

FAS/GMW/rms

29-208-4-119

IN THE SUPREME COURT OF ILLINOIS

MICHELLE WILLIAMS, Individually and)
as Special Administrator of the Estate of)
BABY DOE, deceased,)

Plaintiff-Respondent,)

v.)

JOHN C. MANCHESTER,)

Defendant-Petitioner.)

Petition for Leave to Appeal
from the First District Appellate Court

Case No. 1-05-2126

There heard on appeal from the Circuit Court
of Cook County, Illinois

Circuit Court No. 03 L 000863

Honorable Jennifer Duncan-Brice,
Judge Presiding

AMENDED PETITION FOR LEAVE TO APPEAL
OF DEFENDANT-PETITIONER JOHN C. MANCHESTER

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ORAL ARGUMENT REQUESTED

PRAYER FOR LEAVE TO APPEAL

Defendant-Petitioner JOHN C. MANCHESTER, by his attorneys CREMER, KOPON, SHAUGHNESSY & SPINA, LLC, pursuant to Supreme Court Rule 315(a), petitions the Supreme Court to accept this appeal, from the 2-1 ruling of the First District appellate court, on a claim for the death of a fetus brought under the Wrongful Death Act, 740 ILCS 180/1, where the death of the fetus resulted from a voluntary elective abortion.

Petitioner asks that this Court reverse the decision of the majority, which itself reversed the entry of summary judgment for MANCHESTER by the circuit court.

DATE UPON WHICH THE JUDGMENT WAS ENTERED

The 2-1 majority opinion was issued March 16, 2007. A copy of that decision is found in the Appendix. No petition for rehearing was filed by MANCHESTER.

STATEMENT OF POINTS FOR REVERSAL

1. The majority's 2-1 decision creates a conflict between appellate districts on the fundamental legal issue of whether the voluntary and elective decision to abort a pregnancy through abortion is a superseding intervening act which severs any proximate cause between the alleged negligence of the alleged tortfeasor and the death of the fetus.
2. The majority's ruling is contrary to the legislative intent expressed in the plain language of the Wrongful Death Act, as it impermissibly expands the reach of that Act to permit a cause of action for the death of a fetus through a voluntary therapeutic abortion, where the fetus sustained no injury from the alleged negligence of the defendant prior to the abortion.
3. The majority's ruling raises significant public policy concerns in tort law on the issue of proximate cause.

STATEMENT OF FACTS

On October 15, 2002, MICHELLE WILLIAMS was a passenger in a motor vehicle traveling eastbound on Montrose Avenue in Chicago. (C. 3). MANCHESTER was driving westbound on Montrose, and made a left turn onto Western Avenue. A collision occurred between the two vehicles. (C. 3). At that time, WILLIAMS was approximately three months pregnant with BABY DOE, an unplanned pregnancy. (C. 254-55; 262; 272). The father was WILLIAMS' boyfriend, Humberto. (C. 253).

An ambulance took WILLIAMS to Illinois Masonic Hospital. (C. 254; 267-68). The doctors told her the fetus was not injured. (C. 269). WILLIAMS had a broken pelvis. Doctors told her she would be bedridden if she continued the pregnancy. (C. 254).

The discussion regarding whether to terminate the pregnancy involved WILLIAMS, Humberto, and certain doctors. (C. 254). Humberto let WILLIAMS make the decision whether to terminate the pregnancy. (C. 255). WILLIAMS decided to abort the fetus and undergo surgery to repair the pelvis. (C. 254; C. 332-33). WILLIAMS testified at her deposition the doctors "convinced" her that terminating the pregnancy was the better option. (C. 253; 273). The doctors told her that a delayed surgery would keep her bedridden, result in an inability to walk properly, along with a possibility that her pelvis would have to be broken again. (C. 254; 271). The effects of radiation, if any, to which the fetus had been exposed up to that point was not stated to factor into her decision to abort. Instead, she was concerned with repairing her hip. (C. 254; 271). In noting this testimony, MANCHESTER does to waive any evidentiary issues as to the hearsay nature of this testimony with respect to what the doctors told WILLIAMS.

