

NORTH CAROLINA COURT OF APPEALS

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GORDON W. JENKINS, Guardian
ad Litem for MIRIAM HAJEH,
and ASMA S. HAJEH,

Plaintiffs,

v.

HEARN VASCULAR SURGERY,
P.A., d/b/a CAROLINA
VASCULAR AND VEIN
SPECIALISTS and ANDREW T.
HEARN, M.D.,

Defendants.

From Forsyth County
10 CVS 7052

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NORTH CAROLINA ADVOCATES FOR JUSTICE

AMICUS CURIAE BRIEF

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QUESTION PRESENTED

IS A CHILD INJURED BY PRENATAL MEDICAL MALPRACTICE
BARRED FROM BRINGING A CAUSE OF ACTION IF THE
NEGLIGENCE OCCURRED EARLY IN THE PREGNANCY?

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SUMMARY OF ARGUMENT

Decades ago, North Carolina joined nearly every other state in recognizing that survivors of prenatal medical malpractice can bring negligence claims against the doctors responsible for their injuries and birth defects. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968). Our courts did not make recovery dependent on a fetus's gestational age at the time of the negligence.

The question of whether North Carolina's Wrongful Death Act, N.C.G.S. § 28A-18-2 creates a cause of action for the wrongful death of a nonviable fetus has no relation to claims of common law negligence. When it is reasonably foreseeable that negligent care could injure a woman's future child, doctors have the duty to avoid negligently placing the future child at risk of injury. This duty does not depend on whether a fetus has reached the stage of viability. Accepting a contrary rule would run counter to North Carolina law, break ranks with every other state, and deny a remedy to injured children who will suffer their entire lives because of avoidable medical negligence.

ARGUMENT

NORTH CAROLINA RIGHTLY RECOGNIZES THAT A CHILD INJURED BY
PRENATAL MEDICAL NEGLIGENCE HAS THE RIGHT TO RELIEF, EVEN
IF THE NEGLIGENCE OCCURRED EARLY IN THE PREGNANCY.

A. North Carolina recognizes a common law cause of action
for a child born with injuries caused by negligence at
any stage of pregnancy.

In discussing cases where "a pregnant woman is injured, and as a result the child subsequently born alive suffers deformity or some other injury," the North Carolina Supreme Court has recognized that "[s]ince the child must carry the burden of infirmity that results from another's tortious act, it is only natural justice that it, if born alive, be allowed to maintain an action on the ground of actionable negligence." Gay, 266 N.C. at 399, 146 S.E.2d at 429. The Court reiterated this rule in Stetson, which adopted the above quoted language from Gay "as authoritative in this jurisdiction." Stetson, 274 N.C. at 156, 161 S.E.2d at 534. The court made no distinction between viable and nonviable fetuses.

Defendants attempt to add ambiguity to this clear statement of the law by invoking cases interpreting North Carolina's Wrongful Death Act, such as DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987) and Johnson v. Ruark Obstetrics & Gynecology Associates, P.A., 89 N.C. App. 154, 365 S.E.2d 909 (1988) aff'd, 327 N.C. 283, 395 S.E.2d 85 (1990). However,

"wrongful death actions, particularly in this jurisdiction, are statutory creations," while "[c]ases of prenatal injury followed by a live birth constitute a type of common law personal injury action." Gay, 266 N.C. at 399, 146 S.E.2d at 429. The legislature did not intend the Wrongful Death Act to alter claims of common law negligence brought on behalf of injured persons, and cases interpreting that Act do not undermine Stetson's clear statement of the law.

As long as a child is born alive, North Carolina permits negligence suits for all injuries resulting from negligent prenatal care.

B. Other states share North Carolina's approach.

Some other states once prohibited negligence suits over injuries resulting from either prenatal negligence or pre-viability negligence. However, North Carolina courts have never recognized a distinction based on viability, and nearly every state long ago renounced that prohibition. Restatement (Second) of Torts: § 869 cmt. (a), (d) (2011); Gay, 266 N.C. at 399, 146 S.E.2d at 429.

Cases from nearly every jurisdiction accept claims such as plaintiff's. See, e.g., Simon v. Mullin, 34 Conn. Supp. 139, 380 A.2d 1353 (1977) (recovery permitted for "a child born alive for prenatal injuries...without regard to the viability of the fetus"); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93

S.E.2d 727 (1956) ("Where a child is born after a tortious injury sustained at any period after conception, he has a cause of action."); Humes v. Clinton, 246 Kan. 590, 792 P.2d 1032 (1990) ("viability...is an irrelevant demarcation when a child survives prenatal injuries and is born alive with damages suffered within the womb."); Group Health Ass'n v. Blumenthal, 295 Md. 104, 453 A.2d 1198 (1983) ("the concept of viability has no role in a case, such as this, where the child is born alive."); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960) ("Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress."); Hudak v. Georgy, 535 Pa. 152, 634 A.2d 600 (1993) ("infant born alive is a person and concept of viability is irrelevant when infant survives birth"); Delgado v. Yandell, 468 S.W.2d 475 (Tx Ct. App. 1971) ("a cause of action does exist for prenatal injuries sustained at any prenatal stage provided the child is born alive and survives."). Defendants do not direct the court to any jurisdiction that currently limits recovery to injured children on the basis of their gestational stage when injured.¹

