ORAL ARGUMENT – 10/08/2003
02-1061
FORT WORTH OSTEOPATHIC HOSP. V. REESE

HARCROW: This case is before you because a DC in Tarrant county having read the Witty decision decided that the SC had spoken, that the parents as well as the proposed estate of a stillborn had no cause of action, and granted a summary judgment.

That case was then appealed to the 2nd CA who held otherwise. And in our view ignored the Witty decision and followed their own decision in the Parvin case, and held that in fact under constitutional arguments that there was such a cause of action.

We have come to this court asking this court to reaffirm the holdings that this court has had in Witty and its progeny, that there is no cause of action for the parent's derivative claim for the death of a stillborn.

PHILLIPS: The new statute is going to supercede whatever we do.

HARCROW: Except in the field of medical malpractice. S.B. 319, in fact makes Parvin the law in everything except in the medical malpractice area.

PHILLIPS: And there there is going to be no more suit for wrongful death of survivorship. Correct?

HARCROW: Yes.

PHILLIPS: The doctrine that we've struggled with in Krishnan and some of these other cases about the injury to the mother's body, will that survive this statute and that's still by law against doctors as well as anyone else?

HARCROW: Yes. I think the injury does survive. That exception is specifically for the death. And then SB 319 addresses the death and carves out an exception.

PHILLIPS: So if we could make that any clearer or knew better what we meant and could explain it to the world, that's going to be jurisprudentially significant?

HARCROW: Yes. I believe that's true. And I believe we are in a window of time where this court - when the TC ruled on our summary judgment and when the 2nd CA ruled, we believe the law of the land in Texas was Witty. And this court has said it will be Witty until the legislature speaks. The legislature has spoken, and as of Sept. 1 going forward the legislature has spoken and we will deal with that as the cases come through the system.

However, for those cases that are in the system, such as our case, I believe that Witty is the law and should be upheld; and, therefore, I believe this court needs to uphold Witty as it applies to our case.

I would suggest to you that it is an awkward situation, because it is clear what should have been done but for 319. Now that 319 is the reality as of Sept. 1, I think you have to look forward and be cognizant of what your opinion and how that applies after Sept. 1.

But in the medical malpractice, and this is a medical healthcare liability claim, I think it is clear that this court - that Witty still is the law and that the exception in 319 makes that very clear. Even for the cynics who believe that the legislature in having to deal with tort reform this time, it was all about the TMA and the healthcare area. Be that as it may, it is the law in the State of Texas after Sept. 1.

WAINWRIGHT: Even though Witty and its determination that there must be a live birth for a cause of action to lie under the wrongful death act to be the law, even though that was on the books we decided that in 1987, this court has never squarely addressed the equal protection arguments have we?

HARCROW: I would argue that when the _____ case and the Blackmon(?) case made arguments about constitutionality, this court turned those aside and said we have ruled this is our decision. But I don't think this court has gone through that delineation of that discussion of those matters. And I think that that is something that could be addressed. But if you do then you were looking into perspective how that would affect 319 are you not in taking on 319 in the constitutionality of a statute that's really not before you at this time. Although we are aware that it's obviously out there.

WAINWRIGHT: Someone might suggest that you've answered the question by saying that 319 is not before us. You talk about in your briefing the equal protection clause of the federal constitution and how typically in our equal protection jurisprudence we've followed the US SC's jurisdiction in that regard. Our state constitution doesn't have to be the same does it in our interpretation of the equal protection clause?

HARCROW: I agree with Mr. ____ it does not.

WAINWRIGHT: It provides more protection, more rights than is provided under the federal constitution. Correct?

HARCROW: That's how I understand the scheme to be.

WAINWRIGHT: Would you address the respondent's argument that there's no rational basis for treating an unborn child which dies one second before birth differently from the same child that is born, lives a second and then gets treated differently for the wrongful death statute. And the

argument wasn't a second. I'm using that unit of time.

