IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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LEAH CASTRO, individually and as PERSONAL REPRESENTATIVE of the ESTATE OF BRIANDALYNNE CASTRO, deceased minor, Respondent/Plaintiff-Appellee,

vs.

LEROY MELCHOR, in his official capacity; WANNA BHALANG, in her official capacity; TOMI BRADLEY, in her official capacity; STATE OF HAWAIʻI; and HAWAIʻI DEPARTMENT OF PUBLIC SAFETY, Petitioners/Defendants-Appellants,

and

AMY YASUNAGA, in her official capacity; ROBERTA MARKS, in her official capacity; KENNETH ZIENKIEWICZ, M.D., in his official capacity; and KEITH WAKABAYASHI, in his official capacity, Respondents/Defendants-Appellees.

SCWC-12-0000753

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-12-0000753; CIV. NO. 08-1-0901)

MARCH 13, 2018

CONCURRING OPINION BY NAKAYAMA, J.

The Intermediate Court of Appeals (ICA) held that "a claim may be brought pursuant to [Hawaiʻi Revised Statutes (HRS)]

§ 663-3 for the death of a viable, unborn fetus." Castro v. Melchor, 137 Hawaiʻi 179, 191, 366 P.3d 1058, 1070 (App. 2016). On certiorari, neither party challenged the ICA's holding on this point. Accordingly, for this procedural reason alone, I agree with the Chief Justice insofar as he does not address the ICA's holding that a wrongful death claim may be brought on behalf of a stillborn fetus that was viable before death, and affirms the ICA's holding on the matter. Additionally, I believe that Justice McKenna should not have addressed the ICA's holding on this point on the merits. Therefore, inasmuch as I am constrained in affirming the ICA's decision with respect to its interpretation of HRS § 663-3, I am compelled to join the Chief Justice in affirming the ICA's judgment on appeal.

However, I write separately to clarify and explain that had the issue of whether a wrongful death claim may be brought on behalf of a stillborn fetus been properly raised for our consideration on certiorari, I would have reversed the ICA's holding and held that an unborn, viable fetus is not a "person" within the meaning of HRS § 663-3. For compelling policy reasons, I believe that the death of an unborn, viable fetus should not give rise to a cause of action under HRS § 663-3. Thus, I would have held that the estate of an unborn, viable fetus should not be able to recover hedonic damages under HRS §

663-7 because, in my view, no cause of action arising out of HRS § 663-3 should survive in favor of the fetus's estate.

I. DISCUSSION

A. Because the issue of whether an unborn, viable fetus is a "person" within the meaning of HRS § 663-3 was not properly raised on certiorari, the issue should not be considered on the merits, and the ICA's decision should be affirmed.

Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 40.1(d)(1) (2015) states, in relevant part:

> (d) Contents. The application for a writ of certiorari . . . shall contain . . . (1) A short and concise statement of the questions presented for decision, set forth in the most general terms possible. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Questions not presented according to this paragraph will be disregarded. The supreme court, at its option, may notice a plain error not presented.

(Emphasis added.)

In their application for writ of certiorari, Petitioners do not present any questions as to whether the ICA properly concluded that a wrongful death claim may be brought on behalf of a stillborn fetus, which was viable prior to death. Additionally, Respondent does not raise any questions with respect to the ICA's holding on the matter in her response to Petitioners' application. Accordingly, this issue is not before this court on certiorari. See HRAP Rule 40.1(d). Thus, I believe that the issue should not be addressed on the merits, and that the ICA's holding on this point should be affirmed on this

procedural basis alone.

Notwithstanding the foregoing, Justice McKenna addresses the issue of whether an unborn, viable person is a "person" under HRS § 663-3 on the merits because, in her view, the issue may be properly addressed as a "'subsidiary question fairly comprised' within [Petitioners'] question on certiorari as to whether hedonic damages were properly awarded to the estate of the stillborn fetus." Opinion of McKenna, J., at 10 (quoting HRAP Rule 40.1(d)). Justice McKenna asserts that because "this court need address the specific questions on certiorari only if a viable yet stillborn fetus is a 'person' for purposes of HRS § 663-3," the ICA "addressed the threshold question in extensive detail before affirming [the Circuit Court of the First Circuit's (circuit court)] damage award," and because the question presents an important matter of first impression, this court can and should address the issue on the merits. Opinion of McKenna, J., at 14.

