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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,

v.

KATHERINE A. GOODPASTURE, D.O.,

Defendant-Appellee.

OFFICE OF ATTORNEY GENERAL DEREK SCHMIDT,

Intervenor.

Appeal from the District Court of Riley County, Kansas
Honorable John F. Bosch, District Judge
District Court Case No. 2016-CV-94

BRIEF OF INTERVENOR KANSAS ATTORNEY GENERAL

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NATURE OF THE CASE

This case involves a claim of wrongful birth—a modern tort theory first recognized in this State in 1990 by the Kansas Supreme Court. *See Arche v. U.S. Dep't of Army*, 247 Kan. 276, 798 P.2d 477 (1990). Plaintiffs acknowledge that K.S.A. 60-1906(a) on its face bars their wrongful birth cause of action. (R. Vol. I, 6, ¶ 32.) They claim, however, that K.S.A. 60-1906 violates §§ 5 and 18 of the Bill of Rights of the Kansas Constitution, which preserve the right to a jury trial (§ 5) and the right to a remedy by due course of law (§ 18) for causes of action recognized as justiciable at common law when the Kansas Constitution was adopted in 1859. The District Court disagreed. It dismissed Plaintiffs' case with prejudice, concluding that §§ 5 and 18 do not protect Plaintiffs' wrongful birth cause of action because such claims were not recognized by the common law in 1859. (R. Vol. II, 95-96.)

STATEMENT OF THE ISSUES

1. Do §§ 5 and 18 of the Kansas Bill of Rights apply to Plaintiffs' wrongful birth action?
2. If §§ 5 and 18 of the Kansas Bill of Rights apply to Plaintiffs' wrongful birth action, does K.S.A. 60-1906, which bars wrongful birth actions, violate §§ 5 and 18?

STATEMENT OF FACTS

Plaintiffs-Appellants Alysia R. Tillman and Storm Fleetwood claim their daughter, A.F. ("Baby A"), should not have been born. They have alleged that Defendant-Appellee, Dr. Katherine A. Goodpasture, should have identified brain defects in their unborn child, and if she had, Tillman would have obtained an abortion to terminate the pregnancy. (R. Vol. I, 5-8.)

Plaintiffs recognize that their wrongful birth claim is barred by K.S.A. 60-1906(a), which provides:

> 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(b) defines "claim of wrongful birth" as follows:

> [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.

Plaintiffs claim that K.S.A. 60-1906(a) should not be given effect because it violates §§ 5 and 18 of the Kansas Constitution's Bill of Rights. (R. Vol. I, 6, ¶ 32.) Section 5 of the Kansas Bill of Rights provides, "The right of trial by jury shall be inviolate." And § 18 requires that, "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

Dr. Goodpasture moved for judgment on the pleadings arguing, consistent with more than a century of case law, that §§ 5 and 18 do not apply to K.S.A. 60-1906(a) because wrongful birth actions were not recognized as justiciable at common law when §§ 5 and 18 were ratified. (R. Vol. I, 36, 68 & n.1.) Upon receiving notice of Plaintiffs' challenge to the constitutionality of K.S.A. 60-1906, the Attorney General moved to intervene to defend the statute. *See* K.S.A. 75-764(e); K.S.A. 60-224(b)(2)(C). (R. Vol. I, 85.) The Court granted the Attorney General's motion and granted the Attorney General leave to file a supplemental brief. (R. Vol. I, 103.)

After receiving supplemental briefing from all parties, the District Court granted Dr. Goodpasture's motion for judgment on the pleadings. (R. Vol. II, 95-96.) The District Court concluded that K.S.A. 60-1906 does not violate §§ 5 and 18 of the Kansas Bill of Rights because those constitutional protections apply only to civil actions that "existed at common-law prior to the adoption of the Kansas Constitution in 1859." (R. Vol. II, 92.) And since Plaintiffs' wrongful birth cause of action was "not simply another species of negligence, and because it was only created by the Kansas Supreme Court in 1990," the District Court found that §§ 5 and 18 do not apply. (R. Vol. II, 95.) Plaintiffs appealed.

