

No. 17-117439-S

IN THE SUPREME COURT
OF THE STATE OF KANSAS

ALYSIA R. TILLMAN AND STORM FLEETWOOD
Plaintiffs/Appellants,

vs.

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

OFFICE OF ATTORNEY GENERAL DEREK SCHMIDT
Intervenor.

APPELLEE'S SUPPLEMENTAL BRIEF

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

Dustin J. Denning, KS 19348
CLARK, MIZE & LINVILLE, CHARTERED
129 South 8th, P.O. Box 380
Salina, Kansas 67402-0380
785-823-6325 Telephone
785-823-1868 Facsimile
djdennin@cml-law.com
Attorney for Defendant/Appellee

TABLE OF CONTENTS

I. NATURE OF THE MATTER 1

 K.S.A 60-1906 1

 Kansas Constitution, Bill of Rights, Section 1 1

Hodes & Nauser, MDs, P.A. v. Schmidt,
 No. 114,153, 2019 WL 1868843 (Kan. Apr. 26, 2019)..... 1

 Kansas Constitution, Bill of Rights, Section 5 1

 Kansas Constitution, Bill of Rights, Section 18 1

II. ARGUMENT AND AUTHORITY 1

**A. *Hodes* Is Not a Section 5 or Section 18 Decision, and Plaintiffs Have Not
 Argued That Wrongful Birth Is a Constitutionally Protected Tort by
 Virtue of the Right to an Abortion Alone** 1

Hodes & Nauser, MDs, P.A. v. Schmidt,
 No. 114,153, 2019 WL 1868843 (Kan. Apr. 26, 2019)..... 1

 Kansas Constitution, Bill of Rights, Section 1 1, 2

 Kansas Constitution, Bill of Rights, Section 5 1

 Kansas Constitution, Bill of Rights, Section 18 1

 K.S.A 60-1906 2

Wolfe Elec., Inc. v. Duckworth, 293 Kan. 375, 266 P.3d 516 (2011)..... 2

Paternity of M.V. By & Through Her Nat. Mother v. T.R.,
 56 Kan. App. 2d 28, 422 P.3d 1178 (2018) 2

**B. The Tort of Wrongful Birth Is Different Than Abortion and Merits a
 Separate Analysis under Sections 5 and 18** 2

Hodes & Nauser, MDs, P.A. v. Schmidt,
 No. 114,153, 2019 WL 1868843 (Kan. Apr. 26, 2019)..... 2, 3, 4, 5

Planned Parenthood of Southeastern Pennsylvania v. Casey,
 505 U.S. 833, 846, 112 S.Ct. 2791, 120 L. Ed. 2d 674 (1992)..... 2

| | |
|---|------|
| <i>Arche v. U.S. Dep't of Army</i> , 247 Kan. 276, 798 P.2d 477 (1990) | 2, 3 |
| K.S.A 60-1906 | 3, 4 |
| Locke, <i>Two Treatises of Government</i> , Bk. II (Routledge and Sons ed., 1884)..... | 4 |
| Philip A. Hamburger, <i>Natural Rights, Natural Law, and American Constitutions</i> , 102 Yale L.J. 907 (1993) | 4 |
| Kansas Constitution, Bill of Rights, Section 1 | 5 |
| Kansas Constitution, Bill of Rights, Section 5 | 5 |
| Kansas Constitution, Bill of Rights, Section 18 | 5 |
| <i>Leiker By & Through Leiker v. Gafford</i> , 245 Kan. 325, 778 P.2d 823 (1989) | 5 |
| <i>Brown v. Wichita State Univ.</i> , 219 Kan. 2, 547 P.2d 1015 (1976) | 5 |
| <i>Miller v. Johnson</i> , 295 Kan. 636, 289 P.3d 1098 (2012)..... | 5 |
| III. CONCLUSION | 5 |
| <i>Hodes & Nauser, MDs, P.A. v. Schmidt</i> , No. 114,153, 2019 WL 1868843 (Kan. Apr. 26, 2019)..... | 5 |
| K.S.A 60-1906 | 5, 6 |
| Kansas Constitution, Bill of Rights, Section 5 | 5 |
| Kansas Constitution, Bill of Rights, Section 18 | 5 |

I.

NATURE OF THE MATTER

The tort of wrongful birth and legislation barring it, K.S.A. 60-1906, arguably raise the specter of abortion rights. This Court recently held that section 1 of the Bill of Rights of the Kansas Constitution (“Section 1”), protects the right to personal autonomy, which includes a right to abortion. *Hodes & Nauser, MDs, P.A. v. Schmidt*, No. 114,153, 2019 WL 1868843, at *3, 31 (Kan. Apr. 26, 2019). However, neither the right to an abortion nor the *Hodes* decision affect the result of this case.

