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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6943

In the Supreme Court of Appeals of Virginia at Richmond

WILLIAM M. LAWRENCE, ADMR., ETC.

v.

CRAVEN TIRE COMPANY, ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6943

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 16th day of April, 1968.

William M. Lawrence, Administrator of the estate of Baby Girl Lawrence, deceased, Plaintiff in error,

against

Craven Tire Company and Cherner-Shirlington Motor Company, a partnership composed of: Joseph Cherner, individually and as Trustee for Nadine I. Cherner, Roberta N. Cherner, Margery L. Cherner and Thelma Zucker; Henry J. Gertler, individually and as Trustee for Nadine I. Cherner, Roberta N. Cherner, Margery L. Cherner and Thelma C. Zucker; Leon Cherner; Ruth R. Cherner; Anne C. Gertler; and Henry Cherner, Defendants in error.

From the Circuit Court of Fairfax County
Albert V. Bryan, Jr., Judge

Upon the petition of William M. Lawrence, Administrator of the estate of Baby Girl Lawrence, deceased, a writ of error is awarded him to a final order entered by the Circuit Court of Fairfax County on the 24th day of October, 1967, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Freddie Gray Spivey and others were defendants; no bond being required.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6943

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 16th day of October, 1968.

WILLIAM M. LAWRENCE, Admr., etc., Plaintiff in error,

against

CRAVEN TIRE COMPANY, et al., Defendants in error.

Upon a writ of error to a judgment rendered by the Circuit Court of Fairfax County on the 24th day of October, 1967.

In accordance with the stipulation heretofore filed in this cause by all the parties hereto, it is ordered as follows:

1. That the petition, heretofore filed by the appellant, William M. Lawrence, administrator of the estate of Baby Girl Lawrence, deceased, to add Freddie Gray Spivey as an appellee is agreed to by all parties;
2. That the said appellee Spivey (defendant below) be considered to occupy the same position as if a timely demurrer and answer and grounds of defense had been filed on his behalf in the trial court;
3. That the said appellee Spivey shall be allowed to participate in this appeal in the same manner as if he had been legally before the trial court below; and
4. That his counsel shall be noted of record as Charles H. Duff of Duff, Slenker & Brandt, 2009 North 14th Street, Arlington, Virginia.

RECORD

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page 1 }

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Filed in Circuit Court Clerk's Office Oct. 27, 1966. Howard G. Guerny, Jr., Clerk, Fairfax County, Va.

* * * * *

page 2 } MOTION FOR JUDGMENT

COUNT I

Comes now the plaintiff, WILLIAM M. LAWRENCE, administrator of the estate of BABY GIRL LAWRENCE, and moves this Honorable Court for a judgment and award of execution against the defendants FREDDIE GRAY SPIVEY, CRAVEN TIRE COMPANY, a Virginia corporation, JOSEPH CHERNER, individually and as trustee for Nadine I. Cherner, Roberta N. Cherner, Margery L. Cherner, and Thelma C. Zucker, HENRY J. GERTLER, individually and as trustee for Nadine I. Cherner, Roberta N. Cherner, Margery L. Cherner, and Thelma C. Zucker, LEON CHERNER, RUTH R. CHERNER, ANNE C. GERTLER, and HENRY CHERNER, co-partners doing business as CHERNER-SHIRLINGTON MOTOR COMPANY (which said defendants are hereinafter referred to collectively as "CHERNER-SHIRLINGTON MOTOR COMPANY"), of Thirty-Five Thousand Dollars ($35,000) and costs, and as grounds therefor states as follows:

(1) On the 6th day of April, 1966, the plaintiff qualified and was duly appointed as the administrator of the estate of his daughter, BABY GIRL LAWRENCE, deceased, by the Circuit Court of Fairfax County, Virginia.

