Case No. 117439

IN THE SUPREME COURT OF THE STATE OF KANSAS

ALYSIA R. TILLMAN AND STORM FLEETWOOD,

Plaintiffs-Appellants,

v.

KATHERINE A. GOODPASTURE, D.O.,

Defendant-Appellee.

APPELLANTS' REPLY BRIEF

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

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ORAL ARGUMENT REQUESTED:
30 minutes

I. Introduction

Defendant is correct that this case isn't about abortion rights. It is and always has been about medical malpractice, more specifically about the right to trial by jury and right to a remedy by due course of law when a person is harmed by medical malpractice. The medical malpractice at issue is: (1) the duty to exercise the standard of care of a reasonable medical professional in reading and relaying the results of an ultrasound of a pregnant woman's uterus; (2) the breach of that duty by failing to exercise the standard of care; which (3) caused Plaintiffs to be deprived of vital information about the health of their unborn child and therefore unable to choose to terminate the pregnancy; resulting in (4) the enormous expense of raising a child with severe disabilities. This type of action is commonly called wrongful birth medical malpractice, though it is merely a species of common law medical negligence. *Plowman v. Fort Madison Comty. Hosp.*, 896 N.W.2d 393, 401 (Iowa 2017).

Under this Court's longstanding jurisprudence, § 5 of the Kansas Bill of Rights protects the right to trial by jury for common law actions at law, *First Nat'l Bank of Olathe v. Clark*, 222 Kan. 619, 622, 602 P.2d 1299, 1302 (1979), and § 18 of the Bill of Rights protects the right to a remedy by due course of law, i.e. the right to be made whole and to economic and non-economic damages, *Miller v. Johnson*, 295 Kan. 636, Syl. 3, 289 P.3d 1098, 1108 (2012). K.S.A. 60-1906(a) deprives Plaintiffs of these constitutional rights to trial by jury and to a remedy by due course of law by stripping pregnant women of their right to hold their doctors accountable to the reasonable standard of medical care that a non-pregnant woman or a man can expect.

The issues before this Court have been extensively briefed[1] and Plaintiffs refer the Court to their Petition for Review and Supplemental Brief for the bulk of their arguments. Plaintiffs will only discuss a few brief points here. First, Plaintiffs explain why Defendant's and Intervenor's attempts to distinguish wrongful birth medical malpractice and common law medical negligence are unavailing. Second, Plaintiffs explain why the criminal abortion statutes in place near the time of the ratification of the Kansas Constitution do not indicate wrongful birth medical malpractice causes of action are unprotected by the Kansas Bill of Rights. Third, Plaintiffs respond to Intervenor's arguments regarding the test for § 18 protection. Fourth, Plaintiffs address Intervenor's request that this Court jettison settled precedent regarding the legislature's ability to alter common law rights protected by the Kansas Constitution. For these reasons and those previously briefed, this Court should hold K.S.A. 60-1906(a) unconstitutional.

II. Wrongful Birth Medical Malpractice Is a Species of Medical Negligence

As explained at length in Plaintiff's Supplemental Brief, wrongful birth medical malpractice claims "fall within existing medical negligence principles." Appellant's Suppl. Br. 2 (quoting *Plowman*, 896 N.W.2d at 401). In fact, this Court's opinion in *Arche v. U.S. Dept. of Army*, 247 Kan. 276, 798 P.2d 477 (1990), has been cited for the proposition that "the so-called wrongful pregnancy, wrongful birth and wrongful life actions are not 'new' torts. They fall within the traditional boundaries of negligence actions." *Liddington v. Burns*, 916 F. Supp. 1127, 1131 (W.D. Okla. 1995). Many other state and federal courts

[1] Recognizing this, Plaintiffs will rest on this Reply and will not file a response to Defendant's Supplemental Brief.

agree that wrongful birth medical malpractice claims are grounded in traditional medical negligence. *See* Appellant's Suppl. Br. 3–5 (collecting cases).

