No. 17-117439-A

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.

APPELLANT'S PETITION FOR REVIEW

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

Table of Contents

Prayer for Review

Plaintiffs Alysia R. Tillman and Storm Fleetwood respectfully pray the Court exercise its discretion and grant review of the Kansas Court of Appeals' decision in its Order affirming the District Court's grant of Defendant Goodpasture's Motion for Summary Disposition. Relief is warranted because this case presents a constitutional challenge that has not previously been presented to this Court. It also provides an opportunity for this Court to clarify the application of Sections 5 and 18 of the Bill of Rights and correct a Court of Appeals decision that contradicts this Court's precedent.

Date of the Decision of the Court of Appeals

The Kansas Court of Appeals filed its Order on June 15, 2018.

Statement of Issues for Which Review Is Sought

I. K.S.A. § 60-1906 bars common law medical negligence wrongful birth causes of action without providing a substitute remedy. Section 5 of the Bill of Rights of the Kansas Constitution guarantees the right to trial by jury for common law actions at law. Does K.S.A. § 60-1906 violate Section 5?

II. K.S.A. § 60-1906 bars common law medical negligence wrongful birth causes of action without providing a substitute remedy. Section 18 of the Bill of Rights of the Kansas Constitution guarantees the right to remedy by due course of law. Does K.S.A. § 60-1906 violate Section 18?

Factual Statement of the Case

Alysia Tillman and Storm Fleetwood (Plaintiffs) employed Katherine A. Goodpasture, D.O. (Defendant) to provide ongoing obstetrical prenatal medical care,

treatment, and management of Plaintiff Tillman's pregnancy. Vol. 1, p. 4. On January 24, 2014, Defendant incorrectly assured Plaintiffs that the obstetrical ultrasound demonstrated a healthy female fetus with normal anatomy and no fetal anatomical abnormalities. Vol. 1, p. 4–5. In reality, the obstetrical ultrasound did not demonstrate a healthy female fetus with normal anatomy. Vol 1, p. 5. Instead, it demonstrated severe structural deformities and defects of the brain of the fetus. *Id.*

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

Arguments and Authorities

I. The Supreme Court Should Accept Review of this Case.

This Court should accept review of this case first and foremost because this Court has not yet considered the Constitutionality of the legislature's ban on wrongful birth causes of action. In 2013, the Kansas legislature enacted K.S.A. § 60-1906(a), which reads:

> No civil action may be commenced in any court for a claim of wrongful life or wrongful birth, and no damages may be recovered in any civil action for any physical condition of a minor that existed at the time of such minor's birth if the damages sought arise out of a claim that a person's action or omission contributed to such minor's mother not obtaining an abortion.

The Court should consider whether this statute violates Sections 5 and 18 of the Bill of Rights of the Kansas Constitution.

It is important that this Court consider this issue because, as evidenced by the briefing and orders in this case, there is uncertainty about the proper test for protection under Sections 5 and 18 of the Bill of Rights of the Kansas Constitution. This Court should accept review to provide guidance on the contours of those protections and their application to wrongful birth causes of action. It should hold that Section 5 and 18 protect the right to bring a cause of action for wrongful birth.

Under Section 5, the right to trial by jury is guaranteed as it existed at common law when the Kansas Constitution was adopted. *Miller v. Johnson*, 295 Kan. 636, 647, 289 P.3d 1098, 1108 (2012). The constitutional right to trial by jury was "predicated on whether the action at common law was one of law or in equity." *First Nat'l Bank of Olathe v. Clark*, 226 Kan. 619, 622, 602 P.2d 1299, 1302 (1979). Actions at law are entitled to trial by jury. *Kan. Malpractice Victims v. Bell*, 243 Kan. 333, 343, 757 P.2d 251, 258

(1988). Therefore, the question is whether wrongful birth causes of action are at law or in equity.

K.S.A. § 60-1906(a) violates the right to trial by jury because the wrongful birth cause of action is an action at law. An action at law is an action seeking monetary recovery or damages. *Id.* Common law negligence actions, including medical malpractice, seek monetary damages and were triable to a jury at common law. *Id.* at 342-43, 757 P.2d at 258. Therefore, Section 5 protects the right to a jury trial in medical malpractice cases. A wrongful birth action is simply a type of medical malpractice action and is therefore protected under Section 5. *See, Arche v. U. S. Dep't of Army*, 247 Kan. 276, 281, 798 P.2d 477, 480 (1990).

