

STATE OF MICHIGAN
COURT OF APPEALS

SHARON BARNES and TIM BARNES,

Plaintiffs-Appellees,

v

DR. IVANA VETTRAINO, DR. WILLIAM
BLESSED, PROVIDENCE HOSPITAL, and
MICHAEL ROTH, M.D.,

Defendants-Appellants,

and

JANE DOE,

Defendant.

UNPUBLISHED

March 25, 2003

No. 235357

Oakland Circuit Court

LC No. 00-022089-NH

Before: Owens, P.J., and Murphy and Cavanagh, JJ.

MURPHY, J. (*dissenting*).

I write separately to respectfully voice my disagreement with the decision of the trial court and the opinion of the majority, which, perhaps unintentionally, essentially recognize a cause of action for wrongful infliction of abortion. Such a cause of action is contrary to the public policy of this state. I would reverse the trial court's decision and grant defendants' motion for summary disposition because the claim brought by plaintiffs is not one upon which "relief can be granted" under MCR 2.116(C)(8).

It is beyond dispute that the public policy of Michigan, while limited by decisions of the United States Supreme Court, favors life and proscribes elective abortions. MCL 400.109a ("It is the policy of this state to prohibit the appropriation of public funds for the purpose of providing an abortion to a person who receives welfare benefits unless the abortion is necessary to save the life of the mother."); MCL 333.17014(f) ("This state has an interest in protecting women and, subject to United States constitutional limitations and Supreme Court decisions, this state has an interest in protecting the fetus."); *Doe v Dep't of Social Services*, 439 Mich 650, 678; 487 NW2d 166 (1992); *Taylor v Kurapati*, 236 Mich App 315, 347; 600 NW2d 670 (1999). I also note MCL 750.14 and MCL 750.15, which impose criminal penalties for administering a drug or employing an instrument to procure a miscarriage or abortion if the fetus is viable,

subject to certain limitation. See *People v Bricker*, 389 Mich 524, 527-530; 208 NW2d 172 (1973).

Moreover, the case law in this state supports this basic principle by prohibiting certain causes of action dealing with subjects of reproduction, contraception, and the decision to avoid or terminate pregnancy where negligence has occurred.

Thus, a claim for wrongful life, a tort action brought on behalf of a child born with a birth defect in which it is alleged that but for the negligent advice to the parents, the child would not have been born, is not recognized in Michigan. *Eisbrenner v Stanley*, 106 Mich App 357, 366; 308 NW2d 209 (1981), abrogated in part on other grounds in *Taylor*, *supra*.

Similarly, a claim for wrongful pregnancy or wrongful conception, which involves negligence relating to sterilization or contraception wherein a party seeks to recover as part of their damages the customary costs of raising and educating a normal healthy child is also not recognized. *Rouse v Wesley*, 196 Mich App 624, 627, 631; 494 NW2d 7 (1992).

Most recently, this Court in *Taylor*, *supra* at 319-321, addressed a case wherein the plaintiffs alleged that the defendants were negligent with respect to an ultrasound performed on Brandy Taylor during her pregnancy, and that had there been no negligence on the part of medical personnel, the ultrasound would have revealed that the child had gross anatomical deformities. The plaintiffs alleged that “the failure to reveal the disabilities deprived [them] of their right to make a reproductive decision regarding the pregnancy.” *Id.* at 321. The plaintiffs pursued, in part, a cause of action for wrongful birth. *Id.* at 318. This Court, after a thorough review of the case law concerning wrongful birth, life, and conception, noted that our jurisprudence had “partially repudiated the birth-related tort of wrongful conception and totally rejected the birth-related tort of wrongful life[,] . . . and ha[d] continued to recognize the tort of wrongful birth.” *Id.* at 341. The *Taylor* panel reconsidered pre-1990 decisions establishing the wrongful birth tort and held that, “as a matter of law, it has no continued place in our jurisprudence,” thereby abolishing the tort. *Id.* at 355-356. The holding was predicated on the inherent dangers of applying the benefits rule,¹ under which a jury was asked to quantify the unquantifiable, and the Court emphasized the lack of any approval of the wrongful birth tort by the Michigan Supreme Court or our Legislature. *Id.* at 349-356.