On October 17-18, 2002, Dr. James Keller, medical director of maternal-fetal

medicine at the hospital, consulted with WILLIAMS. (C. 295, 301-03). He was board-certified in obstetrics and gynecology and in maternal-fetal medicine (also known as high-risk obstetrics). (C. 293). He was the interim chair of the obstetrics and gynecology department, and medical director of maternal-fetal medicine. (C. 295). Dr. Keller discussed the risks of undergoing a dilation and curettage (D&C) procedure. (C. 302). He assessed the choices and management of the pregnancy and their impact on WILLIAMS and the fetus. (C. 299). At that time, the fetus was alive, and the pregnancy was viable and could have gone to term. (C. 309).

Dr. Keller's goal was to provide WILLIAMS as much information as possible, and assist the orthopedic surgeons to understand the relevant issues so they could make a decision on the best course of action. (C. 307). He did not know the level of radiation exposure prior to consultation, and could not conclude a fetus would have problems as a result of such exposure. (C. 310-12). He did not recall any case where a fetus was exposed to radiation and problems resulted. (C. 312-13). The effect of exposure on any individual fetus could not be determined. (C. 311-12). He could not say that at birth the fetus would have problems from the accident or radiation from the x-ray WILLIAMS had. (C. 314). He had no opinion as to an increased risk to the fetus from the radiation exposure. (C. 315). Although continuing with the pregnancy might lead to additional radiation exposure, he could not quantify the chances the fetus would have suffered damage as a result. (C. 350). He could not quantify the risk to the fetus if WILLIAMS underwent immediate surgery. The orthopedic surgeons did not quantify the increased risk of hip problems if WILLIAMS waited to the 2d trimester for surgery. (C. 327).

The medical notes of Dr. David Beigler, WILLIAMS' treating orthopedic

surgeon, state non-operative care was recommended if the baby was desired; if the baby was not desired, then “therapeutic abortion” was suggested so that pelvic surgery could proceed immediately. (C. 332-33). Dr. Keller believed that non-operative care was an orthopedic surgical decision. (C. 333). Continuing the pregnancy increased the risk to WILLIAMS for embolic phenomenon, thrombosis, embolism, and blood clots. (C. 310).

A good outcome regarding WILLIAMS’ pelvis could not be guaranteed by Dr. Keller. (C. 324-25). WILLIAMS had three options: (1) terminate the pregnancy and undergo immediate hip surgery; (2) delay surgery to the second trimester, decreasing the risk to the fetus; or (3) undergo immediate surgery without terminating the pregnancy, thereby putting the fetus at risk of loss or of difficult-to-quantify long-term problems. (C. 325). Dr. Keller did not advise WILLIAMS which option to choose. (C. 307). WILLIAMS chose to proceed with the abortion and to immediately repair her hip. (C. 334).

ARGUMENT

1. **Applicable Rule 315 Standards for Appeal**

MANCHESTER urges this Court to accept this case for multiple reasons. First, the appellate decision fundamentally conflicts with a prior decision of another appellate district, *Light v. Proctor Community Hospital*, 182 Ill.App.3d 563, 538 N.E.2d 828 (3d Dist. 1989). Only the state of Georgia has directly addressed the issue of recovery for the death of an unborn child resulting from a voluntary “therapeutic abortion” which occurred after a tortfeasor’s initial negligence.

Additionally, as Justice Robert Cahill’s dissenting opinion indicates, the majority’s opinion expands the reach of the Illinois Wrongful Death Act beyond the

legislature's intent, writing out of that Act the need for an injury to the decedent other than death itself from the defendant's negligence, which would have given rise to a cause of action had death not ensued. The majority's reasoning for such a significant expansion of current Illinois law is grounded in the decisions of foreign jurisdictions and secondary sources. The majority decision has infringed upon the domain of the Illinois legislature.

This case also raises significant public policy implications on a unique issue. Also, the public interest in the subject matter is great. See *Chicago Sun Times* and the *Chicago Daily Law Bulletin* articles on this case, found in the Appendix. The majority's decision also fails to properly analyze and apply the law of proximate cause, and thus deviates from settled Illinois law on this important tort theory.

