

No. 117439

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.

BRIEF OF APPELLANTS

APPEAL FROM THE DISTRICT COURT OF RILEY COUNTY,
HONORABLE JOHN F. BOSCH, JUDGE,
DISTRICT COURT CASE NO. 16-CV-000094

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NATURE OF THE CASE

Plaintiffs sued Defendant for common law medical negligence wrongful birth because Defendant failed to recognize and inform Plaintiffs of the severe structural abnormalities and defects of the brain of their fetus in utero. Upon motion by Defendant, the District Court dismissed Plaintiffs' lawsuit with prejudice applying K.S.A. 60-1906 which wholly bars the common law medical negligence wrongful birth cause of action in Kansas. Plaintiffs assert in this appeal that the statutory bar in K.S.A. 60-1906 is unconstitutional and that the District Court erred in dismissing Plaintiffs' cause of action with prejudice.

STATEMENT OF ISSUES ON APPEAL

This Court must decide the following issues:

- I. Whether the trial court erred in failing to find K.S.A. 60-1906 violates Section 5 of the Bill of Rights of the Kansas Constitution because it bars and prohibits common law medical negligence wrongful birth causes of action for the recovery of monetary damages without providing an adequate substitute remedy?

- II. Whether the trial court erred in failing to find K.S.A. 60-1906 violates Section 18 of the Bill of Rights of the Kansas Constitution because it bars and prohibits common law medical negligence wrongful birth causes of action for the recovery of monetary damages without providing an adequate substitute remedy?

FACTUAL STATEMENT OF THE CASE

Alysia Tillman and Storm Fleetwood (Plaintiffs) employed Katherine A. Goodpasture, D.O. (Defendant) in November of 2013 to provide ongoing obstetrical prenatal medical care, treatment and management of Plaintiff Tillman's pregnancy. Vol. 1, p. 4. On January 24, 2014, Defendant ordered and reviewed an obstetrical ultrasound with Plaintiffs. Vol. 1, p. 4. Defendant incorrectly assured Plaintiffs that the obstetrical ultrasound demonstrated a healthy female fetus with normal anatomy and that no fetal anatomical abnormalities were detected by the obstetrical ultrasound. Vol. 1, p. 4-5. However, the obstetrical ultrasound did not demonstrate a healthy female fetus with normal anatomy. Vol. 1, p. 5. Instead, it demonstrated severe structural deformities and defects of the brain of the fetus. Id.

On May 18, 2014, Plaintiff Tillman gave birth to "Baby A," who was born with a brain abnormality that was diagnosed as schizencephaly. Vol. 1, p. 6. The brain abnormality of Baby A was a continuum of the same structural abnormalities of the brain that were demonstrated by the January 24, 2014, obstetric ultrasound. Vol. 1, p. 5-6. As a result, Baby A is severely and permanently neurologically, cognitively and physically disabled and handicapped, Baby A's condition is not medically correctable and Baby A will never be able to function with normal neurological, cognitive or physical activity. Vol. 1, p. 6-7. Had Plaintiffs received the proper interpretation of the January 24, 2014, obstetrical ultrasound they would have chosen to terminate the pregnancy. Vol. 1, p. 8. Due to Baby A's condition, she will require hospital, doctor and related care, rehabilitation services and care, attendant care and therapy, physical, occupational,

speech and miscellaneous therapy, as well as other special needs consistent with her total and complete disability from ever being able to perform activities of daily living for the rest of her life. Vol. 1, p. 7.

ARGUMENTS AND AUTHORITIES

I. Standard of Review

The constitutionality of a statute is a question of law. State ex rel. Six v. Kan. Lottery, 286 Kan. 557, 562, 186 P.3d 183, 188 (2008). “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, 1108 (2012). A statute will not be held unconstitutional “unless it is clear beyond a reasonable doubt that the statute infringes on constitutionally protected rights.” Id.

Plaintiffs contend that K.S.A. 60-1906 is unconstitutional as it clearly violates two provisions of the Bill of Rights of the Kansas Constitution: Section 5 (Trial by Jury) and Section 18 (Remedy by Due Course of Law). Plaintiffs may pursue their common law medical negligence wrongful birth cause of action because the statutory bar is void under the Kansas Constitution.

