No. 17-117439-S

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.

KANSAS ATTORNEY GENERAL DEREK SCHMIDT,

Intervenor.

Appeal from the District Court of Riley County, Kansas
Honorable John F. Bosch, District Judge
District Court Case No. 2016-CV-94

INTERVENOR KANSAS ATTORNEY GENERAL'S RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT

Bryan C. Clark
Assistant Solicitor General
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
Telephone: (785) 296-2215
Fax: (785) 291-3767
E-mail: bryan.clark@ag.ks.gov
Attorney for Intervenor Kansas Attorney General Derek Schmidt

TABLE OF CONTENTS AND AUTHORITIES

ISSUES

1. Do §§ 5 and 18 of the Kansas Bill of Rights—which preserve the right to trial by jury (§ 5) and the right to remedy by due course of law (§ 18) only as to civil causes of action recognized as justiciable by the common law when the Constitution was adopted in 1859—apply to wrongful birth actions first recognized in this State in 1990?
2. If §§ 5 and 18 apply to plaintiffs' wrongful birth action, does K.S.A. 60-1906, which prohibits wrongful birth claims and the recovery of damages from any such claims, violate § 5 or § 18?

BACKGROUND

Plaintiffs-Appellants Alysia R. Tillman and Storm Fleetwood claim their daughter should not have been born. They contend that Defendant-Appellee, Dr. Katherine A. Goodpasture, should have identified brain defects in their unborn child, and if she had, Tillman would have aborted the child. R. Vol. I, 5-8.

Plaintiffs acknowledge that their wrongful birth claim, which this Court first recognized in *Arche v. U.S. Dep't of Army*, 247 Kan. 276, 798 P.2d 477 (1990), is barred by K.S.A. 60-1906(a). That statute prohibits claims for wrongful birth and prohibits recovering damages in any civil action based on the physical condition of a minor "if the damages sought arise out of a claim that a person's action or omission contributed to the minor's mother not obtaining an abortion." K.S.A. 60-1906(a); *see also* K.S.A. 60-1906(d)(2) (defining wrongful birth as a cause of action seeking

damages for a minor's physical condition at birth because "a person's action or omission contributed to such minor's mother not obtaining an abortion").

Plaintiffs claim that K.S.A. 60-1906(a) violates §§ 5 and 18 of the Kansas Constitution's Bill of Rights. R. Vol. I, 6, ¶ 32. Section 5 protects the "right of trial by jury." And § 18 protects the right to "remedy by due course of law, and justice administered without delay," for certain injuries.

Consistent with more than a century of case law, Dr. Goodpasture moved for judgment on the pleadings arguing that §§ 5 and 18 do not apply to K.S.A. 60-1906(a) because wrongful birth actions did not exist at common law when the Kansas Bill of Rights was adopted. R. Vol. I, 36, 68 & n.1. The Attorney General was allowed to intervene to defend the statute. *See* K.S.A. 75-764(e); K.S.A. 60-224(b)(2)(C); R. Vol. I, 85, 103.

The district court granted Dr. Goodpasture's motion for judgment on the pleadings, concluding that §§ 5 and 18 do not apply to wrongful birth actions. R. Vol. II, 92-95. Plaintiffs appealed and the Court of Appeals affirmed, holding that the "cause of action for wrongful birth was unavailable when our Constitution was adopted and thus does not implicate Sections 5 or 18." *Tillman v. Goodpasture*, No. 117439-A, 2018 WL 2994343, at *1 (Kan. Ct. App. June 15, 2018) (slip op. 3).

THE PETITION FOR REVIEW SHOULD BE DENIED

The petition for review asks this Court to disrupt the settled precedent the district court and Court of Appeals faithfully followed. Under the factors this Court applies in determining whether to grant review, the petition should be denied. *See*

K.S.A. 20-3018(b); Kan. Sup. Ct. R. 8.03(b)(6)(E). To be sure, the Legislature's public policy decision to eliminate wrongful birth as a cause of action was an important one. But plaintiffs' counsel has conceded that there have been "very few" such claims—maybe as few as three in the last 30 years, including this case and *Arche*. R. Vol. III, 34. The district court and the unanimous Court of Appeals panel applied this Court's settled precedents consistent with Kansas public policy that every life is valuable. Plaintiffs have given no good reason for the Court to grant review to upend settled law.

A. The courts below faithfully followed this Court's settled precedents in holding that §§ 5 and 18 do not apply to plaintiffs' wrongful birth action.

