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Ohio Emotional Distress Damages For The Loss Of A Fetus Prior To Viability

by Brian W. Parker

A partner came into my office with a challenge. Our firm represented a couple who had tragically lost an unborn child in an automobile accident. At the time of the accident, Naomi, our client, was 8 weeks pregnant. Defense counsel challenged the partner to show that Ohio would allow Naomi to recover emotional distress damages for the loss of an unviable fetus. Defense counsel asserted that emotional distress damages for the death of another are only available in Ohio in a wrongful death action, and that a wrongful death action was not available in this case due to the lack of viability of the fetus. Thus, defense counsel challenged, we were not able in the present case to recover for our client's emotional distress damages due to the loss of her unborn child.

In support of his position, defense counsel cited a Maryland case which, defense counsel indicated, was consistent with Ohio law. That case, *Smith v. Borello*, 370 Md. 227 (2002), states:

A pregnant woman who sustains personal injury as the result of a defendant's tortious conduct and who, as part of that injury, suffers the loss of the fetus may recover, in her own action for personal injuries, for any demonstrable emotional distress that accompanies and is attributable to the loss of the fetus. The distress recoverable in that action includes that arising from the unexpected termination of her pregnancy and the enduring of a miscarriage or stillbirth. * * * It does not include, however,

in the context of this case, pecuniary losses or solatium or loss of consortium damages recoverable under the wrongful death statute, whether or not that statute applies in the circumstances. **The recovery, in other words, is for the psychic injury inflicted on the mother and not for her sorrow over the loss of the child. Recovery for that sorrow must be had, if at all, under the wrongful death statute.**

Id. at 247-48 (Emphasis added).

Thus, it was defense counsel's position that we were not able to recover for our client's emotional damages resulting from the loss of her unviable fetus, thereby, in defense counsel's mind, significantly diminishing the value of the case.

Not only was I enthusiastic about silencing the bravado of defense counsel, but more importantly, I wanted to help Naomi and her husband recover for their tragic loss. If Ohio law was truly as defense counsel stated, it was clear that an injustice would be done. Naomi and her husband had been struggling to have a child. There was no question that Naomi had lost the baby as a result of the defendant's negligence, and it seemed unjust that defendant should get a windfall, at our client's expense, solely due to the early stage of the baby's development.

I first looked to see whether Ohio law allowed a wrongful death action for the death of a fetus who was not viable. Defense counsel was right in

this aspect of his challenge. Currently under Ohio law, there is no wrongful death claim for the death of a non-viable fetus, non-viability being the inability to sustain life of the child outside the mother's womb. See *Griffiths v. Rose Ctr.*, 5th Dist. No. 2005CA00256, 2006-Ohio-1573, ¶ 39 ("The law in Ohio recognizes the viable child as a person under the wrongful death statute rather than to designate the same status to a fetus incapable of independently surviving a premature birth"); *Werling v. Sandy*, 17 Ohio St.3d 45, syllabus (1985) ("A **viable** fetus which is negligently injured *en ventre sa mere* and subsequently stillborn may be the basis for a wrongful death action pursuant to R.C. 2125.01") (emphasis added).

The next question I looked at was whether emotional distress damages are available when a plaintiff loses a loved one where there is no wrongful death action available, such as where one suffers the loss of someone who is not a family member. Immediate legal research results in the context of deaths of unborn children did not prove fruitful. However, I found that the fact that a wrongful death action is not available does not mean that a plaintiff may not recover for emotional damages for the death of another person where the plaintiff is also injured in the accident. In *Binns v. Fredendall*, 32 Ohio St.3d 244 (1987), the Court held:

Recovery for negligently inflicted emotional and psychiatric injuries accompanied by contemporaneous physical injury may include damages for mental anguish, emotional distress, anxiety, grief or loss of enjoyment of life caused by the death or injury of another, provided the plaintiff is directly involved and contemporaneously injured in the same motor vehicle and accident with the deceased or other injured person.

Id., syllabus ¶ 3.

