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

CHIEF JUSTICE PHILLIPS delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE OWEN, JUSTICE O'NEILL, JUSTICE JEFFERSON, JUSTICE WAINWRIGHT and JUSTICE BRISTER joined.

JUSTICE O'NEILL filed a concurring opinion.

JUSTICE SMITH filed a dissenting opinion.

JUSTICE SCHNEIDER did not participate in the decision.

We again address whether parents of a stillborn child can sue for statutory wrongful death and survival damages. This case presents the new issue of whether foreclosing this claim denies such plaintiffs and their unborn fetuses their constitutional right to equal protection of the laws. Because we conclude that the Legislature's decision to exclude such claims is not unconstitutional,

we hold that the court of appeals erred in concluding that the Equal Protection Clause guarantees parents the right to bring a wrongful death or survival claim for a stillborn child. 87 S.W.3d 203, 205.

We also must decide whether the mother in this case raised a fact issue on her own claim for medical malpractice. We hold that the court of appeals correctly reversed the trial court's summary judgment, which prohibited the mother from maintaining her own cause of action for mental anguish. *Id*. We therefore reverse the judgment of the court of appeals in part, affirm in part, and remand to the trial court for further proceedings in accordance with this opinion.

I

Tara Reese went to the Fort Worth Osteopathic Medical Center emergency room in her seventh month of pregnancy, complaining of a racing pulse and dizziness. Doctors determined that she had a high pulse rate and high blood pressure and sent her to the labor and delivery room for further observation. On multiple occasions through the course of the evening, doctors monitored the heart tones of the fetus, which were often difficult to detect. The following morning the doctors confirmed that the fetus would be stillborn.

Tara and her husband, Donnie Reese, brought suit against Fort Worth Osteopathic Hospital, Osteopathic Family Medicine Clinics, Craig Smith, D.O., Roberta Beals, D.O., Reid Culton, D.O., and John Chapman, D.O. (health care providers), for negligence, gross negligence, and vicarious liability, seeking damages under the wrongful death and survival statutes and for personal injuries to Tara Reese. The trial court granted summary judgment in favor of all health care providers. The Reeses appealed all claims except that against Dr. Chapman. The court of appeals affirmed the

summary judgment disposing of Donnie Reese's individual bystander claim, but reversed the remainder of the summary judgment, remanding the case to the trial court. The health care providers petitioned this Court for review, arguing that the court of appeals incorrectly held that the Reeses could assert wrongful death and survival actions and that Tara Reese could assert her own individual claim. Donnie Reese did not appeal the adverse judgment against his individual claim.

II

At common law, the death of a person who was physically injured by a defendant's negligence and died from those injuries had two important consequences with respect to legal recovery. First, the decedent's own tort action was extinguished. Second, third persons who suffered loss by the decedent's death, like children, parents or a spouse, lost their right to recover. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127 at 945 (5th ed. 1984). To ameliorate this harsh result, the Texas Legislature followed the lead of the British Parliament and other states and enacted the wrongful death and survival statutes in 1860 and 1895. *See generally* Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965) (detailing the passage of Lord Campbell's Act in England in 1840 and the creation of wrongful death causes of action by American courts and legislatures after 1838). Our wrongful death statute provides: "A person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfullness, or default." TEX. CIV. PRAC. & REM. CODE § 71.002(b). Our survival statute provides: "A cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person or because of the death of a person liable for the injury."

Id. § 71.021(a).

In 1987, this Court held that these laws did not modify the common law rule against recovery with respect to a stillborn fetus. *Witty v. Am. Gen. Capital Distrib., Inc.*, 727 S.W.2d 503, 506 (Tex. 1987). We reasoned in *Witty* that the Legislature did not intend the words "individual" or "person" to include an unborn fetus. *Id*. at 504. Because of the common-law rule that legal rights were contingent upon live birth, we opined that the Legislature would have expressly created a wrongful death or survival cause of action for an unborn fetus if it intended to do so. *Id*. at 505. In so holding, we expressed no opinion about whether a fetus is a person in either the philosophical or scientific sense. *Id*. at 506.

