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No. 17-117439-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

ALYSIA R. TILLMAN AND STORM FLEETWOOD
Plaintiffs/Appellants,

vs.

KATHERINE A. GOODPASTURE, D.O.
Defendant/Appellee.

BRIEF OF APPELLEE

Appeal from the District Court of Riley County, Kansas
Honorable John F. Bosch, Judge,
District Court Case No. 16 CV 94

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TABLE OF CONTENTS

I.

NATURE OF THE MATTER

Plaintiffs Alysia R. Tillman and Storm Fleetwood (collectively, "Plaintiffs") allege that Defendant Dr. Goodpasture committed a single tort, "wrongful birth." Plaintiffs' action arises from their child's developmental disabilities and birth in 2014, and hinges upon their right to a non-therapeutic abortion, as conferred by the United States Supreme Court in 1973. However, Kansas statute has barred wrongful birth actions through K.S.A. 60-1906 since 2013. That statute overturned the Kansas Supreme Court's recognition of wrongful birth as an actionable tort in *Arche v. U.S. Dep't of Army*, 247 Kan. 276, 798 P.2d 477 (1990). To evade this statutory bar, Plaintiffs have alleged that K.S.A. 60-1906 violates sections 5 and 18 of the Bill of Rights of the Kansas Constitution ("Section 5" and "Section 18," respectively), and thus cannot be enforced.

Sections 5 and 18 only apply to actions that existed at common-law when the Kansas constitution was adopted. Wrongful birth is no such tort. Thus, Sections 5 and 18 do not apply, and K.S.A. 60-1906 is a valid, constitutional statute that bars Plaintiffs' case.

II.

STATEMENT OF ISSUES

1. Whether Sections 5 and 18 protect all tort actions permitting the recovery of money damages that were not created by the legislature, as Plaintiffs suggest, or whether such rights only apply to actions justiciable at common-law when the Kansas Constitution was adopted?

2. Whether the wrongful birth tort, which has elements and policy considerations that are separate and distinct from common-law negligence, was justiciable at common-law when the Kansas Constitution was adopted, and is entitled to Sections 5 and 18 protection?

3. If the court is inclined to apply Sections 5 and 18 to Plaintiffs' wrongful birth action, whether the court should adopt and apply a compelling interest component to the test for Sections 5 and 18 compliance and uphold K.S.A. 60-1906, the statute that bars Plaintiffs' wrongful birth action?

III.

STATEMENT OF FACTS

For the purpose of Plaintiffs' appeal only, Defendant does not dispute Plaintiffs' statement of facts, as the issues before the court only concern whether Sections 5 and 18 apply to the tort of wrongful birth. Should Plaintiffs' appeal be successful, Defendant will vigorously defend Plaintiffs' claim of wrongful birth, and reserves the right to controvert each and every fact alleged by Plaintiffs.

IV.

ARGUMENT AND AUTHORITY

A. PROCEDURAL BACKGROUND.

1. The Trial Court Entered Judgment on the Pleadings in Favor of Defendant.

This case comes before the court following Defendant's motion for judgment on the pleadings. Defendant's motion was based solely upon the viability of Plaintiffs' case in light of the explicit Kansas statutory bar to wrongful birth actions at K.S.A. 60-1906. (Record on Appeal ("ROA") Vol. I, p. 30.) The trial court agreed that Sections 5 and 18 only protect actions that existed at common-law in 1859. (ROA Vol. II, pp. 92-93.) The trial court ruled that wrongful birth was not such an action, ruled that K.S.A. 60-1906 constitutionally barred Plaintiffs' case in accordance with the Kansas Constitution, granted Defendant's motion for judgment on the pleadings, and entered judgment against Plaintiffs. (*See* ROA Vol. II, pp. 94-96.)

2. When a Petition Fails to State a Viable Claim, a Defendant is Entitled to Judgment on the Pleadings.

Judgment for failure to state a claim may be properly requested under a motion for judgment on the pleadings. K.S.A. 60-212(c), 60-212(h)(2)(B). "A motion for judgment on the pleadings is based upon the ground that the moving party is entitled to a judgment on the face of the pleadings themselves." *Koss Const. v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 200, 960 P.2d 255 (1998). "Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim." *Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140 (2001). Whether a pleading states a viable cause of action is a question of law, *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1191, 221 P.3d 1130 (2009), and appellate review of that question is unlimited, *see Williamson v. City of Hays*, 275 Kan. 300, 305, 64 P.3d 364 (2003).

B. PLAINTIFFS' ACTION IS BARRED UNDER KANSAS LAW.

1. Kansas Courts Disfavor Invalidating Statutory Law, but Appellate Review of Such Questions Is Unlimited.

Plaintiff has filed a "wrongful birth" action against Defendant. Wrongful birth actions are explicitly barred by K.S.A. 60-1906, as discussed below. Plaintiffs attempt to invoke Sections 5 and 18 to render K.S.A. 60-1906 unconstitutional, and evade that statutory bar. The burden is on Plaintiffs to demonstrate such unconstitutionality.

"When a statute's constitutionality is attacked, the statute is presumed constitutional and all doubts must be resolved in favor of its validity." *Miller v. Johnson*, 295 Kan. 636, 646, 289 P.3d 1098 (2012).

> In determining whether a statute is constitutional, courts must guard against substituting their views on economic or social policy for those of the legislature. Courts are only concerned with the legislative power to enact statutes, not with the wisdom behind those enactments. When a legislative act is appropriately challenged as not conforming to a constitutional mandate, the function of the court is to lay the constitutional provision invoked beside the challenged statute and decide whether the latter squares with the former—that is to say, the function of the

> court is merely to ascertain and declare whether legislation was enacted in accordance with or in contravention of the constitution—and not to approve or condemn the underlying policy.

Samsel v. Wheeler Transp. Servs., Inc., 246 Kan. 336, 348-49, 789 P.2d 541 (1990), *disapproved of on other grounds by Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991), *abrogated on other grounds by Miller*, 295 Kan. 636, 289 P.3d 1098. Constitutional issues – and all of the issues in this case – are questions of law that are subject to unlimited review on appeal. *Martin v. Kansas Dep't of Revenue*, 285 Kan. 625, 629, 176 P.3d 938 (2008).

2. Kansas Statute Bars, and Kansas Public Policy Does Not Support, Plaintiffs' Action.

A. K.S.A. 60-1906 Explicitly Bars Plaintiffs' Action, and Thus the Trial Court Should Be Affirmed.

"Wrongful birth" actions are barred in Kansas. K.S.A. 60-1906(a) provides, among other things:

> No civil action may be commenced in any court for a claim of wrongful life or wrongful birth, and no damages may be recovered in any civil action for any physical condition of a minor that existed at the time of such minor's birth if the damages sought arise out of a claim that a person's action or omission contributed to such minor's mother not obtaining an abortion.

