, without further comment, plaintiffs' faulty argument that the third paragraph of section 2.2 deserved analysis separate and apart from the second paragraph, which was the focus of defendants' position and the Third District in *Light. Id.*[3] The appellate court did not reconcile its analysis with the Third District's reasoning or further comment on the facts in *Light*, the one reported decision addressing the issue raised in the certified question.

Here, by ignoring their own allegations, plaintiffs attempted to distinguish the allegedly negligent conduct of the radiologist in *Light*, who failed to discover the plaintiff's pregnancy before proceeding with a CT scan, from plaintiffs' claims against these defendants. Plaintiffs argued in the appellate court that defendants had "actual knowledge" of Ms. Thomas' pregnancy (response at 7); but, in their complaint, they alleged that the physicians failed to diagnose the pregnancy based on the presurgical testing (C 188, 189). Even in their appellate brief, plaintiffs acknowledged the trial court's characterization of their theory, which is not that defendants had actual

[3] Although the appellate court did not further address *Light* in its opinion, at oral argument on February 19, 2020 (https://multimedia.illinois.gov/court/AppellateCourt/Audio/2020/1st/021920_1-19-1052.mp3), the panel dismissed out of hand both the *Light* decision and the legal principle strongly suggesting that the earlier opinion captured the intent of the legislature. See *Ready v. United/Goedecke Services, Inc.*, 232 Ill. 2d 369, 380 (2008) (citations omitted) (applying legislative acquiescence principle to appellate court decisions).

knowledge, but whether defendants "knew or had a medical reason to know of the pregnancy." (Response at 14.) Whether a physician fails to discover a pregnancy by performing no testing at all–as alleged in *Light*–or by misinterpreting the testing, as plaintiffs claim here, provides no meaningful distinction.

Plaintiffs' allegations here are no more governed by the third paragraph of section 2.2 than were the allegations in *Light*. Paragraph three of section 2.2 refers to "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." (Emphasis added); 740 ILCS 180/2.2. The plaintiff in *Light* alleged that the applicable standard of care required the defendant radiologist to determine whether the plaintiff was pregnant prior to a thyroid scan; *Light*, 182 Ill. App. 3d at 565; thus, under paragraph three of the statute, "the standard of good medical care" provided the physician with "reason to know" of the pregnancy. The fact that defendants here allegedly performed testing before advising plaintiff that surgery could proceed does not distinguish this case from the allegations against the radiologist in *Light*. In both instances, the plaintiffs sued on the theory that a physician failed to discern a pregnancy and moved forward with a medical procedure that presented risks to a fetus. The allegations here, like the allegations in *Light*, do not invoke the third paragraph of section 2.2.

B. The appellate court ignored the legislature's acquiescence to the *Light* court's construction of section 2.2.

The appellate opinion does not account for the longevity of *Light* without legislative correction. In the 31 years since the appellate court decided *Light*, the

legislature has not amended section 2.2. This Court should presume that the General Assembly is aware of judicial decisions interpreting legislation. See *Pielet v. Pielet*, 2012 IL 112064, ¶ 48 (citations omitted). Where the legislature elects not to amend the statute after a judicial construction, a court should presume that the legislature has acquiesced in the judicial decision. See *Ready v. United/Goedecke Services, Inc.*, 232 Ill. 2d 369, 380 (2008) (citations omitted). Judicial construction of a statute, in effect, becomes part of the statute. See *Village of Vernon Hills v. Heelan*, 2015 IL 118170, ¶ 19.

The legislature has not amended section 2.2 to supersede the *Light* court's "judicial gloss." See *Heelan*, 2015 IL 118170, ¶ 19. Since the Third District released its decision in 1989, the General Assembly has repeatedly amended the Wrongful Death Act. (Pub. Act 89-7, § 40 (eff. Mar. 9, 1995) (amending 740 ILCS 180/1-2); Pub. Act 91-380, § 5 (eff. July 30, 1999) (amending 740 ILCS 180/2); Pub. Act 95-3, § 5 (eff. May 31, 2007) (amending 740 ILCS 180/2); Pub. Act 99-587, § 5 (eff. Jan. 1, 2017) (amending 740 ILCS 180/2); Pub. Act 87-1260, § 1 (eff. Jan. 7, 1993) (amending 740 ILCS 180/2.1); Pub. Act 92-288, § 5 (eff. Aug. 9, 2001) (amending 740 ILCS 180/2.1). The legislative activity included a proposed amendment of the second paragraph of section 2.2—a bill that did not pass but, importantly, did not involve a proposed amendment of the language that is applicable here. Accordingly, the legislature's attention to the Wrongful Death Act with knowledge of the *Light* court's interpretation of section 2.2 strongly signals that the judicial decision conforms to the legislative intent. See *Pielet*, 2012 IL 112064, ¶ 48.

C. This Court's decision in *Williams v. Manchester* does not support the appellate court's statutory interpretation.

The appellate court cited this Court's decision in *Williams v. Manchester*, a case addressing whether a plaintiff could prove proximate cause of the death of a fetus in a wrongful death action against a negligent driver following an automobile accident. Opinion, ¶¶ 21-22 (citing *Williams*, 228 Ill. 2d 404 (2008)). In *Williams*, the plaintiff sustained a broken hip and pelvis in a car accident and received medical advice that the optimal treatment for her injuries posed risks to the fetus. *Id*. at 408-09. Plaintiff understood that her physicians believed termination of the pregnancy would be best for plaintiff and ultimately decided to have an abortion within one week of the accident. *Id*. at 408, 412.

In *Williams*, the defendant driver contended that the accident did not proximately cause the death of the plaintiff's fetus. *Id*. at 413. This Court agreed. *Id*. at 423. It held that, as a matter of law, plaintiff could not establish the threshold requirement of a wrongful death action because the record did not establish that the fetus sustained an actionable injury that would have supported a claim for damages had death not intervened. *Id*. at 423-25, 427.