Two prior Kansas Supreme Court cases control the analysis of whether wrongful birth claims are common law actions at law under Section 5. First, in *Arche*, this Court recognized wrongful birth as a common law action in medical negligence. *Id.* at 281, 798 P.2d at 480. Second, in *Lemuz ex rel. Lemuz v. Fieser*, this Court recognized corporate negligence as merely a different application of the negligence cause of action that existed at common law when the Constitution was adopted. 261 Kan. 936, 945, 933 P.2d 134, 142 (1997). Here, wrongful birth is merely a different application of the medical negligence action that existed at common law when the Constitution was adopted. Therefore, the wrongful birth cause of action is a common law action at law and Section 5 protects the right to try a wrongful birth cause of action to a jury.

The Court of Appeals misapplied this Court's jurisprudence on Section 5 protection for causes of action at law. The Court of Appeals acknowledged that this Court has

historically analyzed Section 5 application by considering whether the general cause of action at issue is at law or in equity. Ct. App. Op. 8. Instead of following that precedent here, the Court of Appeals analyzed the specific wrongful birth cause of action, found it was not recognized at common law, even though it is an action at law, and denied Section 5 protection. Ct. App. Op. 9. The Court of Appeals arrived at this conclusion as a result of several specific flaws in reasoning, which this Petition discusses in detail.

K.S.A. § 60-1906(a) violates the right to remedy by due course of law. Section 18 of the Bill of Rights of the Kansas Constitution guarantees the right to remedy by due course of law. Section 18 applies to all common law causes of action, whether they existed when the Kansas Constitution was adopted or not. *See Miller*, 295 Kan. at 636 Syl. ¶ 2, ¶ 3, 289 P.3d at 1102. Because wrongful birth causes of action are common law causes of action, they are protected by Section 18.

The Kansas Court of Appeals misread the Section 18 precedent to only protect specific causes of action that existed when the Kansas Constitution was adopted in 1859. Ct. App. Op. 15. Though two Kansas Supreme Court cases appear to stand for this proposition, the cases they cite do not support such a rule and therefore the rule should not be relied upon. On the contrary, the line of Kansas cases analyzing Section 18 does not require the cause of action to be one that existed in 1859. *See Hanson v. Krehbiel*, 68 Kan. 670, 75 P. 1041, 1042 (1904); *Miller*, 295 Kan. at 655–66, 269 P. 3d at 1113. Even if the Kansas Court of Appeals were correct to require the existence of the cause of action at common law, the requirement would be satisfied because the general medical negligence cause of action existed at common law in 1859.

The cause of action for wrongful birth is protected by Sections 5 and 18 and therefore cannot be abrogated without a substitute remedy. *Miller*, 295 Kan. at 651–52, 269 P.3d at 1111. Because the Court of Appeals erroneously found Sections 5 and 18 did not protect the medical negligence wrongful birth cause of action, it did not consider whether the legislature provided an adequate substitute remedy when it prohibited this cause of action. Ct. App. Op. 17. The legislature has provided no substitute remedy, let alone an adequate one, and K.S.A. § 60-1906 is therefore unconstitutional.

This Court should accept review to consider the constitutionality of K.S.A. § 60-1906, to clarify the application for Section 5 and 18 protection, and to correct the Court of Appeals' application of the applicable law.

II. Section 5 Protects Medical Negligence Wrongful Birth Claims Because the Cause of Action Is Recognized at Common Law.

Section 5 protects actions at law that existed when Constitution was adopted in 1859. *First Nat'l Bank of Olathe*, 226 Kan. at 622–23, 602 P.2d at 1302–03. Actions at law seek monetary damages. *Kan. Malpractice Victims*, 243 Kan. at 343, 757 P.2d at 258. Plaintiff brings a cause of action for money damages. Plaintiff's claim is therefore at law. Additionally, Plaintiff's claim is a type of medical negligence claim, which indisputably existed in 1859 as an action at law that was triable to a jury. This Court's opinions in *Arche* and *Lemuz* allow for no other conclusion.