ARGUMENTS AND AUTHORITIES

Plaintiffs face a daunting task in this appeal. They must convince the Court that their wrongful birth cause of action, which did not exist in Kansas until 1990, is somehow covered by §§ 5 and 18 of the Kansas Bill of Rights, which only preserve rights that existed in 1859. And because Plaintiffs ask the Court to invalidate

K.S.A. 60-1906, they must carry the heavy burden plaintiffs bear when asking a court to strike down a duly enacted statute "adopted through the legislative process ultimately expressing the will of the electorate in a democratic society." *Barrett v. U.S.D. No. 259*, 272 Kan. 250, 255, 32 P.3d 1156 (2001). Such statutes are presumptively constitutional and "all doubts must be resolved in favor of [the statute's] validity." *Bair v. Peck*, 248 Kan. 824, 829, 811 P.2d 1176 (1991) (internal quotation marks omitted). Courts are duty bound to uphold a statute under attack, if possible, rather than defeat it. *Id.* A statute should be struck down only if its unconstitutionality is "clear beyond substantial doubt." *Barrett*, 272 Kan. at 255. Plaintiffs' constitutional challenge presents questions of law this Court reviews de novo, keeping in mind Plaintiffs' heavy burden.

I. Sections 5 and 18 of the Kansas Bill of Rights Do Not Apply to Plaintiffs' Wrongful Birth Cause of Action.

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" in 1859. *Leiker v. Gafford*, 245 Kan. 325, 361, 778 P.2d 823 (1989) (collecting cases), *disapproved of on other grounds by Martindale v. Tenny*, 250 Kan. 621, 829 P.2d 561 (1992); *Unified Sch. Dist. No. 229 v. State*, 256 Kan. 232, 239, 885 P.2d 1170 (1994) (the Kansas Constitution was adopted in 1859). More than a century of Kansas Supreme Court precedent says so. *See, e.g.*, *Miller v. Johnson*, 295 Kan. 636, 647, 289 P.3d 1098 (2012) (§ 5 preserves the right to jury trial "as it historically existed at common law when our state's

constitution came into existence"); *id.* at 720 (Beier, J., concurring) ("Section 18 protects an individual right . . . to the remedies that existed at common law . . . ."); *Kimball v. Connor*, 3 Kan. 414, 432 (1866) ("Trial by jury is guaranteed only in those cases where that right existed at common law.").

Plaintiffs concede that their wrongful birth action "was first recognized in Kansas' common law by the Kansas Supreme Court in Arche," which was decided in 1990. Aplt. Br. 6. But they claim that because actions for money damages were triable to a jury at common law any newly recognized cause of action that seeks money damages should be deemed to have existed in 1859. They also contend that their wrongful birth cause of action is really just a modern application of a run-of-the-mill common law medical negligence action, which §§ 5 and 18 protect. The Kansas Supreme Court has already rejected both of these arguments.

A. Plaintiffs' wrongful birth cause of action was first recognized in Kansas in 1990; it did not exist at common law in 1859.

Plaintiffs' wrongful birth cause of action was first recognized in Kansas in 1990 by the Kansas Supreme Court in *Arche v. U.S. Dep't of Army*, 247 Kan. 276, 798 P.2d 477 (1990), which was before the Supreme Court on certified questions from the Kansas federal district court. *See Arche v. U.S. Dep't of Army*, No. CIV. A. 88-2407-O, 1989 WL 115730, at *2 (D. Kan. Sept. 19, 1989). It was clear to both the federal district court and the Kansas Supreme Court that for the *Arche* plaintiffs to maintain their wrongful birth cause of action Kansas law would have to be expanded to recognize wrongful birth as a new tort.

The Supreme Court framed the question presented in *Arche* as, "Whether a cause of action for wrongful birth *will be* recognized in the case of a child born with defects," and noted the question was one of first impression in Kansas. 247 Kan. at 278 (emphasis added). The Court described the "tort of wrongful birth" as an action brought by 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 (emphasis omitted).

