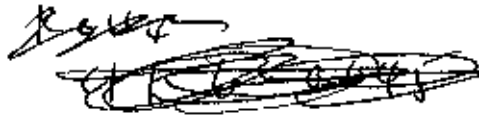


695-4108



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

ALISON MILLER, et al.,

Plaintiffs,

021.7394

AMERICAN INFERTILITY GROUP,

Defendant.

**MEMORANDUM OPINION AND ORDER**

This matter comes before the court on the motion of plaintiffs Alison Miller and Todd Parrish to reconsider the dismissal of Counts I and II of their First Amended Complaint. These counts state claims under the Wrongful Death Act, 740 ILCS 180/1 et seq., arising from a failed *in vitro* fertilization procedure.<sup>1</sup> They allege that, on or about January 7, 2000, they sought treatment for infertility from American Infertility Group of Illinois, S.C. d/b/a Center for Human Reproduction - Illinois ("Center"), that Alison Miller's eggs were harvested and fertilized with Todd Parrish's sperm, and that nine viable embryos were produced which were to be frozen and later implanted in Alison Miller's uterus. They further allege that at least one of these embryos developed into a healthy blastocyst and that, on or about January 13, 2000, one or more agents or employees of the Center

<sup>1</sup> Plaintiff's First Amended Complaint consists of three counts. Count III asserts a claim for breach of contract. Plaintiffs have filed a Second Amended Complaint. Counts I and II of the Second Amended Complaint replead the wrongful death claims. Counts III-VI assert claims based on theories of negligence that the Center's wrongful conduct caused them to suffer diminished fertility. Count VII repleads their contract claim. Plaintiffs have indicated that they wish to hold the non-wrongful death claims in abeyance (as well as a request for leave to file a Third Amended Complaint alleging conversion) pending the court's ruling on the motion to reconsider.

wrongfully destroyed it. Count I asserts claims based on negligence. Count II asserts claims based upon willful and wanton misconduct.<sup>2</sup>

The Center moved to dismiss all three counts of the First Amended Complaint. On May 4, 2004, Hon. David G. Lichtenstein dismissed Counts I and II with prejudice and Count III with leave to replead, provided that references to the Wrongful Death Act were removed. Plaintiffs moved to reconsider. The motion was heard by a new judge, because Judge Lichtenstein had retired. On August 30, 2004, the court denied Plaintiffs' motion to reconsider Judge Lichtenstein's order. Report of Proceedings, p. 62. Neither Judge Lichtenstein's dismissal order nor the order denying reconsideration set forth explanatory reasons.

These orders were interlocutory, since they disposed of less than all counts or issues in the case. A trial court, acting with careful consideration, has authority to revisit the interlocutory order of another judge. No showing of changed circumstances is required, unless reconsideration would thwart the efficient administration of justice or promote uncertainty in litigation. *Peoples Gas, Light & Coke Co. v. Austin*, 147 Ill.App.3d 26, 490 N.E.2d 790, 794 (1986). This case involves an issue of public importance which is apparently one of first impression in Illinois. The court believes that reconsideration, accompanied by a detailed memorandum opinion and order, would promote the administration of justice and, if either party desires, furnish an appropriate record for review. As one appellate court has put the matter, everyone, including litigants,

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<sup>2</sup> Plaintiffs use of the term "embryo" to describe the allegedly destroyed fertilized egg is technically incorrect. An "embryo" is the young of a mammal "...in the early stages of development within the womb, in man being up to the early part of the third month..." *Random House Dictionary of the English Language* (1981), at p. 466. A "blastocyst" is an early developmental state of a fertilized mammalian egg. *Ibid.*, at p. 157. To avoid confusion, the court will use the term "pre-embryo," as it is defined in the new Gestational Surrogacy Act, 750 ILCS 47/10, eff. January 1, 2005: "a fertilized egg prior to 14 days of development."

attorneys, the public and "legal history in general," is entitled to know why a court does what it does. *Hoult v. Kuhne-Simmons Co., Inc.*, 64 Ill.App.3d 476, 381 N.E.2d 403, 404 (1978); *Assoc. Indem. v. Ins. Co. of North America*, 68 Ill.App.3d 807, 386 N.E.2d 529, 544 at fn. 12 (1979).

