1984

Michael Patrick Payne, By And Through His Guardian Ad Litem, John Michael Payne, John Michael Payne And Stephanie Payne v. Garth G. Myers, M.D.; Joseph P. Kesler, M. D.; The State of Utah And Handicapped Children's Service; and the Division of Health of The State of Utah : Brief of Respondent Garth Myers, M.D.

IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL PATRICK PAYNE, by and through his Guardian ad Litem, JOHN MICHAEL PAYNE, JOHN MICHAEL PAYNE and STEPHANIE PAYNE,	:	
Plaintiffs-Appellants,	:	
vs.	:	No. 19218
GARTH G. MYERS, M.D.; JOSEPH P. KESLER, M.D.; THE STATE OF UTAH AND HANDICAPPED CHILDREN'S SERVICE; and THE DIVISION OF HEALTH OF THE STATE OF UTAH,	:	
Defendants-Respondents.	:	

BRIEF OF RESPONDENT
GARTH MYERS, M.D.

APPEAL FROM A SUMMARY JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
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BRIEF OF RESPONDENT
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STATEMENT OF THE NATURE OF THE CASE

Appellants John M. Payne and Stephanie Payne have brought an action for negligent wrongful birth and Appellant Michael P. Payne, through his father and Guardian ad Litem, John Payne, brought an action for wrongful life against Respondents Garth G. Myers, M.D., Joseph P. Kesler, M.D., The State of Utah Handicapped Children's Service; and the Division of Health of the State of Utah. Appellants' claims for damages are based on the allegations that they conceived and gave birth to their son,

Michael P. Payne, relying on the advice and assurance of Respondents Kesler and Myers that this child could be born without of defect or impairment.

DISPOSITION IN THE LOWER COURT

Motions for summary judgment by all respondents were considered by the district court. The motion for summary judgment by respondents Myers and Kesler was granted as to all claims by all appellants on the basis of Utah Code Annotated §63-30-4 (1978). Summary judgments were also entered in favor of the State of Utah Handicapped Children's Services and the Division of Health of the State of Utah against appellants John M. Payne and Stephanie Payne on the grounds that they did not timely serve notice of claim against the State of Utah respondents pursuant to Utah Code Annotated §63-30-12. The motion for summary judgment by the State of Utah respondents as to the claim of Michael P. Payne was denied.

RELIEF SOUGHT ON APPEAL

Respondents ask this Court to affirm the order of the District Court granting respondents Myers'and Keslers' motion summary judgment as to all claims by all appellants.

STATEMENT OF FACTS

On September 2, 1975, Matthew Payne was born to appellants John and Stephanie Payne. Within a few months after the birth, the appellants detected physical ailments in the child. Matthew Payne was subsequently examined by both Dr. Myers and Dr. Kesler. No specific determination of the ailment was made.

In 1977, John and Stephanie Payne discussed the possibility of a second pregnancy with respondents Dr. Kesler and Dr. Myers. The appellants expressed concern that their son Matthew's disabilities might be related to a genetic disorder. In the fall of 1977, the respondents arranged an appointment for the appellants to meet with Dr. Robert Fineman, a doctor with expertise in genetic counseling. This appointment, however, was apparently cancelled and never rescheduled.

On February 14, 1978, Mrs. Payne visited her obstetrician/gynecologist, Dr. R. Kent Gibbs. At that time, Dr. Gibbs removed Mrs. Payne's intra-uterine birth control device (IUD). (Gibbs Depo p. 20). For at least a month after the removal of her IUD, Mrs. Payne used a contraceptive foam to prevent pregnancy. (Gibbs Depo pp. 21 & 52).

Mrs. Payne's last recorded menstrual period was May 2, 1978. (Gibbs Depo p. 22; Tr. p. 10). On January 27, 1979, Mrs. Payne gave birth to her second son, Michael P. Payne, appellant in this case. Soon after birth, Michael Payne began to develop the same impairments which had appeared in his brother. An

examination by a geneticist several months after Michael's birth resulted in a probable diagnosis of Pelizaeus-Merzbacher disease, a hereditary, progressive brain disorder.

