

Electronically Filed
Supreme Court
SCWC-12-0000753
13-MAR-2018
09:54 AM

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---oOo---

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 HAWAI'I; and HAWAI'I 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

OPINION OF MCKENNA, J., IN WHICH POLLACK, J. JOINS

I. Introduction

This case arises from the stillbirth of a formerly viable fetus carried by Leah Castro ("Castro"), an inmate at a state

correctional facility. The Intermediate Court of Appeals ("ICA") affirmed the circuit court's damages awards based on the wrongful death¹ and survival² statutes as well as based on the

¹ Hawaii Revised Statutes ("HRS") § 663-3 (2016), Hawaii's wrongful death statute, provides now and did at all times relevant to this lawsuit as follows:

Death by wrongful act. (a) When the death of a person is caused by the wrongful act, neglect, or default of any person, the deceased's legal representative, or any of the persons enumerated in subsection (b), may maintain an action against the person causing the death or against the person responsible for the death. The action shall be maintained on behalf of the persons enumerated in subsection (b), except that the legal representative may recover on behalf of the estate the reasonable expenses of the deceased's last illness and burial.

(b) In any action under this section, such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including:

- (1) Loss of society, companionship, comfort, consortium, or protection;
- (2) Loss of marital care, attention, advice, or counsel;
- (3) Loss of care, attention, advice, or counsel of a reciprocal beneficiary as defined in chapter 572C;
- (4) Loss of filial care or attention; or
- (5) Loss of parental care, training, guidance, or education, suffered as a result of the death of the person;

by the surviving spouse, reciprocal beneficiary, children, father, mother, and by any person wholly or partly dependent upon the deceased person. The jury or court sitting without jury shall allocate the damages to the persons entitled thereto in its verdict or judgment, and any damages recovered under this section, except for reasonable expenses of last illness and burial, shall not constitute a part of the estate of the deceased. Any action brought under this section shall be commenced within two years from the date of death of the injured person, except as otherwise provided.

² HRS § 663-7 (2016), Hawaii's survival statute, provides now and did at all times relevant to this lawsuit as follows:

§663-7 Survival of cause of action. A cause of action arising out of a wrongful act, neglect, or default, except a cause of action for defamation or malicious prosecution, shall not be extinguished by reason of the death of the injured person. The cause of action shall survive in favor of the legal

common law tort of negligent infliction of emotional distress, Castro v. Melchor, 137 Hawai'i 179, 366 P.3d 1058 (App. 2016).

The remaining defendant state entities and officials³ ("the State") seek certiorari review only of the damages awarded under the survival statute to the estate of the stillborn fetus.

The wrongful death⁴ and survival⁵ statutes are interrelated, and provide recovery for "wrongful act, neglect, or default" causing death to a "person." The wrongful death statute provides for recovery of damages for those in enumerated relationship categories to the deceased "person," while the survival statute provides for recovery of damages for the estate of the deceased "person." Under the survival statute, HRS § 663-7, a decedent's legal representative retains only such causes of action as the deceased "person" had at the moment of his or her death. See Greene v. Teixeira, 54 Haw. 231, 235, 505 P.2d 1169, 1172 (1973). Thus, damages are not available under the survival statute for a deceased "person" unless the deceased

representative of the person and any damages recovered shall form part of the estate of the deceased.

³ The remaining defendants and petitioners are Leroy Melchor, Wanna Bhalang, and Tomi Bradley (all in their official capacities), as well as the State of Hawai'i and the Hawai'i Department of Public Safety.

⁴ The Legislature first enacted a wrongful death statute as Act 245 of 1923. See n.1, supra, for the current version.

⁵ The Legislature first enacted a survival statute as Act 205 of 1955. See n.2, supra, for the current version.

qualifies as a "person" under the wrongful death statute, HRS § 663-3.

We have held that this court's foremost obligation in construing HRS § 663-3, Hawaii's wrongful death statute, is to ascertain and give effect to the intention of the legislature. Lealaimatafao v. Woodward-Clyde Consultants, 75 Haw. 544, 551, 867 P.2d 220, 224 (1994). Although the question of whether a stillborn formerly viable fetus is a "person" under Hawaii's wrongful death statute, HRS § 663-3, was not specifically asserted in the application for writ of certiorari, it is a subsidiary question within the first question on certiorari, "[w]hether the award of loss of enjoyment of life damages [under the survival statute, HRS § 663-7] for a stillborn fetus was error." In our opinion, controlling principles of statutory interpretation clearly indicate that the legislature did not intend to include a stillborn formerly viable fetus in the definition of a "person" under the wrongful death and survival statutes.

For the reasons stated in this opinion, we would therefore conclude that the \$250,000 awarded by the Circuit Court of the First Circuit's ("circuit court") to the stillborn fetus's estate as hedonic damages⁶ for loss of life and loss of enjoyment

⁶ "Hedonic damages" are "(d)amages that attempt to compensate for the loss of the pleasure of being alive." Black's Law Dictionary 472 (10th ed. 2014).

of life under the survival statute, which was based on a threshold holding that a stillborn formerly viable fetus qualifies as a "person" under Hawaii's wrongful death and survival statutes, was erroneous as a matter of law. Although the \$100,000 awarded to Castro for loss of filial consortium under the wrongful death statute also suffers from the same legal defect, the State has not challenged this damages award on certiorari; therefore, we would not set aside that award. In addition, the wrongful death statute is not implicated in the circuit court's award of \$250,000 to Castro herself based on the common law tort of negligent infliction of emotional distress. This award was proper and, in any event, was also not challenged on certiorari. Thus, although we would set aside the award of \$250,000 for hedonic damages for the estate of the stillborn fetus, we would affirm all other damages awards. We construe Justice Nakayama's opinion as agreeing that a fetus does not qualify as a "person" under the wrongful death and survival statutes, but joining with the Chief Justice in a judgment on appeal that also allows the estate of the fetus to recover in this case because the State did not specifically raise the issue on certiorari.

II. Factual and Procedural Background⁷

As noted, this case arises out of the stillbirth of a formerly viable fetus carried by Castro while she was an inmate. The amended complaint filed in the circuit court⁸ alleged wrongful death, survival, and emotional distress claims. Although the wrongful death and survival statutes are not mentioned in the amended complaint, throughout the entire lawsuit, the parties have proceeded on the assumption that this lawsuit is governed by the wrongful death and survival statutes, not based on common law.⁹

⁷ The condensed factual background and procedural history in this opinion is mainly derived from the published opinion of the ICA in Castro, 137 Hawai'i 179, 366 P.3d 1058, which provides details regarding the underlying claims and procedural history.

⁸ The Honorable Karen T. Nakasone presided.

⁹ In Hun v. Center Props., 63 Haw. 273, 626 P.2d 182 (1981), this court stated:

Although we need not resolve this question here, we note that an independent common law right of action for wrongful death may have survived despite the enactment of the death statute.

A common law right to recover for wrongful death was established by this court in Kake v. Horton, 2 Haw. 209 (1860). Subsequent to that, the wrongful death statute was enacted by the legislature. This Court held in Gabriel v. Margah, 37 Haw. 571 (1947), that the wrongful death statute did not abrogate the common law right of action adopted in Kake. But see, Roling v. Moses Akiona Ltd., 45 Haw. 373, 394, 369 P.2d 96, 106 (1961), where in dicta, the court states that the common law action for wrongful death was merged with the statutory action."

