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' SUPPLEMENTAL 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

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I. Introduction

Plaintiffs ask this Court to find K.S.A. 60-1906 unconstitutional. In addressing that issue, this case presents this Court with an opportunity to address a number of issues that have confused litigators and the lower courts. First, Plaintiffs ask this Court to determine that the proper analysis to consider recognizing a wrongful birth claim focuses not on public policy, causation, or damages, but on whether the allegation of negligence itself sounds in common law negligence. Second, Plaintiffs ask this Court to confirm that Section 18 protects all common law claims, not just those that existed in 1859. Third, Plaintiffs ask this Court to clarify that its holding in *Arche v. U.S. Dept. of Army*, 247 Kan. 276, 798 P.2d 477 (Kan. 1990), recognized a cause of action sounding in common law negligence, not a new tort. Fourth, for the Court's reference, Plaintiffs provide an update on the state of wrongful birth law throughout the country. Plaintiffs' supplemental brief, filed pursuant to Kansas Supreme Court Rule 8.03(i)(3), incorporates and expands upon Plaintiffs' briefings filed in the Kansas Court of Appeals and upon Appellants' Petition for Review.

II. Analysis of the Justiciability of Wrongful Birth Causes of Action Should Focus on the Negligent Act.

Much of the briefing and jurisprudence on the subject of wrongful birth is concerned with questions of causation and damage, which too often devolve into fraught arguments about the public policy of abortions. Courts often wonder how a jury could determine that a human life is an injury or how the benefits of a child can be weighed against the economic injury of raising a child with medical abnormalities. But these concerns miss the mark, as

the Iowa Supreme Court explained at length when it recognized a cause of action in 2017 for wrongful birth on facts very similar to the instant matter. *Plowman v. Fort Madison Comty. Hosp.*, 896 N.W.2d 393, 401 (2017).

In *Plowman*, the Iowa Supreme Court found wrongful birth claims "fall within existing medical negligence principles." *Id.* at 401. Although the court did not address the constitutionality of a statute prohibiting wrongful birth claims, its analysis nonetheless centered on whether a wrongful birth cause of action was recognized at common law. To determine whether to recognize the claim, the Iowa court considered whether the action was consistent with traditional common law concepts, whether there were prevailing policy concerns against recognizing the action, and whether Iowa statutes addressed the issue. The first factor, and the only factor discussed here, is instructive, because Section 5 protects the right to a jury trial for causes of action that existed at common law and Section 18 protects common law causes of action. *Miller v. Johnson*, 295 Kan. 636, 636 Syl. ¶ 2, ¶ 3, 289 P.3d 1098 (Kan. 2012).

The Iowa Supreme Court found wrongful birth claims were consistent with traditional common law concepts. *Plowman*, 896 N.W.2d at 401. It did so by considering whether wrongful birth claims fit within the traditional elements of a medical negligence action. *Id.* Traditional medical negligence actions are established by "(1) an applicable standard of care, (2) a violation of this standard, and (3) a causal relationship between the violation and injury sustained." *Id.* Similarly, the court reasoned, a wrongful birth claim could be established by showing that under the applicable standard of care, the physician owed a duty to use the ordinary knowledge and skill of her profession in a reasonable and

careful manner when treating the plaintiff, the physician violated that standard because a "reasonably competent physician would have observed the abnormalities from the ultrasound" and informed the parents of those abnormalities, and a causal relationship existed between the violation and injury because the parents would have chosen to terminate if they had been informed and, therefore, they would not have incurred the expense of raising a child with abnormalities. *Id.* at 401–02. By framing the analysis in this way, the court maintained the proper focus of its analysis on the negligent act in question and the relation of each element of the cause of action to that negligent act. *Id.* This allowed the court to avoid the errors some courts have made in disconnecting causation and damages analysis from the alleged negligence.

