STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2003 CA 0692

LAURA COX, INDIVIDUALLY AND ON BEHALF OF
HER MINOR CHILD, OLIVIA COX

VERSUS

GAYLORD CONTAINER CORPORATION

Judgment rendered: February 23, 2004

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On Appeal from the 22nd Judicial District Court
Parish of Washington, State of Louisiana
Docket Number 79,593, Division A
Honorable Raymond Childress, Judge Presiding

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BEFORE: PETTIGREW, DOWNING AND McCLENDON, JJ.

J. Pettigrew J. Concurs and assigns reasons

DOWNING, J.

Laura Cox, individually and on behalf of her child, Olivia Cox, appeals a judgment ruling that her employer was not vicariously liable for her negligence that resulted in an on-the-job injury to her unborn child. The judgment also decreed that the child had no theory of recovery for prenatal injuries she allegedly sustained from the negligent acts of her mother. For the following reasons, we vacate in part, amend in part, and affirm as amended.

FACTS AND PROCEDURAL HISTORY

On November 3, 1998, Laura Cox, a pregnant employee of Gaylord Container Corporation (Gaylord), sustained injuries on the job when she ran the forklift she was driving into a steel I-beam. At the time of the accident, Laura was taken to the hospital, examined in the emergency room, and released the same day. She had abdominal bruising, but there was no vaginal bleeding and the fetal heartbeat appeared to be normal. Laura gave birth to Olivia Cox on March 2, 1999, four months after the accident occurred. Olivia was born with cerebral palsy.

Laura filed suit on Olivia's behalf against Gaylord alleging that Olivia's neurological damage was a result of the accident. In cross-motions for summary judgment, the trial court granted a partial summary judgment dismissing plaintiff's claims against Gaylord as they relate to the issue and/or theory of recovery that Olivia Cox may recover against either Laura Cox and/or Gaylord (vicariously for the negligence of Laura Cox) for any prenatal negligence which allegedly resulted in injury to Olivia Cox *in utero*.

Plaintiffs appealed alleging that the trial court erred in the following:

1. In concluding that a fetus, later born alive, does not possess a cause of action against its mother for negligently inflicted prenatal injuries.

2. In considering and applying common law legal authorities to the case instead of considering an applying clearly established civilian legal authorities and principles.

3. In applying the duty/risk analysis to the employer in the case *sub judice*; because *respondeat superior* recovery is based on the negligence of an employee, and the duty/risk analysis must be applied to that employee, not to the employer.

PARENTAL LIABILITY

Plaintiffs' first assignment of error alleges that the trial court erred in concluding that Olivia has no theory of recovery against her mother for her negligently inflicted prenatal injuries.

As a general rule, an unemancipated child cannot sue the parent who is entitled to his or her custody and control. La.R.S. 9:571. This statute operates only as a procedural bar to an action by the child against his parent and does not destroy the cause of action. *See* ***Walker v. Milton***, 263 La. 555, 560-61, 268 So.2d 654, 655-56 (La. 1972). Thus, it is foreseeable that when this child becomes of age or is emancipated, she could bring a claim against a parent. *See* ***Tort Actions Among Family Members***, Loyola Law Review Volume 1 1941-48 and 1 A.L.R. 3d 677 (1965).

The judgment at issue not only dismissed the claims against Gaylord, it also dismissed plaintiff's claims as they relate to the issues and/or theories of recovery that Olivia Cox may have against Laura Cox for any prenatal negligence of Laura Cox that allegedly resulted in injury to Olivia Cox *in utero*. Whether Olivia Cox can at some point in her life sue her mother, Laura Cox, for negligently injuring her before birth, was not before the court in Gaylord's motion for summary judgment, and should not have been heard. Furthermore, the holding is not supported by the law or the evidence. While a parent may file the exception of no right of action in this circumstance, ***Walker v. State Farm***, 33,781, p. 2 (La.App. 2 Cir. 8/25/00), 765 So.2d 1224, 1226, and while we are of the opinion that the

matter could also be raised by an exception of prematurity since the procedural bar simply defers the right of action. We can find no law that dispossesses a child of a cause of action. Louisiana Revised Statute 9:571 merely defers the cause of action until the child reaches majority or is emancipated.

This assignment of error has merit. Accordingly, we vacate that portion of the judgment that dismisses Laura Cox from the negligent acts she allegedly inflicted that resulted in damage to her unborn child, Olivia Cox and amend the judgment accordingly.