In recognizing a cause of action for wrongful birth, the Supreme Court explained that its decision was based in large part on the "major change[]" that occurred when "United States Supreme Court recognized a woman's right to obtain an abortion" (under certain circumstances) in *Roe v. Wade*, 410 U.S. 113 (1973). Not only was *Roe* decided more than 100 years after the Kansas Bill of Rights was adopted in 1859, abortion was a crime in Kansas when it became a State, except in the case of medical emergency. *See* Kan. Terr. Stat. 1855, ch. 48, §§ 9, 10, 37, 39; Laws 1862, ch. 33, §§ 9-10, 37.

If the Court needs more evidence that Plaintiffs' wrongful birth action was not recognized at common law in 1859, it need look no further than Justice Six's concurrence in *Arche*, which referred to the plaintiffs' wrongful birth claim as a "new claim" and a "new tort," with no response from the majority. 247 Kan. at 292, 294, 295. And just six years after deciding *Arche* the full Supreme Court called wrongful birth a "new cause of action." *OMI Holdings, Inc. v. Howell*, 260 Kan. 305, 314, 918 P.2d 1274 (1996).

Plaintiffs' attempts to recast their thoroughly modern wrongful birth claim as a common law tort, or even an application of common law tort principles, is contrary to both history and precedent. The Minnesota and Utah Supreme Courts have rejected arguments similar to Plaintiffs'. *See Hickman v. Grp. Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986); *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, 67 P.3d 436. This Court should do the same.

B. Sections 5 and 18 do not apply to all conceivable actions that seek money damages regardless of whether the action existed at common law.

Plaintiffs contend that "the type of tort [they] assert is irrelevant"; all that matters is that their action seeks money damages, therefore §§ 5 and 18 apply. Aplt. Br. 10. But none of the cases Plaintiffs cite to support this argument deal with a new cause of action like wrongful birth. *See, e.g.*, *Miller*, 295 Kan. 636 (tort reforms related to traditional personal injury lawsuits, including traditional medical malpractice actions, did not violate §§ 5 and 18); *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988) (tort reforms relating to traditional medical malpractice claims violated §§ 5 and 18); *First Nat'l Bank of Olathe v. Clark*, 226 Kan. 619, 602 P.2d 1299 (1979) (no right to jury in mortgage foreclosure action).

But in *Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823 (1989), a case not mentioned in Plaintiffs' opening brief, the Kansas Supreme Court addressed this very question: Can §§ 5 and 18 be used to challenge the constitutionality of restrictions on remedies available under a new wrongful death cause of action for

damages? The Court said no. Because "Kansas common law did not recognize a civil claim for wrongful death at the time our Bill of Rights was adopted . . . . neither § 5 nor § 18 of the Bill of Rights can be invoked to challenge the constitutionality of . . . [a] limitation on nonpecuniary damages resulting from wrongful death." *Id.* at 361-62. The same is true of Plaintiffs' wrongful birth claim: There was no such cause of action at common law in 1859; therefore, §§ 5 and 18 cannot be invoked to strike down duly enacted restrictions on the cause of action.

Leiker sinks Plaintiffs' theory that any cause of action seeking damages is subject to §§ 5 and 18. If the protections of §§ 5 and 18 swept as broad as Plaintiffs say, *Leiker* would have reached the opposite result. Although Plaintiffs' opening brief completely ignores *Leiker*, Plaintiffs tried to distinguish *Leiker* in the District Court by arguing that wrongful death actions were recognized by statute as opposed to judicial decision, and that is why the Supreme Court found §§ 5 and 18 did not apply. But *Leiker* does not make that distinction. Rather, *Leiker* recognized that both statutes and judicial decisions can modify the common law, and it did not suggest that modifications by judicial decision should be treated any differently than modifications made by statute. *See id.* at 360; *see also Brown v. Wichita State Univ.*, 219 Kan. 2, 10, 547 P.2d 1015 (1976) (because "the right to sue the state for torts was a right denied at common law," the Court rejected a § 18 challenge to a statute that, by restoring governmental immunity to certain torts, prohibited tort actions the Court by judicial decision had previously permitted).

C. Plaintiffs' wrongful birth cause of action is not a new application of a traditional negligence action; it is an entirely "new cause of action."