This Court has recognized that the "Bill of Rights of the Kansas Constitution preserves the right to trial by jury (§ 5) and the right to remedy by due course of law (§ 18) only as to civil causes of action that were recognized as justiciable by the common law as it existed at the time our constitution was adopted" in 1859. *Leiker v. Gafford*, 245 Kan. 325, 361, 778 P.2d 823 (1989) (collecting cases), *disapproved of on other grounds by Martindale v. Tenny*, 250 Kan. 621, 829 P.2d 561 (1992); *see also, e.g.*, *Brown v. Wichita State Univ.*, 219 Kan. 2, 10, 547 P.2d 1015 (1976) (explaining that "right[s] denied at common law" are "not protected by Section 18"); *Kimball v. Connor*, 3 Kan. 414, 432 (1866) ("[Section 5] does not require every trial to be by jury; nor does it contemplate that every issue, which, by the laws in force at the adoption of the constitution of the State, was triable by jury, should remain irrevocably triable by that tribunal.").

The courts below followed these precedents and correctly held that §§ 5 and 18 do not apply to plaintiffs' wrongful birth action. *See, e.g.*, R. Vol. II, 92-95; *Tillman*, 2018 WL 2994343, at *4-6, 8 (slip op. 9-12, 15-16).

Starting with § 5, plaintiffs assert that because they seek money damages their claim is an action at law that would have been triable to a jury at common law. Pet. 6. The courts below correctly rejected this argument. In *Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823 (1989), a case not mentioned in the petition for review, this Court held that §§ 5 and 18 did not apply to limitations the Legislature had placed on "*damages* resulting from wrongful death" because "there was no cause of action for wrongful death at common law" when the Kansas Bill of Rights was adopted. 245 Kan. at 361-62 (emphasis added); *see also, e.g.*, *Bair v. Peck*, 248 Kan. 824, 835-36, 811 P.2d 1176 (1991) (holding that the Legislature's elimination of a claim for damages based on vicarious liability did not violate § 5).

Plaintiffs have tried to distinguish *Leiker* because wrongful death actions were recognized by statute as opposed to judicial decision. But *Leiker* does not allow that distinction. *Leiker* recognized that both statutes and judicial decisions can modify the common law, and it did not suggest that modifications by judicial decision should be treated any differently than modifications made by statute. *See* 245 Kan. at 360; *see also Brown*, 219 Kan. at 10. More fundamentally, § 5 does not provide a substantive right to a cause of action, only a procedural right to a jury trial as the right existed at common law. *See infra* § B.1.

As for § 18, plaintiffs claim the Court made a mistake in *Leiker* when it said that § 18 only applies to civil causes of action recognized as justiciable at common law when the Bill of Rights was adopted. Pet. 12-13. This Court was not mistaken in *Leiker*. The courts below faithfully applied this Court's precedents in concluding that § 18 only applies to causes of action existing at common law in 1859. R. Vol. II, 92-95; *Tillman*, 2018 WL 2994343, at *8 (slip op. 15-16). For example, in *Brown v. Wichita State University*, 219 Kan. 2, 547 P.2d 1015 (1976), this Court said that "[§] 18 does not create any new rights, but merely recognizes long established systems of laws existing prior to the adoption of the constitution." *Id.* at 10. Based on that premise, the Court upheld a statute that prohibited the plaintiffs' damages actions against the State because "the right to sue the state for torts was a right denied at common law." *Id.*

The Court of Appeals also correctly held that under *Lemuz v. Fieser*, 261 Kan. 936, 933 P.2d 134 (1997), determining whether a cause of action or remedy existed at common law requires more than just asking whether the plaintiffs seek damages. *See* 261 Kan. at 944-45; *Tillman*, 2018 WL 2994343, at *4 (slip op. 9). In *Lemuz*, the Court held that statutes barring claims against hospitals for corporate negligence violated § 18 because the plaintiffs' claim was "based upon the basic principle of negligence, a common-law remedy which was recognized at the time the Kansas Constitution was adopted." 261 Kan. at 945. In other words, § 18 protected the plaintiffs' corporate negligence claim because it simply required "plugg[ing]" hospitals "into an old cause of action, negligence." *Id.* That result was possible

because such claims had not been rejected at the time the Bill of Rights was adopted. *See McVay v. Rich*, 255 Kan. 371, 376, 874 P.2d 641 (1994). Not so for wrongful birth.

This Court has already said that wrongful birth is a "new cause of action based on public policy." *OMI Holdings, Inc. v. Howell*, 260 Kan. 305, 314, 918 P.2d 1274 (1996). In *Arche* itself, Justice Six's concurrence referred to the plaintiffs' wrongful birth claim as a "new claim" and a "new tort," with no response from the majority. 247 Kan. at 292, 294, 295. And for good reason: the wrongful birth cause of action bears all the hallmarks of a new cause of action, and not just an application of traditional negligence. That is why, before the case could proceed in *Arche*, the Court had to "recognize[]" the plaintiffs' wrongful birth cause of action. *Id.* at 278. Both courts below faithfully followed this Court's decisions and plaintiffs have given the Court no good reason to reconsider those decisions.