63 Haw. at 279 n.3, 626 P.2d at 186 n.3.

Castro filed the lawsuit individually and as the personal representative of the estate of the stillborn formerly viable fetus, alleging that the State's failure to provide proper medical care caused the stillbirth. She pled causes of action based on negligence, gross negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress.

The circuit court denied the State's pre-trial motion to dismiss all survival claims brought on behalf of the estate of the fetus based on the State's argument that a stillborn viable fetus did not qualify as a "person" under the wrongful death statute.¹⁰ After a bench trial, the circuit court ruled against the State, and awarded Castro \$250,000 based on the common law tort of negligent infliction of emotional distress and \$100,000 for loss of filial consortium under the wrongful death statute. The circuit court also awarded \$250,000 to the estate of the stillborn formerly viable fetus under the survival statute for loss of life and loss of enjoyment of life. Thus, with respect to damages awarded the estate of the fetus, the circuit court ruled that a stillborn formerly viable fetus is a "person" under Hawaii's wrongful death statute.

Before the ICA, the State argued (1) that a stillborn fetus is not a "person" for purposes of the wrongful death statute;

¹⁰ The State did not, however, move for summary judgment on Castro's claims under the wrongful death statute on her own behalf.

(2) that the circuit court erred in finding negligence; and (3) that even if negligence had been proven, the damages awarded were improper and speculative. Castro, 137 Hawai'i at 185, 366 P.3d at 1064. The ICA affirmed the circuit court on all three issues. 137 Hawai'i at 203, 366 P.3d at 1082.

In its application for certiorari to this court, the State raised two questions:

- A. Whether the award of loss of enjoyment of life damages for a stillborn fetus was error.
- B. Whether the award of \$250,000 damages to the estate of Briandalyne Castro was error when there was no evidence presented to justify that monetary amount.

[App. at 3] Thus, the State only challenges the \$250,000 in hedonic damages awarded to the estate of the stillborn fetus, and has waived any arguments against the other damages awards.

III. Standards of Review

A. Findings of Fact and Conclusions of Law

This court reviews a trial court's factual findings under the clearly erroneous standard. A finding of fact is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed. A finding of fact is also clearly erroneous when the record lacks substantial evidence to support the finding. We have defined substantial evidence as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

Conclusions of law are reviewed de novo, under the right/wrong standard of review.

Lambert v. Waha, 137 Hawai'i 423, 430-31, 375 P.3d 202, 209-10

(2016) (internal citations omitted).

B. Statutory Interpretation

Statutory interpretation is reviewable de novo. Citizens Against Reckless Dev. v. Zoning Bd. of Appeals, 114 Hawai'i 184, 193, 159 P.3d 143, 152 (2007). When construing statutes, the court is governed by the following rules:

First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.

When there is ambiguity in a statute, "the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." Moreover, the courts may resort to extrinsic aids in determining legislative intent, such as legislative history, or the reason and spirit of the law.

114 Hawai'i at 193-94, 159 P.3d at 152-53 (citations omitted).

IV. Discussion

A. **The question of whether a viable fetus is a "person" under HRS § 663-3 is a subsidiary question within the first question on certiorari properly considered by this court.**

The State's first question on certiorari is "[w]hether the award of loss of enjoyment of life damages for a stillborn fetus was error." The State did not specifically argue the issue of whether a viable fetus is a "person" under HRS § 663-3 in its certiorari application. We believe, however, that it is incumbent on this court to address the issue of whether a

stillborn formerly viable fetus qualifies as a person under the wrongful death statute. First, the ICA's published opinion discusses the issue in detail, then holds that a viable fetus is a "person" for purposes of the wrongful death statute. Castro, 137 Hawai'i at 186-91, 366 P.3d at 1065-70.

Second, the issue is clearly subsumed within the first question on certiorari. Hawai'i Rules of Appellate Procedure Rule 40.1(d)(1) (2016), specifically provides that "[t]he statement of a question presented [in an certiorari application] will be deemed to include every subsidiary question fairly comprised therein." (Emphasis added.) Thus, the issue of whether the ICA erred by including a stillborn formerly viable fetus in the definition of a "person" as a decedent under the wrongful death statute is a "subsidiary question fairly comprised" within the State's question on certiorari as to whether hedonic damages were properly awarded to the estate of the stillborn fetus under the survival statute.

The propriety of addressing subsidiary issues is illustrated by Matter of Lorenzo's Estate, 61 Haw. 236, 602 P.2d 521 (1979). In that case, the appellant filed an appeal to challenge specific rulings made by the trial judge during the course of a jury trial. 61 Haw. at 238, 602 P.2d at 524. In his answering brief, the appellee argued that a jury trial was improperly granted in the first place. 61 Haw. at 238, 602 P.2d

at 525. In turn, the appellant argued that the court should ignore the issue raised in the appellee's answering brief because it was not specifically raised in the appellant's opening brief or properly raised by the appellee through a cross-appeal. 61 Haw. at 238-39, 602 P.2d at 525. This court agreed that a cross-appeal should have been filed, but determined that it may nevertheless "consider the [appellee's] contention because it is subsidiary to the other issues raised by the appellant." 61 Haw. at 239, 602 P.2d at 525. We said:

[Q]uestions presented . . . "will be deemed to include every subsidiary question fairly comprised therein." Appellant raises several issues on appeal concerning the propriety of certain of the trial judge's rulings during the jury trial. These issues can only be reached if the jury trial was properly granted in the first place. As we stated in Shoemaker v. Takai, 57 Haw. 599, 607, 561 P.2d 1286, 1291 (1977): "(I)t seems that no cross appeal is necessary in order that an appellate court may review a question closely related, in substance, to a question raised by the appeal." We believe the issue of whether the trial court erred in granting appellant's motion for jury trial is a subsidiary question underlying the other issues raised by appellant, and thus, a proper question for this court's consideration.

Id. (emphasis added, footnote omitted). In a footnote, this court further explained why it considered the issue to be a subsidiary issue:

In the present case, the proper granting of a jury trial is an issue necessarily precedent to the issue of the judge's proper conduct during that same jury trial. If we find that the jury trial was improperly granted, the issue of the propriety of the judge's conduct during that trial need not even be reached.

61 Haw. at 239 n.6, 602 P.2d at 525 n.6 (emphasis added).

United States Supreme Court precedent also supports this court's reasoning in Matter of Lorenzo's Estate. According to the Court, where the resolution of a question is "predicate to an intelligent resolution" of the question presented, it is "fairly included therein." Ohio v. Robinette, 519 U.S. 33, 38 (1996) (citations omitted). In United States v. Grubbs, 547 U.S. 90 (2006), the Court considered the constitutionality of an anticipatory search warrant, even though the issue was not expressly raised, because answering this question was "predicate to an intelligent resolution of the question presented." 547 U.S. at 94 n.1 (quoting Robinette, 519 U.S. at 38). According to the Court, "[i]t makes little sense to address what the Fourth Amendment requires of anticipatory search warrants if it does not allow them at all." Id.