#### Questions Presented.

In 1980, the Illinois legislature amended the Wrongful Death Act by adding Sec. 2.2, 740 ILCS 180/2.2:

"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."

Two issues are raised by this case: (1) is a pre-embryo a "human being" within the meaning of Sec. 2.2 of the Wrongful Death Act, and (2) must it be implanted in its mother's uterus to give rise to a claim under the Act for its destruction?

### Construction of the Wrongful Death Act.

Resolution of these issues will require construction of the 1980 amendment to the Wrongful Death Act. The primary rule of statutory construction is to ascertain and give effect to the intention of the legislature. *Phoenix Bond & Indem. Co. v. Pappas*, 194 Ill.2d 99, 741 N.E.2d 248 (2000). When the language of a statute is clear and unambiguous, it must be given effect without resort to other tools of construction. *Segers v. Ind. Comm.*, 191 Ill.2d 421, 732 N.E.2d 488 (2000). Words in a statute must be given their plain and ordinary meaning. *Lulay v. Lulay*, 193 Ill.2d 455, 739 N.E.2d 531 (2000). Every word in a statute must be given meaning, so that none is rendered superfluous or meaningless. *Kozak v. Retirement Board*, 95 Ill.2d 211, 447 N.E.2d 394 (1983). However, when necessary, the court may resort to extrinsic aids to construction, such as legislative history and the language of other statutes concerning related subject matter. *People v. Hickman*, 163 Ill.2d 250, 644 N.E.2d 1147 (1994); *Di Fulco v. Board of Trustees*, 122 Ill.2d 22, 521 N.E.2d 923 (1988).

The term "human being" is not defined in the Wrongful Death Act, so the court will have to resort to extrinsic aids to construction. The 1980 amendment adding Sec. 2.2 to the Act was sponsored by Senator Rhoads as Senate Bill 756. During debate, Senator Rhoads referred to two Illinois Supreme Court cases involving negligence which injured an unborn child. Although he did not cite the cases by name, the court is satisfied after research that he was referring to *Chrisafogeorgis v. Brandenburg*, 55 Ill.2d 368, 304

N.E.2d 88 (1973) and *Renslow v. Mennonite Hospital*, 67 Ill.2d 348, 367 N.E.2d 1250 (1977). Senate Journal, May 17, 1979, at p. 165.

*Chrisafogeorgis* involved the death of an unborn child whose mother was injured in an automobile accident in the 36<sup>th</sup> week of the pregnancy. The Illinois Supreme Court held that a cause of action existed for the death of a child from injuries sustained before birth but after it had achieved viability. *Renslow* involved an injury to a prematurely born child resulting from the negligent transfusion of incompatible blood into her mother years before the child's conception. In imposing liability on the defendant hospital, the Illinois Supreme Court declared: "We henceforth reject viability as a criterion to a common law action for prenatal injuries." 67 Ill.2d at 353.

Senator Rhoads stated: "... ironically enough, there is no cause of action, at least, statutorily at the moment for any state of gestation, which may be prior to viability. This would close that particular gap in the law . . . ." *Ibid.* He added: "The purpose . . . is to close a gap in the current law, both case law and statutory law, covering that period . . . from the time of conception to the time of viability." *Ibid.*, at p. 168.

Although Senator Rhoads discussed the time period in human development which the bill was supposed to address, neither he nor anyone else who participated in the Senate or House debates attempted to specifically define "human being." This is where the Illinois Abortion Law of 1975, 720 ILCS 510/1 et seq., comes into play.

During the debates, some legislators expressed concern that the bill was a backdoor attempt to subject doctors performing lawful abortions to suit. In fact, the House engrafted an amendment, in which the Senate concurred, specifically exempting doctors and medical institutions from suit in cases of abortions with lawful consent and where

the doctors and medical institutions were reasonably unaware that the mother was pregnant. House Journal, June 21, 1979, at p. 131. The Legislature was clearly concerned about the interrelationship between the abortion law and the amendment to the Wrongful Death Act, and the court considers these two laws to be *in pari materia*, so that it becomes reasonable to consider the provisions of one in construing the other.

