

2000

Wood v. University of Utah Medical : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MARIE WOOD and TERRY BORMAN
individually, and additionally as the natural
parents of MARY LORRAINE WOOD
BORMAN, a minor,

Plaintiffs/Appellants,

vs.

UNIVERSITY OF UTAH MEDICAL
CENTER,

Defendant Appellee.

No. 20000827-SC

(Priority No. 15)

BRIEF OF APPELLEE

Appeal from the Third Judicial District Court
Salt Lake County, State of Utah
Honorable Homer F. Wilkinson, Presiding

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UTAH SUPREME COURT

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PAT BARTHOLOMEW
CLERK OF THE COURT

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BRIEF OF APPELLEE

STATEMENT OF ISSUES

Although the plaintiffs' brief states the issues in argumentative form, they are essentially correct if stripped of their argumentative overhead. The issues in this case are:

1. Did the District Court correctly rule that the Utah Wrongful Life Act, Utah Code Ann. §§ 78-11-23, *et seq.*, is constitutional under the following constitutional provisions:

- a. Open courts provision of the Utah Constitution, article I, section 11.
- b. Due Process Clause of the 14th amendment to the U.S. Constitution, and article 1, section 7 of the Utah Constitution.

c. Equal Protection Clause of the 14th amendment to the U.S. Constitution and article 1, section 24 of the Utah Constitution.

2. Did the District Court correctly decide that the Act also barred plaintiffs' informed consent claim?

The foregoing decisions of the District Court are reviewed for correctness. "A statute is presumed constitutional, and 'we resolve any reasonable doubts in favor of constitutionality.'" *Board of Commissioners of Utah State Bar v. Petersen*, 937 P.2d 1263, 1267 (Utah 1997) (quoting *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 920 (Utah 1993)). "[T]he party challenging a statute bears the burden of proving its invalidity." *Blue Cross and Blue Shield v. State*, 779 P.2d 634, 637 (Utah 1989).

There is some support in Utah law for the proposition that statutes challenged as unconstitutional under the open courts provision are not entitled to the ordinary presumption of validity. See *Hipwell v. Sharp*, 858 P.2d 987, 988 n.4 (Utah 1993); *Currier v. Holden*, 862 P.2d 1357, 1362-63 (Utah Ct. App. 1993). The reasoning behind this position in substance is that the right to sue protected by the open courts provision is essentially a fundamental right the impairment of which is subject to heightened scrutiny. See *Condemarin v. University Hospital*, 775 P.2d 348, 368 (Utah 1989) (Zimmerman, J., concurring in the result).

This Court has never directly addressed the question of heightened scrutiny under such circumstances. If such scrutiny were applied, it would be contrary to the Court's repeated pronouncements in open courts provision cases that the Legislature has "great latitude in defining, changing, and modernizing the law." *Craftsman Builder's Supply v.*

Butler Mfg., 974 P.2d 1194, 1198 (Utah 1999) (quoting *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676 (Utah 1985)). *Accord*, *Hirpa v. IHC Hospitals, Inc.*, 948 P.2d 785, 792 (Utah 1997) (rights protected by open courts provision are “not always paramount”).

Moreover, there seems to be little justification for elevating this constitutional right above others. To do so would be to send a message to the Legislature that this Court intends to place a roadblock in front of legislation affecting the rights and obligations of citizens to each other, and that the Court views its own opinion on the subject to be entitled to greater weight than that of the elected Legislature. The present case arises in an arena where the advancements of science are outpacing traditional legal remedies. Where the Legislature has taken express action in such an evolving area, the balance of power is better achieved by appropriate, but not unlimited, deference to the Legislature’s decisions concerning such evolving social policy.

STATEMENT OF THE CASE

Plaintiffs assert claims for wrongful birth for the birth of Mary Lorraine Wood Borman, a child born with Down Syndrome (genotype TRISOMY 21), and seek a declaratory judgment that the Utah Wrongful Life Act, Utah Code Ann. §§ 78-11-23, *et seq.* (the “Act”) is unconstitutional. Plaintiffs also assert a wrongful life claim on behalf of Mary, and claims labeled negligent infliction of emotional distress and failure to obtain informed consent which are also based on Mary’s alleged wrongful birth.

RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

For purposes of this appeal, the University does not dispute plaintiffs' statement of facts.

SUMMARY OF ARGUMENT

This is not a case where a doctor's actions caused a child to be born with defects. "The disorder is genetic and not the result of any injury negligently inflicted by the doctor." *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528, 536 (1985), *cert. denied*, 479 U.S. 835 (1986). "It is incurable and was incurable from the moment of conception. Thus the doctor's alleged negligent failure to detect it during prenatal examination cannot be considered a cause of the condition by analogy to those cases in which the doctor has failed to make a timely diagnosis of a curable disease. The child's handicap is an inextinguishable result of conception and birth." *Id.*

The issue in this case is not whether a cause of action for wrongful birth or wrongful life should be recognized in Utah. The Legislature has already made that public policy determination and prohibited such claims. The issue in this case, therefore, is only whether the Legislature in doing so acted within its constitutional prerogative.