In *Williams*, this Court did not analyze whether the second paragraph of section 2.2 bars an action for the wrongful death of a fetus in the circumstance of a voluntary abortion. In the absence of a claim against a physician or a medical institution, the *Williams* court had no reason to consider whether, had the fetus been injured prior to the abortion, section 2.2 would preclude a cause of action.

Williams provides guidance, however, by demonstrating a fundamental error in the appellate and trial courts' construction of the Wrongful Death Act. Because the Act is in derogation of the common law and is the sole source of the right to sue for wrongful death, the complaint must clearly fall "within the prescribed requirements necessary to confer the right of action" created by the legislature. *Id*. at 420. This Court has observed that "'statutes in derogation of common law are to be strictly construed and nothing is to be read into such statutes by intendment or implication.'" *Id*. at 419 (quoting *Summers v. Summers*, 40 Ill. 2d 338, 342 (1968)); see also *Miller*, 386 Ill. App. 3d at 150.

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 addition to *Williams*, the appellate court cited three appellate decisions pertaining to wrongful death actions, none of which involved medical malpractice claims for the wrongful death of a fetus terminated by an abortion. See Opinion, ¶ 18 (citing *Riley v. Koneru*, 228 Ill. App. 3d 883, 885 (1st Dist. 1992) (affirming judgment for plaintiff in wrongful death action following the delivery of a stillborn fetus); *Seef v. Sutkus*, 205 Ill. App. 3d 312, 314 (1st Dist. 1990) (recognizing a cause of action for wrongful death of fetus allegedly caused by failure to timely perform a cesarean section); *Smith v. Mercy Hospital & Medical Center*, 203 Ill. App. 3d 465, 474 (1st Dist. 1990) (reversing dismissal of wrongful death action seeking loss of a stillborn child's society). The decisions the appellate court cited, unlike *Light*, do not involve circumstances falling

within and governed by the second paragraph of section 2.2. The appellate court relied on inapposite cases standing for an uncontested proposition: that a wrongful death action may lie for a fetus where the death is not caused by an abortion.

In a related error, the trial court invoked the concept of proximate causation as a justification for its statutory interpretation. (C 403-04.) As a statutory cause of action, the Act alone defines the circumstances under which a claim may proceed. *Williams*, 228 Ill. 2d at 420. The trial court's analysis rested on the inaccurate premise that a wrongful death claim exists solely because a death occurred, regardless of the cause. (C 403.) The legislature, however, through paragraph two of section 2.2, expressly foreclosed a cause of action for the death of a fetus caused by a voluntary abortion. The prohibition against maintaining a claim for wrongful death from a lawful abortion does not hinge upon the circumstances that led to the voluntary termination of a pregnancy. See *Light*, 182 Ill. App. 3d at 566. Had the legislature intended to permit a cause of action for the wrongful death of a fetus where the alleged negligence proximately caused the abortion, it would have done so explicitly. See *In re Estate of Shelton*, 2017 IL 121199, ¶ 44. As the appellate court noted in *Light*, "[i]t is not a legitimate function of the court to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions which depart from its plain meaning." *Light*, 182 Ill. App. 3d at 566 (citing *Belfield v. Coop*, 8 Ill. 2d 293, 307 (1956)).

D. The trial court erroneously invoked the negative implication canon to authorize a cause of action.

A court should give effect to unambiguous language in a statute without resorting to other aids of construction. *People v. Woodard*, 175 Ill. 2d 435, 443 (1997). Terms not

included should not be inferred; the legislature knows how to use terms or phrases it intends to include. See *Brucker v. Mercola*, 227 Ill. 2d 502, 532 (2007).

Departing from these governing principles of statutory construction and from the plain language of the statute, the trial court interpreted the third paragraph of section 2.2 to authorize a cause of action—even where fetal death resulted from a lawful abortion—where a defendant knew or had reason to know of a pregnancy. (C 400-01.) The trial court made this leap based upon the "negative implication canon," the maxim *expressio unius est exclusio alterius*, meaning that the enumeration of one thing excludes others. *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶ 17; see *Jennings v. Rodriguez*, 583 U.S. __, 138 S. Ct. 830, 844 (2018) (plurality opinion). Unlike the trial court below, this Court employs the negative implication canon not to determine whether an ambiguity exists, but to resolve one. See *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 153-54 (1997); *Sulser v. Country Mutual Insurance Co.*, 147 Ill. 2d 548, 555 (1992). Moreover, nothing in that interpretation canon permits excluding the separate statutory exception for a lawful abortion set forth in paragraph 2 of section 2.2.

To the extent the negative implication canon is applicable at all, it supports an interpretation contrary to that perceived by the trial court. The legislature expressly provided an exception to the prohibition of an action for the wrongful death of a fetus caused by a lawful abortion in the second sentence of paragraph two: "Provided, however, that a cause of action is not prohibited where the fetus is live-born but subsequently dies." See 740 ILCS 180/2.2. Overlooking the last sentence of paragraph two, the trial court read the third paragraph as providing an exception to the second paragraph. It could do so only by disregarding the plain language in paragraph two

prohibiting wrongful death actions where the death results from a lawful abortion and misapplying the rules of statutory construction to imply a second exception where the legislature enumerated only one.

II. The Legislative History of Section 2.2 Does Not Support the Trial Court's Conclusion That the Third Paragraph Authorizes a Cause of Action for the Wrongful Death of a Voluntarily Aborted Fetus.