Finally, we note that four separate judges have analyzed this case (one at the circuit court level, three at the appellate court level). They are split 2-2 as to the outcome. This fact alone calls out for this Court to accept and decide the issue with finality.

2. Standard of Review

The circuit court granted summary judgment to MANCHESTER on the wrongful death claim. Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Appeals from rulings on summary judgment motions are reviewed *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill.2d 154, 862 N.E.2d 985, 991 (2007).

3. The Split Among Districts and Lack of Guidance from Foreign Jurisdictions

This case arises under the Illinois Wrongful Death Act for the death of an unborn fetus, resulting from WILLIAMS' voluntary election to abort her pregnancy. 740 ILCS 180/1 (2002). There is no evidence that the fetus sustained any injuries in the accident,

or by any treatment WILLIAMS obtained prior to the abortion. Therefore, the issue is whether a statutory cause of action can be sustained when the death of the fetus was the result of an elective abortion performed with the mother's consent. Before this case, Illinois law and reasoned legal principles have not allowed such a claim to proceed.

Light is the only Illinois case addressing the issue, and the majority's decision conflicts with that holding. In *Light*, while at the defendant hospital, the plaintiff underwent a thyroid scan, during which or subsequent thereto she learned she was pregnant. At the recommendation of the defendant radiologist, she terminated her pregnancy due to possible complications to the fetus from the scan. The plaintiff filed a wrongful death action on behalf of her unborn fetus, alleging medical negligence in failing to determine she was pregnant and warn that she should not undergo the scan if pregnant. She alleged that this negligence proximately caused the death of the fetus.

The trial court dismissed the claim. On appeal, the plaintiff argued that her decision to undergo an abortion was a foreseeable result of the defendants' initial negligent conduct of failing to determine if she was pregnant prior to administering the scan. The court determined that the fetus was not aborted due to any negligence in performing the scan. Rather, despite the substandard medical care received during that procedure, the fetus was terminated as a result of the plaintiff's voluntary, consensual abortion. At most, the medical negligence only increased the risk to the well being of the fetus. Accordingly, the court rejected the plaintiff's claim.

The majority in our case declined to apply *Light*, erroneously concluding that it was decided solely under the language of a portion of Section 2.2 of the Wrongful Death Act. 740 ILCS §180/2.2. Such a reading of *Light* is much too narrow, as the outcome in

that case necessarily hinged upon the same proximate cause issues which are presented here. Notably, in order to determine whether Section 2.2 barred the plaintiff's claims, the *Light* court, as a threshold matter, had to determine what "caused" the death of the fetus. Accordingly, the court addressed the plaintiff's contention that the defendants proximately caused the death of her fetus. The *Light* court concluded that the only abortion proximately caused the death, despite the defendants' underlying negligence.

The legal analysis of *Light* applied here shows, as a matter of law, that any negligence by MANCHESTER was not the proximate cause of the death of the fetus. The record is clear that the fetus was not injured in the car accident. Rather, the death of the fetus resulted entirely from WILLIAMS' own election to voluntarily terminate the pregnancy, in the face of other options under which the fetus could have been carried to term. The majority's decision has thus created a split among the districts over the issue of whether a mother's voluntary election to undergo a therapeutic abortion is the superseding cause of the death of a fetus, despite prior negligence of a tortfeasor.

Only Georgia courts have addressed this issue in depth. All foreign cases cited by the majority involving the death of a fetus (slip op. at pages 28-35) are inapposite, as they involve either a different cause of action – one for mother's own damages resulting from the death of the fetus; or an entirely different issue – whether the fetus falls within the purview of the state's statute. *McGeehan v. Parke-Davis*, 573 So.2d 376 (Fla. Dist. Ct. App. 1991); *In re Alice D.*, 113 Misc. 2d 940, 450 N.Y.S.2d 350 (Civ. Ct. 1982); *Rottman v. Krabloonik, Inc.*, 834 F. Supp. 1269 (D. Colo. 1993); *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988); *Farley v. Sartin*, 195 W. Va. 671, 466 S.E.2d 522 (1995); *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901 (1969); *Coveleski v. Bubnis*, 535

Pa. 166, 634 A.2d 608 (1993). Those other foreign cases therefore provide no guidance to assist the decision in this case. Yet they were heavily relied upon by the majority.