Since 1987, this Court has repeatedly affirmed its decision in *Witty*. *See Brown v. Shwarts*, 968 S.W.2d 311, 335 (Tex. 1998); *Krishnan v. Sepulveda*, 916 S.W.2d 478, 479-80 (Tex. 1995); *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) (per curiam). In *Brown*, we held that a fetus, later born alive, was a "patient" within the meaning of TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4), and that the statute of limitations for its wrongful death action began to run from the date of its prenatal injuries. The dissent argues that because this recognized "legal injury" to a fetus, it implicitly disaffirmed *Witty*. But the Court in *Brown* explained that its holding was indeed consistent with *Witty*. *Brown* held that a fetus achieves the status of a patient whose injuries are entitled to legal recognition only upon live birth, at which time that status then relates back to the date of injury for limitations purposes. *Brown*, 968 S.W.2d at 335. In *Krishnan*, we emphasized that the Legislature still had not amended the wrongful death

and survival statutes to change our holding in *Witty* and create a wrongful death or survival cause of action for loss of a fetus. *Krishnan*, 916 S.W.2d at 481. Relying on the presumption that legislative inaction is legislative acquiescence, we again declined to recognize a statutory cause of action when the Legislature had not altered the statute. *Id.* at 481. We also declined to recognize a common law right to recover for the loss of companionship stemming from the death of a fetus. *Id*. at 482. None of these cases raised the question whether the law violated the Equal Protection Clause.

In 2003, the Legislature did grant the parents of a stillborn child a cause of action under the Wrongful Death Act. *See* TEX. CIV. PRAC. & REM. CODE § 71.001(4) (defining "individual" under the wrongful death act to include "an unborn child at every stage of gestation from fertilization until birth"). However, the statute expressly does not apply to claims "for the death of an individual who is an unborn child that is brought against . . . a physician or other health care provider licensed in this state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or health care provider." *See* TEX. CIV. PRAC. & REM. CODE § 71.003(c)(4). Additionally, the Legislature expressly stated that the statute operates prospectively only. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 822, § 1.04, 2003 Tex. Gen. Laws 2607, 2608. The parties do not contend that this case involved anything other than a lawful medical procedure, so this case would not be covered even if the new statute were applicable.

The Reeses first urge that we recognize the repeated error of our jurisprudence in this area and overrule *Witty*. Because the Legislature has left the holding of *Witty* in place for all suits against

health care providers arising after September 1, 2003, we decline to overrule *Witty* for those cases remaining in the court system that arose before that date.

Next, the Reeses correctly point out that none of our previous decisions on this issue address the equal protection arguments that were the basis for the court of appeals' decision. They urge us, as a matter of first impression, to hold that the wrongful death and survival statutes are unconstitutional on equal protection grounds.[1]

The United States Constitution prohibits the government from denying persons equal protection of the laws. The Fourteenth Amendment provides that "No State shall . . . deny to any person . . . the equal protection of the laws." U.S. CONST. amend XIV, § 1. The Texas Constitution contains a similar provision: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." TEX. CONST. art. 1, § 3. The parties do not argue any distinction between these two clauses, and we have said that both guarantees "require a similar multi-tiered analysis." *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 451 (Tex. 2000); *see also Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846 (Tex. 1990) ("Texas cases echo federal standards when determining whether a statute violates equal protection."). Two classifications are at issue here. The first is the distinction in the wrongful death statute between parents of a stillborn fetus and parents of a child born alive. The second is the distinction under the survival statute between a fetus that

[1] In *Parvin v. Dean*, a case not appealed to this Court, the court of appeals held that the law violated both the United States and Texas Constitutions. 7 S.W.3d 264, 274 (Tex. App.–Fort Worth 1999, no pet.). The *Parvin* court wrote: "We perceive no rational or compelling state interest that justifies the wrongful death and survival statutes' unequal application to born babies while at the same time excluding viable but unborn babies and the unequal application to their parents." *Id.* at 274. For reasons we explain below, we reject the *Parvin* court's equal protection analysis.