The *Taylor* panel, finding that it was not required to recognize a cause of action for wrongful birth, stated:

Because the state has no obligation to affirmatively aid a woman in obtaining an elective abortion by paying for it, the state similarly has no obligation to take the affirmative step of imposing civil liability on a party for failing to provide a pregnant woman with information that would make her more likely to have an elective, and eugenic, abortion. [*Id.* at 348.]

¹ The benefits rule requires the jury in wrongful birth cases to weigh the costs to the parents of bearing and raising a child against the benefits to the parents of the life of that child. *Taylor*, *supra* at 349.

I interpret this language to require us to hold that plaintiffs here would have no cause of action against defendants because the essence of plaintiffs' claim is that defendants failed to provide Mrs. Barnes with accurate and timely information that would have made her more likely to have an elective abortion.

I find it to be a contradiction to say in one breath that the policy of this state favors life and proscribes abortion, and in another breath rule that a party can recover civil damages through the Michigan legal system arising out of a choice to have an abortion, where no damages, in negligence actions, are recoverable for wrongful birth if the choice is to give birth.² The majority opinion opens the door to lawsuits for damages associated with an elective abortion decision under not only circumstances that exist here, but situations where a woman conceives through the negligence of a defendant. If plaintiffs are permitted to pursue their action and recover damages, so can any other party who alleges a negligent act that led to the painful decision to terminate a pregnancy. The majority has necessarily embraced a new cause of action for wrongful infliction of abortion, or in other words, a cause of action for damages associated with the decision to undergo an abortion.

The case at bar presents a somewhat unique set of circumstances, in that the factual background does not fit cleanly under either the wrongful birth or wrongful conception scenario. Mrs. Barnes was not deprived of the opportunity to seek an abortion as in a wrongful birth case and some wrongful conception cases (physician fails to diagnose the existence of a pregnancy and the mother gives birth to a healthy child). See *Taylor, supra* at 323, 325-326. Defendants' alleged actions also did not result in causing Mrs. Barnes to conceive as in other wrongful conception cases. *Id.* at 325-326. Rather, plaintiffs' circumstances share qualities similar to both wrongful birth and wrongful conception actions. There is an alleged failure to identify abnormalities as in a wrongful birth scenario, yet an opportunity existed to make a decision between terminating the pregnancy and giving birth as in a wrongful conception scenario. *Id.* at 323, 325-326. Plaintiffs' action is predicated on the claim that Mrs. Barnes was deprived of the opportunity to undergo a "regular" abortion procedure as opposed to a late-term abortion procedure. However, Mrs. Barnes also had the opportunity and choice to carry the pregnancy to term and give birth. The majority opinion would allow her a civil recovery for choosing to terminate the pregnancy. This holding would necessarily allow any woman, who through an act of negligence is confronted with a decision to choose an abortion or choose birth, to recover damages for terminating the pregnancy.³

² My comments and thoughts closely parallel those of Judge Titone in his dissenting opinion in *Lynch v Bay Ridge Obstetrical & Gynecological Associates, PC*, 72 NY2d 632, 638-640; 532 NE2d 1239 (1988).

³ I disagree with the majority's statement that it is factually inaccurate to conclude that the majority's ruling recognizes a "wrongful infliction of abortion" cause of action. Whether through negligence that causes a pregnancy to occur or under the circumstances that exist here, a plaintiff is confronted with an abortion decision that would **not** have been posed but for the negligence of a defendant. If the abortion is undergone, it can be stated that but for the defendant's negligence, in part, the abortion would not have occurred. Therefore, it is not improper to deem such cases as one seeking recovery for the wrongful infliction of abortion. I recognize that here, an abortion would have taken place regardless of any negligence; however,
(continued...)