Even though the Kansas Supreme Court has already said that an action for wrongful birth is a "new cause of action," *OMI Holdings*, 260 Kan. at 314, Plaintiffs contend that their wrongful birth action is just a new application of a common law medical negligence action. This Court is bound to follow the Kansas Supreme Court's description of Plaintiffs' claim. *See Rojas v. Barker*, 40 Kan. App. 2d 758, 767, 195 P.3d 785 (2008). But even if this Court were not bound by the Supreme Court's statement in *OMI Holdings*, Plaintiffs' wrongful birth action is not just a new application of nineteenth century common law tort principles.

Plaintiffs primarily rely on *Lemuz v. Fieser*, 261 Kan. 936, 933 P.2d 134 (1997) to support their claim that §§ 5 and 18 apply to their wrongful birth action because it is just an application of common law negligence to new medical technology. In *Lemuz*, an infant and his parents brought negligence claims against two doctors for medical malpractice, and against Central Kansas Medical Center for granting obstetrical privileges to one of the doctors and for not ordering the doctor to transfer the infant plaintiff to a hospital equipped to handle his neurological issues. *Id.* at 938.

The question before the Court was whether a Kansas statute that barred the plaintiffs' suit against the Medical Center violated § 18 of the Kansas Bill of Rights by withdrawing from the plaintiffs their negligence claim against the hospital. *See id.* at 944. The Medical Center argued that the statute did not implicate § 18

because until 1966 hospitals were not liable for the negligence of nonemployee members of the medical staff and were not required to use reasonable care in recruiting staff physicians. *Id.* The Supreme Court rejected this argument because the "[t]he plaintiffs' claim of corporate negligence against the hospital [was] based upon the basic principle of negligence, a common-law remedy which was recognized at the time the Kansas Constitution was adopted." *Id.* at 945. That is, the plaintiffs' claim simply required "plugg[ing]" hospitals "into an old cause of action, negligence." *Id.*

Lemuz does not help Plaintiffs. Unlike the corporate negligence action in *Lemuz*, Plaintiffs' wrongful birth cause of action is not just a new application of a traditional common law negligence action—it is a novel cause of action that seeks a new remedy unimaginable at common law for all the reasons described above. *See supra* § I.A. Even setting aside the fact that Plaintiffs' wrongful birth action would have required them to confess intent to commit a crime in 1859, and that the Kansas Supreme Court has already called their action a "new cause of action," the elements of their wrongful birth action plainly show that it is a new cause of action and not just an application of common law negligence.

Lemuz says that § 18 applies only where a cause of action only involves plugging a new set of facts into "an old cause of action." *Id.* at 945. An analogy to the U.S. Supreme Court's approach to distinguishing between new rules and new applications of old rules in the criminal procedure context also provides some helpful guidance. For example, in *Chaidez v. United States*, 568 U.S. 342 (2013), the

U.S. Supreme Court addressed whether *Padilla v. Kentucky*, 559 U.S. 356 (2010), in which the Court held that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea, announced a new rule or was simply a new application of the well-known general standard for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court explained that "garden-variety applications" of the *Strickland* test for ineffective assistance of counsel "do not produce new rules." *Chaidez*, 568 U.S. at 347. And because *Padilla* did something more—first deciding whether failing to provide "advice about deportation was 'categorically removed' from the Sixth Amendment right to counsel"—the Court found that *Padilla* had announced a new rule. *Chaidez*, 568 U.S. at 349.

The Kansas Supreme Court's recognition of a cause of action for wrongful birth in *Arche* bears all the hallmarks of a new cause of action, not just a "garden-variety application" of the traditional negligence cause of action. *See Chaidez*, 568 U.S. at 347, 349. That the Kansas Supreme Court had to "recognize" a wrongful birth cause of action before the federal district court would allow the case to proceed shows that Plaintiffs' wrongful birth action is more than just a new application of an old rule. But that is not all. The Kansas Supreme Court also explained that the traditional elements of a medical negligence action apply differently in a wrongful birth action. *Arche*, 247 Kan. at 281. It then added two elements to the three traditional negligence elements of duty, breach, and causation of injury, *id.*, and

explained that the traditional rules for calculating damages did not apply, *id.* at 281-83.

