

Legislative Analysis



WRONGFUL DEATH STATUTE: CLARIFY APPLICATION TO THE UNBORN

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House Bill 4777 (Substitute H-1)
Sponsor: Rep. William Van Regenmorter
Committee: Judiciary

First Analysis (10-24-05)

BRIEF SUMMARY: The bill would amend the provision allowing a civil action for a wrongful death to include a reference to the provision allowing an action for conduct against a pregnant woman that results in a miscarriage or stillbirth or physical injury or death of the embryo or fetus.

FISCAL IMPACT: The bill would have no significant fiscal impact on the courts.

THE APPARENT PROBLEM:

When a person dies as a result of another party's negligence or wrongdoing, the deceased's relatives may sue that party for damages in a wrongful death action. Prior to 1998, the Michigan law did not specifically speak to the right of an individual to sue if the death in question was that of the unborn. Historically, lawsuits through the years went back and forth, sometimes applying regardless of gestational age, then more recently, being limited to instances in which the fetus was viable. Legislation in 1998 sought to settle the question by establishing both civil liability and criminal penalties for conduct against a pregnant woman that caused a miscarriage or stillbirth or that caused physical injury to the embryo or fetus (Public Act 211 – civil and Public Act 238 – criminal).

The language establishing the civil penalty was placed in a separate section (MCL 600.2922a) from the existing wrongful death provision (MCL 600.2922) as a compromise between pro-life and pro-choice advocates. Since Section 2922 specifies a right to recover damages for the wrongful death of a "person", pro-choice advocates voiced a concern that including conduct against a pregnant woman in that section would, by association, attach "personhood" to a fetus or embryo and subsequently could be used to attack laws protecting reproductive rights.

Many thought the 1998 legislation was clear, but a 2000 Oakland County case proved otherwise. The Oakland County Circuit Court ruled that a man who had killed his pregnant wife could not be charged with the death of his wife's embryo because his actions did not "technically" result in either a miscarriage or a stillbirth as the embryo was not expelled from the wife's body. As a result, Public Act 2 of 2001 and Public Act 164 of 2002 were enacted to amend the Michigan Penal Code and the wrongful death statute, respectively, to extend the criminal and civil penalties to conduct causing the death of an embryo or fetus. It was believed at the time that Public Act 164 closed the

loophole in the wrongful death statute and so would apply to all situations in which conduct toward a pregnant woman resulted in the death of the embryo or fetus she carried.

However, in subsequent civil actions, courts around the state have apparently only looked at Section 2922 of the wrongful death statute and not Section 2922a. Most notably, in *McClain v University of Michigan Board of Regents*, 256 Mich App 492 (2003), the court held that "under Michigan law, an action for wrongful death, MCL 600.2922, cannot be brought on behalf of a nonviable fetus, because a nonviable fetus is not a 'person' within the meaning of the wrongful-death act."

Once again, it has become clear that legislation is needed to clarify the legislature's intent of providing a cause of action for the wrongful death of not only a person, but also an embryo or fetus.

THE CONTENT OF THE BILL:

House Bill 4777 would amend the portion of the Revised Judicature Act known as the wrongful death provision (MCL 600.2922) to clarify that the right to sue for a wrongful death also applies if the act committed by the liable party resulted in a death described in Section 2922a.

Section 2922a of the RJA provides that a person who committed a wrongful or negligent act against a pregnant woman is liable for damages if the act resulted in a miscarriage or stillbirth by that woman or physical injury to or the death of the embryo or fetus. The liability provision does not apply to any of the following:

- ** An act committed by the pregnant woman.
- **The lawful dispensation, administration, or prescription of medication.
- **A medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the consent of a person who may lawfully provide consent on her behalf, or without consent as required by a medical emergency.

ARGUMENTS:

For:

The bill is needed to clarify that the intent of legislation enacted in 1998 and amended in 2002 (MCL 600.2922a) was to create a cause of action in which a person could recover damages if conduct of another against a pregnant woman (i.e., through assault, gross negligence, or drunk or reckless driving) caused a miscarriage or stillbirth or caused physical injury to or the death of the embryo or fetus. Over the past few years, several civil actions involving the death of a nonviable embryo or fetus have been dismissed by the courts for failing to present a case for which damages can be recovered. Apparently, the courts only looked at Section 2922 of the Revised Judicature Act, known as the wrongful death statute, which applies the provision to a "person". Since a nonviable embryo or fetus is not considered to be a person, for purposes of a wrongful death, the

suits were dismissed or the courts found in favor for the defendants. Had the courts examined Section 2922a, it should have been clear that depending on the particulars of a case, a person can be held liable for an act causing the death of a pregnant woman's fetus or embryo. Since the term "embryo" generally refers to the first weeks or months of a pregnancy, viability should not be an issue in determining if a cause of action exists.

The bill would address the problem by including in the wrongful death provision a reference to deaths described in Section 2922a. As a result, the two provisions would be clearly linked and Section 2922a less likely to be overlooked.

POSITIONS:

Right to Life of Michigan supports the bill. (10-12-05)

The law firm of Buchanan & Beckering submitted written testimony in support of the bill. (10-10-05)

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