The Iowa Supreme Court is far from alone in its analysis. Other state courts have also found wrongful birth actions fall within traditional common law negligence concepts. *Keel v. Banach*, 624 So. 2d 1022, 1026–28 (Ala. 1993) ("A cause of action for wrongful birth is, in essence, an action for professional malpractice by a health care provider."); *Robak v. U.S.*, 658 F.2d 471, 477 (7th Cir. 1981) (applying Alabama law) ("A case like this one is little different from an ordinary medical malpractice action."); *Linninger v. Eisenbaum*, 764 P.2d 1202, 1205–08 (Colo. 1988) ("Although courts and commentators often speak of wrongful life and wrongful birth as torts in themselves, it is more accurate to view these terms as describing the result of a physician's negligence."); *Garrison v. Med. Ctr. of Del.*, 581 A.2d 288, 290 (Del. 1989) ("The cause of action need not be characterized as "wrongful birth" since it falls within the realm of traditional tort and medical malpractice law."); *Goldberg v. Ruskin*, 471 N.E.2d 530, 533 (Ill. Ct. App. 1984) ("To the extent that

recognition of causes of action for wrongful life or wrongful birth would merely be an extention [sic] of existing principles of tort law to new factual situations, we can and should recognize them."); *Reed v. Campagnolo*, 630 A.2d 1145, 1152 (Md. 1993) (applying "traditional medical malpractice principles for negligence" and finding them satisfied over defendant's argument that wrongful birth was a new tort that should be left to the legislature"); *Viccaro v. Milunsky*, 551 N.E.2d 8, 9 n.3 (Mass. 1990) ("Any "wrongfulness" lies not in the life, the birth, the conception, or the pregnancy, but in the negligence of the physician. The harm, if any, is not the birth itself but the effect of the defendant's negligence on the parents' physical, emotional, and financial well-being resulting from the denial to the parents of their right, as the case may be, to decide whether to bear a child or whether to bear a child with a genetic or other defect."); *Smith v. Cote*, 513 A.2d 341, 346 (N.H. 1986) (noting that "[i]n general, at common law, one who suffers an injury to his person or property because of the negligent act of another has a right of action in tort," finding that the traditional negligence elements could be satisfied in wrongful birth action, and stating that the court must do its "best to effectuate the first principles of [its] law of negligence: to deter negligent conduct, and to compensate the victims of those who act unreasonably."); *Becker v. Schwartz*, 386 N.E.2d 807, 811 (N.Y. 1978) ("Irrespective of the label coined, plaintiffs' complaints sound essentially in negligence or medical malpractice. As in any cause of action founded upon negligence, a successful plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party."); *Schirmer v. Mt. Auburn and Gynecologic Assoc. Inc.*, 844 N.E. 2d 1160, 1165 (Ohio 2006) ("[D]etermining that the instant case presents a

'wrongful life' [or 'wrongful birth'] claim does not confer a special legal status on it, nor change the traditional legal analysis used to determine its merits. Rather, such cases are properly decided by applying the same legal analysis employed in any medical negligence claim. It is within that traditional framework that we analyze this case.") (citations omitted); *Phillips v. U.S.*, 508 F. Supp. 544, 550 (D.S.C. 1981) ("Thus, it can readily be seen that plaintiffs' claim falls within the traditional boundaries of negligence: the essential elements of duty, breach, proximate cause, and damage are undeniably present."); *Owens v. Foote*, 773 S.W.2d 911, 913 (Tenn. 1989) ("Reference is made to [ ] the definition of wrongful birth. However, medical malpractice suits of this nature, brought by parents, alleging birth defects of an infant, are not unknown in this State and we see no reason to endeavor to fit them into some specific category beyond a suit for ordinary negligence."); *Naccash v. Burger*, 290 S.E.2d 825, 829 (Va. 1982) ("Whether a cause of action exists for the wrongs complained of and the damages sought here is a question that should be determined, in our opinion, according to traditional tort principles. Only a novel twist in the medical setting differentiates the present situation from the ordinary malpractice action. Hence, like the [Eastern District of Pennsylvania], we believe we need not defer to the legislature, but may appropriately decide the question ourselves."); *Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 359 P.3d 841, 854 (Wash Ct. App. 2015) ("As with other claims against health care providers, wrongful birth claims are governed by ordinary negligence principles. To establish such a claim, a plaintiff must show duty, breach, proximate cause, and damage or injury. A defendant may move for summary judgment by showing that there is an absence of evidence of any of these essential elements.") (citations omitted).

