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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001096-MR

THOMAS A. STEVENS, ADMINISTRATOR
OF THE ESTATE OF THE UNBORN CHILD OF
DESIREE STEVENS, DECEASED; AND
THOMAS A. STEVENS INDIVIDUALLY — APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 08-CI-00288

GINA FLYNN AND PROGRESSIVE
DIRECT INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: Thomas Stevens ("Stevens"), both individually and as administrator of the estate of his unborn grandchild, appeals from orders of the Estill Circuit Court awarding summary judgment to Gina Flynn and Progressive Direct Insurance Company, dismissing a wrongful death action following a fatal

traffic collision that killed his pregnant daughter and her unborn fetus, and denying a subsequent motion to alter, amend or vacate. The single question posed is whether Kentucky law allows a civil suit to be maintained for the wrongful death of a nonviable fetus whose life is ended by another's negligence. Having reviewed the briefs, the record and the law, we hold it does not and affirm.

FACTS

According to a deposition given by Flynn, on the afternoon of August 16, 2008, she was driving two of her three daughters home. Before proceeding onto Winston Road in Irvine, Estill County, she came to a stop at the intersection of Kentucky 52 and Trotting Ridge Road. Upon looking to her right, she saw no traffic; upon looking to her left, she saw a car in the distance. Believing she had adequate time to cross three lanes of traffic and reach Winston Road, she entered the intersection. She cleared two lanes of traffic, but upon entering the third lane of traffic, one of her daughters screamed "Stop" causing her to bring her car to a complete stop just as a car driven by Desiree Stevens came in front of her vehicle and the two cars collided. Desiree, who according to an autopsy was in the early second trimester stage of an intrauterine pregnancy, died on impact from multiple fractures and internal injuries. Her fetus, which showed no signs of trauma, died from "maternal blunt force injuries." Stevens was appointed administrator of the estates of both his daughter, Desiree, and her unborn fetus.

On September 19, 2008, Stevens filed a complaint against Flynn alleging she negligently caused the death of Desiree and her unborn fetus.

Progressive Direct was named in the action as Desiree's underinsured motorist coverage carrier. Stevens sought damages from both Flynn and Progressive Direct on behalf of the estates of Desiree and her unborn fetus. Claims by Desiree's estate against Flynn and Progressive Direct were settled.

On October 10, 2008, Flynn filed an answer arguing the complaint failed to state grounds for relief pertaining to the estate of the unborn fetus because such a claim is not recognized under Kentucky law. On October 29, 2008, Progressive Direct filed an answer arguing application of its coverage to Desiree's unborn fetus was a legal conclusion to be made by the trial court.

On October 15, 2009, Progressive Direct moved for summary judgment arguing Desiree's unborn fetus was a "13-14 week 'previable' fetus" at the time of Desiree's death and a fetal wrongful death action may be maintained under KRS[1] 411.130 only for a viable fetus. According to Progressive Direct's motion, which Flynn adopted, the Kentucky state medical examiner confirmed the fetus was "previable" and Stevens did not dispute that fact.

On November 23, 2009, Stevens responded to the motion for summary judgment arguing Kentucky law protects human beings from "fertilization until death[.]" KRS 311.720(6). His argument was based largely upon Missouri's interpretation of its statutory scheme in *Connor v. Monkem Company, Inc.,* 898 S.W.2d 89, 92 (Mo. banc 1995), wherein it allowed wrongful death recovery for a stillborn nonviable fetus where that state's wrongful death

[1] Kentucky Revised Statutes.

statute specifies both that human life "begins at conception" and "[u]nborn children have protectable interests in life, health, and well-being[.]"