1. The traditional elements of medical malpractice apply differently in a wrongful birth action.

In an ordinary medical negligence action a physician's conduct is assessed "according to professional standards." Dennis J. McCann, Comment, *Liability for Negligent Prenatal Diagnosis: Parents' Right to a "Perfect" Child?*, 42 Ohio St. L.J. 551, 572 (1981); *see also Miller*, 295 Kan. at 683. But in a wrongful birth cause of action the "legal interest of the parent-plaintiffs has nothing to do with medicine"; the "decision to abort a fetus afflicted with Down's syndrome," for example, "is not a medical decision, but a personal, ethical, and social decision." McCann, *supra*, at 572. While "a medical professional's expert knowledge and cooperation are required if parents are to exercise the choice to abort, it does not follow that this use of technology is simply a matter of professional standards." *Id.*

Put another way, "[r]ather than focusing on a defendant's conduct, as in a traditional tort action," wrongful birth suits focus on an unborn child's disability and require juries to "evaluate whether a particular disability is so horrible, from the non-disabled perspective, as to make plausible the choice of abortion . . . by the parent." Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 Harv. C.R.-C.L. L. Rev. 141, 144 (2005). For example, in Kansas, wrongful birth plaintiffs are required to prove the "child has . . . gross deformities [that are] not medically correctable" and that "the child will never be able to function as a normal human being." *Arche*, 247 Kan. at 281.

Plaintiffs' wrongful birth cause of action also is unique because "[w]rongful birth actions, unlike medical malpractice claims, do not involve a physical injury to the plaintiff." Paula Bernstein, *Fitting a Square Peg in a Round Hole,* 18 J. Contemp. Health L. & Pol'y 297, 303 (2001); *see also Arche*, 247 Kan. at 294 (Six, J., concurring) ("The juxtaposition between the substantive law of wrongful birth, as a new tort, and the damage award for that tort is unique."). Instead, "the alleged injury is based on the physician's depriving the plaintiff of the right to choose whether or not to terminate the pregnancy of a defective fetus." Bernstein, *supra*, at 303. Wrongful birth actions require an "*entirely untraditional analysis*" because they are based on the premise "that the existence of human life can constitute an injury cognizable at law." *Azzolino v. Dingfelder*, 315 N.C. 103, 111, 337 S.E.2d 528 (1985); *accord Arche*, 247 Kan. at 282.

In recognizing wrongful birth as a cause of action for the first time, the Kansas Supreme Court candidly acknowledged that even though a wrongful birth action may share some of the same elements as a traditional medical negligence action, the elements of the two causes of action are applied in fundamentally different ways. *See Arche*, 247 Kan. at 282-83. In contrast to traditional negligence actions, "in a wrongful birth case, the result of the tortious conduct is the existence, or benefit, of a child," as opposed to a traditional physical injury. *Id.* at 282; *see also id.* at 294-95.

2. Wrongful birth actions require plaintiffs to prove two new elements not required to prove common law negligence.

Plaintiffs claim their wrongful birth cause of action only requires them to prove the three elements of a traditional negligence action: duty, breach, and causation of damages. Aplt. Br. 6. But *Arche* specifically requires wrongful birth plaintiffs to prove two elements not required to prove a traditional medical negligence cause of action: "that the child is severely and permanently handicapped," meaning that (1) "the child has . . . gross deformities [that are] not medically correctable"; and (2) "the child will never be able to function as a normal human being." 247 Kan. at 281. Unlike the corporate negligence action in *Lemuz*, the wrongful birth cause of action the Kansas Supreme Court recognized in *Arche* requires more than plugging a new duty into an old cause of action. *See Lemuz*, 261 Kan. at 945.