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.

Section 5 of the Bill of Rights of the Kansas Constitution protects and guarantees the right to trial by jury, and specifically states “[t]he right to trial by jury shall be inviolate.” The right to trial by jury is a basic and fundamental feature of American jurisprudence. Miller, 295 Kan. at 647 (quoting Gard v. Sherwood Construction, Co.,

194 Kan. 541, 549, 400 P.2d 995 (1965)). The right to trial by jury is a substantial and valuable right and should never be lightly denied. The law favors trial by jury, and the right should be carefully guarded against infringements. Id. The Kansas Supreme Court has consistently held that Section 5 of the Bill of Rights of the Kansas Constitution preserves the jury trial right as it historically existed at common law when the Kansas Constitution came into existence. Id.

The constitutional right to a trial by jury “is predicated on whether the action at common law was one of law or in equity.” First Nat’l Bank of Olathe v. Clark, 226 Kan. 619, 622, 602 P.2d 1299 (1979). The right turns on the type of remedy sought. Kan. Malpractice Victims v. Bell, 243 Kan. 333, 343, 757 P.2d 251 (1988). Suits seeking monetary recovery or money damages are actions at law, and thus they are guaranteed a trial by jury unless waived. Id. In contrast, suits seeking equitable relief are not entitled to a trial by jury. Id. Similarly, the legislature may dispense with a jury in statutory proceedings. Matter of the Estate of Suesz, 228 Kan. 275, 277, 613 P.2d 947, 950 (1980) (holding a contest to probate a will was a creature of statute that did not provide for jury trial; it was not a matter triable by jury at common law).

Common law tort actions, including medical negligence/medical malpractice claims were historically triable to a jury. Kan. Malpractice Victims, 243 Kan. at 342-343. Kansas case law makes clear that medical negligence/medical malpractice actions for the recovery of monetary damages are subject to Section 5 protection. Miller, 295 Kan. at 648; Samsel v. Wheeler Transport Services, Inc., 246 Kan. 336, 358, 789 P.2d 541 (1990) (“Samsel II”); Kan. Malpractice Victims, 243 Kan. at 342-343.

The Kansas Supreme Court recognized and defined the wrongful birth cause of action for the recovery of monetary damages in Arche v. United States Department of Army, 247 Kan. 276, 281, 292, 798 P.2d 477 (1990). The court in Arche stated the cause of action is a common law medical negligence cause of action for the recovery of damages. The medical negligence action recognizes the duty owed by a physician to their patient to appropriately perform, interpret and inform their patient of the results of available prenatal medical testing procedures and the right of a woman to have an abortion as established in Roe v. Wade, 410 U.S. 113 (1973) and K.S.A. 21-3407. Arche, 247 Kan. at 281. The action applies new medical technology (prenatal medical testing procedures) and the right of a woman to have an abortion to the three elements that a plaintiff must prove to prevail in a common law medical negligence cause of action in Kansas. Id.; see also Lemuz v. Fieser, 261 Kan. 936, 944-945, 933 P.2d 134 (1997). Those elements are: (1) that a duty was owed by the physician to the patient; (2) that the duty was breached; and (3) that a causal connection existed between the breached duty and the injury sustained by the patient. Arche, 247 Kan. at 281. The wrongful birth cause of action is not a new tort or a new common law cause of action.

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. The wrongful birth cause of action is not a creature of statute, because it was first recognized in Kansas' common law by the Kansas Supreme Court in Arche. The wrongful birth cause of action is a common law tort action that was historically triable to a jury. Kansas case law makes clear that common

law tort actions, including medical negligence actions for the recovery of monetary damages, are subject to Section 5 protection. Therefore, the common law medical negligence wrongful birth cause of action for the recovery of monetary damages recognized and defined by the Kansas Supreme Court in Arche is subject to Section 5 protection.

