

NO. 23-0727

IN THE
SUPREME COURT OF TEXAS

CAROLINA ANTOUN,
PETITIONER

VS

GABY ANTOUN,
RESPONDENT

Cause No. 21-5535-367
APPEALED FROM THE 367TH DISTRICT COURT OF
DENTON COUNTY, TEXAS
and
NO. 02-22-00343-CV
FROM SECOND COURT OF APPEALS OF TEXAS
FORT WORTH, TEXAS

REPLY BRIEF FOR PETITIONER

J. Edward Niehaus
State Bar Card No. 24074812
Bodkin, Niehaus, Dorris & Jolley, PLLC
6021 Morriss Rd. Suite 111
Flower Mound, TX 75028
Phone: (972) 704 -1368
Jason@BNDJlegal.com

COUNSEL FOR PETITIONER/APPELLANT

Oral Argument Requested if Petition Granted

Table of Contents

Table of Contents..... 2

Index of Authorities..... 3

CONSOLIDATED REPLY TO BOTH ISSUES. 4

 I. Life requires a consistent and applicable definition. 4

 II. The Texas Legislature has provided a definition of life..... 5

 III. That pregnancy is required for abortion does not equate to pregnancy being required for an embryo to be an individual as individual is defined by the Legislature. 7

CERTIFICATE OF SERVICE 9

CERTIFICATE OF COMPLIANCE 10

Index of Authorities

CASES

Lawrence v. State, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007) 6, 7

STATUTES

Tex. Civ. Prac. & Rem. Code § 71.001(4) (2003) 6
Tex. Estates Code § 1002.023 4
Tex. Estates Code § 22.027 4
Tex. Fam. Code § 101.003 4
Tex. Gov’t Code § 4001.064 4
Tex. Gov’t Code 311.005(2)..... 4
Tex. Health & Safety Code 170A.001 8
Tex. Health & Safety Code 170A.001(5)..... 8
Tex. Ins. Code § 30.003 4
Tex. Nat. Res. Code § 81.002 4
Tex. Penal Code § 1.07 4
Tex. Penal Code § 1.07(26) 5, 6, 8
Tex. Transp. Code § 111.001 4
Tex. Transp. Code § 112.001 4
Tex. Transp. Code § 173.001 4
Tex. Transp. Code § 174.001 4

OTHER AUTHORITIES

House Comm. on State Affairs, Bill Analysis, Tex. S.B. 319, 78th
Leg., R.S. (2003)..... 5

RULES

Tex. R. App. P. Rule 60.2(d) 9
Tex. R. App. P. Rule 9.4(i)(2)(b) 10

TREATISES

NOTE AND COMMENT: INNER TURMOIL: REDEFINING THE
INDIVIDUAL AND THE CONFLICT OF RIGHTS BETWEEN
WOMAN AND FETUS CREATED BY THE PRENATAL
PROTECTION ACT, 11 Tex. Wesleyan L. Rev. 131, 132 6

CONSOLIDATED REPLY TO BOTH ISSUES.

Because of the extent to which these issues interplay and the limited utility of bickering via paper, Counsel files this consolidated reply to the Respondent's brief. The brevity is intentional and is not intended to be a comment on the import of the issues to both the parents of these embryos and to Texas law broadly.

I. Life requires a consistent and applicable definition.

The Texas Legislature has seen fit to separately define "person" as a term that includes both living beings and jural entities and "individual" as a term for people from conception to death.

The definition of individual begin at conception. *See* Tex. Penal Code § 1.07; Tex. Civ. Prac. & Rem. Code § 71.001(4). In contrast, definitions of "person" include jural entities. Examples of 'persons' are found in the Estates Code (Tex. Estates Code § 22.027, Tex. Estates Code § 1002.023), the Insurance Code (Tex. Ins. Code § 30.003), the Government Code (Tex. Gov't Code 311.005(2), Tex. Gov't Code § 4001.064), the Natural Resources Code (Tex. Nat. Res. Code § 81.002), and the Transportation Code (Tex. Transp. Code § 111.001, Tex. Transp. Code § 112.001, Tex. Transp. Code § 173.001 and Tex. Transp. Code §

174.001).

Respondent's interpretation of the definition of individual is not consistent with this deeply ingrained definitional scheme and is entirely unworkable. Should the Legislature desire to carve-out embryos from the definition of life as provided by Prenatal Protection Act, they have repeatedly demonstrated their ability to do so.

II. The Texas Legislature has provided a definition of life.

The Texas legislature sought to protect a woman's right to carry her pregnancy to term and to protect the potential life of an unborn fetus by its passage of the Prenatal Protection Act. *See* House Comm. on State Affairs, Bill Analysis, Tex. S.B. 319, 78th Leg., R.S. (2003). The Prenatal Protection Act expands the definition of an "individual" to include "an unborn child at every stage of gestation from fertilization until birth." *See* Tex. Penal Code § 1.07(26) (Vernon Supp. 2004-2005). As a result of this expansion, the law now provides for civil liability and criminal penalties upon the death of an unborn fetus. Michelle Haynes, *Note And Comment, Inner Turmoil: Redefining The Individual And The Conflict Of Rights Between Woman And Fetus Created By The Prenatal Protection Act*, 11 Tex. Wesleyan L. Rev. 131, 132 (2004).

This expansion included criminal liability for crimes up to and including capital murder for the death of an unborn child.

