District Court, Eleventh Judicial District Fremont County, State of Colorado 136 Justice Center Road, Room 103 Canon City, CO 81212 Telephone: (719) 269-0100	
JEREMY L. STODGHILL, individually and as parent, guardian and next friend of **ELIZABETH STODGHILL,** a minor child, Plaintiffs, v. **JOHN BARRY PELNER, M.D.,** **CATHOLIC HEALTH INITIATIVES COLORADO d/b/a SAINT THOMAS MORE HOSPITAL**, and **PELHAM PORTER STAPLES, III, M.D.**, Defendants.	▲ **COURT USE ONLY** ▲ Case Number: 07CV522 Division 1, Courtroom 302

AMENDED ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS HOSPITAL AND DR. PELNER ON ALL CLAIMS AND FOR DEFENDANT STAPLES REGARDING LIABILITY FOR DEATH OF TWIN FETUSES AND CERTIFYING FINAL JUDGMENT UNDER RULE 54(b)

THIS MATTER is before the Court on the pending motions for summary judgment of the defendants, and the Court having reviewed the motions, responses and replies, as well as the supporting summary judgment evidence, finds and concludes as follows:

In this wrongful death action, the plaintiff, Jeremy L. Stodghill, seeks to recover damages for himself and his minor daughter, Elizabeth, resulting from the death of his wife and Elizabeth's mother, Lori Stodghill. He also seeks recovery for himself resulting from the death of his wife's twin fetuses. It is undisputed that shortly after arriving at Saint Thomas More Hospital (the hospital) on January 1, 2006, Lori Stodghill stopped breathing and went into cardiac arrest. After unsuccessful resuscitation efforts, she died. It was confirmed upon autopsy that Mrs. Stodghill had died of pulmonary emboli completely occluding (blocking) the pulmonary arteries as well as smaller segmental arteries. At the time of her death, Mrs. Stodghill was pregnant with twin fetuses. The fetuses were not born nor delivered by caesarian section prior to their deaths.

Wrongful Death of Fetuses

The defendants move for summary judgment on the grounds that a 'person' as that term is used in the wrongful death statute does not include a fetus which was not born or delivered alive. The Colorado Wrongful Death Act provides that:

> When the death of a *person* is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured.

[Emphasis added] § 13-21-202, C.R.S.

The defendants argue that to be a 'person' one must at some point have been born alive. The plaintiffs, on the other hand, argue that a viable fetus who dies in utero should be considered a 'person' for purposes of the wrongful death statute. The parties have ably briefed this issue. The Court finds the defendants' arguments most persuasive. The Court will not reiterate all of the defendants' arguments and authorities here. Suffice it to say that no Colorado appellate decision has held that a fetus which died in utero, whether or not viable, is a 'person' as that term is used in the Colorado wrongful death statute. The two Colorado appellate cases dealing with wrongful death claims based upon injuries sustained by a fetus in utero, although not specifically on point, are both consistent with the defendants' construction of the statute. In *Gonzales v. Mascarenas*, 190 P.3d 826, 830 (Colo. App. 2008), the Court of Appeals held that "a child who is *born alive* and subsequently dies is a person within the meaning of our wrongful death statute, and a wrongful death action can be maintained regardless of whether the child was viable at the time of the injury or whether the child was viable at the time of birth." [Emphasis added]. *See also, Pizza Hut of America, Inc. v. Keefe*, 900 P.2d 97, 101 (Colo. 1995) ("If a child *dies after birth* as a result of prenatal injuries, a surviving parent may bring a wrongful death claim derived from the child's injuries.") [Emphasis added].

Because the Colorado Wrongful Death Act is in derogation of common law, it must be strictly construed. *Martin v. Cuellar,* 131 Colo. 117, 120, 279 P.2d 843, 844 (Colo. 1955). The term 'person' is not expressly defined in the wrongful death statute itself. In the criminal context, however, when referring to the victim of a homicide, 'person' has been legislatively defined "as a human being who had been born and was alive at the time of the homicidal act." § 18-3-101(2), C.R.S. When construing the term 'person' in the context of other criminal statutes where it was not expressly defined, the Court of Appeals defined the terms 'child' and 'person' to " include a fetus injured in the womb, born alive, and who subsequently dies of the injuries . . ." *People v. Lage,* 232 P.3d 138, 142 -143 (Colo. App. 2009).[1] The common thread

[1] In *Lage*, the majority declined to apply the definition of "person" found in the homicide statute to the non-homicide statutes at issue in that case criminalizing or enhancing criminal penalties for fetal injuries, finding the statutory construction rule of *in pari materia* inapplicable. However, as a practical matter, the only portion of the homicide statute's definition the majority rejected was the additional requirement that after being born alive, a human being must have been alive at the time of the homicidal act.

found in the statutory definition applicable to homicides, as well as the above Colorado appellate decisions construing the term 'person' in statutes imposing either criminal or civil liability where that term is not expressly defined, is the requirement that a fetus must be born alive to fall within the definition of a 'person.'