Given the plain language of section 2.2, this Court need not consider its legislative history. See *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 235 (2007). Alternatively, were this Court to look beyond the language of section 2.2 to discern legislative intent as the trial court did, the First District's decision in *Miller* provides guidance. The *Miller* opinion contains the appellate court's detailed analysis of the genesis of section 2.2 and the purpose of the legislation: to permit, in derogation of the common law, some, but not all, wrongful death actions on behalf of an unborn fetus in some but not all circumstances.

The trial court began its legislative analysis by questioning the *Miller* court's interpretation of the General Assembly's intent. (C 401.) The trial court dismissively wrote that "[o]ne court has written that the purpose of section 2.2, 'was simply to eliminate the distinction between a viable and a nonviable fetus.' *Miller v. American Infertility Group of Ill.*, 386 Ill. App. 3d 141, 150 (1st Dist. 2008)." (C 401.)[4]

[4] The appellate court did not engage in a legislative history analysis to determine the General Assembly's intent. Instead, the court noted that *Miller* "is inapposite on its facts and has no bearing on a possible internal inconsistency in section 2.2 of the Wrongful Death Act." Opinion, ¶ 23. Yet, the decision generally is relevant to the question of legislative intent, as is apparent from the appellate court quotation of *Miller* for the proposition that the " 'legislature's intent in enacting section 2.2 of Wrongful Death Act was to extend the cause of action to pregnancies in the mother's body regardless of

Discounting the *Miller* court's analysis of the purpose of section 2.2, the trial court ruled that the "plain language of the second and third paragraphs make it equally apparent that the purpose of section 2.2 was far more than just legal gap filling." (C 401.) To reach this conclusion, the trial court relied on the General Assembly debates concerning the amendment to section 2.2 that the appellate court analyzed in *Miller*. State representatives and senators considered the initially proposed version of section 2.2, which authorized a cause of action for wrongful death of a fetus regardless of the state of gestation, and the bill's amendments, which barred wrongful death actions caused by lawful abortion with requisite consent and wrongful death actions against physicians where the defendant had no reason to know of the mother's pregnancy. (C 401-03.)

The trial court failed to consider the context in which the General Assembly enacted section 2.2. As the appellate court observed in *Miller*, Senator Mark Rhoads presented the legislation, Senate Bill 756, to the Illinois Senate in 1979, six years after the United States Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), and ruled unconstitutional a Texas statute criminalizing abortion at any stage of pregnancy except to save the life of the mother. *Miller*, 386 Ill. App. 3d at 146. The bill proposed that the gestation or development of a human being would not prohibit a cause of action for wrongful death. *Id*. at 146-47. In response to concerns raised that the bill might facilitate attempts to circumvent *Roe* by allowing litigants to sue physicians or others participating in an abortion, Senator Rhoads explained that "the simple purpose" of the bill was to cover a gap that existed in the statutes with respect to a cause of action for wrongful

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whether the fetus was viable or nonviable.' " Opinion, ¶ 23 (citing *Miller*, 386 Ill. App. 3d at 150-51).

death of an unborn child between the time of conception and point of viability. *Miller*, 386 Ill. App. 3d at 148 (citing 81st Gen. Assem., Senate Proceedings, May 17, 1979, at 174 (statements of Senator Rhoads)). Senator Rhoads explained that he had no intention to outlaw abortion. (81st Gen. Assem., Senate Proceedings, May 17, 1979, at 174.)

Subsequently, the legislation was amended in committee to clarify that no cause of action could be brought against a physician for the wrongful death of a fetus caused by a voluntary abortion. *Miller*, 386 Ill. App. 3d at 148-49 (citing 81st Gen. Assem., House Proceedings, June 21, 1979, at 131 (statement of Rep. Cullerton)); 81st Gen. Assem., Senate Proceedings, June 28, 1979, at 52-53 (statements of Senator Rhoads)). The amendments also prohibited a cause of action against a doctor who did not know that a patient was pregnant. *Miller*, 386 Ill. App. 3d at 148-49 (citing 81st Gen. Assem., House Proceedings, June 21, 1979, at 131 (statement of Rep. Cullerton)). Contrary to the trial court's broad reading of the debates concerning the legislation (C 401-03), the transcripts contain no comment that the legislature intended to permit a cause of action for fetal death caused by a voluntary abortion. The trial court merely cited the references to the two amendments to Senate Bill 756, then drew the inference that "the converse to paragraph three is also true." (C 401-02.) The debates do not contain any reference to permitting causes of action following a lawful, voluntary abortion.

The trial court searched for a basis in the legislative history to conclude the General Assembly implicitly suggested that, even if death is caused by a lawful abortion, a cause of action exists where a defendant knew or had reason to know of the pregnancy. (C 401-03.) The statements the trial court quoted, however, simply explain the nature of the bill and the amendments which clarified that the legislature intended to foreclose

wrongful death actions in two instances: where a lawful, consensual abortion caused fetal death, and when the alleged misconduct of a defendant who did not know or have reason to know of a pregnancy resulted in fetal death. (*Id*.)

As the legislative debates reflect, and the trial court observed, the General Assembly considered and accepted that the second and third paragraphs of section 2.2 would restrict the statutory remedy in certain situations. Consistent with the statute, the trial court initially dismissed plaintiffs' wrongful death claims but not Ms. Thomas' medical negligence action. (C 185.) The trial court's reasoning in later denying the defendants' motion to dismiss not only deviates from the principle that the General Assembly determines what the public interest and welfare require, but also contradicts the legislature's broad regulatory power with respect to health-care professionals. See *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 280 (2003); *Burger v. Lutheran General Hospital*, 198 Ill. 2d 21, 40-41 (2001).

III. The Lower Courts Invaded the Province of the Legislature.

A trial court should not question—as the trial court did here—whether a statute adopted by the General Assembly is "unjust" (C 403) or whether the legislature has enacted a law constituting good public policy. See *Crusius v. Illinois Gaming Board*, 216 Ill. 2d 315, 332 (2005). Similarly, the appellate court expressed its disapproval of the legislative decision limiting medical negligence actions alleging the death of a fetus. Opinion, ¶ 22. Contrary to the appellate court's comment that physicians and medical institutes may "deflect" medical malpractice claims under the defendants' argument, *id*., other remedies for the parents remain pending (C 185).