The appellants consulted their attorney in August of 1980, and filed their complaint in this action on April 9, [illegible]. The complaint alleged only negligence against respondents Myers and Kesler. The trial court granted respondents Myers' and Keslers' motion for summary judgment based on Utah Code Ann. §63-30-4 (1978). The statute precludes personal liability of a government employee for the negligent performance of his duties unless the employee acted or failed to act through gross negligence, fraud or malice.

Section 63-30-4 became effective on March 30, 1978. This was clearly before Mrs. Payne became pregnant and, as the trial court held, before any cause of action for negligence (for wrongful birth) could have arisen on behalf of the parents. All the parties agreed that the statute came into effect before a cause of action had arisen for wrongful life on behalf of the appellant, Michael P. Payne. (See Tr. p. 40, l. 1-13.)

Respondents take the position that §63-20-4 was in effect before any and all causes of action for negligence against the respondents arose on behalf of the appellants and that the statute precludes suit against individual governmental [illegible] absent allegations of fraud, gross negligence or malice. [illegible]

[illegible] asserts that §63-30-4 is constitutional and that the [illegible] of the trial court should be affirmed.

ARGUMENT

POINT I

UTAH CODE ANNOTATED §63-30-4 (1975) PRECLUDES PERSONAL LIABILITY OF GOVERNMENT EMPLOYEE FOR ACT OR OMISSION OCCURING DURING PERFORMANCE OF HIS DUTIES UNLESS THE ACT WAS DUE TO GROSS NEGLIGENCE, FRAUD OR MALICE.

The appellants filed an action alleging only negligence against respondents Kesler and Myers in their personal capacity. There is no dispute that respondents Kesler and Myers were employees of the State of Utah acting within the scope of their employment. (See Plaintiffs complaint, ¶23). Utah Code Ann. §63-30-4 as amended in 1978, provides:

> Nothing contained in this act unless specifically provided is to be construed as an omission or denial of liability or disability insofar as governmental entities are concerned. Wherein immunity from suit is waived by this act, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.
>
> The remedy against a governmental entity or its employees for an injury caused by an act or omission which occurs during the performance of such employees duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil act or proceeding by reason of the same subject matter against the employee or the estate of the employee, whose act or omission gave advice to the claim, unless the employee acted or failed to act through gross negligence, fraud or malice.

> An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one in which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occuring during the performance of the employees duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to gross negligence, fraud or malice.

The amended statute became effective on March 30, 19[illegible]. It is the respondent Myer's position that §63-30-4 clearly precludes appellants from bringing a negligence action against respondents Kesler and Myers in their personal capacity. This Court has analyzed this specific issue in the recent case of Madsen v. Borthick, 658 P.2d 627 (Utah 1983). In assessing the personal liability of government employees, the court stated:

> The 1978 amendment to the Governmental Immunity Act, in §63-30-4, establishes a new statutory standard for official immunity. Thus, under the first quoted paragraph, the act's expansion of the right to sue governmental entities and its permission to sue governmental employees for "gross negligence, fraud, or malice" is declared to be "exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee. . . ." By this provision, §63-30-4 precludes all statutory or common law causes of action against an employee in his or her personal capacity for acts or omissions which occur during the performance of the employees' duties, except as authorized in the governmental immunity act.
>
> The second quoted paragraph of §63-30-4 reaffirms that the employee will not be personally liable unless he or she acted or failed to act due to gross negligence, fraud or malice. [658 P.2d at 633 (footnote omitted, emphasis added)].

Thus, it is clear that if the provisions of §63-30-4 as amended in 1978, are applicable to the facts in this case, the granting of the motion for summary judgment in favor of respondents Kesler and Myers was proper. Appellants argue, however, that their cause of action arose prior to the date §63-30-4 became effective. As will be set forth below, appellants' cause of action did not arise until after March 30, 1978, and is subject to the provisions of the statute. Respondents Kesler and Myers cannot be sued in their personal capacity because §63-30-4 precludes personal liability of government employees for acts or omissions occuring during the performance of their duties, unless the employees "acted or failed to act, through gross negligence, fraud or malice." Since plaintiffs' complaint makes no such allegation, the granting of summary judgment as to respondents Kesler and Myers was proper.

POINT II

APPELLANTS' CLAIMS AGAINST RESPONDENTS DID NOT ARISE UNTIL AFTER §63-30-4 BECAME EFFECTIVE AND, THEREFORE, ARE BARRED BY THE STATUTE.