Section 18 of the Bill of Rights of the Kansas Constitution guarantees the right to a remedy by due course of law. Section 18 states “[a]ll persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.” Remedy by due course of law as used in Section 18 has been defined by the Kansas Supreme Court to mean the reparation for injury, ordered by a tribunal having jurisdiction, in due course of procedure and after a fair hearing. Hanson v. Krehbiel, 68 Kan. 670, Syl. 2, 75 P. 1041 (1904); Kan. Malpractice Victims, 243 Kan. at 346; and Miller, 295 Kan. at 655. To be protected under Section 18, the remedy must have been recognized at common law. Hanson, 68 Kan. at 670.

Here, Plaintiffs seek monetary damages to remedy their injuries caused by the tortious acts of Defendant in failing to recognize and inform Plaintiffs of the severe structural abnormalities and defects of the brain of their child in utero. This is a common law tort action that was historically triable to a jury. Kansas case law makes clear that common law tort actions, including medical negligence actions for the recovery of monetary damages, are subject to Section 18 protection. Therefore, the common law medical negligence wrongful birth cause of action for the recovery of monetary damages

recognized and defined by the Kansas Supreme Court in Arche is subject to Section 18 protection.

The case at hand is analogous to Lemuz by and through Lemuz v. Fieser, 261 Kan. 936, 933 P.2d 134 (1997). In Lemuz, the plaintiffs argued that a statute, K.S.A. 60-442(b), unconstitutionally violated Section 18 of the Kansas Constitution Bill of Rights, because it precluded claims against licensed medical care facilities for failure to render professional services within the facility by a person who was not an employee or agent of the medical care facility. The defendants argued that K.S.A. 60-442(b) was not governed by Section 18, claiming that it only protected common law remedies as they existed at the time the Kansas Constitution was adopted and did not apply to protect later judicial expansions of such remedies. Specifically, the defendants argued that K.S.A. 60-442(b) addressed the corporate negligence doctrine, which the defendants contended did not exist at the time the Kansas Constitution was adopted, and was therefore a judicial expansion of common law negligence remedies. 261 Kan. at 944. The court in Lemuz rejected the defendants' argument. The court, in holding that the cause of action was protected by Section 18, set forth that corporate negligence causes of action

are simply different applications of the basic concepts of negligence which existed at common law when the Kansas Constitution was adopted. [...] If this were not the case, then any evolution of negligence law since the time the Kansas Constitution was adopted could be abrogated without implicating § 18. Since K.S.A. 60-442(b) precludes a corporate negligence cause of action, it implicates § 18.

Id. at 945. Similarly, the wrongful birth cause of action is a different application of the basic concept of negligence, which existed at common law when the Kansas Constitution was adopted. Because K.S.A. 60-1906 precludes a wrongful birth cause of action, it implicates Section 18.

The rights protected by Section 5 and Section 18 are guaranteed for all actions seeking monetary damages, which are not specifically created by statute. These fundamental constitutional rights are not limited to traditional common law negligence actions as they existed in 1859. As the court recognized in Lemuz, if constitutional rights were limited to actions as they existed in 1859, “then any evolution of negligence law since the time the Kansas Constitution was adopted could be abrogated without implicating [§ 5 and] § 18.” 261 Kan. at 945. Whether the tort is new is simply not relevant to the determination whether these constitutional rights apply. The details of the tort do not change the key fact: that Plaintiffs seek monetary damages for injuries caused by tortious conduct. The objective in Plaintiffs’ case is to restore themselves to the monetary position they would have occupied, had Defendant’s tortious conduct not occurred. Such restoration will allow Plaintiffs to pay for Baby A’s medical bills.

The District Court of Riley County, Kansas found that Sections 5 and 18 do not apply to protect the wrongful birth cause of action, declaring it is not “simply another species of negligence, and because it was only created by the Kansas Supreme Court in 1990, a cause of action for wrongful birth could not have been part of the common-law when the Kansas Constitution was adopted in 1859.” Vol. 2, at p. 95. The District Court improperly characterized the wrongful birth action as new, when it is more appropriately

classified as a different application of the basic concept of negligence as permitted in Lemuz.

