PA Superior Court Panel Declares Statute Prohibiting Wrongful Birth And Wrongful Life Claims Unconstitutional

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A three-judge panel of the Superior Court ruled in Sernowitz v. Dershaw (November 14, 2012) that the statute [42 Pa.C.S.A. § 8305] which prohibits causes of action for wrongful birth and wrongful life is unconstitutional. The holding is not based upon a finding that the prohibition of such causes of action is unconstitutional. In fact, the statute had previously withstood a substantive constitutional challenge in 1994. Rather, the decision is based totally on a legislative technicality in Article III, Section 3 of the Pennsylvania Constitution which requires that a bill passed by the Pennsylvania Legislature relate to only one subject. The statute was added to a bill in the amendment process and several different provisions that resulted from the legislative process were deemed not to be related to one subject, and thus, violated the single subject requirement. The bill in question, SB 646 of 1987, was first introduced containing one provision regarding the appointment of substitute bail commissioners in Philadelphia. In the legislative process, several amendments were added including provisions for sentences for impersonating a police officer, a provision regarding direct appeals to the Supreme Court from the Court of Common Pleas, a provision limiting defenses available for a claim of in utero injury, and the provision precluding wrongful life and wrongful birth actions.

SERNOVITZ RESULTS IN A RETURN TO COMMON LAW

Assuming this decision is not reversed, the law on wrongful life and wrongful birth in Pennsylvania reverts to that stated in Supreme Court decisions in 1984 and 1986. The “Concurring Statement” of Judge Ford Elliott states, “a cause of action for ‘wrongful life’ has never been recognized as a legally cognizable cause of action in this Commonwealth,” but “wrongful life” refers only to the assertion of a cause of action by a child for damages resulting from his or her disabilities. Judge Ford Elliot cited two cases: Speck v. Finegold and Ellis v. Sherman which articulate the pre-statutory law relating to such claims. One could not create a factual situation more compelling for the ruling in Speck. Mr. Speck had a crippling form of a hereditary disease, neurofibromatosis, and after the Specks had two children who were born with the disease, he chose to be sterilized and underwent a vasectomy which proved to be unsuccessful in preventing a pregnancy. His wife then underwent an abortion which was also unsuccessful. The Superior Court ruled that wrongful life (the child’s claim) was not legally cognizable, that under the wrongful birth (the parents’) claim, the parents could recover for pecuniary expenses which they had bourn and would continue to bear for the child’s care, but they could not recover for the “emotional disturbances and general distress allegedly due to the fact of the infant’s birth.” The Supreme Court held that both wrongful birth claims were recoverable. Since the Court was evenly divided on the issue of “wrongful life,” the Superior Court’s holding that the child’s claim was not legally cognizable prevailed.

In Ellis, both the Superior Court and Supreme Court, in 1984 and 1986 respectively, held that the child’s cause of action (wrongful life) was not legally cognizable. The only issue on appeal was the dismissal of the child’s cause of action. The
lower court had not dismissed the parents’ claim for emotional damages arising out of the birth of the child they would have not conceived or would have aborted had the father’s genetic disease been diagnosed. There is a statement offered in Ellis by the opinion’s author, Justice Flaherty, that “[t]he parents’ right of action is not at issue in this case, and if they are able to establish their claim, they will recover not only for their mental anguish but also for expenses related to the birth and care of their child.”

There is a factual distinction between Speck and Ellis. While in Speck, medical procedures performed for the specific purpose of preventing pregnancy and terminating the specific pregnancy failed, the claims in Ellis were that the physicians who had treated Mr. Ellis’ skin condition negligently failed to advise him that his skin condition was caused by neurofibromatosis and could be genetically transmitted. Additionally, after receiving a history that her husband suffered from a skin condition, Mrs. Ellis’ obstetricians negligently failed to inquire further to discover the nature of the disease and whether it might be harmful to a child born to the couple. The Ellis’ contended that had they been properly informed of the risk of “bearing a diseased child, they would have aborted the fetus.” Justice Flaherty’s statement in Ellis supports the position that parents may pursue a wrongful life claim when they contend that the negligence of physicians deprived them of information which would have caused them to prevent or terminate a pregnancy, and is not limited to only those situations when medical procedures to prevent pregnancy or to abort a pregnancy fail. Justice Flaherty’s statement does, however, constitute dicta as it was not related to the issue before the Court or relevant to its holding. There is no opinion on the precise issue which would preclude arguing that the wrongful birth cause of action recognized in Speck and now resurrected as a result of Sernovitz should not extend beyond the situation where medical treatment provided with the intention of preventing pregnancy or terminating a pregnancy failed. It appears that any wrongful birth actions to be filed after Sernovitz will nevertheless have to be initiated within two years of the birth.

**SERNOVITZ IS PENDING ON APPEAL**

The Sernovitz defendants are filing an Application to the Superior Court for Reargument/Reconsideration. The Superior Court holding is the law of Pennsylvania unless it is overturned by a Superior Court en banc decision (a decision by the full court after granting an application for reargument) or a Supreme Court decision on appeal from the Superior Court. In Sernovitz, the Superior Court referred to Commonwealth v. Neiman, in which Judge Ford Elliot had previously written the Superior Court’s en banc opinion holding that a statute relating to Megan’s law was unconstitutional as its passage also violated the “single-subject” provision. The bill in question began as an amendment to the Deficiency Judgment Act. It was modified in the process to include an amendment of the Landlord Tenant Act of 1951 (later deleted), and minor additions and changes to the Municipal Police Education and Training law. The provisions relating to Megan’s law were added in the bill’s fifth revision. The Neiman case is now on appeal to the Supreme Court and oral argument was held in September 2012. The Supreme Court decision in Neiman will likely indicate how the full Superior Court or the Supreme Court will rule on an appeal in Sernovitz because the bills in question both relate to a similar variety of issues, and unless the decision in Neiman is closely divided, it is difficult to envision the Supreme Court reaching a different decision in Sernovitz. The appeal by the Sernovitz defendants should “keep the balls in the air” long enough for the Supreme Court to announce its decision in Neiman and, in the meantime, the Pennsylvania Legislature could reenact the statute precluding wrongful life and wrongful birth causes of action.

At least for the near term, the law on the viability of wrongful life and wrongful birth will revert to the Speck v. Feingold decision and after a twenty-five year legislative ban, wrongful birth actions will return to the civil judicial system.
For more information regarding this alert, please contact Peter Samson (215.864.7198 / samsonp@whiteandwilliams.com).

[1] Mr. Samson has successfully defended wrongful life and wrongful birth claims in Pennsylvania and New Jersey.

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