EMPLOYER'S LIABILITY

Plaintiffs allege in their third assignment of error that the trial court erred in finding that Gaylord was not vicariously liable for the negligent acts of Laura Cox that caused damage to her unborn child and erred in applying the duty/risk analysis to the employer and not to the employee.

Louisiana Civil Code article 2320 provides in part:

> [E]mployers are answerable for the damage occasioned by their servants...in the exercise of the functions in which they are employed.
>
> [R]esponsibility only attaches, when...employers...might have prevented the act which caused the damage, and have not done it.

This article makes it clear that employers are vicariously liable for the damage its employees cause in the exercise of the functions in which they are employed, even if the injury is to the employee's child. And as discussed above, the parental immunity found in La.R.S. 9:571 only operates as a procedural bar to an action by the child against the parent and does not destroy the cause of action. ***Walker v. Milton***, 263 La. at 560-61, 268 So.2d at 655-56.

The Code article explains the exceptions to the general rule imposing vicarious liability on employers. In several recent cases, application of this code article has been discussed. In ***Spears v. Roundtree Oldsmobile-Cadillac Co.***, 26,810, p. 5 (La.App. 2 Cir. 4/5/95), 653 So.2d 182, 184, the court concluded that

under article 2320, damage could not be imputed to the employer because the employer had no actual or constructive knowledge of the conduct until after the incident occurred. Thus, the employer could not have prevented the act that caused the damage. In ***Alexander v. Lowes Companies***, 96-2169, pp. 5-6 (La.App. 1 Cir. 9/19/97), 701 So.2d 239, 242, the court discussed when a principal is vicariously liable for a contractor's work. The court made it clear that "responsibility attaches only when the employer might have prevented the act that caused the damage, and did not do so." *See also* ***Gender Specific Regulations in the Chemical Workplace***, 27 Santa Clara L.Rev. 353 (1987).

Pregnancy-based discrimination is not permissible. *See* Title VII of the Civil Rights Act of 1964.

In this case, Laura Cox was a union worker, and Gaylord is a Title VII employer. The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978), provides that it is illegal discrimination to treat women differently because of pregnancy, childbirth or related medical conditions. The act specifically requires employers to treat pregnant women the same for "all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected."

Gaylord had no choice but to keep Laura working. There is no evidence Laura requested light duty or asked to be moved to another assignment and Gaylord could not require her to do so. Gaylord had no way to protect itself from Olivia being negligently injured on the job by her mother. Since responsibility only attaches when an employer might have prevented the act causing the damage, article 2320 prevents liability from attaching.

Accordingly, since Gaylord cannot be liable under article 2320 for the negligent acts of its employee in this situation, we pretermit this discussion of to

whom the duty/risk analysis might apply. This assignment of error is without merit.

CIVILIAN VS. COMMON LAW PRINCIPLES OF LAW

Plaintiffs allege that the trial court erred by applying common law legal authorities to this case instead of considering civilian legal authorities. After a careful and thorough review of the extensive record, we conclude that nothing in the record indicates that the trial court used common law principles in deciding this case. This assignment of error is without merit.

DECREE

There are no disputed facts in this matter and Gaylord has established that it is entitled to partial summary judgment as a matter of law. Therefore summary judgment is appropriate. ***Taylor v. Rowell***, 98-2865 p. 3, (La. 5/18/99), 736 So.2d 812, 814. However, on this issue of a parent's potential liability to this child the trial court incorrectly ruled on a matter not before it.

For the above reasons, the summary judgment of the trial court dismissing plaintiff's claims against Gaylord Container Corporation is affirmed. The judgment is vacated in so far as it dismissed Olivia Cox's claim against her parent. As amended, the judgment is affirmed. Costs of this appeal are allocated equally between Laura Cox and Gaylord.

VACATED IN PART AND AFFIRMED AS AMENDED.

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BEFORE: PETTIGREW, DOWNING, AND McCLENDON, JJ.

PETTIGREW, J., CONCURS AND ASSIGNS REASONS.

PETTIGREW, J., concurring.

I agree with the majority that Olivia has a cause of action against her mother and that La. R.S. 9:571 only operates as a procedural bar to an action by the child against his parent and does not destroy the cause of action. I also agree that La. Civ. Code art. 2320 makes its clear that under the right circumstances, employers are vicariously liable for the damage their employees cause in the exercise of the function in which they are employed even if the injury is to an employee's unborn child if that child is later born live.

I would be inclined to reverse the trial court's dismissal of Gaylord from this action. However, because the plaintiff failed to submit evidence that her employer might have prevented the act that caused the damage, I am constrained to follow the majority. Therefore, I will respectfully concur.

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