As the Legislature explicitly recognized, there are significant adverse societal consequences to allowing claims for wrongful birth and wrongful life to go forward. The prosecution of such an action "requires that parents deny the worth of their child, thus placing their own values over those of the child." *C.S. v. Nielson*, 767 P.2d 504, 523 (Utah 1988) (Howe, J., dissenting). Such claims stigmatize the "defective" child. They place the imprimatur of law on a claim that the child's family, and society in general,

would be better off had the child not been born. They “denigrate[] human life” and are “an insidious attack on the family unit.” *Id.*

One cannot pass over how painful to parents and child alike an action by parents must be. Parents will show that they did not want the child in his condition and that he would have been aborted had it not been for the professional inattentiveness of a physician or other medical person. Had they known, he never would have been. It is public policy obviously to encourage love and harmony in family relationships. Public policy which importance transcends individual disputes will hardly be served by lawsuits of this character.

Siemieniec v. Lutheran General Hospital, 117 Ill. 2d 230, 512 N.E.2d 691, 709 (1987) (Ward, J., concurring and dissenting).

Thus, the Legislature was well within its power in passing the Act and prohibiting such actions. Especially where the frontiers of science and law are evolving together, as they are in this area, great deference should be accorded to the Legislature’s decision, as the elected representatives of the people, to make the difficult policy questions involved.

Plaintiffs have failed to meet their burden of overcoming the presumption of constitutionality of the Act. They have failed to establish that in passing the Act, the Legislature eliminated a legal remedy existing at the time of enactment or that the Act does not represent a reasonable response to a societal evil, as required to prove a violation of the open courts provision. They have failed to show, as required by the Due Process clauses of the United States and Utah constitutions, that the Act has an unlawful purpose or places significant obstacles in the path of a woman’s right to choose to have an abortion. They have failed to prove they are similarly situated to but are treated differently from others whose rights are not burdened or that the Act is not narrowly tailored to achieve a compelling state interest.

Every statute barring claims for wrongful birth and wrongful life which has been challenged as unconstitutional has withstood scrutiny. The Utah Wrongful Life Act is constitutional under both the Utah and United States Constitutions. Because plaintiffs' remaining claims depend upon the allegation that Mary would have been aborted, a factual basis the Act precludes, they also fail as a matter of law.

ARGUMENT

I. THE UTAH WRONGFUL LIFE ACT.

The Utah Legislature enacted the Utah Wrongful Life Act in 1983. The Act contains a legislative declaration of purpose, followed by a ban on claims based upon the allegation that, but for the act or omission of another, a person would not have been born:

The Legislature finds and declares that it is the public policy of this state to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency, including all handicapped persons and all unborn persons.

A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.

The failure or refusal of any person to prevent the live birth of a person shall not be a defense in any action, and shall not be considered in awarding damages or child support, or imposing a penalty, in any action.

Utah Code Ann. §§ 78-11-23 through 25.

Seven other states have enacted similar statutes. *See* Idaho Code § 5-334; Ind. Code Ann. § 34-12-1-1; Minn. Stat. § 145.424; Mo. Rev. Stat. § 188.130; N.D. Cent. Code § 32-03-43; 42 Pa. Cons. Stat. § 8305; S.D. Codified Laws § 21-55-1. The Minnesota and Pennsylvania statutes have been challenged as unconstitutional. Both were up-

held. *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986); *Dansby v. Thomas Jefferson University Hosp.*, 424 Pa. Super. 549, 623 A.2d 816 (1993).

Claims in this general area fall into three general categories. *Wrongful pregnancy* cases involve claims arising out of negligence with regard to birth control and sterilization procedures. *Wrongful birth* claims are asserted by parents who allege that an erroneous post-conception diagnosis led them to give birth to a “defective” child whom they would have aborted had the diagnosis been correct. *Wrongful life* claims are similar to wrongful birth claims, but are asserted by or on behalf of the defective child. See *C.S. v. Nielson*, 767 P.2d 504, 506 (Utah 1988) (recognizing wrongful pregnancy claim but restricting nature of recoverable damages). Wrongful life claims, in particular, are not favored. See *Kassama v. Magat*, 136 Md. App. 637, 767 A.2d 348, 365 (2001).