In *Roseberry v. Brooks*, 218 Ga.App. 202, 461 S.E.2d 262 (Ct. App. 1995), the court's rationale was similar to *Light*. A mother diagnosed with liver cancer discovered during an ultrasound treatment that she was pregnant, and after being told by her physician that the fetus was "doomed" as a result of radiation exposure required to treat the cancer, voluntarily underwent an abortion. Shortly thereafter, the mother died, and her husband brought a wrongful death action against the defendants relating to the fetus.

Uncontradicted evidence showed that the mother elected an abortion in part because she wanted to proceed with experimental chemotherapy to combat her cancer, which she would be unable to undergo while pregnant. Consequently, the court found the voluntary abortion to be a superseding act that became the proximate cause of the fetus' death, notwithstanding the defendants' alleged negligence.

In an earlier case, *Shirley v. Bacon*, 154 Ga.App. 203, 267 S.E.2d 809 (Ct. App. 1980), the Court of Appeals of Georgia reached a decision upon which the majority in this case relied heavily. In that case, the plaintiff was a passenger in an automobile that was involved in a collision. As a result of the collision, the plaintiff, who was between two and three months pregnant, was injured. She sustained injuries and had numerous pelvic x-rays taken of those injuries. Approximately one month after the collision, the plaintiff underwent a therapeutic abortion. The plaintiff sued for the wrongful death of her fetus. Denying summary judgment in favor of the defendants, the court concluded that "the fact that the 'homicide' in question occurred at the time of the therapeutic abortion does not preclude appellant from maintaining this action if the trier [*sic*] of fact

concludes that said abortion was necessitated because of the injuries sustained as a result of the negligence of [the defendants].” *Shirley*, 154 Ga.App. at 204.

As these cases from Illinois and Georgia show, there is no clear consensus whether a voluntary therapeutic abortion is a superseding act that severs any proximate cause between the death of a fetus and the initial negligence of another tortfeasor. For this reason, this Court should accept this appeal. It can issue a clear statement of the law in Illinois to guide all Illinois courts when faced with this issue in the future.

4. Infringement upon the Legislature’s Domain

As Justice Cahill’s dissent indicates, the majority’s opinion impermissibly expands the reach of the Wrongful Death Act, writing out of that Act the need for an injury, other than death, to the decedent (here, the fetus) that would give rise to a direct cause of action by the decedent had death not ensued. Doing so infringes on the domain of the Illinois legislature to make law. Statutes like the Wrongful Death Act, which are in derogation of common law, must be strictly construed. The meaning of the statute cannot be extended beyond that which the statute’s language requires. *Miller v. Kramarczyk*, 306 Ill.App.3d 731, 732, 714 N.E.2d 613 (2d Dist. 1999); *Cherney v. Soldinger*, 299 Ill.App.3d 1066, 1072, 702 N.E.2d 231, 235 (1998).

The Wrongful Death Act states:

“Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not

ensued, shall be liable to an action for damages, notwithstanding the death of the person injured * * *." (Emphasis added). 740 ILCS 180/1.

The statutory language clearly allows an action only if the decedent was injured by the defendant's negligence, and would have had a direct cause of action against that tortfeasor had death not ensued. *Kessinger v. Grefco, Inc.*, 251 Ill.App.3d 980, 983-88, 623 N.E.2d 946 (1993).

In *Varelis v. Northwestern Memorial Hospital*, 167 Ill.2d 449, 657 N.E.2d 997 (1995), this Court examined the breadth of the Act. In that case, the decedent while alive had pursued and obtained a judgment for personal injury damages from the same defendants. The verdict was paid and a release given after the plaintiff died. His estate then filed a wrongful death claim arising from the same operative facts. Analyzing the nature of a wrongful death claim, this Court stated:

"In this sense an action under the Wrongful Death Act may be said to be derivative of the decedent's rights, for the ability to bring the wrongful death action 'depends upon the condition that the deceased, at the time of his death, had he continued to live, would have had a right of action against the same person or persons for the injuries sustained.' " *Varelis*, 167 Ill.2d at 454-55.