In addition, in Wilkinson v. Austin, 545 U.S. 209 (2005), the Court accepted certiorari in a case seeking to determine the process due inmates before assignment to a maximum-security facility. 545 U.S. at 220. Before the U.S. District Court and the Court of Appeals for the Sixth Circuit, Ohio raised a threshold argument that the due process clause was not at issue because the inmates did not have a constitutional liberty interest at stake. Id. The district court concluded otherwise, and the Sixth Circuit affirmed, ruling that the inmates had a liberty interest in avoiding transfer to the facility. Id. In

its certiorari application, Ohio conceded the liberty interest issue, asking the Court to determine only what process was due. 545 U.S. at 221. The Court noted that Ohio "initially adhered" to its concession at oral argument, "but when pressed, the State backtracked" to its earlier position contesting the existence of a liberty interest. Id. The Court therefore addressed the existence of a liberty interest as a threshold question, explaining, "We need reach the question of what process is due only if the inmates establish a constitutionally protected liberty interest, so it is important to address this threshold question at the outset." Id.

These cases illustrate that "subsidiary issues" are properly considered to review possible error, rather than just to expound on reasons for affirming a decision below. A proper interpretation of HRS § 663-3 is "necessarily precedent" to whether an award of damages pursuant to the survival statute is available. If this court determines that the ICA's interpretation of HRS § 663-3 was wrong, and that a viable, stillborn fetus is not a "person" for purposes of the wrongful death statute, "the issue of the propriety of" damages under the survival statute "need not even be reached." In the instant case, before both the circuit court and the ICA, the State argued that a fetus is not a "person" for purposes of HRS § 663-3. The circuit court and ICA both ruled against the State.

Castro, 137 Hawai'i at 191, 366 P.3d at 1070. Given the issues in this case, 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. Thus, "it is important to address the threshold question at the outset" of this court's decision. Wilkinson, 545 U.S. at 221.

In addition, as noted, the ICA opinion addressed the threshold question in extensive detail before affirming the circuit court's damages award. See Castro, 137 Hawai'i at 186-91, 366 P.3d at 1065-70. Therefore, the subsidiary question in this case was raised and argued by both parties before the circuit court and the ICA. Furthermore, the question is a matter of first impression and merits rigorous analysis by this court, particularly where the public interest calls for a reasoned resolution of the issues. See Morgan v. Planning Dep't, 104 Hawai'i 173, 181, 86 P.3d 982, 990 (2004) (addressing the merits of the issue, "notwithstanding [a] technical violation" by the appellant, because "the issues raised in the instant case are of great importance").

For all of these reasons, it is appropriate and necessary to fully address the issue of whether a stillborn formerly viable fetus is a "person" for purposes of HRS § 663-3. We therefore now address the merits of the question.

B. **Applying rules of statutory interpretation, there is no ambiguity. If an ambiguity exists, there is no legislative intent to include a viable fetus within the definition of "person" for purposes of the wrongful death statute.**

At the outset, it is important to point out that this case does not require or compel us to generally define "personhood" for purposes of Hawai'i law; rather, our only duty is to determine whether the legislature intended to include a stillborn formerly viable fetus in the definition of a "person" for purposes of HRS § 663-3, the wrongful death statute. In this regard, as noted, this court's foremost obligation in construing HRS § 663-3 is to ascertain and give effect to the intention of the legislature. Lealaimatafao, 75 Haw. at 551, 867 P.2d at 224.

1. There is no ambiguity in HRS § 663-3.

The first three principles of statutory interpretation dictate that we examine the language of the statute itself, give effect to its plain and obvious meaning where the language is plain and unambiguous, and that we give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Citizens Against Reckless Dev., 114 Hawai'i at 193-94, 159 P.3d at 152-53. The wrongful death statute provides as follows:

Death by wrongful act. (a) When the death of a person is caused by the wrongful act, neglect, or default of any person, the deceased's legal representative, or any of the persons enumerated in subsection (b), may maintain an

action against the person causing the death or against the person responsible for the death. The action shall be maintained on behalf of the persons enumerated in subsection (b), except that the legal representative may recover on behalf of the estate the reasonable expenses of the deceased's last illness and burial.

(b) In any action under this section, such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including:

- (1) Loss of society, companionship, comfort, consortium, or protection;
- (2) Loss of marital care, attention, advice, or counsel;
- (3) Loss of care, attention, advice, or counsel of a reciprocal beneficiary as defined in chapter 572C;
- (4) Loss of filial care or attention; or
- (5) Loss of parental care, training, guidance, or education, suffered as a result of the death of the person;

by the surviving spouse, reciprocal beneficiary, children, father, mother, and by any person wholly or partly dependent upon the deceased person. The jury or court sitting without jury shall allocate the damages to the persons entitled thereto in its verdict or judgment, and any damages recovered under this section, except for reasonable expenses of last illness and burial, shall not constitute a part of the estate of the deceased. Any action brought under this section shall be commenced within two years from the date of death of the injured person, except as otherwise provided.

Applying the first three principles of statutory interpretation, the language of the statute is clear; it allows a wrongful death action to be brought for the death of a "person." The statute does not refer to a "fetus." Second, our sole duty is to give effect to the plain and obvious meaning of "person," which does not include an unborn fetus. Third, we are to give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Again, the language of the statute does not include a "fetus."

2. **Even if there is an ambiguity in the statute, there is no legislative intent to include a viable fetus in the definition of "person" under the wrongful death statute.**

There is no ambiguity in the wrongful death statute on the issue of whether a "person" includes a stillborn formerly viable fetus. Even if there is an ambiguity, however, the remaining principles of statutory interpretation also require us to ascertain and give effect to legislative intent with respect to the meaning of the wrongful death statute. To do so, we may consider the context within which the ambiguous word appears and examine extrinsic aids, such as legislative history or the reason and spirit of the law. With respect to this analysis, HRS § 1-15 (1993) provides:

Construction of ambiguous context. Where the words of a law are ambiguous:

- (1) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.
- (2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.
- (3) Every construction which leads to an absurdity shall be rejected.

Applying the rules of statutory construction under HRS § 1-15 subsections (1) and (3), and examining the context within which the allegedly ambiguous word "person" appears, HRS § 663-3 uses the word "person" in three ways. The initial reference to "person" signifies the decedent ("When the death of a person is caused. . . ."). HRS § 663-3 (emphasis added). The second

reference to "person" identifies those who can be held liable for a wrongful death ("is caused by the wrongful act . . . of any person."). HRS § 663-3 (emphasis added). Finally, the word "person" is used in the context of defining possible plaintiffs ("by any person wholly or partly dependent upon the deceased"). HRS § 663-3 (emphasis added).

Thus, the word "person" is used in three contexts within HRS § 663-3. By opining that a stillborn formerly viable fetus qualifies as a person under the survival statute, the Chief Justice implicitly construes "person" in the first context of the wrongful death statute only, as a decedent, to include a fetus. Yet, it would be absurd to construe "person" in the second context, as a tortfeasor, or the third context, as one dependent on the deceased, to include a fetus. The legislature, however, uses the same word, "person," in all three contexts. The Chief Justice would thus ascribe a different definition of "person" in only one context, that of the decedent, to include a fetus. Respectfully, we believe such an interpretation not only ignores the remainder of the statute, contrary to HRS § 1-15(1), but also leads to an absurdity, in violation of HRS § 1-15(3).