3. Wrongful birth actions are based on a novel theory of damages with no basis in common law negligence.

Another striking difference between Plaintiffs' wrongful birth cause of action and a traditional negligence action is the nature of the remedy. The Kansas Supreme Court acknowledged that the remedy it crafted for wrongful birth actions in 1990 breaks from the common law: "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. 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 (internal citation omitted); *see also Azzolino*, 315 N.C. at 111 (traditional tort law principles "break down" on the

causation and injury elements); *Atlanta Obstetrics & Gynecology Group v. Abelson*, 260 Ga. 711, 715, 398 S.E.2d 557 (1990) (same); *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) (same).

The remedial issues in wrongful birth cases are much deeper than simply monetizing losses suffered by victims. Determining the appropriate remedy for a wrongful birth action involves profound policy considerations rooted in the value of life that were not implicated by common law negligence actions. For example, "[u]nder traditional theories of tort law, defendants are liable for all of the reasonably for[e]seeable results of their negligent acts or omissions." *Azzolino*, 315 N.C. at 111-12. But most jurisdictions, including the Kansas Supreme Court, do not "apply this traditional rule of damages with full vigor in wrongful birth cases." *Id.* at 111-12.

Because of the fundamental differences between wrongful birth and traditional negligence, the Kansas Supreme Court crafted a new, custom-made remedial regime for wrongful birth causes of action. Instead of simply plugging wrongful birth duties into a traditional negligence cause of action the Court held that parents who prevail on a wrongful birth claim may recover some "pecuniary losses," but only "those expenses caused by the child's handicaps," and "not those expenses natural to raising any child." *Arche*, 247 Kan. at 283. This is known as the "extraordinary cost" rule, which is a "special rule" of damages applied in wrongful

birth to "ameliorate the otherwise harsh consequences that would result from a strict application" of the common law rule. *Atlanta Obstetrics*, 260 Ga. at 716.

Plaintiffs bear the burden of showing that K.S.A. 60-1906 is unconstitutional, but they point to no common law analog for the remedial regime the Kansas Supreme Court adopted for wrongful birth actions. They simply assert, without support, that their wrongful birth action is "brought under the same concept and pursuant to the same elements of a common law negligence claim." Aplt. Br. 11. Plaintiffs' say-so, which is obviously contrary to history and precedent, is not sufficient to carry Plaintiffs' heavy burden of showing that K.S.A. 60-1906 violates §§ 5 and 18 of the Kansas Bill of Rights. Plaintiffs' wrongful birth cause of action "does not fit within the parameters of traditional tort law." *Atlanta Obstetrics*, 260 Ga. at 718. And "[i]t is naive to suggest that such [an action] falls neatly into conventional tort principles." Dierdre A. Burgman, Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 Val. U.L. Rev. 127, 170 (1978), *available at* http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1625&context=vulr.

II. K.S.A. 60-1906 Does Not Violate § 5 or § 18.

If the Court concludes that § 5 or § 18 applies to Plaintiffs' wrongful birth cause of action, the Court must then determine whether K.S.A. 60-1906 satisfies the due process protections of those provisions. Plaintiffs contend that the only way for the Legislature to comply with §§ 5 and 18 is to provide an alternative remedy, what the Kansas Supreme Court calls a "quid pro quo."

In the context of reviewing tort reform statutes, the Kansas Supreme Court has said that the Legislature "*must* provide an adequate and viable substitute when modifying a common-law jury trial right under Section 5 or right to remedy under Section 18." *Miller*, 295 Kan. at 652. But the Court was careful to note that its decision to require a substitute remedy under §§ 5 and 18 is context specific. *See, e.g.*, *id.* (noting that the adequate substitute requirement came from cases dealing with tort reform); *id.* at 654 ("[I]t seems logical *when dealing with statutory caps* to have Section 5 and Section 18 encroachments measured against the same standard as has been done in our prior caselaw." (emphasis added)). The Court also has recognized that a substitute remedy is just "[*o*]*ne way* to meet due process requirements." *Id.* (quoting *Kansas Malpractice Victims Coalition*, 243 Kan. at 344, *disapproved of on other grounds by*, *Bair*, 248 Kan. 824).