On January 14, 2010, the trial court entered its order awarding summary judgment to Flynn and Progressive Direct stating:

> During its independent research, the Court came across the case of *Commonwealth v. Morris,* 142 S.W.3d 654 (Ky. 2004), which contained the statement by the majority that "[i]t is inherently illogical to recognize a viable fetus as a human being whose estate can sue for wrongful death and who cannot be consensually aborted except to preserve the life or health of the mother, but not as a human being whose life can be nonconsensually terminated without criminal consequences. Thus, we overrule *Hollis* [*v. Commonwealth, 652 S.W.2d 61* (Ky. 1983)]. and hold that a viable fetus is a 'human being' for purposes of KRS 500.080(12) and the KRS Chapter 507 homicide statutes." (*Commonwealth v. Morris,* 142 S.W.3d at 660.) This statement does not answer the question presented to this Court, which was whether or not there could be a cause of action for a <u>non-viable fetus</u>, but that question was addressed in Justice Wintersheimer's concurring opinion. In his concurring opinion, Justice Wintersheimer quotes the South Dakota Supreme Court's decision in *Wiersma v. Maple Leaf Farms,* 543 N.W.2d 787 (S.D. 1996). The appellee (Maple Leaf) had argued that "inconsistency would be created by allowing a cause of action for the wrongful death of a nonviable fetus and at the same time allowing an abortion up to the twenty-fourth week of pregnancy. That Court stated that if it accepted such an argument, someone could fatally injure an unborn child by a non-consensual, wrongful act and still avoid civil liability because the child was not yet viable. This would ironically give the tort feasor (sic) the same civil rights as the mother to terminate a pregnancy. (*Id.* at 791). This analysis is clear and consistent with [*Roe*], which allowed the mother to choose to abort an unborn child, but not anyone else, not even the father." (Quoting Justice Wintersheimer's opinion in *Morris* at page 669).

The *Morris* Court went on to discuss the "born alive" rule and its departure in favor of recognizing that a viable fetus can be a victim of a homicide.

> Viability was recognized in [*Roe*] *v. Wade*, 410 U.[S]. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), as [the] "compelling point at which the fetus then presumably has the capability of meaningful life outside the mother's womb and the earliest time at which a state may proscribe consensual abortions." *Id*. at 163–64, 93 S.Ct. at 732, (quoting *Morris* at 660). It is also the point at which [time] the killing of an unborn child gives rise to a civil cause of action for wrongful death on behalf of the unborn child's estate. KRS 411.130.

That does appear to be the answer to the inquiry made of the Court. The majority criminalized the killing of a viable fetus, although they did not allow it to be retrospectively applied, but evidently not the killing of a non-viable fetus. Although the *Morris* case was a criminal case, it discusses the civil issues before this Court.

> Every other case the Court could find under KRS 411.130 discussed viability when it referred to recovery. Those cases were as follows: *Rice v. Rizk,* 452 S.W.2d 732 (Ky. 1970), which stated that a viable fetus is a person, and there is an inference that a child would have some earning power; *City of Louisville v. Stuckenborg,* 438 S.W.2d 94 (Ky. 1968), which stated that a "viable . . . unborn child is an entity," and damages may be recovered for the wrongful death; and *Mitchell v. Couch,* 285 S.W.2d 901 (Ky. 1955), which stated, "A viable unborn child is a person, and the administrator may maintain an action for its wrongful death."

On January 25, 2010, Stevens moved the trial court to alter, amend or vacate the order of dismissal. Stevens argued the trial court correctly relied upon

Justice Wintersheimer's concurring opinion in *Morris* but misapplied it in denying protection to human life from the moment of conception. Flynn responded that the motion was untimely because it was filed fifty days after entry of the court's order rather than within the ten days allowed for the filing of such a motion under CR[2] 59.05, and that the gist of Stevens' motion was mere disagreement with the trial court's resolution of the case. Progressive Direct also responded arguing Stevens had offered nothing new and that this Court had recently decided the precise issue in *Baxter v. AHS Samaritan Hospital, LLC,* 328 S.W.3d 687 (Ky. App. 2010).

On May 21, 2010, the trial court entered an order on the motion to alter, amend or vacate. Finding its prior order was not final in that it did not contain finality language, the court determined it retained jurisdiction over the case. In doing so, it reached the same conclusion; denied the motion to alter, amend or vacate; and granted Progressive Direct's motion for summary judgment and Flynn's motion for partial summary judgment. This appeal followed. We affirm.