In any event, whether a medical malpractice action for wrongful death should exist in the instance of termination of a pregnancy is a question of public policy for the legislature. The General Assembly, not the judiciary, determines what the public interest and welfare require. See *Sherman*, 203 Ill. 2d at 280; *Burger v. Lutheran General Hospital*, 198 Ill. 2d 21, 40-41 (2001). In creating a cause of action that did not exist at common law, the legislature determined that death of a fetus resulting from a legal, consensual abortion is not actionable under the Wrongful Death Act, and the lower courts erred in concluding otherwise.

CONCLUSION

WHEREFORE, the petitioners, Edgard Khoury, M.D. and Robert Kagan, M.D. request that this Honorable Court reverse the judgment of the trial and appellate courts, answer "yes" to the certified question; rule that section 2.2 of the Wrongful Death Act bars plaintiffs' wrongful death claims, and order such other and further relief this Court deems just.

Dated: December 9, 2020

Respectfully submitted,

By: /s/Karen Kies DeGrand

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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 27 pages.

/s/ Karen Kies DeGrand
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APPENDIX

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12752/pleadings/first amended complaint at law

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

MONIQUE THOMAS, individually and as Special Administrator of the Estate of Baby Doe; CHRISTOPHER MITCHELL, individually and as Special Administrator of the Estate of Baby Doe,	)	
Plaintiffs	)	Case No.: 2018 L 001059
v.	)	
ROBERT KAGAN, M.D.; EDGARD KHOURY, M.D.; and ALEXIAN BROTHERS MEDICAL CENTER	)	
Defendants.	)	

FIRST AMENDED COMPLAINT AT LAW

Now come Plaintiffs, Monique Thomas, individually and as administrator of the estate of Baby Doe, and Christopher Mitchell, individually and as administrator of the estate of Baby Doe by and through their attorneys, Busse, Busse & Grassé, and as their complaint against Defendants, Robert Kagan, M.D., Edgard Khoury, M.D., allege as follows:

COUNT I - MEDICAL MALPRACTICE – MONIQUE THOMAS

1. At all relevant times herein, Plaintiff, Monique Thomas, was a resident of Cook County, Illinois.

2. At all times hereto, Defendant, Robert Kagan, M.D., was a licensed physician in the state of Illinois, with a primary practice in Cook County, Illinois.

3. At all times hereto, Defendant, Edgard Khoury, M.D., was a licensed physician in the state of Illinois, with a primary practice in Cook County, Illinois.

4. Plaintiff was admitted to Alexian Brothers Medical Center, on March 18th, 2016, with a diagnosis of bilateral macromastia, with a plan for a bilateral reduction mammoplasty and belt lipectomy to be performed by Defendant, Robert Kagan, M.D.

5. As part of the standard pre-surgical testing procedures, a urine pregnancy screening test, along with a blood test for HCG was obtained on the morning of the March 18th, 2016 surgery. Both tests returned with positive results, indicating that Ms. Thomas was potentially pregnant.

6. An ultrasound was performed after the returned positive results, which did not definitively show an intra-uterine pregnancy, but was consistent with a pregnancy of less than four weeks gestation.

7. Plaintiff was assured "not to worry" and that she was not pregnant, and was informed that the surgery would still take place.

8. Defendants, together and individually, owed a duty to plaintiff to exercise the knowledge, skill, and care of a reasonably well-qualified healthcare provider in the same or similar circumstances.

9. Despite this, Plaintiff received general anesthesia by Defendant, Edgard Khoury, M.D., and underwent the scheduled surgery, performed by Defendant, Robert Kagan, M.D.;

10. Following the surgery on March 18th, 2016, Plaintiff was evaluated in the emergency room for pain from infection. Her pregnancy was confirmed at this stage of her medical treatment. The Unborn Child is herein referred to as Baby Doe.

11. By this time, there had already been serious damage and personal injury caused to Baby Doe. Because of the serious health risks and damage already caused to the fetus and concerns related to the anesthesia administered by Defendant Edgard Khoury, M.D., the medications administered during the surgical period, and the resulting post-operative infection, Plaintiff was informed by her physician that it was probable that the fetus would not survive to term and that the pregnancy should be terminated. As a result of the Defendant's negligence, it was more probably true than not that the fetus would not have survived to term.

12. Defendants deviated from the standard of care owed to Plaintiff, Monique Thomas, as a medical patient and those deviations directly resulted in the significant harm done to Baby Doe and to Plaintiff.

13. Defendants, Robert Kagan, M.D. and Edgard Khoury, M.D., breached the standard of care when they failed to consider the significance of Plaintiff's history, urine pregnancy test, and blood HCG and ultrasound results when they proceeded with her surgery on March 18th, 2016.

14. Defendants Robert Kagan, M.D. and Edgard Khoury, M.D., breached the standard of care when they failed to review and/or consider the results of the ultrasound done on Plaintiff on the date of the surgery and proceeded with the surgery on a woman who was pregnant.

15. Defendant Robert Kagan, M.D. breached the standard of care when he failed to consider Plaintiff's pregnancy when he prescribed antibiotics and analgesics to Plaintiff in the first trimester of her pregnancy.

16. Defendant Robert Kagan, M.D. breached the standard of care when he misled Plaintiff on the results of her screening tests and ultrasound, when he informed her that she was not pregnant and that it was safe to proceed with elective surgery on that same day, when there was clear evidence that Plaintiff Monique Thomas was indeed pregnant.

