

**SUPREME COURT
STATE OF FLORIDA**

No. SC22-597
L.T. 4D20-1939

JENNIFER RIPPLE, ETC.
Petitioner,

v.

CBS CORPORATION, ET AL.,
Respondents.

**PETITIONER’S NOTICE OF
SUPPLEMENTAL AUTHORITY**

The petitioner, Jennifer Ripple, etc. (“Petitioner”), pursuant to Florida Rule of Appellate Procedure 9.225, submits as supplemental authority the following opinion, which is attached as EXHIBIT A:

Ellis v. Humana of Fla., Inc., 569 So. 2d 827, 828-29 (Fla. 5th DCA 1990), *review denied*, 581 So. 2d 163 (holding the decedent’s surviving minor child, who was an unborn fetus on the date of the decedent’s death—and thus was not yet alive on “the date of [the decedent’s] injury”—was nevertheless a “survivor” and “minor child” entitled to recover under section 768.21(3) of the Wrongful Death Act, which authorizes the decedent’s “minor children” to

recover damages “from the date of injury”).

Ellis is germane to Petitioner’s position in Section I.C. of the Initial Brief, where Petitioner challenges the Fourth District’s assertion that the provision in section 768.21(2) authorizing a “surviving spouse” to recover damages “from the date of injury” requires the “surviving spouse” to have already been married to the decedent on “the date of injury.”

Dated: August 22, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail on this 22nd day of August, 2023, on all counsel of record, including:

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EXHIBIT A

569 So.2d 827

District Court of Appeal of Florida,
Fifth District.

June B. ELLIS, etc., Appellant,

v.

HUMANA OF FLORIDA, INC., etc., et al., Appellees.

No. 89–2079.

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Nov. 1, 1990.


Synopsis

Wife acting as representative of estate of deceased husband brought wrongful death action on behalf of estate, herself, a daughter and a son born six weeks after husband's death. The Circuit Court, Orange County, B.C. Muszynski, J., entered partial summary judgment disallowing claim of son. Appeal was taken. The District Court of Appeal, Harris, J., held that child born after death of parent was a “minor child” or “survivor” under the Wrongful Death Act.

Reversed and remanded.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (1)

[1] Death  Persons for Whose Benefit Suit May Be Maintained

Child who is born alive following the death of a parent is a “minor child” or “survivor” for purposes of Wrongful Death Act. West's F.S.A. §§ 768.16 et seq., 768.17.

7 Cases that cite this headnote

Attorneys and Law Firms***827** Kimberly Sands, Daytona Beach, for appellant.

Lora A. Dunlap, Tracy Troutman Cheek and Gary H. Rushmer of Fisher, Rushmer, Werrenrath, Keiner, Wack & Dickson, P.A., Orlando, for appellee James L. Bolen, M.D.




***828** J. Charles Ingram of Hannah, Marsee, Beik & Voght, Orlando, for appellee Humana of Florida, Inc.**Opinion**

HARRIS, Judge.


June Ellis, as Personal Representative of the Estate of Harry L. Ellis, Jr., (appellant) sued James L. Bolen, M.D. and Humana of Florida, Inc. seeking damages for the wrongful death of her husband on behalf of the estate, herself, her eighteen year old daughter, Leslie, and her son, Harry Lee Ellis III, born six weeks after his father's death. The trial court entered a partial summary judgment disallowing the claim of Harry Lee Ellis III holding that he was not a “minor child” or “survivor” under the Florida Wrongful Death Act.

The issue simply put is what rights does an unborn child (appellant's terminology) or unborn fetus (appellees' terminology) have under the wrongful death statute when its father is wrongfully killed shortly before its birth? The answer requires a determination of legislative intent.

Appellees urge that had the legislature intended to include protection for this potential heir,¹ it would have specifically included fetus in the definition of “survivor” or “minor child”. They urge that we hold the wrongful death act, since it is in derogation of the common law, to a strict interpretation. However the act requires that it be “liberally construed,” in order to achieve its remedial goal of shifting the survivors' loss to the wrongdoers.²

Appellees cite cases which hold that parents may not sue because of the “wrongful death” of a stillborn fetus.  *Stern v. Miller*, 348 So.2d 303 (Fla.1977);  *Stokes v. Liberty Mutual Insurance Company*, 213 So.2d 695 (Fla.1968). See also  *Henderson v. North*, 545 So.2d 486 (Fla. 1st DCA 1989). It is true that *Stokes* holds that a stillborn fetus is not a “minor child” under the wrongful death act which would permit it to be the *subject* of a wrongful death action. *Stern* agrees, albeit reluctantly, with the *Stokes* holding. But neither case holds that a fetus at the time of the wrongful death of its father but a born, living minor child at the time the action is brought does not come within the intended protection of the act. The purpose of the act after all is to substitute the financial resources of the wrongdoer for the resources of the decedent to meet the financial obligations of the decedent. And while the decedent had no direct obligation of child

support before the birth of the child, this inchoate obligation created at fertilization springs forth into full life upon the birth of the newborn child.

In  *McNamara v. Seibert*, 537 So.2d 1009 (Fla. 5th DCA 1989), *rev'd on other grounds* 566 So.2d 767 (Fla.1990) we held:

[The unborn child] was an insured within the meaning of the policy, and has uninsured/underinsured motorist coverage as a “survivor” for the wrongful death of her father caused by the wrongful acts of the underinsured motorist.

McNamara at 1010.³ The Supreme Court reversed *McNamara* not because the posthumous child had no standing under the Wrongful Death Act (an issue not specifically before the court) but rather because the decedent father was not covered by the insurance policy.

It seems more consistent with the legislative intent to hold that the minor child of the decedent (even if unborn at the time of decedent's death) is a survivor under the act. The rights of such child, inchoate at the time of the wrongful death, become fully vested upon the occurrence of its live birth. This holding seems consistent with the reasoning in *Rahn v. AMP, Inc.*, 447 So.2d 929 (Fla. 3rd DCA 1984) (an action *829 for wrongful death brought by a posthumous child must be brought within two years from the death of the decedent not from the birth of the child) and *Whitefield v. Kainer*, 369 So.2d 684 (Fla. 4th DCA 1979) (a posthumous illegitimate child is not a “survivor” under the wrongful death act unless the father has recognized responsibility for the child's support).

We therefore hold that a posthumous child is a “survivor” of its father (or mother if the child survives the death of the mother) under the Florida Wrongful Death Act.

REVERSED and REMANDED for further proceedings.

PETERSON and GRIFFIN, JJ., concur.

All Citations

569 So.2d 827, 15 Fla. L. Weekly D2691

Footnotes

- 1 Both sides agree that an unborn fetus or child, is a potential heir. Since it is unnecessary to determine w life begins under *Roe v. Wade* analysis in order to resolve the issue before us, we will use this neutral term. See *Roe v. Wade*, 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973)
- 2 § 768.17, Fla.Stat. (1987)
- 3 In *McNamara* this court upheld the trial court's finding (although not set forth in the opinion):
[A] fetus that is unborn at the time of its father's death has a right to recover under Florida's Wrongful Death Act ...