Plus the decisions below correctly applied *Lemuz*. To begin with, the traditional elements of medical negligence apply differently in a wrongful birth action. Traditional medical negligence actions turn on the actions of the defendant—whether her actions comported with the standard of care. Wrongful birth actions, however, turn on a mother-to-be's personal decision about the circumstances in which she would choose to terminate a pregnancy and whether "a particular disability is so horrible . . . as to make plausible the choice of abortion . . . by the parent." Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 Harv. C.R.-C.L. L. Rev. 141, 144 (2005); *see also, e.g.*,

Arche, 247 Kan. at 281-82 ("[I]n a wrongful birth case, the result of the tortious conduct is the existence, or benefit, of a child," as opposed to a traditional physical injury.).

Wrongful birth actions also require proving two additional elements—(1) that "the child has . . . gross deformities [that are] not medically correctable," and (2) that "the child will never be able to function as a normal human being." *Arche*, 247 Kan. at 281. Also, parents who prevail on a wrongful birth claim may only recover "those expenses caused by the child's handicaps," and "not those expenses natural to raising any child." 247 Kan. at 283. This is a "special rule" of damages applied in wrongful birth to "ameliorate the otherwise harsh consequences that would result from a strict application" of the common law rule. *Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 260 Ga. 711, 716, 398 S.E.2d 557 (1990).

Finally, the public policy that drove the Court's decision in *Arche* (unlike the public policy in *Lemuz*) was prohibited at the time the Kansas Bill of Rights was adopted. The Court's recognition of a cause of a cause of action for wrongful birth was based in large part on the "major change[]" that occurred when the "United States Supreme Court recognized a woman's right to obtain an abortion" (under certain circumstances) in *Roe v. Wade*, 410 U.S. 113 (1973). But *Roe* was decided more than 100 years after the Kansas Bill of Rights was adopted in 1859, and abortion was a crime in Kansas when it became a State, except in the case of medical emergency. *See* Kan. Terr. Stat. 1855, ch. 48, §§ 9, 10, 37, 39; Laws 1862, ch. 33, §§ 9-10, 37.

A straightforward application of this Court's precedents requires the conclusion reached by both the district court and the Court of Appeals—that §§ 5 and 18 do not apply to plaintiffs' wrongful birth cause of action. There is no need for this Court to grant review.

B. This case is a poor vehicle for clarifying § 5 and § 18 protections.

The petition asks this Court to grant review to reconsider the scope of § 5 and § 18 protections. *See* Pet. 3, 13. For all the reasons described above, the Court should not do so. In addition, this case is a particularly poor vehicle for reconsidering the scope of § 5 and § 18 protections because neither of the courts below reached that issue, and this Court should not reach it either even if it grants review. If the Court were to grant review, and conclude that § 5 or § 18 applies, this Court would be confronted with a host of questions about the application of §§ 5 and 18 that would be better left for a different case. *See, e.g.*, Brief of Intervenor Kansas Attorney General, *Hilburn v. Enerpipe Ltd.*, No. 14-112765-S (Mar. 26, 2018).

1. In the context of reviewing tort reform statutes, this Court has interpreted §§ 5 and 18 as requiring a quid pro quo—"an adequate and viable substitute"—"when modifying a common-law jury trial right under Section 5 or right to remedy under Section 18." *Miller v. Johnson*, 295 Kan. 636, 652, 289 P.3d 1098 (2012). But a quid pro quo is just "[o]*ne way to meet due process requirements*." *Id.* (quoting *Kansas Malpractice Victims Coalition*, 243 Kan. at 344). And determining whether a quid pro quo is required is context-specific. *See, e.g.*, *id.* (noting that the adequate substitute requirement came from cases dealing with tort reform).

In general, the Legislature has the "power to change the common law," including the power to "modify the right to a jury trial," as long as the "statutory modification of the common law . . . meet[s] due process requirements and [is] 'reasonably necessary in the public interest to promote the general welfare of the people of the state.'" *Miller*, 295 Kan. at 651 (quoting *Kansas Malpractice Victims Coal.*, 243 Kan. at 343-44); *accord Manzanares v. Bell*, 214 Kan. 589, 599, 522 P.2d 1291 (1974). Due process simply requires that "'the legislative means selected have a real and substantial relation to the objective sought.'" *Miller*, 295 Kan. at 651 (quoting *Kansas Malpractice Victims Coal.*, 243 Kan. at 344).