Plaintiffs’ arguments to overturn K.S.A. 60-1906 are based upon sections 5 and 18 of the Bill of Rights of the Kansas Constitution (“Section 5” and “Section 18,” respectively). Abortion rights and the tort of wrongful birth are also fundamentally different concepts involving distinguishable considerations. The analysis under Sections 5 and 18 remains the same as previously briefed, and K.S.A. 60-1906 should stand.

II.

ARGUMENT AND AUTHORITY

A. *Hodes* Is Not a Section 5 or Section 18 Decision, and Plaintiffs Have Not Argued That Wrongful Birth Is a Constitutionally Protected Tort by Virtue of the Right to an Abortion Alone.

In *Hodes*, the Court held that Section 1 protects an inexhaustive list of natural rights, including the right to abortion or to continue a pregnancy. 2019 WL 1868843 at *3, 31. The Court’s decision did not turn on Sections 5 or 18 (as this case does), nor did it address, more generally, what rights are protected under those provisions. *Hodes* is distinguishable on that basis, alone.

Plaintiffs also have not argued that federal rights mandate a viable wrongful birth action under state tort law, nor have they argued that K.S.A. 60-1906 violates their rights under Section 1. (*See, e.g.*, Petition, ROA Vol. I, p 8 (only challenging K.S.A. 60-1906 on the basis of Sections 5 and 18, not the 14th Amendment to the United States Constitution or Section 1)). Therefore, such issues have been waived. *See, e.g., Wolfe Elec., Inc. v. Duckworth*, 293 Kan. 375, 403, 266 P.3d 516 (2011); *Paternity of M.V. By & Through Her Nat. Mother v. T.R.*, 56 Kan. App. 2d 28, 32, 422 P.3d 1178 (2018) (discussing exceptions). However, even if those arguments had been raised, the existence of a right to abortion – whether under the Kansas or United States Constitution – does not change the outcome.

B. The Tort of Wrongful Birth Is Different Than Abortion and Merits a Separate Analysis under Sections 5 and 18.

Abortion is founded upon “a woman’s right to make decisions about her body.” *Hodes*, 2019 WL 1868843, at *2. But the right to an abortion is not coextensive with the wrongful birth tort – far from it. While a mother could obtain an abortion for any number of reasons depending upon the duration of the pregnancy, *see Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 870, 112 S.Ct. 2791, 120 L. Ed. 2d 674 (1992), *Hodes*, 2019 WL 1868843, at *2, 37, 41, only a small subset of pregnancies with the potential for disability could lead to a wrongful birth action, *Arche v. U.S. Dep’t of Army*, 247 Kan. 276, 281, 798 P.2d 477 (1990).

Moreover, the right to an abortion implicitly weighs the interests of the mother against those of the embryo or fetus. *See Planned Parenthood*, 505 U.S. at 912–13, 112 S. Ct. 2791 (Stevens, J., concurring). Wrongful birth damages, whether characterized as the consequences flowing from a woman’s right to terminate a pregnancy or as the impact of a child’s existence, require an entirely different measurement: the life of an existing child with disabilities against the

life of a hypothetical child without. *Arche*, 247 Kan. at 283, 798 P.2d 477. Unlike the right to abortion, the tort of wrongful birth is not built on the contrast between personal autonomy and an unborn embryo or fetus. Wrongful birth requires weighing one living person against someone that could possibly have existed in her place.

Even when wrongful birth is framed in terms of parental rights, the choice in wrongful birth is not simply one to an abortion or to continue a pregnancy, but rather to choose a *specific* child. “[T]he suit is 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.” *Arche*, 247 Kan. at 278, 798 P.2d 477 (emphasis added). “Wrongful birth plaintiffs typically desire a child and plan to support the child. Such support is, of course, the obligation of all parents. It is therefore reasonable to deny those normal and foreseeable [sic] costs which accrue to all parents.” *Id.* at 282.

K.S.A. 60-1906 also does nothing to limit access to abortion. Plaintiffs can still exercise their natural right in light of that statute. K.S.A. 60-1906 does, however, affect the ability to maintain a court action under a specific legal theory. That is something different than an inherent, natural right to an abortion.

Whereas natural rights are inherent to personhood and freedom, *see, e.g., Hodes*, 2019 WL 1868843 at *17-20, entitlement to damages or a remedy in a specific case is determined by the judicial branch of government. In other words, Plaintiffs’ right to a court action – the right at issue here – depends on government, and thus cannot be considered a natural right like abortion:

William Blackstone in his Commentaries identified the private rights to life, liberty, and property as the three “absolute” rights—so called because they “appertain[ed] and belong[ed] to particular men, merely as individuals,” not “to them as members of society [or] standing in various relations to each other”—that is, *not dependent upon the will of the government*. 1 Blackstone, Commentaries on the Laws of England *123, *129-38 (1765). American courts reaffirmed these observations in

applying the common law in this country. See, e.g., *State v. Moore*, 42 N.J.L. 208, 13 Vroom 208 (1880) (quoting 1 Blackstone, at *134: “[T]he law ... regards, asserts and preserves the personal liberty of individuals.”).

