STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1650

CARLI LONG AND ANDREW HOLLIE

VERSUS

TANGIPAHOA HOSPITAL SERVICE DISTRICT #1,
D/B/A NORTH OAKS MEDICAL CENTER, MICHAEL R. CHRISTNER, M.D.,
AND WILLIAM G. BLACK, M.D.

Judgment Rendered: APR 13 2010

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APPEALED FROM THE
TWENTY-FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF TANGIPAHOA
STATE OF LOUISIANA
DOCKET NUMBER 2009-0000252, DIVISION G

THE HONORABLE ERNEST G. DRAKE, JR., JUDGE

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David L. Browne New Orleans, Louisiana and J. Parker Layrisson Ponchatoula, Louisiana	Attorneys for Plaintiffs/Appellants Carli Long and Andrew Hollie
Vance A. Gibbs Randal R. Cangelosi Baton Rouge, Louisiana	Attorneys for Defendant/Appellee William G. Black, M.D.
Ashley E. Sandage Shaan M. Aucoin Hammond, Louisiana	Attorneys for Defendants/Appellees North Oaks Medical Center and Michael R. Christner, M.D.

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

KUHN, J CONCURS AND WILL ASSIGN REASONS

McDONALD, J.

On September 27, 2006, Carli Long was injured in an automobile accident and sent to North Oaks Medical Center, where she was treated in the emergency room (ER) by Dr. Michael R. Christner. Ms. Long, who was seven months pregnant, had been pinned in her vehicle and was ultimately diagnosed with a hip fracture. Ms. Long's obstetrician and gynecologist was Dr. Charles Berry. Dr. Christner consulted by phone with Dr. Berry's partner, Dr. William G. Black, during her stay in the ER.[1] At 5:06 p.m. an ER nurse caring for Ms. Long charted a fetal heart rate of 120. However, when Ms. Long was admitted to the obstetrics unit at 7:30 p.m. and placed on a fetal heart monitor, no fetal heart rate could be detected. Ms. Long then underwent a cesarean section to deliver the stillborn child.

Ms. Long and Andrew Hollie, the father of the unborn child, filed a complaint with the Patients' Compensation Fund through the Division of Administration, asserting that the health care providers' treatment of their unborn child was below the standard of care. The Medical Review Panel rendered a decision, finding that Dr. Black complied with the standard of care in his treatment of the unborn child.[2] Thereafter, Ms. Long and Mr. Hollie filed suit against the North Oaks Medical Center, Dr. Christner, and Dr. Black, asserting a medical malpractice claim against them for their failure to recognize that Ms. Long's unborn child was in distress following the automobile accident. Ms. Long and Mr. Hollie asserted negligence and wrongful death claims for themselves, as well as a survival action on behalf of their unborn child.

North Oaks Medical Center and Dr. Christner filed a peremptory exception raising the objection of no cause of action for the survival action asserted on behalf

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[1] Apparently Dr. Black was the physician on call for the practice that afternoon.

[2] The record does not reveal a Medical Review Panel finding as to North Oaks Medical Center and Dr. Christner.

of the unborn child. Dr. Black also filed a peremptory exception raising the objection of no cause of action for the survival action asserted on behalf of the unborn child. The district court granted the exceptions raising the objections of no cause of action for the survival action. The district court rendered judgment dismissing the claim for the survival action against North Oaks Medical Center and Dr. Christner, and rendered another judgment dismissing the claim for the survival action against Dr. Black. Ms. Long and Mr. Hollie are appealing those two judgments.

Louisiana law clearly does not allow a survival action on behalf of a stillborn fetus. Louisiana Civil Code article 26 provides:

> An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception. If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death.

The issue is squarely addressed further in **Wartelle v. Women's and Children's Hospital, Inc.**, 97-0744 (La. 12/2/97), 704 So.2d 778, which states:

> Our jurisprudence has recognized that the fetus can acquire a cause of action in utero contemporaneous with its tortious injury. However, the cause of action can be pursued only *if* the fetus is subsequently born alive.
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> A survival action for damages suffered by a stillborn fetus clearly does not fit within this first exception to the general rule because the stillborn fetus, even though it may have provisionally acquired an action in utero, is not born alive. Because it is born dead, it is as though it had never existed and the cause of action it acquired conditioned on live birth is considered as never having been acquired. A survival action is based on the victim's right to recovery being transferred upon the victim's death to the beneficiary. **Taylor v. Giddens**, 92-3054 (La. 5/24/93), 618 So.2d 834. The stillborn fetus cannot transmit any rights, because under the law it acquires none.

Wartelle, 704 So.2d at 781 (footnotes omitted).

Thus, for the foregoing reasons, the trial court judgments granting the exceptions raising the objection of no cause of action for the survival action are affirmed. Costs are assessed against Ms. Long and Mr. Hollie.

AFFIRMED.

ORIGINAL

Kuhn, J., concurring.

More than two decades ago, the Louisiana legislature enacted La. C.C. art. 26, addressing the legal status of the unborn child. Because our state constitution's provisions are not grants of power, but instead are limitations on the otherwise plenary power of the people of the state, exercised through the legislature, our state legislature may enact any legislation that our state constitution does not prohibit. **In re State ex rel. A.J.,** 09-0477 (La. 12/1/09), 27 So.3d 247, 266. Thus, in this instance, I do not write to challenge the authority of the legislature in enacting La. C.C. art. 26, but to express my concerns regarding the manner in which this legislation addresses the unborn child. In particular, the legislative pronouncement that a "child ... born dead ... shall be considered *never to have existed as a person* ..." is offensive to matters of conscience.[1] See La. C.C. art. 26. (Emphasis added.)