After analyzing the general elements of negligence law as they relate to wrongful birth actions, the Iowa Supreme Court explained the analytical flaw in focusing on causation that has derailed some courts when considering whether to recognize a claim for wrongful birth. *Id.* at 402. As *Plowman* observed, some courts become stuck on the fact that the physician in a wrongful birth claim did not cause the medical abnormality. *Id.* Similarly, the Court of Appeals here focused on whether the failure to diagnose and inform of the abnormality in a wrongful birth claim could have caused the injury in a wrongful birth claim in 1859 before abortion was legal. Ct. App. Op. 13. Whether the defendant in a wrongful birth claim caused the genetic abnormality with which the child was ultimately born is irrelevant. *Plowman*, 896 N.W.2d at 402. Similarly, whether the specific legal or technological advancement which could have provided the plaintiff with a choice to prevent the birth of the child with an abnormality was available in 1859 is irrelevant. Instead, the proper question is whether the defendant's failure to inform the parents of the abnormality deprived them of the choice to bear a child with disabilities. *Id.* at 403. As the court recognized, on the proper facts in an allegation of wrongful birth, this question can be answered yes. *Id.* at 401−02.

Contrary to what the Court of Appeals' opinion suggests, there is no inherent causation problem with the proposed claim itself. *Id.* at 403. In fact, a medical negligence claim has long been cognizable for failure to diagnose a medical condition when that failure causes complications or decreases a person's chance for survival. *Id.* at 402–03; *Russell v. May*, 306 Kan. 1058, 1075–81, 400 P.3d 647 (Kan. 2017). In the same way, failure to diagnose a fetal abnormality and inform the parents of that abnormality, causes the parents

to lose the opportunity to make an informed choice in response to that diagnosis. *Id.* at 403. The consequences of the loss of that choice were proximately caused by the failure to diagnose.

The Iowa Supreme Court also explained the analytical flaw in focusing on the damages obtainable in wrongful birth claims that has derailed some courts. *Id.* The Iowa court's reasoning is particularly instructive here because the Court of Appeals struggled to see the birth of a child as an "injury." Ct. App. Op. 12–13. As the Iowa Supreme Court explained, it is not necessary to see the birth of the child as the injury: "[U]nder the wrongful-birth theory, the relevant injury is not the resulting life, but the negligent deprivation of information important to the parents' choice whether to terminate a pregnancy." *Plowman*, 896 N.W.2d at 403. "Courts disallowing wrongful-birth claims "conflate [ ] the claimants' injury allegation with their ultimate claim for damages." *Id.* (quoting *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 694–95 (Ky. 2003) (Keller, J., concurring in part and dissenting in part). The injury is not the new life, but the lack of informed consent which deprives a person of "the right to exercise control over his or her body by making an informed decision." *Id.* at 403 (citations omitted). By focusing on the wrong injury, some courts reject wrongful birth claims because of a perceived problem with the claim that does not actually exist.

To accept the Court of Appeals' analysis in this case would mean that many previously recognized torts are suddenly non-justiciable because the specific facts satisfying causation and damages could not have existed in 1859. The Court of Appeals' reasoned that a woman would not have been able to choose to terminate her pregnancy in

1859 and, therefore, her claim did not exist in 1859 and is not protected by the Kansas Bill of Rights. But this type of analysis is not appropriate. In 1859, a person could not claim a physician had incorrectly interpreted an X-ray because X-rays had not been invented. Surely, no court today would hold that the Kansas Constitution does not protect a person's right to allege medical negligence for failure to accurately interpret an X-ray. Advancements in medicine and technology do not render existing claims unprotected. This wrongful birth claim is no different. It alleges that a physician's failure to accurately read and report an ultrasound deprived a woman of her legal right to make informed decisions about her pregnancy. Advancements in medicine, technology, and women's rights do not render an existing claim unprotected. This Court should adopt the analysis of the Iowa Supreme Court and recognize an action for wrongful birth existed at common law and is protected by the Kansas Bill of Rights.