Id. at *18 (emphasis added).

Indeed, *giving up* the inherent, natural right to settle differences is a defining feature of civil society, according to Locke.

Man being born, as has been proved, with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature... hath by nature a power not only to preserve his property—that is, his life, liberty, and estate against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others... [I]t is easy to discern who are, and are not, in political society together. Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them and punish offenders, are in civil society one with another; but those who have no such common appeal, I mean on earth, are still in the state of Nature, each being where there is no other, judge for himself and executioner; which is, as I have before showed it, the perfect state of Nature.

Locke, *Two Treatises of Government*, Bk. II, § 87 (Routledge and Sons ed., 1884); *see also, e.g.*, Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907, 908 (1993) (distinguishing “natural” rights from “acquired” rights on a similar basis). In short, the ability to maintain an action in court is *acquired* through the formation of and dictated by government.

The tort of wrongful birth and the right to an abortion are two different and distinguishable things. Wrongful birth applies depending upon the specific characteristics of the embryo or fetus, whereas abortion rights generally apply depending upon the duration of a pregnancy. Wrongful birth requires an assessment of an existing child’s life as a disabled person against that of a hypothetical, non-disabled child, whereas abortion rights weigh the interests of a mother against those of an unborn embryo or fetus. The ability to maintain an action in court – the basis for Plaintiffs’ specific complaint about K.S.A. 60-1906 – is acquired and implemented through the

establishment of the judiciary, whereas abortion is borne from a natural right to personal autonomy. The existence of an abortion right does not change the reasoning or result here.

That is the correct result under our constitution. The liberty interests under Section 1 are meant to protect against legal restrictions on the exercise of certain personal rights. *See Hodes*, 2019 WL 1868843, at *11 (reasoning that the drafters’ “focal point” for Section 1 rights was a “broad concept of natural rights” due to “a desire to protect those rights from *government* infringement” (emphasis added)). Section 1 rights are not a springboard to constitutionally protected tort actions.

Instead, the Kansas Bill of Rights addresses access to the Kansas judiciary and entitlement to damages in Sections 5 and 18. And those acquired rights are defined and protected using a different, well-established standard based upon whether an action was justiciable at common-law when the Kansas Constitution was adopted in 1859. *Leiker By & Through Leiker v. Gafford*, 245 Kan. 325, 361, 778 P.2d 823 (1989); *see also, e.g., Brown v. Wichita State Univ.*, 219 Kan. 2, 10, 547 P.2d 1015 (1976); *Miller v. Johnson*, 295 Kan. 636, 696, 289 P.3d 1098 (2012) (Beier, J., dissenting); (Appellee Brief, pp. 8-14).

III.

CONCLUSION

The *Hodes* decision and Plaintiffs’ right to an abortion, more generally, do not change the outcome of this case. Sections 5 and 18 – the provisions at issue here – are not the basis for that decision or the right to abortion. Plaintiffs have not argued that their right to an abortion invalidates K.S.A. 60-1906 or protects the tort of wrongful birth. The tort of wrongful birth and the right to an abortion are entirely different concepts with different treatment under our constitution. Finally,

there is nothing in K.S.A. 60-1906 that limits access to an abortion. K.S.A. 60-1906 is constitutional, and the Court should permit it to stand.

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

Respectfully submitted,

/s/ Dustin J. Denning

Dustin J. Denning, KS 19348

Jacob E. Peterson, KS 25534

CLARK, MIZE & LINVILLE, CHARTERED

129 South 8th Street, POB 380

Salina, Kansas 67402-0380

785-823-6325 Tel. | 785-823-1868 Fax

djdenning@cml-law.com

jepeterson@cml-law.com

Attorneys for Defendant/Appellee

Katherine A. Goodpasture, D.O.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 31st day of May, 2019, 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:

Lynn R. Johnson
David R. Morantz
Ashley E. Billam
Shamberg, Johnson & Bergman, Chtd.
ljohnson@sjblaw.com
dmorantz@sjblaw.com
abillam@sjblaw.com
Attorneys for Plaintiffs/Appellants

Stanley R. Ausemus
Stanley R. Ausemus, Chtd.
Stanley@sraclaw.com
Attorney for Plaintiffs/Appellants

Jeffrey A. Chanay
Chief Deputy Attorney General
Bryan C. Clark
Dwight R. Carswell
Assistant Solicitor General
jeff.chanay@ag.ks.gov
bryan.clark@ag.ks.gov
dwight.carswell@ag.ks.gov
Attorneys for Intervenor Office of
Kansas Attorney General Derek Schmidt

/s/ Dustin J. Denning
Dustin J. Denning, KS 19348
Attorney for Defendant/Appellee
Katherine A. Goodpasture, D.O.