

**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

---

**SUPPLEMENTAL BRIEF OF INTERVENOR**

---

OFFICE OF ATTORNEY GENERAL  
DEREK SCHMIDT

Bryan C. Clark, No. 24717  
Assistant Solicitor General  
120 SW 10th Avenue, 2nd Floor  
Topeka, Kansas 66612-1597  
Telephone: (785) 296-2215  
Fax: (785) 291-3767  
E-mail: [bryan.clark@ag.ks.gov](mailto:bryan.clark@ag.ks.gov)  
*Attorney for Intervenor Office of Kansas  
Attorney General Derek Schmidt*

**TABLE OF CONTENTS AND AUTHORITIES**

	Page
<i>Arche v. U.S. Dep't of Army</i> , 247 Kan. 276, 798 P.2d 477 (1990) .....	1, 2
<i>Miller v. Johnson</i> , 295 Kan. 636, 289 P.3d 1098 (2012) .....	1, 2
K.S.A. 38-2282 .....	1, 2
K.S.A. 59-2124 .....	1, 2
K.S.A. 60-1906 .....	1, 2
Kan. Const. art. 2, § 1 .....	2
CERTIFICATE OF SERVICE .....	3

This supplemental brief is filed in response to the Court's request at oral argument, and by Order dated February 21, 2018, for supplemental briefing on whether Kansas statutes provide Plaintiffs an adequate and viable substitute remedy for eliminating the wrongful birth cause of action first recognized by the Kansas Supreme Court in *Arche v. U.S. Dep't of Army*, 247 Kan. 276, 798 P.2d 477 (1990).

The Attorney General, as intervenor, contends that Sections 5 and 18 of the Bill of Rights of the Kansas Constitution do not apply to wrongful birth claims. The tort of wrongful birth was not cognizable at common law in 1859 when the Kansas Bill of Rights was adopted. As a result, the Legislature's power to eliminate the cause of action by enacting K.S.A. 60-1906 is unfettered. Accordingly, the Attorney General urges the Court not to reach the adequate-substitute-remedy question.

If the Court determines that the tort of wrongful birth was cognizable at common law in Kansas in 1859 (meaning that Sections 5 and 18 apply) *and* that an adequate substitute remedy is required, the Court "has the authority and duty" to uphold the statute if there is "*any* reasonable way to construe [it] as constitutionally valid." *Miller v. Johnson*, 295 Kan. 636, 646-47, 289 P.3d 1098 (2012). An adequate substitute remedy need not be enacted contemporaneous with the limitation or elimination of the right or remedy at issue. *Id.* at 661.

At oral argument, the Court specifically directed the parties to consider K.S.A. 38-2282 and K.S.A. 59-2124. These statutes are of a piece with K.S.A. 60-1906; all three further the State's policy of preserving and protecting the dignity of

all human life. By eliminating wrongful birth claims, K.S.A. 60-1906 reflects the Legislature's judgment that the life of every child, disabled or not, is to be valued and not to be used as the basis for claiming an injury because the child was allowed to be born. K.S.A. 38-2282 and K.S.A. 59-2124 likewise further the State's policy of valuing all human life by providing lawful options for parents who decide they are unable to, or for whatever reason choose not to, keep and raise a child.

The issues raised by the wrongful birth claim Plaintiffs assert are unlike any of the issues Kansas courts have faced in other Section 5 or Section 18 cases. *Compare Arche*, 247 Kan. at 282 (“[I]n a wrongful birth case, the result of the tortious conduct is the existence, or benefit, of a child.”) *with Miller*, 295 Kan. at 636 (challenging \$250,000 noneconomic damages cap in medical malpractice actions).

It is therefore unclear how (or whether) the adequate-substitute-remedy analysis would (or should) apply in this context. Nonetheless, it is clear that the Legislature understood that it was acting within its broad authority to prospectively eliminate wrongful birth claims, which are premised on an act that was a crime when the Bill of Rights was adopted and which are contrary to the State's prevailing public policy. There is no doubt the Legislature intended to enact a constitutional statute, and the State urges the Court to find K.S.A. 60-1906 a valid exercise of the legislative power entrusted by the People to their Legislature. *See* Kan. Const. art. 2, § 1.

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

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL  
DEREK SCHMIDT

/s/ Bryan C. Clark

Bryan C. Clark, # 24717  
Assistant Solicitor General  
Dwight R. Carswell, # 25111  
Assistant Solicitor General  
Memorial Building, 2nd Floor  
120 SW 10th Ave.  
Topeka, KS 66612-1597  
Telephone: (785) 296-2215  
Fax: (785) 291-3767  
bryan.clark@ag.ks.gov  
dwight.carswell@ag.ks.gov

*Attorneys for Intervenor Office of Kansas  
Attorney General Derek Schmidt*

### CERTIFICATE OF SERVICE

I certify that on this 9th day of March 2018, this Supplemental 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:

Lynn R. Johnson  
David R. Morantz  
Paige L. McCreary  
Shamberg, Johnson & Bergman, Chtd.  
2600 Grand Boulevard, Ste. 550  
Kansas City, MO 64108  
Telephone: (816) 474-0004  
Fax: (816) 474-0003  
ljohnson@sjblaw.com  
dmorantz@sjblaw.com  
pmccreary@sjblaw.com

Stanley R. Ausemus, Esq.  
Stanley R. Ausemus, Chtd.  
413 Commercial  
P.O. Box 1083  
Emporia, KS 66801  
Telephone: (620) 342-8717  
Fax: (620) 342-8717  
Stanley@sraclaw.com

*Attorneys for Plaintiffs-Appellants*

Dustin J. Denning, KS 19348  
Jacob E. Peterson, KS 25534  
CLARK, MIZE & LINVILLE, CHARTERED  
129 South 8th Street, POB 380  
Salina, Kansas 67402-0380  
Telephone: (785) 823-6325  
Fax: (785) 823-1868  
djdenning@cml-law.com  
jepeterson@cml-law.com

*Attorneys for Defendant-Appellee  
Katherine A. Goodpasture, D.O.*

/s/ Bryan C. Clark  
Bryan C. Clark, KS # 24717  
*Attorney for Intervenor Office of Kansas  
Attorney General Derek Schmidt*