Although the type of tort Plaintiffs assert is irrelevant to the determination of Section 5 and 18's application, Arche clearly demonstrates that Plaintiffs' claim is a different application of the basic concept of negligence. The court in Arche began by laying out the prima facie elements of medical malpractice in Kansas: "(1) that a duty was owed by the physician to the patient; (2) that the duty was breached; and (3) that a causal connection existed between the breached duty and the injury sustained by the patient." Arche v. U.S. Dept. of Army, 247 Kan. 276, 281, 798 P.2d 477, 480 (1990) (citing Wozniak v. Lipoff, 242 Kan. 583, 587, 750 P.2d 971 (1988)). Then, the court in Arche acknowledged that causation of damages in a wrongful birth action is found between (a) "negligence on the part of the defendants; that the gross defects of the child could have been determined by appropriate testing prior to birth; that defendants owed plaintiffs a duty to perform such tests; and that no such tests were offered or performed, or if performed, were negligently performed" and (b) the "plaintiff [mother] was denied her right to make an informed decision whether or not to seek an abortion under facts which could and should have been disclosed." Id. The court in Arche modeled its analysis after the New Jersey Supreme Court's analysis of wrongful birth actions from Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979). The court in Arche applied that analysis and determined that a wrongful birth cause of action fits within the well-established elements of Kansas medical malpractice actions.

The court in Arche noted that a wrongful birth cause of action would involve a child that is “severely and permanently handicapped.” 247 Kan. at 281. Regardless of the types of damages involved, a wrongful birth cause of action is fundamentally a claim for monetary damages. It is brought under the same concept and pursuant to the same elements of a common law negligence claim. It therefore is not a new tort and is entitled to the protections of Sections 5 and 18 of the Bill of Rights of the Kansas Constitution.

III. K.S.A. 60-1906 violates Sections 5 and 18 of the Bill of Rights of the Kansas Constitution because it bars and prohibits the common law medical negligence wrongful birth cause of action for the recovery of monetary damages without providing an adequate substitute remedy.

A. Section 5 of the Kansas Constitution’s Bill of Rights requires an adequate substitute remedy.

The Section 5 protection of the right to trial by jury for common law tort actions for the recovery of monetary damages, including common law medical negligence causes of action for the recovery of monetary damages, is not absolute. The legislature may modify the common law if the modification meets due process requirements. Miller, 295 Kan. at 651-652. The Kansas Supreme Court has determined that the due process constraints of Section 5 are satisfied when the legislature provides an adequate substitute remedy, or quid pro quo, when modifying or abolishing common law rights. Id. at 652 (citing Kan. Malpractice Victims, 243 Kan. at 346-347).

B. Section 18 of the Kansas Constitution’s Bill of Rights requires an adequate substitute remedy.

Similarly, the Kansas Supreme Court has determined that modifications of common law rights by the legislature are acceptable as long as the due process

requirements of Section 18 of the Bill of Rights of the Kansas Constitution are satisfied. Miller, 295 Kan. at 651 (citing Manzanares v. Bell, 214 Kan. 589, 599, 522 P.2d 1291 (1974) and Kan. Malpractice Victims, 243 Kan. at 343-344). The due process requirements of Section 18 of the Bill of Rights of the Kansas Constitution may be satisfied by providing an adequate substitute remedy to replace the common law remedy that was modified or abolished by the legislation. Miller, 295 Kan. at 652 (citing Kan. Malpractice Victims, 243 Kan. at 346-347).

C. K.S.A. 60-1906 fails the “quid pro quo” test, because it provides no adequate substitute remedy to replace that provided from the wrongful birth cause of action.

Kansas courts have long recognized that the legislature can modify the common law in limited circumstances, without violating the right to a jury trial and the right to a remedy by due course of law. Miller, 295 Kan. at 651-52. The power is not absolute. Id. The legislature must comply with the “quid pro quo test” when it modifies the rights guaranteed under Section 5 and Section 18 of the Bill of Rights of the Kansas Constitution, which are those rights recognized at common law. Id. at 655-57.