This case, which has little in common with tort reform cases like *Miller*, highlights why the Court should apply traditional due process principles instead of the quid pro quo requirement this Court has used as a proxy for due process in tort reform cases. Allowing courts to extend the common law to new contexts based on modern public policy determinations and then prohibit the Legislature from modifying or reversing the courts' public policy decisions without providing a substitute remedy would raise serious separation of powers concerns. *See Sierra Club v. Mosier*, 305 Kan. 1090, 1112, 391 P.3d 667 (2017) ("Under the separation of powers doctrine, determination of the appropriate policy must be left to the legislative and executive branches of Kansas government."); *Unified Sch. Dist. No. 229 v. State*, 256 Kan. 232, 238, 885 P.2d 1170 (1994) ("In determining whether a statute is constitutional, courts must guard against substituting their views on economic or social policy for those of the legislature." (quotation marks omitted)).

K.S.A. 60-1906 satisfies the due process requirements of §§ 5 and 18 because plaintiffs had no vested right in a wrongful birth cause of action when the statute was enacted and the statute is reasonably related to a permissible legislative objective of promoting the State's policy that every life is valuable. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992) (reiterating that States have "legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child"); *Bruggeman v. Schimke*, 239 Kan. 245, 254, 718 P.2d 635 (1986) ("It has long been a fundamental principle of our law that human life is precious."). And the law does not burden the right of a woman to, under certain circumstances, have an abortion.

2. Alternatively, the Court would need to reconsider its § 5 and § 18 case law to comport with the text and purpose of those provisions.

Section 5 provides: "The right of trial by jury shall be inviolate." Plaintiffs claim these words provide a substantive right to a cause of action the Court first recognized in 1990 and the Legislature later eliminated. They cite no authority for this, and this Court's cases suggest otherwise. *See, e.g.*, *Smith v. Printup*, 254 Kan. 315, 322, 332-33, 566 P.2d 985 (1993) (holding that even though punitive damages were determined by a jury at common law, a statute requiring courts to determine punitive damages did not violate § 5 because a "claim for punitive damages is not a 'cause of action'"); *Bair*, 248 Kan. at 835-36 (holding that the Legislature's elimination of a claim for vicarious liability did not violate § 5); *Hasty v. Pierpont*, 146 Kan. 517, 72 P.2d 69, 71 (1937) ("*When a cause is properly justiciable* before a

jury, such a trial may not be denied without the assent of parties. Kansas Bill of Rights." (emphasis added)); *cf. Samsel v. Wheeler Transp. Servs., Inc.*, 246 Kan. 336, 363, 789 P.2d 541 (1990) (McFarland, J., concurring) ("[T]he scope of the remedy to be afforded is a matter of legislative determination without the quid pro quo requirement affixed by the majority.").

Section 18 provides: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." This language, a form of which is found in numerous state constitutions, was intended to "protect the judiciary from corruption and to ensure its independence," Shannon M. Roesler, Comment, *The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 U. Kan. L. Rev. 655, 669 (1999), and not to guarantee a substantive entitlement to a remedy. *See* Brief of Intervenor Kansas Attorney General, *Hilburn v. Enerpipe Ltd.*, No. 14-112765-S (Mar. 26, 2018) (compiling cases); *see also* Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279, 1293 (1995). The focus of Section 18 is not on ensuring a substantive right to pursue all remedies without regard to legislative or judicial restrictions, but on guaranteeing that every plaintiff has a free and unbiased opportunity to recover whatever remedies the law provides by "due course of law."

K.S.A. 60-1906 does not violate § 5 or § 18, properly applied, but this Court should not be the first to address these issues.

CONCLUSION

The petition should be denied.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT

/s/ Bryan C. Clark
Toby Crouse, #20030
Solicitor General of Kansas
Bryan C. Clark, # 24717
Assistant Solicitor General
Dwight R. Carswell, # 25111
Assistant Solicitor General
Memorial Building, 2nd Floor
120 SW 10th Ave.
Topeka, KS 66612-1597
Telephone: (785) 296-2215
Fax: (785) 291-3767
toby.crouse@ag.ks.gov
bryan.clark@ag.ks.gov
dwight.carswell@ag.ks.gov

Attorneys for Intervenor Kansas Attorney General Derek Schmidt

CERTIFICATE OF SERVICE

I certify that on this 9th day of August 2018, this Response was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy was e-mailed to:

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

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

Attorneys for Plaintiffs-Appellants

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

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

/s/ Bryan C. Clark

Bryan C. Clark, KS # 24717
Attorney for Intervenor Kansas Attorney General Derek Schmidt