This Court cited *Mooney v. City of Chicago*, 239 Ill. 414, 83 N.E. 194 (1909). See also *Wyness v. Armstrong World Industries, Inc.*, 131 Ill.2d 403, 546 N.E.2d 568 (1989). This Court also limited the scope of the ruling in *Murphy v. Martin Oil Co.*, 56 Ill.2d 423, 308 N.E.2d 583 (1974) from the expansive reading that some had given it.

In our case, the majority's analysis relies on the premise that the "death" of the

fetus is the requisite "injury" which supports the wrongful death action. But this cannot be so. There must be an initial injury to the decedent caused by the defendant's negligence which would allow a cause of action "if death had not ensued", and this cause of action remains after the injured person's death for the pecuniary damages resulting from the death (contrary to what would occur under common law, where death extinguished the personal injury claim).

In its analysis, the majority focuses so intensely upon the reasons for the decision of WILLIAMS to undergo the abortion and on her own injuries (which have no relevance to the wrongful death claim), that it disregards the complete absence of evidence for the requisite predicate injury to the fetus before its existence was terminated through the abortion. Hence, the majority improperly expands the limited scope of a statutory cause of action for wrongful death which the legislature created.

It is undisputed that the fetus did not sustain injury in the accident, as is the absence of admissible evidence that the fetus suffered injuries from WILLIAMS' care prior to the abortion. Only speculation exists in the record on the latter point, not admissible facts. Thus, the only "injury" to the fetus upon which the appellate court could rely was its death. The fetus had no cause of action against MANCHESTER which it could have pursued had the pregnancy not been terminated. The abortion cannot support both the predicate initial injury and the subsequent resulting death. Although death is a necessary element for a wrongful death claim, it alone is not sufficient to sustain such a claim if there was no initial injury to the decedent caused by the defendant's negligence.

The majority focused entirely on the injuries of WILLIAMS and the circumstances surrounding her care. The court disregarded the undisputed fact that the

pregnancy was viable and the fetus could have been carried to term, notwithstanding the accident allegedly caused by MANCHESTER's negligence. Potential risks that the fetus might sustain some later injury from the treatment WILLIAMS would have received were highly speculative and unspecified, and cannot amount to the predicate "injuries," as required by the Wrongful Death Act.

Under the majority's ruling, Illinois now permits a cause of action to be prosecuted to a jury for the death of a fetus under the Wrongful Death Act, where the fetus sustains no injury from the alleged negligence of the defendant, and instead death ensues solely from a voluntary therapeutic abortion, without correlation to the condition of the fetus prior to the abortion. This improperly expands by judicial decree the scope of the Wrongful Death Act beyond the intention of the Illinois legislature, which is a result that must be reserved for the legislature. Because the majority's decision infringes on the legislature's authority, this Court should accept this appeal.

5. The Law of Proximate Cause and Public Policy Concerns

The majority agrees the issue of proximate cause is a public policy question—"how far should a defendant's legal responsibility extend for conduct that did, in fact, cause harm"? (Slip op. at 19); see *Young v. Bryco Arms*, 213 Ill. 2d 433, 446, 821 N.E.2d 1078, 1086 (2004). This Court should accept this appeal because the majority decision improperly transforms the concept of proximate (or "legal") cause into the much more broad concept of "cause in fact". Indeed, the majority decision effectively abolishes proximate cause as the standard for liability and substitutes cause in fact as the standard.

No dispute exists that proximate cause consists of both "cause in fact" and "legal cause." *Young*, 213 Ill.2d at 446. "Cause in fact" is determined by analyzing whether the

plaintiff's injury would have occurred but for the defendant's conduct. *Id.* "Legal cause" involves an assessment of foreseeability; that is, whether the injury is the type that a reasonable person would see as a likely result of his conduct. *Id.* at 446-47.

