

DATE: November 22, 2010

KEYWORDS: Mama v. Repro; wrongful birth; reproductive wrong; medical malpractice; in vitro fertilization; Polycystic Kidney Disease

QUESTION PRESENTED

I. Will a Nebraska court refuse to recognize a claim for wrongful birth when Repro performed a genetic screening procedure on the embryos used for IVF, Repro advertised that the screening procedure was accurate but not a substitute for amniocentesis, the screening procedure failed to identify the marker for PKD in an embryo, the embryo carrying PKD was implanted by Repro in Mama, the implantation of the embryo in Mama was successful, Mama refused to undergo an amniocentesis while pregnant, PKD is detectable by an amniocentesis, Mama gave birth to a child (Kidder) with PKD, and Kidder may not experience the symptoms of PKD until adulthood but will require periodic testing?

BRIEF ANSWER

I. A Nebraska court will probably recognize a claim for wrongful birth. The majority of jurisdictions deciding whether to recognize a claim for wrongful birth have elected to recognize the claim. Showing medical causation is not necessary to state a wrongful birth claim and the potential for fraudulent testimony is not unique to wrongful birth

claims and will probably not be sufficient for the court to find that Mama's complaint must fail on the issue of causation as a matter of law. The Nebraska legislature has expressed a negative view of abortion but there is Nebraska precedent recognizing that the loss of the opportunity to prevent the birth of a healthy child can be a legally cognizable injury. Although damages will be difficult to determine, this fact is probably not sufficient to cause Mama's claim to fail as a matter of law on the issue of injury.

STATEMENT OF FACTS

Ms. Ima Mama (Mama) is a 35-year old single woman who sought the company Repro-Empros' (Repro) services for in vitro fertilization (IVF). Repro advertises the effectiveness of its practice of screening embryos used for IVF for genetic disorders but also offers the disclaimer that the screening procedure is not a substitute for prenatal testing. Mama met with Doctor Helpum (Helpum), a Repro employee, who advised Mama against implanting multiple embryos because it increases the chances of having multiple babies and the risk of premature birth and lifelong health problems. Mama insisted on being implanted with six pre-screened embryos, Helpum performed the IVF, and Mama became pregnant with sextuplets. In her eleventh week of pregnancy, Mama was advised by Helpum to perform an amniocentesis on the fetuses but Mama refused. All six children were born healthy but testing approximately one year later revealed that one of Mama's sons, Kidder, had Polycystic Kidney Disease (PKD). PKD is a disorder where multiple cysts develop in both kidneys with the potential to cause

damage to the kidneys, liver, pancreas, heart, and brain and is detectable by amniocentesis. Kidder has not yet developed cysts in his kidneys but may do so as he reaches adulthood. Mama brought suit against Repro and Helpum, alleging that they were negligent in failing to identify the PKD marker in Kidder's embryo during the pre-screening process and, as a result of their negligence, Kidder was born with PKD. Mama alleged damages for periodic testing until Kidder reaches the age of majority and for Mama present and future emotional distress and mental suffering.

DISCUSSION

We have been asked to determine whether Mama's wrongful birth claim will survive Repro's motion for summary judgment.

I.

Mama can probably defend Repro's motion for summary judgment. Under Nebraska law, a motion for summary judgment is granted when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332. A claim for wrongful birth is a theory of malpractice where the parents of an unhealthy child born following the defendant's negligence seek damages arising from the child's birth and/or care. *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs.*, 108 Ohio St. 3d 494 (2006). To state a claim of malpractice, Mama must demonstrate that (1) there was a standard of care extending from Repro to Mama,

(2) Repro breached this standard of care, and (3) Repro's breach of the standard of care was a cause of (4) Mama's injuries. See *Hamilton v. Bares*, 267 Neb. 816, 821 (2004).

Generally, first two elements of the claim, standard of care and breach, have not been factors weighed heavily by courts determining whether to recognize a claim for wrongful birth. *Atlanta Obstetrics & Gynecology Group v. Abelson*, 260 Ga. 711, 715. The two factors the court will likely consider are those of causation and injury. The analysis will proceed with a discussion of the factor of causation.