The quid pro quo test is a two-step analysis. First, “any statutory modification of the common law must meet due process requirements and be ‘reasonably necessary in the public interest to promote the general welfare of the people of the state.’” Id. at 651-52. “Due process requires that the legislative means selected have a real and substantial relation to the objective sought.” Id. This first step is similar to the analysis used to decide equal protection questions under the rational basis standard.” Id., at 657.

Second, “[w]hen a common law remedy is modified or abolished, an adequate substitute remedy must be provided to replace it.” Id. at 651-52. “This step is more stringent than the first because even if a statute is consistent with public policy, there still must be an adequate substitute remedy conferred on those individuals whose rights are adversely impacted.” Id. at 657; Samsel II, 246 Kan. 336, 348, 789 P.2d 541 (1990) (“Our constitution does not make this court the critic of the legislature; rather this court is the guardian of the constitution ... ”); Lemuz, 261 Kan. at 948 (“Obviously, this test is more stringent than the rational basis test because it requires a substantive quid pro quo to replace any common-law remedy that has been extinguished by statute”); Weaver v. First Nat’l Bank, 76 Kan. 540, 94 P. 273, 274 (1907) (“A reason advanced to support this distinction between decisions construing statutes and those construing the Constitution is that, if the people are dissatisfied with the construction of a statute, the frequently recurring sessions of the Legislature afford easy opportunity to repeal, alter, or modify the statute, while the Constitution is organic, intended to be enduring until changed conditions of society demand more stringent or less restrictive regulations, and if a decision construes the Constitution in a manner not acceptable to the people, the opportunity of changing the organic law is remote”).

In Manzaneres, the Kansas Supreme Court considered the Kansas No-Fault Insurance Act, which denied a right to jury trial and recovery for pain and suffering resulting from a motor vehicle accident unless the injured party incurred more than \$500.00 in medical services or suffered a statutorily designated injury. 214 Kan. 589, 522 P.2d 1291 (1974). The court held that the mandatory availability of no-fault

insurance was a sufficient quid pro quo for the limitation on the recovery because it provided prompt, efficient and reliable sources of partial recovery for serious injuries. Id. In Miller, the Kansas Supreme Court considered the noneconomic damages cap imposed on medical malpractice plaintiffs. 295 Kan. at 640. The court held that the other provisions in the Health Care Provider Insurance Availability Act that provided for an available source of recovery of the statutorily mandated minimums were a sufficient quid pro quo for the limitation on the recovery. Id. at 661-65. The statutes in Manzaneres and Miller merely limited the recoveries available in certain situations; they did not eliminate the right to recover altogether, as K.S.A. 60-1906 does.

In contrast, in Kan. Malpractice Victims, the Kansas Supreme Court considered statutes placing caps on noneconomic damages, overall damages and requiring annuity for payments of future economic loss in all medical malpractice cases. 243 Kan. 333, 757 P.2d 251 (1988). The court held the statutes unconstitutionally infringed on rights guaranteed by Sections 5 and 18 of the Bill of Rights of the Kansas Constitution, because they seriously limited a plaintiff's right to recover nonpecuniary losses, they cut off total recovery and they required a plaintiff to accept recovery for future economic loss in the form of an annuity. Id. "In return for this infringement of his rights, the injured patient does not receive prompt payment (as in no-fault insurance) or a reduced burden of proof (as in workers' compensation)." Id. The plaintiffs already had a source of recovery for their injuries and the statutes added nothing to it. Id. The court found the savings promised by the statutes did not outweigh a plaintiff's lost rights. Id. The statute effectively acted as compulsory, pre-established remittitur. Id.

In Noel v. Menninger Foundation, the Kansas Supreme Court considered the doctrine of immunity of charitable corporations, which provided charitable and nonprofit organizations immunity from tort liability. 175 Kan. 751, 267 P.2d 934 (1954). The court held the immunity unconstitutionally infringed on the right to remedy by due course of law, because it required injured individuals to forego their cause of action altogether for the wrongful acts of another when they were otherwise entitled thereto, simply because the injury was committed by charity. Id. at 762. The court analogized the rule to an unreasonable contribution to charity against one's will, "and a rule of law imposing such burdens cannot be regarded as socially desirable nor consistent with sound policy." Id. "It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens." Id. at 763.

