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# The Ramifications of Rejecting Wrongful Birth: A Closer Look at Grubbs v. Barbourville Family Health Center

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# The Ramifications of Rejecting Wrongful Birth: A Closer Look at *Grubbs v. Barbourville Family Health Center*

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## I. INTRODUCTION

On August 21, 2003, the Kentucky Supreme Court handed down a controversial decision in *Grubbs v. Barbourville Family Health Center*.[1] The court held, with two justices dissenting in part, that "birth–related torts," specifically wrongful life and wrongful birth claims, have no place in Kentucky jurisprudence.[2] While the court's stance on wrongful life mirrors that of most jurisdictions in the United States, its position on wrongful birth is woefully out of sync.

Part II of this note provides background on the concepts of wrongful birth and wrongful life, including significant decisions in both areas.[3] Since the Kentucky Supreme Court's decision regarding wrongful life matches that of most other jurisdictions, the note primarily focuses on wrongful birth. Initially, Part II outlines the elements of a successful wrongful birth claim.[4] Part III delves deeper into the *Grubbs* decision, including the story behind the case, the majority opinion, and a comparison of the supreme court's reasoning with the wrongful birth jurisprudence of other jurisdictions.[5] Part IV discusses the primary flaws in the majority's decision and what the court could have done to provide adequate relief.[6]

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[1] Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682 (Ky. 2003).

[2] Charles Wolfe, *High Court Rejects 'Wrongful Life' Suits*, COURIER–JOURNAL (Louisville), Aug. 22, 2004, at B4.

[3] *See infra* notes 6–77 and accompanying text.

[4] *See infra* notes 68–77 and accompanying text.

[5] *See infra* notes 78–128 and accompanying text.

[6] *See infra* notes 129–188 and accompanying text.

## II. WRONGFUL LIFE AND WRONGFUL BIRTH: FROM INFANCY TO ADULTHOOD

The birth–related tort debate is relatively new to Kentucky; thus, it is useful to examine the origin and evolution of the issues. But first, it is important to understand the difference between the terms "wrongful birth" and "wrongful life," as they have often been misused and confused.[7]

Wrongful life and wrongful birth can easily be distinguished by the identity of the plaintiff in the suit. Courts consistently define a "wrongful life action" as one brought by the child against a physician, alleging that the physician's negligence "deprived the child's parents of the decision to abort or never conceive."[8] Basically, the child claims that he or she should never have been born. On the other hand, the parents, not the child, are the plaintiffs in wrongful birth claims.[9] These suits typically allege that the physician has either "misread the findings of a genetic test or otherwise failed to determine that a fetus has a genetic defect."[10] A child born as a result of such negligence is typically not a normal, healthy child.[11] The parties in both types of claims seek damages ranging from the entire cost of rearing and caring for the child,[12] to emotional pain and suffering,[13] to only the additional costs of caring for a severely

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[7] *See* Michele E. Beasley, *Wrongful Birth/Wrongful Life: The Tort Progeny of Legalized Abortion*, *in* ABORTION, MEDICINE, AND THE LAW 233 (J. Douglas Butler & David F. Walbert eds., 1992).

[8] *Id.* at 234.

[9] Thomas A. Burns, Note, *When Life is an Injury: An Economic Approach to Wrongful Life Lawsuits*, 52 DUKE L.J. 807, 807 (2003) ("Wrongful birth lawsuits are prenatal negligence suits brought by the parents of a deformed or retarded child against a doctor who negligently failed to diagnose or inform the parents about potential birth defects.").

[10] William Young, *Wrongful Birth and Life Suits Hit Med–Mal Nerve*, 12 NEW JERSEY LAWYER: THE WEEKLY NEWSPAPER, April 28, 2003, at 17; *see also* Burns, *supra* note 9, at 807.