A. Repro's motion for summary judgment will probably not be granted on the basis of causation. In a wrongful birth claim, the requirement of causation is satisfied when, but for the defendant's negligence, the plaintiff would have elected to terminate the pregnancy or not to conceive. *Canesi v. Wilson*, 158 N.J. 490, 515 (1999); *Robak v. United States*, 658 F.2d 471, 478 (1981); *Lininger v. Eisenbaum*, 764, P.2d 1202, 1205 (1988). Mama's wrongful birth claim is one of first impression in Nebraska, although a wrongful pregnancy claim has been recognized without any noted concerns over problems of causation. See *Hitzmann v. Adam*, 246 Neb. 201 (1994). Accordingly, the court will likely look for guidance from other state and federal appellate courts.

Courts which have refused to recognize a wrongful birth claim on the basis of causation have generally done so on the ground that the defendant did not cause the child's defect, because of concerns over the potential for fraudulent claims, or because of concerns over the effects of advances in genetic testing. *Azzolino v. Dingfielder*, 315 N.C. 103 (1985); *Wilson v. Kuenzi*, 751 S.W.2d 741, 744 (1988). In *Azzolino*, the court

found that a wrongful birth claim could not satisfy the element of causation due to the potential for fraud and the implications of the use of genetic testing. Affirming the lower court's decision, the *Azzolino* court stated that wrongful birth claims would be "peculiarly subject to fraudulent claims." *Azzolino* 315 N.C. at 114. Of specific concern was the necessity that the element of causation would usually have to be shown by the testimony of parents after the birth of their child. *Id.* Not only would the temptation to "invent" a prior desire to terminate the pregnancy if the fetus was determined to suffer from a genetic defect be great, the court also perceived a similar temptation to "at least deny the possibility that they might have changed their minds and allowed the child to be born even if they had known of the defects it would suffer." *Id.* The court was also concerned that allowing parents to decide what genetic defects harbored by the fetus would cause them to terminate the pregnancy could lead to abortions where the fetus was only a carrier of a genetic defect or when it was not the sex the parents desired. *Id.* The court noted that Beethoven's father had chronic syphilis, his earlier siblings had been deaf, blind, and mentally handicapped and, in jurisdictions where wrongful birth claims are recognized, Beethoven himself may have been aborted. *Id.* at 114; See also Feinman, *Getting Along with the Genetic Genie*, Legal Aspects of Med. Prac. 38 (March 1979).

In *Wilson*, the court accused jurisdictions recognizing wrongful birth claims of having "closed their eyes to" or "leaped over" the element of causation. *Wilson*, 751 S.W.2d at 744. For support, the court quoted the dissenting opinion of a leading New York appellate case: "The heart of the problem in [wrongful birth] cases is that the

physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor. . . . The child's handicap is an inexorable result of conception and birth." *Id.* at 744-45; quoting *Becker v. Schwartz*, 46 N.Y.2d 401, 417-22 (1978) (Watchler, J., concurring in part and dissenting in part). The court could find no case recognizing wrongful birth claims which effectively addressed such issues and concluded that courts in jurisdictions where the claim was recognized either ignored the element of causation, blended it into policy considerations, or blended it into discussions of damages. *Id.* at 745. Like the *Azzolino* court, the *Wilson* court was also concerned with the potential for fraudulent testimony. The court stated that "percentage of women who refuse to consider abortion under pressure, whether for reasons of religious belief, strong motherly instincts, or for other reasons, is sometimes astounding" and that "more verifiable" testimony or objective standards were needed before "substantial" damages could be awarded to plaintiffs in wrongful birth actions. *Id.* at 746.