In Neely v. St. Francis, the Kansas Supreme Court considered a statute that abolished judgment creditors' right to invoke garnishments against nonprofit organizations. 192 Kan. 716, 391 P.2d 155 (1964). The court held the statute unconstitutional under Section 18, because it prevented injured persons from receiving their guaranteed remedy in attempt to circumvent the holding in Noel, supra. The court found the statute's effect as watering down or diluting the remedy and failing to provide an adequate substitute remedy. 192 Kan. at 720-721.

The statute enacted by the Kansas legislature subsequent to Arche, K.S.A. 60-1906, explicitly abolished the common law tort of wrongful birth. Thus, in order for the statute to comply with the Kansas Constitution, the statute must provide an adequate substitute remedy. However, the legislature failed to do just that. A plain reading of

K.S.A. 60-1906 shows that it provides no substitute remedy. It provides injured persons absolutely nothing in exchange for abolishing their common law tort cause of action recognized in Arche.

(a) 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.

(b) Nothing in this section shall be deemed to create any new cause of action, nor preclude any otherwise proper cause of action based on a claim that, but for a person's wrongful action or omission, the death or physical injury of the mother would not have occurred, or the handicap, disease or disability of an individual prior to birth would have been prevented, cured or ameliorated in a manner that preserved the health and life of such individual.

(c) If any provision or clause of this act or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

(d) As used in this section:

(1) "Abortion" has the same meaning as such term is defined in K.S.A. 65-6701, and amendments thereto.

(2) "Claim of wrongful birth" means 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.

(3) “Claim of wrongful life” means a cause of action brought by, or on behalf of, a minor, which seeks damages, whether economic or noneconomic, for such minor 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.

Furthermore, no existing statutes provide an alternative source of recovery for this action, because the right to recover has been altogether eliminated. This statute does not resemble the Workers’ Compensation Act or the No Fault Insurance Act, because there is no guaranteed partial recovery offered as a substitute. The right to recover has been altogether eliminated. This case is more closely related to Kan. Malpractice Victims and Noel, because the statute has completely cut off recovery for a common law cause of action.

In its briefings to the District Court of Riley County, Defendant explicitly acknowledged, “[n]ot 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.” Vol. 1, p. 32. Similarly, the District Court stated “K.S.A. 60-1906 explicitly bars Plaintiffs’ action.” Vol. 2, p. 91. Both the District Court and Defendant acknowledged that the statute requires injured individuals to forego their cause of action altogether, simply because the injury was committed in a specific context. Vol. 1, p. 28, Vol. 2, p. 95. No one disputes the fact that there is no alternative substitute remedy to replace the common law right to bring wrongful birth actions in Kansas extinguished by K.S.A. 60-1906.

K.S.A. 60-1906 prohibits and abolishes the common law medical negligence wrongful birth cause of action for wrongful birth for the recovery of monetary damages recognized and defined by the Kansas Supreme Court in Arche. K.S.A. 60-1906 was enacted during the legislative session of 2013 and became effective July 1, 2013. The statute provides no adequate substitute remedy. More importantly, the statute provides no substitute remedy for the common law remedy that it abolishes. K.S.A. 60-1906 violates Sections 5 and 18 of the Bill of Rights of the Kansas Constitution, because it bars, prohibits and abolishes the common law medical negligence wrongful birth cause of action for the recovery of monetary damages without providing any substitute remedy, let alone an adequate substitute remedy.

“It is a general principle that for negligent or tortious conduct, liability is the rule” and immunity is the exception to the rule. Noel, 175 Kan. at 762. K.S.A. 60-1906 creates immunity for doctors’ negligent and tortious actions while a fetus is in utero. “[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. To exempt doctors from liability for their torts is plainly contrary to our constitutional guaranties in Section 5 and Section 18 of the Kansas Constitution’s Bill of Rights.

