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.

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

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ORAL ARGUMENT REQUESTED

ARGUMENT IN REPLY

Section 2.2 of the Wrongful Death Act bars a wrongful death claim against a physician for the death of a fetus caused by a lawful, consensual abortion and compels dismissal of the wrongful death claim against the two physicians before this Court. See 740 ILCS 180/2.2. The plain language of the statute encompasses the cause of action the trial court described in the Supreme Court Rule 308 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*." (Emphasis added.) (A 20; C 404.) The appellate court agreed that a voluntary, legal abortion was the cause of death, yet, expressing disapproval of the General Assembly's limitation on wrongful death claims, held that plaintiffs may proceed with their wrongful death claim in accordance with the panel's notions of good public policy. *Thomas v. Khoury*, 2020 IL App (1st) 191052 ("*Opinion*"), ¶¶ 4, 22.

In their response brief, plaintiffs rely on 1) *Williams v. Manchester*, 228 Ill. 2d 404 (2008), an automobile accident case, not an action against a physician, in which this Court found that plaintiff had no cause of action for the wrongful death of a fetus; 2) an unavailing attempt to factually distinguish *Light v. Proctor Community Hospital*, 182 Ill. App. 3d 563 (3d Dist. 1989), interpreting the second paragraph of section 2.2 to bar a wrongful death cause of action on closely analogous facts – a decision which has not generated any legislative reaction in more than 30 years; and 3) speculation about the legislators' intent.

The trial court should have dismissed the two counts of plaintiffs' "First Amended Complaint at Law" (C 187) in which plaintiffs alleged wrongful death claim for the death of a fetus plaintiff Monique Thomas elected to abort. Plaintiffs allege that Ms. Thomas was misled regarding the results of pregnancy testing before proceeding with elective cosmetic

surgery. (C 188.) Claiming that Ms. Thomas was told that test results indicated she was not pregnant and could safely proceed with the surgery, plaintiffs allege that Ms. Thomas later learned she was pregnant and then voluntarily terminated the pregnancy based on concerns of the effects on the fetus of anesthesia, medications, and infection associated with the surgery. (C 188-89, 374.)

Section 2.2 contains no ambiguity. The statute simply creates a wrongful death action for a fetus, regardless of the state of gestation or viability subject to two exceptions. The first exception to the statutorily created action 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 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*.

Paragraphs two and three address, respectively, situations where the legislature determined no wrongful death action may proceed. Paragraph two applies here and bars plaintiffs' wrongful death claim. Paragraph three involves another set of circumstances, not involved here, and has no application. The two paragraphs present no "conundrum." (A 17; C 401.) This Court should correct the lower courts' expansion of the boundaries for a wrongful death action against a physician involving the death of a fetus by a lawful abortion, a function for the General Assembly, not for the courts.

I. *Light v. Proctor*, a 1989 decision the legislature has implicitly approved, correctly construes section 2.2.

Plaintiffs cannot meaningfully distinguish *Light*, in which the appellate court abided by the "certain and unambiguous" language in section 2.2 requiring dismissal of a

wrongful death claim brought on behalf of an aborted fetus. 182 Ill. App. 3d 563, 565-66 (3d Dist. 1989). Like here, the fetus in *Light* was not aborted during the medical procedure involving the allegedly substandard care. Rather, the fetus was "terminated as the result of [plaintiff's] subsequent voluntarily consensual legal abortion." *Id*. at 566.

The plaintiff in *Light* filed a medical malpractice action against a hospital and a radiologist on the theory that the radiologist negligently failed to determine whether plaintiff was pregnant before a thyroid scan procedure and failed to warn that, if she were pregnant, she should not undergo the scan. *Id*. at 564-65. Here, by ignoring their own allegations, plaintiffs attempt to distinguish the allegedly negligent conduct of the radiologist in *Light*, who failed to discover the plaintiff's pregnancy before proceeding with the scan, from plaintiffs' claims against these defendants. Plaintiffs argue that defendants had "actual knowledge" of Ms. Thomas' pregnancy (response at 11); but, in their complaint, they allege that the physicians knew or should have known of the pregnancy based on the presurgical testing (C 188-89).