In ***Wartelle v. Women's and Children's Hosp., Inc.***, 97-0744 (La. 12/2/97), 704 So.2d 778, 780, the supreme court sanctioned the terminology employed in Article 26, stating that "person" is employed in a technical sense:

> The Louisiana Civil Code's refusal to accord unconditional legal personality to a fetus before live birth constitutes no moral or philosophical judgment on the value of the fetus, nor any comment on its essential humanity. Rather, the classification of "person" is made solely for the purpose of facilitating determinations about the attachment of legal rights and duties. "Person" is a term of art, as

[1] Conscience is an interior faculty that guides our moral judgments. See John H. Garvey and Amy V. Coney, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303, 323 (1998). *See also* Black's Law Dictionary 303 (6th ed. 1990), which defines "conscience" in pertinent part as "[t]he sense of right and wrong inherent in every person by virtue of his existence as a social entity ...." In law, especially the moral rule which requires probity, justice, and honest dealing between man and man ...."

explained in A.N. Yiannopoulos, *Louisiana Civil Law Systems* § 48 (1977):

> According to the Romanist tradition, rights and duties attach to, or are conferred by law upon, "persons." Civilian terminology thus employs the word person in a technical sense to signify a subject of rights or duties.

Despite this rationale, I am guided and compelled by my conscience to express that statutory law cannot be separated from concepts of natural law and should not "ignore the principles of natural ethics" rooted in the nature of the human person.[2] I reject the legal fiction that "personhood depends on recognition by the law."[3] The democratic structures of our political system "would be quite

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[2] Congregation for the Doctrine of the Faith, Doctrinal Note on some questions regarding The Participation of Catholics in Political Life (2002), ¶ 2 available at http://www.vatican.va/roman_tions/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html.

[3] Noonan, *The Root and Branch of Roe v. Wade*, 63 Neb. L. Rev. 668 (1984), cites the point of view of H. Kelsen, *The Pure Theory of Law* 95 (M. Knight trans. 2nd ed. 1967), in relation to his discussion of abortion decisions, which he regards as stemming from the view that whether or not an entity is a person is a matter of law:

> Whoever has the power to define the bearer of constitutional rights has a power that can make nonsense of any particular constitutional right. That this power belongs to the state itself is a point of view associated in jurisprudence with Hans Kelsen. According to Kelsen a person is simply a construct of the law....
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> ...
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> There is one massive phenomenon in the history of our country that might be invoked to support Kelsen's point of view. That phenomenon is the way a very large class of human beings were treated prior to the enactment of the thirteenth and fourteenth amendments. When one looks back at the history of 200 years of slavery in the United States, and looks back at it as a lawyer observing that lawyers had a great deal to do with the classifications that made the phenomenon possible, one realizes that the law, in fact, has been used to create legal rights and legal duties in relation to human behavior that should never have been given a legal form and a legal blessing. To put it bluntly, law was the medium and lawyers were the agents responsible for turning one class of human beings into property....
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> Gross characterization of human beings in terms that reduced them to animals, or real estate, or even kitchen utensils now may seem so unbelievable that we all can profess shock and amazement that it was ever done. Eminently respectable lawyers were able to engage in this kind of characterization – among them Thomas Jefferson, who co-authored the slave code of Virginia, and Abraham Lincoln who argued on behalf of a slave owner seeking to recover as his property a woman and her four children who had escaped to the free state of Illinois. Looking at such familiar examples and realizing how commonplace it was for lawyers to engage in this kind of fiction, we learn, I think, that law can operate as a kind of magic. All that is necessary is to permit legal legerdemain to create a mask obliterating the human person being dealt with. Looking at the mask – that is looking at the abstract category created by the law – is not to see the human reality on which the mask is imposed.

Id. at 668-69. (Footnotes omitted.)

fragile were its foundation not the centrality of the human person."[4] From the first moment of existence, a human being must be recognized as a person. Otherwise, what is a fetus? "A nonentity, a nothing, a mass of lifeless matter ...[?]"[5] ***Danos v. St. Pierre***, 383 So.2d 1019, 1031 (La. App. 1st Cir. 1980) (Lottinger, J., concurring in the court's holding that a mother and father of a stillborn child could recover damages for the wrongful death of a fetus), ***affirmed***, 402 So.2d 633 (La. 1981)(on rehearing). By providing that a "child ... born dead ... shall be considered never to have existed as a person ...," the legislature ignores these fundamental principles, resulting in "an attack on the inviolable dignity of human life."[6] The legislature could have otherwise limited the rights of recovery attributable to unborn children without denying their existence.

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[4] Congregation for the Doctrine of the Faith, Doctrinal Note on some questions regarding The Participation of Catholics in Political Life at ¶ 3.

[5] *See also* La. R.S. 14:2(7), defining "person" as including "a human being from the moment of fertilization and implantation and also includes a body of persons, whether incorporated or not."

[6] See Gregory A. Kalscheur, S.J., *Catholics in Public Life: Judges, Legislators, and Voters*, 46 J. Cath. Legal Stud. 211, 224.