K.S.A. 60-1906(d)(2) defines wrongful birth claims as

> a cause of action brought by a parent, legal guardian or other individual legally required to provide for the support of a minor, which seeks damages, whether economic or noneconomic, as a result of a physical condition of such minor that existed at the time of such minor's birth, and which is based on a claim that a person's action or omission contributed to such minor's mother not obtaining an abortion.

See also Arche v. U.S. Dep't of Army, 247 Kan. 276, 278, 798 P.2d 477 (1990) (stating "wrongful birth" actions are "brought by the parents, who claim they would have avoided conception or

terminated the pregnancy had they been properly advised of the risks or existence of birth defects to the potential child.").

Plaintiffs claim damages arising from the care that must be provided to Baby A in light of her disability, and further claim that Plaintiff Tillman would have terminated Baby A's pregnancy, had Plaintiff Tillman been adequately informed of Baby A's disability. (ROA Vol. 1, pp. 6-8.) Accordingly, Plaintiffs' petition states a "wrongful birth" action. Thus, K.S.A. 60-1906 bars Plaintiffs' action, and Plaintiffs admit that the explicit language of K.S.A. 60-1906 operates to prohibit their suit (*see* Plaintiffs' Brief, p. 1). The court should affirm the trial court's judgment in favor of Defendant, as Plaintiffs have failed to state a claim upon which relief can be granted.

B. Kansas Public Policy Clearly Supports K.S.A. 60-1906 and Dismissal of Plaintiffs' Action.

By enacting K.S.A. 60-1906, the Kansas Legislature has made clear that wrongful birth actions are contrary to Kansas public policy. And as Plaintiffs have emphasized in their brief, not only does K.S.A. 60-1906 prevent the recovery of damages for a wrongful birth action, it even attempts to bar the "commencement" of those suits. (*See* Plaintiffs' Brief, p. 17.) Public policy matters are squarely within legislative purview. *See, e.g.*, *Higgins v. Abilene Mach., Inc.*, 288 Kan. 359, 364, 204 P.3d 1156 (2009) ("[W]e are not free to act on emotion or even our view of wise public policy. We leave the guidance of public policy through statutes to the legislature.").

Indeed, the Kansas Legislature has repeatedly indicated its disapproval of abortion itself – the foundation of a wrongful birth action:

- **K.S.A. 65-6703:** Generally addressing the conditions under which abortions can occur, but stating, "Nothing in this section shall be construed to create a right to an abortion."

- **K.S.A. 65-6715:** "(a) Nothing in the woman's-right-to-know act shall be construed as creating or recognizing a right to abortion. (b) It is not the intention of the woman's-right-to-know act to make lawful an abortion that is currently unlawful."

- **K.S.A. 65-6737:** "No state agency shall discriminate against any individual or institutional health care entity on the basis that such health care entity does not provide, pay for or refer for abortions."

The legislature has even codified one of the basic premises of anti-abortion activism – that human life "begins at fertilization" – subject "only to the constitution of the United States, and decisional interpretations thereof by the United States supreme court and specific provisions to the contrary in the Kansas constitution and the Kansas Statutes Annotated." *See* K.S.A. 65-6732.

Kansas is not alone in barring wrongful birth actions. Defendant has found thirteen other states with a statutory ban.

Arizona:	Ariz. Rev. Stat. Ann. § 12-719	**Montana:**	Mont. Code Ann. § 27-1-747
Arkansas:	Ark. Code Ann. § 16-120-902	**Ohio:**	Ohio Rev. Code Ann. § 2305.116
Idaho:	Idaho Code Ann. § 5-334	**Oklahoma:**	Okla. Stat. Ann. tit. 63, § 1-741.12
Indiana:	Ind. Code Ann. § 34-12-1-1	**Pennsylvania:**	42 Pa. Stat. and Cons. Stat. Ann. § 8305
Michigan:	Mich. Comp. Laws Ann. § 600.2971	**South Dakota:**	S.D. Codified Laws § 21-55-2
Minnesota:	Minn. Stat. Ann. § 145.424	**Utah:**	Utah Code Ann. § 78B-3-109
Missouri:	Mo. Ann. Stat. § 188.130		

Every single one of those statutes still stands, and at least two were enacted following a decision recognizing wrongful birth, *see Walker by Pizano v. Mart*, 164 Ariz. 37, 790 P.2d 735 (1990),

superseded by statute, Ariz. Rev. Stat. Ann. § 12-719; *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315 (1984), *superseded by statute*, Idaho Code Ann. § 5-334. A number of other states have refused to judicially recognize a wrongful birth action. *See Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682 (Ky. 2003), *as amended* (Aug. 27, 2003); *Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 260 Ga. 711, 398 S.E.2d 557 (1990); *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985); *c.f. Taylor v. Kurapati*, 236 Mich. App. 315, 600 N.W.2d 670 (1999).

Overturning the statute as suggested by the Plaintiffs would run afoul of the Kansas Legislature's clearly established public policy. The people of Kansas elected their legislature, which saw fit to enact K.S.A. 60-1906, and that statute is still valid today.

Further, as has been widely discussed by a number of courts and commentators, wrongful birth actions implicate a number of policy concerns. *See, e.g.*, *Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 260 Ga. 711, 718-19, 398 S.E.2d 557 (1990) ("[the question of whether to recognize a wrongful birth action] is an area more properly suited to legislative action as the legislature offers a forum wherein all of the issues, policy considerations and long range consequences involved in recognition of the novel concept of a 'wrongful birth' cause of action can be thoroughly and openly debated and ultimately decided."); James Bopp, Jr., Barry, Donald A., *The 'Rights' and 'Wrongs' of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461, 502 (1989). "Courts should avoid making public policy where the statutory law has developed." *O'Bryan v. Columbia Ins. Grp.*, 274 Kan. 572, 575, 56 P.3d 789 (2002); *see also Taylor v. Kurapati*, 236 Mich. App. 315, 355, 600 N.W.2d 670 (1999). The court should refrain from overruling the clearly stated will of the people of Kansas.

3. Plaintiffs' Attempt to Avoid K.S.A. 60-1906 Must Fail, as Sections 5 and 18 Do Not Apply to Wrongful Birth Actions.

Although Plaintiffs' action is barred by K.S.A. 60-1906, Plaintiffs claim that K.S.A. 60-1906 violates their constitutional rights by depriving them of their right to "trial by jury" and their right to "remedy by due course of law" under Sections 5 and 18. (*See* Plaintiffs' Brief, p. 4.) Section 5 states that "The right of trial by jury shall be inviolate," and Section 18 provides that "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Neither Section 5 nor Section 18 applies to the barred tort of wrongful birth.