Although more than one cause of an injury might exist, a tortfeasor may cease to be the proximate cause of the injury if an intervening act supersedes the tortfeasor's negligence, which was not a natural and probable foreseeable consequence of that negligence. *Jefferson v. City of Chicago*, 269 Ill.App.3d 672, 676, 646 N.E.2d 1305, 1309 (1995); *Abrams v. City of Chicago*, 211 Ill.2d 251, 259, 811 N.E.2d 670, 675 (2004); *Bentley v. Saunemin Township*, 83 Ill.2d 10, 15, 413 N.E.2d 1242, 1245 (1980); *Felty v. New Berlin Transit, Inc.*, 71 Ill.2d 126, 131, 374 N.E.2d 203, 205 (1978).

Here, the proper analysis is whether MANCHESTER would reasonably foresee that WILLIAMS would abort the pregnancy of an uninjured fetus as a result of his alleged negligent operation of his car, resulting in an accident. The circuit court said "no" to this question as a matter of law, as did the dissent. With its discussion beginning on page 22 of the slip opinion, the majority has clearly reduced the proximate cause analysis to one of cause in fact, despite what the court says it is doing. The court expounds for pages, citing hornbook law and case law (much of it from foreign jurisdictions), reducing the element of foreseeability to pure sequential causation (the act starting the rock rolling down the hill). The phrase the majority uses often is "natural consequence". But as applied by the court, that term clearly means "cause in fact". That is not proximate cause.

Consider the following statement by the majority:

There is further evidence that these considerations [*the effects of WILLIAMS' own long-term health if she did not terminate the pregnancy*]

only came about as a result of the alleged negligence of Manchester in striking the car in which Williams rode. Thus, Williams' decision to abort appears 'closely and reasonably associated with the immediate consequences of the defendant's act, and * * * a normal part of its aftermath' (cite omitted)." (Emphasis added). Slip op. at 35.

There can be no doubt that what the majority was discussing here was cause in fact. This is not the proper formulation of legal cause required for a tort case to proceed to disposition by a jury.

The majority viewed the question of foreseeability as whether a defendant's negligence causing injury to a pregnant woman (but not the fetus), would make foreseeable her decision to undergo an abortion to facilitate her own medical treatment. Incorrectly focusing on WILLIAMS' own health allowed the court to forego the required inquiry into whether the death of the fetus was a reasonably foreseeable outcome of an accident in which the fetus sustained no injury, and was capable of being carried to term. As the court stated:

"* * * we cannot agree that, as a matter of law, it would be unforeseeable that a pregnant woman, injured through a person's negligence *would agree to endure the medical consequences to herself, or the fetus for that matter, regardless of their severity, simply for the sake of maintaining the pregnancy.* (Emphasis added). Slip op. at 35-6.

A proper inquiry on whether the voluntary termination of the fetus was foreseeable, rather than on WILLIAMS' medical treatment, would have been answered negatively as the circuit court did, thereby defeating the element of proximate cause.

The fetus did not sustain injury in the car accident; nor suffer any identifiable injuries as a result of the care WILLIAMS received prior to the abortion. Consequently, MANCHESTER's conduct was not a proximate cause of the death of the fetus.

The majority also failed to recognize that MANCHESTER's alleged negligence did nothing more than furnish a condition from which WILLIAMS made her decision. This Court noted in *Abrams* that in cases where the claimed injury did not result from the defendant's negligence directly, but rather from a subsequent, independent act, the test is whether the first wrongdoer reasonably might have anticipated the intervening act as a natural and probable result of the first party's own negligence. *Abrams* at 259. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition results in an injury by the subsequent, independent act of another, the creation of the condition is not the proximate cause of the injury. The proper inquiry is whether the intervening cause was of a type that a reasonable person, including the defendant, would see as a likely result of his conduct. *Id.*

The "injury" here is the death of the fetus through a voluntary abortion. WILLIAMS' independent action in terminating the pregnancy broke any chain of causation relating to MANCHESTER's operation of his vehicle, thereby defeating any possibility of proximate cause. The majority simply ignored this reasoning.