LEGAL ANALYSIS

As an appellate court, we review a summary judgment *de novo*. *Baker v. Weinberg*, 266 S.W.3d 827, 831 (Ky. App. 2008). As such, we review "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). In applying the

[2] Kentucky Rules of Civil Procedure.

standard of review to the case at hand, we will resolve all doubts in Stevens' favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should only be granted if, as a matter of law, it appears it would be impossible for Stevens to produce evidence at trial warranting a judgment in his favor and against the movant. *Id.* at 483.

Adopted in 1974, Kentucky's wrongful death statute, KRS 411.130, reads in pertinent part:

> Whenever the death of a *person* results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

KRS 411.130(1) (emphasis added). More than half a century ago, Kentucky courts held that a viable fetus falls within the word "person" in KRS 411.130 and therefore, recovery for damages is allowed for the death of a viable fetus resulting from another's negligence. *Mitchell v. Couch,* 285 S.W.2d 901, 905-06 (Ky. 1955). A panel of this Court affirmed this holding just last year in *Baxter*. In light of fifty-six years of clear precedent, we see no reason to chart a new path, especially when doing so would place Kentucky in the minority.[3] Precedent deserves deference. The concept of *stare decisis*, which ensures the law will "develop in a principled and intelligible fashion[,]" *Chestnut v. Commonwealth*,

[3] 25A C.J.S. Death § 36; *Jeter v. Mayo Clinic Arizona,* 211 Ariz. 386, 399, 121 P.3d 1256, 1269 (Ariz. App. 2005); *Bolin v. Wingert,* 764 N.E.2d 201, 205 (Ind. 2002).

250 S.W.3d 288, 295 (Ky. 2008), is "an ever-present guidepost" in appellate review. *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 795 (Ky. 2009).

Stevens urges us, on the strength of two abortion statutes, KRS 311.710[4] and KRS 311.720,[5] and Kentucky's fetal homicide law, KRS 507A.020,[6] to expand our state's wrongful death statute to allow recovery for the death of a nonviable fetus. This we decline to do.

Amendments to Kentucky's abortion statutes and adoption of a fetal homicide statute simply do not convince us the General Assembly intended to expand Kentucky's wrongful death statute. Were that its intent, it could have easily done so, but it did not. As explained in *Morris,*

> while the introductory sentence in KRS 311.720 purports to apply the definitions enumerated therein to "KRS 311.710 to 311.820, *and laws of the Commonwealth unless the context otherwise requires*" (emphasis added), the definition of "human being" was added to KRS 311.720 by an Act entitled, "AN ACT relating to abortion." 1982 Ky. Acts, ch. 342, § 2. Section 51 of our Constitution provides that "[n]o law enacted by the General Assembly shall relate to more than one subject, *and that shall be expressed in the title* . . . ." (Emphasis added.) Thus, the definition of "human being" set forth in KRS 311.720(6) cannot constitutionally be applied to the homicide provisions of the penal code. *Edwards v.*

[4] Adopted in 1974, amended in 1982, and using the terms "viable unborn child" and "unborn human life."

[5] Adopted in 1974, amended in 1982, 1998 and 2005, and defining "fetus" as "a human being from fertilization until birth" and "human being" as "any member of the species homo sapiens from fertilization until death."

[6] Adopted in 2004 and defining "unborn child" as "a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency."

> *Land*, Ky. App., 851 S.W.2d 484, 487 (1992) (if a portion of the Act falls within the scope of the title and another portion falls outside the scope of the title, the portion falling outside may be omitted), *overruled on other grounds by O'Bryan v. Hedgespeth*, Ky., 892 S.W.2d 571, 578 (1995).

Morris, 142 S.W.3d at 660-61. Thus, contrary to Stevens' contention, a definition pertaining to abortion or fetal homicide does not automatically apply to an action for wrongful death. Without more, and in light of half a century of precedent, we decline to hold that Kentucky law allows a civil suit to be maintained for the wrongful death of a nonviable fetus whose life is ended by another's negligence. *Baxter,* 328 S.W.3d at 692-93. Should the General Assembly intend to so expand Kentucky's wrongful death statute, it is within its legislative prerogative to do so.

For the foregoing reasons, we affirm the order of the Estill Circuit Court awarding summary judgment to Flynn and Progressive Direct because Kentucky law does not recognize an action for the wrongful death of a nonviable fetus.

ALL CONCUR.

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