A. Only Torts Justiciable at Common-law When the Kansas Constitution Was Adopted in 1859 Receive Constitutional Protection Under Sections 5 and 18.

In their most broad articulation of the test for Sections 5 and 18 applicability, Plaintiffs assert that Section 5 and 18 rights are "guaranteed for all actions seeking monetary damages, which are not specifically created by statute." (*See* Plaintiffs' Brief, p. 9.) They also argue that "[w]hether the tort is new is simply not relevant to the determination whether these constitutional rights apply," (Plaintiffs' Brief, p. 9) but admit that "[t]he Kansas Supreme Court has consistently held that Section 5… preserves the jury trial right as it historically existed at common law when the Kansas Constitution came into existence," (Plaintiffs' Brief, p. 5) and that "[t]o be protected under Section 18, the remedy must have been recognized at common law," (Plaintiffs' Brief, p. 7). Plaintiffs' position is inconsistent and incomplete, and ignores applicable precedent.

While Section 5 states "The right of trial by jury shall be inviolate," it does not provide a right to jury trial in all cases. As mentioned above, Section 5 only preserves those rights and remedies that existed at common-law prior to the adoption of the Kansas Constitution. *See, e.g.*, *Miller v. Johnson*, 295 Kan. 636, 647, 289 P.3d 1098 (2012); *Swarz v. Ramala*, 63 Kan. 633, 66

P. 649, 650 (1901) ("[S]ection 5 of the bill of rights does not guaranty the right of trial by jury to all parties litigant in all cases, but only guaranties the right in such cases as were properly triable by jury at common law before the adoption of the constitution.").

Section 18 states that "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay," and similarly concerns whether a remedy available at common-law has been limited by the legislature. *See, e.g.*, *Bonin v. Vannaman*, 261 Kan. 199, 218, 929 P.2d 754 (1996) (discussing the necessity under Section 18 of an "adequate, substitute remedy" when common-law remedies "such as a minor's cause of action for personal injury" are restricted); *see also Kansas Malpractice Victims Coal. v. Bell*, 243 Kan. 333, 346-51, 757 P.2d 251 (1988) ("[A]s with Section 5, the court looks to insure that due process requirements [under Section 18] are met and, when a common-law remedy is modified or abolished, an adequate substitute remedy must be provided to replace it."), *disapproved of on other grounds by Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991).

In that vein, the Kansas Supreme Court has articulated a test for applicability of Sections 5 and 18. There are three distinct matters to consider:

a) **Is the action civil in nature?**

b) **Was the action recognized at common-law?** (i.e., Was it recognized as "justiciable by the common-law"?)

c) **Was the action recognized as justiciable in 1859?** (i.e., Was it recognized as justiciable by the common-law "as it existed at the time our constitution was adopted"?)

See Leiker By & Through Leiker v. Gafford, 245 Kan. 325, 361, 778 P.2d 823 (1989), *disapproved of on other grounds Martindale v. Robert T. Tenny, M.D., P.A.*, 250 Kan. 621, 829 P.2d 561 (1992); *Unified Sch. Dist. No. 229 v. State*, 256 Kan. 232, 239, 885 P.2d 1170 (1994) (discussing the adoption of the Kansas Constitution in 1859). The last two factors must be answered "yes" for

Sections 5 and 18 to apply to a civil action. *See Leiker*, 245 Kan. at 361, 778 P.2d 823; *see also State v. Love*, 305 Kan. 716, 735, 387 P.3d 820 (2017) (stating that "there are two basic questions in any Section 5 analysis: In what types of cases is a party entitled to a jury trial as a matter of right?.... And when such a right exists, what does the right protect?") (internal citations omitted). Therefore, whether the wrongful birth tort existed at common-law in 1859 – the time the Kansas Constitution was adopted – is determinative.

Plaintiffs, however, articulate at least two different tests for Sections 5 and 18 protection. At times, Plaintiffs indicate that Section 5 and 18 apply to all actions seeking "money damages." (*See* Plaintiffs' Brief, p. 4, heading "II" ("The Protections Guaranteed by Sections 5 and 18 of the Bill of Rights of the Kansas Constitution Apply to the Wrongful Birth Cause of Action, *Because the Action Seeks Monetary Damages*." (emphasis added)); p. 6 ("Here, Plaintiffs seek money damages. Vol. 1, p. 8. Thus, their lawsuit is an action of law at common law. The analysis to determine whether the rights asserted by Plaintiffs existed at common law requires nothing further."); p. 7 ("Here, Plaintiffs seek monetary damages to remedy their injuries.... This is a common law tort action that was historically triable to a jury."); p. 20 ("Sections 5 and 18 of the Bill of Rights of the Kansas Constitution protect civil actions that seek monetary remedy.")). That test cannot be. Wrongful death actions permit the recovery of monetary damages, and yet do not receive Sections 5 and 18 protection. *See Leiker*, 245 Kan. at 361-62, 778 P.2d 823.

Plaintiffs also indicated on at least one occasion that Sections 5 and 18 protection requires something more: "The rights protected by Section 5 and Section 18 are guaranteed for all actions seeking monetary damages, which are not specifically created by statute." (Plaintiffs' Brief, p. 9.) That test also cannot be. Kansas courts created causes of action against governmental entities by removing common-law governmental immunity for negligence, and yet the legislature did not run

afoul of the Kansas Constitution by reinstating immunity. *See Brown v. Wichita State Univ.*, 219 Kan. 2, 10, 547 P.2d 1015 (1976).

Plaintiffs do cite a number of cases to support their proposed test for Section 5 protection: *Kansas Malpractice Victims Coal. v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988), *Matter of Suesz Estate*, 228 Kan. 275, 613 P.2d 947 (1980), *First Nat. Bank of Olathe v. Clark*, 226 Kan. 619, 602 P.2d 1299 (1979). (*See* Plaintiffs' Brief, p. 5.) But all of these cases were also cited by the Court in *Leiker* when it articulated the test discussed above. *See Leiker*, 245 Kan. at 361, 778 P.2d 823. The paragraph in *Leiker* articulating the proper test and the cases cited by Plaintiffs is restated below for the Court's convenience:

> The plaintiffs go to great lengths in their brief to persuade this court that there never was a common-law rule precluding civil recovery for wrongful death. *The apparent purpose of this argument is to avoid Kansas case law which holds that the Bill of Rights of the Kansas Constitution preserves the right to trial by jury (§ 5) and the right to remedy by due course of law (§ 18) only as to civil causes of action that were recognized as justiciable by the common law as it existed at the time our constitution was adopted.*
>
> See *Kansas Malpractice Victims Coalition v. Bell,* 243 Kan. 333, 342, 757 P.2d 251 (1988); *In re Estate of Suesz,* 228 Kan. 275, 277, 613 P.2d 947 (1980); *First Nat'l Bank of Olathe v. Clark,* 226 Kan. 619, Syl. ¶ 1, 602 P.2d 1299 (1979); *In re Rome,* 218 Kan. 198, 204, 542 P.2d 676 (1975); *Craig v. Hamilton,* 213 Kan. 665, 670, 518 P.2d 539 (1974); *Kimball and others v. Connor, Starks and others.,* 3 Kan. 414, 428 (1866).
>
> Plaintiffs ask this court to reverse longstanding Kansas law holding that there was no right at common law to recover for wrongful death, and then to strike down a damages limitation imposed by the very statute that itself abrogated the common-law rule which plaintiffs so vehemently criticize.