I am sympathetic with the suffering of plaintiffs in this case; however, recognition of a cause of action for wrongful infliction of abortion is not sound in light of Michigan's public policy and this Court's decision in *Taylor*, which we are bound to follow. MCR 7.215(I). If Mrs. Barnes had decided not to terminate her pregnancy, she would have no right to seek recovery, under a negligence theory, for the mental anguish that she would have unquestionably felt after the birth. In allowing this case to proceed to trial, the jury will be required to place a monetary value on the suffering Mrs. Barnes experienced in undergoing the late-term abortion, but it will also be required, in assessing damages, to necessarily weigh and offset any pain and suffering that was avoided in not giving birth to a potentially impaired child.⁴ This would be asking the trier of fact in my opinion to quantify the unquantifiable, which is the reason that the wrongful birth tort and the accompanying benefits rule were rejected in our jurisprudence. *Taylor, supra* at 349.⁵

I cannot help but be concerned by the message that the majority sends when it allows Mrs. Barnes to recover while denying relief to similarly situated women who choose to carry their pregnancies to term. A rule creating such a preference for the decision to undergo an abortion is unquestionably inconsistent with public policy. Rewarding a woman's decision to terminate her pregnancy with an opportunity to recover for an injury that is withheld from the woman who decides to give birth requires the court to embroil itself in value judgments that it quite properly should avoid. Also, it is a troublesome concept to allow a cause of action that potentially discourages the medical profession from correcting its mistake upon discovery,

(...continued)

Mrs. Barnes was faced with a different and more complicated abortion procedure, not comparable to a typical abortion. It is not incorrect to state that defendants, in part, and if proven at trial, inflicted a late-term abortion on Mrs. Barnes. Thus begins a slippery slope to recognize a cause of action in any situation where negligence forced an abortion decision upon a woman, and the woman chooses to terminate the pregnancy.

⁴ I disagree with my colleagues that an assessment by the jury of circumstances concerning a hypothetical birth will be unnecessary on the basis that plaintiffs' claim presumes an abortion would have taken place regardless of any negligence. In tort actions, "[i]t is well-settled that an injured party has a duty to exercise reasonable care to minimize damages, including obtaining proper medical or surgical treatment. *Klanseck v Anderson Sales & Service, Inc.*, 426 Mich 78, 91; 393 NW2d 356 (1986); see also M Civ JI 53.05 (mitigation of damages). Here, defendants conceivably will argue that, in the face of any negligence, Mrs. Barnes could have minimized any damages by carrying the pregnancy to term, which argument will necessarily entail a decision by the jury whether giving birth would have been reasonable and thus asking a juror to place value judgments on life with a potentially impaired child versus abortion. Moreover, merely because plaintiffs would have had an abortion if there had been no negligence, it does not follow that the jury should not consider any offset for pain and suffering that was avoided in not giving birth; it remains relevant. The majority fails to recognize that besides comparing a typical abortion and a late-term abortion, giving birth was an option that must be considered in unison in assessing this case and any damages to be awarded.

⁵ I also note the arduous task that a jury would be called upon to undertake in delineating the pain and suffering associated with a "normal" abortion, which Mrs. Barnes states she would have undergone had there been no negligence, and the pain and suffering caused by a late-term abortion. This delineation will be necessary to properly determine damages if this type of cause of action is permitted.

because to do so may expose it to liability if an abortion occurs whereas there would be no liability if the parties are not informed and the woman proceeds to give birth. Despite the temptation to provide a means to seek recompense and accountability for the negligence of medical personnel, the law cannot provide a remedy for every injury suffered.

Pursuant to binding authority found in *Taylor* and Michigan public policy as enunciated in case law and statutory provisions, I would reverse the judgment denying defendants' motion for summary disposition.

I respectfully dissent.⁶

/s/ William B. Murphy

⁶ I additionally have concerns about the apparently illegal nature of a late-term abortion under Michigan law; however, there is no need to address that matter in light of my conclusion that plaintiffs' cause of action should be dismissed. See generally *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995).