dies in utero and a fetus that is born but dies subsequent to birth. The United States Supreme Court has held that the unborn are not included within the protection of the Fourteenth Amendment, which contains the Equal Protection Clause. That Court held in *Roe v. Wade*, 410 U.S. 113, 158 (1973), "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." While the Supreme Court has acknowledged the state's interest in the life of a fetus before birth, *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992), it has never repudiated its holding in *Roe* that the Equal Protection Clause does not apply to a fetus. The Legislature may therefore extend wrongful death and survival causes of action only to persons that are born live without violating the federal Equal Protection clause. The Reeses do not argue that our state constitution's guarantee of equal protection is broader than or different from the federal constitution in this regard. *See Tex. Dep't of Transp. v. Barber*, 111 S.W.3d 86, 106 (Tex. 2003). In the absence of this showing, we decline on this record to hold that our state constitution provides additional protection to fetuses or requires that we abandon the common-law rule.

A parent's claim for loss of consortium and mental anguish damages for the death of a child is entirely derivative of the child's cause of action against a tortfeasor. *See generally Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex. 1997). If the child has no cause of action, neither do the parents. It is not a violation of the Equal Protection Clause to fail to provide parents with a claim for the wrongful death of a fetus in utero when the Equal Protection Clause does not prohibit a legislative body from withholding a wrongful death cause of action from the fetus. There is a distinction between the harm that a mother suffers from injury to part of her body and the loss of a fetus. *Edinburg Hosp. Auth. v. Treviño*, 941 S.W.2d 76, 79 (Tex. 1997); *Krishnan*, 916 S.W.2d at 481-82.

The former is a direct cause of action that the mother has in her own right, while the latter is a derivative claim.

We therefore hold that the wrongful death and survival statutes do not violate the Equal Protection Clause by prohibiting parents of a stillborn fetus from bringing claims under them.[2]

III

Next, we address the court of appeals' holding that the trial court erred in granting summary judgment for the health care providers, thereby prohibiting Tara Reese's separate cause of action for the damages she suffered as a result of her doctors' alleged negligence. 87 S.W.3d at 206.

The health care providers moved for summary judgment under both Rule 166a(c) and Rule 166a(i). TEX. R. CIV. P. 166a(c), 166a(i). To succeed in a motion for summary judgment under Rule 166a(c), a movant must establish that there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether there is a disputed issue of material fact, every doubt must be resolved in favor of the nonmovant and evidence favorable to the nonmovant must be taken as true. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). Under Rule 166a(i), a movant must establish that "[a]fter adequate time for discovery . . . there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." TEX. R. CIV. P. 166a(i); *see also Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 207 (Tex. 2002). To defeat a Rule 166a(i) summary judgment motion, the nonmovant must

[2] In so holding, we join a number of other jurisdictions around the country that have reached the same conclusion. *See Marie v. McGreevey*, 314 F.3d 136, 141-42 (3d Cir. 2002); *Kandel v. White*, 663 A.2d 1264, 1269 (Md. 1995); *Hernandez v. Garwood*, 390 So.2d 357, 359 (Fla. 1980); *Justus v. Atchison*, 565 P.2d 122, 132 (Cal. 1977).

produce summary judgment evidence raising a genuine issue of material fact. TEX. R. CIV. P. 166a(i); *Ford Motor Co. v. Ridgway*, ___ S.W.3d ___, ___(2004). A genuine issue of material fact exists if the nonmovant produces more than a scintilla of evidence establishing the existence of the challenged element. *Ford Motor Co.*, ___ S.W.3d at ___; *Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex. 2000).