(2) On or about November 26, 1965, the mother of the plaintiff's decedent, Lutrell M. Lawrence (hereinafter referred to as "decedent's mother") was a passenger in an automobile operated by her husband, the plaintiff WILLIAM M. LAWRENCE, which said automobile was headed in a northerly direction in the intersection of two driveways on the parking lot of E. J. Korvette, Inc., 3524 South Jefferson Street, East of Bailey's Crossroads in Fairfax County, Virginia.

page 3 } (3) At the same time and place the defendant, FREDDIE GRAY SPIVEY was operating another vehicle in a westwardly direction on a driveway through the parking lot. Thereupon it became his duty to operate said vehicle free from negligence and with due regard for the safety of other persons on the parking lot. Notwithstanding said duties, the vehicle operated by the said defendant did strike the right front fender of the vehicle in which decedent's mother was a passenger. This collision was proximately due to the violation of aforesaid duties by the defendant, FREDDIE GRAY SPIVEY, and his negligence consisted of:

(a) Failure to keep a proper lookout;

(b) Failure to travel at a reasonable speed prior to striking the vehicle which plaintiff was operating;

(c) Failure to apply his brakes in time to avoid the collision;

(d) Failure to give full time and attention to the operation of his vehicle;

(e) Failure to keep his vehicle under proper control;

(f) Failure to keep his vehicle in the proper mechanical condition;

(g) Operating his said vehicle in a reckless manner.

(4) The defendant, FREDDIE GRAY SPIVEY, was an employee of the defendant CRAVEN TIRE COMPANY, and at the time of aforesaid accident was acting within the scope of his employment with the said corporate defendant.

(5) At the time of the aforesaid accident, the defendants CRAVEN TIRE COMPANY and CHERNER-SHIRLINGTON MOTOR COMPANY were engaged in a joint page 4 } enterprise as respects the operation of the vehicle driven by the defendant FREDDIE GRAY SPIVEY, who was then and there acting within the scope of the enterprise.

(6) The vehicle operated by the defendant, FREDDIE GRAY SPIVEY, was owned by CHERNER-SHIRLINGTON MOTOR COMPANY. Both CHERNER-SHIRLINGTON MOTOR COMPANY and the defendant CRAVEN TIRE COMPANY negligently entrusted said vehicle to the defendant FREDDIE GRAY SPIVEY, in that they should have known that he was not competent nor possessed of the necessary skills and faculties to permit him to operate said vehicle.

(7) At the time of aforesaid collision, decedent's mother was the child, said child being BABY GIRL LAWRENCE

who was then and there a viable being, capable of an independent existence.

(8) As a result of aforesaid collision, decedent's mother was thrown in and about the vehicle and sustained injuries, including abdominal trauma, apoplexy of the uterus, tetanic contractions, and internal bleeding, which injuries impaired the further development of her unborn, viable child; and resulted in precipitate labor and delivery.

(9) As a result of the aforesaid wrongful and negligent acts of the defendants, and each of them, the plaintiff's decedent, BABY GIRL LAWRENCE, sustained injuries, which injuries caused hemorrhaging and necrosis and impaired the continued development of plaintiff's decedent, and resulted in her death on or about January 16, 1966.

(10) This action is brought pursuant to Title 8, Chapter 29, Article 3, Code of Virginia (1950) as amended.

page 5 } WHEREFORE, the plaintiff, WILLIAM M. LAWRENCE, demands judgment jointly and severally against defendants, FREDDIE GRAY SPIVEY, CRAVEN TIRE COMPANY, a Virginia corporation, JOSEPH CHERNER, individually and as trustee for Nadine I. Cherner, Roberta N. Cherner, Margery L. Cherner, and Thelma C. Zucker, HENRY J. GERTLER, individually and as trustee for Nadine I. Cherner, Roberta N. Cherner, Margery L. Cherner, and Thelma C. Zucker, LEON CHERNER, RUTH R. CHERNER, ANNE C. GERTLER, and HENRY CHERNER, co-partners doing business as CHERNER-SHIRLINGTON MOTOR COMPANY, in the sum of Thirty-Five Thousand Dollars ($35,000) and costs.