The majority of jurisdictions that have decided whether to recognize a wrongful birth claim have not required a showing of "medical causation" and instead found causation to be satisfied when the plaintiff shows that, in the absence of the defendant's negligence, the plaintiff would have not conceived or would have terminated the pregnancy. *Canesi*, 158 N.J. 490 at 515; See also Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 Harv. C.R.-C.L. L. Rev. 141 (2005). In *Robak*, the court rejected the argument that causation could not be shown because the injury to the fetus had occurred prior to the physician's negligence. *Robak*, 658 F.2d at 478. The

court found that this argument “misstate[d] the nature of the test for proximate cause” because the cause of action was based not upon the actual injuries to the fetus but upon the physician’s failure to inform the plaintiffs of the test results so as to provide them the opportunity to terminate the pregnancy. *Id.* The court held that the issue of causation did not prevent a wrongful birth claim from being recognized because but for the physician’s negligence the plaintiffs would have terminated the pregnancy. *Id.*

Similar to the *Robak* court, the *Canesi* court held that “medical causation” is not necessary to satisfy the requirement of causation. The court began its analysis by stating that a wrongful birth claim is “predicated on a woman’s right to determine for herself whether or not to continue or terminate her pregnancy” and emphasized at several points that the interest vindicated by the claim is a woman’s right of “self-determination.” *Canesi*, 158 N.J. at 501, 502, 503-04. The court rejected the contention that the plaintiff had to show medical causation on the ground that it “unduly burdens a patient’s wrongful birth claim that does not seek recovery for the congenital impairment.” *Id.* at 514. Historically, the court stated, medical causation was a requirement for wrongful birth claims but jurisprudence on the claim had evolved to where the difference between causing the injury to the child and causing the parent(s) to lose the opportunity to terminate the pregnancy was widely recognized. *Id.* at 514-15. In addition to showing that the pregnancy would have been terminated or avoided but for the defendants’ negligence, however, the plaintiff must show that the birth defect was “reasonably foreseeable, that is, not too remote in relation to defendants’ negligence.” *Id.* at 515.

The court will probably not grant Repro's summary judgment motion on the ground that a wrongful birth claim, as a matter of law, is incompatible with a showing of causation. The majority of courts now recognize that causation is satisfied by showing that but for the defendant's negligence, the plaintiff would have terminated the pregnancy or chosen not to conceive. Mama demonstrated concern over the possibility of genetic defects by electing to undergo in vitro fertilization at Repro at least in part due to its genetic pre-screening of embryos. Mama's concern supports a contention that she would not have conceived Kidder had she known his embryo carried the PKD marker and would help satisfy the "reasonably foreseeable" requirement in *Canesi*, should the court adopt the standard. As to the potential for fraud, the court will likely recognize that Mama will be required to testify under oath and that wrongful birth claims are not the only actions where the testimony of a single, self-interested individual is essential.

B. Mama's wrongful birth claim will probably survive Repro's motion for summary judgment if the court focuses on the issue of injury. In a wrongful birth claim, the injury suffered by the plaintiff is the loss of an opportunity to avoid the birth of an impaired child. *Lininger*, 764 P.2d at 1206; *Schirmer*, 108 Ohio St. 3d at 497; *Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 688 (2003); *Atlanta Obstetrics & Gynecology Group*, 260 Ga. at 713; *Azzolino*, 315 N.C. at 107; *Siemienic v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 254 (1987). Damages arising from the injury, however, have been

less consistently defined and there is little uniformity between jurisdictions recognizing wrongful birth claims. *Wilson*, 751 S.W.2d at 744.

Courts which have held that a wrongful birth claim cannot satisfy the element of injury as a matter of law have generally done so on the ground that the birth of a child cannot be an injury, the damages stemming from such an injury are too difficult to determine, and the implications of the benefit rule. *Grubbs*, 120 S.W.3d at 682; *Azzolino*, 315 N.C. at 111; *Taylor v. Kurapati*, 236 Mich. App. 315, 349 (1999). In *Azzolino*, the court stated that in order to allow recovery on a wrongful birth claim, it would have to “take a step into *entirely untraditional analysis* by holding that the existence of a human life can constitute an injury cognizable under the law.” *Azzolino*, 315 N.C. at 111. This step required a “view of human life previously unknown to the law of this jurisdiction” and the court found itself “unwilling to say that life, even life with severe defects, may ever amount to a legal injury.” *Id.* The court also noted the difficulty jurisdictions recognizing wrongful birth claims had in determining damages and reasoned that this struggle “arises at least in part from a failure to recognize that the ‘injury’ for which they seek to compensate the plaintiffs is the existence of a human life.” *Id.* at 112.

