

2000

# Wood v. University of Utah Medical : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs and Appellants,

v.

UNIVERSITY OF UTAH MEDICAL  
CENTER,

Defendant and Appellee.

**APPELANTS' REPLY BRIEF**

Supreme Court No. 20000827-SC

Priority No. 15  
Oral Argument Requested

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**REPLY BRIEF OF APPELLANTS MARIE WOOD, TERRY BORMAN and MARY  
LORRAINE WOOD BORMAN**

---

Appeal from a Judgment of the Third Judicial District Court, Salt Lake County, Honorable  
Homer F. Wilkinson, District Judge

---

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## **INTRODUCTION**

The University goes to great lengths to argue for the immunity of geneticists, regardless of whether their negligent or intentional conduct causes injury to innocent parents. But this Court has consistently rejected such immunity. As this Court stated

The failure to recognize a cause of action against a physician who negligently performs [] procedures [affecting reproductive choice] would be a grant of absolute immunity to a physician whose negligence results in injury to the patient. We decline to grant such immunity. We see no reason why a physician who performs such [procedures] should be held to a lesser standard of care than a physician or surgeon who performs any other [] procedure. Such a ruling could lead to a decrease in the standard of care, and would leave victims of professional negligence without a remedy.

*C.S. v. Nielson*, 767 P.2d 504, 508 (Utah 1988) (quotations omitted).

Regardless of the University's attempts to obfuscate the purpose of Utah Code Ann. 78-11-23 – 25 (the "Act") and demonize Wood/Borman as parents, the Act remains unconstitutional. The University is unable to establish that the Act, which eliminated an existing legal remedy, passes the *Berry* Test. The University is also unable to overcome the Act's invalid purpose. Finally, regardless of whether Wood/Borman would have aborted, they plead viable causes of action for negligent infliction of emotional distress and failure to obtain informed consent.

## **ARGUMENT**

### **I. THE BURDEN IS ON THE UNIVERSITY TO ESTABLISH THE ACT'S CONSTITUTIONALITY.**

The University argues that the Act should be blessed with a strong presumption of constitutional validity. The express and implicit holdings of Utah courts reject this presumption in this matter since this case implicates the Open Courts Clause.

The University correctly notes that this Court has never directly stated in a majority opinion that there is a presumption that a statute limiting rights protected by the Open Courts Clause is unconstitutional, thereby placing the burden to show that the *Berry* Test is satisfied upon those seeking to uphold the challenged statute. However, this shift of presumption can be seen from a careful reading of *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985); *Sun Valley Waterbeds v. Hughes & Son*, 782 P.2d 188 (Utah 1989); and *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989). In each of those cases, this Court, without so stating, shifted the burden of establishing constitutionality to the proponent of the legislation. In other words, the statute was presumed unconstitutional until the *Berry* Test could be satisfied.

This practice of shifting the burden of constitutionality to the legislative proponent has been expressed by this Court in numerous non-majority opinions. *See, e.g., Hipwell v. Sharp*, 858 P.2d 987, 988 n.4 (Utah 1993) (finding that a majority of the court agreed that statutes implicating the open courts clause must be analyzed under a heightened level of scrutiny for constitutional purposes); *Condemarin v. University Hospital*, 775 P.2d 348, 368 (Utah 1989) (Zimmerman, J., concurring in part) (“Because the interests at stake are specifically protected by the constitution, the presumption of validity that normally attaches to legislative action must be reversed . . .”).

In fact, the implication from this Court to shift the burden has been so strong that the Utah Court of Appeals held that the legislative proponent bears the burden of establishing the Act's constitutionality and that the normal presumptions do not apply. As the Utah Court of Appeals held, “because this statute of limitations impacts the

constitutional right . . . protected under Article I, Section 11 of the Utah Constitution, **the usual presumption of validity does not control our review of this statute.**” *Currier v. Holden*, 862 P.2d 1357, 1362 (Utah Ct. App. 1993) (emphasis added), *cert. denied*, 870 P.2d 957 (1993). *See also, Velarde v. Bd. of Review of Indus. Com’n*, 831 P.2d 123, 128 n. 8 (noting that “the burden shifts to the [legislative] proponent to demonstrate the statute’s constitutionality” where the Open Courts Clause is at issue).

Contrary to the University’s contention, there is substantial justification for providing a heightened level of scrutiny to this constitutional right, thereby checking the Legislature’s power to modernize the law. “The constitution’s drafters recognized that the normal political processes would not always protect the common law rights of all citizens for injuries. . . .” *Lyon v. Burton*, 2000 UT 19 at ¶28, 5 P.3d 616, 625 (Utah 2000) (quotations omitted). The drafter’s rightfully believed that the political processes would not protect those who are injured in “their persons, property, or reputations since they are generally isolated in society, belong to no identifiable group, and rarely are able to rally the political process to their aid.” *Berry*, 717 P.2d at 676. Accordingly, the framers included the Open Courts Clause as a check upon legislative power.