While I agree with Justice McKenna that we have the authority to consider the issue as a threshold issue under HRAP Rule 40.1(d), see Opinion of McKenna, J., at 10, I believe that upon consideration of the principles underlying our adversary system, and our role as a neutral arbiter therein, our discretionary authority should be used sparingly in circumstances

where the interests of justice demand us to consider questions that the parties have not presented.

A fundamental underpinning of the adversary system is "the principle of party presentation." Greenlaw v. United States, 554 U.S. 237, 243 (2008). Under the principle of party presentation, courts "rely on the parties to frame the issues for decision" and are "assign[ed] . . . the role of neutral arbiter of matters the parties present." Id. Put differently, the adversary system is "designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." Id. at 244 (quoting Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring)). Consequently, courts generally hesitate to consider issues not raised by the parties "both because our system assumes and depends upon the assistance of counsel, and because of the unfairness of such a practice to the other party." United States v. Pryce, 938 F.2d 1343, 1353 (D.C. Cir. 1991) (Silberman, J., dissenting) (citations omitted).

A decision by this court to employ its authority to consider questions other than those presented by the parties contravenes the foregoing bedrock principles upon which the adversary system rests. Therefore, in my view, a departure from these key values is warranted only in cases where the interests

of justice require such action.

Based on its specific facts and circumstances, this case does not appear to be one in which the exercise of such authority is appropriate. Here, both parties fully briefed whether an unborn, viable fetus is a "person" under HRS § 663-3 before the circuit court and the ICA. In their application for writ of certiorari, Petitioners do not challenge the ICA's holding that an unborn, viable fetus is a "person" within the meaning of HRS § 663-3. In their response, Respondents do not reignite the conflict or otherwise request this court to resolve the issue on the merits. Furthermore, at oral argument, Petitioners made clear that they did not intend for this issue to be a part of their case on certiorari. At oral argument, Petitioners averred that while the issue was briefed fully before the circuit court and the ICA, they did not believe that their arguments on the matter were part of their case on certiorari because they had deliberately chosen not to challenge the ICA's interpretation of HRS § 663-3. Oral Argument at 3:27-3:36, 4:24-4:41, Castro v. Melchor, SCWC-12-0000753, http://oaoa.hawaii.gov/jud/oa/16/SCOA_090116_SCWC_12_753.mp3. In light of the foregoing, I do not believe that this court should exercise its authority to consider the issue on the merits when it was not raised by either party on certiorari.

Therefore, for procedural reasons alone, I agree with the Chief Justice to the extent that, in declining to address the issue, the Chief Justice effectively affirms the ICA's holding that a wrongful death claim can be brought on behalf of a stillborn fetus that was viable before its death. Although I agree with Justice McKenna that this court has the discretionary authority to consider the issue despite the fact that the parties did not raise it on certiorari, I do not believe that the circumstances in this case justify exercising such authority.

B. The estate of an unborn, viable fetus should not be able to recover hedonic damages under HRS § 663-7 because a cause of action under HRS § 663-3 should not exist for the stillbirth of a fetus that was viable before death.

The ICA held that a cause of action exists for the death of an unborn, viable fetus under HRS § 663-3. Castro, 137 Hawaiʻi at 191, 366 P.3d at 1070. As discussed in section II.A, supra, I am constrained in affirming the ICA's holding on this point for procedural reasons. However, had the parties properly challenged the ICA's interpretation of HRS § 663-3 on certiorari, I would have reversed the ICA's holding on this point, as I believe its decision is unwise for two reasons.

First, the ICA's conclusion results in inconsistent standards whereby an unborn fetus is deemed to be a "person" under our civil statutes, but is not a "person" under our penal code. In my view, whether an unborn fetus may be considered a

"person" should not vary between statutory frameworks. As this case illustrates, whether an unborn fetus is viewed as a "person" in the eyes of the law determines not only the legal rights that the fetus is entitled to, but also the legal duties and responsibilities that all other individuals in society owe to the unborn fetus. Put simply, the legal definition of whether an unborn fetus is a "person" structures the basic legal relationships between the unborn fetus and all other persons in our community. A definition with such significant, fundamental consequences should be consistent across the board and should not fluctuate from statute to statute.