A related common law principle of statutory construction is implicated through the legislature's use of the word "person" in three separate contexts within HRS § 663-3. As this court stated in a recent case:

Even if we were to assume that the phrase "residence, including yard" is ambiguous, the district court's interpretation was erroneous under comparable principles of statutory interpretation used in resolving ambiguities within a statute.

The first of such principles states that "[w]here the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute." Kam v. Noh, 70 Haw. 321, 325, 770 P.2d 414, 416 (1989). This means that, "[i]n the absence of an express intention to the contrary, words or phrases used in two or more sections of a statute are presumed to be used in the same sense throughout." Id. at 325-26, 770 P.2d at 417 (quoting Gaspro, Ltd. v. Comm'n of Labor & Indus. Relations, 46 Haw. 164, 172, 377 P.2d 932, 936 (1962)) (internal quotation marks omitted).

State v. Guyton, 135 Hawai'i 372, 380, 351 P.3d 1138, 1146 (2015) (emphasis added). The Kam case cited in the quotation above cites to 2A Sutherland Statutory Construction, § 47.16 (4th ed. 1984) in support of the same principle. Kam, 70 Haw. at 325, 770 P.2d at 416-17.

Applying this common law rule of statutory interpretation, legislative intent, as further discussed below, displays no "express intention" to construe "person" as "decedent" any differently from "person" as "tortfeasor" or "person" as one "dependent on the deceased." Despite the lack of any legislative intent to ascribe differing meanings to the word "person" within HRS § 663-3, and contrary to principles of statutory interpretation in HRS § 1-15, the Chief Justice implicitly construes "person" in the first context only, as decedent, to include a fetus. As noted, however, it would be

absurd to construe "person" to include a fetus for the second and third contexts in which the word appears. Moreover, as explained below, there is simply nothing to indicate the legislature intended to give differing meanings to the word "person" within HRS § 663-3.

In this regard, legislative history is also important in determining legislative intent.¹¹ The legislature initially passed the wrongful death statute as Act 245 of 1923. This original predecessor statute to HRS § 663-3 provided in pertinent part:

When the death of a person is caused by the wrongful act or neglect of another, any person who was wholly or partly dependent upon such decedent and who has no remedy for compensation under the provisions of Act 221 of the Session Laws of Hawaii, 1915, as amended, may maintain an action for damages against the person causing the death. . . .

1923 Haw. Sess. Laws Act 245 at 308. The critical opening language of HRS § 663-3, "[w]hen the death of a person is caused by the wrongful act" has remained unchanged from 1923 to the present. (Emphasis added.)

To ascertain legislative intent of a statute, courts may look to legislative history, including committee reports. Ahn v. Liberty Mut. Fire Ins. Co., 126 Hawai'i 1, 11, 265 P.3d 470,

¹¹ In a 1990 opinion in Wade v. U.S., 745 F. Supp. 1573 (D. Haw. 1990), the United States District Court for the District of Hawai'i, in predicting that this court would adopt the majority position allowing a cause of action for the wrongful death of a viable fetus and then so holding, opined that the Hawai'i legislature never considered the issue of whether a viable fetus is a "person" for purposes of the wrongful death statute and that nothing in the legislative history associated with the statute touches upon the issue. 745 F. Supp. at 1577, 1579. For the reasons outlined in this opinion, we respectfully disagree with this statement and holding.

480 (2011). The House Judiciary Committee stated in relevant part as follows:

Your Committee on Judiciary, to which was referred House Bill No. 395, entitled, "An Act to prevent homicides[]" . . . reports as follows:

That the purpose of the Bill is to provide that an action for damages on account of wrongful act or negligence of another, causing death, may be brought when the same can not [sic] be brought at present under the laws of the Territory. Your Committee believes that this action should be limited, however, to those actually damaged by the death, and therefore as prepared an amended Bill, which it submits herewith.

H. Stand. Comm. Rep. No 519, in 1923 House Journal, at 1079.

Later, the Senate Judiciary Committee reported in relevant part:

This Bill enlarges the right of suit and recovery for death by wrongful act. It provides that any person wholly or partly dependent upon any decedent, whose death has been caused by the wrongful act or neglect of another, may maintain a suit for damages.

This is not a radical bill. It is drafted very closely upon statutes in other jurisdictions, the majority of which have a similar law. It enlarges the common law recovery which we believe to be too limited.

S. Stand. Comm. Rep. No. 437, in 1923 Senate Journal, at 977.

Thus, when initially enacted, a wrongful death cause of action existed only for those financially dependent on a "decedent." Thus, it is eminently clear that upon promulgation, the wrongful death statute did not include a stillborn formerly viable fetus within the definition of a "person." In addition, with respect to the reference to "statutes in other jurisdictions," it appears no state recognized a wrongful death cause of action for a viable fetus until 1949. See Dena M. Marks, Person v. Potential: Judicial Struggles to Decide Claims

Arising from the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question, 37 Akron L. Rev. 41, 44 (2004), citing to Verkennes v. Corniea, 38 N.W.2d 838 (Minn. 1949).

Thus, nothing in the legislative history of the original statute indicates the 1923 legislature intended to include a viable fetus in the definition of "person." There is nothing in the subsequent legislative history of the wrongful death statute to suggest any change to this legislative intent.

This is because in comparing the 1923 statute with HRS § 663-3, it is apparent that the original statute has been amended in various ways that do not bear on the issue in this case. The only major change between the 1923 statute and HRS § 663-3 was to expand the class of possible plaintiffs to include specified categories of persons not financially dependent on the decedent. This conceptual amendment occurred in 1955. 1955 Haw. Sess. Laws Act 205 at 184. The committee report discussing the reasons for this expansion of the class of possible plaintiffs does not indicate any intent to include viable fetuses within the definition of "person" as decedent under HRS § 663-3. In relevant part, the House Judiciary Committee stated as follows:

1. The purpose of this bill is to broaden the right of action and the extent of recovery in wrongful death suits.

. . . .

3. This bill, as amended, broadens the wrongful death statute by permitting a deceased person's spouse, children, father, mother, or dependents to recover for the wrongful death of the deceased. . . .

The right of action under the present wrongful death action is based on the archaic principal of dependency.

The provisions of this bill are consistent with the theory of the majority of the statutes in the United States. This bill permits recovery for not only pecuniary losses but also for loss of love and affection, including (1) loss of society, companionship, comfort, consortium or protection, (2) loss of marital care, attention, advice or counsel, (3) loss of filial care or attention or, (4) loss of parental care, training, guidance or education.

4. The provisions of this bill follow, in substance, the doctrine of the case of Gabriel [v]. Margah, 37 Haw. 571, which extended the interpretation of the existing statutory right of action.