The Court also concurs with the decision in *Castillo v. Stringfellow*, No. 02CV2256, 2006 WL 6222993 (El Paso County Dist. Ct. March 7, 2006),[2] and the Restatement (Second) of Torts § 869 (1979).

The plaintiffs raise a weighty argument that the courts in three out of four states have extended similar wrongful death statutes to cover viable fetuses that die in utero. If it were up to a vote of the state supreme courts to determine Colorado law, the plaintiffs might well prevail. Each of those states, however, has its own wrongful death statute and its own lengthy history under its respective statute.

The Colorado general assembly is and has been free to extend the scope of the wrongful death statute to causes of action on behalf of unborn fetuses, viable or not. To date, it has chosen not to do so. The legislature is the appropriate place to debate and consider whether persons who have lost an unborn fetus should be able to recover and whether potential tortfeasors and their insurers should be held accountable financially for such losses. The legislature is the appropriate place to debate such issues and make social policy in a deliberate manner rather than in the context of isolated, anecdotal and perhaps sympathetic cases that might redirect concern from the broader issues. The legislature is the appropriate place to debate and consider whether to draw the line at birth, viability, conception or some other benchmark, including consideration of the amount of litigation that might arise because of the difficulty for the parties to establish that they have met whatever benchmark is chosen. Until the legislature does so, the wrongful death statute continues to apply only to actions for the death of a person, meaning one who has been born alive.

Given the foregoing, the Court concludes that a fetus injured prenatally must be born alive in order to be a "person" as that term is used in the Colorado Wrongful Death Act. Because is it undisputed that Lori Stodghill's fetuses were not born alive, the defendants are entitled to summary judgment on Jeremy Stodghill's wrongful death claims relating to the death of the fetuses.

Wrongful Death of Lori Stodghill - Causation

Dr. Pelner and the hospital[3] have also moved for summary judgment on the wrongful death claim relating to Lori Stodghill on the grounds that the summary judgment evidence

[2] In *Castillo v. Stringfellow*, Judge Miller refers to *Small v. Duletsky*, Summit County Case No. 02CV243. In that case, Judge Ruckriegle permitted a cause of action for wrongful death on behalf of an unborn fetus to proceed to trial, the verdict was for the defendant, and consequently the issue was not appealed.

[3] Dr. Staples has joined in the other defendants' motions for summary relating to the fetuses, but does not appear to have joined in the defendants' motions or asserted his own motion for summary judgment relating to the death of Lori Stodghill on the grounds of causation.

negates causation, an essential element of the Plaintiffs' case. Plaintiffs allege Lori Stodghill's death was the direct and proximate result of negligence on the part of the Defendant doctors and the hospital. [Second Amended Complaint]. It has been the long-standing law in Colorado that "a finding of negligence does not create liability on the part of a defendant unless that negligence is a proximate cause of the plaintiff's injury." *City of Aurora v. Loveless,* 639 P.2d 1061, 1063 (Colo. 1981). As indicated by the supreme court in *Kaiser Foundation Health Plan v. Sharp*:

> To prove causation in a negligence case, the plaintiff must show by a preponderance of the evidence that the injury would not have occurred but for the defendant's negligent conduct.
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> * * *
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> To create a triable issue of fact regarding causation in a medical malpractice case, the plaintiff need not prove with absolute certainty that the defendant's conduct caused the plaintiff's harm, or establish that the defendant's negligence was the only cause of the injury suffered. J. Dooley, *Modern Tort Law* § 34.104, 34.106, at 544-45 (1983). However, the plaintiff must establish causation beyond mere possibility or speculation.

[Emphasis added] *Kaiser Foundation Health Plan v. Sharp,* 741 P.2d 714, 719 (Colo. 1987) (hereinafter *Sharp II*). Expert testimony would be required to establish causation under the circumstances of this case. *See Smith v. Curran,* 28 Colo. App. 358, 472 P.2d 769 (1970).