HARCROW: I think that the difference there, and I think as parents we all recognize the miracle of birth, and the fact that pregnancy is what it is but the miracle of birth there is something that goes on there when a child is born and takes that first breath. That is the clear line that this court has chosen to use as opposed to getting into some other - and the court was free to choose whatever demarcation point it chose. And other courts have looked to viability issues. And I would again speak to that statute that doesn't apply here, but they've chose to totally ignore viability.

WAINWRIGHT: You said the court was free to look into this issue. You're talking about Witty I assume?

HARCROW: Yes. The Texas SC.

WAINWRIGHT: And Witty was an interpretation of the wrongful death statute here. Correct?

HARCROW: Yes.

WAINWRIGHT: Now I'm talking about equal protection clause of the constitutions, ours and in the federal courts.

HARCROW: And I'm saying this court is free to look at what point it chooses to say what is that point. And you can say there is a difference and that's the argument about the rational - are we to say that there is a distinction between one second before a child is born and one second after that child is born.

OWEN: It's not really our choice. We construe the statute and decide what it means, and then decide based on what the legislature's choice has been, does that violate the equal protection clause? It's not our choice.

HARCROW: The interpretation is that the SC is charged with the responsibility in trying to interpret the constitution of the US and of the State of Texas and the statutes. And so it is the court's rulings in deciding whether this is a rational basis for the that decision.

OWEN: As to whether we pick one second or liability, that's dictated by what the legislature said, and our interpretation of what the legislature said, not what we say there's a difference.

WAINWRIGHT: And that's my point. If you can now go forward and just talk about rational reason between treating the two differently. You talked about the miracle of birth and how that makes a difference.

HARCROW: My argument is that this court I believe has looked at the concept that since

individual has not (and it's a statutory interpretation) been extended to the rights of the unborn that therefore not being an individual, not having a cause of action there would be no derivative cause of action for the parents. That's been the analysis I believe that this court and others have looked at it.

The challenge clearly is to say that is not the basis and that shouldn't be the basis of the distinction that in fact they should be treated the same and that individual should be extended. And this court has looked at that definition of individual and said there is no legislative basis for that. So therefore we are not going to find that the unborn is an individual that has a cause of action unless they are born alive. And if they are not born alive, then that doesn't exist.

SCHNEIDER: I think that you are saying law or we've said in the past, but why is it more rational to distinguish between born and unborn rather than now with all the technology we have to say viability verses nonviability. Technology today, I think you would agree and accepts 23 weeks as being perhaps viable. Why then is it rational to draw this line at the prebirth verses afterbirth?

HARCROW: As I understand this court's interpreting could you ____ viability standard. It has chosen in the past not to.

SCHNEIDER: Are we staying with constitution is what I'm asking?

HARCROW: I'm saying that I think that that could be constitutional if you look at a viability standard and then it becomes an issue of fact as to what is viable and what is not viable. Which then gets back to the battle of the experts as to when is a child viable. Because we all know that a child can go 9 months and be viable but through the miracle of birth not make that process, and in fact, be stillborn.

O'NEILL: I think the question is what's the rational basis to uphold this distinction. And if the answer you're giving is that the court has recognized the legislature's distinction, but that doesn't answer the question of what is the rational basis?

HARCROW: I think the rational basis is this court has decided that there is a distinction with the birth process and that you have a live child as opposed to saying...

O'NEILL: But that distinction is based solely on what the legislature's done. If we're engaging in a constitutional equal protection analysis what would be the rational basis the state has in making that distinction?

HARCROW: I think the state again can make that decision based upon the scientific evidence to say now we know more than we did sometime prior and that therefore medically there isn't a difference. That is an argument that could be made. I would still suggest that it ignores the reality of the birth process. Whether it's by cesarean section or natural birth there is a process that that child must survive to make on the other side unless the court says we're not concerned about

the survivability. And I think that's what our legislature has done this time by not even looking at viability. Viability is not an issue under 319.

OWEN: You keep bringing it back to the court. Let's just say we look at the word. The legislature has said birth is the demarkation not viability. Now what is the rational basis for the legislature to say under the US constitution, we are going to draw the line at birth rather than viability? What's the rational justification for the legislature's decision to draw the line at birth rather than at viability?