III. Section 18 Protects All Common Law Claims.

Precedent appearing to hold the contrary is in error. In its opinion, the Court of Appeals acknowledged that *Leiker v. Gifford*, incorrectly stated that Section 18 only protects causes of action justiciable at common law in 1859. 245 Kan. 325, 361, 778 P.3d 823 (Kan. 1989). The Court of Appeals noted that none of the cases *Leiker* cited held that Section 18 applied only to causes of action justiciable at common law in 1859. Ct. App. Op. 15.

As discussed in Plaintiffs' Petition for Review, after acknowledging *Leiker* was incorrect, the Court of Appeals still applied the *Leiker* rule that Section 18 only protects causes of action justiciable in 1859, relying on a case that discussed Section 18 in an

entirely different context. That case, *Brown v. Wichita State University*, is inapplicable here because it asked an entirely different question – whether Section 18 abrogated governmental immunity that existed at common law. 219 Kan. 2, 10, 547 P.2d 1015 (Kan. 1976). *Brown* did not ask whether Section 18 only protected causes of action that existed in 1859. *See id.*

The Court of Appeals also cited *Lemuz* in support of the proposition that Section 18 only protects causes of action that existed in 1859. Ct. App. Op. 15. But *Lemuz* merely relied on *Leiker*. *Lemuz*, 261 Kan. at 945, 933 P.2d 134. Because *Lemuz* relied on the erroneous citation from *Leiker*, *Lemuz* cannot be relied upon either. No case without erroneous citation holds that the cause of action must have existed in 1859 to be protected by Section 18.

On the contrary, in the clearest enunciation of Section 18 protection, *Miller v. Johnson* stated: "Section 18 of the Kansas Constitution Bill of Rights provides an injured party a constitutional right to be made whole and a right to damages for economic and noneconomic losses."[1] 295 Kan. 636, 636 Syl. ¶ 3 (2012). *Miller* says nothing to indicate that Section 18 only protects actions that were justiciable at common law in 1859. *See id.*

Miller's interpretation of Section 18, as the only applicable precedent that does not rely on an erroneous citation of law, was binding on the Court of Appeals in this matter.

[1] Notably, in the previous paragraph, the Court stated that Section 5 "preserves the right to jury trial as it historically existed at common law when the Kansas Constitution came into existence. *Id.* at 636 Syl. ¶ 2. If the Court had meant for Section 18 and 5 to be analyzed in the same way, surely it would have described their purposes in the same way.

This Court should correct the Court of Appeals' error by clarifying that Section 18 protects all common law causes of action.

IV. *Arche* Did Not Recognize Wrongful Birth as a "New Tort".

Wrongful birth is not a "new tort," and the majority opinion in *Arche* does not suggest that it is. The *Arche* opinion is not as complicated as the defendant or Court of Appeals would have this court believe. This Court simply applied the facts of a wrongful birth claim to traditional medical negligence elements, found the elements were established, and recognized wrongful birth as a cognizable medical negligence action. *Arche*, 247 Kan. at 281.

Defendants and the Court of Appeals rely heavily on Justice Six's reference to wrongful birth as a "new tort" in his concurring opinion. Ct. App. Op. 12; *Arche*, 247 Kan. at 292, 294–95, 798 P.2d 477 (Six, J. concurring). The Court of Appeals suggested that the majority could or should have corrected Justice Six if he were wrong. *Id.* Of course, the majority opinion is itself the correction. The majority need not individually address each misstatement in a concurrence or dissent. The very reason for writing a concurrence is to express an opinion which one judge holds but to which the majority did not agree. When the concurrence contradicts the majority, the majority opinion is the authoritative view. 21 C.J.S. *Courts* § 189 (2019) ("A concurring opinion, while persuasive, is not binding and does not constitute authority under the doctrine of stare decisis or have any precedential value."); Ryan M. Moore, *I Concur! Do I Matter?: Developing A Framework for Determining the Precedential Influence of Concurring Opinions*, 84 Temp. L. Rev. 743, 744 (2012) ("Despite their prevalence, concurring opinions written by a single appellate-

