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The Palm Beach Post

Thursday, January 9, 2014

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POST EXCLUSIVE MEDICAL MALPRACTICE SUIT

Overtured malpractice verdict may lead to abortion-law change

By Jane Musgrave
Palm Beach Post Staff Writer

WEST PALM BEACH — When a jury in 2011 awarded Rodolfo Santana and his wife \$2.5 million so they could get their son the help he needs to live with no arms and one leg, the West Palm Beach man cried softly, believing life was finally looking up.

Then, in November, his wife, Ana Mejia, was shot dead. On Wednesday an ap-

peals court delivered another blow, throwing out the verdict in the medical malpractice case. To get the millions the jury said his now 5-year-old son Bryan will need for prosthetics and other medical services, Santana probably will have to endure a second trial.

"This family just can't catch a break," said attorney Jason Weisser, who represented the couple in the emotional legal battle against Dr. Marie Mo-

rel and Perinatal and Gynecologic Specialists of the Palm Beaches.

While devastating to the family, the decision by a deeply divided 4th District Court of Appeal also calls into question the state's abortion laws — questions lawyers said may have to be resolved by the state Legislature or the Florida Supreme Court.

Following the landmark

Abortion continued on A5

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Abortion

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1973 ruling in *Roe v. Wade*, Florida regulates abortions by trimesters. It permits them in the first two trimesters of pregnancy, but prohibits them in the third trimester unless a woman's health is in jeopardy. However, unlike many other states, Florida doesn't clearly define when the third trimester begins.

Would have aborted

And, in Santana's case, the ambiguity created a math problem that turned out to be critical.

Santana and his wife filed a "wrongful birth" case against Morel and her practice after the "perfect" baby they were promised was born with severe abnormalities. Had Morel and a technician discovered the three missing limbs on an ultrasound they administered, the couple said they would never have brought Bryan into the

world. They would have opted for an abortion.

However, Morel's attorneys claimed that by the time the couple arrived at the obstetrician's office for the ultrasound, Mejia was in the third trimester of her pregnancy, too late to have an abortion in Florida. They based their arguments on the gestational age of the fetus, which is calculated from the date of a woman's last menstrual period.

Weisser countered that Mejia wasn't in the third trimester, arguing that she conceived the child two weeks after her last menstrual period.

Not wanting to confuse the jury and turn the case into a trial on the state's abortion laws, Palm Beach County Circuit Judge Lucy Chernow Brown ruled that Morel's attorneys couldn't tell the jury about Florida's abortion laws.

That, according to the appeals court, was a mistake.

"Our holding in this case is consistent with the well-settled princi-

ple that a party is entitled to have the trial court instruct the jury on its theory of the case when the evidence, even though controverted, supports that theory," wrote Judge Mark Klingensmith. The decision was joined by Judge Dorian Damoorgian.

Judicial review cited

More importantly, he wrote, although state law doesn't specify if a trimester is based on the gestational age of a fetus or its age since conception, medical experts testified that "physicians customarily and routinely use the 'gestational age.'"

Using that method, Klingensmith wrote, Mejia was 24 weeks and one day pregnant when she got the flawed ultrasound, too late to get an abortion in Florida.

In a sharply worded dissent, Judge Carole Taylor said medical experts don't determine what the law says.

"It is emphatically the province and duty of the

judicial department to say what the law is," she wrote, quoting the landmark 1803 U.S. Supreme Court decision in *Marbury v. Madison* that established judicial review of legislation.

She said her colleagues wrongly assumed state lawmakers intended trimesters to be calculated by gestational age. "Had the legislature meant 'gestational age' as measured from the last menstrual period, it could have easily said so," she wrote. Since it defined trimesters on "weeks of pregnancy," it could have easily meant the age since conception. Further, she said, Mejia could have traveled to a state that permits late-term abortions.

Given such uncertainties, Taylor said Brown made the right call.

Weisser said he isn't worried about the outcome of a second trial. In addition to misreading the ultrasound, he said he will argue that Morel was negligent in scheduling Mejia's ultrasound so

late, knowing there was a strong likelihood of abnormalities.

Mark Rosen, who represents Morel, applauded the ruling, saying it was important for him to tell the jury about the state's abortion laws. However, he said, he suspects the ruling may transcend the case.

"It kind of defines when the third trimester begins," he said. "It's a hot topic. Maybe the Florida Legislature will address it."

Attorney Bard Rockenbach, who represented the family in the appeal, said the ruling could be used in other cases that turn on the legalities of near third-trimester abortions. He said he could ask for a rehearing, in hopes of changing the appeals court judges' minds. Or he could try to persuade them to send the case to the Florida Supreme Court.

Meanwhile, Weisser said, Santana is raising two kids and dealing with the prosecution of former family friend Wil-

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Mark Rosen
Attorney for Dr. Marie Morel

Liam Nunez Reyes, who claims he shot Mejia accidentally.

St. Mary's Medical Center, which also didn't detect problems on Mejia's ultrasounds, paid \$2 million to the family in an out-of-court settlement, according to records. Still, Weisser said, the youngster's needs are enormous.

"It's not been a good couple of years for them," he said.

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