This Court simply “cannot ignore the fact that the framers of our Constitution – based on the experience of a number of other states – placed the open courts provision in the Utah Constitution to protect important individual rights against legislative power.” *Horton*, 785 P.2d at 1093. Those important rights being “[t]he right of access to the courts and to a civil remedy to redress injuries, which Article I, section 11 protects,

[which are] fundamental in Anglo-American law.” *Lyon*, 2000 UT 19 at ¶28, 5 P.3d at 625. Because of the fundamental nature of the right to access the courts, statutes which limit this right are, and should be, subject to higher scrutiny. A component of this scrutiny is shifting the burden to the legislative proponent to establish the statute’s constitutionality.

## **II. THE ACT ABROGATED AN EXISTING LEGAL REMEDY.**

The University argues that the Open Courts Clause is not at issue in this matter because the Act did not abrogate an existing remedy, namely wrongful birth. To support this contention, the University relies upon *Payne v. Myers*, 743 P.2d 186 (Utah 1987) and *C.S. v. Nielson*, 767 P.2d 504 (Utah 1988). As will be shown below, the University’s reliance is misplaced and *Payne* and *Nielson* in fact substantiate that the Act abrogated an existing remedy.

### **A. The *Nielson* Decision Does Not Stand For the Proposition that Wrongful Birth Is Not An Ordinary Medical Malpractice Action.**

The University does not dispute that a legal remedy for medical malpractice, including negligent diagnosis, existed in Utah prior to the Act’s passage. Such a claim required the plaintiff to establish (1) the existence of a duty; (2) the breach of that duty; (3) which causes (4) an injury to the plaintiff. *Payne*, 743 P.2d at 188. A thorough examination of the wrongful birth cause of action reveals that it requires proof of these

same elements and is no different than any other claim for medical malpractice/negligence.<sup>1</sup>

**1. The Health Care Provider Owed and Could Breach A Duty.**

This Court held that a health care provider, including a geneticist, has a duty to his or her patients to provide genetic counseling within reasonable standards of professional performance. *Payne*, 743 P.2d at 189. The *Payne* Court specifically held that

It is now possible for prospective parents to know, well in advance of birth, of the risk of congenital defects in children not yet conceived. Courts accordingly have recognized that physicians who perform testing and provide advice relevant to the constitutionally guaranteed procreative choice, or whose actions could reasonably be said to give rise to a duty to provide such testing or advice, have a corresponding obligation to adhere to reasonable standards of professional performance.

*Id.* at 189 (quotations omitted). The court then concluded, “there was a duty to the parents . . .” *Id.* Therefore, wrongful birth, like any other medical malpractice action, imposes a duty upon the health care provider.

This duty can easily be breached if the counseling falls below the reasonable standard of care, as is alleged in this matter. The *Payne* Court recognized the possibility

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<sup>1</sup> To the extent the University argues that only causes of action existing at the time of Utah Statehood are protected by the Open Courts Clause, the University is wrong. This Court rejected such an assertion stating the “proposition that [Open Courts Clause] should be construed to protect only those rights and remedies that were recognized under the common law at the time of statehood is not supported by *Berry v. Beech Aircraft* . . . or by its progeny . . .” *Day v. State ex rel. Dept. of Public Safety*, 980 P.2d 1171, 1185 (Utah 1999). Rather, the determination of whether an injured person has been denied a remedy “should be decided by reference to the general law of rights and remedies at the time that the Legislature abrogates a remedy.” *Id.* at 1184.

of breach when it stated that that “there was a duty to the parents which the doctors may have breached . . . .” *Id.*

## **2. The Breach Can Cause Injury.**

The University’s primary contention is that the wrongful birth injury is different from that in any other medical malpractice case. Essentially, the University’s argument is two-fold, (1) that the existence of life – even with severe defects – cannot constitute an injury and is the only injury in wrongful birth cases; and (2) that the measure of damages is precluded in Utah by *Nielson*. 767 P.2d 504. However, the University’s argument lacks an understanding of wrongful birth jurisprudence and misapplies *Nielson*, and should therefore be ignored.

### **a. The injury in wrongful birth is not exclusively dependent upon the assertion that the child should not have been born.**

Contrary to the University’s contention, in a wrongful birth claim “all damages [do not] depend on the assertion that the child should not have been born.” University at 10. As this Court noted in *Payne*, wrongful birth is brought by the parents of a severely defective child “against a physician who negligently fails to inform them, in a timely fashion, of an increased possibility that the mother will give birth to such a child, thereby depriving the parents of the choice to make an informed decision as to whether to have a child.” 743 P.2d at 187 n. 1. (citation omitted). The *Payne* court recognized that the injury was not the life of the child, but the lost opportunity to make an informed reproductive choice.