Further trying to reconcile *Light* with their tortured statutory analysis, plaintiffs also misstate the theory against the defendant in that case. Plaintiffs inaccurately claim the physician in *Light* was not alleged to have any reason to know of the plaintiff's pregnancy. (Response at 10.) 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. 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. In *Light*, the plaintiff alleged that the

scanning procedure allegedly posed a "risk to the well-being of the fetus," and pursuant to the radiologist's recommendation, she decided to abort the fetus. *Light*, 182 Ill. App. 3d at 566. In the instant case, plaintiffs allege that Ms. Thomas was advised to terminate her pregnancy based on "serious health risks and damage" to the fetus, and thereafter elected to have an abortion. (C 188.) There is no meaningful distinction on the facts of the two cases.

Light expressly rebuts plaintiffs' claim that paragraphs two and three of section 2.2 protect only a physician who performs an abortion. The plaintiff in *Light* similarly argued that the second paragraph of Section 2.2 of the Wrongful Death Act "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." *Light*, 182 Ill. App. 3d at 565. The *Light* court noted that the Wrongful Death Act must "be strictly construed as being in derogation of the common law, and being thus a creature of statute, courts are not a liberty to engraft conditions not within the purview of the Act" and refused to adopt the plaintiff's interpretation of section 2.2. *Id.*

Observing that the plaintiff alleged a breach of the defendant hospital's and radiologist's duty to exercise reasonable medical care, the appellate court reasoned that the alleged tortious act could not support a cause of action for the death of the plaintiff's fetus under section 2.2 where the fetus was not aborted during the scanning procedure performed by the radiologist. *Id*. Rather, the fetus was terminated as the result of a subsequent voluntary and legal abortion. *Id*. Under the second paragraph of section 2.2, therefore, the allegations providing the basis for the plaintiff's medical malpractice claim did not support a separate cause of action against the radiologist and the hospital for the unborn fetus. *Id*.

Here, plaintiffs do not and cannot quarrel with the longevity of the *Light* decision. Undeniably, the General Assembly has been aware of the decision for 31 years. See *Pielet v. Pielet*, 2012 IL 112064, ¶ 48 (citations omitted) (observing that General Assembly is aware of judicial decisions interpreting legislation). Defendants listed the many amendments of the Wrongful Death Act at page 17 of their opening brief. Aware of the *Light* opinion and the plain meaning analysis set forth by the appellate court, the legislature has not changed the wording of section 2.2. "Judicial construction of a statute becomes part of the law." *Board of Education of the City of Chicago v. Moore*, 2021 IL 125785, ¶ 29. Where the legislature elects not to amend the terms of a statute after a court construes it, this Court presumes the legislature "has acquiesced in the court's statement of legislative intent." *Id*., ¶ 30.

If the Third District incorrectly rejected the argument that paragraph two of section 2.2 pertains only to physicians who perform abortions, the legislature surely would have corrected it by now. 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. Accordingly, *Light* has earned a presumption that it is correct.

In its *amicus curiae* brief submitted in support of plaintiffs' position, the Illinois Trial Lawyers Association ("ITLA"), cites authority supporting the defense position. ITLA argues that legislative acquiescence is not extended to appellate decisions; yet it cites several opinions in which this Court did exactly that: applied the principle of legislative acquiescence to appellate opinions. See *Ready v. United/Goedecke Services, Inc.*, 232 Ill. 2d 369, 380 (2008) (citations omitted) (applying acquiescence principle to appellate court

decisions); *In re Marriage of O'Neill*, 138 Ill. 2d 487, 495 (1990) (same); *Kobylanski v. Chicago Board of Education*, 63 Ill. 2d 165, 172 (1976) (same). (ITLA brief at 10-11.)

In another failed attempt to avoid *Light*, ITLA claims that the doctrine applies only where a statute is ambiguous. (ITLA brief at 10.) Again, however, ITLA misses the mark. The case law does not indicate a consistent adherence to ITLA's statutory construction analysis. See, *e.g.*, *Moore*, *Pielet*, *O'Neill*, *Kobylanski* (none of which indicate that a finding of ambiguity is a precursor to the presumption of validity of a judicial construction of a statute).