HARCROW: I guess I'm not understanding because 319 does not draw that distinction. 319 says it starts at fertilization.

PHILLIPS: This is not a 319 case. Don't mention 319.

HARCROW: So if we forget 319, and we look at the state of the law as it was when the summary judgment was, then I believe that this equal protection argument is made because there is a distinction, there is different situations because one has been born, and one has made it into this world. One has not. One has the potential to do that.

O'NEILL: What's the basis for drawing that distinction? What's the rational basis? What interest does that distinction serve?

HARCROW: I think that the court has to look at real situations and real circumstances. And when we have someone who is alive, albeit for a moment, they are alive within the realm of all the rest of us. If you're talking about someone who is not alive, but is a potential life, that is a different circumstance, and I believe that is a distinction that makes a difference under our constitution, under equal protection arguments, because that unborn child isn't in the same realm that we're in. It is a potential, but it has not been realized yet. Much like unfortunately those that pass are not with us either. They have gone to wherever they have gone on to. Those folks are outside of our realm, which is this court has to decide controversies and the legal rights and responsibilities of those that are before us that are in the realm that we are in.

O'NEILL: What is the current status of the criminal statutes on homicide with this?

HARCROW: It's my understanding that that whole change was brought about because of this issue about being able to prosecute someone in a criminal environment, which I would argue is completely different than in a civil environment. But in a criminal environment to bring the death of someone, I would be happy to submit a post submission brief.

O'NEILL: Well I guess I'm saying prior to 319, was the law the same as the civil law has been here that in order to be prosecuted for homicide the child has to be born alive?

HARCROW: And the honest answer is, I don't know. I believe that that was the purpose

of 319 was to bring it forward. I will be happy to submit that to the court in a post-submission brief.

So my point goes back to in terms of the summary judgment when this judge decided this in looking at the Witty decision that that was the law in the State of Texas. And that Parvin, I believe was a departure in the State of Texas.

This case having come through the 2nd CA we get a decision that is different than would have been in other CA's. And I believe that this SC then looks at the case before you, the Reese case, and say as it relates to the ability of an estate of a stillborn that that was not recognized. And also the derivative rights of the parents that is not recognized, and so therefore this court should affirm the summary judgment of the TC, which then denied all the claims of the parents.

PHILLIPS: Let's look at the second prong. The TC said there was no injury to the body of Ms. Reese. Correct?

HARCROW: Yes.

PHILLIPS: Then this pregnancy went full term did it not?

HARCROW: No. It was 26-27 weeks. Right on the cusp of viability.

PHILLIPS: Our cases have been pretty liberal in indicating that discomfort or going through the trauma of labor knowing that this is going to be an exercise that does not result in a live birth, that any type of invasive treatments to the body, lost time, all of that can be an injury to the body that is recoverable by an individual as opposed to survival action or loss to the estate. How come there's not at least more than a scintilla of evidence of that type of loss on this record?

HARCROW: I agree that this court has recognized that cause of action, and it does exist. But that is fact specific. In the first case, none of use were quibbiling about the stillborn nature of the child. So it makes easy to get right to the argument. And the other argument is a fact issue, and the affidavit of the mother and the father talked about their pain about losing a child, and their pain of not having this person be with them.

PHILLIPS: They may make claims that are not valid under the doctrine. But after you take all of that away, why isn't there more than a scintilla of evidence that is valid?

HARCROW: Had they brought evidence about just that, that I went through this process and therefore I was injured and I have a cause of action, then I think the TC properly should allow them to go forward with just a loss of a part of the body. But the evidence was specific in that this is my emotion for having lost a child. I think the husband spoke about us going to the hospital, about our child, and it was all about the loss of the child, not just her injuries of having to go through the labor that gave the final point that was in the stillborn.