Id. (paragraph separated for emphasis and ease of review) (italics outside of citations added).

Justice Beier, in her dissent to *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012), similarly discussed the historical nature of a Section 5 inquiry:

> This language [the text of Section 5] preserves the right to jury trial in those causes of action that were triable to a jury under the common law extant in 1859, when the Kansas Constitution was ratified by the people of our state. *In re Rolfs,* 30 Kan. 758, 762, 1 P. 523 (1883); see *In re L.M.,* 286 Kan. 460, 476, 186 P.3d 164 (2008) (Luckert, J., concurring) ("[T]he uncompromising language of [Section 5] applies if an examination of history reveals there was a right at common law to a jury trial under the same circumstances.").

Miller, 295 Kan. at 696 (first modification added).

And "[j]ust as the rights secured by Section 5 are not absolute, neither are the rights secured by Section 18." *Kansas Malpractice Victims Coal. v. Bell*, 243 Kan. 333, 346, 757 P.2d 251 (1988) *disapproved of by Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991). The Kansas Supreme Court in *Brown v. Wichita State Univ.*, 219 Kan. 2, 547 P.2d 1015 (1976), clearly focused Section 18 on rights existing prior to the adoption of the Kansas Constitution when considering governmental immunity:

> Section 18 does not create any new rights, but merely recognizes long established systems of laws existing prior to the adoption of the constitution. (See, 16 Am. Jur. 2d, Constitutional Law, s 385, p. 721.) *Since the right to sue the state for torts was a right denied at common law, such right is not protected by Section 18.* This conclusion is consistent with our view that the laws at the time the constitution was framed are relevant in interpreting our constitution. (Leek v. Theis, supra 217 Kan. at 793, 539 P.2d 304.) It seems unlikely framers of our constitution intended Section 18 to abrogate governmental immunity.

219 Kan. at 10 (emphasis added). Indeed, the Kansas Supreme Court in *Brown* permitted the legislature to reinstate governmental immunity after it was removed by the judiciary (thereby *taking away* a potential action – just like this case) because the right to sue the government did not exist at common-law. *Id.* at 10-12. It did not – as Plaintiffs' test suggests – base its ruling upon a failure to claim money damages or statutory creation. Even the primary case cited by Plaintiffs to support Section 18 applicability, *Lemuz By & Through Lemuz v. Fieser*, 261 Kan. 936, 933 P.2d 134 (1997), undermines Plaintiff's position. The Court in *Lemuz* did not simply consider money

damages and statutory origin when determining whether Section 18 applied to "corporate negligence" cases, but discussed how the "corporate negligence" doctrine compared to a negligence action. *See id.* at 945.

That is not to say that monetary damages and statutory origin are unimportant considerations. They are *signs* of existence at common-law, rather than a test in and of themselves, as the Court reasoned in *Leiker*:

> Our cases are clear that, right or wrong, *Kansas common law did not recognize a civil claim for wrongful death at the time our Bill of Rights was adopted.* See *Goodyear, Administratrix, v. Railway Co.,* 114 Kan. 557, 561-62, 220 Pac. 282 (1923); *City of Eureka v. Merrifield,* 53 Kan. 794, 798-99, 37 Pac. 113 (1894); *McCarthy, Adm'r, v. Railroad Co.,* 18 Kan. 46, 48 (1877). The cause of action for wrongful death is purely a creature of statute in Kansas. *Since there was no cause of action for wrongful death at common law*, neither § 5 nor § 18 of the Bill of Rights can be invoked to challenge the constitutionality of either the $100,000 limitation on nonpecuniary damages resulting from wrongful death, or the prohibition against informing the jury of the statutory limit.

Leiker, 245 Kan. at 361-62, 778 P.2d 823 (emphasis added). *See also Adams v. Via Christi Reg'l Med. Ctr.*, 270 Kan. 824, 833, 19 P.3d 132 (2001) (refusing the plaintiff's request to overrule the Court's ruling in *Leiker*); *McGinnes v. Wesley Med. Ctr.*, 43 Kan. App. 2d 227, 242, 224 P.3d 581 (2010) (upholding wrongful death damages caps based upon the holding in *Leiker*).

That distinction is important. Under Plaintiffs' proposed test, any judicially created (i.e., non-statutory) tort giving rise to money damages would receive Sections 5 and 18 protection, regardless of whether the tort was first created in 1817 or 2017. It is highly unlikely that the framers intended to implicitly give Kansas courts the power to create torts immune to legislation or later judicial rulings by mere written opinion. The time at which a tort is created must be considered by the court, and, again, that issue is determinative in this case.

As *Leiker*, *Brown,* and the other cases make clear, the relevant inquiry to application of Sections 5 and 18 is deeper than Plaintiffs suggest. Far from being "not relevant to the

determination of whether [Sections 5 and 18] apply," (Plaintiffs' Brief, p. 9) the Court has framed the test for Sections 5 and 18 rights in terms of the common-law in existence at adoption of the Kansas Constitution. Whether wrongful birth actions are "civil causes of action that were recognized as justiciable by the common law as it existed at the time our constitution was adopted" is not merely a matter of checking the boxes for "money damages" and "judicial origin." Plaintiffs' action does not survive the Kansas Supreme Court's test for applicability.

B. While the Kansas Supreme Court Recognized Wrongful Birth in *Arche*, It Did Not Address the Issue Before the Court Now.

As Plaintiffs state in their brief, the Kansas Supreme Court first recognized the tort of wrongful birth in *Arche v. U.S. Dep't of Army*, 247 Kan. 276, 798 P.2d 477 (1990). Plaintiffs' interpretation goes awry, however, when they assert (without corresponding citation) that "[t]he court in *Arche* stated the cause of action is a *common law medical negligence cause of action* for the recovery of damages," (Plaintiffs' Brief, p. 6 (emphasis added)) and that "the Kansas Supreme Court declared the wrongful birth action in Kansas constitutes a regular common law negligence action in *Arche*," (Plaintiffs' Brief, p. 20). The Court was not presented with and does not address whether the tort of wrongful birth existed at common-law, let alone whether it existed when the Kansas Constitution was adopted in 1859.