But even if ITLA were correct that legislative inaction is relevant only in the instance of a statutory ambiguity, ITLA – contradicting plaintiffs, who primarily argue that the legislative intent is clear from the words used in section 2.2. – urges that section 2.2 is ambiguous. (ITLA brief at 12; cf. response at 12.) By ITLA's reasoning, therefore, the legislative acquiescence principle is fully applicable.

Ultimately, plaintiffs concede that, under the *Light* court's analysis of paragraph two, they have no cause of action. (Response at 16.) Plaintiffs and ITLA cannot shoehorn *Light* into paragraph three of section 2.2 or otherwise excuse the lower courts' rejection of *Light.* The trial court erroneously distinguished *Light* (C 400) when it should have followed the Third District's decision as binding precedent. The First District did not address the Third District's reasoning; it only summarized plaintiffs' unavailing distinction of *Light*. *Opinion*, ¶ 19. Instead, the First District should have acknowledged and deferred to the *Light* court's statement of legislative intent, in addition to its well-reasoned analysis. See *Nelson v. Artley*, 2015 IL 118058, ¶¶ 21, 23.

Lastly, *Light* should have been followed because it correctly applies the plain and unequivocal language of the second paragraph of section 2.2, expressly precluding an

action for the wrongful death of a fetus where, as here, the fetal death was caused by an abortion "permitted by law and the requisite consent was lawfully given." 740 ILCS 180/2.2.

II. The injury analysis of *Williams v. Manchester* provides no support for plaintiffs' statutory interpretation.

Plaintiffs rely on *Williams v. Manchester*, 228 Ill. 2d 404 (2008), a case addressing whether a plaintiff could prove proximate cause of the death of a fetus in an action against a negligent driver following an automobile accident. *Williams*, 228 Ill. 2d at 407-08. Citing *Williams*, plaintiffs focus on the concept of injury to the fetus and criticize defendants' occasional use of the word "death" without the adjective "wrongful" in describing paragraph two of section 2.2. (Response at 4-10, 14.) But *Williams* stands for a principle not in dispute: that no wrongful death action exists in the absence of an injury to a fetus that would have provided a cause of action if no abortion had occurred. 228 Ill. 2d 404, 423-25, 427 (2008).

Plaintiffs' analysis again misapprehends the language contained in the second and third paragraphs of section 2.2. Plaintiffs erroneously claim that paragraph two applies only if no injury is caused before a pregnancy is terminated. (Response at 13-14.) While ITLA concedes that *Williams* does not address the issue before the Court (ITLA brief at 8), it similarly insists that plaintiffs need only plead an injury to the fetus to pursue a wrongful death action, regardless of the election to terminate the pregnancy. (ITLA brief at 8-9.) But as held in *Light*, paragraph two of section 2.2 takes the analysis beyond the fundamental question of an injury prior to death and focuses on the *cause* of fetal death. See 182 Ill. App. 3d at 566.

In *Williams*, the plaintiff sustained a broken hip and pelvis and received medical advice that the optimal treatment for her injuries posed risks to the fetus. 228 Ill. 2d at 408-09. The plaintiff understood that her physicians believed termination of the pregnancy would be best for the plaintiff and ultimately decided to have an abortion within one week of the accident. *Id*. at 408, 412. The defendant driver contended that the accident was not the proximate cause of the death of the plaintiff's fetus. *Id*. at 413. This Court agreed. 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 an actionable injury to the fetus would have supported a claim for damages had death not intervened. *Id*. at 423-25, 427.

The defendant in *Williams* was not a physician. Thus, this Court in *Williams* did not assess 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.

Here, by interpreting section 2.2 to provide plaintiffs a wrongful death cause of action regardless of how the death occurred, the trial and appellate courts disregarded the plain language of the statute. Both the second and third paragraphs recognize the creation in paragraph one of a wrongful death cause of action, and then set forth two specific instances in which a claim is not actionable under the statute.