So I agree with the court that there is a cause of action. I believe that the TC looking at the affidavits that were submitted saw that those affidavits and the evidence presented by the mother and the father was specifically about the loss of a child, and their attempts to get pregnant and their attempts with this pregnancy and it was all about the loss of a child, not just her injury to say, I went through labor and I lost a part of my body.

JEFFERSON: Well she said she had to go through a long and painful delivery. Why is that not a scintilla of evidence in itself?

HARCROW: I would believe that the TC in looking at the affidavit as a whole saw that this was all about the loss of a fetus, or the loss of a stillborn and not her own personal injury.

Obviously that's something for this court to look at. I don't believe there's a scintilla. I believe the TC made the right decision. That is an area that clearly this court can say there is a scintilla and send it back and the case could be tried just on that issue about the mother and the loss of the part of her body. As long as it doesn't involve the emotion of the loss of a fetus or the whole concept of the loss of a child.

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RESPONDENT

BULLARD: If this court accepts the position of Osteopathic Hospital in this case and affirms the TC's SJ, then the court will effectively be telling Tara and Donnie Reese that you have absolutely no remedy for the loss of your child, Clarence, even though that child was viable and capable of sustaining life outside the womb.

The viability of Clarence Reese in this case is uncontested. That being the case the Reese's we contend have a remedy under one of two rationales. The first we believe, and it's thoroughly discussed in the brief, is that the Witty court simply interpreted the wrongful death statute incorrectly. And if they had interpreted the statute using the code construction act, they would have reached the conclusion we believe.

O'NEILL: Are we required to overrule Witty to go your way?

BULLARD: I believe that you are required to overrule Witty to the extent that we're dealing with the viable child here. Witty didn't deal with that issue.

O'NEILL: I was under the impression that your argument was, we did not address the equal protection analysis in Witty, and so therefore, Witty wouldn't touch that decision.

BULLARD: That's part of our argument. But it's really a two prong argument. The first part did deal directly with Witty. If we accept the definition that Witty gives to an unborn child, in other words there is no cause of action unless there is a live birth, then that's where we take issue

with the manner in which the other statute was interpreted by the Witty court. And it's that...

O'NEILL: I understand that. But if you take that interpretation and say that it was not analyzed as violative of equal protection, then we could keep that definition in Witty, but say that's how it was interpreted. But after reviewing it under equal protection it does violate equal protection.

BULLARD: That is correct. When I'm talking about overruling Witty, I'm talking about to the extent that we're dealing with the manner in which they reached the conclusion. And that's the term individual in the current statute, rather just the time or person did not include a viable unborn child. To that extent you would have to overrule Witty.

O'NEILL: But it seems to me the analysis would be in Witty we interpreted the statute this way: here's what the legislature meant. And in this case you would want us to say the legislation violates equal protection. We interpreted the legislation in Witty. Now we look at it under equal protection and that definition either can or cannot stand. I don't see how it overrules Witty. Witty is just a statutory interpretation, that's not been evaluated under equal protection.

BULLARD: From an equal protection standpoint you're correct. You wouldn't have to overrule Witty. Essentially what we have is an alternative argument. We believe that the Witty court got it wrong. At least as it applied to defining what a person or individual was. So if the court went that route and looked at the statute and construed it using the code construction act, then you would have to overrule Witty to extend to apply to viable children.

The second argument was, and it's an argument in the alternative, if we look at it from an equal protection standpoint, we're assuming that what the Witty court did in the way they interpreted the statute is correct. That being the case when you look at it from the context of viability, that's where you get into the equal protection concerns. And I think that's where the 2nd CA nailed it when they addressed those concerns in an equal protection context.

PHILLIPS: You agree it's a rational basis test?

BULLARD: That's true.

PHILLIPS: Well what about other government decisions - driver's license at 16. Is there a rational basis for that?

BULLARD: I believe the legislature can make a determination whether or not a 16 year old should have a driver's license. I believe they can do their research and gather what data they need to evaluate whether they are capable of making reasonable decisions under ____ of circumstances and things along those lines. But I think here we're talking about something totally different. We're talking about life.