Intervenor attempts to refute this consensus by citing to two opinions which it claims are the only cases in which a plaintiff has challenged a statutory ban of a wrongful birth cause of action on a right to remedy basis. Intervenor's Resp. Br. 9 (citing *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986) and *Wood v. U. of Utah Med. Ctr.*, 67 P.3d 436 (Utah 2002)). Intervenor asserts that in both instances, the statutes were upheld on the basis that wrongful birth medical malpractice is not common law negligence. *Id.* Intervenor's characterization is inaccurate.

In *Hickman*, the Plaintiff argued that a statute banning causes of action for wrongful birth was unconstitutional under federal due process law, citing *Roe v. Wade* and arguing the statute placed an undue burden on a woman's right to terminate a pregnancy. *Hickman*, 396 N.W.2d at 12–14. The court's discussion of the state constitutional protection of a right to remedy is one paragraph, in which the court did not discuss or consider whether wrongful birth was a species of common law medical negligence. *Id.* at 14.

In *Wood*, the court reached no majority opinion on whether wrongful birth medical malpractice is a species of common law medical negligence. *Wood*, 67 P.3d at 442–43, 50. The lead opinion, which two justices signed, does not actually address what a medical malpractice cause of action is or whether wrongful birth causes of action fit that mold. *Id.* Instead, it merely states that wrongful birth causes of action were not recognized when the statute in question was enacted. *Id.* at 442–43. Two other justices wrote opinions that did consider the issue and determined that wrongful birth medical malpractice is a species of

common law medical negligence. *Id.* at 453–55 (Durham, C.J. dissenting) (citing *Arche* for support), 461 (Russon, J. concurring in Chief Justice Durham's Opinion). The fifth and final justice signed on to portions of the various opinions, but did not sign on to any portion that expressed an opinion on whether wrongful birth medical malpractice is common law medical negligence. *Id.* at 450, 461 (Justice Howe concurred in other portions of the lead opinion and Chief Justice Durham's opinion). Whatever weight this Court may give these opinions, they do not support Defendant's argument.

Intervenor also attempts to distinguish wrongful birth medical malpractice from common law medical negligence by pointing to alleged difficulties in determining proximate cause and damages in wrongful birth medical malpractice cases, claiming that such difficulties are not present in or make the tort materially different from common law medical negligence cases. Intervenor's Resp. Br. 12–13. On the contrary, proximate cause and damages are often difficult issues and wrongful birth medical malpractice is not unique in this regard.

Intervenor makes much of the plausibility of Plaintiffs' choice to terminate a pregnancy, stating that " '[r]ather than focusing on a defendant's conduct, as in a traditional tort action,' it would require juries to 'evaluate whether a particular disability is so horrible, from the non-disabled perspective, as to make plausible the choice of abortion.' " Intervenor's Resp. Br. 12. This assertion is grossly inaccurate. Defendant's conduct is very much at issue in a wrongful birth medical malpractice action. A plaintiff must, as always, prove duty and breach in order to succeed on a claim of negligence. A plaintiff must also, of course, prove causation and damages by showing, in part, that the pregnancy would have

been terminated had the defendant not violated the standard of care. But whether the jury believes Plaintiff's testimony that she would have chosen to terminate is merely a matter of credibility. It in no way requires proving that abortion was a plausible choice by some objective standard as Defendant's argument appears to suggest. Nor is it relevant that some people would disagree with Plaintiff's choice to terminate. The jury's task in determining credibility is no different than in any number of causes of action that require the jury to determine the credibility of a plaintiff's testimony. If the jury does not find Plaintiff credible, her claim will fail, but it does not fail merely because Plaintiff's credibility is at issue.

Intervenor also asserts that unlike Plaintiffs in other medical malpractice cases, Plaintiffs in wrongful birth medical malpractice cases suffer no physical injury. Intervenor's Resp. Br. 11. Defendant's assertion is simplistic and inaccurate. In the closest analogy, the parents in a birth injury claim suffer no personal injury, yet they still have a claim for the cost of medical care that must be provided to their injured child. Further, in a loss of consortium claim, the plaintiff's claim is not for her own personal injuries but for the loss of services and companionship of her spouse. Medical malpractice claims carry no requirement that the damages be or arise from physical injuries to the plaintiff. It is not the physical injury that makes it medical malpractice; it is the allegation that the damages were caused by a medical provider's negligence.