The health care providers argued in their summary judgment motions that as a matter of law a bystander cannot recover mental anguish damages in a medical malpractice case. Additionally, the health care providers claimed that Tara Reese failed to present any evidence that she sustained legally recoverable damages resulting from the health care providers' alleged negligence. The trial court granted both motions. The court of appeals reversed the trial court, holding that Reese presented more than a scintilla of evidence to support her claims against the health care providers arising from their negligent care and treatment. We agree.

Reese produced an affidavit from another obstetrician stating that her health care providers failed to monitor her blood pressure or evaluate her tachycardia, and that such failure fell below the legal standard of care. The obstetrician's affidavit is some evidence that Reese's doctors breached their legal duty to provide competent medical care to her. *See Krishnan v. Sepulveda*, 916 S.W.2d 478, 480 (Tex. 1995).

In *Krishnan*, this Court held that mental anguish damages are recoverable when a doctor's medical negligence causes injury, which includes the loss of a fetus. 916 S.W.2d at 480-82. Although the hospital argues that there is no evidence of any physical injury to Tara Reese "that would not have otherwise occurred," we recognized in *Krishnan* that recovery may be had in this

situation "even absent proof of physical injury" other than the loss of the unborn child. *Id*. at 482. The elements of a mother's claim include: (1) a breach of the "legal duty to provide competent medical care to [the mother,]" (2) that "proximately caus[es] . . . the loss of her fetus[,]" (3) "coupled with the mental anguish resulting from the loss of an unborn child." *Id*. We stated in *Krishnan*, however, that not all mental anguish resulting from the loss of an unborn child is recoverable. *Id.* Specifically, we held that parents may not recover "damages for loss of society, companionship, and affection[.]" *Id*.

In *Edinburg Hospital Authority v. Treviño*, 941 S.W.2d 76, 79 (Tex. 1997), we expanded our holding in *Krishnan*. As in this case, the mother in *Edinburg Hospital Authority* brought a claim against her doctor for mental anguish resulting from negligent treatment that allegedly caused her child to be stillborn. *Id*. at 78. To prove her mental anguish damages, she presented

> evidence that she had made preparations in expectation of the arrival of her baby: she had set aside a room in her home for the baby and purchased furniture for the room. She also testified that the loss of the fetus "still hurts [her] like it was yesterday," that she carries a clipping of the funeral service with her, and that her marriage deteriorated after the loss of the fetus.

Id. at 79. We held that the mother's evidence related to her grief over the loss of the fetus as a separate individual, but did not relate to damages suffered as a result of the mother's own injury. *Id*. Because *Krishnan* was decided after the trial in *Edinburg Hospital Authority*, we remanded the case to the trial court in the interest of justice to allow the mother to present evidence of "mental anguish damages suffered because of loss of the fetus resulting from an injury to the mother." *Id*.

The hospital suggests that Tara Reese only provided evidence of her grief from the loss of her unborn child. We disagree. Certainly, there is evidence in the record that Tara Reese grieved

over this loss. While such grief may be non-compensable under our law, it is nonetheless an expected, natural consequence of the loss of an unborn child, and it is not surprising that Tara Reese's affidavit would reflect such grief. We believe, however, that the affidavit also raises a fact question as to mental anguish damages separate and apart from the "loss of society, companionship, and affection." Reese described a "long and painful delivery" that was made even more psychologically traumatic because she had to experience the delivery "knowing [her] baby was dead."

We conclude that this evidence of mental anguish suffered during the course of Reese's medical treatment is sufficient to raise a fact question regarding compensable mental anguish damages from her own injury. *See Krishnan*, 916 S.W.2d at 482. Consequently, we affirm the court of appeals' holding that Reese produced sufficient evidence raising material fact issues as to whether Tara Reese suffered mental anguish damages for her own injury sufficient to defeat the summary judgment motion.

* * *

For these reasons, we reverse the court of appeals' judgment in part and affirm in part. We render judgment that the Reeses take nothing on their wrongful death and survival claims, and we remand Tara Reese's individual medical negligence claim to the trial court for further proceedings in accordance with this opinion.

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Thomas R. Phillips
Chief Justice

Opinion delivered: August 27, 2004