In fact, the injury in a wrongful birth claim is not the life of the child, but is the loss of opportunity to choose whether to terminate the pregnancy. The damages flowing from that injury are incurred by the parents, not the child and include the emotional, physical and financial impact of being denied the opportunity to terminate the pregnancy. The injury is simply not life itself. That is a wrongful life claim. *See Liddington v. Burns*, 916 F. Supp. 1127, 1130-31 (W.D. Okla. 1995) (noting injury is not life of child, but effect of physician's negligence in denying parents right to informed choice); *Reed v. Campagnolo*, 630 A.2d 1145, 1150 (Md. 1993); *Vicarro v. Milunsky*, 551 N.E.2d 8, 10 n. 3 (Mass. 1990); *Garrison v. Med. Cent. of Delaware, Inc.*, 581 A.2d 288 (Del. 1990) ("the resulting injury to the plaintiff parents lies in their being deprived of the opportunity to make an informed decision . . .").

In addition to the loss of reproductive choice, the injury may be the emotional pain of witnessing the birth of the defective child when a healthy child was expected and assured by the medical provider or the physical and emotional pain associated with going through with a pregnancy that would have been terminated had the parents been informed of the child's true genetic makeup. *See Nielson*, 767 P.2d at 505-06 (recognizing that a mother could be awarded physical and emotional damages for going through with a pregnancy she did not want). None of these injuries is dependent upon the life of the child or terminating the pregnancy.

**b. *Nielson* does not eliminate damages.**

In *Nielson*, this Court held that a wrongful pregnancy cause of action exists in Utah. 767 P.2d at 516 (Utah 1988). A plurality of *Nielson* also stated that in wrongful

pregnancy actions, “the projected costs of rearing a normal, healthy child may not be recovered.” *Id.* The University argues that this plurality decision establishes that wrongful birth is not an ordinary medical malpractice claim because there are no available damages. Again, the University is incorrect.

First, as noted above, the injury in wrongful birth is not the existence of the child. Rather, it is, among others, the lost opportunity to make an informed reproductive choice. Even accepting that the *Nielson* plurality limiting damages was and remains sound law, Wood/Borman suffered an injury and damages. The damages in a wrongful birth cause of action are not the cost of rearing a normal, healthy child. Rather, “[i]t is generally recognized that, in a wrongful birth action, parents may recover the extraordinary costs necessary to treat the birth defect and any additional medical or educational costs attributable to the birth defect . . . .” *Keel v. Banach*, 624 So.2d 1022, 1030 (Ala. 1993). *See also, Arche v. U.S. Dept. of Army*, 798 P.2d 477, 481 (Kan. 1990) (holding expenses caused by the child’s handicaps may be recovered, but not those expenses natural to raising any child); *James G. v. Caserta*, 332 S.E.2d 872, 881 (W.V. Ct. App. 1985).

Moreover, damages need not be given only for the costs of raising an unhealthy child, but may be based upon a variety of grounds including the deprivation of a mother’s opportunity to make a procreative choice, the costs of pregnancy and delivery and emotional distress. *See also, Wrongful Life Actions*, Utah L. Rev. 1994 221, 222. Again, these damages are exclusive of the child’s life and certainly exclusive of the cost of raising a healthy child. This rationale is entirely in line with *Nielson*, in that the parents do not receive damages for the life of a healthy, normal child.



Second, the *Nielson* Plurality did not find that no cause of action existed for the birth of the child, but rather that damages were limited. *Id.* at 576. There is a fundamental difference between eliminating a cause of action and limiting potential damages. For example, a person injured by government negligence, which is covered under the governmental immunity act, may be without legal remedy. That is not the same, however, as a person who can bring a cause of action against the government, but whose damages may be capped by Utah Code Ann. § 63-30-34. One has a cause of action, but limited damages, while the other is without remedy. A similar result occurs when carrying out the *Nielson* Plurality to its logical conclusion. A remedy for wrongful pregnancy existed, but the amount or nature of damages was merely limited.

Third, *Nielson*'s limitation on damages does not apply to this matter. As noted above, the *Nielson* plurality held that "the projected costs of rearing a **normal, healthy child** may not be recovered." *Id.* at 516 (emphasis added). In this matter, unfortunately, there is not a normal, healthy child. Mary Borman was born with severe handicaps, including mental retardation. Thus, the *Nielson* Plurality's limitation on damages for "normal, healthy" children is simply irrelevant to this case. *Goldberg v. Ruskin*, 471 N.E.2d 530, 536 (Ill. Ct. App. 1984) ("The reasons for denying the costs of rearing a normal and healthy child should not prevent the parents of an abnormal child who establish liability from recovering expenses reasonably necessary for the care and treatment of their child's physical impairment.").