Intervenor also makes much of the goal of tort law to return the plaintiff to the position he or she would have occupied had the injury not occurred, apparently claiming that because this cannot be accomplished in wrongful birth causes of action and the result

of the alleged negligence is the "benefit" of a child, the cause of action should not be protected as justiciable at common law. Intervenor's Resp. Br. 12–13. But, of course, the law is never truly able to put plaintiffs in the position they would have been in if not for defendant's conduct. The law cannot bring back the dead or regrow a missing limb. It cannot erase pain and suffering. It can only provide monetary compensation for the damage a plaintiff would not have suffered if it had not been for defendant's negligence. Plaintiffs ask no more or less here.

Finally, wrongful birth medical malpractice damages are not unique in that juries may be asked to consider difficult issues regarding the impact or value of life. Juries must decide the value of the loss of a mother's guidance and companionship in a wrongful death case, the value of the loss of the ability to walk when the plaintiff is still able to work in a personal injury case, and the value of the loss of a husband's ability to do the dishes or take the children to school in a loss of consortium case. " '[T]o deny redress for the parents' injuries merely because damages cannot be measured with precise exactitude would constitute a perversion of fundamental principles of justice.' " *Arche*, 247 Kan. at 282, 798 P.2d 477 (quoting *Berman v. Allan*, 80 N.J. 421, 433, 404 A.2d 8 (N.J. 1979). This Court should reject Intervenor's invitation to find this cause of action unprotected by the Bill of Rights merely because some of its elements may raise difficult questions for jurors.

III. Criminal Abortion Statutes Have No Bearing on Whether Wrongful Birth Medical Malpractice Causes of Action Are Justiciable at Common Law

The existence of criminal abortion statutes near the time of the ratification of the Kansas Constitution does not support the assertion that wrongful birth medical malpractice

causes of action are not justiciable at common law. The question is whether medical malpractice causes of action in general are justiciable at common law, or alternatively whether they were justiciable at common law in 1859, not whether abortion was legal in 1859. Nevertheless, this Court's recent decision in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019) provides valuable context for the legal treatment of abortion at common law and at the ratification of the Kansas Constitution. With this context it becomes clear that early criminal abortion statutes are not relevant to the determination of Constitutional protection.

First, as this Court noted in *Hodes*, the history of criminal abortion statutes does not support the claim that these statutes reflected the will of Kansans. *Id.* at 486. The statutes were adopted in 1855, as part of 147 chapters, or 1,058 printed pages, of legal code in just over 30 days' time. *Id.* at 486–87. They were summarily reenacted by the territorial legislature in 1859 and reenacted without argument by the state legislature in 1862. *Id.* at 489. Most of the statutes, including those criminalizing abortion, were copied, virtually verbatim, from existing Missouri statutes. *Id.* at 487. In fact, the legislators in 1855 were elected in part by 5,000 Missouri voters who took over the Kansas Territory polls. *Id.* These statutes may reflect the views of Missourians, but there is no indication they reflect the views of Kansans.

Further, the Missouri laws themselves were modeled after Connecticut and New York laws, neither of which truly attempted to criminalize abortion. *Id.* at 487–88. The Connecticut law is better characterized as a poison control measure than an attempt to criminalize abortion in that it only proscribed the use of poison or a similar substance to

cause a woman to miscarry. *Id.* at 487. The New York law is similarly better characterized as an attempt to regulate the practice of medicine than to criminalize abortion in that it required two physicians trained in scientific medicine to consult on the abortion whereas prior to the law many of the individuals practicing medicine, including abortions, were self-taught healers or folk doctors. *Id.* at 488. Missouri's enactment of the New York law actually decreased New York's requirement for two trained physicians to one. *Id.* Because these statutes merely regulated abortion, they cannot stand for the proposition that early Kansans were so opposed to abortion that they meant to leave out of the Bill of Rights protections for medical malpractice causes of action related to abortion.

Second, as this Court noted, these criminal abortion statutes were never challenged on constitutional grounds. *Id.* at 490. In light of this Court's decision in *Hodes & Nauser, MDs, P.A.*, it is clear that these statutes were and always have been unconstitutional. *Id.* at 502. Therefore, they cannot be helpful in analyzing the constitutionality of K.S.A. 60-1906(a).