17. Defendant Robert Kagan, M.D. breached the standard of care when he failed to refer Plaintiff Monique Thomas to a qualified obstetrician to verify the status of her pregnancy when there was clear evidence suggesting a pregnancy, and instead proceeded with the elective surgery.

18. Plaintiff's counsel has consulted with a health care profession who is a board-certified plastic surgeon, who has reviewed Plaintiff's medical records, and opined that Defendants' treatment of Plaintiff violated the standard of care owed to Plaintiff. See affidavit of attorney Alan Barinholtz, attached hereto as Exhibit A.

19. But for the Defendants' negligence, together and individually, including but not limited to the physical effects of the medications, the surgery, and subsequent infection resulting from the surgery, Baby Doe would not have sustained injury.

20. As a direct and proximate result of the Defendants' negligence, together and individually, Plaintiff suffered great pain and anguish in body as well as suffered mentally and emotionally from the pain and anguish and will continue to so suffer in the future.

WHEREFORE, the plaintiff, Monique Thomas, prays for a judgment against Defendants Robert Kagan, M.D. and Edgard Khoury, M.D., together and individually, in an amount in excess of $50,000.00, plus costs of this suit.

COUNT II – WRONGFUL DEATH – BABY DOE

21. Plaintiffs, Monique Thomas and Christopher Mitchell, as administrators of the estate of Baby Doe, herein restates Paragraphs 1 through 20 as though fully stated herein.

22. Plaintiff, Monique Thomas, was the mother of Baby Doe.

23. Plaintiff, Christopher Mitchell, was the father of Baby Doe.

24. Defendants had a duty to act with reasonable care in the treatment of Monique Thomas, once they were aware of the potential existence of Baby Doe.

25. Defendants breached that duty by performing a surgery on Monique Thomas and providing subsequent treatment to Monique Thomas which the Defendants knew or should have known would cause injury or death to Baby Doe.

26. Defendants deviated from the standard of care owed to Baby Doe as a medical patient and those deviations directly resulted in the significant harm and eventual death of Baby Doe.

27. Defendants actions resulted in injury to Baby Doe which was irreversible.

28. As a direct and proximate result of the Defendants' negligence, which caused direct injury to Baby Doe, Defendants ultimately caused the death of Baby Doe and thereby caused injury and damages to Plaintiffs.

Wherefore, Plaintiffs pray for a judgment against Defendants Robert Kagan, M.D. and Edgard Khoury, M.D., together and individually, in an amount in excess of $50,000.00, plus costs of this suit.

COUNT III – NEGLIGENCE

29. Plaintiff Chris Mitchell herein restates Paragraphs 1 through 29 as though fully stated herein.

30. Defendants had a duty to Christopher Mitchell as the father of Baby Doe to act with reasonable care in the treatment of Monique Thomas, once they were aware of the potential existence of Baby Doe as the child of Monique Thomas and Christopher Mitchell.

31. Defendants knew or should have known that Christopher Mitchell was the father of Baby Doe and that the parents of Baby Doe would suffer damages from any injury caused to Baby Doe as a result of their negligence.

32. Defendants breached that duty by performing a surgery on Monique Thomas and providing subsequent treatment to Monique Thomas which the Defendants knew or should have known would cause damages to Christopher Mitchell as a result of the injury their negligence caused to Baby Doe.

33. Defendants breached the standard of care owed to both Plaintiffs Monique Thomas and Christopher Mitchell as parents of Baby Doe through the medical malpractice by Defendants alleged in Count I of the complaint that lead to injuries to Baby Doe.

34. As a result of Defendants' negligence, Baby Doe was caused to sustain serious personal injury prior to death, as well as eventual death proximately caused by defendant's negligence.

35. As a direct and proximate result of the Defendants' negligence, Plaintiff Christopher Mitchell suffered mental and emotional damages including but not limited to grief, sorrow, loss of affection, loss of society, loss of companionship, and mental shock and suffering due to the personal injuries to and eventual death of Baby Doe.

Wherefore, Plaintiffs pray for a judgment against Defendants Robert Kagan, M.D. and Edgard Khoury, M.D., together and individually, in an amount in excess of $50,000.00, plus costs of this suit.

Respectfully submitted,

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DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2018L001059

AMENDED 2-622 AFFIDAVIT

I have reviewed the medical records provided by attorney Alan Barinholtz regarding the care provided to Ms. Monique Thomas on March 18, 2016 and subsequently. My opinions are based on my education, knowledge, and experience as a board-certified plastic surgeon, and I regularly care for patients undergoing breast reduction and body lift surgery. I have been so certified for over the last twenty years.

Ms. Thomas was a 30-year-old women who was admitted to Alexian Brothers Medical Center on March 18, 2016, with a diagnosis of bilateral macromastia as well as laxity in the buttocks and lower back skin. The plan was for a bilateral reduction mammoplasty and belt lipectomy.

As part of the standard pre-surgical testing procedures for a woman in this age group, a urine pregnancy screening test was obtained on the morning of Ms. Thomas' scheduled surgery. The records reveal that this test was positive, and thus, a blood test for HCG was obtained, and the nursing staff documented that this result was positive as well, and an ultrasound test was then ordered.

The results of the ultrasound did not definitively show an intra-uterine pregnancy but were clearly read as consistent with a pregnancy of less than four weeks gestation and Ms. Thomas had in fact reported sexual activity about a month before surgery.

Despite this, Ms. Thomas received general anesthesia and the surgery was performed that day by Dr. Robert Kagan, and the patient reports being informed that she "was not to worry" as she was not pregnant.

Following the surgery Ms. Thomas was evaluated in the emergency room at Advocate Lutheran General Hospital and treated with analgesics for pain and antibiotics

for an infection. Her pregnancy, consistent with the urine test, blood HCG and pre-operative ultrasound, was then confirmed.