H. Stand. Comm. Rep. No. 581, in 1955 House Journal, at 772-73.

As indicated, the intent of the 1955 legislative amendments was to follow this court's 1947 opinion in Gabriel, 37 Haw. 571, discussed briefly in footnote 9, supra. As mentioned there, this court recognized a common law cause of action for wrongful death in Kake, 2 Haw. 209. The legislature then passed a wrongful death statute in 1923. In Gabriel, this court held that the legislative enactment did not abrogate the common law wrongful death cause of action, and expanded Hawaii's common law wrongful death cause of action to allow claims by parents for the death of a child. Gabriel, 37 Haw. at 580. The 1955 legislature's stated intent was merely to follow Gabriel and eliminate the dependency requirement. Gabriel recognized a common law wrongful death cause of action for the parents of a minor child, not a stillborn fetus. It did nothing to affect the definition of "person" as a decedent under the wrongful death statute.

In addition, as noted earlier, by 1955, when the wrongful death statute was amended to conform with Gabriel and the survival statute was enacted, the Minnesota Supreme Court in the Verkennes case had recognized a wrongful death cause of action for a stillborn viable fetus. However, the legislature made no reference to that case, and cited only to Gabriel. Again, Gabriel merely recognized a common law wrongful death cause of action for the death of a child born alive. Thus, contrary to the Chief Justice's opinion, nothing in the 1955 legislative history indicates that the legislature intended to "broaden the right of recovery" to the extent of including a fetus in the definition of "person" for purposes of HRS § 663-3.

In addition, when the wrongful death statute was first enacted in 1923, Hawai'i statutory law had a general definition of "person":

SECTION 17. The word person, or words importing persons, for instance, another, others, any, any one, anybody, and the like, signify not only persons, but corporations, societies, communities, assemblies, inhabitants of a district, or neighborhood, or persons known or unknown, and the public generally, where it appears, from the subject matter, the sense and the connection in which such words are used, that such construction is intended.

The Civil Code of the Hawaiian Islands 1859, page 8. This statute remains in place, with minor amendments, as HRS § 1-19 (2009), which reads as follows:

"Person", "others", "any", etc. The word "person", or words importing persons, for instance, "another", "others", "any", "anyone", "anybody", and the like, signify not only individuals, but corporations, firms, associations,

societies, communities, assemblies, inhabitants of a district, or neighborhood, or persons known or unknown, and the public generally, where it appears, from the subject matter, the sense and connection in which such words are used, that such construction is intended.

The legislative change from "signify not only persons" to "signify not only individuals" also occurred in 1955. Act 57 of 1955, Section 1(e). Webster's defines "individual" in relevant part as:

1 a: a particular being or thing as distinguished from a class, species, or collection: as (1): a single human being as contrasted with a social group or institution <a teacher who works with --s> [sic] (2): a single organism as distinguished from a group
b: a particular person <are you the -- I spoke with on the telephone?> [sic]
2: an indivisible entity

Merriam Webster's Collegiate Dictionary (1993) at 593.

Whether a "person" signifies a "person" or an "individual," applying rules of statutory construction, the plain language of "person" or "individual" does not include a viable fetus. A fetus is not an "individual." If the term is ambiguous, which it is not, we can examine legislative intent. The Senate and House Judiciary committee reports regarding this change from "signify not only persons" to "signify not only individuals," were part of S.B. 751 of 1955, which included technical changes to other statutes governing statutory construction. S. Stand. Comm. Rep. No. 214, in 1955 Senate Journal, at 751-52; H. Stand. Comm. Rep. No. 551, in 1955 House Journal, at 761. The committee reports merely stated that the change was being made, but gave no reason for the change. Id. There is no indication

that the legislature intended that the amendment redefine "person" to include a viable fetus.

Common law principles of statutory interpretation also suggest examining the "spirit and intent of the law" in order to determine legislative intent. In doing so, we note that Act 245 of 1923, the original wrongful death statute, was introduced as House Bill 395 of 1923. At the time of its introduction, it was entitled "An Act to prevent homicides." See H. Stand. Comm. Rep. No. 519, in 1923 House Journal, at 1079. The index to the Revised Laws of Hawai'i (1915), page 1683¹² includes the term "homicides," and instructs the reader to see "[m]urder" and "[m]anslaughter" under "[c]riminal [l]aw." The murder and manslaughter statutes at the time, Sections 3862 and 3866 of the Revised Laws of Hawai'i (1915), defined those crimes as the "killing" of a "human being." Although "human being" was not further statutorily defined at the time, the plain meaning of the word indicates a person already born alive. Thus, the wrongful death statute was introduced as "An Act to prevent homicides," and the homicide statutes did not indicate they applied to fetuses.

¹² The 1915 bound volume was the latest version of Hawaii's statutes before the 1925 bound volume. There were no amendments to the homicide statutes between 1915 and 1925. The wrongful death statute was passed in 1923.

Consistent with the 1923 homicide statutes, HRS § 707-700 (2014) of the Hawai'i Penal Code now clearly defines "person" as "a human being who has been born and is alive." Thus, this legislative history also indicates that the legislature did not intend to include a viable fetus in the definition of "person" for purposes of the wrongful death statute.

Additional evidence of this legislative intent exists. The legislature recognizes the distinction between "persons" and "fetuses" as well as "deaths" and "fetal deaths." The State Public Health Statistics Act, HRS Chapter 338 Part I (2010), distinguishes between "deaths" and "fetal deaths," and HRS § 338-1 (2010) defines "fetal death," as a death of a fetus "irrespective of the duration of pregnancy." "Death certificates" and "fetal death certificates" are separate terms under HRS § 338-9 (2010). Nowhere in the Hawaii Revised Statutes is a "person" defined to include a "fetus."

Therefore, principles of statutory interpretation do not support the Chief Justice's and ICA's opinions. The legislative history and statutory scheme do not indicate any legislative intent to include a stillborn formerly viable fetus in the definition of a "person" under HRS § 663-3.¹³ Pursuant to

¹³ Construing a stillborn formerly viable fetus as a person under HRS § 663-3 raises additional legal issues that might need to be addressed by the legislature, including whether any death benefits under state law would become available for the stillbirth of a viable fetus. The absence of such

Lealaimatafao, this conclusion ends the inquiry. We go on, however, to address additional reasons why it is erroneous to construe the wrongful death statute to include a cause of action for a stillborn fetus.

C. Construing "person" under HRS § 663-3 to include a stillborn formerly viable fetus would subject a woman to potential civil liability if her negligence causes fetal death or if she exercises abortion rights.

Construing "person" under HRS § 663-3 to include a stillborn viable fetus would, without more, subject to civil liability a woman carrying a fetus whose negligence caused a viable fetus to die in utero or who exercised her rights to terminate a pregnancy under HRS § 453-16.¹⁴ In other words, a

statutory enactments further indicates a lack of legislative intent to include a viable fetus in the definition of "person" under HRS § 663-3.

¹⁴ HRS § 453-16 (2013) provides as follows:

Intentional termination of pregnancy; penalties; refusal to perform. (a) No abortion shall be performed in this State unless:

(1) The abortion is performed by a licensed physician or surgeon, or by a licensed osteopathic physician and surgeon; and

(2) The abortion is performed in a hospital licensed by the department of health or operated by the federal government or an agency thereof, or in a clinic or physician's or osteopathic physician's office.