Arche established the wrongful birth cause of action as a type of medical negligence action. 247 Kan. at 281, 798 P.2d at 480. The Court began by calling the action in question a "medical malpractice wrongful birth action." *Id.* at 276, 798 P.2d at 477. Next, the Court

set out the elements necessary to prevail in a medical malpractice action as follows: "(1) that a duty was owed by the physician to the patient; (2) that the duty was breached; and (3) that a casual connection existed between the breached duty and the injury sustained by the patient." *Id.* at 281, 798 P.2d at 480. The Court noted that the plaintiff could have had an abortion if it were determined that the unborn child had a physical or mental defect and that under *Roe v. Wade*, a woman has a right to an abortion. *Id.* at 281, 798 P.2d at 480. (citing K.S.A. § 21-3407). Next, for the purpose of analyzing the question at issue, the Court assumed the plaintiff "was denied her right to make an informed decision whether or not to seek an abortion under facts which could and should have been disclosed." *Id.* at 281, 798 P.2d at 480. In other words, the Court assumed the doctor had breached the duty to provide information necessary to make an informed decision and that beach caused the plaintiff's inability to exercise her right to make an informed decision. *Id.* at 281, 798 P.2d at 480. Finally, the Court held that under such facts, the medical negligence wrongful birth cause of action is recognized in Kansas. *Id.* at 281, 798 P.2d at 480. The Court therefore found medical negligence wrongful birth is cognizable as a medical negligence action.

Contrary to the Court of Appeals' conclusion, the Court did not lay out any extra elements required to establish a wrongful birth cause of action above and beyond those required for medical negligence. The Court did note that "[i]n recognizing a cause of action for wrongful birth in this state, we *assume* that the child is severely and permanently handicapped, . . . that there is negligence on the part of the defendants; that the gross defects of the child could have been determined by appropriate testing prior to birth; that defendants owed plaintiffs a duty to perform such tests; and that no such tests were offered

or performed, or if performed, were negligently performed." (emphasis added). *Id.* at 281, 798 P.2d at 480–81. This does not mean that Kansas law requires additional elements for wrongful birth causes of action above and beyond the elements required to prove medical negligence. If this Court meant to add elements, it would have stated so clearly, as it stated the elements of medical negligence. The Court would have used words like "held" or "found." Instead, the Court assumed these facts just as it assumed the plaintiff was denied her right to make an informed decision in the previous paragraph. In other words, it assumed these facts for the purpose of making the decision required in the case. There is no indication whatsoever that these facts would be required in another cause bringing the same cause of action. On the contrary, in context, this paragraph of *Arche* is much more fairly read as limiting the Court's holding to the issue before it and foregoing the opportunity to determine whether a threshold level of damages is required than to add elements to the cause of action.

Lemuz establishes that the Bill of Rights protects new applications of old causes of action as if the new application existed at common law at the adoption of the Constitution. 261 Kan. at 945, 933 P.2d at 142. In *Lemuz*, this Court considered Constitutional protection for corporate negligence causes of action and held that they "are simply different applications of the basic concepts of negligence which existed at common law when the Kansas Constitution was adopted." *Id.* at 945, 933 P.2d at 142. As this Court explained, "[o]nce this new duty for hospitals [i.e., the duty to exercise reasonable care in granting, reviewing, and extending staff privileges] is plugged into an old cause of action, negligence, the hospital's liability under the corporate negligence doctrine develops. Thus,

corporate negligence causes of action are not "new" causes of action but are simply different applications of the basic concepts of negligence which existed at common law when the Kansas Constitution was adopted." *Id.* at 945, 933 P.2d at 142. (citations omitted). That is exactly the case at bar. Here, the wrongful birth cause of action is simply a different application of the basic concepts of medical negligence which existed at common law. The duty to exercise the same degree of care and skill that a medical professional of the same specialty would exercise in reading an ultrasound, advising a patient of those results, and advising the patient of her options is plugged into an old cause of action, negligence. Wrongful birth causes of action are not "new."

Arche and *Lemuz* compel the holding that wrongful birth causes of action are simply a new application of the medical negligence action, which existed at common law as an action at law and therefore carry a right to trial by jury under Section 5.

III. The Court of Appeals Reasoning on Section 5 Is in Error

The Court of Appeals erred in refusing to read the wrongful birth cause of action as a type of medical negligence cause of action justiciable at law in 1859. The Court of Appeals acknowledged that historically this Court has considered the general nature of a cause of action – whether it was an action at law or in equity – to determine whether Section 5 applied. Ct. App. Op. 8. Despite that acknowledgement, the Court of Appeals turned *Lemuz* on its head and erroneously distinguished the specific wrongful birth cause of action here from the specific corporate negligence cause of action in *Lemuz*, without acknowledging that both are tied to general causes of action recognized at common law. *Id.* at 9. Instead, citing five reasons, the Court of Appeals labeled medical negligence

wrongful birth a new cause of action. *Id.* at 11–13. Plaintiff addresses each of these five grounds in turn.