Effectively recasting MANCHESTER's causation argument to something never argued, the majority says MANCHESTER invoked the rule of avoidable consequences. (Slip op. at 40-46). This is nothing more than an effort to justify a rationale which cannot be sustained under the law or the fact of this case. We have always argued the absence of legal cause, not the mitigating defense of avoidable consequences.

The majority accuses MANCHESTER of attempting to second guess WILLIAMS' decision to have an abortion. (Slip op. at 43-44). We do nothing of the sort. As our brief to the appellate court stated and as the majority acknowledged, we raise no moral issues in this case. But we do raise an important legal issue of legal causation, and we are certainly entitled to challenge whether WILLIAMS' decision to voluntarily abort her pregnancy breaks any legal causal link between MANCHESTER's alleged negligence and the death of the fetus.

There are other public policy issues lurking in the majority's reasoning. As noted by the dissenting opinion in *Lynch v. Bay Ridge Obstetrical & Gynecological Associates*, 72 N.Y.2d 632, 638-39, 532 N.E.2d 1239 (1988), there must be a concern over the treatment afforded by tort law to the decision to carry a fetus to term, as compared to how tort law treats a decision to voluntarily abort a pregnancy. If WILLIAMS had decided not to terminate her pregnancy and instead carried the fetus to term, she might have been rewarded with a healthy child. But there would have been no tort recovery. Although the decision to terminate or to continue a pregnancy is a matter of private choice, the appellate court's decision has the effect of encouraging the choice to abort, as it creates an opportunity to recover for the death of the fetus. This recovery cannot occur if a mother carries the fetus to term. Does not the majority decision embroil the court in the type of value judgment and line-drawing that courts should avoid?

Next, in assessing the decisions of other states, the majority elected to apply *Shirley v. Bacon*, 154 Ga.App. 203, 267 S.E.2d 809 (Ct. App. 1980), rather than the later decision of the Georgia courts in *Roseberry v. Brooks*, 218 Ga.App. 202, 461 S.E.2d 262 (Ct. App. 1995). *Shirley* is inapposite to our case. Despite its numerous factual

similarities, one critical fact distinguishes that it: the abortion was necessary there. There is no indication that the mother had any other choice, unlike WILLIAMS in this case.

The Georgia court was aware of the *Shirley* decision when, 15 years later, it issued *Roseberry*, which held that where a plaintiff undergoes a lawful abortion in order to proceed with medical treatment benefiting that plaintiff, the abortion is an intervening act that supersedes any negligence of the defendant and becomes the proximate cause of death. Yet, the appellate court in our case rejected *Roseberry* as being too far removed factually to be of any value. Despite the fact that, unlike the fetus in this case, the fetus in *Roseberry* was “doomed,” the appellate court refused to accept the reasoning in *Roseberry* that where a plaintiff undergoes a voluntary therapeutic abortion for the benefit of her own treatment, she cannot recover for the wrongful death of the fetus.

The majority pointed to a later holding in *Breyne v. Potter*, 258 Ga.App. 728, 574 S.E. 916 (Ct. App. 2002), to demonstrate that the Georgia courts have not adhered to the *Roseberry* holding. Reliance on *Breyne* is misplaced. While *Breyne* states that “*Roseberry* does not stand for the proposition that a patient’s decision to terminate a pregnancy breaks the chain of proximate cause following a doctor’s erroneous diagnosis on which the patient relied in making that decision,” it does so within the context of a medical malpractice claim, which the court saw as wholly distinct from a wrongful death claim. Within the context of that case, where the plaintiff aborted the fetus based on her physician’s negligently erroneous advice that the fetus had Down’s syndrome, the *Breyne* court understandably ruled that the negligent advice would be actionable despite the elective abortion. That situation is entirely different than *Roseberry*, as well as our case.

