

# IN THE SUPREME COURT OF TEXAS

=====  
No. 96-1224  
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CHRISTINA MICHELLE BROWN AND CECIL TED BROWN, INDIVIDUALLY AND ON  
BEHALF OF THE ESTATE OF DILLON RAY BROWN, DECEASED, PETITIONERS

v.

KALMAN JAY SHWARTS, M.D., AND NAVARRO MEMORIAL HOSPITAL, INC. D/B/A  
NAVARRO REGIONAL HOSPITAL, RESPONDENTS

=====  
ON APPLICATION FOR WRIT OF ERROR TO THE  
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS  
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**Argued on October 7, 1997**

JUSTICE GONZALEZ, concurring, joined by JUSTICE ABBOTT with respect to Part II, and  
JUSTICE BAKER and JUSTICE ABBOTT with respect to Part III.

## I

There is . . . no negligence cause of action arising out of the treatment or injury  
of a fetus.

. . . .  
. . . [T]his court declines to overrule its prior opinions and continues to  
hold that “there is no wrongful death or survival cause of action for the death of  
a fetus.” [*Pietila v. Crites*, 851 S.W.2d 185 (Tex. 1993); *Blackman v. Langford*,  
795 S.W.2d 742 (Tex. 1990); *Witty v. American Gen. Capital Distribs., Inc.*, 727  
S.W.2d 503 (Tex. 1987); *Tarrant County Hosp. Dist. v. Lobdell*, 726 S.W.2d 23  
(Tex. 1987)]. Furthermore, the Legislature has not amended the wrongful death  
and survival statutes to create a wrongful death or survival cause of action for loss  
of a fetus.

*Krishnan v. Sepulveda*, 916 S.W.2d 478, 479-81 (Tex. 1995).

Without overruling any of the above cases, the Court today holds that the Browns, whose  
claims resulted from the alleged negligent treatment of their son in utero, “waited one day too  
long to file [the wrongful death] suit,” \_\_\_ S.W.2d at \_\_\_, but that “the Browns’ survival action  
is not barred.” \_\_\_ S.W.2d at \_\_\_. In so holding, the Court finally recognizes that because “a

physician can be liable for negligently injuring a fetus, it follows that a fetus can be a patient.” \_\_\_ S.W.2d at \_\_\_. Unfortunately, when viewed alongside the Court’s previous writings, today’s opinion adds confusion to an already muddled area of the law and does nothing to resolve the tension in our opinions.

Nevertheless, while I cannot join the Court’s writing, I concur in its judgment. It is clear that the statute of limitations on the Browns’ survival action, which is wholly based on Dillon’s injury and the damages Dillon suffered, was tolled until Dillon’s death. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1998) (“Medical Liability Act”). Therefore, the survival action is not barred.

I also agree that under sections 4.01(c) and 10.01 of the Medical Liability Act, a wrongful death action filed more than two years and 75 days after the occurrence of the breach or tort against an unborn *patient* is barred by limitations. I have consistently urged the Court to recognize that such a *patient* should be able to recover for its injuries received in the womb, regardless of whether the *patient* is later born alive. See *Edinburg Hosp. Auth. v. Treviño*, 941 S.W.2d 76, 85-92 (Tex. 1997) (Gonzalez, J., dissenting); *Krishnan*, 916 S.W.2d at 483-90 (Gonzalez, J., dissenting). Under the absolute statute of limitations of the Medical Liability Act, the clock starts running from the date of breach or tort against the *patient* whose injury or death forms the basis for the health care liability claim. Therefore, I agree with the Court’s disposition of this case.

However, I am concerned with the inconsistency in holding that for the purposes of the statute of limitations of the Medical Liability Act, a fetus is a *patient*, when this Court has unwaveringly held that under the Wrongful Death Act, a fetus is not an *individual*, and therefore may not recover for its wrongful death if that fetus (*patient*) happens to die in utero. See *Treviño*, 941 S.W.2d at 78, 79 n.1; *Witty*, 727 S.W.2d at 504 (stating that the Legislature did not intend the word “individual” to include an unborn fetus). The Medical Liability Act does not define “patient.” Still, the Court is willing to say that under that Act, a fetus is a patient, as a

doctor/patient relationship clearly exists between a doctor and fetus. \_\_\_ S.W.2d at \_\_\_. But on the other hand, in *Witty*, 727 S.W.2d at 504, the Court faced a similar situation involving the absence of a legislative definition, yet reached a contrary result.