A. All the Elements of a Negligence Action Must Exist Before a Cause of Action Can Arise.

The elements of actionable negligence are: (1) A legal duty owed by one person to another, (2) a breach of that duty, and (3) damage proximately resulting from such breach. All the elements must co-exist before there can be any recovery. Rodriquez v. Carson, 519 S.W.2d 214, 216 (Tex.Civ.App. 1975);

Hunter v. Knight, Vale & Gregory, 18 Wash.App. 640, 571 P.2d 215 (1977) (negligence action arises when all elements necessary to maintenance of a law suit are present.) See also Strombo v. Cokayne, 646 P.2d 747 (Utah 1982); Industrial Comm'n of Utah v. Wasatch Grading Co., 14 P.2d 988, 992-993, (Utah 1932).

Thus, the general rule is that unless the plaintiff sustained injury, there is no cause of action for a claim sounding in negligence. See e.g. Bonano v. Potthoff, 527 F.Supp. 561, 564 (N.D.Ill. 1981) (under Illinois law, no cause of action for negligence until the injury or damage has occurred-attorney malpractice action); Royal Crown Bottling, Etc. v. Aetna Cas. & Sur. Co., 438 F.Supp. 39, 44-45 (W.D.Okl. 1977) (rule in Oklahoma is that a negligence action may not be maintained until and until the plaintiff has sustained injury, because "injury" an essential element of the claim"); Doyle v. Lynn, 547 P.2d 257, 259 (Colo.App. 1975) (without damage, there is no cause of action on claim based on negligence; Romano v. Westinghouse Elec. Co., 336 A.2d 555, 559 (R.I. 1975) (proof of actual damages is essential part of plaintiff's case and negligence action); cf. Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279, (Utah 1982).

General principles which ordinarily govern in negligence also apply in medical malpractice cases. Riffey v. Rauch, 36 Md.App. 633, 375 A.2d 1138, 1147 (1977). Thus, to prove a case in medical malpractice the plaintiff has the burden of proving that the physician was negligent in failing to use

ordinary care and that the failure to use ordinary care was the proximate cause of plaintiff's injury. Conrad v. St. Clair, 100 Idaho 401, 599 P.2d 292, 295 (1979); Nixdorf v. Hicken, 612 P.2d 348, 354 (Utah 1980).

It is the appellants' contention that their claim and the negligence had fully matured prior to March 30, 1978, the date amended §62-30-4 became effective. The respondents vigorously dispute this assertion. The respondents recognize that if a physician-patient relationship existed between Mrs. Payne and Drs. Kesler and Myers, then a duty existed. Respondents will also acknowledge, for the sake of argument, that if their action fell below the standard of care exercised by physicians of similar training in similar locals, there may be a breach of the duty owed to Mrs. Payne. The respondents, however, contend unequivocally that whatever injury was sustained by the alleged breach of the duty owned to Mrs. Payne did not occur until Mrs. Payne became pregnant, a time clearly after March 30, 1978.

B. Claims of Any Appellant Against Respondents Kesler and Myers Did Not Arise Until Mrs. Payne Became Pregnant.

All the parties agree the statute became effective before a cause of action accrued on behalf of the appellant, Michael Payne. (See Tr. p. 40, l. 1-13.) The appellants argue, however, that John and Stephanie Payne, acting in reliance on the alleged negligent advise of respondents Kesler and Myers, had Mrs. Payne's IUD removed, and, thus incurred some medical expense. The appellants assert that this expense constituted an

"injury" which gave rise to their claim against the respondents. As a matter of law, this contention is incorrect.

As was noted above, the general principles which ordinarily govern in negligence actions also apply in medical malpractice cases. Riffey v. Conder, supra; Nixdorf v. Hicks, supra. A brief review of the case law and legal commentary dealing with the accrual of a negligence cause of action will demonstrate that the so-called injury, by the appellants was not sufficient to sustain a cause of action for "wrongful birth." It is "wrongful birth" which is John and Stephanie Payne's cause of action against the respondents, and is the parents equivalent of the child's claim for "wrongful life." See generally, Rodgers, Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Pre-Natal Testing, 33 S.C.L.Rev. 713 (1982).