Ultimately, because of concerns related to the teratogenic effects of the anesthesia and peri-operative medications given to her, and subsequent infection, Ms. Thomas had the pregnancy terminated.

It is the opinion of this reviewer that her surgeon, Dr. Robert Kagan, along with the anesthesiologist, Dr.Edgard Khoury, and the Alexian Brothers Medcial Center Staff deviated from the standard of care and that those deviations directly led to the significant harm done to Ms. Thomas.

Dr. Kagan and Dr. Khoury, the anesthesiologist and Alexian Brothers Medical Center Staff treating Ms. Thomas failed to meet the standard of care as follows:

Dr. Kagan and Dr. Khoury, the anesthesiologist and Alexian Brothers Medical Center Staff failed to consider the significance of Ms. Thomas' history, urine pregnancy test, and blood HCG when they proceeded with her elective surgery on March 18, 2016.

Dr. Kagan and Dr. Khoury, the anesthesiologist and Alexian Brothers Medical Center Staff failed to review and or consider the results of the ultrasound done on Ms. Thomas on the date of surgery and proceeded with elective surgery on a woman who was most likely pregnant on the date of surgery.

Dr. Kagan failed to consider her likely pregnancy when he prescribed antibiotics and analgesics to Ms. Thomas in the first trimester of her pregnancy.

Dr. Kagan misled Ms. Thomas on the results of her screening tests and ultrasound when he informed her that she was not pregnant and that it was safe to proceed with elective surgery on that same day, when in fact there was clear evidence

that just the opposite was true.

Dr. Kagan, Dr. Khoury and the Alexian Brothers Medical Center staff failed to refer Ms. Thomas to a qualified obstetrician to verify or rule out her pregnancy when there was clear evidence suggesting a pregnancy, and instead took her to surgery for an elective procedure.

As a result of the negligence of Dr. Kagan, Dr. Khoury, the anesthesiologist and the staff of Alexian Brothers Medical Center at the time of surgery, Ms. Thomas terminated the pregnancy and as clearly noted in the obstetrical notes, she experienced ambiguous feelings and difficulty coming to that decision. If not for the teratogenic effects of the medications, and the surgery, and subsequent infection associated with her surgery, she would not have ended the pregnancy.

The above constitutes my expert opinion after review of the records available to me as of this date.

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

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

MEMORANDUM OPINION AND ORDER

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

Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis

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

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

740 ILCS 180/2.2.

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

Based on the foregoing, it is ordered that:

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

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18L1059

3. the May 13, 2019 case management conference 4335 scheduled for 9:30 a.m. in courtroom 2209 shall stand.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

APR 20 2019

Circuit Court 2075

No. 1-19-1052

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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-Respondents, v. EDGARD KHOURY, M.D.; and ROBERT KAGAN, M.D., Defendants-Petitioners.	)	Appeal from the Circuit Court of Cook County No. 18 L 001059 Honorable John H. Ehrlich, Judge Presiding

ORDER

This matter coming to be heard on defendants-petitioners'—Edgard Khoury, M.D. and Robert Kagan, M.D.—petition for leave to appeal pursuant to Illinois Supreme Court Rule 308(a), an answer having been filed by plaintiffs-respondents Monique Thomas and Christopher Mitchell;

IT IS HEREBY ORDERED: the petition for leave to appeal is GRANTED.

ORDER ENTERED

JUL 12 2019

APPELLATE COURT FIRST DISTRICT

JUSTICE

JUSTICE

JUSTICE

A 22

C 416

2020 IL App (1st) 191052
No. 1-19-1052
Opinion filed March 31, 2020

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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. v. EDGARD KHOURY, M.D.; ROBERT KAGAN, M.D.; and ALEXIAN BROTHERS MEDICAL CENTER, Defendants, (Edgard Khoury, M.D., and Robert Kagan, M.D., Defendants-Appellants).	Appeal from the Circuit Court of Cook County. No. 18 L 1059 The Honorable John H. Ehrlich, Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court, with opinion.
Presiding Justice Griffin and Justice Walker concurred in the judgment and opinion.

OPINION

¶ 1 Monique Thomas and Christopher Mitchell seek damages, alleging Dr. Edgard Khoury and Dr. Robert Kagan caused the wrongful death of their fetus from injury suffered during elective surgery on Thomas. Pregnancy testing before the surgery alerted the doctors that Thomas was "potentially pregnant." After an inconclusive ultrasound, defendants proceeded with the surgery. A short time later, the pregnancy was confirmed. Because drugs and procedures had exposed the

fetus to health risks that resulted in a nonviable fetus, Mitchell and Thomas had to decide whether to terminate the pregnancy. They decided on an abortion. Now, Thomas and Mitchell seek damages alleging the surgery injured the fetus leading to the wrongful death.

¶ 2 In denying defendants' motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2018)), the trial court found 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 (740 ILCS 180/2.2 (West 2018)), and certified this 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."

¶ 3 Basically, the question posed asks us to interpret the second paragraph in section 2.2, which bars a cause of action when a legal abortion with proper consent caused fetal death, and the third paragraph, which authorizes a cause of action, regardless of how the fetus died, based on the alleged misconduct of a physician or a medical institution who knew, or had a medical reason to know, of the pregnancy. *Id.*

¶ 4 We hold that the wrongful death action may proceed. Although the cause of the death, in a literal sense, was the abortion (second paragraph), the decision to abort or not arose out of defendants' alleged medical misconduct (third paragraph) when they knew and, "under the applicable standard of good medical care, had medical reason to know of the pregnancy." The second and third paragraphs appear in section 2.2 as independent paragraphs, and under the facts here, the second paragraph does not nullify (or provide an impediment for bringing) the cause of action.