The second paragraph focuses on the cause of death, rather than the defendant's conduct: "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." 740 ILCS 180/2.2 (emphasis added). In referring to "wrongful death," the legislature presumed the existence of an injury that would sustain a wrongful death cause of action; by following the phrase "wrongful death" with the words "caused by an abortion ***," the legislature removed from the statute's purview injury-causing conduct that otherwise might support an action for wrongful death. See *Light*, 182 Ill. App. 3d at 566; see also *Vitro v. Mihelcic*, 209 Ill. 2d 76, 89-90 (2004) (observing that setting boundaries upon liability is a policy decision that falls within the purview of the legislature). Thus, unlike paragraph three, which does not mention the ultimate cause of death, paragraph two forecloses a wrongful death action where the death resulted from an abortion. In contrast to paragraph two, paragraph three focuses on the defendant's conduct; it forecloses an action "based on" alleged misconduct where the physician or medical institution did not know or, under the standard of care, did not have a "medical reason" to know of the pregnancy. 740 ILCS 180/2.2.

Plaintiffs ultimately acknowledge the "potential" that paragraph two applies to their wrongful death claim (response at 12) and that, under the *Light* court's interpretation of the statute, no wrongful death claim exists (response at 16). Plaintiffs have pleaded that a lawful, voluntary abortion caused the fetus' death, and under the second paragraph of section 2.2, that allegation bars their wrongful death claim.

III. Plaintiffs Find an Ambiguity in Section 2.2 Only by Ignoring the Plain Language of Paragraph Two and Adding a New Phrase to Paragraph Three.

No rule of statutory construction authorizes what plaintiffs ask this Court to do: declare that the legislature did not mean what the plain language of the statute says. See *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 184 (2007). In their statutory analysis, plaintiffs and ITLA commit the error that they attribute to the defense. Plaintiffs

focus on paragraph three of section 2.2 rather than reading the statute as a whole. (Response at 12-13.) A court determines legislative intent by examining a statute in its entirety and construing the material parts of legislation together, rather than—as plaintiffs do—reading a portion in isolation. See *Ultsch*, 226 Ill. 2d at 184.

Plaintiffs claim the second paragraph applies only if no injury is alleged to occur before an abortion. (Response at 12-13.) The second paragraph does not include this limitation, and this Court should not amend the statute to insert it. See *In re Estate of Shelton*, 2017 IL 121199, ¶ 36. Plaintiffs repeatedly urge this Court to find that only the third paragraph of section 2.2 contains any limitations on wrongful death actions for the death of a fetus. (Response at 10, 12, 13.) They say "the Legislature clearly intended that physicians would only be excused from their 'alleged misconduct' which injured a fetus if the physician did not know or had no reason to know that the mother was pregnant." (Response at 13.) With this argument plaintiffs ask the Court to delete the limitation on wrongful death actions in the instance of a consensual abortion contained in the second paragraph of section 2.2, a request this Court cannot fulfill. See *People v. Legoo*, 2020 IL 124965, ¶ 26 ("No rule of construction authorizes this court to declare that the legislature did not mean what the plain language of the statute imports, nor may we rewrite a statute to add provisions or limitations the legislature did not include") (quoting *People v. Smith*, 2016 IL 119659, ¶ 59).

Taking a similar approach, ITLA focuses on the inapplicable third paragraph and contends that it controls the analysis. (ITLA brief at 17.) ITLA claims that paragraph three supports the lower courts' rulings, because it says "no cause of action lies if the physician does not have reason to know of the pregnancy under the applicable standard of care but injures the fetus, *later resulting in an abortion*." (emphasis added) (ITLA brief at 17.)

Tellingly, however, paragraph three contains no reference to a "later *** abortion." The fictional depiction of paragraph three offered by plaintiffs' *amicus* underscores the fundamental flaw in plaintiffs' statutory analysis.

Plaintiffs' attempt to find support in the negative implication canon is defeated by plaintiffs' own description of the canon's purpose. This rule of construction provides that the expression of one thing in a statute excludes any other thing. (Response at 18-19.) The very language plaintiffs quote, that courts use this rule "to help them ascertain the intent of the legislature where such intent is not clear from the statute's plain language," undercuts plaintiffs' own argument. (Response at 19, quoting *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 153-54 (1997).) The quoted language does not assist plaintiffs in their secondary argument in which they attempt to identify an ambiguity. The canon comes into play only where—unlike here—the legislative intent is not clear.