COUNT II

Comes now the plaintiff WILLIAM M. LAWRENCE, administrator of the estate of BABY GIRL LAWRENCE, and moves this Honorable Court for a judgment and award of execution against the defendants FREDDIE GRAY SPIVEY, CRAVEN TIRE COMPANY, a Virginia corporation, JOSEPH CHERNER, individually and as trustee for Nadine I. Cherner, Roberta N. Cherner, Margery L. Cherner, and Thelma C. Zucker, HENRY J. GERTLER, individually and as trustee for Nadine I. Cherner, Roberta N. Cherner, Margery L. Cherner, and Thelma C. Zucker, LEON CHERNER, RUTH R. CHERNER, ANNE C. GERTLER, and HENRY CHERNER, co-partners doing business as CHERNER-SHIRLINGTON MOTOR COMPANY (which said defendants are hereinafter referred to collectively as "CHER-

NER-SHIRLINGTON MOTOR COMPANY"), of Thirty Five Thousand Dollars ($35,000) and costs, and as grounds therefore states as follows:

page 6 } (1) Paragraphs 1, 2, 3, 5, 6, 7, 8, 9 and 10 of the foregoing Count I are hereby incorporated in Count II by reference and realleged as though fully set forth herein.

(2) The defendant CRAVEN TIRE COMPANY was the regular employer of the defendant FREDDIE GRAY SPIVEY. However, at the time and place of the accident involved herein the said FREDDIE GRAY SPIVEY was the borrowed employee of CHERNER-SHIRLINGTON MOTOR COMPANY and was then and there acting within the scope of his said employment.

WHEREFORE, the plaintiff, WILLIAM M. LAWRENCE, demands judgment jointly and severally against defendants, FREDDIE GRAY SPIVEY, CRAVEN TIRE COMPANY, a Virginia corporation, JOSEPH CHERNER, individually and as trustee for Nadine I. Cherner, Roberta N. Cherner, Margery L. Cherner, and Thelma C. Zucker, HENRY J. GERTLER, individually and as trustee for Nadine I. Cherner, Roberta N. Cherner, Margery L. Cherner, and Thelma C. Zucker, LEON CHERNER, RUTH R. CHERNER, ANNE C. GERTLER, and HENRY CHERNER, co-partners doing business as CHERNER-SHIRLINGTON MOTOR COMPANY, in the sum of Thirty-Five Thousand Dollars ($35,000) and costs.

WILLIAM M. LAWRENCE,
Administrator of the Estate of
BABY GIRL LAWRENCE,
Deceased
By Counsel

BANKHEAD T. DAVIES
2060 14th Street, North
Arlington, Virginia

LEONARD BRAMAN
1116 Woodward Building
Washington, D. C.

Counsel for Plaintiff

• • • • •

page 25 }

* * * * *

DEMURRER

Now come Cherner-Shirlington Motor Company, a partnership, and Joseph Cherner, individually and as trustee for Nadine I. Cherner, Roberta N. Cherner, Margery L. Cherner, and Thelma C. Zucker; and Henry J. Gertler, individually and as trustee for Nadine I. Cherner, Roberta N. Cherner, Margery L. Cherner, and Thelma C. Zucker; and Leon Cherner, Ruth R. Cherner, Anne C. Gertler and Henry Cherner, defendants, by counsel, and submit this, their demurrer to the plaintiff's motion for judgment, respectfully moving this Honorable Court to dismiss the same on the grounds that the said motion for judgment fails to state a cause of action for which the plaintiff can have a recovery at law.

CHERNER-SHIRLINGTON MOTOR COMPANY, a partnership, and JOSEPH CHERNER, individually and as trustee for NADINE I. CHERNER, ROBERTA N. CHERNER, MARGERY L. CHERNER, and THELMA C. ZUCKER; and HENRY J. GERTLER, individually and as trustee for NADINE I. CHERNER, ROBERTA N. CHERNER, MARGERY L. CHERNER, and THELMA C. ZUCKER; and LEON CHERNER, RUTH R. CHERNER, ANNE C. GERTLER and HENRY CHERNER
By Counsel

Boothe, Dudley, Koontz,
Blankingship & Stump
10530 Page Avenue
Fairfax, Virginia

By: A. HUGO BLANKINGSHIP, JR.