[11] Actions stemming from the birth of healthy, unwanted children due to a physician's negligence (e.g., from his failure to perform a sterilization procedure correctly, *see* Harbeson v. Parke–Davis, Inc., 656 P.2d 483, 488 (Wash. 1983)) are called "wrongful conception" or "wrongful pregnancy" actions. *See, e.g.*, Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981). This type of action has been recognized in at least 12 states. Beasley, *supra* note 7, at 234.

[12] *See, e.g.*, Robak v. United States, 658 F.2d 471, 473 (7th Cir. 1981) (seeking expenses for the "care, education, and maintenance" of the impaired child).

[13] *See, e.g.*, Lininger v. Eisenbaum, 764 P.2d 1202, 1204 (Colo. 1988) (seeking "general damages for emotional distress and pain and suffering"); Bader v. Johnson, 732 N.E.2d 1212, 1220 (Ind. 2000) (seeking, *inter alia*, damages for "mental and emotional anguish"); Smith v. Cote, 513 A.2d 341, 348 (N.H. 1986) (seeking damages for

handicapped child, which are above and beyond those of raising a normal, healthy child.[14] This vast range of possible damage awards fuels the controversy surrounding this emotional area of tort law.[15]

### *A. Wrongful Life*

*Zepeda v. Zepeda*[16] introduced the contentious concept of wrongful life. After serious discussion, the court decided that the plaintiff:

> [P]rotests not only the act which caused him to be born but birth itself. Love of life being what it is, one may conjecture whether, if he were older, he would feel the same way. . . . Be that as it may, the quintessence of his complaint is that he was born and that he is.[17]

The court believed this argument was both dangerous and unacceptable for two reasons: 1) there might be no end to such litigation if the court opened the floodgates,[18] and 2) creating this new cause of action is best left to the legislature.[19] As a result, the court refused to recognize this first presentation of wrongful life as a viable cause of action in tort.[20]

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"emotional distress, anxiety and trauma"); Becker v. Schwartz, 386 N.E.2d 807, 809 (N.Y. 1978) (seeking damages for emotional distress due to the birth of the child).

[14] *See, e.g.*, *Lininger*, 764 P.2d at 1204 (seeking "special damages for doctors, nurses, hospitals, and special education for the impaired child"); *Bader*, 732 N.E.2d at 1220 (seeking damages for "(1) the extraordinary costs necessary to treat the birth defect, (2) only additional medical or educational costs attributable to the birth defect during the child's minority, [and] (3) medical and hospital expenses incurred as a result of the physician's negligence"); *Cote*, 513 A.2d at 348 (seeking "compensation for the extraordinary medical and educational costs" necessary to raise the child); Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975) (seeking "medical and hospital expenses" incurred during the deformed child's life).

[15] It is this broad range of damages sought and inconsistently awarded that has created the most debate about whether these claims should be allowed at all. *See* discussion *infra* Part IV.B.

[16] Zepeda v. Zepeda, 190 N.E.2d 849, 851 (Ill. App. Ct. 1963) (involving an infant son, born illegitimately, who sued his father for not marrying his mother, claiming "damages for the deprivation of his right to be a legitimate child").

[17] *Id.* at 857, *reprinted in* Beasley, *supra* note 7, at 236.

[18] *Zepeda*, 190 N.E.2d at 858 ("One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation.").

[19] *Id.* at 859.

[20] *Id.*

The next case in this lineage added new wrinkles to the argument. *Gleitman v. Cosgrove*,[21] decided prior to *Roe v. Wade*,[22] was the first case to relate wrongful life to the parents' option of abortion.[23] The "core issue of the child's claim"[24] was that "the conduct of [physicians] prevented his mother from obtaining an abortion which would have terminated his existence, and that his very life [was] 'wrongful.'"[25] That is, "in the language of tort he says: but for the negligence of defendants, he would not have been born to suffer with an impaired body."[26] While recognizing that the infant had a right to bring prenatal torts,[27] the justices still rejected the wrongful life claim because the child could not prove that the defendant doctors had caused his injury, and because they deemed it "logically impossible" to calculate damages.[28] To do so would require weighing the plaintiff's life with birth defects against the "utter void of non–existence";[29] that is, placing a dollar value on the difference between an impaired life and no life at all. This the court was unwilling (and quite possibly unable) to do.

