FILED
SEP 20 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BRENDA L. FULLER, Administrator of the Estate of Charles Joseph Fuller, Deceased,	)	Filed September 20, 1979
Plaintiff-Appellant,	)	
vs.	)	
KELLY'S LOUNGE, INC., an Iowa Corporation, and **ROBERT H. BIRD,** d/b/a Kelly's Lounge,	)	201 2-62860
Defendants-Appellees.	)	

Appeal from Black Hawk District Court - Carroll E. Engelkes, Judge.

Plaintiff appeals summary judgment for defendants denying her damages sought on behalf of a viable fetus killed as a result of an automobile accident. - Affirmed.

John W. Holmes, of Beecher, Beecher, Holmes & Rathert, Waterloo, for Plaintiff-Appellant.

Gerry M. Rinden, of Klockau, McCarthy, Lousberg, Ellison & Rinden, Rock Island, and Robert L. Rausch, of Cutler & Rausch, Waterloo, for Defendants-Appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Appellant, Brenda L. Fuller, appeals trial court's summary judgment for appellees, Kelly's Lounge and Robert Bird. Affirmed.

Brenda Fuller was 28 to 30 weeks pregnant when she was involved in an automobile accident December 13, 1975. She was a passenger in a vehicle that collided with a car driven by Lawrence K. Miller who is alleged to have been intoxicated at the time. As a result, Brenda Fuller was admitted to a Waterloo hospital and five days later, Charles Fuller was stillborn. This suit was filed alleging Kelly's and Bird were liable for the negligence of Miller under the Iowa Dram Shop act, section 123.92, The Code 1975. Brenda Fuller sought recovery on behalf of Charles Fuller under the survival statute, section 611.20, The Code. Appellees Kelly's and Bird moved for summary judgment. The trial court found Charles Fuller was a viable fetus capable of living outside the womb of his mother, was alive prior to the automobile accident of December 13, 1975, and was a fully developed infant at the time of his stillbirth. The trial court, however, concluded recovery on his behalf was precluded by McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971) and summary judgment was entered.

Brenda Fuller appeals that summary judgment and challenges the applicability of McKillip to cases where, as here, the fetus was capable of living independently from its mother at the time of prenatal injury. In McKillip, however, the court rejected any analysis made under a viability approach. McKillip, 191 N.W.2d at 708. Instead, the court, through statutory interpretation, concluded the survival statute excluded an unborn fetus from its protected class: "We hold 'person' as used in Code section 611.20 means only those born alive." McKillip, 191 N.W.2d at 709. Here, Charles Fuller was stillborn. Under McKillip, Charles Fuller was not a person as contemplated in section 611.20 and recovery on his behalf is precluded. The trial court did not err by its entry of summary judgment.

AFFIRMED.

Snell and Carter, JJ. concur. Oxberger, C.J., and Donielson and Johnson, JJ, concur specially.

OXBERGER, C.J. (specially concurring)

I concur in the decision only because the pressures of stare decisis limit our review. If this were a case of first impression I would hold that this action for the wrongful death of Charles Fuller could be maintained. Charles Fuller was a fetus capable of life independent from his mother's womb. That capability of life should qualify him as a person whom the law protects from injury.

At least 25 jurisdictions recognize the right of recovery for injuries inflicted upon a fetus. See Annot. 84 ALR3d 411 (1978); See also Justus v. Atchison, 19 Cal.3d 564, 569n.4, 565 P.2d 122, 125n.4, 139 Cal. Rptr. 97, 100n.4 (1977). The trend is toward allowing recovery for prenatal injury or wrongful death of a fetus. See Spieser, Recovery for Wrongful Death, section 4:38 (2d ed. 1975). Some jurisdictions allow recovery if the injury or death occurred after the fetus became viable. Others permit recovery for injuries to a nonviable fetus who is born alive. Georgia allows recovery for the wrongful death of a fetus if it was "quick" when injured and Rhode Island allows a wrongful death action to be maintained to recover damages for the death of a viable or nonviable fetus. See generally 62 Am. Jur. Prenatal Injuries § 12 et seq. (1972). In this case, we need go no further than to hold liability could result for injury to a fetus capable of independent life. Other areas of Iowa law have recognized a fetus capable of independent life:

— Section 707.2, The Code 1979: criminal liability imposed for feticide - the termination of pregnancy after the end of its second trimester. (This provision was enacted after McKillip and undermines a portion of its reasoning.