¹ Defendants cite Griffiths v. Doctors Hospital, 150 Ohio App. 3d 234 (2002) as supporting their stance. Def.'s br. at 16. However, that opinion by the Ohio Court of Appeals principally addressed statutory wrongful death claims. In contrast, Ohio's Supreme Court has suggested that individuals have valid causes

C. North Carolina's approach is consistent with the underlying rationale of negligence suits.

The conclusion reached by Gay, Stetson, and nearly every other state is well grounded in traditional principles of negligence. "To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." Stein v. Asheville City Bd. Of Educ., 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006). These elements are satisfied when, as alleged by plaintiff, a doctor knows a patient is pregnant, negligently provides care he should have known could injure a future child, and causes injury to the future child as a result.

Defendants and their amicus base their argument on defendants' alleged lack of a duty to plaintiff. See NCADA's br. at 10 ("no physician or health care provider in any specialty should owe a duty to a nonviable fetus when providing medical care to a pregnant patient"). The argument is based on a flawed premise. "[O]ne who undertakes to render services to another which he should recognize as necessary for the protection of a third person, or his property, is subject to

of action for injuries they suffer because of another party's *preconception* negligence, as long as the defendant had a duty of care to the mother and harm to the child was within a defendant's "range of apprehension." Grover v. Eli Lilly & Co., 63 Ohio St. 3d 756, 761, 591 N.E.2d 696, 700 (1992) (ultimately rejecting a suit on behalf of a child injured by his grandmother

liability to the third person for injuries resulting from his failure to exercise reasonable care in such undertaking." Quail Hollow East Condominium Ass'n v. Donald J. Scholz Co., 47 N.C. App. 518, 522, 268 S.E.2d 12, 15 (1980) (citing Restatement (Second) of Torts § 324A (1965); W. Prosser, Handbook of the Law of Torts § 93 (4th ed. 1971)). A doctor who fails to exercise reasonable care while treating a pregnant woman when the doctor should have recognized that reasonable care was necessary for the protection of the future child is liable to a child injured by that negligence.

Defendants' amicus asserts that "since a nonviable child cannot exist separate from its mother... it is not an independent person or being to whom separate rights can accrue." NCADA's br. at 7. The Court should decline the invitation to inject this case with unnecessary political overtones. Tort liability to third parties may arise regardless of whether the negligent act was committed before the existence of the injured party. While, as defendants assert, "negligence analysis focuses on the time of the procedure at issue," Def.'s br. at 20, the appropriate question is not whether the victim existed at that time, but if at that time "in the exercise of reasonable care, the defendant might have foreseen that some injury would

having taken defendant's pharmaceuticals "[b]ecause of the remoteness in time and causation.")

result from his act or omission." Hart v. Curry, 238 N.C. 448, 449, 78 S.E.2d 170, 170 (1953).

The Missouri Supreme Court aptly addressed this question when recognizing tort liability for negligence that occurred prior to a plaintiff's reasonably foreseeable conception:

Assume a balcony is negligently constructed. Two years later, a mother and her one-year-old child step onto the balcony and it gives way, causing serious injuries to both the mother and the child. It would be ludicrous to suggest that only the mother would have a cause of action against the builder but, because the infant was not conceived at the time of the negligent conduct, no duty of care existed toward the child.

Lough v. Rolla Women's Clinic, 866 S.W.2d 851, 854 (Mo. 1993) (finding it to be "unjust and arbitrary to deny recovery" to a plaintiff "simply because he had not been conceived" at the time negligence occurred.)

Courts commonly extend doctors' duty of care before conception or fetal viability, allowing relief as long as the other elements of negligence are satisfied. See, e.g., Torres v. Sarasota County Pub. Hosp. Bd., 961 So. 2d 340, 346 (Fla. Dist. Ct. App. 2007) (child stated valid medical malpractice claim for the negligent treatment of his mother before his conception); Renslow v. Mennonite Hospital, 67 Ill.2d 348, 10 Ill.Dec. 484, 367 N.E.2d 1250 (1977) (child had a cause of action against preconception tortfeasors for resulting injuries); Walter v. Rinck, 604 N.E.2d 591 (Ind. 1992)

(physician owed duty to patient's yet-to-be conceived children); Monusko v. Postle, 175 Mich.App. 269, 437 N.W.2d 367 (1989) (recognizing a tort claim for injuries caused by negligent care given to mother pre-conception); Lynch v. Scheininger, 162 N.J. 209, 744 A.2d 113 (2000) (allowing preconception tort for physician's failure to provide Rh immune globulin); Harbeson v. Park Davis, Inc., 98 Wash.2d 460, 656 P.2d 483 (1983) (physician's duty may extend to persons not yet conceived at the time of a negligent act).²

Defendants and defendants' amicus further propose that only obstetricians and gynecologists have a duty to future children injured by their negligent care. NCADA's br. at 9; Def.'s br. at 20. Such an arbitrary standard would undermine the safety of countless pregnancies. All health care practitioners have a duty of reasonable care in providing services and treatment to pregnant women. Neither defendants nor their amicus cite any authority, in North Carolina or elsewhere, for such an ill-advised standard.

