



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 12, 2018

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Re: *Amparo Lopez Healey v. Perfectly Female Women's Health Care, P.C., et. al.*
Case No. CL-2017-17132

Dear Counsel:

The issue before the Court is whether it must classify a fetus as a “person” in order to allow damages to statutory beneficiaries in an action for the wrongful death of a fetus. However, for the reasons stated herein, the Court is not required to decide whether a fetus is a person or a nonperson to resolve this issue, and therefore will not do so. It holds that the Virginia Wrongful Death Act permits the distribution of damages to statutory beneficiaries of a fetus beyond only the natural mother, and overrules Defendant Farimah Farahani’s Demurrer to Count I of the Complaint.

OPINION LETTER

Plaintiff Amparo Lopez Healey lost her baby towards the end of her pregnancy, which resulted in a stillborn birth. She has brought suit against several facilities and doctors involved in her pregnancy pursuant to Virginia Code § 8.01-50(B) as “the natural mother of the fetus.” Additionally, she has named the father, brother, and sisters of the fetus as statutory beneficiaries, pursuant to Virginia Code § 8.01-53(ii). Compl. ¶¶ 5, 44. Defendant Farimah Farahani, D.O, (“Doctor”) has brought the instant Demurrer in regards to the legal status of those additional statutory beneficiaries.

The relevant statutes here are part of the Virginia Wrongful Death Act, which provides compensation to those impacted by negligently caused death. Virginia Code §§ 8.01-50, *et seq.* Virginia Code § 8.01-50(B) creates a cause of action for the wrongful death of a fetus. Virginia Code § 8.01-50(C) appoints the “natural mother” as the personal representative of the fetus. It also imposes a successor scheme should the natural mother die or become disabled. Virginia Code § 8.01-52 enumerates the damages recoverable for wrongful death. Finally, Virginia Code § 8.01-53(A)(ii) provides that damages awarded pursuant to Virginia Code § 8.01-52 shall be distributed “to the parents, brothers, and sisters of the *deceased*” as statutory beneficiaries in cases where there is no surviving spouse or children of the deceased, as would be the case in any fetal death. (Emphasis supplied).

The Doctor relies on the word “deceased” in Virginia Code § 8.01-53(A)(ii) to claim that the statute does not permit distribution to the statutory beneficiaries listed therein. She cites Black’s Law Dictionary’s definition of “deceased” as “a dead person,” and objects to a fetus being classified as a “person.” She argues that defining an unborn fetus as a “dead person” would be incongruous with Virginia Code § 8.01-50(A) and (B), which distinguishes between “the death of a person” and a “fetal death,” respectively. She claims that the General Assembly, when it added Sec. B regarding fetal death to Virginia Code § 8.01-50 in 2012, considered and rejected changing the definition of a person to include an unborn child within the wrongful death statute or including an unborn child within Sec. A of the statute.

The Doctor offered to the Court two proposed, unsuccessful amendments – Sen. 674, 2012 Sess. (Va. 2012) (proposing that the definition of “death of a person” in the statute be amended to include a fetal death) and H.D. 1, 2012 Sess. (Va. 2012) (proposing that “death of an unborn child” be included in subsection A of the wrongful death statute). She concludes that, as a result, Virginia Code § 8.01-50(B) abrogates common law only to the degree that it permits the mother to recover damages for the wrongful death of a fetus, but that it does not abrogate the common law with relation to the statutory beneficiaries. She reasons that the legislature had to affirmatively change common law to make such a change. She argues that the legislature triggers the statutory beneficiary provision only upon the wrongful death of a person. Since, she claims, a fetus is not a “person” within the meaning of that statute, there are no statutory beneficiaries other than the mother for this cause of action. To support her position on the status of the common law, she cites *Modaber v. Kelley*. 232 Va. 60, 66 (1986) (“In Virginia, the law is established that an unborn child is not a “person” within the meaning of our wrongful death statute.”).¹

¹ This case was decided prior to the 2012 amendments establishing wrongful death of a fetus as a cause of action.