Some medical malpractice cases hold that a cause of action arises when an injury is sustained by the plaintiff, not when the causes are set in motion which ultimately produce injury as a consequence. Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788, 790 (1959) (citing Foley v. Pittsburg Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949)). "The injury is done when the act heralded a possible tort inflicts damage which is physically objective and ascertainable." Ayers v. Morgan, supra at 792.

It is important to note that the mere fact a physician is mistaken in a diagnosis is not sufficient, standing alone, to warrant a finding of negligence. Winkler v. Herr, 277 N.W.2d 579, 586 (N.D. 1979); Borne v. Brumfield, 363 So.2d 79, 83

(La. App. 1978). Rather, "[c]onclusive proof of a doctor's negligence will not of itself support a malpractice action. The plaintiff must also show that such negligence was a proximate cause of the injury." Voegeli v. Lewis, 568 F.2d 89, 94 (8th Cir. 1977).

Thus, no medical malpractice action arises until injury is suffered. It is at this point that a plaintiff's cause of action is complete and legally cognizable. "Where a physician negligently diagnosis a case, he is not liable unless injury follows as a result of such negligence." Seattle-First National Bank v. Rankin, 367 P.2d 835, 840 (Wash. 1962).

Case law from the area of legal malpractice is also instructive. In Veseley Otto Miller & Keefe v. Blake, 311 NW.2d 3 (Minn. 1981), a lawyer sought contribution from a doctor after the lawyer had been found liable for malpractice for failing to advise a client about the two-year statute of limitations claim against the doctor. In denying the lawyer's claim for contribution, the court stated:

> When Dr. Blake allegedly treated John Togstead in a negligent manner, Todstead could have sued him for damages for personal injuries arising from medical malpractice at that time and throughout the two-year statute of limitations. However, the Togsteads could not have sued appellants for negligent legal advice during this two-year period because at this point they had suffered no damage arising from the legal malpractice. The Togstead's ability to appellants for damages arose only at the time, and indeed for the very reason, that they could no longer sue Dr. Blake, i.e. at the expiration of a limitations for the medical malpractice claim. [311 NW.2d at 5].

Similarly, in Reliance In. Co. vs. Arneson, 322 N.W. 604 (Minn. 1982), the Minnesota Supreme Court again held that a lawyer was not negligent as a matter of law for malpractice for his acts or omissions resulted in damage to his client, because of the expiration of the Statute of Limitations. The court held that damage is an essential element of a negligence cause of action, and that "the threat of future harm, not yet realized, will not satisfy the damage requirement." 322 N.W.2d at 607. Thus, the client's right to sue for legal malpractice does not accrue when the client incurs a financial obligation to the lawyer, but only when the final act directly leading to the actual damage is consummated.

A similar line of reasoning was applied by the court in Bonanno v. Potthoff, 527 F.Supp. 561 (N.D.Ill. 1981). In that case, a client brought a malpractice action against his attorney after the attorney negligently failed to file his appearance in litigation brought by the client. A subsequent action filed on identical grounds to those of the original action was also dismissed on a res judicata decision. The court held that plaintiff's cause of action did not arise until the second claim was dismissed by the trial court and this dismissal was upheld by the appellate court. The court stated: "Indeed, the force of this analysis is supported by case law indicating that a suit brought against Potthoff before the appellate court decision might have been dismissed as premature." 527 F.Supp. at 565 (emphasis added). See also Walker v. Pacific Indem. Co., 6 Cal.Rptr. 93

426, 183 Cal.App.2d 513, 517 (1960) (probability that event causing damage will result from wrongful act does not render act actionable).

The appellants, therefore, could not have brought a wrongful birth action when they allegedly received assurances from the respondents that a second child would be healthy. Nor could appellants have brought suit for wrongful birth when they incurred the nominal cost of the office visit to Dr. Gibbs. A suit for wrongful birth, at that time, would clearly have been premature. As the court succinctly states in Alhino v. Starr, 169 Cal.Rpt. 136, 147, 112 Cal.App.3d 158, 176 (1980):

> If the allegedly negligent conduct does not cause damage, it generates no cause of action and tort. The mere breach of a professional duty, causing only nominal damages, speculative harm-not yet realized-does not suffice or create a cause of action for negligence.