II. THE ACT DOES NOT VIOLATE THE OPEN COURTS PROVISION.

Plaintiffs assert the Act violates the open courts provision of the Utah Constitution because it eliminates an existing cause of action for which there is no clear social or economic evil and fails to provide a reasonable alternative remedy. The open courts provision provides:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

Utah Constitution, article I, section 11.

The open courts provision is not an inflexible bar to the Legislature's, or the Court's, ability to effectuate change in the law to address changing social needs or values.

[T]he purpose of the open courts clause was to “impose some limitation” on the legislature's “great latitude in defining, changing, and modernizing the law.”

Craftsman Builder's Supply v. Butler Mfg., 974 P.2d 1194, 1198 (Utah 1999) (quoting *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676 (Utah 1985)).

The open courts analysis recognizes that “the rights of individuals protected by the open courts provision must be balanced against the Legislature's need to enact laws to meet changing societal needs. Thus, the rights protected by the open court's provision are ‘not always paramount,’ and ‘the Legislature has great latitude in defining, changing, and modernizing the law, and in doing so may create new rules of law and abrogate old ones.’” *Hirpa v. IHC Hospitals, Inc.*, 948 P.2d 785, 792 (Utah 1997) (citing *Berry*, 717 P.2d at 676 (citation omitted)). In striking that balance, the Court has held:

[W]e will declare a statute violative of the open courts provision only if it “is unreasonable and arbitrary and will not further the statutory objectives.”

To achieve the proper balance between the competing interests of allowing the legislature to address changing societal problems and protecting injured persons, a two-step process is employed to determine whether a statute abrogating a cause of action or remedy violates the open courts provision:

First, section 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy “by due course of law” for vindication of his constitutional interest Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

Id. (quoting *Berry* at 680, 681).

A. *The Act Does Not Abrogate an Existing Legal Remedy.*

The first step of the analysis is determination whether the Act abrogated an existing legal remedy. The open courts analysis is not applicable unless the statute in question “abrogates an *existing* legal remedy for the violation of a basic right” *Ross v. Schackel*, 920 P.2d 1159, 1162 (Utah 1996) (emphasis added).¹

Plaintiffs assert that Utah accepted the existence of claims for wrongful birth in *Payne ex rel. Payne v. Myers*, 743 P.2d 186 (Utah 1987). Plaintiffs have overstated the *Payne* decision. *Payne* indeed involved a claim for wrongful birth, but the Court considered the viability of that alleged claim under a governmental immunity analysis, finding that the doctors were immune and affirming dismissal of the case. In doing so, the Court assumed but did not decide that a wrongful birth claim exists under Utah law:

Assuming, but not deciding, that Utah jurisprudence should recognize an action for wrongful birth, it is necessary to determine precisely when the parents’ cause of action accrued.

743 P.2d at 188-89 (footnote omitted). The contention that the Utah Supreme Court decided in *Payne* that wrongful birth was a viable cause of action in Utah is simply wrong.

Plaintiffs assert that their claim is nothing more than a medical malpractice claim. This Court rejected similar reasoning in *C.S. v. Nielson*, 767 P.2d 504 (Utah 1988), by rejecting the availability of a remedy for the cost of raising a child that should not have

¹ Utah cases are not consistent in defining the meaning of an “existing” remedy. According to *Ross*, an “existing legal remedy” is a remedy available at common law that existed at the time of statehood. 920 P.2d at 1162. However, in *Day v. State ex rel. Dept. of Public Safety*, 1999 UT 46 ¶ 36, 980 P.2d 1171, the Court held that the issue is whether the abrogated remedy existed at the time the Legislature acted.

been born. That case involved “wrongful pregnancy” resulting from a failure to inform the patient that a tubal ligation procedure did not prevent pregnancy in all cases. While the Court viewed the negligent counseling as a form of medical malpractice, the Court treated the case as one involving the medical condition of the mother, as distinct from a case in which a decision to abort an already conceived child is asserted. 767 P.2d at 508.

The Court concluded that expenses and damages directly related to the mother’s medical condition of pregnancy could be recovered, but rejected the notion that the cost of raising the child, although proximately caused by negligence, was recoverable. 767 P.2d at 515 (plurality² opinion).

In a claim for wrongful birth, all damages depend on the assertion that the child should not have been born. The portion of the wrongful pregnancy claim that was rejected in *Nielson*, damage arising out of the existence of the child, is at the core of wrongful birth and wrongful life claims. By holding that no remedy exists at law for the birth of the child, the Court decided that ordinary medical malpractice remedies do not exist in this area of law and strongly inferred that the core concepts of wrongful life and wrongful birth claims are against public policy in Utah.