The Wrongful Death Act allows a cause of action for damages “arising from an injury that causes an individual’s death.” TEX. CIV. PRAC. & REM. CODE § 71.002(a). But the Legislature did not define “individual” in the statute. Nonetheless, the Court held that when enacting the statute, the Legislature did not intend the word “individual” to include a fetus, *Witty*, 727 S.W.2d at 504, despite a complete absence of evidence of what the Legislature intended, and without any reasoning, discussion, or analysis of such intent. *Id.* at 507 (Kilgarlin, J., dissenting).

In fact, the Court’s analysis in *Witty* centered around the fact that the be a nonsubstantive change. *See Witty*, 727 S.W.2d at 504. Essentially the Court’s summary conclusion was that a fetus is not an “individual” because a fetus is not a “person.” However, there are numerous sources that indicate that a patient is a “person.” *See* TEX. HEALTH & SAFETY CODE § 313.002(8) (defining a patient as “a *person* who is admitted to a hospital . . . .”) (emphasis added); TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08(m) (Vernon Supp. 1998) (defining a patient as “any *person* who consults or is seen by a person licensed to practice medicine to receive medical care”) (emphasis added); TEX. R. CIV. EVID. 509(a)(1) (defining a patient as “any *person* who consults or is seen by a physician to receive medical care”) (emphasis added); BLACK’S LAW DICTIONARY 1126 (6<sup>th</sup> ed. 1990) (defining a patient as a “*Person* under medical or psychiatric treatment and care”) (emphasis added). If indeed a fetus is a patient, as the Court admits, how does it follow that a fetus is necessarily *not* a person or individual for the purposes of wrongful death jurisprudence?

The *Treviño* Court followed *Witty* and stated that it would be up to the Legislature to rewrite the Wrongful Death Act to include under the definition of *individual* a fetus, which according to the Court today, is a *patient*. Therefore, the Court finds itself in the following untenable position: it recognizes in the present case, with no guidance from the Legislature, that

a fetus is a patient, while at the same time, *because* there has been no guidance from the Legislature, it adheres to the antiquated concept that a fetus is *not* an “individual” in the area of wrongful death jurisprudence. If the Court had simply recognized, at my urging in *Krishnan* and *Treviño*, that there is no limitation in the Wrongful Death Act that prevents us from construing the

## II

Nevertheless, this predicament can be remedied by legislative action. Just over a year ago in *Treviño*, I called upon the Court to abandon the anachronistic rule of law that dictates that parents cannot recover for the wrongful death of their unborn child, and urged the Court to join the overwhelming majority of jurisdictions that allow such recovery. *Treviño*, 941 S.W.2d at 86 & n.1 (Gonzalez, J., dissenting). As mentioned earlier, the *Treviño* Court deferred to the Legislature, stating, “If the law is to change, it would be up to the Legislature, not this Court, to rewrite [the Wrongful Death Act] to allow the cause of action that Justice Gonzalez seeks to create.” *Id.* at 79 n.1.

I still adhere to the view that the Legislature, by providing a cause of action for the wrongful death of an “individual,” has done all that is necessary for us to recognize a tort for an unborn baby’s wrongful death. The mistake, as I have reiterated time and again, was this Court’s interpretation of the Wrongful Death Act in *Witty*. However, it is abundantly clear that my colleagues will not overrule *Witty* and its progeny.

## III

Therefore, I now call on our Legislature to bring Texas in line with the vast majority of jurisdictions that recognize a wrongful death cause of action for the death of a fetus. *Id.* at 86 n.1 (Gonzalez, J., dissenting) (listing thirty-nine jurisdictions that recognize some form of action to recover damages for an unborn child’s death); *see Santana v. Zilog, Inc.*, 95 F.3d 780, 783 n.3 (9<sup>th</sup> Cir. 1996) (pointing out that only nine jurisdictions do not allow wrongful death causes of

action for any fetus, regardless of viability). The reasons to recognize such a claim are many, as I have exhaustively detailed in my previous dissents in *Treviño* and *Krishnan*. *Treviño*, 941 S.W.2d at 85-92 (Gonzalez, J., dissenting); *Krishnan*, 916 S.W.2d at 483-90 (Gonzalez, J., dissenting).

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Raul A. Gonzalez  
Justice

OPINION DELIVERED: March 13, 1998