¶ 5 Background

¶ 6 On March 18, 2016, Alexian Brothers Medical Center admitted Thomas for "elective" surgery." Standard presurgical testing of urine and blood samples showed an elevated human chorionic gonadotropin (hCG), a potential indication of pregnancy. An ultrasound did not definitively show an intra-uterine pregnancy, although it could have been consistent with a pregnancy of less than four weeks. The doctors told Thomas that she was not pregnant. Dr. Kagan performed the surgery with Dr. Khoury administering general anesthesia. (Plaintiffs voluntarily dismissed Alexian Brothers Medical Center as a defendant.)

¶ 7 After surgery, Thomas came to the emergency room at Advocate Lutheran General Hospital for treatment of an infection and received both analgesics for pain and antibiotics for the infection. Her pregnancy was then confirmed. The effects of anesthesia and other medications given before and during the surgery, and related to the infection, can bring about malformations in a fetus. Given a choice, Thomas terminated the pregnancy and had an abortion.

¶ 8 In count I of their "first amended complaint," Thomas alleged defendants deviated from the standard of care owed to her as a patient and directly caused harm to her and the fetus, resulting in the termination of her pregnancy. Specifically, as part of the standard presurgical testing procedures on the morning of the surgery, a urine pregnancy screening and a blood test for hCG were performed. Both tests "returned with positive results, indicating that Ms. Thomas was potentially pregnant." After the "returned positive results," an ultrasound did not definitively show an intra-uterine pregnancy "but was consistent with a pregnancy of less than four weeks gestation." Thomas alleged defendants misled her by telling her " 'not to worry' and that she was not pregnant" and their negligence harmed the fetus.

¶ 9 Count II alleged the wrongful death of the fetus because of injury resulting from the breach of the standard of care owed to "Baby Doe as a medical patient." In count III, Mitchell alleged negligence that caused the death of Baby Doe by performing a surgery on Thomas and providing later treatment that they knew or should have known would cause injury or death to the fetus. Mitchell sought a judgment against defendants for his mental and emotional damages, "including but not limited to grief, sorrow, loss of affection, loss of society, loss of companionship, and mental shock and suffering."

¶ 10 The parties' dispute involves the second and third paragraphs of section 2.2 of the Wrongful Death Act:

> "
>
> * * *
>
> 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." *Id.*

¶ 11 The trial court found the statute does not address whether a cause of action for fetal death is barred where the defendant knew and had medical reason to know of the pregnancy and the defendant's alleged misconduct serves as the basis for causing a lawful abortion conducted with

requisite consent. The trial court certified whether the statute contained a "seeming" internal inconsistency that bars this lawsuit.

¶ 12 Analysis

¶ 13 A permissive interlocutory appeal under Illinois Supreme Court Rule 308 (eff. July 1, 2017) creates an exception to the general rule that a party can appeal only from final judgments. *McMichael v. Michael Reese Health Plan Foundation*, 259 Ill. App. 3d 113, 116 (1994). A court of review avoids issues outside of the certified question and considers only the question certified. *Applebaum v. Rush University Medical Center*, 376 Ill. App. 3d 993, 995 (2007). Our review is *de novo*. *Miller v. American Infertility Group of Illinois, S.C.*, 386 Ill. App. 3d 141, 144 (2008) (citing *Bajalo v. Northwestern University*, 369 Ill. App. 3d 576, 580 (2006)).

¶ 14 The fundamental rule of statutory construction involves ascertaining and giving effect to the legislature's intent. *Orlak v. Loyola University Health System*, 228 Ill. 2d 1, 8 (2007). The intent of clear and unambiguous statutory language should be drawn from the language's plain and ordinary meaning. *Id.* We do not append or substitute statutory provisions or "read into a statute exceptions, limitations, or conditions which depart from its plain meaning." *Light v. Proctor Community Hospital*, 182 Ill. App. 3d 563, 566 (1989) (citing *Belfield v. Coop*, 8 Ill. 2d 293, 307 (1956)). Rather, we evaluate the statute as a whole. See *Orlak*, 228 Ill. 2d at 8 ("In determining the plain meaning of a statute's terms, we consider the statute in its entirety, keeping in mind the subject it addresses, and the apparent intent of the legislature in enacting the statute.").

¶ 15 The trial court called the differences between the second and third paragraphs a "conundrum." Does the third paragraph authorize plaintiffs' cause of action because, regardless of how the fetus died, defendants' alleged misconduct serves as the basis for the wrongful death when defendants knew and should have known that Thomas was pregnant before her surgery? Or does

the second paragraph bar the cause of action because fetal death resulted from a legal abortion with proper consent? The merits of the claims have no relevance to our determination.

¶ 16 Statutes in derogation of the common law, such as the Wrongful Death Act, cannot extend to situations beyond the legislature's intent. See *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2015 IL App (1st) 142804, ¶ 27 ("The [Snow and Ice Removal Act (745 ILCS 75/1 et seq. (West 2010))] was passed in derogation of the common law. [Citation.] [A] court cannot construe a statute in derogation of the common law beyond what the words of the statute expresses [*sic*] or beyond what is necessarily implied from what is expressed. [Citation.] Any legislative intent to abrogate the common law must be clearly and plainly expressed, and we will not presume from ambiguous language an intent to abrogate the common law." (Internal quotation marks omitted.)).

¶ 17 The language of the second paragraph bars a cause of action against a physician or medical institution for the wrongful death of a fetus "caused by" a legal and consensual abortion. 740 ILCS 180/2.2 (West 2018). Coming after the second paragraph's incorporation of "caused by," the language of the third paragraph bars a cause of action where the defendants did not know and "under the applicable standard of good medical care, had no medical reason to know" of the patient's pregnancy. *Id.* These paragraphs stand independent of one another, each a separate limitation on causes of action against physicians and medical institutions.