Second, the ICA's holding ventures into uncertain and treacherous territory and may be difficult for courts to apply consistently in the future. Under the ICA's holding, whether the estate of a stillborn fetus may bring a cause of action for wrongful death under HRS § 663-3 hinges upon whether the fetus was viable before death. See Castro, 137 Hawaiʻi at 191, 366 P.3d at 1070 ("[W]e hold that a claim may be brought pursuant to HRS § 663-3 for the death of a viable, unborn fetus." (emphasis added)). However, the concept of a fetus's viability and the determination thereof are both vastly problematic. On this issue, the Supreme Court of the United States has stated:

> [A] physician determines whether or not a fetus is viable after considering a number of variables: the

> gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors. Because of the number and the imprecision of these variables, the probability of any particular fetus'[s] obtaining meaningful life outside the womb can be determined only with difficulty. Moreover . . . even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all. In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability.

Colautti v. Franklin, 439 U.S. 379, 395-96 (1979) (footnotes omitted). In other words:

> [R]ather than being a description of an existing state of facts, the conclusion that a fetus is viable is really more of a medical prediction--often a highly disputable prediction--concerning what might happen to a fetus if you radically change its location. There is no clear distinguishing feature that separates viable fetuses from previable fetuses. Different doctors might classify the same fetus as viable or nonviable, perhaps for reasons having nothing to do with the fetus itself, but arising instead from differences in medical skill or treatment philosophy.

Randy Beck, State Interests and the Duration of Abortion Rights, 44 McGeorge L. Rev. 31, 37 (2013) (footnotes omitted). It follows that under the ICA's holding, a complex medical inquiry fraught with uncertainty determines whether a cause of action may be brought for the death of an unborn fetus under HRS § 663-3. From my perspective, the existence of a wrongful death claim, which may have significant financial and personal consequences for all parties involved, should not depend on an analysis that

has a substantial likelihood of yielding arbitrary results.

Accordingly, I believe that the ICA's recognition of a cause of action for the wrongful death of an unborn, viable fetus is ill-advised. Thus, had the issue been properly presented for our consideration on certiorari, I would have held that unborn fetuses should not be included as "person[s]" under HRS § 663-3, and thereby adopt a clear principle of consistent application, which parallels the existing rule in our penal code.

Therefore, I would have concluded that a cause of action does not exist for the stillbirth of an unborn, viable fetus under HRS § 663-3, such that the fetus's estate retains no cause of action arising out of the fetus's stillbirth under HRS § 663-7. See Green v. Texeira, 54 Haw. 231, 235, 505 P.2d 1169, 1172 (1973) ("Under HRS § 663-7 there survives in favor of the decedent's legal representative only such cause of action as the decedent himself [or herself] had at the moment of his [or her] death."). Based upon this premise, I would have concluded that the estate of an unborn fetus should not be able to recover hedonic damages under HRS § 663-7.

II. CONCLUSION

Therefore, for procedural reasons, I agree with the Chief Justice's opinion to the extent that he does not address the issue of whether the stillbirth of a previously viable fetus

gives rise to a cause of action under HRS § 663-3 on the merits, and affirms the ICA's holding on this matter. As I am constrained in affirming the ICA's holding with respect to its interpretation of HRS § 663-3, I am compelled to join the Chief Justice in affirming the ICA's judgment on appeal. I therefore concur with the result that he reaches, but not the reasoning that he employs.

To be clear, however, had the ICA's interpretation of HRS § 663-3 been properly raised for our consideration on certiorari, I would have held that an unborn, viable fetus is not a "person" within the meaning of HRS § 663-3, and that no cause of action survives in favor of the fetus's estate under HRS § 663-7. Accordingly, I would have concluded that the estate of an unborn, viable fetus should not be able to recover hedonic damages under HRS § 663-7.

/s/ Paula A. Nakayama