Philosophers and theologians may debate, but there is no doubt in the mind of the Illinois Legislature when life begins. It begins at conception. Sec. 1 of the Abortion Law declares:

"... The General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State."

Sec. 2 of the Abortion Law provides, in relevant part:

"(5) 'Fertilization' and 'conception' each mean the fertilization of a human ovum by a human sperm, which shall be deemed to have occurred at the time when it is known a spermatozoon has penetrated the cell membrane of the ovum."

(6) 'Fetus' and 'unborn child' each mean an individual organism of the species homo sapiens from fertilization until live birth."

Based upon the legislative history of the 1980 amendment to the Wrongful Death Act and the provisions of the Abortion Law of 1975, this court has no hesitation in ruling that a pre-embryo is a "human being" within the meaning of Sec. 2.2 of the Act.

The more difficult problem, however, is to determine whether a pre-embryo must be implanted in its mother's uterus to give rise to a claim under the Act.

In its original form, Senate Bill 756 referred to "state of gestation, development, dependency, capacity or disability of a human being." Legislative Synopsis and Digest, 1979 Session, at p. 573. This version was deleted from the bill. The purpose of the amendment, Senator Rhoads explained, was to address concerns raised by the ACLU that it might precipitate lawsuits in defiance of the wish of elderly patients not to prolong their lives by artificial means. "We amended that out to make it simply the state of gestation," he said. Senate Journal, May 17, 1979, at p. 172. Senator Rhoads informed his colleagues that the purpose of the bill was to create a cause of action for the death of a fetus during the first three months of its mother's pregnancy. *Ibid.*, at p. 167-169. For aught that appears in the record, he thought that the bill's purpose was to create a claim for the loss of a child in the first trimester of pregnancy, and there is no evidence that he or anyone else considered whether a claim could be brought for the loss of an unimplanted pre-embryo.

The problem in determining legislative intent in this case occurs because the bill was not amended to provide "simply the 'state of gestation,'" as Senator Rhoads described, but the final enacted version provides: "The state of gestation or development of a human being . . . shall not foreclose maintenance of any cause of action . . . arising from the death of a human being." (emphasis supplied). Senator Rhoads mischaracterized his own bill. No discussion of the term "development" appears in the Senate or House journals. As a result, legislative history furnishes no clue as to its meaning.

The court cannot simply assume that the legislature made an inadvertent mistake and confine the law's reach to gestation in the mother's womb. This amounts to a judicial amendment of a statute, which would offend the doctrine of separation of powers. See *People v. Garner*, 147 Ill.2d 467, 475-476, 590 N.E.2d 470 (1992). It must therefore fall back on the principle of statutory construction which holds that all words in a statute must be given meaning, and none should be construed as superfluous and meaningless. If the Legislature had meant to confine a cause of action for death of a pre-viable human being to one gestating in its mother's womb, there would have been no need to use the term "development." Since it added this term, it is a reasonable inference that it must have contemplated nongestational development or development outside the womb.

The court believes that this inference is consistent with the Illinois Supreme Court's decision in *Renslow v. Mennonite Hospital*, *supra*. There, it held that viability would no longer be a prerequisite for a claim for prenatal injuries. What sense does it make to allow a claim for prenatal injuries, but to deny it for prenatal death? What sense does it make to allow claims for injuries occurring before conception and after viability, but deny them for injuries between conception and viability?<sup>3</sup> In light of the Legislature's ringing reaffirmation of the right to life in the Abortion Law, what sense does it make to allow a claim for the death of a human being after implantation in its mother's womb but deny it for one before implantation?