As an initial matter, the Court cannot accept the Doctor's invitation to consider the legislative history that she offers. It cannot look to legislative history, or any other extrinsic sources, unless it finds that a statute is ambiguous. *Brown v. Lukhard*, 229 Va. 316, 321 (1985). Here, the Court finds the relevant statutes to be unambiguous as to their plain meaning.

When the language of a statute is unambiguous, [courts] are bound by the plain meaning of that language. Furthermore, [courts] must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity. If a statute is subject to more than one interpretation, [courts] must apply the interpretation that will carry out the legislative intent behind the statute.

Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104 (2007) (citations omitted). "[T]he plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." *Turner v. Commonwealth*, 226 Va. 456, 459 (1983) (citations omitted).

Moreover, the Court must read Virginia Code § 8.01-50(B) in context with the entire Wrongful Death Act.

[Courts have] a duty, whenever possible, to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal. Generally, the Court will look to the whole body of [a statute] to determine the true intention of each part. [A] statute should be read and considered as a whole, and the language of a statute should be examined in its entirety to determine the intent of the General Assembly from the words contained in the statute. In doing so, the various parts of the statute should be harmonized so that, if practicable, each is given a sensible and intelligent effect.

Oraee v. Breeding, 270 Va. 488, 498 (2005) (citations and internal quotation marks omitted).

Virginia Code § 8.01-50(B) reads, "[w]henever a fetal *death*, as defined in Virginia Code § 32.1-249, is caused by the wrongful act . . . of any person . . . the natural mother of the fetus may bring an action pursuant to this section against such tortfeasor." (Emphasis supplied).

Virginia Code § 32.1-249(2) reads, "'[f]etal death' means *death* prior to the complete expulsion or extraction from its mother of a product of human conception, regardless of the duration of pregnancy; *death* is indicated by the fact that after such expulsion or extraction the fetus *does not breathe or show any other evidence of life* such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles." (Emphasis supplied).

Virginia Code § 8.01-52 reads, "[t]he jury or the court, as the case may be, in any such action under § 8.01-50 may award such damages as to it may seem fair and just." It then lists classes of damage categories.

Virginia Code § 8.01-53 reads, “[t]he damages awarded pursuant to § 8.01-52 shall be distributed . . . to . . . (ii) . . . the parents, brothers and sisters of the *deceased* [.]” (Emphasis supplied).

This leaves the Wrongful Death Act as, in this Court’s eyes, an unambiguous series of statutes that it must read together to determine if it is necessary to classify a fetus as a “person.” The Doctor has argued that Black’s Law Dictionary defines “deceased” to mean “a dead person.” Black’s Law Dictionary 491 (10th ed. 2010). Indeed, a standard dictionary definition of deceased is “a person who has died.” New Oxford American Dictionary 448 (3d ed. 2010). However, the ambiguity of a term “does not turn solely on dictionary definitions of its component words. Rather, the plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole.” *Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015).

The Doctor would have this Court read the statutes in such a way that it declares a fetus to be a nonperson, and thereby unable to be “deceased.” However, the Court does not need to declare a fetus as a person or nonperson. The wrongful death statute plainly creates the cause of action for the wrongful death of a fetus. Virginia Code § 8.01-50(B). It also plainly sets forth the type of damages the natural mother (or her successor) may recover from the wrongful death of a fetus. Virginia Code § 8.01-52. Neither statute requires a court to determine personhood. There is no disagreement as to the state of the law up to this point.

