

COA Opinion: Failure to Perform a Requested Medical Procedure to Prevent Premature Birth Gives Rise to a Cause of Action Under the Wrongful Death Act

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In *Johnson v. Pastoriza*, No. 288338, the Court of Appeals held that Plaintiff, whose child died shortly after premature birth, stated a claim under the Wrongful Death Act, Mich. Comp. L. 600.2922, against the physician who refused her request to perform a procedure that would have prevented the premature birth. As a result, it affirmed the lower court's denial of Defendant's motion for summary disposition.

Plaintiff had a medical condition that heightened her risk of entering premature labor and delivering her child before term. During prior pregnancies, her physician performed a procedure that reduced this risk, and she was able to carry two babies to term. When she discovered that she was pregnant for a third time, she again requested this procedure. Defendant, her physician, refused to perform it. Plaintiff entered premature labor and the procedure was performed in an emergency, but Plaintiff suffered significant complications. Her child was born after only 20 weeks of gestation, and died shortly after birth. Plaintiff filed suit under section 2922a(1), which states: "A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or death of the embryo or fetus."

As a preliminary matter, the Court determined that a 2005 amendment to the Wrongful Death Act applied retroactively. It then concluded Plaintiff's claim that Defendant failed to perform the requested procedure in a timely fashion was sufficient to establish a cause of action. The Court reasoned that the statute does not require a plaintiff to establish that an affirmative act caused the injury at issue because liability may arise from "a wrongful act, neglect, or fault of another." Moreover, even if an affirmative act *were* necessary, the Court held that Defendant's refusal to perform the requested constituted an affirmative act.

Next, the Court held that section 600.2922a(2)(b), delineates three exceptions to the rule that a medical procedure performed by a physician within the scope of his or her practice that results in the death of a fetus or embryo gives rise to liability: (1) where the pregnant individual consented to the procedure, (2) where there was consent by someone else authorized to give consent on the pregnant individual's behalf, and (3) where there was no consent, but the procedure was "necessitated by a medical emergency." In this case, however, no medical procedure was performed, so the statutory exemptions from liability did not apply.

Finally, the Court held that *McClain v University of Michigan Board of Regents*, 256 Mich App 492 (2003), which allowed a plaintiff to bring an action for damages in her own right as a result of a miscarriage, remains good law. The Wrongful Death Act, which allows actions for damages only in the name of the personal representative of the estate of a deceased embryo or fetus, did not supersede *McClain*, so a Plaintiff may pursue statutory remedies under the Wrongful Death Act alongside a common law claim under *McClain*.