Again, plaintiffs ask this Court to read the third paragraph of section 2.2 as though the second paragraph does not exist. Again, this Court must construe section 2.2 in its entirety as creating a wrongful death action, regardless of the state of gestation of a human being, with two qualifications: first, that no wrongful death action exists for the death of a fetus caused by a lawful, voluntary abortion; and second, that no wrongful death action may proceed against a physician or medical institution having no medical reason to know, under the applicable standard of care, of a pregnancy. 740 ILCS 180/2.2; see *Miller v. Infertility Group of Illinois*, 386 Ill. App. 3d 141, 150-51 (1st. Dist. 2008). The second paragraph of section 2.2 contains an exception to the existence of a wrongful death action. The exception is applicable here, and the negative implication canon does not rebut it.

Plaintiffs also argue that the legislature did not intend section 2.2 to apply where a pregnancy no longer is viable. (Response at 18.) Yet section 2.2 does not depend on a

finding of viability. To the contrary, in the first paragraph of section 2.2, the legislature demonstrated its intent to remove the issue of viability, "[t]he state of gestation or development of a human being," from the maintenance of wrongful death actions. See 740 ILCS 180/2.2; see also *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶¶ 11, 17 (ascertaining legislative intent from the best source–the statutory language itself).

ITLA complains that the defense suggests an "absurd" interpretation of section 2.2 and a "harsh" result based on the limitation imposed by paragraph two. (ITLA brief at 17.) Plaintiffs, likewise, takes the position that, despite the plain language of the statute, the appellate court was correct to insert its negative view of the statute's limitations into its construction of the statute. (Response at 20-21.) Plaintiffs and their *amicus* ignore the remedy that remains. The statute does not bar all medical negligence actions alleging the death of a fetus. Consistent with the statute, the trial court initially dismissed plaintiffs' wrongful death claims but not Ms. Thomas' medical negligence action. (C 185.) In Count I, plaintiffs allege personal injuries and mental and emotional pain and anguish. (C 189.) The existence of another potential cause of action rebuts the contention that the defense read the statute in an inappropriately harsh manner. See *Vassell v. Presence Saint Francis Hospital*, 2018 IL App (1st) 163102, ¶ 62.

IV. The Legislative History Does Not Support Plaintiffs' Conclusions Concerning Legislative Intent.

The plain language of section 2.2 dispenses with any reason to consider its legislative history. See *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 235 (2007). Should this Court elect to consider the legislative history, it supports the defense interpretation of the statute.

The trial court questioned and then dismissed the appellate court's analysis in *Miller*. (C 401.) Substituting the appellate court's reading of the legislative history for its own, the trial court disregarded the *Miller* court's determination that the purpose of section 2.2 "was simply to eliminate the distinction between a viable and a nonviable fetus." (C 401 (citing *Miller*, 386 Ill. App. 3d at 150).)

The appellate court did not indicate that it found the language of the statute ambiguous. The panel only commented that *Miller* "has no bearing on a possible internal inconsistency in section 2.2" and quoted a statement from that decision concerning the General Assembly's goal: "'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.'" *Opinion*, ¶ 23 (quoting *Miller*, 386 Ill. App. 3d 141, 150-51 (1st Dist. 2008)).

In *Miller*, the First District considered whether the Wrongful Death Act provided a cause of action for the loss of an embryo created by in vitro fertilization which had not been implanted into the mother. *Miller*, 386 Ill. App. 3d at 143-44. The certified question before the court in *Miller* turned on whether the embryo was a "human being" within section 2.2. *Id*. at 143. Observing that the phrase "human being" is not defined in the Wrongful Death Act and that the legislature's intent was not discernable from the plain language of the statute, the appellate court reviewed the legislative history of section 2.2. *Id*. at 145-50. The court found guidance in the statements of Senator Rhoads, to the effect that the legislation extended the Wrongful Death Act to provide a cause of action for the wrongful death of a fetus from the time of conception to the time of viability. *Id*. at 149 (citing 81st Ill. Gen. Assem., Senate Proceedings, May 17, 1979, at 168 (statements of Senator Rhoads)). However, the appellate court also noted in *Miller* the legislative intent

for the two qualifications that appear in the second and third paragraphs of section 2.2. Amendments to the original version of the bill assured both that the bill would preclude a wrongful death action on behalf of an aborted fetus where an abortion was lawfully performed and would protect physicians from a wrongful death claim where a physician had no reason to know of a pregnancy. *Id*. at 148.