Thus, because a wrongful birth cause of action requires duty, breach, causation and damages, it is the same as any other negligence based malpractice claim. Those

courts addressing wrongful birth have generally recognized this. *Garrison*, 581 A.2d at 290 (Del. 1990) (“The cause of action need not be characterized as “wrongful birth” since it falls within the realm of traditional tort and medical malpractice law”); *Keel v. Banach*, 624 So.2d 1022, 1026 (Ala. 1993); *Liddington v. Burns*, 916 F. Supp. 1127, 1131 (W.D. Okla. 1995); *Robak v. United States*, 658 F.2d 471, 478 (7th Cir. 1981); *Greco v. United States*, 893 P.2d 345, 348 (Nev. 1995). Hence, wrongful birth is nothing more than a medical malpractice claim sounding in negligence. A claim that was without doubt in existence at the time of the Act’s passage.

**B. *Payne* Recognizes Wrongful Birth.**

Even if wrongful birth is not an ordinary medical malpractice claim, this Court in *Payne*, without an express holding, recognized wrongful birth as an available cause of action. 743 P.2d at 189-90. Wood/Borman recognizes and does not dispute that the *Payne* Court stated that it assumed but did not expressly hold that Utah should recognize the wrongful birth cause of action. Notwithstanding, the logical conclusion from its opinion is that the *Payne* Court did just that.

This Court found that “there was a duty to the parents which the doctors may have breached . . . .” *Id.* Finding a duty and accepting a possible breach, the *Payne* Court concluded that the “[p]arents had a remedy against the state defendants for injuries arising out of the negligent acts of State employees . . . .” *Id.* at 190. Finally, the Court held that “the parents were not denied the guarantees of article I, section 11 **because they still had an opportunity to seek redress in the courts.**” *Id.* (emphasis added). The reason the parents could seek redress for wrongful birth was because the Court had

expressly held that a duty existed from a geneticist to a patient, a breach could result therefrom, and implicitly held that the parents had a viable cause of action for what we now term “wrongful birth.”

In finding that the parents had a remedy for their injuries, the Court was not acting in a vacuum. Regardless of whether the Court stated “wrongful birth exists in Utah”, the Court stated that the *Payne* plaintiffs could have brought their wrongful birth cause of action, had they done so timely. In short, the Court determined that a duty existed and that a breach was actionable, but that it had to be brought in compliance with the Utah Governmental Immunity Act. *Id.* In other words, a wrongful birth cause of action existed.

**C. Negligent Infliction of Emotional Distress/Informed Consent Were Available.**

Even if wrongful birth was not a viable cause of action in 1983, negligent infliction of emotional distress and failure to obtain informed consent clearly were. Therefore, the *Berry* Test is implicated, because by the University’s own argument, the Act abrogates these remedies in this matter as well.

**III. THE ACT VIOLATES THE *BERRY* TEST BECAUSE NO CLEAR SOCIAL EVIL EXISTED IN UTAH IN 1983.**

Recognizing that abortion cannot be a social evil, and therefore without a social evil identified by the Legislature, the University is left to invent one. This invented evil comes from a tortured reading of the preamble to the Act, which states 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.” Utah Code Ann. § 78-11-23. The University interprets this to mean that the social evil to be eliminated “is the stigmatization of the disabled and of unwanted children in general.” University at 12. This so-called evil fails for several reasons.

First, wrongful birth does not discriminate nor label the child as unwanted as the University claims. This was succinctly summarized in Justice Durham’s concurrence in *Nielson*, which stated

Parents seek damages, not because they do not love and want to keep the unplanned [or disabled] child, but because the direct, foreseeable and natural consequences of the physician’s negligence has forced burdens upon the parents which they sought to avoid . . . .”

767 P.2d at 508 (citations omitted). In this matter, Wood/Borman love their child dearly and she has brought them much happiness. However, she has brought increased expenses and costs, both emotional and monetary, that Wood/Borman was not anticipating. A cause of action for the recovery of these increased costs does not imply that the child is unwanted or not loved or is discriminated against, but that the “resultant birth [] cause[ed] hardship to family members due to the diminution of family resources rather than the birth itself.” *Id.*

In fact, the *Nielson* Court refused to recognize the very “social evil” the University claims the Act attempts to eliminate. Adopting wrongful pregnancy as a cause of action, an action in which the parents essentially claim that a healthy child should not have been born or even conceived, this Court stated that parents should be allowed “to recover damages which they prove are the natural, probable, and direct consequences of

professional negligence [and that such actions] neither contravenes the policy of placing high value on human life nor necessarily encourages increased litigation in this area.”