² Chief Justice Hall wrote the opinion, which was joined by Justice Stewart. Justice Howe’s dissent asserted that the claim for wrongful pregnancy should not be recognized even in the limited form allowed in the case. This yielded three votes against expanded damages. Justices Durham and Zimmerman agreed that wrongful pregnancy claims should be recognized, but advocated an expanded scope of recoverable damages which would have included certain expenses of raising the child, subject to other offsets for the “benefit” conferred by the birth of the child.

Traditional tort analysis simply does not apply when a necessary assumption is that the existence of life is a cognizable injury. As the North Carolina Supreme Court has stated:

Courts which purport to analyze wrongful birth claims in terms of “traditional” tort analysis are able to proceed to this point [proximate cause] but no further before their “traditional” analysis leaves all tradition behind or begins to break down. In order to allow recovery such courts must then take a step into *entirely untraditional analysis* by holding that the existence of a human life can constitute an injury cognizable at law. Far from being “traditional” tort analysis, such a step requires a view of human life previously unknown to the law of this jurisdiction. We are unwilling to take any such step because we are unwilling to say that life, even life with severe defects, may ever amount to a legal injury.

Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528, 533-34 (1985), *cert. denied*, 479 U.S. 835 (1986) (emphasis original).

Traditional tort analysis does not apply. No remedy has ever existed in Utah for the claims plaintiffs assert here. Accordingly, the first prong of the open courts analysis requires that the statute be upheld, and it is unnecessary to address whether the statute is a reasonable means for achieving the Legislature’s objectives.

B. *The Act Is a Constitutional Exercise of Legislative Power.*

Even if the Legislature had eliminated a previously existing right to recover for wrongful birth by passing the Act, abolition of that right would not violate the open courts provision.

Nowhere in this state’s jurisprudence is it suggested that article I, section 11 flatly prohibits the legislature from altering or even abolishing certain rights which existed at common law. In fact, in *Berry*, we specifically stated that the legislature may eliminate or abrogate a cause of action entirely if there is sufficient reason and the elimination or abrogation “is not an arbitrary or unreasonable means [of] achieving the objective.” *Berry* also makes it clear that article I, sec-

tion 11 is not to be read as preserving every common law cause of action that may have existed prior to 1896.

Cruz v. Wright, 765 P.2d 869, 871 (Utah 1988).

Elimination of a cause of action is arbitrary or unreasonable if (1) there is no clear social evil to be eliminated, or (2) elimination of the remedy is not an arbitrary or unreasonable means for addressing the social evil. *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 681 (Utah 1985).

Here, the evil to be eliminated is the stigmatization of the disabled and of unwanted children in general. The State has a compelling interest in assuring that individuals afflicted with physical or mental deformities are not viewed or treated as second-class citizens or as having less worth or fewer rights than “normal” people.

A claim that a child should not have been born labels the child as unwanted. Providing a remedy having the force of law to compensate the parents for the burden of raising that unwanted child places the imprimatur of the State on that label, in effect telling the child and those like him or her that society would prefer not to be burdened with “defective” children. Moreover, allowing such a claim to proceed because the child is “defective” runs directly counter to society’s concerted efforts to provide the disabled with equal rights and equal access. By what standard is one to judge whether a child or its parents would be better off if the child had not lived? Does the claim not require the parent to aver that the child is loved less because it is “defective,” or that the parents cannot be happy without a “perfect” child?

Claims requiring the parents to allege that they did not want a child are:

an insidious attack on the family unit since the unwanted child will someday learn that his parents did not want him and in fact went to court to force someone to pay for the medical and hospital costs attendant to his birth, the wages they lost when he was born, and the pain and suffering and “emotional trauma” of his mother. The emotional harm inflicted by this cruel knowledge will be carried by the child throughout his or her life. Who is going to compensate this unwanted child in damages for his “emotional trauma” in being born, through no fault of his own, to parents who did not want him and considered the advent of his birth not as a “blessed event,” but as damage to them?

C.S. v. Nielson, 767 P.2d 504, 523 (Utah 1988) (Howe, J., dissenting).

Such views are contrary to contemporary views of the value of life:

[They] would be incompatible with contemporary views concerning one of life’s most precious gifts – the birth of a normal and healthy child. We are loath to adopt a rule, the primary effect of which is to encourage, indeed reward, the parents’ disparagement or outright denial of the value of their child’s life.

Weintraub v. Brown, 98 A.D.2d 339, 470 N.Y.S.2d 634, 641 (1984).

The Legislature was well within the boundaries of reasonableness in concluding that such claims constitute a social evil. “Respect for life and the rights proceeding from it are at the heart of our legal system and, broader still, our civilization.” *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 447 N.E.2d 385, 389, *cert. denied sub nom. Raja v. Michael Reese Hosp. & Med. Center*, 464 U.S. (1983). The Legislature’s declaration of purpose correctly invokes the public policy “to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency.” The prohibition of a remedy based upon a claim that a child should not have been born directly and narrowly achieves that purpose.