Rather, the Court in *Arche* was presented with two certified questions from the United States District Court for the District of Kansas:

> 1. Does Kansas law recognize a cause of action for the wrongful birth of a permanently handicapped child?
>
> 2. If Kansas does recognize such a cause of action, what is the extent of damages which may be recovered upon proper proof?

Arche, 247 Kan. at 276, 798 P.2d 477. Describing "wrongful birth" as an action "brought by the parents, who claim they would have avoided conception or terminated the pregnancy had they

been properly advised of the risks or existence of birth defects to the potential child," *id.* at 278, the Court's holdings in response to the federal court are explicitly laid out in the opinion:

- "[W]e hold that the action of wrongful birth is recognized in Kansas." *Id.* at 281.
- "We hold that those expenses caused by the child's handicaps may be recovered, but not those expenses natural to raising any child." *Id.* at 283.
- "We therefore hold that damages for emotional distress of the parents are not recoverable in a wrongful birth case." *Id.*
- "We… find that the 'benefit rule' should not be applied to wrongful birth cases in Kansas." *Id.* at 284.
- "[W]e hold that a parent is no longer required by law to provide support for an adult incompetent child in this state. Recovery in this case, then, may be had only for the period of time of the child's life expectancy or until the child reaches the age of majority, whichever is the shorter period." *Id.* at 291.

And contrary to Plaintiffs' assertions, Chief Justice Miller *did not* characterize wrongful birth as a "common-law" or "negligence" action, but rather started his opinion by describing the suit in subtly, but crucially, different terms: "This is a *medical malpractice wrongful birth action* brought in the United States District Court…." *Id.* at 276.

In summary, the Court in *Arche* did not address the relationship between wrongful birth and the common-law in 1859, as Plaintiffs allege. *Arche* should be read in accordance with the questions presented and addressed, and certainly should not be read to have implicitly ruled on the constitutional issues before this court now. *Arche* does, however, address the contours of the tort of wrongful birth, as discussed further below.

C. Because the Abortion Rights Necessary to a Wrongful Birth Action Did Not Exist Prior to 1973, the Court Must Determine Whether "Wrongful Birth" Is Simply a Variation on a Tort in Existence When the Kansas Constitution Was Adopted – Negligence – or Whether It Is a New Tort.

The right necessary to make a wrongful birth claim – the right to an abortion – only arose in Kansas after that right was conferred by the United States Supreme Court in 1973. *City of Wichita v. Tilson*, 253 Kan. 285, 291, 855 P.2d 911 (1993) ("[S]ince 1973 a woman has an unfettered constitutional right to an abortion during the first trimester of pregnancy and a somewhat more restricted right to abortion thereafter."). Indeed, as the Attorney General's Office pointed out in its supplemental brief before the trial court, abortion was *a crime* at the time the Kansas Constitution was adopted. (ROA Vol. II, p. 67 (citing Kan. Terr. Stat. 1855, ch. 48, §§ 9, 10, 37, 39; Laws 1862, ch. 33, §§ 9-10, 37)); *see also Hodes & Nauser, MDs, P.A. v. Schmidt*, 52 Kan. App. 2d 274, 316, 368 P.3d 667 (2016), *review granted* (Apr. 11, 2016) (Acheson, J., concurring) (discussing how abortion was a crime in Kansas until 1973). Thus, the only way that wrongful birth could have existed when the Kansas Constitution was adopted is if it is a kind of negligence with a specific name, rather than a new tort created by the Kansas Supreme Court in *Arche v. U.S. Dep't of Army*, 247 Kan. 276, 798 P.2d 477 (1990). *See also Hummel v. Reiss*, 129 N.J. 118, 125-27, 608 A.2d 1341 (1992) (reasoning that defendant physicians could not be held liable for tortious actions occurring before *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) that would otherwise lead to "wrongful birth" or "wrongful life" claims, because abortion was illegal in New Jersey prior to that decision).

Therefore, the question before the court is whether wrongful birth actions are merely an application of common-law negligence, or whether wrongful birth is a new tort with new remedies. Engaging that issue requires a closer examination of what wrongful birth is and what it means.

That inquiry shows wrongful birth is a new tort, and is not entitled to Section 5 or Section 18 protection. *See, e.g.*, *OMI Holdings, Inc. v. Howell*, 260 Kan. 305, 314, 918 P.2d 1274 (1996) ("OMI cites to several cases in which Kansas courts have found that it was proper to adopt a *new* cause of action *based on public policy*, such as wrongful birth...." (emphasis added)).

D. Wrongful Birth Is Not a Common-law Action – It Is a Tort with Additional Elements and Unique Policy Considerations Distinct from Negligence; Therefore, Sections 5 and 18 Do Not Apply, and K.S.A. 60-1906 Bars Plaintiffs' Case.

Plaintiffs argue that because the Kansas Supreme Court drew upon negligence concepts when recognizing the tort of wrongful birth in *Arche v. U.S. Dep't of Army*, 247 Kan. 276, 798 P.2d 477 (1990), wrongful birth is a common-law cause of action entitled to protection under Sections 5 and 18. (*See* Plaintiffs' Brief, p. 10.) Plaintiffs are incorrect. Although wrongful birth shares similarities with negligence, it is a separate tort that merits different treatment under Sections 5 and 18.

(i). Wrongful Birth Requires Additional Proof.

To state a valid claim for negligence in a malpractice context, a plaintiff must show (1) the existence of a duty of care, (2) a breach of that duty by a healthcare provider, (3) injury, and (4) proximate cause linking the breach and injury. *E.g.*, *Foster ex rel. Foster v. Klaumann*, 296 Kan. 295, 302, 294 P.3d 223 (2013). Contrary to Plaintiffs' assertions, (*see* Plaintiffs' Brief, p. 6) wrongful birth actions require additional proof. In addition to the typical negligence elements, a wrongful birth plaintiff must show that the child is not merely born with a disability, but is "severely and permanently handicapped" to such a degree that (5) the disabilities are "not medically correctable," and (6) "the child will never be able to function as a normal human being." *Arche*, 247 Kan. at 281, 798 P.2d 477. The application of these elements further illustrates the distinction between the tort of negligence and the tort of wrongful birth.