767 P.2d at 509. In other words, it was not an evil to bring a claim that a pregnancy, and thus the resulting child, should not have occurred. In fact, the *Nielson* parents were entitled to damages as the result of the negligence in allowing such an unwanted birth. Wrongful birth is no different. The wrongful birth child has no less rights nor is viewed any less favorably than the child in *Nielson*, whose parents did not want said pregnancy. Thus, the “evil” the University claims is no evil at all.

Moreover, this “evil” certainly was not identified by the Legislature as existing in 1983. The Utah Legislature never identified discrimination as the evil to be eliminated. Nor does the University point to any evidence establishing that discrimination against handicapped children was a problem facing Utah at the time of the Act’s passage. Under Utah law, absent a clear showing that the evil existed in Utah, the claimed evil cannot form the justification to abrogate a legal remedy. *See Day*, 980 P.2d at 1186; *Lee v. Gaufin*, 867 P.2d 572, 583-88 (Utah 1993) (holding legislative abrogation of remedies based on economic and social problems that had occurred in other states, but not in Utah to be unconstitutional). Therefore, the University's claimed evil is insufficient to satisfy the *Berry* Test.

#### **IV. THE ACT DOES NOT SUBSTANTIALLY ADVANCE THE SOCIAL EVIL IDENTIFIED BY THE UNIVERSITY.**

Under the *Berry* Test, the Act must “reasonably and substantially advance the stated purpose of the statute.” *Berry*, 717 P.2d 670, 683 (Utah 1985). Even accepting the

“social evil” identified by the University, the Act does not reasonably and substantially advance the elimination of this so-called evil.

The University makes no attempt to demonstrate how the Act achieves the so-called legislative purpose by eliminating a valid cause of action. In a similar situation, this Court stated that “since such claims are generally limited to negligent . . . counseling, it appears unlikely that there will be great proliferation of the same. At any rate, the potential for some increase in litigation cannot justify refusal to recognize a valid cause of action.” *Nielson*, 767 P.2d at 507. Because this cause of action is so remote, there will not be a rash of claims that label children as unwanted or defective.

Additionally, the Act will not prevent children involved in wrongful birth claims from learning that “society would prefer not to be burdened” with him or her. Wrongful birth claims are limited to children born with grave defects, including, as in this matter, mental retardation. The sad truth is that Mary Borman will never understand this litigation or its purpose. Accordingly, the Act does nothing to spare her feelings, but does eliminate the opportunity for her to have access to funds to ensure that she receives a proper upbringing and receives the extra-ordinary services and care that her condition necessitates.

Moreover, even if this were a legitimate purpose – eliminating causes of action that label children unwanted – it could be achieved by a far less intrusive means. As in *Nielson*, the claim could be brought anonymously through the parents’ initials only, with no identity revealed. In fact, this Court already has endorsed such a principle. As the *Nielson* Court stated, “[b]ecause of the emotional, moral, and philosophical implications

inherent in cases such as this one, styling the case using the plaintiff's initials will help to preserve the sanctity of the family involved." 767 P.2d at 505 n.2. Essentially, no one would know the identity of the child or the parents. No one could label the child or discriminate against him or her. The cause of action could still exist, the child protected and the so-called "evil" eliminated without denying Wood/Borman's rights protected by the Open Courts Clause.

Finally, if anything, the Act encourages negligence and is counterproductive in terms of public safety. The District Court for South Carolina summarized this best, stating

Society has an interest in insuring that genetic testing is properly performed and interpreted. The failure to properly perform or interpret an amniocentesis could cause either the abortion of a healthy fetus, or the unwanted birth of . . . [an afflicted] child . . . Either of these occurrences is contrary to public policy . . . The recognition of a cause of action for negligence in the performance of genetic testing would encourage the accurate performance of such testing by penalizing physicians who fail to observe customary standards of good medical practice.

*Phillips v. United States*, 508 F. Supp. 544, 551 (1981). This Court has long recognized that the threat of lawsuit is an effective "stick" to ensure that the citizens of Utah receive proper medical care and treatment. Immunizing geneticists reduces the quality of care and is against public policy.

The University's argument that the threat of peer review and loss of license deters malpractice is naïve. The administrative bodies the University suggest should regulate geneticists are routinely made up of other physicians who are loath to discipline their own. Likewise, the bodies are unable to award damages to injured patients, which reduces their effectiveness because injured patients see little benefit in pursuing

administrative remedies. All in all, these problems have led many to conclude that such panels are ineffective and of little deterrence. *See* Andrew K. Dolan & Nicole D. Urban, The Determinates of the Effectiveness of Medical Disciplinary Boards: 1960-1977, 7 LAW & HUM. BEHAF., 203, 215-17 (1983).

