

SUPREME COURT OF LOUISIANA

No. 97-C-0744

PATRICK WARTELLE AND KRISTINE WARTELLE

Versus

WOMEN'S AND CHILDREN'S HOSPITAL, INC. AND
LOUISIANA PATIENTS' COMPENSATION FUND

LEMMON, J., Dissenting

The critical inquiry is the meaning of La. Civ. Code art. 26's language "except for purposes of actions resulting from its wrongful death." The word "it" in that language refers to the unborn child who is born dead.

But for its wrongful death, the unborn child in the present case would have been born alive. Until the death-causing medical malpractice committed by the admitted tortfeasor during the delivery, the unborn child was a live, full-term and fully viable fetus.

As this court noted in Danos v. St. Pierre, 402 So. 2d 633 (La. 1981)(on reh'g), it would be arbitrary and illogical to reward the tortfeasor with immunity from liability because the tortfeasor injured a viable fetus seriously enough to cause its death just before birth, rather than immediately after the birth. When the Legislature heeded that reasoning by this court and amended Article 26 to add the pertinent language, the lawmakers clearly reserved all actions resulting from a tort committed on a viable fetus that caused the fetus wrongfully to be born dead.

In Thomas J. Andre, Louisiana Wrongful Death and Survival Actions §9.3 (2d ed. 1993), cited by the majority, the author notes that recognizing a survival action in favor of an unborn child who is born dead solely because of a tort would be a logical

extension of Danos. The author continues:

The applicability of article 2315 to both wrongful death and survival actions depends upon a finding that there is an "injured person." If an unborn child is an injured person for purposes of a wrongful death action, as Danos held, then an unborn child should also be an "injured person" for purposes of the survival action.

A viable full-term fetus killed by medical malpractice just before its birth presumably has the capacity to feel and to sustain conscious pain and suffering. When the evidence presented by the survival action beneficiaries establishes that the viable fetus, more probably than not, sustained conscious pain and suffering inflicted by the death-causing tort, the survival action falls within the contemplation of Article 26 as an action resulting from the viable fetus' "wrongful death."

In the present case, there is no doubt that the viable full-term fetus would be entitled to recover for the pain and suffering sustained because of medical negligence during its birth, if it had lived for one second or longer. That recovery should not be denied to the survivors solely because the medical negligence killed the child in the womb just before birth rather than just after. The killing of the child, either just before or just after birth, gives rise to a survival action resulting from the child's wrongfully-caused death.

It is equally incorrect to deny bystander damages under La. Civ. Code art. 2315.6 even to the laboring mother who not only saw, but also sensed, the death-dealing tort to her child who, but for that tort, would momentarily have been born alive.