III. THE ACT DOES NOT VIOLATE DUE PROCESS BECAUSE IT DOES NOT UNDULY BURDEN A WOMAN'S RIGHT TO CHOOSE ABORTION.

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the United States Supreme Court reaffirmed the “right of a woman to choose to have an abortion before viability and to obtain it without *undue* interference from the State.” *Id.* at 846 (emphasis added). “Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.” *Id.* at 874. “Not all burdens on the right to decide whether to terminate a pregnancy will be undue.” *Id.* at 876. A burden is undue where it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Id.* at 877.

The doctrine of *Roe v. Wade* “protects the woman from unduly burdensome interferences with her freedom to decide whether to terminate her pregnancy. In order for a state to be in violation of *Roe v. Wade*, the state must directly affect or impose a significant burden on the woman’s right to an abortion. Legislation which does not place a government obstacle in the path of a woman who chooses to terminate her pregnancy will not be deemed unconstitutional.

Dansby v. Thomas Jefferson University Hospital, 424 Pa. Super. 549, 623 A.2d 816, 819 (1993) (quoting *Maher v. Roe*, 432 U.S.464, 473-74 (1977) and citing *Harris v. McRae*, 448 U.S. 297, 315 (1980)).

A. *The Plaintiffs Have Not Established State Action.*

The Fourteenth Amendment guarantee of due process only applies where the deprivation of a constitutional right is by governmental “state action.” *Lugar v. Edmondson*

Oil Co., 457 U.S. 922, 941 (1982). Applying the fourteenth amendment, the Utah Supreme Court has held:

The general test for determining whether state action is involved in a deprivation [is:] First, the deprivation must be caused by the exercise of a state-created right or privilege. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Swayne v. L.D.S. Social Services, 795 P.2d 637, 640 (Utah 1990) (footnote omitted).

Plaintiffs cannot establish state action. They claim that by extinguishing causes of action for wrongful birth and wrongful life, the Legislature encourages physicians to withhold accurate information, and that this in turn precludes women from choosing to abort their unborn child. That alleged causal link, however, is broken by the individual choices of the non-state actors involved in the decision. Plaintiffs' argument is that, by protecting the health care provider from liability for wrongful birth, the Act facilitates the provider's imagined ability to directly mislead the woman and thus impairs her ability to make an informed choice concerning abortion. Plainly, under those hypothetical circumstances (which do not exist in this case) the provider's individual actions cause the failure of choice, and no state action is involved.

We conclude, therefore, that the legislative decision to preclude a cause of action for wrongful birth does not place a government obstacle in the path of a woman's right to choose to abort a fetus which she is carrying for whatever reason. Her freedom to decide is not impaired by a statute which denies her the right to bring an action against the physician who has negligently failed to advise her correctly regarding the health of the fetus. "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."

Dansby v. Thomas Jefferson University Hosp., 424 Pa. Super. 549, 623 A.2d 816, 819 (1993) (quoting *Harris v. McRae*, 448 U.S. 297, 316).

The Minnesota Supreme Court declared constitutional a statute barring claims for wrongful birth, in *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986). The court stated, “[W]e do not believe that the due process and equal protection clauses of the Fourteenth Amendment apply in this case. Prerequisite to a possible violation of the Fourteenth Amendment is state action or involvement.” *Id.* at 13 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)). The court continued, “How can it be argued that state action is involved in this case? The relationship here is strictly between doctor and patient. The statute does not forbid the doctor to inform the patient of new tests and the risk they entail. It does not directly touch on the expectant mother’s right to choose an abortion. Due process does not require that the state adopt regulations prohibiting purely private conduct.” *Id.* (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982)).

The Act does not regulate or directly affect a woman’s right to choose to have an abortion. It does not forbid doctors from informing patients about prenatal tests, the risks they entail and the results of any tests. The Act merely precludes claims such as this one that but for the mistakes of doctors in performing and reporting prenatal tests, a child would have been aborted prior to birth. Such a prohibition on civil claims is not state action.

B. *The Purpose of the Act is Not to Prevent Abortions.*

Plaintiffs assert that the Act violates due process because its purpose is to prevent abortions and to prevent a woman from becoming informed about the health of her unborn child. The Legislature specifically set forth the purpose of the Act in § 78-11-23. Section 78-11-23 states, “The Legislature finds and declares that it is the public policy of

this state to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency, including all handicapped persons and all unborn persons.”