In short, the Act does not substantiate its stated purpose. Moreover, it is likely to reduce the standard of medical care within this state. Where an Act is counterproductive it may be unconstitutional, as it neither reasonably nor substantially advances a legitimate legislative purpose. *See, e.g., Berry*, 717 P.2d at 683 (finding statute unconstitutional in part because it encouraged shoddy workmanship rather than promoting public safety). Since the Act actually encourages negligence, it fails the *Berry* Test.

**V. THE ACT'S STATED PURPOSE IS NOT SUFFICIENT TO SURVIVE THE "PURPOSE" PRONG OF CASEY.**

The University does not dispute that a statute with "the purpose . . . of placing a substantial obstacle in the path of a woman seeking an abortion" is invalid. *Casey v. Planned Parenthood*, 505 U.S. 833, 846 (1992). Regardless of a statute's effect, if the purpose is to impede abortion, the statute is unconstitutional. Attempting to avoid any implication of abortion, the University asserts that because the Act states that its purpose is to encourage respect of disabled life – an arguably proper purpose – no further analysis is needed. While it is understandable that the University does not want this Court to discover or examine the Utah Legislature's true, unconstitutional purpose for the Act, the University ignores the appropriate test for determining whether a statute has a constitutionally improper purpose.



It is generally true that legislative history is relevant only where statutory language is ambiguous. However, this rule does not apply where the purpose of a statute determines its constitutionality. In fact, the United States Supreme Court has ignored the general rule in three specific areas, including: abortion, establishment clause and voting districts. In each of these areas, the Supreme Court has outlined a constitutional test requiring an analysis of the statute's purpose. *See Edwards v. Aguillard*, 482 U.S. 578, 586 (1987).

It is well established that where the court must determine if a statute has an improper purpose the court should look beyond the statute's unambiguous language to the legislative history. *See Edwards*, 482 U.S. at 594-95, (noting finding of improper purpose is determined by analyzing the statute on its face as well as its legislative history). This is especially true when analyzing the legislative purpose under the *Casey* Purpose Prong. *See generally, Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10<sup>th</sup> Cir. 1996) (“[a] forbidden purpose may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment.”); *Richmond Medical Center For Women v. Gilmore*, 55 F.Supp.2d 441, 486 (E.D.Va. 1999) (“under *Casey*, the legislative intent behind the enactment is a pertinent inquiry.”).

In fact, the Supreme Court has even noted that a court need not accept a legislature's express and unambiguously stated purpose if the legislative history shows that the proffered purpose was not sincere, but merely a sham. *Edwards*, 482 U.S. at 586 (finding statute unconstitutional after legislative history revealed that legislature's stated purpose in statute was not sincere). The Tenth Circuit used a similar legislative analysis

to strike down Utah's abortion statute. *Bangerter*, 102 F.3d at 1116. The statute at issue in *Bangerter* included a preamble that expressly declared the statute's purpose as protecting the lives and right to life of unborn children, a purpose similar to that of the Act. *See* Utah Code Ann. § 76-7-301. This stated purpose was both proper and unambiguous.

Nevertheless, the Tenth Circuit did not end its analysis of the legislature's purpose simply at the unambiguous language of the preamble. *Bangerter*, 102 F.3d at 1116. Rather, the court looked specifically to the process that led to the statute's enactment. Because the legislature's true intent – not that expressed for constitutional purposes in the preamble – was to prevent the abortion of non-viable fetuses, the Tenth Circuit declared the statute unconstitutional. *Id.* at 1117.

Similarly, in this matter, as the University noted, the Act expresses an allegedly proper and unambiguous purpose. However, this Court's analysis does not end there. Instead, the Court must look to the legislative history to discover if the expressed purpose was in fact the true purpose or merely a sham. The evidence is overwhelming that the purpose was to impede and place an obstacle in the path of those choosing to abort.

The Act itself reveals that its only intent was to prevent and or reduce abortion. The principal drafter of the Act did not hide this purpose. He declared that the Act was intended to prevent physicians from informing parents as to the health of the fetus, thereby preventing the parents from choosing to abort. *Wrongful Life Actions*, 1994 Utah L. Rev. 221, 224 n.748-52 and accompanying text; William Shane Topham, *Wrongful Birth and Wrongful Life*, 1984 Utah L. Rev. 833, 858 n. 153 (noting that

Professor Wardle indicated “purpose of the Act [was] to codify, in Utah, the rights of individuals to refuse to provide, perform or undergo nontherapeutic abortion or contraceptive sterilization operations that contradict the individual’s religious beliefs or moral convictions.”). Legislators supported this rationale behind the Act. *See* Second Reading S. 149, 45<sup>th</sup> Utah Leg., Gen. Sess. (Feb. 28, 1983) (statement of Sen. Swann) (“the bill is a good bill, that it shouldn’t put pressure on a doctor for instance to actually be encouraged to create an abortion in order to avoid a handicap or a possible handicap and in effect deny someone the opportunity to live.”).