The parties diverge in their interpretation when applied to statutory beneficiaries other than the natural mother. However, the Court disagrees with the Doctor’s interpretation. While Virginia Code § 8.01-53 uses the term “deceased” in the context of establishing statutory beneficiaries of a decedent in the Wrongful Death Act, it clearly relates to Virginia Code § 8.01-50 in two ways. First, the statutory beneficiary section, Virginia Code § 8.01-53, says that those beneficiaries are entitled to damages awarded under Virginia Code § 8.01-52, which in turn permits the awarding of damages under Virginia Code § 8.01-50. Importantly, this chain of statutes points to the entirety of Virginia Code § 8.01-50, and not exclusively to Sec. A, which deals with wrongful death as a general matter. Thus, it also points to Sec. B, which deals with the wrongful death of a fetus. If the legislature intended that the only beneficiary in the case of a wrongful death of a fetus would be the natural mother, it would have explicitly pointed Virginia Code § 8.01-52 only to Sec. A.²

Regarding the Doctor’s argument that the Virginia Wrongful Death Act failed to completely abrogate the common law, another Virginia Circuit Court recently reviewed the evolution of the wrongful death laws from the time when, at common law, there was no right of

² This point could also be consistent with a dictionary analysis of the statutory language at issue. While the word “deceased” references a “person” when used as a noun, it also means “dead; no longer living” and makes no reference to “person” when used as an adjective. New Oxford American Dictionary 448 (3d. ed 2010). The word is used as a noun when one reads Virginia Code § 8.01-53 alone. However, it could be considered an adjective when read alongside Virginia Code § 8.01-50(B). Read together, the word “deceased” could modify the word “fetus” as to what is dead.

action to recover damages from injuries resulting in death. *Justin Benjamin Velvin v. Tabb*, 96 Va. Cir. 208 (Petersburg 2017). The *Velvin* opinion examined the history of the seminal Supreme Court of Virginia cases prior to the 2012 amendment in great detail. It found that the 2012 fetal death amendment to the wrongful death statute “nearly lifted” Virginia Code § 8.01-50(B) from *Kalafut v. Gruver*,³ to expressly abrogate common law to permit a cause of action for fetal death. *Id.* at 211 (citing 239 Va. 278 (1990)). The Doctor argues that she is not claiming that the legislature failed to abrogate the common law with regard to wrongful death of a fetus, but that it failed to do so with regard to statutory beneficiaries.

However, while the defendant in *Velvin* did not make the same argument as the Doctor in this case regarding the words “deceased” and “person,” the court in *Velvin* still faced a very similar issue on demurrer as this Court does now. In overruling the demurrer, it reasoned that “[t]he natural mother is but one of the class of beneficiaries described in §8.01-53, so this Court finds no language in Sections 8.01-52 or 53 limiting damages or compensation to only the natural mother.” 96 Va. Cir. at 213. This Court agrees with *Velvin* and finds that the legislature’s link in the chain of statutes pointing to Virginia Code § 8.01-50 as a whole, as discussed above, to be the express will of the legislature to abrogate that part of the common law.

Second, the language used throughout the Wrongful Death Act, with regard to fetal death, uses the colloquial language of life and death. It refers to “fetal death,” which it defines as the “death” of the product of human conception and the “inability to breathe or show any other evidence of ‘life.’” When the legislature chooses life and death terms such as these to describe a fetus showing no signs of life, it only makes sense that it would continue this theme by using terms synonymous with death, such as “deceased.” This is the only plain, obvious, or rational meaning of these statutes. The legislature’s use of common life and death terms throughout the statute makes its intent obvious, despite the Doctor’s citation to dictionary definitions. Therefore, this Court need not decide whether or not a fetus is a “person” or a “nonperson” for the purposes of these statutes.

For these reasons, the Court overrules the Doctor’s Demurrer to Count I of the Complaint. This Court holds that parents, brothers, and sisters of a dead fetus can be statutory beneficiaries. An Order reflecting the same is attached.

Kind regards,



David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit

Enclosure

³ The Doctor relies on *Modaber*, but *Kalafut* is the last pre-2012 Supreme Court decision on the issue of fetal death prior to the statutory amendments of Virginia Code § 8.01-50(B).