HECHT: Won't that research show that there are lots of people at 15 years, 11 months

that are world class drivers and lots of people at 17 years that are terrible drivers? You've got to draw a line some place.

BULLARD: That research could very well show that. I don't know that to be the case but it could very well do that. I know you can apply for a hardship.

PHILLIPS: How is that line different, or drinking at 21, or social security at 67, or Texas SC justice at 35? There are all lines. Now how are those lines alright and the line of your born verses you're not born is not an acceptable legislative line?

BULLARD: I think the line as we are talking about - we're talking about a human life, whether or not a remedy is available to parents when they have a child that's viable and capable of living outside the womb. Because if you interpret the statute in that fashion where it has to be live born verses a stillborn...

OWEN: But then you've got the argument to the parents who are just one week short of viability, and they say well but for the physician's malpractice my child would have met the viability's threshold and I'm not being equally protected under the law. It seems like wherever you draw the line there are always arguments for drawing it further _____.

BULLARD: There will always be an argument to draw it further back. What we're asking this court to do really falls in line and comports with Roe v. Wade in which the court said the point of viability there's a compelling interest at stake to protect that child.

PHILLIPS: Is there not a rational basis for the legislature to say we can protect that child for livelihood but not for lawsuits?

BULLARD: I'm trying to draw distinctions and I have not thought that one through. But where I draw the line here is I can see an instinctive difference between a driver's license, or consuming alcohol.

PHILLIPS: But what you're telling us is this is rational basis. It's a predicate to all this discussion, you abandoned an argument that the scrutiny here was going to be any higher than the maximum difference we afford to the legislature in looking at their line drawing. That's where they are. They are at the bottom. We give the most difference into the legislature's decision on structuring lawsuits than we did any of their _____. We give them the maximum difference in that area and that's what this is about. It's not about the sanctity of life or medical procedures or anything else. It's about the ability to bring a lawsuit.

BULLARD: That's correct. It's about the ability to seek a remedy. What I think about in terms of the way we analyze this particular statute - I mean I can certainly make an argument I believe that a strict scrutiny standard should apply. I could certainly make the argument that a the quasi intermediate level should apply.

PHILLIPS: Are you making that argument?

BULLARD: I think we could make that argument in this case.

PHILLIPS: But you're not.

BULLARD: I would like to make that argument. But I'm taking the position that the 2nd CA took and they did the rational basis test, or the compelling state interests test. And I believe that that certainly is an appropriate level of scrutinization, although I believe we can go back to strict scrutiny and say well this is an uncontrollable trait. This is an unborn child that's viable.

O'NEILL: Before we get to the level of scrutiny though to simplistically state an equal protection claim, you have to first show that you're treating two groups that are similarly situated differently before you determine whether there's a rational basis for it. So in order to buy into the equal protection argument, you have to apply the premise that an unborn viable child is similarly situated to a born live child. Help me with that concept.

BULLARD: When I look at similarly situated, I look at it in this context. Let's say we have a 36 week unborn child, or we have a 30 week unborn child which this child was pretty close to 30. Now medical technology tells us that a physician can take that child and that child will survive. So what's the distinction at this point? Well we have the distinction being made where we had a child that exist the womb and one that does not...

O'NEILL: But you're equating capable of viability with viability. You're saying the group that's capable of viability is similarly situated to a group that's viable.

BULLARD: That's correct. When I say capable of life outside the womb I'm talking about essentially the definition that the medical professionals have placed on it. What does that mean? Well I would have to go in there and do some digging to see exactly what they meant by saying capable. I suspect that means that if we take the child out of the womb at that point, the child was going to survive. There may be a hedge(?) factor on their part, but if you're talking about a child with similar physical characteristics and the only thing separating them is the fact that one has existed the womb and one has not, then that's where the similarly situated...

PHILLIPS: So social security numbers is an arbitrary decision to give those to people who are born?

BULLARD: I suspect that once you apply for one of those, then you are supposed to get one. I'm trying to see where the question that you're asking is...