level jurist are not considered binding upon lower courts and have almost no dispositive impact upon the law on which they speak."). This is especially true when, as in *Arche*, the vote of the concurring justice was not needed to reach a majority. Igor Kirman, *Standing Apart to Be A Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 Colum. L. Rev. 2083, 2106–07 (1995).

Justice Miller's majority opinion is all the more authoritative because Justice Miller was the expert on the topic of the then developing tort law surrounding pregnancy and birth. Justice Miller wrote the opinions on wrongful life, wrongful pregnancy, and wrongful birth. *Bruggeman v. Schimke*, 239 Kan. 245, 718 P.2d 635 (1986) (refusing to recognize tort for wrongful life); *Johnston v. Elkins*, 241 Kan. 407, 736 P.2d 935 (1987) (recognizing wrongful pregnancy). In describing these three types of claims at the beginning of his opinion in *Arche*, Justice Miller contrasted the proposed cause of action for wrongful life, which "would create a new tort, rather than apply [ ] established tort principles to technological advances" with the introduction of his analysis of wrongful birth. *Arche*, 247 Kan. at 278, 798 P.2d 477. This suggests that if Justice Miller thought he was creating a new tort in wrongful birth, he would not have done so, just as he refused to recognize a new tort for wrongful life. If Justice Miller had meant to recognize a new tort in his wrongful birth opinion, he would have said so. Justice Miller's straightforward analysis of a wrongful birth claim within the confines of traditional elements of medical negligence is binding precedent on the analysis of such claims.

Courts in many other jurisdictions have recognized wrongful birth actions as sounding in traditional notions of negligence rather than a new tort. *Bader v. Johnson*, 732

N.E.2d 1212, 1219 (Ind. 2000) ("Labeling the [Plaintiffs]' cause of action as "wrongful birth" adds nothing to the analysis, inspires confusion, and implies the court has adopted a new tort. Medical malpractice cases are no different from other kinds of negligence actions regarding that which must be proven."); *Reed v. Campagnolo*, 630 A.2d 1145, 1152 (Md. 1993) (applying "traditional medical malpractice principles for negligence" and finding them satisfied over defendant's argument that wrongful birth was a new tort that should be left to the legislature"); *Greco v. U.S.*, 893 P.2d 345, 348 (Nev. 1995) ("[W]e see no reason for compounding or complicating our medical malpractice jurisprudence by according this particular form of professional negligence action some special status apart from presently recognized medical malpractice or by giving it the new name of 'wrongful birth.'[Plaintiff] either does or does not state a claim for medical malpractice; and we conclude that she does."); *Schirmer v. Mt. Auburn and Gynecologic Assoc. Inc.*, 844 N.E. 2d 1160, 1165 (Ohio 2006) "[D]etermining that the instant case presents a 'wrongful life' [or 'wrongful birth'] claim does not confer a special legal status on it, nor change the traditional legal analysis used to determine its merits. Rather, such cases are properly decided by applying the same legal analysis employed in any medical negligence claim. It is within that traditional framework that we analyze this case.") (citations omitted); *Owens v. Foote*, 773 S.W. 2d 911, 913 (Tenn. 1989) ("Reference is made to [ ] the definition of wrongful birth. However, medical malpractice suits of this nature, brought by parents, alleging birth defects of an infant, are not unknown in this State and we see no reason to endeavor to fit them into some specific category beyond a suit for ordinary negligence.").