Based upon uncontroverted summary judgment evidence[4], as well as the plaintiffs' stated position in their response, the negligent conduct of the defendants which the plaintiffs assert caused and/or contributed to Lori Stodghill's death was "Defendants' failure to adequately assess and treat Mrs. Stodghill by performing the emergent c-section . . ." [Plaintiffs' Combined Response, p. 12]. The plaintiffs concede, however, that their own experts "will opine at trial that even with a perimortem caesarian section, the odds of Lori Stodghill surviving given the seriousness of her pulmonary embolus was less than 50%. . ." [Plaintiffs' Combined Response, p. 11]. Specifically, the plaintiffs' emergency medicine expert, Dr. Glaser, testified that emboli totally occluding Lori Stodghill's pulmonary arteries was a condition "inconsistent with life" and agreed that "emptying the uterus is not going to change that condition, to a probability." [Glaser deposition, p. 183]. Further, Dr. Schwartz, the plaintiffs' ob-gyn expert, testified that Lori Stodghill "had a very high mortality with a total occlusion of both pulmonary arteries" and that

[4] When referring to the summary judgment evidence, the Court has not considered or relied upon the expert endorsements which are included in the exhibits filed the parties, with the exception of that of Dr. Markovchick, which is supported by his affidavit (Exhibits J & J-1 to Dr. Pelner's motion relating to the death of Lori Stodghill). Also, the Court cannot, and has not, considered the factual assertions of counsel in their briefs which are not otherwise supported by sworn summary judgment evidence. Finally, the Court has not considered evidence which Plaintiffs' counsel argues will be presented at trial, but has not been submitted in the form of admissible summary judgment evidence. *Sharp II, supra* at 720, ("The court's consideration of a motion for summary judgment should not be based upon a prediction of potential evidence to be offered at trial, but rather on existing pleadings, depositions, answers to interrogatories, admissions, and affidavits."); s*ee also,*C.R.C.P. 56(c).

performing a caesarian section would not have made a difference in her outcome to "a great degree of probability." [Schwartz deposition p. 151].

Thus, based upon the uncontroverted summary presented by the plaintiffs' own experts, it was probable – approaching certainty – that Lori Stodghill would die as result of the emboli occluding her pulmonary arteries whether or not a caesarian section was performed. Applying the test set forth by the supreme court in *Sharp II* quoted above, the summary judgment evidence does not present a triable issue of fact regarding causation because the fact that a caesarian section was not performed was not a "but for" cause of Lore Stodghill's death, nor have the plaintiffs produced any summary judgment evidence on the issue of causation "beyond mere possibility or speculation." *Sharp II, supra* at 719. Dr. Pelner and the hospital are therefore entitled to summary judgment on the plaintiffs' wrongful death claim relating to Lori Stodghill.

Notwithstanding the foregoing, the plaintiffs argue, for the first time in their response, that the Court should recognize a 'loss of chance' theory of causation and find that a fact issue precluding summary judgment exists if any chance of survival was lost as a result of a caesarian section not being performed. The plaintiffs rely upon the court of appeals opinion in *Sharp v. Kaiser Foundation Health Plan*, 710 P.2d 1153 (Colo. App. 1985), *aff'd. on other grounds,* 741 P.2d 714 (Colo. 1987) (hereinafter *Sharp I).* In *Sharp I,* the court of appeals applied a "substantial factor" test based, in part, upon the Restatement (Second) of Torts. In *Sharp II*, the supreme court expressed no opinion on whether it would apply section 323(a) of the Restatement (Second) in a proper case, affirming the court of appeals decision applying the traditional causation analysis quoted above. *Sharp II, supra*, note 5, at 718. Thus, the holding in *Sharp I* is not binding precedent or persuasive [5] and, to date, the supreme court has not expressly adopted either the Restatement (Second) or Restatement (Third) provisions relating to the 'loss of chance' doctrine.

However, this Court need not predict whether our appellate courts would adopt a theory of causation other than the standard set forth in *Sharp II* for purposes of this order. Even if it is assumed that our Supreme Court would adopt the causation analysis of either the second or third Restatement of Torts, the Court finds that Plaintiffs have failed to produce summary judgment evidence which would create a triable fact issue under either Restatement. In reaching this conclusion, the Court found the Tenth Circuits' thorough discussion of the Restatement sections helpful. *See June v. Union Carbide Corp.* 577 F.3d 1234, 1238-48 (10th Cir. 2009). The Tenth Circuit concluded that the substantial factor requirement of the Restatement (Second) is essentially the same standard as the 'factual cause' requirement used in the Restatement (Third), *Id* at 1241, and summarized the Restatement tests as follows:

[5] The court of appeals in *Sharp I,* relying upon the Restatement (Second), held that "[a] defendant's conduct is a substantial factor where it is of sufficient significance in producing the harm as to lead reasonable persons to regard it as a cause and to attach responsibility." *Sharp I, supra* at 1155. However, as pointed out by the Tenth Circuit, the *Sharp I* court "apparently ignored Restatement (Second) § 432 . . . which states that conduct is not a substantial factor unless it is a but-for cause or one of multiple sufficient causes" thereby applying a more minimal causation standard than that set forth in the Restatement (Second). *June v. Union Carbide Corp*., 577 F.3d 1234, 1245 (10th Cir. 2009).

> To sum up, as we understand the Restatement (Second) and the Restatement (Third), a defendant cannot be liable to the plaintiff unless its conduct is either (a) a but-for cause of the plaintiff's injury or (b) a necessary component of a causal set that (probably) would have caused the injury in the absence of other causes. In particular, conduct was not a "substantial factor," within the meaning of the term in the Restatement (Second), in bringing about a plaintiff's injury unless it satisfied (a) or (b), and also was a sufficiently significant factor under the considerations set forth in Restatement (Second) § 433.

Id at 1244. As pointed out above, the decision not to perform a caesarian section, even if negligent, was not a "but for" cause of Lori Stodghill's death and thus, does not satisfy (a) above. Further, under (b), the alleged failure to perform a caesarian section was not a necessary component of causal set (pulmonary emboli + failure to perform caesarian section) that probably would have caused the death in the absence of the other cause, *i.e.* the pulmonary emboli. Otherwise stated, under the Restatement (Third) § 27, for the failure to perform a caesarian section to be one of a number of "sufficient" causes, there must be evidence that this failure would have caused Lori Stodghill's death, in the absence of the pulmonary emboli, even if it was not a "but for" cause of her death. Plaintiffs have presented no expert testimony suggesting that the failure to perform a c-section would have probably caused Lori Stodghill's death if she had not developed the pulmonary emboli. Therefore, applying the Restatement would not preclude summary judgment in the Defendants' favor and the Court believes it unlikely that Colorado would adopt the even more lenient causation standards suggested in *Sharp I* (significant factor) or by the Plaintiffs (any loss of chance).

Conclusion

The purpose of summary judgment "is, in advance of trial, to test, not . . . on bare contentions found in the legal jargon of pleadings, but on the intrinsic merits, whether there is in actuality a real basis for relief . . ." *Sullivan v. Davis*, 172 Colo. 490, 496, 474 P.2d 218, 221 (Colo. 1970). The Court acknowledges the tragic losses which gave rise to the plaintiffs' claims in this case. However, given the emotional and economic costs involved in trying the plaintiffs' wrongful death claims, it would be a disservice to the parties to go to trial on these claims in the face of the uncontroverted facts presented and the law as it stands at this time.

Certification Pursuant to Rule 54(b)

This order completely adjudicates the plaintiffs' wrongful death claims relating to the twin fetuses of Lori Stodghill asserted against all defendants. It further completely adjudicates the plaintiffs' wrongful death claims relating to Lori Stodghill asserted against the defendants John Barry Pelner, M.D. and Catholic Health Initiatives Colorado d/b/a Saint Thomas More Hospital, thereby adjudicating all the claims asserted against these two defendants. There is no just reason for delay of entry of final judgment as to the claims and defendants indicated below and this order is therefore certified as a final order pursuant to C.R.C.P. 54(b).

IT IS THEREFORE ORDERED that summary judgment is granted in favor of the defendants John Barry Pelner, M.D., Catholic Health Initiatives Colorado d/b/a Saint Thomas More Hospital and Pelham Porter Staples, III, M.D. and against the plaintiff Jeremy L. Stodghill on the wrongful death claims asserted relating to the death of the twin fetuses of Lori Stodghill.

IT IS FURTHER ORDERED that summary judgment is granted in favor of the defendants John Barry Pelner, M.D. and Catholic Health Initiatives Colorado d/b/a Saint Thomas More Hospital and against the plaintiff Jeremy L. Stodghill, individually and as parent, guardian and next friend of Elizabeth Stodghill, a minor child, on the wrongful death claims asserted relating to the death of Lori Stodghill.

DATED: December 7, 2010, *nunc pro tunc* December 5, 2010.

BY THE COURT:

/s/David M. Thorson

David M. Thorson, District Judge

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