“When interpreting a statute, this Court’s ‘primary goal is to give effect to the legislature’s intent in light of the purpose the statute was meant to achieve.’” *Boulder Mountain Lodge, Inc. v. Town of Boulder*, 983 P.2d 570, 573 (Utah 1999) (quoting *Evans v. State*, 963 P.2d 177, 184 (Utah 1998)). ““When faced with a question of statutory construction, we look first to the plain language of the statute.”” *C.T. ex rel. Taylor v. Johnson*, 977 P.2d 479, 481 (Utah 1999) (quoting *Stephens v. Bonneville Travel, Inc.*, 935 P.2d 518, 520 (Utah 1997) (citations omitted in original)). “[C]ourts are not to infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed.” *Id.* (quoting *Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994) (citations omitted in original)). “Only if that language is ambiguous do we then turn to a consideration of legislative history and relevant policy considerations.” *Wilson v. Valley Mental Health*, 969 P.2d 416, 418 (Utah 1998).

The stated purpose of the Act is clear and unambiguous. It is to encourage people to “respect the right to life of all other persons, regardless of age, development, condition or dependency, including all handicapped persons and all unborn persons.” Utah Code Ann. § 78-11-23. Nowhere does the Act state or even imply that its purpose is to prevent abortions or prevent a woman from becoming informed about the health of her unborn

child. Because the purpose of the Act is clear and unambiguous, the Court may not look to its legislative history to rewrite it to include a purpose not expressed.

Plaintiffs refer in their brief to so-called “legislative history” of the Act to bolster their claim that the Act had an unstated purpose of limiting abortion. This argument is unpersuasive on several levels. The sources cited are not legislative history. Rather, they are unsupported speculation and secondhand statements of individual legislators in the newspaper and in personal interviews. *See Note, Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah’s Statutory Breakwater*, 1984 Utah L. Rev. 833, 857-58 nn.152-153. Even if such sources were credible, they are an inappropriate source of legislative history in this case. Members of the Legislature voted on the statement of purpose set forth in the Act, not on floor statements or media statements of individual legislators. Where the express statement of purpose is in the Act, is clear, and was voted on, it must be accepted over the clamor of individual politicians attempting to obtain political advantage from their votes.

C. *The Act Does Not Have the Effect of Preventing a Woman From Obtaining an Abortion.*

Plaintiffs argue the Act has the effect of substantially obstructing a woman from exercising an informed decision to terminate her pregnancy by leaving doctors free to mislead women concerning their choices. That argument is incorrect, because there are other substantial penalties for doctors who engage in such conduct. Doctors are still subject to penalties for misrepresenting a patient’s condition to the patient. The Division of Occupational and Professional Licensing may “revoke, suspend, restrict, place on pro-

bation, issue a public or private reprimand to, or otherwise act upon the license of any licensee . . . [if] the . . . licensee has engaged in unprofessional conduct.” Utah Code Ann. § 58-1-401(2). The Division may also assess administrative penalties of up to \$10,000 for unprofessional conduct. Utah Code Ann. § 58-67-503(2) (citing § 58-67-402(1)). “‘Unprofessional conduct’ means . . . violating . . . any generally accepted professional or ethical standard applicable to an occupation or profession regulated under this title.” Utah Code Ann. § 58-1-501(2)(b). It is a violation of a doctor’s professional and ethical duties to make intentional misrepresentations in connection with patient care.

The Pennsylvania Superior Court rejected the “substantial obstacle” argument in *Edmonds v. Western Pennsylvania Hospital Radiology Associates of Western Pennsylvania*, 414 Pa. Super. 567, 607 A.2d 1083 (1992). In *Edmonds*, the plaintiffs challenged the constitutionality of a Pennsylvania statute prohibiting claims for wrongful birth. The *Edmonds* court ruled the statute did “not encourage either intentional misrepresentations or the negligent impartation of information relating to abortion rights” and, therefore, did not amount to state action. *Id.* at 1087. The court stated the statute did not regulate or directly affect a woman’s right to choose to have an abortion but merely extinguished causes of action arising from a claim that but for the improper conduct of a medical provider, a child would have been aborted prior to birth. *Id.* Because physicians could be disciplined or their licenses revoked or suspended if they intentionally misrepresented to a woman the state of her health or that of her unborn child in an effort to infringe upon her abortion rights, the court ruled the statute did not encourage physicians to lie to their patients. *Id.* The court continued, “[W]e would be engaging in speculation were we to

assume that this extinguishment of liability encourages such improper [negligent] behavior.” *Id.* at 1088. The court went on to rule the statute was constitutional.

The Utah Legislature has by statute allowed physicians to be fined and their licenses revoked or suspended if they intentionally misrepresent the state of a woman’s health or that of her unborn child to prevent her from having an abortion. These statutes impose severe consequences upon them for failure to do so, and thus provide sufficient protection to ensure to the best of the State’s ability that doctors adequately inform their patients of the status of their medical condition. The statutory consequences are potentially more severe than the consequences of civil litigation, prohibiting the doctor from ever practicing medicine in Utah again. Moreover, they would not be covered by malpractice insurance and would have more lasting effects than a monetary settlement.