Respondent commits a logical fallacy by requiring the legislative definition of life, as passed by the Texas Legislature in the Prenatal Protection Act of 2003, to be applied solely and specifically in the context of abortion. *See* Br. Resp. at 29 – 31. Texas law is not so limited. *See* S.B. 319, 78th Leg., R.S. (providing for new definitions as follows: “Individual’ means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.” Tex. Penal Code § 1.07(26) (2003) “Individual’ includes an unborn child at every stage of gestation from fertilization until birth.” Tex. Civ. Prac. & Rem. Code § 71.001(4) (2003). *See Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007) (“The Penal Code ... defines an “individual” as “a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.” It follows from these provisions that a person who intentionally or knowingly causes the death of a woman and her unborn child, at any stage of gestation, commits capital murder.”)

Indeed, Texas law already provides for the possibility of homicide charges related to embryos. *See* Tex. Penal Code 19.06(3) (2023)

("[Homicide] does not apply to the death of an unborn child if the conduct charged is: (3) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code"). If killing an embryo outside the womb is excluded from homicide if done with the requisite consent, then by simple logic, killing an embryo outside the womb is homicide, if done without the requisite consent. Legislators clearly had embryos outside the womb in mind when drafting the Prenatal Protection Act of 2003, or else they would not have written a limited exclusion for embryos. *See Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007)

III. That pregnancy is required for abortion does not equate to pregnancy being required for an embryo to be an individual as individual is defined by the Legislature.

"While Chapter 170A of the Performance of Abortion section of the Texas Health and Safety Code does define an "unborn child" as an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development, this must be read in the context of the entire statute where "pregnant" means the female human reproduction condition of having a

living unborn child within the female's body during the entire embryonic and fetal stages of the unborn child's development from fertilization until birth. Tex. Health & Safety Code 170A.001." Br. Resp. at 23.

Respondent's argument is attacking a strawman. Petitioner has never, at any stage of this litigation, argued that section 170A considers destroying an embryo outside the womb to be an abortion. Petitioner has never, at any stage of this litigation, argued that section that 170A considers a fertilized embryo outside the womb to be a pregnancy. Petitioner has never, at any stage of this litigation, argued that section 170A adds any new prohibition on destroying embryos, as that is accounted for in the Penal Code already. *See* Tex. Penal Code 19.06(3).

But the legislature still took pains to explicitly state in 170A that an embryo is an "unborn child." Tex. Health & Safety Code 170A.001(5). This explicitly invokes the same term in the 2003 Prenatal Protection Act. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 71.001(4), Tex. Penal Code § 1.07(26). It was unnecessary to do this merely to outlaw performance of an abortion. Rather, the Texas legislature was reiterating a previously stated public policy that an embryo is an unborn child. Indeed, Respondent's logic undercuts their position. Unborn child is defined

outside the context of pregnancy. Abortion is defined entirely within the scope of pregnancy. In other words, the definition of "pregnancy" requires that there be an unborn child, but the definition of "unborn child" does not require a pregnancy. Embryos destroyed prior to implantation may not have been aborted, but they have still lives ended too soon.

Petitioner prays the court GRANT the Petition for Review and REVERSE the Court of Appeals. Because neither issue may be resolved without a new trial, a request to render is inappropriate and REMAND to the trial court is necessary. *See* Tex. R. App. P. Rule 60.2(d)

Respectfully submitted,

/s/ J. Edward Niehaus
Jason Edward Niehaus
State Bar Card No. 24074812
Bodkin, Niehaus, Dorris & Jolley, PLLC
6021 Morriss Rd. Suite 111
Flower Mound, TX 75028
Phone: (972) 704-1368
Jason@BNDJlegal.com

CERTIFICATE OF SERVICE

Undersigned counsel of record for the Petitioner hereby certifies that (1) a true and correct electronic copy of the foregoing Brief was e-mailed to Respondents, and (2) a true and correct copy has been electronically served on all parties via electronic filing, and (3) each of the

same were served on or about Thursday March 21, 2024

/s/J.Edward Niehaus
J. Edward Niehaus

CERTIFICATE OF COMPLIANCE

Relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this brief is 1,636. Tex. R. App. P. Rule 9.4(i)(2)(b)

/s/J.Edward Niehaus
J. Edward Niehaus

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Kristi Edwards on behalf of Jason Niehaus
Bar No. 24074812
kristi@bndjlegal.com
Envelope ID: 85824075
Filing Code Description: Reply Brief
Filing Description: Petitioner's reply Brief
Status as of 3/21/2024 3:37 PM CST

Associated Case Party: Caroline Antoun

Name	BarNumber	Email	TimestampSubmitted	Status
Jason E.Niehaus		jason@BNDjlegal.com	3/21/2024 3:35:11 PM	SENT
Kristi Edwards		kristi@bndjlegal.com	3/21/2024 3:35:11 PM	SENT

Associated Case Party: Hannah, John and MarleneStrege

Name	BarNumber	Email	TimestampSubmitted	Status
Hannah, John and Marlene Strege		nseltzer@thejusticefoundation.org	3/21/2024 3:35:11 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
James Horton		james@jameshorton.attorney	3/21/2024 3:35:11 PM	SENT
Brad Horton		brad@jameshorton.attorney	3/21/2024 3:35:11 PM	SENT
Patrick Wright		patrick@thewrightlawyers.com	3/21/2024 3:35:11 PM	SENT