These statements, coupled with those discussed in Wood/Borman’s Opening Brief, reveal that the Act’s true purpose and driving force was abortion, not discrimination. The University’s claim that these statements are unreliable should be ignored because they come from politicians trying to “obtain political advantage” has been rejected by the United States Supreme Court. *See Edwards*, 482 U.S. at 594-95. This Court must look beyond the Act’s stated purpose, to the actual purpose the legislature had in mind when passing the Act. This actual purpose, gleaned from the text and the legislative history, is clear. So clear, that at the district court level, the University admitted the true purpose when it stated, “[t]he Act is not only rationally related but narrowly tailored **to achieve the State’s interest in protecting fetus’ from abortion** solely because of their physical condition.” (R. 80 (emphasis added)).

Despite its best efforts, the University cannot hide the Act’s true intent. A proper constitutional analysis of purpose requires this Court to look not only to the Act’s language, but also to the legislative history surrounding its passage. After performing

this analysis, the Court can only find, as the University recognized, that the Act was intended to protect fetuses by eliminating abortion and informed choice. This purpose is invalid and so too is the Act.

## **VI. THE ACT CONSTITUTES STATE ACTION.**

The University correctly notes that the Fourteenth Amendment protect individuals against state action, not private action. Nevertheless, the Act, while facially directed toward private parties, constitutes state action.

It is indisputable that passage of the Act constitutes state action. It is commonly accepted that statutory provisions enacted by a state's legislature constitute one of the most fundamental forms of state action. *See, e.g.,* Adam M. Silverman, *Constitutional Law – Pennsylvania's Wrongful Birth Statute's Impact on Abortion Rights*, 66 Temple L. Rev. 1087, 1105 n.122 (quoting Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW*, 18-1 at 1688 ("If litigants challenge a federal or state statute , , , in a case where the validity of the statute is necessarily implicated, state action is obvious, and no formal inquiry into the matter is needed.")). Likewise, under the *Casey* Purpose Prong, passage of an act alone is sufficient to render a statute unconstitutional if its purpose was to place an obstacle in the path of a woman choosing an abortion.

As shown above, the Legislature's intent – to prevent abortion – was not merely to affect the relationship between private parties, but was to impact a federally protected right. As one commentator noted,

When the state intends for a statute to have an impermissible impact on constitutionally protected rights, the statute no longer regulates individual conduct alone. While the conduit for the state's act may be a private individual – such as

the physician in a wrongful life or birth suit – if the state intends for that individual to violate another’s constitutional rights, it is if the state itself has acted. Passage and enforcement of such a statute therefore constitutes state action.

Julie F. Kowitz, *Not Your Garden Variety Tort Reform: Statutes Barring Claims for Wrongful Life and Wrongful Birth Are Unconstitutional Under the Purpose Prong of Planned Parenthood v. Casey*, 1995 Brooklyn L. Rev. 235, 261-262.

The impairment to Borman/Wood’s reproductive freedom was not simply a private injury inflicted by her physician. The Act undermined the University’s legal duty to act in accordance with accepted medical malpractice. Such an act carries the imprint of the state and upsets the balance which medical malpractice strikes between the patient and her physician. This too is sufficient to constitute state action. *Bowman v. Davis*, 356 N.E.2d 496, 499 (Ohio 1976) (“For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations except those involving sterilization would constitute an impermissible infringement of a fundamental right.”); *See Kowitz* at 263 n.136 and accompanying text.

Finally, when the District Court enforced the Act, leaving Wood/Borman without remedy, the state affirmatively injected itself into the private patient/doctor relationship. Such action is state action for purposes of the Fourteenth Amendment. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (dismissing the proposition that no state action was involved when the state court applied a state rule of law in a civil lawsuit between two private parties); *Shelley v. Kraemer*, 334 U.S. 1, 14 (1947) (recognizing that action of state courts in enforcing common law or statutory enactments

“is to be regarded as action of the State within the meaning of the Fourteenth Amendment.”).

In short, the Act constitutes state action and therefore implicates the Fourteenth Amendment and the attendant Due Process and Equal Protection Clauses.

## **VII. THE UNIVERSITY’S RELIANCE UPON MINNESOTA AND PENNSYLVANIA CASE LAW IS MISPLACED.**

The University argues that this Court should be persuaded by decisions in Minnesota and Pennsylvania that have upheld the constitutionality of wrongful birth statutes. Specifically, the University relies upon *Edmonds v. Western Pennsylvania Hosp. Radiology Assoc.*, 607 A.2d 1083 (Pa. 1992), *Dansby v. Thomas Jefferson University Hospital*, 623 A.2d 816 (Pa. 1993) and *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986). For various reasons, these cases are irrelevant to a proper interpretation of the Act under both the United States and Utah Constitutions.