First, the Court of Appeals read *Arche* to add elements to the wrongful birth cause of action and found these additional elements changed the cause of action from a negligence action existing at common law into a new tort. *Id.* at 11. As discussed in the previous section, this Court never stated in *Arche* that wrongful birth causes of action required proof of additional elements. This Court simply assumed facts in the course of its analysis. An assumption of facts is not a holding that those facts are required.

Second, the Court of Appeals reasoned that the wrongful birth cause of action is not analogous to the corporate negligence cause of action considered in *Lemuz*, because in *Arche* this Court did not specifically state wrongful birth was simply a different application of negligence. Ct. App. Op. 11–12. Of course, the Court had no reason to do so in *Arche*, because Section 5 protection was not at issue, and the existence of wrongful birth causes of action at common law was irrelevant. As discussed above, the wrongful birth cause of action is directly analogous to the corporate negligence cause of action in *Lemuz*, was therefore in existence at common law, and should be afforded the same protection as corporate negligence.

Third, the Court of Appeals found that wrongful birth is a "new claim" and "new tort," because Justice Six referred to it that way in his concurring opinion in *Arche*, and this Court referred to wrongful birth as a new cause of action in *OMI Holdings, Inc. v. Howell*, 260 Kan. 305, 314, 918 P.2d 1274, 1282 (1996). Ct. App. Op. 12. Neither Justice Six's concurrence nor the *OMI Holdings* reference is dispositive. The references in Justice

Six's concurring opinion are far from precedential and do not necessarily reflect the majority view. This Court's reference to wrongful birth as a new cause of action in *OMI Holdings* is, at best, dicta. The reference appears in a statement of the arguments presented by the plaintiff, not in the Court's own reasoning or holding. *Id.* at 314, 918 P.2d at 1281–82. In *OMI Holdings*, the Court was presented with the question of whether to adopt the new tort of embracery. *Id.* at 313–14, 918 P.2d at 1281. Plaintiff cited a number of cases in which it believed the Kansas Supreme Court had adopted new torts, including *Arche*. *Id* at 314, 918 P.2d at 1281–82. This Court neither confirmed nor denied plaintiff's assertion about *Arche*. *Id* at 314, 918 P.2d at 1281–82. It did not even begin to consider whether the wrongful birth cause of action is a "new tort" for purposes of constitutional protection.

Fourth, the Court of Appeals stated that the tort of wrongful birth is "founded on public policy that sprang into being in 1973" and did not exist in 1859. Ct. App. Op. 12–13. This is not accurate. More importantly, it is irrelevant. The public policy surrounding abortion is not the question presented to the Court. If, as the Court of Appeals opinion suggests, changes in public policy preclude Constitutional protection, the common law would have to remain static, which is contrary to this Court's precedent and simply not possible under our justice system. *See Hoffman v. Dautel*, 189 Kan. 165, 168, 368 P.2d 57, 59 (1962). This Court rejected the very same argument precluding evolution of the law in *Lemuz*. 261 Kan. at 945, 933 P.2d at 142. It is also not accurate to state that wrongful birth is founded on public policy that sprang into being in 1973. As the Supreme Court of the United States explained at length in *Roe v. Wade*, abortions at various stages of pregnancy have been legal throughout much of human history, including early common

law. 410 U.S. 113, 129–141 (1973). The Supreme Court did not announce public policy in *Roe*, it interpreted the Constitution. *Id.* at 152–53. It reached its conclusion against the backdrop of jurisprudence protecting privacy and with an acknowledgement that medical advancements had significantly lessened the state's interest in protecting a woman's safety in undergoing an abortion. *Id.* at 148–50, 152–53.

Fifth, the Court of Appeals relied on this Court's refusal to recognize a claim for wrongful life in *Bruggeman v. Schimke*, 239 Kan. 245, 254, 718 P.2d 635, 642 (1986), to bolster an irrelevant public policy statement on the value of life. The *Bruggeman* holding is entirely irrelevant here. Plaintiff does not assert a claim of wrongful life. Plaintiff asserts a claim for wrongful birth, which this Court has previously recognized. Public policy considerations about the value of life are not at issue in this appeal. A woman has a right to make an informed decision about whether to have an abortion. The question on this appeal is whether the Kansas Constitution protects a woman's right to seek redress when medical negligence extinguishes her right to make that informed decision.

IV. Section 18 Protects Medical Negligence Wrongful Birth Claims Because the Cause of Action Was Recognized at Common Law.