Plaintiffs and ITLA cite comments in the legislative debates demonstrating an intention to foreclose a wrongful death action based on medical malpractice in the instance of a voluntary, legal abortion. Based on those statements, plaintiffs and ITLA speculate that the second paragraph of section 2.2 pertains only to health care professionals who perform abortions. (Response at 17-18; ITLA brief at 15-16.) But the transcripts do not refer to allowing wrongful death actions against other physicians or medical institutions involved in the mother's care where a pregnancy is terminated by a lawful, voluntary abortion. Neither does section 2.2.

V. Plaintiffs' *Amicus* Oversteps its Role and Raises a Meritless Constitutional Challenge.

ITLA attempts to frame a new issue plaintiffs have not raised – whether section 2.2 violates the special legislation clause of the Illinois Constitution. (ITLA brief at 18-21.) In accordance with this Court's well settled precedent, the Court should decline to the invitation to recast the focus of this appeal. An "*amicus* takes the case as he finds it, with the issues framed by the parties." *Burger v. Lutheran General Hospital*, 198 Ill. 2d 21, 62 (2001) (quoting *People v. P.H.*, 145 Ill. 2d 209, 234 (1991)). At no stage of the briefing in the lower courts or this Court have plaintiffs challenged the constitutionality of section 2.2, as interpreted by the appellate court in *Light* or as analyzed by defendants. ITLA's attempt

to act as though it were a party to the action should be rejected. See *Karas v. Strevell*, 227 Ill. 2d 440, 450-51 (2008).

On the merits, the special legislation argument fails. ITLA does not rebut the strong presumption of constitutionality of section 2.2. Under the legal standard application where, as here, no fundamental right or suspect classification is involved, the legislative determination to permit a cause of action under the Wrongful Death Act is rationally related to a legitimate state interest. See *Big Sky Excavating*, *Inc. v. Illinois Bell Telephone Co*., 217 Ill. 2d 221, 237 (2005). Treating health care professionals differently than other classes of defendants is supported by the legitimate goal of reducing the burdens on the health care profession. See *Miller v. Rosenberg*, 196 Ill. 2d 50, 61-62 (2001). The statute confers no special benefit which others similarly situated do not receive. See *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 42; see also *DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 74-75 (1992) (rejecting special legislation challenge to statute requiring health professional report that medical malpractice action has merit); *Anderson v. Wagner*, 79 Ill. 2d 295, 313-21 (1979) (holding the statute of limitations for medical malpractice actions does not constitute special legislation).

VI. The Wisdom of the Statute Resides Exclusively in the Legislature's Domain.

At their essence, the arguments of plaintiffs and their *amicus*, as well as the decisions of the circuit court and the appellate court, challenge the wisdom of protecting physicians from wrongful death actions under plaintiffs' allegations here and in *Light*. But as this Court has held on many occasions, "[w]hether a statute is wise and whether it is the best means to achieve the desired result are matters for the legislature, not the courts." *Piccioli v. Board of Trustees of the Teachers Retirement System*, 2019 IL 122905, ¶ 20; accord *LMP Services, Inc. v. City of Chicago*, 2019 IL 123123, ¶ 17 ("courts do not

consider the wisdom of the enactment or whether it is the best means of achieving its goal"). Here, the legislature may well have been concerned that allowing an action for fetal death against medical providers because of a concern for the health of the fetus could result in a proliferation of wrongful death suits arising from voluntary consensual abortions. While the issue is debatable, the debate belongs in the legislature and not this Court.

CONCLUSION

In denying defendants' motion to dismiss, the appellate and trial courts did not fulfill their duty of deferring to the General Assembly in determining the public interest and in delineating what causes of action for wrongful death in derogation of the common law are permitted. Defendants Edgard Khoury, M.D. and Robert Kagan, M.D., respectfully request that this Court correct lower courts' errant statutory analysis, answer the certified question in the affirmative, and rule that section 2.2 of the Wrongful Death Act bars plaintiffs' wrongful death claim.

Dated: February 17, 2021.

Respectfully submitted,

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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 18 pages.

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NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on February 17, 2021, I electronically filed the Reply Brief 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 February 17, 2021, 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.

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