PHILLIPS: Well it seems to me this notion of being born and not being born runs through a whole lot of laws both at the federal and state government. Were we to write an opinion that says conditioning a lawsuit on being born is irrational, that it would call into question a lot of laws.

BULLARD: Looking at in the civil context in a remedial statute, the law is that statutes - I submit is whatever the statute is has to be applied equally. And that's where we get to the equal protection analysis. So right now I'm talking about this case is about the wrongful death statute.

I understand where you're coming from...

PHILLIPS: But you're asking us to make a federal constitutional decision. And our decision here would presumably say how we would act on acts of congress that might come before Texas courts.

BULLARD: We're asking you to deal with a federal issue and also the Texas issue as for as equal protection goes.

PHILLIPS: But our recent jurisprudence has rejected any distinction between Texas and the US equal protection jurisprudence for the last 9 years.

BULLARD: I understand that to be the case. As far as drawing a distinction between social security numbers and laws similar to that and the case that we have here dealing with a remedial statute entitling one to recover for the death of a family member.

WAINWRIGHT: Let me change our focus back to statutory interpretation. We interpreted the roll-in provisions of the wrongful death statute at that time to require live birth to have a claim. For the next 16 years until this year the legislature didn't change the statute to change Witty. Since Witty was a statutory interpretation case they could have done that. Shouldn't that be significant to us or should it not?

BULLARD: As our brief states, we think the Witty court got it wrong. So why is there a silence between 1987 and this year? We would have to assume that the political process somehow dictated what got through the legislature and what did not. But when you look at it from analysis of statutory construction...

WAINWRIGHT: Doesn't the political process always dictate what gets through the legislature? I'm not sure how that 16 year period, the explanation you've given is different from any other 16 year period.

BULLARD: It does. But there's also recognition that the courts or the state have to interpret the statute that comes out of the legislature to give them meaning and to attach ordinary meaning to words and phrases that the legislature uses. And that's where we go back to when the original wrongful statute was enacted, where they used the term "person" without a definition. And when we look at it in context or 4 years earlier, the legislature defining homicide said a person had to be someone is who is in existence by actual birth. So we take a look at it in that context and we try to attribute a meaning to those terms. We can certainly go back to what the legislature did in1856 and 1860 and look at the meaning that they attached to that term "person" to the one instance they

said person who is in existence by actual birth, and one that is not. And that's the wrongful death statue where they defined person without carving out an exception. So that gives some indication 150 years ago what the legislature placed on the meaning of that word, because that's the way they made the distinction between a penal code and civil code. So we can take that interpretation way back when and we can look at what this court did in 1890 in interpreting children under that same statute to mean an unborn child. That gives an indication of what that court at that time found to be the legislative intent in drafting that statute.

So now we have in a statutory beneficiary context...

O'NEILL: But those cases required a live birth for that right to become intact. I mean under the inheritance laws if the child had not been born alive it would lapse I suppose. In order for it to become co___ there had to be a live birth.

BULLARD: That's correct. That's what the court held in Nelson v. Galveston. That's the 1890 case. But what I'm taking a look at and what I'm asking the court to consider is what the intent of the legislature was in promulgating that statute means in the word person. At that point in time they realized that there was a difference and if they didn't...

O'NEILL: If you were to treat it the same way under the inheritance laws and property laws and things like that, wouldn't you say that a fetus is a person if it's viable, which is the one you want to draw, that we recognize that as a person? But they will not have a claim unless they are born alive would be the more appropriate analysis because that's the way it's applied in the inheritance context. And if we were to say they are a person for the wrongful death statute we're going to get it in line with that case law as you're proposing which is simply say yes they are a person, but unless they are born alive they can't bring a claim.

BULLARD: I would take the commerce of that. I'm talking about bringing the definition of person whether it's live born or not and bring it in line with what this court has ruled beginning in 1890 dealing with statutory beneficiaries and the legislature pronouncements dealing with inheritance and things along those lines. I'm asking the court to go the other direction to reconcile this.