(b) Abortion shall mean an operation to intentionally terminate the pregnancy of a nonviable fetus. The termination of a pregnancy of a viable fetus is not included in this section.

(c) The State shall not deny or interfere with a female's right to choose or obtain an abortion of a nonviable fetus or an abortion that is necessary to protect the life or health of the female.

(d) Any person who knowingly violates subsection (a) shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

(e) Nothing in this section shall require any hospital or any person to participate in an abortion nor shall any hospital or any person be liable for a refusal.

Subsection (c) of this statute, which precludes the State from denying "a female's right to choose or obtain an abortion . . . necessary to protect the life or health of the female[,]" was added in 2006. 2006 Haw. Sess. Laws Act 35, § 2 at 39. This was the first major substantive change to the predecessor statute passed in 1970, which decriminalized abortion. 1970 Haw. Sess. Laws Act 1, at 1-2.

When passing the original bill, the Conference Committee Report stated:

There are many cases where medical indications which may justify an abortion do not become evident until the second trimester or even in the third trimester of pregnancy. For example, a patient may inadvertently fail to inform her doctor about having contracted rubella in the early stages of pregnancy or where a possible cancerous condition of the cervix or uterus may be discovered in the second or third trimester of pregnancy. In all of these cases, the decision requires a medical judgement as to whether the particular medical indications justify an abortion. This aspect should therefore not be regulated by law. The bill has been amended to define abortion as the intentional termination of a non-viable fetus and such definition excludes the intentional termination of a viable fetus in order to allow the medical profession the legal protection it is entitled to in such cases.

Conf. Comm. Rep. No. 3, in 1970 House Journal, at 1218, 1970 Senate Journal, at 984. The Conference Committee Report further stated:

Your Committee feels real concern for those physicians who may be faced with the problem of destroying a fetus in the later stages of pregnancy due to medical indications, but this problem can be resolved by the fact that this kind of operation will probably not be legally considered an abortion.

Id. Thus, it appears that the legislative intent in 1970 was to completely exclude late term abortions from the ambit of HRS § 453-16. We express no opinion as to whether the 2006 amendment affected the 1970 legislative intent. What is clear at minimum is that under Hawai'i law, a woman has a right to terminate a pregnancy when it is necessary to protect her life or health. This was also true in 1923, when the legislature passed the wrongful death statute. Section 4455 of the Revised Law of Hawai'i (1915), provided a justification defense to an abortion performed to save the life of the woman; this justification defense remained up until 1970, when abortion was decriminalized. It is also relevant that the abortion law from 1923 to 1970 did not actually criminalize the killing of a fetus, but rather, criminalized intentional acts leading to an abortion:

Section 44162. Abortion; punishment. Whoever maliciously without lawful justification, administers, or causes or

parent representing the estate of the fetus could sue a woman carrying a viable fetus;¹⁵ construing HRS § 663-3 to include a stillborn formerly viable fetus in the definition of a "person" would cause a woman exercising abortion rights under HRS § 453-16, or whose negligence causes the death of a viable fetus, to be subject to lawsuits.

The ICA's holding did not preclude these possibilities. The Chief Justice attempts to exclude such potential liability by indicating he would rule as a matter of law that a pregnant woman does not owe of duty of care to the fetus she carries, Opinion of Recktenwald, C.J., at Section IV(A), citing to Remy v. MacDonald, 440 Mass. 675, 801 N.E.2d 260 (2004), an opinion from the Supreme Judicial Court of Massachusetts.

The Remy case is distinguishable. Remy involved a lawsuit brought by a father on behalf of a child born alive against a mother for injuries allegedly suffered in utero due to the mother's negligence. 440 Mass. at 675-76, 801 N.E.2d at 262.

procures to be administered any poison or noxious thing to a woman when with child, in order to produce her miscarriage, or maliciously uses any instrument or other means with like intent, shall, if the woman be then quick with child, be punished by a fine not exceeding one thousand dollars and imprisonment at hard labor not more than five years; and if she be then not quick with child, shall be punished by a fine not exceeding five hundred dollars, and imprisonment at hard labor not more than two years.

Revised Laws of Hawai'i (1915).

¹⁵ This phrasing is used because it is possible that the woman bearing the child would not be a "mother" under the law, for example, a surrogate carrying a fetus whose parents have been determined to be other persons.

Unlike Hawai'i, however, and as noted by the Massachusetts Supreme Judicial Court, the Massachusetts wrongful death statute expressly includes a viable fetus, whether or not born alive, in the definition of "person." 440 Mass. at 681, 801 N.E.2d at 265. In addition, Massachusetts law also recognizes a viable fetus as a "person" for purposes of its motor vehicle homicide statute. 440 Mass. at 681 n.6, 801 N.E.2d at 266 n.6. Thus, it appears that unless that court created an exception, a woman could have also been held liable for wrongful death of a viable fetus. Hawai'i law is distinguishable, as no cause of action for the wrongful death of fetus is provided by law, and no cause of action should be recognized, obviating any need for an exception.

More importantly, however, the need to fashion an exception for a woman's potential liability illustrates that the legislature never intended to include a stillborn formerly viable fetus within the definition of "person" under HRS § 663-3. If a stillborn formerly viable fetus is a "person" for purposes of HRS § 663-3, not only a negligent woman, but a woman exercising her rights to terminate a pregnancy under HRS § 453-16 would be subject to civil liability under HRS § 663-3. See footnote 15, supra. If the legislature intended to include a viable fetus within the definition of "person" under the

wrongful death statute, it undoubtedly would have addressed the obvious conflict with HRS § 453-16.

D. Analysis of other arguments.

1. The laws of other states that allow wrongful death actions for stillborn fetuses do not govern, as Hawai'i law differs and controls.

According to the ICA, forty-one states and the District of Columbia now permit wrongful death actions to be brought on behalf of stillborn formerly viable fetuses. Castro, 137 Hawai'i at 186, 366 P.3d at 1065. The proper focus for this court, however, is not whether other states recognize such a cause of action but whether the Hawai'i legislature intended to include a stillborn formerly viable fetus in the definition of "person" for purposes of HRS § 663-3. As noted above, the legislative history of Hawaii's wrongful death statute does not indicate such an intent. The language and legislative intents of other states might differ.¹⁶

It is important to note that of the forty-one states cited in the ICA opinion as allowing wrongful death claims for stillborn formerly viable fetuses, whether originally by

¹⁶ For example, in deciding to construe "person" to include a viable fetus for purposes of that state's wrongful death statute, the Arkansas Supreme Court cited to an amendment to that state's constitution declaring that "[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth." Aka v. Jefferson Hosp. Ass'n, Inc., 42 S.W.3d 508, 517-18 (Ark. 2001). See Marks, 37 Akron L. Rev. at 53-74 for a listing of reasons given by various states in recognizing a wrongful death cause of action for stillborn fetus, including non-viable fetuses.

judicial opinion or by statute, Castro, 137 Hawai'i at 187 n.8, 366 P.3d at 1066 n.8., thirty-five criminalize injuries to fetuses, as compared to Hawai'i, which does not.¹⁷ Many of those states even allow criminal prosecutions for offenses against non-viable fetuses.¹⁸ Moreover, it appears that at least six states even allow wrongful death actions to be brought for the death of a fetus before it reaches viability. See Marks, 37 Akron L. Rev. at 71.