The Act’s bar on wrongful birth claims does not constitute an undue burden on a woman’s right to choose to have an abortion. Consequently, the Act is constitutional.

IV. THE ACT DOES NOT VIOLATE EQUAL PROTECTION
BECAUSE PLAINTIFFS ARE NOT SIMILARLY SITUATED TO
THOSE THEY ALLEGE RECEIVE DIFFERENT TREATMENT
AND THE ACT IS PROPERLY TAILORED TO ACHIEVE THE
STATED INTEREST.

Plaintiffs claim that the Act violates the Equal Protection clauses of the United States and Utah constitutions because it allows recovery for negligence associated with infringement on the right to prevent a child from being conceived, but prohibits recovery for infringement on the right to abort. The Equal Protection clauses of the United States and Utah constitutions require that similarly situated individuals be treated in a similar manner. *State v. Fife*, 911 P.2d 989, 991 (Utah Ct. App.), *cert. denied*, 923 P.2d 693

(Utah 1996). “[P]ersons in different circumstances should not be treated as if their circumstances were the same.” *Id.* (quoting *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984)).

This Court in *C.S. v. Nielson*, 767 P.2d 504 (Utah 1988), clearly articulated the difference between cases involving contraception and cases involving abortion:

Such language emphasizes the critical distinction between the types of claims sought to be precluded by [the Act] and the claim alleged in the instant case. Here, plaintiff sought a means to avoid pregnancy itself. Indeed, the injury she claims resulted from the fact that she became pregnant allegedly due to her physician’s negligent counseling regarding a surgical procedure designed to prevent her from being able to conceive. Clearly, “[a] person’s decision not to conceive a child and to undergo surgical sterilization should not be confused with one’s decision to abort a child already conceived.” In order for us to adopt defendant’s view, we must ignore established and proven principles of tort law as well as the fact that in this case and others like it, it is not the birth or life of the child, but rather “the pregnancy [of the mother] as a medical condition that gives rise to compensable damages and completes the elements for a claim of negligence.” This we will not do.

767 P.2d at 508 (footnotes omitted).

Plaintiffs cannot claim they are similarly situated to individuals obtaining testing prior to conception or undergoing sterilization procedures. The plaintiffs in a wrongful pregnancy action never wanted to become parents. Their suit is based upon the alleged negligent performance of an actual sterilization or abortion procedure. Plaintiffs, however, wanted a child -- just not one who was impaired. Because they wanted a child and took measures to bring one into this world, they are not in the same class as individuals who attempted to prevent conception altogether, and have no viable challenge on equal protection grounds.

The court in *Hickman v Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986), reached the same result. The court reasoned:

[T]he state has a rational basis for distinguishing a situation where a parent decides to be sterilized and the doctor negligently performs the operation from one where the parents decide to assume certain well-known risks in childbearing and then want to sue the physician for the realization of the possible consequences. Most adults are fully aware of the risks of childbearing when the mother is over 30 years old . . . These parents should not be allowed to take the risk and then sue the doctor for the consequences.

396 N.W.2d at 14.

Even if plaintiffs were similarly situated to individuals attempting to prevent a pregnancy, the Act is properly tailored to achieve the stated interest. Before conducting an equal protection analysis, the Court must determine the standard of review that applies. If a challenged classification involves a suspect class or infringes on a fundamental right, Utah courts apply a “strict scrutiny test” and uphold the classification if it “furthers a compelling state interest.” *State ex rel. N.R. v. State*, 967 P.2d 951, 954 (Utah Ct. App. 1998) (citation omitted). If the challenged classification does not involve a suspect class or impinge on a fundamental right, courts apply a “rational basis test” and “will uphold the classification as long as it is rationally related to a valid legislative purpose.” *Id.* (citation omitted).

The purpose of the Act is to “respect the right to life of all other persons, regardless of age, development, condition or dependency, including all handicapped persons and all unborn persons,” not to prevent abortions. The State’s interest in protecting and promoting respect for the disabled is certainly a valid legislative purpose. It is also compelling. “A compelling state interest is a ‘paramount interest, one of the highest order.’”

Jeffs v. Stubbs, 970 P.2d 1234, 1250 (Utah 1998) (quoting *Sherbert v. Verner*, 374 U.S. 398 (1963)). In this situation, the Act protects a child from being labeled better dead than alive.