Statutes should be construed so as to avoid logically indefensible results. This principle underlies the previous decision of the Illinois Supreme Court to allow a claim

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<sup>3</sup> The Center concedes that the 1980 amendment removes the viability requirement from a claim for the wrongful death of a fetus. Defendant's Motion to Dismiss Plaintiff's First Amended Complaint, p 5-6. See also *Seef v. Siskus*, 145 Ill.2d 336, 339, 583 N.E.2d 510 (1991)(Miller, specially concurring).

for the wrongful death of a viable fetus in *Chrisafogeorgis, supra*. There, the court, citing a Wisconsin case, noted that it is incongruous to allow a claim for prenatal injury to a child who is born alive while denying a claim for a child who is negligently killed before birth. 55 Ill.2d at 375. The court quoted *Kwaterski v. State Farm Mutual Automobile Ins. Co.*, 34 Wis.2d 14, 20, 148 N.W.2d 107, 110 (1967)

"Denying a cause of action for negligent acts which produce a stillbirth leads to some very incongruous results. For example, a doctor or a midwife whose negligent acts in delivering a baby produced the baby's death would be legally immune from a lawsuit. However, if they badly injured the child they would be exposed to liability. Such a legal rule would produce the absurd result that an unborn child who was badly injured by the tortious acts of another, but who was born alive could recover while an unborn child, who was more severely injured and died as the result of the tortious acts of another, could recover nothing"

In 1978, five years after its decision in *Chrisafogeorgis*, and three years after enactment of the Abortion Law of 1975, the Illinois Supreme Court decided *Green v. Smith*. 71 Ill.2d 501, 377 N.E.2d 77 (1978). This case involved the death of a fetus in an automobile accident at 14 weeks. The majority opinion persisted in the view that proof of viability was required to sustain the claim, but, holding that the case should not have been decided on a motion to dismiss, remanded for an evidentiary hearing. However, Justice Ryan, in a specially concurring opinion, pointed out the court's continued reliance on the viability test contravened the declaration in the Abortion Law of 1975 that life begins at conception. After quoting Sec. 1, Justice Ryan stated, 71 Ill.2d at 509:

"Such clearly expressed legislative concern for the unborn must be considered by this court in construing the Wrongful Death Act, especially since this enactment was post-*Chrisaforgeorgis*."

It would be similarly illogical, and in contravention of Sec. 1 of the Abortion Law, for this court to allow a claim for the death of an implanted pre-embryo, but to deny it for an unimplanted one.

Subsequent Legislative Action.

The Center suggests that an amendment to Sec. 6 of the Abortion Law, 720 ILCS 510/6, passed in 1985 creates an inference that the legislature did not intend to consider an unimplanted pre-embryo to be a "human being." This amendment removed language of the Abortion Law which provided that a fertilized ovum outside the mother's body was deemed a "child" for purposes an "Act to Prevent and Punish Wrongs to Children," 720 ILCS 150/4 (repealed). This court declines to draw such an inference, because it would contravene the plain meaning of the terms "human being" and "conception" used in Secs. 1 and 2 of the Abortion Law.

The Center also suggests that the legislature's failure to address cryopreservation with specific legislation since the technique was introduced in 1983 creates an inference that the 1980 amendment to the Wrongful Death Act was not intended to cover an unimplanted pre-embryo, citing *Arangold v. Zehnder*, 329 Ill.App.3d 781, 768 N.E.2d 391 (2002) and *Jasper v. Chicago National League Ball Club*, 309 Ill.App.3d 124, 722 N.E.2d 731 (1999).

In the first place, these cases simply stand for the proposition that the legislature does not violate the Equal Protection Clause when it elects to approach problems incrementally rather than addressing the entire field. If this court's construction of Sec. 2.2 of the Wrongful Death Act is correct, unimplanted pre-embryos already are

included in its protection, obviating the need for new or incremental legislation. In the second place, a botched cryopreservation is only one of many ways in which an unimplanted pre-embryo could be destroyed.

Conclusion.

The court holds that a pre-embryo is a "human being" within the meaning of Sec. 2.2 of the Wrongful Death Act and that a claim lies for its wrongful destruction whether or not it is implanted in its mother's womb. Accordingly, the motion to reconsider the dismissal of Counts I and II of the First Amended Complaint is granted.

**ORDER**

Plaintiffs' motion to reconsider is granted. The Center's motion to dismiss Counts I and II of the First Amended Complaint is denied. The Center is granted 28 days to answer or otherwise plead to these counts.

ENTER: \_\_\_\_\_