O'NEILL: If that person under the inheritance laws is not born alive they can't then sue for their legacy. Their request lapses. If that same argument were applied to your argument here it would be the same result. I don't see how it gets you there. If you say that a fetus is a person unless they are born alive they can't assert a claim that's the way the beneficiary laws work.

BULLARD: And that's correct. I understand where you're going with that. And I guess that's where I'm asking the court at this point in time to look at that issue of person and essentially define a person as one who is viable at the time that the negligent acts made the basis of the wrongful death act occur. If we're going to take a look at the statute if we're going to construe it then there's plenty of case law that talks about the common law being fluid, changing but depending on both the

circumstances are if you're giving the fact situation.

OWEN: But that's the common law. And we have said as has the US SC, once a court construes a statute that's probably the most compelling situation to apply stare decisis. Because if the court misinterpreted or misconstrued the legislative body can come back and correct it. And that we have as J. Wainwright pointed out 16 years of legislative acceptance. So what do we do with that given the prenouncements? Generally this court and other courts have said once you construe a statute you really shouldn't change your mind in midstream particularly when the public and the legislature it's been static for a long period of time.

BULLARD: If the court is concerned with issues of stare decisis, and I would at least like to allow the court to find comfort in what SC Justice John Marshall ___ wrote, and I believe it's Moragne v. State _____, 398 US 375 at 405 in which he said a judicious reconsideration of precedent cannot be as threatening to public faith and the judiciary's continued inherence to a rule unjustified and reasoned which produces different results for breaches of duty in situations that cannot be differentiated in policy. Respect for the process of adjudication should be enhanced not diminished by a ruling today.

So if the concern is, well this law's been on the books since 1987, which we contend had a faulty analysis that got them to that result, then this court should not shrink back from the opportunity to correct a principle of law that we believe was incorrect when decided.

HECHT: Do you make a Krishnan claim?

BULLARD: We do have a Krishnan claim also alleged in this case. It was pled in the alternative. And that goes back to what I opened with, that if the court agrees with Osteopath Hospital in this case, that there is absolutely no cause of action available to my clients.

Our Krishnan claim was essentially Tara Reese's claim for the personal injury sustained to her due to medical negligence. We do have that claim. The evidence presented at the TC was sufficient to support that claim under this court's analysis in Krishnan and in Edinburg.

HECHT: Petitioner couldn't get summary judgment on that claim on the basis of Witty?

BULLARD: No.

HECHT: So it was just a question of the evidence I take it.

BULLARD: That's correct. That's pleading in the alternative taking into account this court's rulings in Krishnan and Edinburg.

WAINWRIGHT: If your contention about overturning Witty and taking a different approach to interpreting the wrongful death statute is correct, does it follow then that if we do change the

interpretation from Witty that the effect of that should be retroactive back to 1987? It doesn't have to be but doesn't your argument logically suggest that it should be?

BULLARD: I understand that opinions are going to be applied prospectively from the time that they go into effect. I don't know if there's some constitutional issues dealing with that or not. But I believe that if the court does acknowledge that the Witty court got it wrong when they made their decision, the effect would be that that's the way that it should have been since 1987. So in that respect, I guess it would be retrospective. But that shouldn't discourage the court from correcting a wrong that's been on the books for some 15 or 16 years.

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REBUTTAL

HARCROW: It would seem to me that the discussions that we have about the potential or the viability arguments that those are arguments that are better left in the field of medicine or in philosophy or in religion. It's brought back to me that we as lawyers and as the court have to try and provide guidance to practitioners and to the TC's on how to parse out and how to decide the rights, responsibilities and remedies of those brought before the court. And in this case it is my belief that by changing what has been the law, and I believe the stare decisis of Witty and all of its progeny, the court has set out what the standards are and this court has chosen not to go down the viability route because of the difficulty of proof, not because of the philosophical arguments and not because of medical arguments. And so it is my belief that this court using what I believe is the finest of our judicial traditions which is stare decisis that once we have decided an argument, and that isn't to say we can't go back if there is a different argument, but my concern is how do practitioners and trial courts then address this issue if we change the standard from what it is now.