Section 18 states: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Under this Court's precedent, Section 18 applies to all common law causes of action. *See e.g., Ernest v. Faler*, 237 Kan. 125, 131–35, 697 P.2d 870, 874–77 (1985) (notice of claim statute violated Section 18); *Manzanares v. Bell*, 214 Kan. 589, 598–99, 522 P.2d 1291, 1300–01 (1974) (holding Kansas No-Fault Act did not violate Section 18 because the right

received in exchange was no less adequate); *Neely v. St. Francis Hosp. & Sch. of Nursing, Inc.*, 192 Kan. 716, 719–23, 391 P.2d 155, 157–60 (1964) (holding statute exempting funds from attachment, garnishment or other process to enforce judgment against charitable organizations violated Section 18); *Noel v. Menninger Found.*, 175 Kan. 751, 762–64, 267 P.2d 934, 942–43 (1954) (holding charitable immunity violated Section 18). As discussed in Part A, infra, wrongful birth is a medical malpractice cause of action justiciable at common law. Therefore, Section 18 protects the right to a remedy for wrongful birth.

V. The Court of Appeals Reasoning on Section 18 Is in Error.

The Court of Appeals applied an inapposite opinion on Section 18 to support this Court's misstatement in *Leiker* that Section 18 applies only to specific causes of action that were justiciable in 1859. The Court of Appeals acknowledged that none of the cases to which *Leiker* cites support this understanding of Section 18 protection. Nevertheless, the Kansas Court of Appeals quoted the following passage from *Brown v. Wichita State Univ.*, to support its conclusion:

> Section 18 does not create any new rights, but merely recognizes long established systems of laws existing prior to the adoption of the constitution. Since the right to sue the state for torts was a right denied at common law, such right is not protected by Section 18. This conclusion is consistent with our view that the laws at the time the constitution was framed are relevant in interpreting our constitution.

219 Kan. 2, 10, 547 P.2d 1015, 1023 (1976) (citations omitted).

When placed in the proper context, *Brown* does not hold that Section 18 only applies to specific causes of action justiciable in 1859. *Brown* asked a different question entirely – whether common law immunities in existence at the time of the Constitution remained

in existence after Section 18 was adopted. *See id.* at 10, 547 P.2d at 1023. *Brown* addressed the constitutionality of a statute establishing governmental immunity, which existed prior to and at the adoption of the Kansas Constitution, and found that immunity constitutional. *Id.* at 5, 547 P.2d at 1019. Importantly, following the portion of the opinion quoted in the Court of Appeals, *Brown* goes on to say that "[i]t seems unlikely framers of our constitution intended Section 18 to abrogate governmental immunity." *Id.* at 10, 547 P.2d at 1023. This indicates that this Court looked to the laws in existence at the time of the Constitution to consider whether the framers intended to abrogate immunity, not whether the cause of action existed. *Brown*'s statement that Section 18 "recognizes long established systems of laws" is merely another way of saying it recognizes the common law. That differs from saying that a specific common law cause of action must have been in existence in 1859 to be protected under Section 18. On the contrary, *Lemuz* specifically holds that the specific cause of action did not have to exist in 1859 as long as the general cause of action existed at common law. 261 Kan. at 945, 933 P.2d at 142.

To the extent that the medical negligence wrongful birth cause of action may not have been a cognizable claim in 1859 because of a criminal statute, that criminal statute does not have the same bearing on Section 18 as common law immunity does. Section 18 protects common law causes of action that were not barred at the adoption of the Constitution. Causes of action for medical negligence were not barred. The common law has since developed to acknowledge wrongful birth causes of action as applications of the broader medical negligence cause of action. That general cause of action has always been protected and, under *Lemuz*, the wrongful birth application is likewise protected.

CONCLUSION

This case presents issues in need of Supreme Court consideration. This Court has not analyzed K.S.A. § 60-1906 and has not explicitly determined whether medical negligence wrongful birth actions existed at common law. The Court of Appeals reached an incorrect opinion, in part, because of confusion surrounding the proper application of Section 5 and 18 protections. This Court should accept review to address those issues and hold that the Kansas Constitution protects the right to bring wrongful birth causes of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that *Appellant's Petition for Review* was filed via the Court's electronic filing system this 10th day of July, 2018, which sent notifications of such filing to all counsel of record. The undersigned also e-mailed *Appellant's Petition for Review* to the persons below at the e-mail addresses listed.

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APPENDIX

1. Court of Appeals Order affirming District Court's grant of Defendant Goodpasture's motion for summary disposition filed June 15, 2018.
2. District Court Order on Motion for Judgment on the Pleadings filed on February 7, 2017.