— Section 702.20, The Code 1979: viability defined.

— Section 144.29, The Code 1979: death certificates required for each fetal death where the fetus had completed 20 weeks of gestation.

— Proposed administrative regulation ARC 0379, 2 Iowa Adm. Bulletin 13 (July 11, 1979): Proposes that whenever the word "Child" is used in Chapter 239, The Code 1979, (Aid to Dependent Children) "it shall include the unborn child in the last trimester of pregnancy."

— Proposed administrative regulation ARC 0378, 2 Iowa Adm. Bulletin 13 (July 11, 1979): Proposes that for purposes of aid to dependent children, a pregnant applicant or recipient who is in the last trimester of pregnancy is considered "the

mother of a child under the age of six" and that "a payment of $10 per month be made for an unborn child in the last trimester of pregnancy."

Recognition of liability for conduct causing the death of a fetus seems logical. As Chief Justice Moore wrote in his dissent in Boyer v. Iowa High School Athletic Assn., 256 Iowa 337, 350, 127 N.W.2d 606, 614 (1964): " 'The law's emphasis generally is on liability, rather than immunity, for wrongdoing.' " Yet the law under McKillip absolves a wrongdoer whose conduct results in the death of a fetus while holding him liable if his conduct injurs but does not kill. That does not seem reasonable. Instead, I think liability should extend to conduct resulting in the death of a fetus such as Charles Fuller. As stated in Shook v. Crabb, 281 N.W.2d 616, 620 (Iowa 1979), "This result is compelled by the fundamental proposition of public policy that the courts should afford redress for a wrong, and the failures of the rationales supporting the doctrine to withstand scrutiny." The rule of statutory construction in section 4.2, The Code 1979, should guide a review of section 611.20: "(The code) provisions and all proceedings under it should be liberally construed with a view to promote its objects and assist the parties in obtaining justice." This action seeks recovery under remedial statutes (the dram shop and survival acts). Under a liberal construction of those statutes, with a view toward promoting their objects and assisting the parties in obtaining justice, Brenda Fuller should be able to maintain this action on behalf of Charles Fuller. Unfortunately, McKillip prevents us from allowing that.

DONIELSON, J. (specially concurring)

While the doctrine of stare decisis underlies the wise and prudential nature of our common law system of adjudication, it may in some instances, like here, prevent the correction of an unwise or incorrect holding. Concurring in the result of this case only because we are bound by the holdings of the final arbiter of Iowa law, the Supreme Court of Iowa, I agree with the concurring opinion of Chief Judge Oxberger in its criticism of the holding of McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971) and wish to discuss an additional point.

The holding of McKillip is based on a statutory analysis of section 611.20, The Code 1975. In its analysis of this section, the supreme court stated:

> In construing statutes we search for the legislative intent as shown by what the legislature said, rather than what it should or might have said. Rule 344(f), par. 13, Rules of Civil Procedure. If the language of a statute when given its plain and rational meaning is precise and free from ambiguity, no more is necessary than to apply to the words used their ordinary sense in connection with the subject considered. Maguire v. Fulton, Iowa, 179 N.W.2d 508, 510. These rules are applicable here. We hold "person" as used in Code section 611.20 means only those born alive. How indeed could an unborn child be a person with a liablity as referred to in the statute?

McKillip, 191 N.W.2d at 709. The flaw in this reasoning is that the term "person" is not precise or free from ambiguity, and legislative intent is not self-evident from the language used.

In the absence of legislative history expressly indicating otherwise, it is reasonable to assume that when the predecessor to section 611.20 was enacted in the mid-1800s, the legislators who drafted it gave no thought to whether unborn fetuses were included or excluded from the term "person," which is the answer to the court's question in McKillip. It is thus inappropriate to regard the issue as simply one of legislative intent. Britt v. Sears, 150 Ind. App. 487, 494-95, 277 N.E.2d 20, 24 (1971). In such a case, courts have considerable latitude in construing statutory provisions on the basis of logic and public policy. Presley v. Newport Hospital, 365 A.2d 748, 750-54 (R.I. 1976). The arbitrariness, illogicality, and unjustness of the McKillip holding are aptly discussed by Chief Judge Oxberger and serve as cogent reasons for a reconsideration of it by the supreme court.

Johnson, J., joins this special concurrence.