Even supposing that the office visit of Mrs. Payne to Dr. Gibbs in February of 1978 is cognizable as an injury to the appellants, when viewed in the context of a negligence claim for wrongful birth this would be "nominal damages, speculative harm-not yet realized. . . " Such a claim of injury, standing alone, is not sufficient to support a negligence action for wrongful birth. See Repp v. Hahn, 45 Or.App. 671, 609 P.2d 398, 400-401 (1980) (doctors' erroneous diagnosis of scalp condition, which later led to cancer, was not actionable harm at time of diagnosis.) It is only at the time when Mrs. Payne becomes pregnant that a cause of action possibly begins to arise.

Indeed, given the fact that the disease that appellant Michael Payne suffers from only occurs in males, it is arguable that a cause of action for wrongful birth would only arise at the time in time during the pregnancy in which it would be possible to determine the sex of the child or even if the child was suffering from the disease. Cf. Foil v. Ballinger, 601 P.2d 144 (Utah 1979) (statute of limitations of Health Care Malpractice Act begins to run when injured person knows or should know that he has suffered legal injury).

The question is when do the plaintiffs have a legally cognizable claim for an action for wrongful birth. The answer is they did not have a legally cognizable claim at any time prior to the conception of Michael Payne, which was clearly after §63-30-4 became effective. W. Prosser, The Law of Torts §30, pp. 143-44 (4th Ed. 1971), agrees with this conclusion:

> Since the action for negligence developed chiefly out of the old forms of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiffs' case. Nominal damages, to indicate a technical right, cannot be recovered in a negligence action where no actual loss has occurred. The threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference with the interest of the world at large that there is any right to complain of it . . .

The record is clear that Mrs. Payne's last menstrual period was in May of 1978. (See Tr. p. 10). This was already date when §63-30-4 became effective.

The Payne's action for wrongful birth, sounding in negligence, did not arise until Mrs. Payne became pregnant, well after the time §63-30-4 became operative. A claim for wrongful birth prior to this time would have been premature. The appellants' "injuries," the supposed charge for removal of Mrs. Payne's IUD, is not even listed in Dr. Gibbs' financial account record for Mrs. Payne. (See Gibbs Depo, Exhibit "A"). The charges listed for 1978 are for a pap smear and a routine office visit. There is no charge for the removal of the IUD. The pregnancy is charged in one lump sum on January 28, 1979, in the amount of $345.00. (See Gibbs Depo, Exhibit "A"). Thus, if the "injury" is the financial obligation incurred from the removal of the IUD, it is arguable they suffered no injury until the obligation appeared in the financial statement of Dr. Gibbs in 1979.

Conceding, however, for the sake of argument, that the cost from the removal of the IUD was a separate charge that was incurred by the plaintiffs at the time of the February, 1978 office visit to Dr. Gibbs, the issue of whether a cause of action for wrongful birth had arisen can be resolved only one way: No such action was sustainable at that time. The appellants, having sued at any time prior to Mrs. Payne's becoming pregnant, would have been entitled to recover only nominal damages-an indication of a technical right which cannot be recovered in a negligence action where no actual harm is incurred. Prosser, supra. See also M. Franks, Limitations on Actions 11 (1959).

Section 63-30-4 precludes personal liability for government employees unless they act or fail to act through negligence, fraud or malice, and became effective March 20, 19 The plaintiffs filed an action alleging only negligence against respondents Kesler and Myers in their personal capacity. The plaintiffs cause of action for wrongful birth accrued only at time Mrs. Payne became pregnant, sometime at the end of April early May, 1978. Section 63-30-4 thus precludes any cause of action against respondents Kesler and Myers and the granting of summary judgment as to those respondents was proper.

POINT III

WRITING REQUIRED AS BASIS FOR LIABILITY FOR BREACH OF ASSURANCE OF RESULT.

The gist of appellant's complaint is that they conceived and gave birth to appellant Michael Payne "relying upon the advice and assurance of defendants Garth G. Myers and Jose P. Kesler that a second child could be born without fear of defect or impairment." (Plaintiffs' Complaint, ¶15.) Utah Code Ann. §78-14-6 (1976) expressly provides:

> No liability shall be imposed upon any health care provider on the basis of an alleged breach of guarantee, warranty, contract or assurance of result to be obtained from any health care rendered unless the guarantee, warranty, contract or assurance as set forth in writing and signed by the health care provider or an authorized agent of the provider.