In *Binns*, the plaintiff was a passenger in a car driven by her live-in boyfriend. The defendant negligently drove his vehicle into the driver side of the plaintiff's vehicle resulting in injury to the plaintiff and a gruesome death for the live-in boyfriend. The plaintiff sought damages including for "mental anguish and emotional distress suffered by the plaintiff as a result of the death of her boyfriend, Donald Binns and as an element thereof her loss of enjoyment of life." *Id.* at 281.

Defendant Fredendall objected to this element of damages, contending that it was only available in a wrongful death action, and since the boyfriend was not the plaintiff's husband, a wrongful death action was unavailable. In rejecting this argument the Court stated:

The fact that mental anguish over the death of a relative is compensable in a wrongful death action does not preclude plaintiff's recovery of damages for such injury where plaintiff also suffers physical injuries in the same accident that caused the death of another. Plaintiff's recovery for mental anguish caused by the death of another, however, must be predicated upon her direct involvement in the accident, not upon the mere fact of the death, which is an aspect of a wrongful death action.

* * *

Accordingly, we hold that recovery for negligently inflicted emotional and psychiatric injuries accompanied by contemporaneous physical injury may include damages for mental anguish, emotional distress, anxiety, grief or loss of enjoyment of life caused by the death or injury of another. We strictly limit such recoveries

to those plaintiffs directly involved and contemporaneously injured in the same motor vehicle and accident with the deceased or other injured person.

Id. at 246-47.

Here, Naomi was physically injured in the accident, and was obviously in the same motor vehicle with her unborn child. As such, the criteria for recovery for her grief caused by the loss of her child under *Binns* is met, notwithstanding the fact that plaintiff may not bring a wrongful death action with respect to the fetus.

Moreover, because Naomi was herself injured in the accident, she may recover her full emotional distress damages without proving the elements of the separate tort of negligent infliction of emotional distress. See *Loudin v. Radiology & Imaging Servs.*, 128 Ohio St.3d 555, 561, 2011-Ohio-1817, ¶ 20 ("Courts have allowed recovery for emotional distress accompanied by the slightest injury. When there is evidence of any injury, no matter how slight, the mental anguish suffered by plaintiff becomes an important element in estimating the damages sustained") (citation omitted); *id.*, syllabus ¶ 2 ("Emotional distress stemming directly from a physical injury is not a basis for an independent cause of action for the negligent infliction of emotional distress").

Despite these encouraging results I was still concerned that defense counsel may object that the rule in *Binns* does not apply because that case, unlike the present, did not involve the death of a non-viable fetus. However, I found that any objection by defense counsel in this regard should be rejected. Ohio law has recognized a mother's cause of action for emotional distress damages, including future damages, associated with the wrongful termination of a pregnancy

which involved a non-viable fetus.

In *Rechenbach v. Haftkowycz*, 100 Ohio App.3d 484 (1995), the plaintiffs, a woman and her husband, brought a medical negligence action against a physician for a miscarriage the physician had caused. The plaintiff mother was diagnosed by the defendant physician as having abnormal cells in her cervix, for which he recommended laser surgery. However, immediately prior to performing the surgery, the physician did not test the plaintiff to ensure she was not pregnant. She was in fact pregnant as of sometime in May 1990, with the surgery being performed by the defendant on June 7, 1990. The laser surgery caused the plaintiff to have a miscarriage of her non-viable fetus.

The jury returned a verdict in favor of the plaintiffs. On appeal, the defendant physician challenged the amount of

damages awarded for future emotional distress associated with the miscarriage. In upholding the jury verdict for plaintiffs' damages, the Court stated:

The injury appellee [i.e., the plaintiff mother] suffered as a result of appellant's negligence, viz., a miscarriage, is an "objective" injury. The fact that pain and suffering are subjective *feelings* makes the injury itself no less objective.

In this case, both appellees testified concerning the pain and suffering they experienced because of the miscarriage. Moreover, they also testified they continued to experience pain and suffering up to the time of trial. Their testimony was sufficient evidence to prove damages occurred as a result of the injury and were continuing. "Since pain and suffering are subjective

feelings, the injured person's testimony is the only direct proof of such damages."