For example, let us assume that an infant, Baby Z, has a permanent disability that will affect her ability to walk, but which does not affect her ability to otherwise function. Let us also assume, like in this case, that the ob-gyn allegedly should have been aware of that disability based upon Baby Z's 20-week ultrasound, and failed to inform Baby Z's mother. Baby Z's mother generally has a right to an abortion for whatever reason she wishes at that gestational age, *see* K.S.A. 65-6703, and rightly or wrongly, would have the opportunity to abort the fetus on that basis, *see Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

Thus, in that scenario, a prima facie case of negligence has been made: (1) the ob-gyn had a duty to inform the mother of Baby Z about that abnormality, (2) and failed to do so (3) when the parents would have exercised their right to an abortion, (4) if the ob-gyn had not breached her duty to inform. However, Baby Z's disability presumably would not satisfy the sixth element of a wrongful birth claim in Kansas, as many without the ability to walk are certainly capable of functioning "as a normal human being." Thus, the ob-gyn breached her duty of care, causing harm to Baby Z's mother – clearly making a "common-law" negligence claim – but Baby Z's mother still would not have been able to maintain a cause of action for wrongful birth, even before K.S.A. 60-1906 was enacted. *Cf. Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 690 (Ky. 2003), *as amended* (Aug. 27, 2003) ("When will parents be allowed to decide that their child is so 'defective' that given a chance they would have aborted it while still a fetus and, as a result, then be allowed to hold their physician civilly liable? [Is it] [w]hen the fetus is only the carrier of a deleterious gene and not itself impaired ... [or] [w]hen the fetus is of one sex rather than the other?") (quoting *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985)); *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 418 (Iowa 2017) (Mansfield, J.,

dissenting) ("What if testing indicates the child will be born blind or without a hand? Is that enough?").

(ii). Wrongful Birth Is Different in Policy, As Well.

What is more, the policy considerations behind a wrongful birth action strike a strong contrast with common-law negligence. Supporters of wrongful birth argue that the tortious conduct in a wrongful birth action is the deprivation of an option to terminate the life of a child with a disability, and damages are based upon the life of that child with a disability. The tort further assumes that the parents would have kept the child had the child's disability not existed.

"Torts" are, by definition, "civil wrongs," TORT, BLACK'S LAW DICTIONARY (10th ed. 2014) – outcomes that should be avoided under law. Therefore, it is implicit within the "wrongful birth" cause of action that children with disabilities are something to potentially be avoided, while healthy children are not. *See also Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 473, 656 P.2d 483 (1983) ("[I]t is an inevitable consequence of recognizing the parents' right to avoid the birth of a defective child that we recognize that the birth of such a child is an actionable injury.").

No other tort strikes such a balance on the existence of one life over another. *C.f., e.g., Etkind v. Suarez*, 271 Ga. 352, 356, 519 S.E.2d 210, 214 (1999) (indicating that wrongful birth, unlike a wrongful pregnancy action, "does not fit within the parameters of traditional tort law. The concept of such a cause of action is unique: It is a new and on-going condition. As life, it necessarily interacts with other lives. Indeed, it draws its 'injurious' nature from the predilections of the other lives it touches. It is naive to suggest that such a situation falls neatly into conventional tort principles, producing neatly calculable damages." (citations omitted)). The lack of uniformity among jurisdictions regarding damages also speaks to this difference – and a lack of shared origin at common-law. *See, e.g., Azzolino v. Dingfelder*, 315 N.C. 103, 112, 337 S.E.2d 528 (1985)

(reasoning that the variation regarding damages among jurisdictions arises from the difficulty in compensating for "human life" as an "injury"); *see also Arche*, 247 Kan. at 281, 798 P.2d 447 ("Formulas for damages in wrongful birth cases vary widely.").

The objective of a wrongful birth action is similarly different than that of general tort actions:

> The aim of a tort action is to restore the plaintiff to the position he or she would have occupied had the injury not occurred. Restatement (Second) of Torts § 901, comment a (1979). However, in a wrongful birth case, the result of the tortious conduct is the existence, or benefit, of a child.

Arche, 247 Kan. at 281-82, 798 P.2d 477. And several courts and judges have noted that causation in a wrongful birth case poses unique considerations, as well:

> The heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor. In addition it is incurable and was incurable from the moment of conception. Thus the doctor's alleged negligent failure to detect it during prenatal examination cannot be considered a cause of the condition by analogy to those cases in which the doctor has failed to make a timely diagnosis of a curable disease. The child's handicap is an inexorable result of conception and birth.

Becker v. Schwartz, 46 N.Y.2d 401, 417, 386 N.E.2d 807, 816 (1978) (Wachtler, J., dissenting), *cited with approval by Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 689 (Ky. 2003), *as amended* (Aug. 27, 2003), *Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 260 Ga. 711, 715, 398 S.E.2d 557 (1990), *Wilson v. Kuenzi*, 751 S.W.2d 741, 744 (Mo. 1988), *Azzolino v. Dingfelder*, 315 N.C. 103, 115, 337 S.E.2d 528 (1985).

(iii). Other Jurisdictions Addressing Challenges to Statutory Bars Have Upheld the Statutes and Reasoned That Wrongful Birth Is Not a Common-law Cause of Action.

The Minnesota and Utah Supreme Courts have addressed "right to remedy" challenges against their wrongful birth statutes much like the Plaintiffs are making in this case. Both courts

upheld the statutes, and distinguished between wrongful birth and common-law negligence in doing so.

In *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986), the plaintiff asserted, among other things, that Article 1, Section 8 of the Minnesota Constitution prohibited the Minnesota Legislature from barring wrongful birth actions. *Id.* at 13. Article 1, Section 8 of the Minnesota Constitution provides that

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

The Minnesota Supreme Court rejected the plaintiff's challenge, reasoning in part that "no such action [wrongful birth] exists at common law." *Hickman*, 396 N.W.2d at 13 (citing *Prosser and Keeton on the Law of Torts,* §§ 55, 125A (W. Keeton, D. Dobbs, R. Keeton & D. Owen 5th ed. (1984)). The court further reasoned that questions about whether a "wrongful birth" cause of action should exist were best "within the exclusive jurisdiction of the legislature" due to "a myriad of public policy problems, including difficulty in ascertaining damages, increased litigation, and distinguishing between legislative and judicial roles." *Id.* at 13-14.

The Utah Supreme Court reached a similar result in *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, 67 P.3d 436 (2002). The plaintiff in *Wood* asserted that the statute prohibiting wrongful birth actions violated Utah's "open courts" clause in Article I, Section 11 of the Utah Constitution. *Id.* at 439. Article I, Section 11 of the Utah Constitution reads

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

In rejecting the plaintiff's challenge, the Utah Supreme Court noted that no wrongful birth cause of action existed at common-law. *Wood,* 67 P.3d at 442. Applying the Utah test for "open courts" protection, the court also stated that because "this court has never recognized the tort of wrongful birth in Utah.... a cause of action for wrongful birth did not exist in Utah" when the statute was enacted, and thus "open courts" protection did not apply. *Id.* at 442-43. Thus, according to the court in *Wood*, recognition is a prerequisite to existence of a wrongful birth action. A preexisting tort at common-law would not have required "recognition" for constitutional protection, by definition.