¶ 18 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. See *Seef v. Sutkus*, 205 Ill. App. 3d 312 (1990) (cause of action for negligent infliction of emotional distress recognized for

wrongful death of fetus caused by failure to monitor condition during pregnancy and timely perform caesarean); *Riley v. Koneru*, 228 Ill. App. 3d 883 (1992) (parents of stillborn fetus may recover damages for medical negligence during pregnancy); see also *Smith v. Mercy Hospital & Medical Center*, 203 Ill. App. 3d 465, 474 (1990) (giving "deference to the will of the legislature in providing parents with redress for the wrongful death of their unborn children as expressed in section 2.2 of the Wrongful Death Act, for where existing law imposes a duty, violations of which are compensable if they cause death even an instant after birth, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because death was caused in the womb").

¶ 19 The doctors argue *Light* is "closely analogous." See *Light* 182 Ill. App. 3d 563. The *Light* court considered only the second paragraph of section 2.2, holding that a woman who voluntarily terminates her pregnancy through abortion could not maintain an action under the Wrongful Death Act on behalf of a fetus for defendants' alleged negligence. *Id.* at 565-66. Thomas and Mitchell distinguish *Light* on its facts. The alleged negligence of the hospital and the radiologist involved failing to determine a pregnancy before a thyroid scan. Thomas and Mitchell counter that the doctors' argument here concentrates on the death of the fetus (second paragraph), as in *Light*, but the appropriate emphasis should be on the negligent medical care, that is, the injury to the fetus (third paragraph) that resulted in the wrongful death.

¶ 20 A wrongful death action derives from the injury to the decedent and turns on the same wrongful act of defendant, whether prosecuted by the injured party during his or her lifetime or by a representative of his or her estate. *Williams v. Manchester*, 228 Ill. 2d 404, 426 (2008). 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." *Id.* at 422, 426.

¶ 21 In *Williams*, the plaintiff was 10½ weeks pregnant when she was seriously injured in a car accident. *Id.* at 407. Medical complications from her injuries brought about voluntary termination of her pregnancy. She then sued the other driver for the wrongful death of the fetus. *Id.* at 408-412. The supreme court affirmed the trial court's grant of summary judgment for the driver, noting that the Wrongful Death Act requires an actionable injury to the fetus with recoverable damages that could have been maintained "had death not intervened." (Internal quotation marks omitted.) *Id.* at 423. The record in *Williams* disclosed that the fetus was not injured in the collision. Rather, the plaintiff in her brief admitted that the injuries " 'occurred in the hospital following the crash.' " *Id.* at 424.

¶ 22 The supreme court found the emergency room treatment increased the risk of future harm to the fetus and was not a present injury for which the fetus could have brought an action for damages. *Id.* at 424-26. Indeed, the *Williams* plaintiff did not present evidence of damages. *Id.* at 426. Thomas and Mitchell argue that the procedural posture here differs. A motion to dismiss under section 2-619(a)(9) of the Code of Civil Procedure allows for the involuntary dismissal of a cause of action on the ground "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2018). 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). 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.

¶ 23 *Miller*, 386 Ill. App. 3d 141, relied on by the doctors, is inapposite on its facts and has no bearing on a possible internal inconsistency in section 2.2 of the Wrongful Death Act. There, the plaintiffs sought to construe the Wrongful Death Act and the Illinois Abortion Law of 1975 (720 ILCS 510/1 *et seq.* (West 2006)) *in pari materia*, an approach the *Miller* court rejected because the two statutes address different subjects and were enacted for different purposes. *Miller*, 386 Ill. App. 3d at 151. "[I]t is clear that the legislature's intent in enacting section 2.2 of the Wrongful Death Act was to extend the cause of action to pregnancies in the mother's body regardless of whether the fetus was viable or nonviable." *Id.* at 150-51.

¶ 24 Accordingly, we answer *no* to the certified question that asked whether section 2.2 of the Wrongful Death Act bars a cause of action or recovery under the act "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."

¶ 25 Certified question answered; cause remanded.

No. 1-19-1052

Cite as:	*Thomas v. Khoury*, 2020 IL App (1st) 191052
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 18-L-1059; the Hon. John H. Ehrlich, Judge, presiding.
Attorneys for Appellants:	Karen Kies DeGrand and Laura Coffey Ieremia, of Donohue, Brown Mathewson & Smyth LLC, Mary Kay Scott and Austin C. Monroe, of Brenner, Monroe, Scott & Anderson, Ltd., and Michael Tarpey and Richard DeJong, of Hall Prangle & Schoonveld, LLC, all of Chicago, for appellants.
Attorneys for Appellees:	Edward K. Grassé, of Busse, Busse & Grassé, P.C., of Chicago, for appellees.

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September 30, 2020

In re: Monique Thomas, Indv., etc., et al., Appellees, v. Edgard Khoury, M.D., et al., Appellants. Appeal, Appellate Court, First District. 126074

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

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November 04, 2020

Karen Kies DeGrand
Donohue Brown Mathewson & Smyth LLC
140 South Dearborn St., Suite 800
Chicago, IL 60603

In re: Thomas v. Khoury
126074

Today the following order was entered in the captioned case:

Motion by Appellants for an extension of time for filing appellant's brief to and including December 9, 2020. Allowed.

Order entered by Justice Theis.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: Christopher Dean Willis
Edward K. Grasse
Leo Michael Tarpey
Mary Kay Scott

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NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on December 9, 2020, I electronically filed Brief and Appendix of Defendants-Appellants, Edgard Khoury, M.D. and Robert Kagan, M.D., with the Supreme Court of Illinois by using the Odyssey eFileIL system.

I certify that on December 9, 2020, I electronically served the above-mentioned document through the court electronic filing manager and by email to the attorneys of record listed below. Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct.

/s/Patrice A. Serritos
Patrice A. Serritos

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