Id. at 493 (citation omitted).

Thus, in *Rechenbach*, the Court allowed the parents of a non-viable fetus to recover damages, including future damages, for emotional distress without any limitation with respect to the plaintiffs' loss arising from the death of the fetus.

Also, in *Strasel v. Seven Hills Ob-Gyn Assocs.*, 170 Ohio App.3d 98, 2007-Ohio-171, the Court allowed a mother to recover for emotional distress where the defendant physician had placed her pre-viable fetus (the mother was 6 or 7 weeks pregnant) in danger by performing a medical procedure on the mother. The physician had misdiagnosed the mother's pregnancy as a blighted ovum and performed a

Editor's Notes

As we finalize this issue of the *CATA News*, we invite you to start thinking of articles to submit for the Winter 2016-2017 issue. If you don't have time to write one yourself, but have a topic in mind, please let us know and we'll see if someone else might take on the assignment. We'd also like to see more of our members represented in the Beyond the Practice section, so please send us your "good deeds" and "community activities" for inclusion in that section. Finally, please feel free to submit your Verdicts and Settlements to us year-round and we'll stockpile them for future issues.

From everyone at the *CATA News*, we hope you enjoy this issue!

Kathleen J. St. John
Editor-in-Chief

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D & C procedure on the mother. After learning that she was in fact pregnant at the time of the procedure, the mother experienced severe emotional distress about the potential harm to the fetus, despite the fact that the child was eventually born healthy.

The Court stated the following in upholding the mother's claim for emotional distress damages despite the birth of a healthy baby:

In this case, Strasel was clearly present when the D & C was performed. It is uncontroverted that her baby was subjected to a real physical peril by the D & C, regardless of whether the peril led to an actual injury. Strasel's emotional distress resulted from the very real risk of injury to a seven-week-old fetus subjected to what was the equivalent of an abortion procedure. The fact that the baby was born without any apparent physical injury did not alter the fact that the D & C had subjected the baby to a very real danger. Strasel clearly appreciated the risk to her baby, and as a result of her recognition of the peril she suffered psychological injuries that were compensable.....

Id., ¶ 22.

In addition, Ohio criminal law recognizes the legal value of a pre-viable fetus. In R.C. § 2903.06(A), it provides that a person may be criminally liable for the unlawful termination of a person's pregnancy by negligent operation of a motor vehicle, as follows:

(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of another or **the unlawful termination of another's pregnancy**, in any of the following ways:

* * *

(a) Negligently;

(Emphasis added).

R.C. § 2903.09(A) includes a pre-viable fetus within the terms of the preceding statute, as follows:

(A) "Unlawful termination of another's pregnancy" means causing the death of an unborn member of the species homo sapiens, who is or was carried in the womb of another, as a result of injuries inflicted **during the period that begins with fertilization and that continues unless and until live birth occurs.**

(Emphasis added). See also *State v. Feller*, 1st Dist. Nos. C-110775, C-110776, 2012-Ohio-6016, ¶ 35 (noting that per R.C. § 2903.09(A), "[t]he General Assembly elected to protect the unborn from the moment of fertilization, not from the moment of viability").

R.C. § 2903.06(A) has passed constitutional scrutiny despite the fact that a mother may legally terminate the life of her own fetus within certain constitutional parameters. See *State v. Alfieri*, 132 Ohio App.3d 69, syllabus (1st Dist. 1998) (noting that, *inter alia*, "a criminal defendant who assaults a pregnant woman [in that case with a motor vehicle], thereby causing the death of the fetus she is carrying, is not similarly situated to a pregnant woman who elects to have her pregnancy terminated by one legally authorized to perform the act").

Therefore, I was very pleased to inform the partner that defense counsel was incorrect in his assertion that Naomi in this case may not recover for the emotional distress related to the loss of her unborn child in this accident. Ohio law clearly establishes the validity for this type of damages in her personal injury claim. ■

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