Analysis of wrongful life actions matured greatly in the late 1970s. The most oft–quoted case in wrongful life jurisprudence, *Becker v. Schwartz*, was decided by the Court of Appeals of New York in 1978.[30] Dolores Becker, age 37, became pregnant and was under the care of the defendant gynecologists until her child was born.[31] Tragically, the child was born with Down's Syndrome.[32] In their complaint, the Beckers alleged that they were never informed of "the increased risk of Down's Syndrome in children born to women over 35 years of age," nor were

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[21] Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967), *abrogated by* Berman v. Allan, 404 A.2d 8 (N.J. 1979).

[22] Roe v. Wade, 410 U.S. 113 (1973).

[23] Beasley, *supra* note 7, at 237. *Gleitman* was also the "first traditional wrongful life *and* wrongful birth lawsuit." Burns, *supra* note 9, at 813.

[24] Beasley, *supra* note 7, at 237.

[25] *Gleitman*, 227 A.2d at 692. This abortion connection would become extremely important to wrongful birth jurisprudence after *Roe*. *See infra* Part II.B.

[26] *Id.*

[27] *Id.* "And regardless of analogies to other areas of the law, justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body." (quoting Smith v. Brennan, 157 A.2d 497, 503 (N.J. 1960)). *Id.*

[28] *See id.* The court also stated that "no comparison is possible since were it not for the act of birth the infant would not exist. By his cause of action, the plaintiff cuts from under himself the ground upon which he needs to rely in order to prove his damage." (citation omitted).

[29] *Id.* Thomas Burns describes this problem as the "nonexistence paradox." *See* Burns, *supra* note 9, at 814, 821.

[30] Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978).

[31] *Id.* at 808.

[32] *Id.*

they informed of the ability to detect the syndrome through a simple amniocentesis test.[33] They sought damages for wrongful life and wrongful birth[34] to cover the cost of institutional care for their child, claiming that if they had received the benefit of the amniocentesis test and its results, they would have chosen to terminate the pregnancy.[35]

The *Becker* court appears to have been very uncomfortable with this argument, noting that "seeking compensation for the wrongful causation of life itself casts an almost Orwellian shadow, premised as it is upon the concepts of genetic predictability. . . . It borders on the absurdly obvious to observe that resolution of this question transcends the mechanical application of legal principles."[36] The court went on to adopt a sanctity–of–life argument,[37] concluding that wrongful life was "a Hobson's choice [between] life in an impaired state and nonexistence," a decision that "the law is not equipped to make."[38] The court also noted that the infants' wrongful life claims[39] "failed to state legally cognizable causes of action,"[40] in large part because there was "no precedent for recognition . . . of 'the fundamental right of a child to be born as a whole, functional human being.'"[41]

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[33] *Id.*

[34] The discussion in this section is confined to the outcome of the wrongful life claim; see *infra* Part II.B for a discussion of *Becker's* wrongful birth claim.

[35] *Becker*, 386 N.E.2d at 810.

[36] *Id.*

[37] *Id.* at 812. The opinion stated:

> Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering.

*Id.*

[38] *Id.*

[39] *Becker* was a consolidated appeal of two cases: *Becker v. Schwartz*, 400 N.Y.S.2d 419 (App. Div. 1977) (claiming damages for "wrongful life" on behalf of the infant in addition to the parents' claims), and *Park v. Chessin*, 400 N.Y.S.2d 110 (App. Div. 1977) (seeking damages for "wrongful life" on behalf of the infant as well as the parents' claims for expenses for the care of the child, the emotional and physical suffering of the mother, the emotional injuries of the father, and a claim by the infant's estate for wrongful death). *Becker*, 386 N.E.2d at 809.