O'NEILL: Do you know if any other states have addressed similar statutes under an equal protection analysis?

HARCROW: No. I can't cite you a case. I am aware that there are other states that have gone in different directions, have used viability standards. The legislature has chosen to do so. Courts have tried to wrestle with this argument. And my point is that there is a rational basis for what the Texas legislature did in defining individual...

O'NEILL: You don't know if any other cases have dealt with the equal protection argument other than Parvin?

HARCROW: No. Not off the top of my head. I believe that while the arguments that Mr. Bullard makes, and I don't question his sincerity in the argument he's making, but I believe that the kinds of arguments he's making are left better to other forums, not in forums that decide the rights, responsibilities and remedies to be provided to a party. Because if you start looking at something that is not in our realm that the unborn child, as wonderful as they may be, it is still a potential. It is not the reality of someone being here. And then you get into the property rights issue, which I

think you made the point that you can have all the property rights in the world, but if you're not born alive those lapse.

How do we choose to describe that? Whether it's you have the right and then it lapse, or you never have the right. To me that's a way of discussing it, but in the reality a TC judge knows that when there is this kind of lawsuit this is how I respond, or a practitioner knows this is the evidence I bring to bear. And today the evidence that's required in Texas is viability after birth. And the birth process is a significant case. The 2nd CA seem to sluff that off as if the birthing process was no big deal. It is a significant deal in that there are children who make it through and there are children who don't who appear equally viable one second or five minutes before, but there is something that happens that that child didn't make it. And I think there is a rational basis that the courts have to decide that this is how we're going to instruct the TC's. This is how we are going to instruct the practitioners that the rights, responsibilities and remedies are going to relate to this issue and not the potential that may be there whether it's in medical circles or whether it's in philosophical or religious circles they can have those discussions.

HECHT: If the legislature had decided after Witty viability as a threshold would that have a rational basis?

HARCROW: I think at that point there could be an argument of saying that the legislature has chosen to look at the issue of viability because that is the distinction they choose to focus on. And I think an argument could be made the proof is very difficult. It's a very fuzzy area because then you get back to the issue of expert witnesses fighting each other over viability when you're talking about whether if it just has a heartbeat is that viability or can it actually survive outside of the womb. We know that the presence of different hormones at different levels make that child viable outside the womb even though artificially, medically we can keep something alive. The question is is that the life they are talking about.

OWEN: What if the legislature has said you cannot bring a wrongful death claim unless you survive to your first birthday. Would that have a rational basis?

HARCROW: I think that would be very difficult.

OWEN: Why?

HARCROW: I would draw the distinction because that once someone is alive what's the difference. And it goes back to all the arguments of this 16 year old driver or 21 year old drinker or retirement at 65 or a 35 year old SC justice. Those are arguments and distinctions and I think at that point it's harder, it's an arbitrary line and they've got to come up with the reasons for why they think there is a rational basis. I just offhand can't think of what that might be.

WAINWRIGHT: The arguments been made in the briefing that the syllogism in underlying

Witty is flawed. Reading one sentence, I think that embodies that syllogisms - I'm going to ask you a question about it. It says, therefore, since there's no cause of action for injuries to a living fetus there can be no cause of action for the death of a fetus. In other words, since there's no cause of action for injuries to a living fetus, there can be no cause of action for its death. Is that a correct syllogism or is it flawed? Just as a matter of logic.

HARCROW: My point goes back to if it is not an individual it doesn't have a cause of action for life or death.

WAINWRIGHT: I understand that, and I'm not asking about the facts of this case or about the facts in Witty. Just as a matter of the logical syllogism is that flawed or do you think it's accurate?

HARCROW: I believe that if there is no cause of action for injury there can be no cause of action for death.

WAINWRIGHT: I understand you believe that. Do you think that the logical basis for that statement is accurate or do you think it's flawed? If A then B. That's okay.

HARCROW: I guess I'm not following the logic. I apologize.