The statutory bar of common law medical negligence wrongful birth causes of action constitutes a contribution or donation against one’s will to the physician whose tortious actions caused the plaintiff’s injury. Parents are forced to forfeit or “donate” the monetary recovery they were once entitled to pursue in order to obtain proper medical care for children born with severe and permanent neurological, cognitive and physical

disabilities and handicaps. K.S.A. 60-1906 completely bars any such pursuit of remedy. Physicians can act without regard to a mother's rights in these circumstances and suffer no consequences in tort law. The District Court suggested the abolition of wrongful birth actions is in the public interest to promote the general welfare of the people of the state. However, as discussed in Noel, a rule of law compelling an unreasonable contribution to charity against one's will is not socially desirable or consistent with public policy. 175 Kan. at 762.

The legislature is not permitted to steal Kansas citizens' fundamental and constitutional rights simply because the subject matter of those rights is controversial. Women have a fundamental right to terminate their pregnancy. See Roe v. Wade, 410 U.S. 113 (1973). Parents have a common law right to pursue a common law medical negligence wrongful birth cause of action for the recovery of their monetary damages, which result from infringements on this right. The Kansas Constitution, specifically Sections 5 and 18 of the Bill of Rights, requires the legislature to provide an adequate substitute remedy or quid pro quo when modifying common law rights, no matter how unpopular those common law rights are. Miller, 295 Kan. at 652 (citing Kan. Malpractice Victims, 243 Kan. at 346-347). In this instance, the unpopular common law right is the parents' right to pursue a common law medical negligence wrongful birth cause of action for the monetary recovery of their damages.

No one is afforded an exception to the Constitution. The rules never bend even where a particular course of action might be more popular with the majority of a state's citizens. If legislators were allowed to ignore constitutional protections, the document

would lose all of its authority and render its fundamental principles meaningless. It is up to this Court to maintain and protect the fundamental rights of its citizens afforded to them by the Constitution of the state of Kansas.

K.S.A. 60-1906 violates the right to trial by jury guaranteed by Section 5 of the Bill of Rights of the Kansas Constitution, thus, the statute is unconstitutional. Furthermore, K.S.A. 60-1906 violates the right to remedy by due course of law guaranteed by Section 18 of the Bill of Rights of the Kansas Constitution, which also causes K.S.A. 60-1906 to be unconstitutional. Because K.S.A. 60-1906 is unconstitutional, the statute does not bar Plaintiffs' common law medical negligence wrongful birth cause of action for the recovery of monetary damages. As the statute does not bar Plaintiffs' common law medical negligence wrongful birth cause of action for the recovery of monetary damages, the District Court's dismissal with prejudice should be reversed and this case should be remanded.

IV. Conclusion

This is a straight forward case. Sections 5 and 18 of the Bill of Rights of the Kansas Constitution protect civil actions that seek monetary remedy. The common law medical negligence wrongful birth cause of action seeks monetary recovery. Furthermore, the Kansas Supreme Court declared the wrongful birth action in Kansas constitutes a regular common law negligence action in Arche. K.S.A. 60-1906 extinguishes Kansas citizens' right to trial by jury and right to remedy by due course of law when they are injured by their doctor's negligence in failing to perform appropriate tests, negligently performing tests, or negligently interpreting tests on a fetus. Although this recognized

common law cause of action is controversial, it nevertheless involves citizens' fundamental and constitutional rights to pursue monetary recovery when they have been injured. Courts must carefully guard these rights against infringement.

Plaintiffs respectfully request that this Court hold that K.S.A. 60-1906 violates the Kansas Constitution's guarantees of the right to trial and right to remedy by due course of law. Plaintiffs further respectfully request that the Court declare K.S.A. 60-1906 unconstitutional and void, reverse the District Court's decision to dismiss Plaintiffs' cause of action with prejudice and remand Plaintiffs' action back to the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on this 14th day of July, 2017, by mail and by electronically filing a copy with the Kansas Judicial Branch e-filing website which sent notices to the following:

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