[40] *Id.* at 811 (citation omitted).

[41] *Id.* at 812.

In 1979, a year after *Becker*, the Supreme Court of New Jersey reconsidered *Gleitman* in *Berman v. Allan*.[42] Once again rejecting the plaintiffs' wrongful life claim, the *Berman* court "abandoned *Gleitman's* difficulty–of–measuring–damages rationale" in favor of adopting the sanctity–of–life reasoning formulated by the *Becker* court.[43] This argument constitutes the backbone of nearly all rejections of wrongful life claims today, including the *Grubbs* decision that is the subject of this note.[44]

Currently, only three states "clearly recognize" wrongful life as a valid cause of action,[45] while twenty–six others expressly forbid it either by statute or under common law.[46] The states that *do* permit wrongful life actions seem to view the impaired life versus nonexistence argument as immaterial because "a plaintiff both exists and suffers, due to the negligence of others."[47] Their view is that the plaintiff, however defective, has rights by virtue of being alive and therefore should be allowed to recover damages.[48]

### *B. Wrongful Birth*

Wrongful birth jurisprudence originated from the same roots as wrongful life, but matured in a more abbreviated fashion. *Gleitman*,[49] in addition to setting the tone for wrongful life claims, also "marked the first appearance and rejection of a wrongful birth claim by a set of parents."[50] Mrs. Gleitman informed her physician that she had rubella (German measles), and her physician negligently informed her that the

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[42] Berman v. Allan, 404 A.2d 8 (N.J. 1979).

[43] Burns, *supra* note 9, at 816–17.

[44] *See* Moores v. Lucas, 405 So. 2d 1022, 1025–26 (Fla. Dist. Ct. App. 1981); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 696 (Ill. 1987); Goldberg v. Ruskin, 471 N.E.2d 530, 534 (Ill. App. Ct. 1984); Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 689 (Ky. 2003); Greco v. United States, 893 P.2d 345, 348 (Nev. 1995); *Berman*, 404 A.2d at 12.

[45] Beasley, *supra* note 7, at 234 n.14; *see also* Young, *supra* note 10. The states that allow wrongful life claims are California (Turpin v. Sortini, 643 P.2d 954, 966 (Cal. 1982)), New Jersey (Procanik v. Cillo, 478 A.2d 755, 764 (N.J. 1984)), and Washington (Harbeson v. Parke–Davis, Inc., 656 P.2d 483, 496 (Wash. 1983)).

[46] For a list of these states *see* Beasley, *supra* note 7, at 235 & nn.17–18.

[47] Burns, *supra* note 9, at 817 (quoting Curlender v. Bio–Science Labs., 165 Cal. Rptr. 477, 488 (Ct. App. 1980)).

[48] *See* Burns, *supra* note 9, at 817 (quoting *Curlender*, 165 Cal. Rptr. at 488).

[49] *See* Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967), *abrogated by* Berman v. Allan, 404 A.2d 8 (N.J. 1979).

[50] Beasley, *supra* note 7, at 240.

disease would have no effect on her unborn child.[51] As a result of this incorrect advice, Jeffrey Gleitman was born deaf and blind.[52] Mrs. Gleitman claimed that she would have aborted her pregnancy if she had been informed of this possibility.[53] The New Jersey Supreme Court was unswayed by Mrs. Gleitman's "missed abortion opportunity" argument, concluding that "substantial policy reasons prevent this Court from allowing tort damages for the denial of the opportunity to take an embryonic life."[54]

Following *Gleitman*, wrongful birth claims seemed to be put on hold for awhile: "no other [wrongful birth claims] were brought until after *Roe v. Wade* was decided in 1973."[55] *Roe* was not only a watershed case for abortion rights; it provided a stronger foundation for wrongful birth claims as well.[56] As a result of *Roe* and subsequent cases, it became easier for courts to give credence to the "lost abortion opportunity" argument since the ability to obtain an abortion prior to viability, for any reason, had become a legally cognizable right.[57]