Unlike *Azzolino*, the *Taylor* court focused the implications of the benefits rule which it found had “far-reaching, and profoundly disturbing, consequences.” *Taylor*, 236 Mich. App. at 349. In an earlier decision, the same appellate court had recognized a claim of wrongful birth and the applicability of the benefits rule, which requires the award of damages as a result of the defendant’s negligence to be reduced by any benefits that are the result of the defendant’s negligence. *Id.* at 349; *See Eisbrenner v.*

Stanley, 106 Mich. App. 502 (1981). As a practical matter, the court stated that the benefits were “unquantifiable” and emphasized the difficulty of determining the benefits the parent(s) would receive over the entire child’s lifetime. *Id.* Furthermore, the court was concerned that use of the “benefits rule” in wrongful birth claims would “slide ever so quickly into applied eugenics.” *Id.* It was a “short step”, according to the court, from accepting the argument that the birth of one particular child should have been prevented to accepting the argument that the birth of entire classes of “defective” children should be prevented, not only for the parents’ sake but for the betterment of the greater society. *Id.* at 350. The court concluded that the “logical end” of the use of the “benefits rule” in wrongful birth claims would be the determination that the disabled child “has no real right to go on living, thereby imposing the costs of child’s continued existence on the parents and society.” *Id.* at 355.

Generally, the courts which have recognized wrongful birth claims have not worried over the moral and philosophical implications of finding that the birth of a child can be a legal injury and have instead found the injury to be the denial of a woman’s right to make the decision whether to carry her pregnancy to term. *Siemienic*, 117 Ill. 2d 230; *Lininger*, 764 P.2d 1202; *Arche v. United States*, 247 Kan. 276 (1990). In *Siemienic*, the court recognized a wrongful birth claim on basis of the “great weight of authority,” which included reasoning from other jurisdictions that the claim is a logical and extension of tort law (See *Becker v. Schwartz*, 46 N.Y.2d 401, 412-413 (1978)), allowing the claim is desirable in light of advances in genetic testing (See *Blake v. Cruz*, 108 Idaho 253, 256 (1984)), refusing to recognize the claim would defeat the underlying

policies of tort law (See *Smith v. Cote*, 128 N.H. 231, 243 (1986)), and refusing to recognize the claim would burden reproductive rights (See *Speck v. Finegold*, 497 Pa. 77, 84-85 (1981)). *Siemienic*, 117 Ill. 2d at 257-58. Regarding damages, the court noted the lack of consistency between other jurisdictions on the question of appropriate damages and concluded that the divergence was due to the “complex legal, moral, philosophical, and social issues raised by wrongful birth claims. . . .” *Id.* at 258. The court found the general torts principle that a negligent actor is liable for all injuries which he/she has caused could not apply to wrongful birth claims and instead recognized only the recovery of “extraordinary expenses,” the costs related to managing and treating the child’s disability. *Id.* at 259-260.

In *Schirmer*, the court found that the nature of the injury in wrongful birth claims severely curtailed what damages could be recovered. Noting the uniqueness of the injury, the lost opportunity to terminate a pregnancy, the court rejected the plaintiffs’ request for the costs of raising the child because a wrongful birth claim did not allow the comparison between the costs of rearing a healthy child and the costs of rearing a disabled child. *Schirmer*, 108 Ohio St. 3d at 497, 499-500. The court stated that “[t]he crux of this case is a comparison of nonexistence versus existence, albeit impaired” and “the law does not sanction an award of damages based on the relative merits of ‘being versus nonbeing.’” *Id.* at 500; quoting *Bowman v. Davis*, 48 Ohio St. 2d 41, 42 (1976). The court also rejected the plaintiffs’ request for consequential noneconomic damages because the jury would be forced to weight the emotional and physical burdens of having a disabled child against having no child at all. *Id.* Accordingly, the only

damages the court held to be recoverable were the costs incurred from the continuation of the pregnancy following the negligent act and the birth of the child. *Id.*