Various courts from other jurisdictions have articulated the importance of this interest. For example, “Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?” *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528, 533 (1985), *cert. denied*, 479 U.S. 835 (1986). “When will parents in those jurisdictions be allowed to decide that their child is so ‘defective’ that given a chance they would have aborted it while still a fetus and, as a result, then be allowed to hold their physician civilly liable? When a fetus is only the carrier of a deleterious gene and not itself impaired? When the fetus is of one sex rather than the other?” *Id.* at 535. “Judges and juries will have to determine the degree of impairment that renders a child’s nonexistence preferable to existence. Not only will such a judgment be unpalatable, but persons making this judgment can look only to their own feelings or fears of being handicapped in deciding the merits of the claim.” Comment, *The Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View*, 31 U.C.L.A. L. Rev. 473, 499 (1981) (footnote omitted).

The State also has both a legitimate and compelling interest in protecting individuals afflicted with a physical or mental deformity from being stigmatized because of their condition, and particularly from having their own parents publicly assert it would have been better for the child never to have been born because of his or her condition. *Cf. Allen v. Wright*, 468 U. S. 737, 755 (1984) (“There can be no doubt that [stigmatizing in-

jury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action”).

The only remaining question is whether the statute is properly tailored to achieve its stated purpose. For the reasons set forth in the discussion of the open courts provision, plaintiffs’ argument fails. The Act is not only rationally related but narrowly tailored to achieve the State’s interest in protecting children from stigma associated with their physical condition. It merely bars any claims parents and the child may make against others for the mere fact the child was born. It does not prohibit women carrying afflicted children from aborting them because of their condition, and it does not impose any conditions or limitations on the mother’s choice. It does not preclude parents’ actions against a doctor for causing a physical or mental deformity during gestation as a result of the doctor’s negligence. Thus, the Act is both rationally related and narrowly tailored to achieve the State’s compelling interest.

Plaintiffs are not similarly situated to those they claim receive favorable treatment. The Act directly promotes both a legitimate and compelling state interest. Consequently, plaintiffs’ equal protection claim fails as a matter of law.

V. PLAINTIFFS’ INFORMED CONSENT CLAIM FAILS AS A MATTER OF LAW BECAUSE IT IS DEPENDENT UPON THEIR WRONGFUL BIRTH CLAIM FOR SUCCESS.

Plaintiffs argue that their claim alleging negligent failure to inform Ms. Wood and Mr. Borman of the prenatal test results is separate and distinct from plaintiffs’ wrongful birth and wrongful life claims. They allege that this cause of action is unaffected by the Act. They have neglected, however, to plead essential elements necessary to prove an

informed consent claim. Specifically, they fail to allege that the prenatal testing performed on Ms. Wood carried with it a substantial and significant risk of causing her or her unborn child serious harm, that she was not informed of the substantial and significant risk of harm, that she (judged by a reasonable person standard) would not have consented to the health care if she had been fully informed concerning the substantial and significant risk of harm associated with the health care, and that the unauthorized part of the health care proximately caused her personal injuries. *See* Utah Code Ann. § 78-15-5. On this basis alone, the lower court's dismissal of the informed consent claim was appropriate and should be affirmed.

Plaintiffs' informed consent claim fails as a matter of law for other reasons, as well. The Act does not preclude claims bearing certain labels. Rather, it precludes remedies based upon the premise that an abortion would have occurred but for the act or omission of another. Plaintiffs' informed consent claim is precluded because it is based on facts described in the Act. The assertion that but for the defendant's negligence, Ms. Wood would have aborted her unborn child, is critical to plaintiffs' claim. Without that assertion, there is no claim or, more specifically, there is no damage because the genetic disorder in the child was not the fault of the physician. It is the same claim as a cause of action for wrongful birth.

Plaintiffs cite a Missouri state court decision allowing the mother of a child born with congenital abnormalities to assert a claim for failure to properly read and interpret prenatal tests and advise her of the results, despite the existence of a statute barring claims for wrongful birth and wrongful life. *Shelton v. St. Anthony's Medical Ctr.*, 781

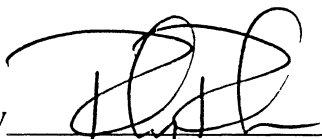
S.W.2d 48 (Mo. 1989). Utah has never recognized such a claim. The University respectfully argues that in light of the existence of the Act and its express purpose, it is not the prerogative of the courts to create a cause of action expressly barred by the Legislature. Such a judgment is better left to the Legislature, which has not only the resources to make such a determination but the responsibility, as well. Because the Legislature has not provided for an informed consent claim of this nature, plaintiffs' claim fails as a matter of law.

CONCLUSION

For the foregoing reasons, the University respectfully requests that this Court affirm the lower court's judgment.

RESPECTFULLY SUBMITTED this 11 day of June, 2001.

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Reply Brief of Appellee were served by first class mail, postage prepaid, on June 11, 2001, as follows:

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