In general, the Legislature has the "power to change the common law," including the power to "modify the right to a jury trial," as long as the "statutory modification of the common law . . . meet[s] due process requirements and [is] 'reasonably necessary in the public interest to promote the general welfare of the people of the state.'" *Miller*, 295 Kan. at 651 (quoting *Kansas Malpractice Victims Coalition*, 243 Kan. at 343-44); *accord Manzanares v. Bell*, 214 Kan. 589, 599, 522 P.2d 1291 (1974) ("Section 18 of the Bill of Rights provides a broad field for the protection of persons, property and reputation," but even "the vested rights contained therein," including the right to a jury trial under § 5, "are subject to change by legislative power, where the change is reasonably necessary in the public

interest to promote the general welfare of the people of the state."). Due process simply requires that "the legislative means selected have a real and substantial relation to the objective sought." *Miller*, 295 Kan. at 651 (quoting *Kansas Malpractice Victims Coalition*, 243 Kan. at 344). That K.S.A. 60-1906 does not provide a substitute remedy for Plaintiffs' wrongful birth action should not be the end of the due-process inquiry.

For example, in *Manzanares*, the Kansas Supreme Court considered whether the No-Fault Insurance Act violated § 18 of the Kansas Bill of Rights. The Act required every motor vehicle owner to purchase liability insurance as specified by the Act and every liability insurance policy to contain certain personal injury protection coverage. In turn, the Act permitted "recovery of damages for pain, suffering, inconvenience or other nonpecuniary loss only when the reasonable value of medical services for the injury is $500 or more." *Manzanares*, 214 Kan. at 597.

Plaintiffs contend that *Manzanares* turned on "the mandatory availability of no-fault insurance," which "was a sufficient quid pro quo for the limitation on the recovery." Aplt. Br. 14. But a close reading of *Manzanares* reveals that its reference to the Act providing an adequate substitute remedy was a secondary consideration. The Court started by noting that the plaintiff "questions the Legislature's authority to alter traditional tort liability concepts, and in so doing, . . . ignores the distinction between an accrued and expected cause of action." *Id.* at 597.

The Court then emphasized that "[t]he Act *prospectively* modifies the common-law tort liability concept, *and in no manner retroactively affects accrued*

common-law rights of redress." *Id.* at 599 (emphasis added). The purely prospective application of the Act was important because, "'(N)o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.'" *Id.* at 599 (quoting *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917) ("The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence.")). Just because "a citizen may find that events occurring after passage of such a statute place him in a different position legally from that which he would have occupied had they occurred before passage of the statute," does not mean the statute violates § 18. *Id.* (internal quotation marks omitted). The Court concluded, after mentioning the statute contains a substitute remedy, that the plaintiffs had "no cause to complain solely because [their] rights are not now what they would have been had [the Act] not been enacted." *Id.*

This case, which has little in common with tort reform cases like *Miller*, presents an even more compelling context for applying traditional due process principles instead of the substitute remedy requirement the Kansas Supreme Court has applied in the tort reform context as a proxy for due process. In the tort reform cases (including *Manzanares*), it was undisputed that the Legislature's authority to alter traditional tort liability concepts was at issue. Even *Lemuz*, which adheres to

the quid-pro-quo line of cases, involved a far more modest expansion of common law principles than Plaintiffs' wrongful birth action. *See* 261 Kan. at 945, 947-48.

Here it is undisputed that at the very least Plaintiffs' wrongful birth cause of action resulted from a public policy-based judicial extension of traditional common law negligence. *See OMI Holdings*, 260 Kan. at 314. Allowing courts to extend the common law to new contexts based on modern public policy determinations and then prohibit the Legislature from modifying or reversing the courts' public policy decision without providing a substitute remedy would raise serious separation of powers concerns. *See Sierra Club v. Mosier*, 305 Kan. 1090, 1112, 391 P.3d 667 (2017) ("Under the separation of powers doctrine, determination of the appropriate policy must be left to the legislative and executive branches of Kansas government."); *Unified Sch. Dist. No. 229*, 256 Kan. at 238 ("In determining whether a statute is constitutional, courts must guard against substituting their views on economic or social policy for those of the legislature." (internal quotation marks omitted)).