Third, as this Court has recently pointed out, the inescapable truth is that women and men did not enjoy equal rights at the ratification of the Kansas Constitution. *Id.* at 490. But the equally inescapable truth is that the Constitution bestowed rights on men and women equally, with pregnant women possessing the same rights as men. *Id.* "Gender-differentiated rights" arising from the early state statutes were as unconstitutional then as they are now. *Id.*

In light of the questionable origin of these criminal abortion laws, the better question for this Court's constitutional analysis is how the common law treated abortions before

these statutes were enacted. *See id.* at 487. At common law in the early nineteenth century, abortion was "if not common, almost certainly not rare" in the United States. *Id.* (citing JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 (1978)). Women who wished to terminate a pregnancy consulted medical guides, health books, midwives, lay healers, folk doctors, and trained physicians for advice. *Id.* at 487–88. There is no reason to believe that these early Kansans who sought medical advice on pregnancy and termination could not have sued for medical malpractice related to that advice. The fact that medical providers in 1859 would not have been able to perform an ultrasound to detect fetal abnormalities is merely a product of the lack of technology at the time. Advancements in medical technology that allow a physician to detect fetal abnormalities are no different, legally speaking, than advancements that allow physicians to see a fracture on an X-ray or a tumor on a CT scan. Failure to exercise the standard of care in any of these scenarios gives rise to a claim for medical malpractice and that claim is protected under the Bill of Rights as a new application of an old cause of action that existed at common law. *Lemuz ex rel. Lemuz v. Fieser*, 261 Kan.936, 945, 933 P.2d 134 (1997). This Court's precedent is clear that § 5 and § 18 of the Kansas Bill of Rights protect these new applications of medical malpractice just as they protect the old cause of action for medical negligence.

IV. Plaintiffs Ask This Court To Clarify the Test for § 18 Protection

Contrary to Intervenor's assertion, Plaintiffs do not ask the Court to take extraordinary measures to overturn *Leiker* and distinguish *Brown*. With regard to *Leiker,* the Court of Appeals acknowledged that *Leiker* misstated the holdings of the cases it relied

on when it stated that § 18 only protects causes of action justiciable at common law in 1859. Ct. App. Op. 15. Plaintiffs ask the Court to clarify this error. With regard to *Brown*, Plaintiffs ask this Court to acknowledge that it addressed an entirely different issue, which means it is not controlling here.

Tellingly, though Intervenor asserts that there is a longstanding understanding that § 18 only protects causes of action that were actually justiciable in 1859, it cites to no other cases to support this assertion. On the other hand, as noted in Plaintiff's Petition for Review, there is substantial case law supporting the understanding that § 18 protects common law causes of action. Appellant's Pet. Review. 12–13 (collecting cases).

Intervenor also misstates the reasoning of *Brown*, describing it as reasoning "that § 18 does not preclude the Legislature from eliminating legal claims *not recognized as justiciable at common law* . . ." Intervenor's Resp. Br. 5 (emphasis added). There is a significant difference between specific claims *not recognized as justiciable at common law*, such as particular types of medical malpractice, and legal claims that were actually *denied at common law*. *Brown* addressed the latter, not the former.

In *Brown*, this Court addressed whether the legislature could eliminate the § 18 right to a remedy for tort claims against the government and held that § 18 does not preclude the legislature from eliminating legal claims that were *denied* at common law. *Id.* at 10. Tort claims against the government were not permitted at common law because of the common law doctrine of sovereign immunity. *Id.* The Court discussed the laws in existence at the ratification of the Constitution in an attempt to understand what § 18 was intended to protect. *See id.* The Court reasoned that § 18 was intended to protect "long established

systems of laws" — in other words, the common law. *Id.* It therefore did not follow that § 18 was intended to protect claims denied at common law because protection of claims denied at common law would be an abrogation of common law. *Id.*

Here, Plaintiffs bring a claim that is grounded in common law, not one that is contrary to common law. There is no dispute that medical malpractice claims are, and always were, justiciable at common law. The question before this Court is whether § 18 protects a specific type of medical malpractice cause of action — wrongful birth medical malpractice. Neither medical malpractice nor wrongful birth medical malpractice have ever been denied at common law. Therefore, *Brown* does not control the analysis of § 18 protection for Plaintiffs' cause of action.