² In support of their proposal that parties can only sue over injuries proximately caused by another's negligence if they were alive at the time of the negligent act, defendants' amicus cites a 1916 Wisconsin case. NCADA's br. at 7 (citing Lipps v. Milwaukee Electric Railway & Light Co., 164 Wis. 272, 159 N.W. 916 (1916)). However, the Wisconsin Supreme Court long ago rejected that case's logic. See Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis.2d 14, 148 N.W.2d 107 (1967). (noting that the reasoning on which Lipps relied has been "completely rejected" by subsequent Wisconsin cases).

If plaintiffs establish at trial that the defendant physician knew or should have known at the time of surgery that his negligence would put his patient's future child at risk, he is liable for the injuries proximately caused by that negligence.

D. Defendants' attempt to excuse negligent medical care given early in a pregnancy is without merit.

Defendants attempt to import into the negligence analysis the fetal viability debate arising from DiDonato's interpretation of North Carolina's Wrongful Death Act. DiDonato, however, is based largely on the text and history of the statute it interprets. None of the considerations that limit the scope of the Act to viable fetuses are relevant to the claim of a live child suing for prenatal negligence.

The Supreme Court's reasoning in DiDonato is closely tied to the text and history of the Wrongful Death Act. In recognizing that the Act allows a suit for the wrongful death of a viable fetus, DiDonato addressed the legislative intent reflected in the preamble's use of the word "person" and the role that subsequent legislative amendments played in changing the scope of the Act. DiDonato, 320 N.C. at 429, 358 S.E.2d at 492. The debate over whether the statute creates a cause of action for the wrongful death of a nonviable fetus has little relevance to negligence claims brought by surviving children.

The more practical concerns underlying the Wrongful Death Act's application to fetuses are of little relevance here. Early cases disallowing suits for prenatal deaths were grounded in concerns regarding the speculative nature of any resulting damages. No cause of action was recognized in part because there could be no evidence from which to infer "pecuniary injury resulting from such death" - the only type of recovery then permitted by statute. Stetson, 274 N.C. at 156, 161 S.E.2d at 534; See also Cardwell v. Welch, 25 N.C. App. 390, 213 S.E.2d 382 (1969); Yow v. Nance, 29 N.C. App. 419, 224 S.E.2d 292, disc. rev. denied, 290 N.C. 312, 225 S.E.2d 833 (1976). In contrast, plaintiff is alive, has clearly defined medical needs and losses, and suffers from obvious pain and physical deficits. Damages arising from her injuries are calculable, tangible, and visible.

The remaining concerns expressed by defendants and defendants' amicus are equally unavailing. Defendants' amicus opines that the burden of "imposing" a duty on physicians not to negligently cause their patient's child to suffer from birth defects "would be compounded by the lack of guidance on the parameters of that duty." NCADA's br. at 9. However, a physician's duties are always defined by accepted standards of care; the physician is only required to act reasonably within the bounds of those standards. See N.C.G.S. § 90-21.12 (health

care provider liable only if the care "was not in accordance with the standards of practice among members of the same health care profession with similar training and experience in the same or similar communities.")

Defendants also allege that "doctors who are not specially trained to care for the unborn will not be equipped to balance the treatment of both a mother and nonviable fetus as patients." Def's br. at 21. But plaintiff's claim does not depend on doctors having a duty to treat all nonviable fetuses "as patients" - it instead rests on a doctor's duty not to negligently cause reasonably foreseeable injuries to his patient's future child. Moreover, defendants' claim cannot be reconciled with their necessary concession that the treating physician is equipped to consider the health of a pregnant woman's future child once the fetus reaches viability.

This case does not require the Court to determine whether a doctor has a duty to a fetus before viability. Under settled North Carolina law, a doctor has a duty not to violate professional standards in providing care to a patient, and that duty encompasses taking reasonable care not to injure the patient's future children. If a child is born with injuries proximately caused by a doctor's negligence, the child is not barred from bringing a claim against the doctor simply because the negligence occurred early in a pregnancy.

CONCLUSION

For the reasons stated herein, this Court should affirm the decisions of the trial court denying Defendant-Appellants' Motion to Dismiss.

NORTH CAROLINA ADVOCATES FOR JUSTICE

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

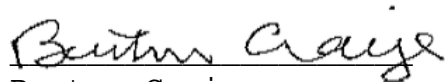
This is to certify that the undersigned has this date served a copy of the foregoing **BRIEF OF AMICUS CURIAE NORTH CAROLINA ADVOCATES FOR JUSTICE** in the above-entitled action upon all other parties to this cause by U.S. Mail, postage paid, addressed to the parties as follows:

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