There is no written document signed by respondent which assures the appellants that a second child could be born without fear of defect or impairment. Indeed, neither John Payne nor Stephanie Payne could place a specific date for the visit during which they allegedly received the oral assurances. (Brief of Appellant at 14.)

Although not raised by the parties at the hearing for summary judgment, the statute is dispositive of appellant's claims and its application is supported by the record before this court. Although the appellants may not raise such a contention for the first time on appeal, the respondent may urge any point reflected by the record in support of its judgment in the appellate process. Spencer v. Community Hospital of Evanston, 87 Ill.App.3d 214, 408 NE 2d 981, 985 (1980). See also Fuller v. Favorite Theater Co., 230 P.2d 335 (Utah 1951) (ordinarily respondent may urge any matter appearing in record in support of judgment appealed from); Adams v. Liedholt, 38 Colo.App. 463, 536 P.2d 15, aff'd 579 P.2d 618 (1976).

It is clearly reflected in the record that the appellants received only oral assurances. (Brief for appellant at 14; Tr. at p.13, l. 12.) Appellants have produced no written documents signed by respondents. The statute is clear that the liability of any health care provider for any breach of an assurance of result is contingent upon a writing so stating and signed by the health care provider. The legal consequences of the statute expressly support and affirm the trial court's

granting of the summary judgment as to respondents Kesler and Myers.

POINT IV

APPELLANTS' ALLEGATIONS ARE NOT SUPPORTED BY THE RECORD BEFORE THE COURT.

It is the responsibility of the appellants to furnish this Supreme Court with the precise record considered by the trial court in order for the Supreme Court to properly review error directed to granting a motion for summary judgment. Jacobsen v. State, 89 Wash.2d 104, 569 P.2d 1152, 1157. (1977) The burden on the party alleging error is to show it affirmatively in the record, and the absence of such an affirmative record to support the appellant's contention will result in the reviewing court's refusal to consider the alleged error. Wilson v. Walker, 139 Ga.App. 145, 227 SE.2d 920, 921 (1976). See also Schranz v. I. L. Grossman, Inc., 90 Ill.App.3d 507, 412 NE.2d 1378, 1383 (1980) (where record is lacking, reviewing court will indulge every presumption favorable to judgment or order appealed from); Cook v. Hahn, 403 NE.2d 834, 837 (Ind.App. 1980) (where error is alleged but not disclosed by the record, such error is not proper subject for review by the court); Cooper v. Bowser, 610 SW.2d 825, 828 (Tex.Civ.App. 1980) (If appellant brings insufficient record, every reasonable presumption will be indulged in favor of ruling below, and a reversal will not be ordered unless it appears that on no possible state of the case could the ruling be upheld).

It is respondent's firm contention that the record presented by appellants on appeal is insufficient to support a reversal of the trial court's summary judgment. The record consists of all memorandum filed in support or in opposition of the motion for summary judgment, the appellants' complaint and the respondent's answers and amended answers, and the deposition of Dr. R. Kent Gibbs and attached exhibits.

Crucial to appellants claimed basis for reversal of the summary judgment are the allegations that appellants incurred immediate money damages as a result of the removal of Mrs. Payne's IUD at the February, 1978 office visit. Equally vital to appellants claim is the assertion that the IUD was removed for the express purpose of having a child. Yet neither of these assertions have a concrete basis in the record before the court. Dr. Gibbs' financial statement shows no direct line-charge for the removal of the IUD. (See Gibbs Depo, Exhibit "A"). Appellants merely assert-and provide no substantiation in the record-that the IUD removal was included in the eventual, general pregnancy bill set down on January 28, 1979.

Again, appellants assert-but provide no substantiation in the record-that Mrs. Payne sought to have her IUD removed solely for the purpose of conceiving a child. Yet the only record before the court relating to Mrs. Payne's state of mind at this time, the deposition of her gynecologist, Dr. Gibbs, reveals no direct statements to this effect. (See Gibbs Depo., pp. 20-21).