Although Nebraska has previously not had the opportunity to recognize a wrongful birth claim, there is precedent recognizing a wrongful pregnancy claim. In a wrongful pregnancy claim, the parents of a healthy child allege that but for the defendant's negligence (e.g. failure properly to perform a sterilization procedure) the child would not have been born. *Lininger*, 764 P.2d at 1204. In *Hitzmann*, the plaintiff gave birth to a healthy child after the defendant negligently failed to complete a sterilization procedure. *Hitzmann*, 246 Neb. at 204. Although the court refused to recognize damages for the cost of raising a healthy child, it held that damages for birthing expenses, emotional distress, pain and suffering, loss of wages, and loss of consortium caused by the failed sterilization could be recovered. *Id.* at 207. By holding that some damages were recoverable, the court implicitly recognized that the lost opportunity to prevent the birth of a healthy child can be a legally cognizable injury.

The Nebraska unicameral has a record of strong support for the protection of fetal life. Neb. Rev. Stat. § 28-325; Neb. Rev. Stat. §§ 28-388-28-394). This commitment is evidenced by the unicameral's declaration of propose statement asserting that "it is in the interest of the people of the State of Nebraska that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to insure the unborn child its continued life after its abortion." Neb. Rev. Stat. 28-325. Any remaining doubt as to the legislative stance towards abortion is remedied by the statement that "the members of the

Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska.” *Id.*

The court will probably not grant Repro’s summary judgment motion on the basis of the injury in a wrongful birth claim. The Nebraska Supreme Court has already implicitly recognized that the lost opportunity to prevent the birth of a healthy child can, in the context of a wrongful pregnancy claim, be a legally cognizable injury and there seems to be no especially compelling reason not to extend this recognition to the birth of an unhealthy child. Unlike a wrongful pregnancy claim abortion is often central to the element of causation in a wrongful birth claim and the Nebraska legislature has clearly expressed a negative view of the termination of pregnancies. Mama, however, alleges that she would have prevented Kidder’s birth as opposed to terminating it in the absence of Repro’s negligence. Furthermore, the court will not be troubled by precedent recognizing the applicability of the “benefits rule” as was the *Taylor* court. Although Mama’s alleged damages for future emotional distress and mental suffering may be too speculative, the alleged damages for past emotional distress and mental suffering and periodic medical testing are more easily determined, making it likely that the court will likely find them acceptable forms of recovery. Furthermore, the court may allow Mama to amend her complaint so as to allege damages arising from Kidder’s share of the costs of Mama’s pregnancy and the delivery of her children, which would comply with the limited damages rule adopted in *Schirmer*. *Schirmer*, 108 Ohio St. 3d at 500.

CONCLUSION

Mama can probably defend Repro's motion for summary judgment successfully. In order to avoid judgment as a matter of law for Repro, Mama must show that in the absence of the defendant's negligence Kidder would not have been conceived and that the loss of an opportunity to prevent the birth of a child with PKD can constitute a legally cognizable injury. The majority of courts deciding whether to recognize a wrongful birth claim have not held that the claim must fail on the basis of causation or injury. Most courts determining whether to recognize the claim have rejected a requirement of medical causation in favor of a showing that, in the absence of the defendant's negligence, a disabled child would not have been born. Although the testimony of a self-interested individual is usually essential to establish causation in wrongful birth claims, the potential for fraud is not unique to wrongful birth claims and Mama will testify under oath. Most courts determining whether to recognize the claim have found the injury, the loss of an opportunity to prevent the birth of an unhealthy child, to be legally cognizable. Although the Nebraska legislature has expressed distaste for abortion, the Nebraska Supreme Court has recognized that, in the context of a wrongful pregnancy claim, the loss of an opportunity to prevent the birth of a healthy child can constitute an injury. Acceptable damages will be difficult to determine, but the court will probably allow Mama to seek recovery at least for damages from her past emotional distress and mental suffering.