K.S.A. 60-1906 satisfies the due process requirements of §§ 5 and 18 because Plaintiffs had no vested right in a wrongful birth cause of action when the statute was enacted and the statute is reasonably related to a permissible legislative objective.

A. Plaintiffs had no vested right in a wrongful birth cause of action when K.S.A. 60-1906 was enacted.

In determining whether K.S.A. 60-1906 violates §§ 5 and 18, the Court should first look to whether Plaintiffs' wrongful birth cause of action had vested, *i.e.*, accrued, when K.S.A. 60-1906 took effect on July 1, 2013. *Resolution Trust Corp. v. Fleischer*, 257 Kan. 360, 366, 892 P.2d 497 (1995) (accrual marks "the creation of vested rights"). A tort cause of action accrues when all of the elements of the action are present. *See Holt v. Wesley Med. Ctr., LLC*, 277 Kan. 536, 542, 86 P.3d 1012 (2004). It is clear from the face of the Petition that Plaintiffs' alleged wrongful birth cause of action had not accrued when K.S.A. 60-1906 took effect on July 1, 2013. The physician-patient relationship between Plaintiff Alysia Tillman and Defendant was not established until November 2013, R. Vol. I, 4, ¶ 7, and Baby A was not born until May 18, 2014, R. Vol. I, 6, ¶ 22. Because Plaintiffs' alleged right to a wrongful birth cause of action had not accrued when K.S.A. 60-1906 took effect, their claim does not constitute a vested right entitled to due process under the Kansas Constitution. *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Assocs., Inc.*, 261 Kan. 17, 41, 927 P.2d 466 (1996); *see also Manzanares*, 214 Kan. at 597-99.

B. K.S.A. 60-1906 is reasonably related to a permissible legislative objective.

As long as the Legislature viewed K.S.A. 60-1906 as "reasonably necessary in the public interest to promote the general welfare of the people of the state," and "the legislative means selected have a real and substantial relation to the objective

sought," the Plaintiffs received all the process they were due under §§ 5 and 18. *See Miller*, 295 Kan. at 651.

Plaintiffs' wrongful birth cause of action involves sensitive and quintessential policy questions about the value of the life of a disabled child. *See OMI Holdings*, 260 Kan. at 314; *Arche*, 247 Kan. at 280-81. There can be no doubt that the public policy of the State of Kansas, as determined by the Legislature, is that every life is valuable. *See, e.g.*, K.S.A. 2017 Supp. 65-6709; K.S.A. 65-6710; K.S.A. 65-6732. "It has long been a fundamental principle of our law that human life is precious. Whether the person is in perfect health, in ill health, or has or does not have impairments or disabilities, the person's life is valuable, precious, and worthy of protection." *Bruggeman v. Schimke*, 239 Kan. 245, 254, 718 P.2d 635 (1986). In enacting the bar on wrongful birth actions, the Legislature was simply answering the policy question the Kansas Supreme Court addressed in *Arche*—what value should be placed on "the existence, or benefit, of a child"? 247 Kan. at 282. The Legislature concluded, consistent with our State's public policy, that the life of every child, including disabled children, is valuable and precious and that parents should not be allowed to bring legal claims asserting that such children never should have been born. The Legislature enacted K.S.A. 60-1906 to promote the public interest and general welfare of the people of Kansas and did so using reasonable means—barring wrongful birth causes of action while preserving claims for common law negligence. *See* K.S.A. 60-1906(b). Thus, K.S.A. 60-1906 "bears a 'reasonable relation' to a permissible legislative objective." *Manzanares*, 214 Kan. at 602-03.

Although the issue of abortion features prominently in any discussion of wrongful birth causes of action, K.S.A. 60-1906 does not affect a woman's right to choose an abortion. Wrongful birth actions are brought only after a child is born with a disability to seek money to compensate for the child's life. K.S.A. 60-1906 does not burden, much less substantially burden, a woman's right to an abortion. The Legislature's rational basis for enacting K.S.A. 60-1906 is sufficient to reject Plaintiffs' constitutional challenge.

CONCLUSION

The State respectfully requests that the Court affirm the District Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 13th day of October 2017, this Brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy was e-mailed to:

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