First, both *Hickman* and *Edmonds* were decided prior to *Casey*. Likewise, the *Dansby* appeal was not brought under the Due Process Clause of the Fourteenth Amendment. Therefore, neither state court had the benefit of *Casey* or the understanding of the Purpose Prong of *Casey*. As shown previously, the Purpose Prong of *Casey* deals a devastating blow to the constitutionality of the Act under the Due Process Clause.

Second, none of the cases dealt with an open courts clause as vigorous as Utah’s. In *Edmonds* and *Dansby*, the issue was not raised. 607 A.2d at 1083, 1086-88; 623 A.2d at 821. In *Hickman*, the Court rejected the argument, essentially finding that unless a cause of action was recognized as far back as Eighteenth Century English common law,

the Minnesota open courts clause would not apply. This holding is in direct contrast with this Court's repeated holdings. *See, e.g., Day*, 980 P.2d at 1183-85.

Accordingly, neither the Pennsylvania nor Minnesota cases are applicable to this matter and the University's reliance thereon is flawed.

#### **VIII. NEGLIGENT INFLICTION AND INFORMED CONSENT ARE VIABLE CAUSES OF ACTION.**

The University incorrectly asserts that Wood/Borman's negligent infliction of emotional distress and failure to obtain informed consent causes of action depend upon the assertion that Wood/Borman would have aborted their fetus. As with the wrongful birth cause of action, the University simply fails to understand the injury and damages suffered by Wood/Borman.

Wood/Borman's final two causes of action do not assert 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 fundamental assertion in both causes of action<sup>2</sup> is that the University failed to inform accurately Wood/Borman of their fetus' condition, which deprived them of the opportunity to make an informed decision, which resulted in emotional trauma at the time of birth and thereafter. As the Missouri Supreme Court noted, a cause of action exists where plaintiffs' assert that

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<sup>2</sup> The University argues that the failure to obtain informed consent cause of action should be dismissed because it does not meet the requirements of Utah Code Ann. § 78-15-5 and that on this basis alone the District Court was justified in dismissing the claim. However, Wood/Borman's Complaint did make the necessary allegations, including, that the prenatal testing carried significant risk, that they were not informed and would not have consented. (R. 7-9).

as a direct and proximate result of the negligence and carelessness of the defendants, . . . plaintiff was denied the right to choose whether or not to terminate her pregnancy; and as a result thereof . . . plaintiff has suffered losses including loss of consortium, the right to lead a normal life; plaintiff has also suffered and will continue to suffer from emotional distress, anxiety and depression.

*Shelton v. St. Anthony's Medical Center*, 781 S.W.2d 48, 49. Wood/Borman's final two causes of action assert these identical elements and damages.

Moreover, the University's claim that Utah has never recognized such damages is simply wrong. As noted earlier, in *Nielson* this Court held – in the wrongful pregnancy cause of action – that a mother was entitled to monetary compensation for the mental anguish associated with childbirth. In fact, this Court noted that “awarding these initial (non-child rearing) damages is likewise congruous with our cases concerning the recovery of damages in negligent malpractice actions.” 767 P.2d at 509. The *Nielson* Court further noted that “damages which may be shown to follow as a proximate cause of the negligence include reasonable charges for discovery and repair of any resultant injury and monetary compensation for mental anguish.” *Id.*

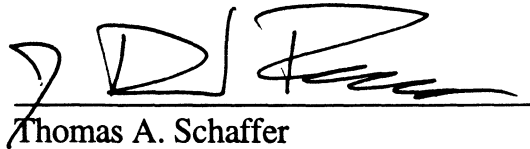
In this matter, Wood/Borman were injured when they experienced the birth of their child, which they were promised and informed would be healthy. Such an injury is within the confines of negligent infliction of emotional distress and or informed consent and was certainly plead by Wood/Borman. This injury, and the measure of damages, is separate and distinct from any allegation that they would have aborted. Damages are also distinct from the life of the child. Accordingly, the Act does not bar the final two causes of action and the District Court erred when it dismissed them.



## **CONCLUSION**

For the foregoing reasons, the Act should be declared unconstitutional and this case remanded to the District Court.

DATED this 20th day of August, 2001.

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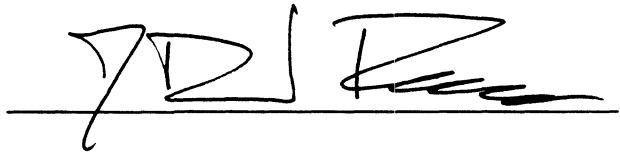
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## **CERTIFICATE OF MAILING**

I hereby certify that on the 20th day of August, 2001, I caused a true and correct copy of the foregoing Opening Brief of Appellants to be mailed postage prepaid to the following:

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