The ICA found unconvincing the State's contention that it would be inconsistent to allow a civil claim where a criminal prosecution would be prohibited. Castro, 137 Hawai'i at 190, 366 P.3d at 1069. The ICA points out that Hawai'i is one of only nine states that still apply the "born alive" rule and have not amended their criminal homicide statutes to include unborn children as victims. 137 Hawai'i at 188, 366 P.3d at 1067. Although the ultimate question is whether the legislature intended to include a viable fetus in the definition of a "person" under HRS §§ 663-3, it is relevant that the Hawai'i legislature has actually chosen to remain in the minority as to the "born alive" rule for criminal prosecutions.

¹⁷ See National Conference of State Legislatures' "Fetal Homicide State Laws," <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>. (Last visited March 7, 2018).

¹⁸ See supra n.18.

The ICA also points out that of the nine states still applying the "born alive" rule, seven, Connecticut, Delaware, New Hampshire, New Mexico, Oregon, Vermont, and Washington, allow a wrongful death action on behalf of a fetus, while New Jersey specifically rejects it, and Colorado remains undecided. 137 Hawai'i at 188-89, 189 n.7, 366 P.3d at 1067-68, 1068 n.7. The ICA thus reasons that the existence of the "born alive" rule in a state's penal code does not foreclose a civil cause of action for the wrongful death of a viable fetus. 137 Hawai'i at 189, 366 P.3d at 1068. By the same token, however, there are six states, California, Florida, Iowa, Maine, New Jersey, and New York, which specifically prohibit wrongful death actions on behalf of unborn, viable fetuses. 137 Hawai'i at 186, 366 P.3d at 1065. Four of those six states, California, Florida, Iowa, and Maine criminalize fetal injuries,¹⁹ yet do not recognize a wrongful death cause of action for a fetus.²⁰ Thus, this argument goes both ways.

¹⁹ See supra n.18.

²⁰ The highest courts of these states have declined to recognize such a cause of action based on their interpretations of the legislative intents of their respective state legislatures. See Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Stern v. Miller, 348 So.2d 303 (Fla. 1977); McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971); Milton v. Cary Med. Ctr., 538 A.2d 252 (Me. 1988).

2. **It is the legislature's prerogative to determine policy with respect to who qualifies as a "person" for purposes of the wrongful death statute.**

It bears repeating that this court's foremost obligation in construing HRS § 663-3 is to ascertain and give effect to the intent of the legislature. Lealaimatafao, 75 Haw. at 551, 867 P.2d at 224. The ICA points out that in State v. Aiwahi, 109 Hawai'i 115, 123 P.3d 1210 (2005), this court stated that even if the statutory language regarding whether a fetus was a "person" for purposes of criminal liability was perceived to be ambiguous, in criminal cases, the rule of lenity would have required that the statute be strictly construed in favor of the defendant and against the prosecution. Castro, 137 Hawai'i at 188, 366 P.3d at 1067. The ICA reasons that states allowing wrongful death actions while not criminalizing injuries to fetuses often rely on the "well-established principle that, while civil causes of action are remedial in nature and therefore are generally construed liberally, criminal statutes are construed strictly and in favor of the accused." 137 Hawai'i at 189, 366 P.3d at 1068. Although this is true, this court has specifically ruled that in construing HRS § 663-3, legislative intent controls. It is therefore improper for this court to construe HRS § 663-3 in a manner that clearly contravenes legislative intent.

The ICA also found persuasive the following rationale of the Vermont Supreme Court:

Numerous reasons have been assigned by the several jurisdictions for reaching the conclusion to which we subscribe. The ones commonly given, and in our view convincing, are summarized in White v. Yup, 85 Nev. 527, 536, 458 P.2d 617, 622 (1969) as follows:

A. If a child, injured when a viable fetus as a result of another's negligence, has a cause of action when born, then it can make no difference in liability whether death occurs just prior to or just after birth.

B. A viable unborn child is, in fact, biologically speaking, a presently existing person and a living human being, because it has reached such a state of development that it can presently live outside the female body, as well as within it.

C. If no right of action is allowed, there is a wrong inflicted for which there is no remedy. Where negligent acts produce a stillbirth and a right of action is denied, an incongruous result is produced. For example, if a doctor acted negligently while delivering a baby and it died, the doctor would be immune from lawsuit. However, if he badly injured the child, the doctor would be exposed to liability. Under such a rule, there is the absurd result that the greater the harm, the better the chance of immunity, and the tort-feasor could foreclose his own liability. (Citations omitted in each instance).

Castro, 137 Hawai'i at 190, 366 P.3d at 1069 (citing Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc., 139 Vt. 138, 142-43, 425 A.2d 92, 94-95 (1980)).

With respect to point (A) in the excerpt above, the Chief Justice and ICA correctly note that under Hawai'i common law, a child subsequently born alive may recover damages for negligently inflicted prenatal injuries. Opinion of Recktenwald, C.J., at Section II(B); Castro, 137 Hawai'i at 190, 366 P.3d at 1069 (citing to Omori v. Jowa Haw. Co., Ltd., 91

Hawai'i 157, 161-62, 981 P.2d 714, 718-19 (App. 1999), aff'd as modified, 91 Hawai'i 146, 981 P.2d 703 (1999)). That, however, is the salient point; such recovery is permitted under Hawai'i common law, which the courts define. By contrast, with respect to points (A) and (B), it is not for this court to redefine a "person" for purposes of HRS § 663-3; this is an issue for the legislature.

This analysis is also consistent with the Restatement (Second) of Torts ("Restatement"). As noted in Bynum v. Magno, 106 Hawai'i 81, 101 P.3d 1149 (2004), this court has many times relied on the Restatement as persuasive authority. Bynum, 106 Hawai'i at 86 n.12, 101 P.3d at 1155 n.12. Restatement § 869 (1979) provides:

§ 869 Harm to Unborn Child

(1) One who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive.

(2) If the child is not born alive, there is no liability unless the applicable wrongful death statute so provides.

Thus, Restatement § 869 subsection (1) recognizes that whether liability exists for prenatal injuries to a fetus born alive is an issue governed by common law, which generally allows recovery for such injuries; as noted, Hawai'i common law is consistent

with subsection (1). Omori, 91 Hawai'i at 161-62, 981 P.2d at 718-19, aff'd as modified, 91 Hawai'i 146, 981 P.2d 703.

Subsection (2) of § 869 makes clear, however, that when a fetus is not born alive, "there is no liability unless the applicable wrongful death statute so provides." Thus, Subsection (2) is also consistent with our common law, which provides that whether wrongful death liability exists is an issue to be decided by the legislature. See Lealaimatafao, 75 Haw. at 551, 867 P.2d at 224. Again, Section IV(B) above explains that our legislature has not provided for such liability for a stillborn viable fetus. Therefore, respectfully, the Chief Justice and ICA err by attempting to create such liability under common law.