Importantly, *Breyne* acknowledged that *Roseberry* “held that the termination

performed for the purpose of obtaining experimental treatment was an intervening act that superseded any medical negligence by the defendant doctor that also caused the mother to terminate the pregnancy." That principle should guide the decision in this case, as WILLIAMS chose to abort the fetus in order to pursue medical treatment for her own injuries, and not because the fetus had any problems. Notably, like the plaintiff in *Roseberry*, WILLIAMS also had no guarantee that her own treatment would succeed.

WILLIAMS was well aware of her pregnancy, she informed emergency personnel of her pregnancy, and as a result was not given pain medication that would harm the fetus. Furthermore, there is no indication that WILLIAMS did not consent to being x-rayed upon her admission to the emergency room. Dr. Keller was unable to opine that the risks of Plaintiff's medical care resulting from the accident while the pregnancy proceeded would have affected the fetus. No other medical evidence supporting such a theory exists. Dr. Keller testified that, from a medical point of view, WILLIAMS could have gone to term with the pregnancy. Further, Dr. Keller testified that WILLIAMS was given two options for treatment other than termination, which would have allowed her to continue her pregnancy and undergo hip surgery at a later date.

The majority failed to give any weight to the *Light* case, which came to the opposite conclusion from our court in the context of the Wrongful Death Act. Even though the plaintiff in *Light* was unaware of her pregnancy until the fetus had been exposed to radiation, the court held that the death of the fetus was terminated as the result of the plaintiff's voluntary consent to a legal abortion. *Light*, 182 Ill.App.3d at 566. Moreover, if a negligent defendant is not the proximate cause of the death via abortion of a fetus that was unknown to exist at the time it was exposed to diagnostic radiation

consented to by the plaintiff, then logically a negligent defendant cannot be the proximate cause of the death via abortion of a fetus that was known to exist.

In this case, the death of the fetus was, as a matter of law, legally caused solely as a result of WILLIAMS' voluntary, consensual, legal abortion. That MANCHESTER's alleged negligence in operating his car was a cause in fact perhaps cannot be extensively debated. But as a matter of law, the majority erred in concluding that WILLIAMS might be able to establish proximate cause between MANCHESTER's alleged negligence and the death of the fetus. WILLIAMS decision to abort was simply an intervening act that as a matter of law superseded any negligence on the part of MANCHESTER.

The majority makes an issue out of the reasonableness of WILLIAMS' decision to abort. That is not relevant to the proximate cause inquiry. As this Court has stated, the test focuses upon what the defendant, here MANCHESTER, reasonably expected. It is "whether the first wrongdoer might have reasonably anticipated the intervening cause as a natural and probable result of the first party's own negligence." *Merlo v. Public Service Co.*, 381 Ill. 300, 316-17, 45 N.E.2d 665, 675 (1942).

MANCHESTER could not have reasonably anticipated that a mother who claimed to have wanted her baby, and went so far as to avoid medications that were harmful to the fetus, would voluntarily choose to abort the fetus for her own medical benefit, where there was no evidence of injury to the fetus from the accident.

The majority also concluded that it was foreseeable that WILLIAMS would abort the fetus as a result of the effects of the radiation to which it was exposed. This conclusion, however, is entirely unsupportable from the record. First, WILLIAMS specifically testified that she made her decision based on the fact that she desired to

repair her hip. She did not testify that the radiation to which the fetus might have been exposed prior to the abortion factored into her decision.

To the extent that her testimony could be construed to state a concern about radiation exposure, that concern was with respect to the effects of future radiation exposure. There is no case law which has permitted a wrongful death cause of action based upon the voluntary therapeutic abortion of a fetus resulting from the plaintiff's concern of the effects to the fetus of future radiation exposure. Yet the majority suggests that such a conclusion is proper.

CONCLUSION

In summary, MANCHESTER urges this Court to recognize the significant conflict in Illinois law that results from the majority's opinion in this case. MANCHESTER urges this Court to recognize the merits in Justice Cahill's dissent, and to address the important public policy concerns raised by this case. Finally, MANCHESTER urges this Court to recognize the analytical and factual errors in the majority's decision in such an important and novel case.

Defendant-Petitioner JOHN C. MANCHESTER therefore prays that this Court exercise its discretionary authority under Supreme Court Rule 315(a), and accept this case for review.

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