Even if § 18 only protected causes of action that were justiciable in 1859, Intervenor's argument would fail. Intervenor claims that this type of action was not justiciable at common law in 1859 by pointing to criminal abortion statutes which this Court has recently noted are of little, if any, help in determining constitutional questions. *Hodes & Nauser, MDs, P.A.,* 440 P.3d at 486. As discussed in Part III, supra, these statutes are and always were unconstitutional. Therefore, they cannot be used to determine what type of action was justiciable at common law in 1859 or at any other time. Causes of action for medical negligence were justiciable in 1859 and this Court's precedent is clear that new applications of those old causes of action are protected by § 18. *Lemuz*, 261 Kan. at 945, 933 P.2d at 142. Therefore, Plaintiffs' cause of action is protected by § 18.

V. This Court Should Reject Intervenor's Invitation to Overturn Precedent on the Legislature's Power to Alter Constitutionally Protected Rights

Intervenor asks this Court to "conclude that neither [§ 5 nor § 18] guarantees a plaintiff a substantive right to a cause of action the Legislature has eliminated." Intervenor's Resp. Br. 14. To so conclude, the Court would have to overturn its entire body of § 5 and § 18 precedents and turn our judicial system on its head by placing the legislature's public policy determinations above the Constitution. Such a decision would ignore the very purpose of the Bill of Rights — to restrict legislative power so that " 'no human legislation should be suffered to conflict with the rights declared to be *inherent and inalienable*.' " *Hodes & Nauser, MDs, P.A.*, 440 P.3d at 492 (quoting BATEMAN, POLITICAL AND CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA 17 n. 1 (1876)). The Court should reject Defendant's request.

Building on this request, intervenor invites this Court to reject its precedent requiring a quid pro quo when the legislature modifies a common law right to jury trial under § 5 or right to remedy under § 18. Intervenor's Resp. Br. 18. In doing so, Intervenor misstates the holding of *Miller*. *Miller* expressly considered whether this Court's analysis of § 5 "should continue to use a quid pro quo analysis to determine whether the legislature properly exercised its power to modify a common law jury trial right" and found that it should. *Miller*, 295 Kan. at 653. The Court retained its quid pro quo analysis of § 5, in part, in order to keep the same standard of analysis for Constitutional challenges under § 5 as for under § 18, the latter of which the court noted "is well entrenched [in] using a quid pro quo analysis." *Id.* at 654. There is no indication, as Intervenor appears to suggest, that

the Court even considered using something other than the quid pro quo test to analyze § 18. The Court should not do so now.

Intervenor further appears to suggest that instead of this Court's quid pro quo test, the Court should uphold any law that has a public interest objective to promote the general welfare and is substantially related to that objective. *See* Intervenor's Resp. Br. 19. Intervenor asserts that the valid public interest of K.S.A. 60-1906(a) is to promote "the State's policy that every life is valuable." *Id.* at 19. On the contrary, K.S.A. 60-1906(a) cuts against the state's alleged public policy objective. By eliminating any recourse for medical malpractice, the statute does nothing to discourage negligent care to pregnant women and their unborn children. If anything, it tells physicians that it is not necessary to properly perform, interpret, and report the results of tests that might reveal the medical condition of an unborn child. Such a message can only make unborn children and pregnant women less safe and therefore harm life. This Court should stand by its established quid pro quo test and reject the State's specious public policy alternative.

VI. Conclusion.

Common law medical malpractice claims, including those alleging Plaintiffs would have terminated a pregnancy if not for a medical provider's negligence, are protected by §§ 5 and 18 of the Kansas Bill of Rights. For the reasons stated herein and in Plaintiffs' previous briefing, this Court should find K.S.A. 60-1906(a) deprives Plaintiffs of these rights without an adequate substitute and K.S.A. 60-1906(a) is therefore unconstitutional.

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 11th day of June, 2019, by electronic 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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