The California Supreme Court's opinion rejecting a wrongful death cause of action for a viable fetus makes a similar point:

We have carefully considered these arguments, each of which finds support in one or more of the out-of-state decisions recognizing a cause of action for the wrongful death of a fetus. They are not all equally convincing, and some are put in serious question by the decisions rejecting this cause of action and by the legal scholars. But we need not enter this debate, less still attempt to settle it. The considerations advanced by plaintiffs would be relevant if we were called upon to decide whether California should adopt the proposed cause of action as a matter of judge-made law; they are not persuasive when, as here, the cause of action for wrongful death in this state is a pure creature of statute.

Justus, 139 Cal. Rptr. at 102-03, 565 P.2d at 126-27 (emphasis added; internal citations omitted). As stated by the California

Supreme Court, the issue of whether a wrongful death cause of action should exist for a fetus is an issue for the legislature.

In addition, the Iowa Supreme Court's rationale in rejecting a wrongful death cause of action for a viable fetus is instructive and concludes with the points discussed in Sections IV(B) (1) and (2) above, that our obligation is to follow the clear language of a wrongful death statute and that it makes no sense to ascribe a different meaning to "person" in just one context, as a decedent:

In construing statutes we search for the legislative intent as shown by what the legislature said, rather than what it should or might have said. Rule 344(f), par. 13, Rules of Civil Procedure. If the language of a statute when given its plain and rational meaning is precise and free from ambiguity, no more is necessary than to apply to the words used their ordinary sense in connection with the subject considered. Maguire v. Fulton, Iowa, 179 N.W.2d 508, 510. These rules are applicable here. We hold 'person' as used in Code section 611.20 means only those born alive. How indeed could an unborn child be a person with a liability as referred to in the statute?

McKillip, 191 N.W.2d at 709 (emphases added).

3. Hawaii's common law tort of negligent infliction of emotional distress allows recovery under these circumstances, eliminating the lack of other tort remedy concern expressed by other states.

Furthermore, in subsection (C) from the Vaillancourt opinion excerpted above, which was quoted favorably by the ICA in its opinion, Castro, 137 Hawai'i at 190, 366 P.3d at 1069, the Vermont Supreme Court posited another reason for recognizing a cause of action for wrongful death for the death of a viable fetus: the alleged lack of other available tort remedies.

Vaillancourt, 139 Vt. at 94-95, 425 A.2d at 142-43. The Chief Justice also opines that "to not allow hedonic damages in this case would create perverse incentives for the tortfeasor." Opinion of Recktenwald, C.J., at Section IV(A).

Respectfully, however, the concerns expressed by the Vermont Supreme Court, the ICA, and the Chief Justice do not exist in Hawai'i. In Hawai'i, a tortfeasor who causes a fetus to be stillborn would not escape liability. Although such a result might be true in Vermont and other states, a tort remedy exists for the loss of a viable fetus under Hawaii's independent common law tort of negligent infliction of emotional distress. As concluded by the circuit court:

79. A plaintiff may recover for Negligent Infliction of Emotional Distress, absent any physical manifestation of her psychological injury or actual physical presence within a zone of danger, where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case. Doe Parents No. 1 v. Dept. of Educ., 100 Hawai'i 34, 69, 58 P.3d 545, 580 (2002).

In fact, the circuit court awarded damages of \$250,000 to Castro individually under this common law tort cause of action; this part of the judgment is not controlled by whether or not a stillborn fetus is a "person" for purposes of HRS § 663-3.

According to Denise E. Antolini, Punitive Damages in Rhetoric and Reality: An Integrated Empirical Analysis of Punitive Damages Judgments in Hawaii, 1985-2001, 20 J.L. & Pol. 143, 172-73 (2004) (internal footnotes omitted):

In 1970, Hawaii sparked a national judicial trend by abolishing the physical injury rule in negligent infliction of emotional distress ("NIED") cases, allowing the claim as an independent cause of action. Hawaii courts recognized NIED claims even based on injury to property alone. In *Rodrigues v. State of Hawaii*,^[21] distressed owners of a Maui home that flooded as a result of the State's negligent failure to clear a plugged culvert were allowed to recover, even though they had not yet moved in, incurred only property damage, and suffered no physical injury related to the flooding incident. A series of cases followed that put Hawaii in a field of its own in this area of the law, creating a novel and expansive test that seems to still be broadening. Under Hawaii law, plaintiffs may recover even for NIED experienced from post-accident news of the death of a pet,^[22] making Hawaii one of only a few jurisdictions in the country to recognize this tort.

Hawaii NIED law continued to be broadly interpreted in subsequent cases like the 1989 *Masaki v. General Motors* case,^[23] which allowed recovery by parents who suffered emotional distress upon seeing their adult son in the hospital after a severe accident. The court took another liberal turn in the 1999 case *John and Jane Roes v. FHP, Inc.*,^[24] holding that airport baggage handlers who were exposed to, but not ultimately infected by, HIV-tainted blood from a burst package could claim NIED for the period of time during which they had a legitimate fear of AIDS. Without doubt, Hawaii has established itself as the national standard[-]bearer of liberal NIED rulings.

Thus, the availability of Hawaii's independent tort of negligent infliction of emotional distress obviates the "lack of other

²¹ *Rodrigues v. State*, 52 Haw. 283, 472 P.2d 509 (1970). In response to *Rodrigues*, the legislature passed HRS § 663-8.9 in 1986, which provides:

Serious emotional distress arising from property damage; cause of action abolished; exception for physical injury. (a) No party shall be liable for the negligent infliction of serious emotional distress or disturbance if the distress or disturbance arises solely out of damage to property or material objects.
(b) This section shall not apply if the serious emotional distress or disturbance results in physical injury to or mental illness of the person who experiences the emotional distress or disturbance.

²² *Campbell v. Animal Quarantine Station*, 63 Haw. 557, 632 P.2d 1066 (1981).

²³ *Masaki v. General Motors Corp.*, 71 Haw. 1, 780 P.2d 566 (1989).

²⁴ *Roes v. FHP, Inc.*, 91 Hawai'i 470, 985 P.2d 661 (1999).

remedy" rationale for the need to recognize a wrongful death cause of action for a stillborn formerly viable fetus.

Finally, even if the common law cause of action of negligent infliction of emotional distress did not exist, the intent of the legislature controls in our interpretation of HRS § 663-3. For all the reasons stated above, the Hawai'i legislature did not intend to include a stillborn formerly viable fetus within the definition of "person" under HRS § 663-3. It is not for this court to substitute our judgment for the legislature's decision.

IV. Conclusion

For the reasons stated above, the ICA's Judgment on Appeal as to the \$250,000 awarded to Castro individually for negligent infliction of emotional distress and, the \$100,000 awarded to Castro for loss of filial consortium should be affirmed, but the \$250,000 awarded to the estate of the fetus for loss of life and loss of enjoyment of life should be set aside. We construe Justice Nakayama's opinion as agreeing that a fetus does not qualify as a "person" under the wrongful death and survival statutes, but joining with the Chief Justice in a judgment on appeal that also allows the estate of the fetus to recover in

this case because the State did not specifically raise the issue on certiorari.

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