It is respondent's position that appellants have failed in their burden of providing this court with a record sufficient to support their claim as to the reversal of the trial court's order granting summary judgment. The crux of appellants' argument is that they suffered injury prior to the effective enactment of §63-30-4. Appellants provide no direct evidence of this bare assertion in the record of appeal. Where appellants have apparently failed to substantiate the basis of their claims, this court should indulge every presumption favorable to the judgment of the trial court. Schranz v. I.L. Grossman, Inc., supra; Cooper v. Bowser, supra. The trial court's order granting summary judgment as to respondents Kesler and Meyers should be reaffirmed.

POINT V

PUBLIC POLICY IN UTAH DOES NOT RECOGNIZE WRONGFUL LIFE OR WRONGFUL BIRTH CAUSE OF ACTION.

It is the express public policy of the State of Utah not to recognize any cause of action for wrongful life or wrongful birth. Utah Code Annotated §78-11-23 (1983), 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." Utah Code Ann. §78-11-24 (1983), states: "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

... of another, a person would not have been permitted to ... been born alive, but would have been aborted."

Respondents do not ask this court to apply the statutes retroactively to this case. Respondents argue, however, that the statute is clearly indicative of what has been and what is the public policy in the State of Utah regarding the cause of action for wrongful life or wrongful birth, and what is the general public policy of the United States with regard to such causes of action. A survey of the general case law reveals that claims for wrongful life have been rejected in an overwhelming majority of the cases. In Phillips v. United States, 508 F.Supp. 537 (D.S.C. 1981), the court considered South Carolina's first claim of "wrongful life." In its exhaustive review of other jurisdictions, the court found an "overwhelming majority of those cases have refused to recognize the validity of 'wrongful life' claims." 508 F.Supp. at 541. Only three courts have recognized such claims: One in New York, one in California and one in Washington. Most significantly, the New York case has been reversed, Becker v. Schwartz, 46 N.Y.2d 401, 413 N.Y.S.2d 595, 386 N.E.2d 807 (1978), and the California case has been soundly rejected as "unsound under established principles of law" and as "representing at least an unwise jurisprudential example which we decline to follow." Turpin v. Sortini, 174 Cal.Rpt. 128, 129, [illegible] (1981).

Respondents argue that the appellants' claim for "wrongful life" and "wrongful birth" should be rejected for the following reasons. First, such claims clearly contravine the pro-life public policy of Utah. These claims are clearly an enigma in the law better left to the state legislatures. Second, damages for such claims can only be made on a highly-speculative basis. Buhrman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979). Finally, defendant submits that an infant has no legally cognizable right to be born without birth defects. Becker v. Schwartz, supra at 812. As a result of these complex and essentially metaphysical problems, most courts have rejected entirely any claim for wrongful life. Respondents urge that the complexity of the issues involved mandate a rejection of the claim for wrongful life and wrongful birth.

CONCLUSION

The trial court's summary judgment dismissing appellants' claims against the respondents Myers and Kesler should be affirmed. Appellants claim that their cause of action arose prior to the date on which §63-30-4 became effective is without merit. The appellants simply did not have a legally cognizable claim until that point in time in which Mrs. Payne became pregnant. Mrs. Payne did not become pregnant until well after §63-30-4 became effective and as such, any claims against the respondents in their personal capacity are barred by the statute

This is not a case of a retroactive application of a statute to extinguish a vested right. The appellants had no cause of action prior to Mrs. Payne's becoming pregnant. Any claim prior to this point would have been premature. All the elements necessary for a negligence action must co-exist before that action is cognizable at law. Duty, breach of duty, a causal relationship, and injury must all exist before a negligence cause of action can arise. Nominal damages will not suffice.

Further, appellants' claim is phrased in the terminology of assurance of result. Utah Code Ann. §78-14-6 clearly states that no liability shall be imposed upon any health care provider on the basis of a breach of an assurance of result unless such assurance is in a writing signed by the health care provider. No such writing was alleged or produced by the appellants in this case. The statute thus stands as an additional and dispositive bar to appellants claims.

Additionally, appellants have not provided a sufficient record to substantiate their claims of error in the court below. Lastly, and perhaps most importantly, it is clearly the public policy of Utah not to recognize causes of action for wrongful life or wrongful birth.

Respondents also deny the appellants contention that §63-30-4 is unconstitutional and incorporate by reference the arguments of the Respondent Kesler as to the constitutionality and soundness of the statute. In light of all these factors, the