

IN THE SUPREME COURT OF TEXAS

No. 02-1061

FORT WORTH OSTEOPATHIC HOSPITAL, INC., D/B/A/ OSTEOPATHIC MEDICAL
CENTER OF TEXAS, CRAIG SMITH, D.O., AND REID CULTON, D.O.,
PETITIONERS

v.

TARA REESE AND DONNIE REESE, INDIVIDUALLY AND AS LEGAL
REPRESENTATIVES OF THE ESTATE OF CLARENCE CECIL REESE, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued October 8, 2003

JUSTICE O'NEILL, concurring.

I agree with the dissent that neither the 8th nor the 24th Legislature intended to exclude from the wrongful death and survival acts a viable human fetus who dies before birth, and for reasons that JUSTICES KILGARLIN and GONZALEZ, and now JUSTICE SMITH, have expressed, *Witty v. American General Capital Distributors, Inc.*, 727 S.W.2d 503 (Tex. 1987), was wrongly decided. See *Krishnan v. Sepulveda*, 916 S.W.2d 478, 483-90 (Tex. 1995); *Edinburg Hosp. Auth. v. Treviño*, 941 S.W.2d 76, 85-92 (Tex. 1997). I am also sympathetic to the dissent's general frustration with the doctrine of legislative acceptance in certain circumstances. But in this area, the Legislature has failed to act for well over a decade and a half even though the Court has continued to follow *Witty*

and repeatedly invited the Legislature to clarify the statutory meaning if it thought the *Witty* court did not interpret the wrongful-death and survival acts correctly. See *Krishnan*, 916 S.W.2d at 479-80; *Pietila v. Crites*, 851 S.W.2d 185, 187 (Tex. 1993) (per curiam); *Blackman v. Langford*, 795 S.W.2d 742, 743 (Tex. 1990) (per curiam); *Tarrant County Hosp. Dist. v. Lobdell*, 726 S.W.2d 23 (Tex. 1987). The Legislature has now acted and, without wholly disavowing *Witty*, amended the statutory definition of “individual” to include “an unborn child at every stage of gestation from fertilization until birth.” TEX. CIV. PRAC. & REM. CODE § 71.001(4). Under these circumstances, I agree with the Court that we are bound by *Witty* and therefore join the Court’s opinion.

Harriet O’Neill
Justice

OPINION DELIVERED: August 27, 2004.