There are other out-of-state courts and jurists who agree. The New Jersey Supreme Court, having been faced with a wrongful life plaintiff born *before Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), affirmed dismissal of the plaintiff's claim because those claims *could not have existed* prior to that decision:

> [P]laintiff overlooks a critical aspect of *Procanik* [the seminal New Jersey wrongful life case]: that case leaves no doubt that its rule – as indeed is the case with *Berman* [a seminal New Jersey wrongful birth case] and *Schroeder* [another wrongful birth case] – is premised on the availability of lawful eugenic abortions. Therefore, the rule that *Procanik* established cannot be applicable to cases arising before the United States Supreme Court's opinion in *Roe v. Wade, supra,* 410 *U.S.* 113, 93 *S.Ct.* 705, 35 *L.Ed.*2d 147.

Hummel v. Reiss, 129 N.J. 118, 127, 608 A.2d 1341 (1992). Justice Mansfield of Iowa has similarly commented on the relationship between wrongful birth actions and the common-law. *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 415 (Iowa 2017) (Mansfield, J., dissenting) ("At common law, parents could not recover for the wrongful birth of a child.").

(iv). Lemuz Is Distinguishable.

Plaintiffs rely heavily upon *Lemuz By & Through Lemuz v. Fieser*, 261 Kan. 936, 933 P.2d 134 (1997) to apply Section 18. In that case, the plaintiff alleged, among other things, that a

hospital negligently granted privileges to one of the physician defendants, and thus should be held liable for damages caused by that physician. *Id.* at 937-38. That cause of action, referred to as "corporate negligence," was barred by K.S.A. 65-442(b). *Id.* at 938. The plaintiff in *Lemuz* asserted that the statutory bar violated Section 18. *Id.* at 944. In response, the defendants in *Lemuz* took the position that Plaintiffs Tillman and Fleetwood hope to use in framing this case: "Since a cause of action for corporate negligence was not recognized at the time the Kansas Constitution was adopted, but is a judicial expansion of common-law negligence remedies, the defendants contend that the legislative preclusion of that cause of action by 65-442(b) does not implicate § 18." *Id.*

The Court rejected the defendant's argument (and, notably, did not simply look to whether plaintiffs were seeking money damages, or whether the action was created by statute). *See id.* at 945. The question before the Court was not about a *new tort*, but rather about a *new duty* giving rise to a negligence cause of action:

> Once this new duty for hospitals [i.e., the duty to exercise reasonable care in granting, reviewing, and extending staff privileges] is plugged into an old cause of action, negligence, the hospital's liability under the corporate negligence doctrine develops.

Id. Because the action merely involved a new duty, the Court reasoned further that, "corporate negligence causes of action are not 'new' causes of action but are simply different applications of the basic concepts of negligence which existed at common law when the Kansas Constitution was adopted." *Id.* Wrongful birth is not simply a matter of "plugging in" a new duty. This case is not "analogous" to *Lemuz*.

(v). Concluding Argument about the Differentiation of Wrongful Birth.

As a final matter, Justice Six's concurring opinion in *Arche* (which was joined by then-Justice McFarland) provides what is perhaps one of the most telling analyses of some fundamental differences between wrongful birth and a run-of-the-mill, common-law negligence action. His opinion reasoned that the Court should require wrongful birth damages to be held in trust for the benefit of the child. *See Arche v. U.S. Dep't of Army*, 247 Kan. 276, 292-96, 798 P.2d 477 (1990). In doing so, he argued that such an unusual remedy was merited by the new, unique nature of a wrongful birth action:

> The juxtaposition between the substantive law of wrongful birth, *as a new tort*, and the damage award for that tort is unique. The claim is by the parents, for the parents, based on the special needs of the child. The typical case involving a claim for future expense arising from personal injuries to a minor is controlled by *Stone v. City of Pleasanton,* 115 Kan. 476, 223 P. 303 (1924). A parent cannot recover for the minor child's prospective medical care. The claim belongs to the minor.
>
> The anomalous relationship between a plaintiff and an award in a wrongful birth case brings the use of any funds recovered within our province. We determine the substantive case law of torts in Kansas. *If we are to recognize the new tort of wrongful birth*, as I feel we should, we can define its characteristics.

Id. at 294-95 (emphasis added).

Wrongful birth is simply a different tort from common-law negligence. Plaintiffs *must* provide additional evidence regarding the permanent nature of and lack of treatment for the child's disability to even state a viable claim. Wrongful birth also implicates unique policy considerations – both in the nature of the injury being remedied, and the implications of the tort itself – that are distinct from common-law negligence. Because wrongful birth is not simply negligence by another name, it is a new tort that was created well after the Kansas Constitution was adopted in 1859.

Therefore, wrongful birth is not constitutionally protected under the Kansas Supreme Court's test for applicability of Sections 5 and 18. Absent constitutional protection, the legislature is free to modify or abolish a given action. "There is a plethora of authority that '(N)o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.'" *Manzanares v. Bell*, 214 Kan. 589, 599, 522 P.2d 1291 (1974) (citations omitted) (modification in original). Far from "stealing" an action from the Plaintiffs (*see* Plaintiffs' Brief, p. 19), the Kansas Legislature properly exercised its prerogative to bar Plaintiffs' action before it would have accrued in 2014. The court should affirm the trial court's entry of judgment in favor of the Defendant.

4. If the Court Agrees with Plaintiffs That Wrongful Birth Is a Common-law Tort, It Should Expand Upon the Existing Test for Applicability of Sections 5 and 18, and Uphold K.S.A. 60-1906 as Constitutional.

Plaintiffs allege that because wrongful birth is a common-law cause of action, wrongful birth plaintiffs are entitled to a *quid pro quo* before wrongful birth is eliminated by way of K.S.A. 60-1906. (Plaintiffs' Brief, p. 18.) Should the court agree with Plaintiffs' position, Defendant argues for an additional component to the Kansas Supreme Court's framework. This issue was argued by Defendant before the trial court, and by virtue of the trial court's ruling, did not need to be ruled upon. (*See* ROA Vol. I, pp. 75-78; Vol. II, pp. 95.)