* * * * *

Filed Nov. 17, 1966. Thomas P. Chapman, Jr., Clerk of the Circuit Court of Fairfax County, Va.

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page 30 }

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Comes now Craven Tire Company, by counsel, and submits this, its demurrer to the plaintiff's motion for judgment, respectfully moving this Honorable Court to dismiss the same on the grounds that the said motion for judgment fails to state a cause of action for which the plaintiff can have a recovery at law.

CRAVEN TIRE COMPANY

By ROBERT C. COLEBURN
Counsel

SIMMONDS, CULLER, DAMM & COLEBURN

By ROBERT C. COLEBURN
Counsel for Defendant Craven Tire Company

* * * * *

Filed Dec. 7, 1966. Thomas P. Chapman, Jr., Clerk of the Circuit Court of Fairfax County, Va.

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page 72 }

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GROUNDS OF DEMURRER

Comes now the defendant, Craven Tire Company, by counsel, and in response to the motion filed herein by the plaintiff, by counsel, states the grounds of its demurrer as follows:

1. That Section 8-633 of the Code of Virginia does not create any cause of action which can be maintained by the plaintiff as Administrator of the Estate of a stillborn child. A stillborn child cannot maintain an action at common law for injuries received by it while in its mother's womb. Consequently the personal representative cannot maintain such action under the Virginia Wrongful Death Statute.

CRAVEN TIRE COMPANY

By ROBERT C. COLEBURN
Counsel

* * * * *

Filed Apr. 6, 1967. Thomas P. Chapman, Jr., Clerk of the Circuit Court of Fairfax County, Va.

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page 73 }

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GROUNDS FOR DEMURRER

The undersigned Defendants, by counsel, assert as grounds in support of their demurrer, the following:

1. There is no cause of action to support the Plaintiff's claim.
2. A prenatal injury affords no basis in Virginia for an action for wrongful death.
3. A suit for wrongful death is statutory in origin and no statute in Virginia exists to establish a claim against the Defendants under the facts alleged.

CHERNER-SHIRLINGTON MOTOR COMPANY, a partnership, and JOSEPH CHERNER, individually and as trustee for NADINE I. CHERNER, ROBERTA N. CHERNER, MARGERY L. CHERNER, and THELMA C. ZUCKER: and HENRY J. GERTLER, individually and as trustee for NADINE I. CHERNER, ROBERTA N. CHERNER, MARGERY L. CHERNER, and THELMA C. ZUCKER: and LEON CHERNER, RUTH R. CHERNER, ANNE C. GERTLER and HENRY CHERNER,
By Counsel

BOTTHE, DUDLEY, KOONTZ,
BLANKINGSHIP & STUMP
10530 Page Avenue, Fairfax, Virginia

By: A. HUGO BLANKINGSHIP, JR.

* * * * *

Filed Apr. 18, 1967. Thomas P. Chapman, Jr., Clerk of the Circuit Court of Fairfax County, Va.

* * * * *

page 131 }

Fairfax County Courthouse
Fairfax, Virginia 22030
September 14, 1967

Mr. Leonard Braman
Attorney at Law
1116 Woodward Building
Washington, D. C. 20005

Mr. Robert C. Coleburn
Attorney at Law
15th Street and North Court House Road
Arlington, Virginia 22201

Mr. John J. Corson
Attorney at Law
4011 Chain Bridge Road
Fairfax, Virginia 22030

Mr. Bankhead T. Davies
Attorney at Law
2060 North 14th Street
Arlington, Virginia 22201

Re: Lawrence v. Spivey and Cherner
At Law No. 16636

Gentlemen:

I have considered the memoranda of counsel in light of the argument of September 8, 1967.