V. The Majority Rule Recognizes Wrongful Birth Causes of Action.

Though much of the jurisprudence on this topic is more than 20 years old, there have been more recent developments. In recognizing a cause of action for wrongful birth, this Court would join the majority of Courts that have now considered the issue. Of the 41 jurisdictions that have considered recognizing wrongful birth causes of action, 26 states and the District of Columbia recognize a cause of action for wrongful birth[2]. *Keel v. Banach*, 624 So. 2d 1022, 1026–28 (Ala. 1993); *Turpin v. Sortini*, 643 P. 2d 954, 956–66 (Cal. 1982); *Linninger v. Eisenbaum*, 764 P.2d 1202, 1204, 1208 (Colo. 1988); *Rich v. Foye*, 976 A.2d 819, 824 (Conn. Super Ct. 2007); *Hayman v. Wilderson*, 535 A.2d 880, 886 (D.C. Cir. 1987); *Garrison v. Med. Ctr. Of Del.*, 581 A.2d 288, 290 (Del. 1989); *Fassaulas v. Ramey*, 450 So. 2d 822, 823 (Fla. 1984) (recognizing "wrongful birth" action when a negligent vasectomy led to the birth of two children with deformities); *Goldberg v.* Ruskin, 471 N.E.2d 530, 533 (Ill. App. Ct. 1984); *Bader v. Johnson*, 732 N.E.2d 1212, 1219–20 (Ind. 2000); *Plowman v. Fort Madison Comm. Hosp.*, 896 N.W.2d 393, 401 (Iowa 2017); *Thibeault v. Larson*, 666 A.2d 112, 115 (Me. 1995)(interpreting 24 M.R.S.A. § 2931); *Reed Campagnolo*, 630 A.2d 1145, 1152 (Md. 1993); *Viccaro v. Milunsky*, 551 N.E.2d 9–10 (Mass. 1990) (rejecting wrongful birth terminology but recognizing cause of action); *Greco v. U.S.*, 893 P.2d 345, 348 (Nev. 1995); *Smith v. Cote*, 513 A.2d 341, 348 (N.H. 1986); *Schroeder v. Perkel*, 432 A.2d 834, 840 (N. J. 1981) abrogated on other grounds by *Hummel v. Reiss*, 608 A.2d 1341 (N.J. 1992); *Becker v. Schwartz*, 386 N.E.2d

[2] The term "wrongful birth" is not used consistently across the states. For the purpose of this survey of case law, Plaintiffs rely on the definition that this Court used in *Arche*: A wrongful birth claim is one "brought by the parents, who claim they would have avoided conception or terminated the pregnancy had they been properly advised of the risks or existence of birth defects to the potential child." 247 Kan. at 278.

807, 813 (N.Y. 1978); *Schirmer v. Mt. Auburn and Gynecologic Assoc. Inc.*, 844 N.E. 2d 1160, 1166–68 (Ohio 2006); *Tomlinson v. Metropolitan Pediatrics, LLC*, 412 P.3d 133, 145 (Or. 2018); (*Emerson v. Magendantz*, 689 A.2d 409, 411 (R.I. 1997) (allowing damages for claim of negligent sterilization when the result was a child with congenital defects); *Phillips v. U.S.*, 508 F. Supp. 544, 550 (D.S.C. 1981) (predicting state law); *Owens v. Foote*, 773 S.W. 2d 911, 913 (Tenn. 1989) (recognizing action sounding in medical malpractice when negligent vasectomy resulted in birth of child with Down's Syndrome, but rejecting the term "wrongful birth"); *Jacobs v. Theimer*, 519 S.W.2d 846, 848 (Tex. 1975); *Naccash v. Burger*, 290 S.E.2d 825, 829 (Va. 1982); *Wuth ex rel. Kessler v. Laboratory Corp. of America*, 359 P.3d 841, 853–54 (Wash. Ct. App. 2015); *James G. v. Caserta*, 332 S.E.2d 872, 882 (W. Va. 1985); *Dumer v. St. Michael's Hospital*, 233 N.W.2d 372, 377 (Wis. 1975).

VI. Conclusion

This Court should take this opportunity to clarify the issues described herein and acknowledge that as a common law negligence cause of action, wrongful birth is protected by the Kansas Bill of Rights.

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 29th day of March, 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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