When the "open courts" provision of the Utah Constitution applies (which is analogous to Section 5 and 18 for the purposes of this motion), Utah courts apply a two-part test. The first component is similar to the *quid pro quo* analysis employed by the Kansas Supreme Court, and the second attempts to ascertain whether a government action is appropriately tailored and aimed at a compelling policy interest:

> First, ... the law [must otherwise provide] an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his

> constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different ... [; or]
>
> [s]econd, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil[1] to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

Wood v. Univ. of Utah Med. Ctr., 2002 UT 134, 67 P.3d 436, 441 (2002) (modifications in original).

It is the clear intent of the legislature and the people of the state of Kansas to limit abortion rights based upon a belief that life begins at fertilization. (*See* discussion above in Section IV(B)(2)(B).) Time and again, the legislature has spoken unequivocally and repeatedly that abortions and wrongful birth actions are disfavored under Kansas public policy.

Plaintiffs may respond by stating that the people of Kansas chose to make the Kansas Constitution superior to legislative action, and thus it is the will of the people to elevate Section 5 and 18 rights above statutory law. They may also argue that if the public policy issues raised by wrongful birth actions are of such grave concern, the people of Kansas can amend the Constitution.

Unlike prior Section 5 and Section 18 decisions involving medical malpractice claims, auto accidents, or workplace injuries, however, it was clearly unforeseeable for the framers of Sections 5 and 18 to anticipate that those sections adopted in 1859 would be possibly used to protect an action that was so different from torts of the day, that was so contrary to Kansas public policy, and that was predicated upon rights that were *criminal offenses* at the time. "In ascertaining the

[1] Defendant disagrees with the use of "evil" in the Utah Supreme Court's framework in the context of this case. Such a term connotes purposefully wrongful action and bad faith that is not constructive in the debate over wrongful birth actions or abortion more generally. Those on both sides of these issues have good faith reasons for holding their respective positions, and the use of "evil" is unnecessarily inflammatory on these politically charged matters. Thus, Defendant prefers the use of "compelling policy interest," as opposed to "social or economic evil."

meaning of a constitutional provision, the primary duty of the courts is to look to the intention of the makers and adopters of that provision." *State ex rel. Stephan v. Parrish*, 256 Kan. 746, 751, 887 P.2d 127 (1994) (internal quotation marks omitted). The Kansas Supreme Court recently stated the "best" method for determining the intent of the framers:

> [T]he best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing.

Gannon v. State, 298 Kan. 1107, 1143, 319 P.3d 1196 (2014) (emphasis in original omitted) (citations omitted).

On its face, Section 5 seems to preserve a procedural right to a fact finder of one's peers. Section 18, on the other hand, preserves the right to remedy due to "injuries" suffered in "person, reputation or property." While tort actions generally address injuries to "person, reputation or property," *see Arche v. U.S. Dep't of Army*, 247 Kan. 276, 282, 798 P.2d 477 (1990) (citations omitted), in a wrongful birth case, the "injury" is something different from the common-law understanding of that term. As discussed above, "the result of the tortious conduct [in a wrongful birth action] is the existence *or benefit* of a child." *See id.* (emphasis added).

Plaintiffs also attempt to invoke intent in their brief: "'[H]ad it been the intent of the framers for our constitution to grant immunity to doctors for their torts, provisions would have been made for such.' *Id.* at 763." (*See* Plaintiffs' Brief, p. 18 (quoting and citing *Noel v. Menninger Found.*, 175 Kan. 751, 267 P.2d 934 (1954)) (alterations in Plaintiffs' Brief). Plaintiffs' misquotation notwithstanding – "Had it been the intent of the framers of our constitution to grant immunity to *charitable organizations* for their torts, provisions would have been made for such." *Noel,* 175 Kan. at 763, 267 P. 2d 934 (emphasis added) – it is nearly impossible to imagine that the framers

of the Kansas Constitution anticipated that Sections 5 and 18 would be used to protect a tort built upon the birth of a child who is disabled and interference with parental abortion rights conferred by the United States Supreme Court in 1973.

Defendant does not argue that the framework articulated by the Kansas Supreme Court is faulty, but merely incomplete. In most cases, the established test will be an appropriate measure of whether the legislature has exercised its authority in a constitutional manner. However, extending Section 5 and Section 18 constitutional protections to a wrongful birth action is a bridge too far. Because of the unforeseen consequence presented by this case (and potentially others), Defendant urges the court to consider adopting a test similar to that provided by the Utah Supreme Court. The additional considerations offered by the Utah Supreme Court would apply constitutional restrictions to those actions that were a part of the common-law and were reasonably foreseeable when the constitution was adopted, while avoiding an unintended extension of constitutional protection to modern issues of significant importance best decided by the contemporary citizens of Kansas via the legislature. And, as argued by the Attorney General before the trial court (ROA Vol II, p. 80), other considerations for satisfying due process requirements were contemplated by the Kansas Supreme Court in *Kansas Malpractice Victims Coal. v. Bell*, 243 Kan. 333, 344, 757 P.2d 251 (1988) *disapproved of by Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991) ("*One way* to meet due process requirements is through substitute remedies." (emphasis added)).

The wrongful birth action inherently signals that children who become disabled should be avoided, whereas healthy children are not. The people of Kansas have indicated that they do not wish to affirm that position, and thus do not consider the existence of a child who is disabled to create compensable injury. Further, part and parcel to Plaintiffs' action is the assertion that

Plaintiffs would have obtained an abortion. There are few social issues that garner the intense, repeated, and negative attention of the people of Kansas as abortion. The only way to ensure that the wrongful birth tort does not further encroach upon these social concerns is to abolish it entirely. Thus, even if Plaintiffs are able to show that wrongful birth is a garden-variety medical negligence action, K.S.A. 60-1906 satisfies the second part of the *Wood* test, and should withstand Plaintiffs' constitutional challenge.

V.

CONCLUSION

Plaintiffs acknowledge that their cause of action is barred by Kansas statute, and ask this Court to overrule the plain will of the Kansas Legislature and the people of Kansas. K.S.A. 60-1906 unequivocally provides that "no damages may be recovered" in any wrongful birth action and even bars the "commencement" of a wrongful birth claim. Kansas public policy is clear and Plaintiffs should not be permitted to move forward with their action. Plaintiffs' attempt to avoid K.S.A. 60-1906 by way of a Kansas constitutional challenge also fails, as the provisions cited by Plaintiffs – Sections 5 and 18 – do not apply to wrongful birth actions. The tort of wrongful birth is distinct from common-law negligence in both proof and policy.

WHEREFORE, for the reasons stated, Defendant Katherine A. Goodpasture, D.O., respectfully requests that the court affirm the trial court's entry of judgment in her favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of October, 2017, I presented the foregoing to the clerk of the court for filing and uploading to the e-flex electronic court filing system and provided a copy by email to the following counsel of record:

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