In my opinion the proposition that a viable fetus is a person is a highly theoretical and fictional concept, and to say that such a "person" could have maintained an action if death had not ensued is to carry the fiction even further. This I am unwilling to do.

With due deference to the respectable authority to the contrary, and the so-called modern trend, I find the reasoning of the Nebraska, Pennsylvania and New Jersey
page 132 } courts more persuasive, and I follow them. *Drabbels* v. *Shelly Oil Co.,* 155 Neb. 17, 50 NW 229 (1951), *Carroll* v. *Skloff,* 415 Pa. 47, 202 A 2d 9 (1964), *Graf*

v. *Taggert,* 43 N. J. 303, 204 A 2d 140 (1964). I recognize that in some of these jurisdictions the recovery in a death case is limited to the pecuniary loss to the beneficiaries; however, in my opinion, the remaining elements of damages allowable in Virginia, namely compensation for loss of the decedent's care, attention and society to the beneficiaries, and a fair and just sum by way of solace and comfort to the beneficiaries for the sorrow, suffering and mental anguish occasioned to them by the death, are so conjectural and emotional in the case of such an unborn infant, as to highlight the undesirability and impracticality of the rule urged by the plaintiff.

The demurrers of defendants are sustained, and their counsel should prepare an order to that effect and present it to the court for entry after submission to plaintiff's counsel for approval as to form.

Very truly yours,

Albert V. Bryan, Jr.

AVB:elc

page 133 }

* * * * *

FINAL ORDER

This matter came on to be heard on the 8th day of September, 1967, for argument on the Demurrers heretofore filed by the defendants and upon consideration of the issues raised and the Court being of opinion that the Demurrers should be sustained, it is accordingly,

ORDERED and ADJUDGED that the Demurrers be, and the same hereby are, sustained. The plaintiff having elected not to amend his Motion for Judgment and on further motion of counsel for defendants, final judgment is hereby entered in favor of the defendants and against the plaintiff.

To the sustaining of the Demurrers and to the entry of this Order counsel for plaintiff has duly noted and preserved his exception.

ENTER: October 24th, 1967.

A. V. B., Jr., Judge.

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page 135 }

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PLAINTIFF'S NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

To: Thomas P. Chapman, Jr.
Clerk
Circuit Court of Fairfax County
State of Virginia

Notice is hereby given that the plaintiff appeals from the final judgment rendered in the above-captioned action by this Court on the 24th day of October, 1967, and plaintiff announces his intention of applying for a Writ of Error to the Supreme Court of Appeals of Virginia.

* * * * *

Filed Dec. 6, 1967. Thomas P. Chapman, Jr., Clerk of the Circuit Court of Fairfax County, Va.

* * * * *

page 136 } ASSIGNMENT OF ERROR

The Trial Court erred in holding that no cause of action exists under the Virginia wrongful death statute (§8-663 of the Code of Virginia, as amended) to recover damages for the wrongful death of an unborn viable infant stillborn.

William M. Lawrence, Administrator of the
Estate of Baby Girl Lawrence, deceased
By counsel

SURREY, KARASIK, GOULD and GREENE

By LEONARD BRAMAN
Michael Nussbaum
1116 Woodward Building
Washington, D. C.
and
BANKHEAD T. DAVIES
2060 14th Street, North
Arlington, Virginia
Attorneys for Plaintiff

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error Awarded	1
Order of Supreme Court of Appeals of Virginia—October 16, 1968	2
Record	3
Motion for Judgment	3
Demurrer of Cherner-Shirlington Motor Co., et al.	7
Demurrer of Craven Tire Co.	8
Grounds of Demurrer of Craven Tire Co.	8
Grounds for Demurrer of Cherner-Shirlington Motor Company, et al.	9
Opinion, Memorandum	10
Judgment—October 24, 1967	11
Notice of Appeal and Assignments of Error	12