Five years after *Roe*, *Becker*[58] became the first case to recognize wrongful birth officially as a viable cause of action. The court, recognizing the mother's right to an abortion, analyzed the problem according to traditional negligence principles.[59] The court assumed *arguendo* that duty, breach, and causation had been shown, and instead focused on the issue of damages,[60] concluding that it "require[d] nothing extraordinary"[61] to calculate damages for the plaintiff parents since the conundrum of impaired existence versus nonexistence was not present.[62]

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[51] *Gleitman*, 227 A.2d at 690.

[52] *Id.*

[53] *Id.* at 691.

[54] *Id.* at 693.

[55] Beasley, *supra* note 7, at 240 (citations omitted). While claims followed in 1975 (*see, e.g.*, Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975)), most wrongful birth claims were filed in the 1980s. *See* Beasley, *supra* note 7, at 241 n.62.

[56] *See* Beasley, *supra* note 7, at 233, 244.

[57] Roe v. Wade, 410 U.S. 113, 163 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 846, 879 (1992) (reaffirming *Roe's* holding, that "the right of a woman to choose to have an abortion before viability and to obtain it without undue influence[,]" still stands).

[58] Becker v. Schwartz, 386 N.E.2d 807 (N.Y.1978).

[59] *See id.* at 813.

[60] *Id.* ("Certainly, assuming the validity of plaintiffs' allegations, it can be said in traditional tort language that but for the defendants' breach of their duty to advise plaintiffs, the latter would not have been required to assume these obligations.").

[61] *Id.*

[62] *See id.*

The court opined that the facts allowed for pecuniary damages,[63] but it declined to allow recovery for emotional harm for policy reasons.[64] This direct, no–nonsense approach has become the template for all or part of many states' decisions regarding wrongful birth damages.[65]

In the United States today, thirty states recognize wrongful birth actions.[66] In addition to *Roe* having legitimized parents' abortion rights, advances in medical technology have raised the standard of care physicians are expected to provide, making wrongful birth claims more prevalent.[67] The technology available to detect the presence of prenatal birth defects has become highly developed, and the expectation that it be used and interpreted accurately has increased proportionately.[68] Wrongful birth claims have quickly become a manifestation of many parents' shock and anger when this expectation is not met.

### C. *Elements of a Successful Wrongful Birth Claim*

Wrongful birth, while "not an ordinary tort,"[69] is also not a *new* tort as some courts, including Kentucky's, have claimed.[70] Wrongful birth is merely a different name for a medical malpractice or medical negligence claim based on a certain set of facts.[71] Therefore, "creation" of a wrongful birth cause of action truly does not require the legislative mandate that some courts claim is necessary; it only requires application of old principles to new facts. Thus, wrongful birth claims must satisfy

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[63] To review the facts of *Becker*, see *supra* notes 30–35 and accompanying text.

[64] *Id.* The court feared that allowing recovery for emotional harm would "inevitably le[a]d to the drawing of artificial and arbitrary boundaries" between what qualified as "emotional harm" and what did not. *Becker*, 386 N.E.2d at 813–14 (citation omitted).

[65] *See, e.g.*, Robak v. United States, 658 F.2d 471, 479 (7th Cir. 1981); Moores v. Lucas, 405 So. 2d 1022, 1026 (Fla. Dist. Ct. App. 1981); Greco v. United States, 893 P.2d 345, 351, 353 (Nev. 1995) (also disallowing recovery for emotional pain and suffering due to policy reasons); Smith v. Cote, 513 A.2d 341, 351 (N.H. 1986). *But see* Phillips v. United States, 575 F. Supp. 1309, 1320 (D.S.C. 1983) (citing *Becker*, but still allowing over a million dollars in damages for emotional suffering).

[66] Young, *supra* note 10, at col. 4. While California, New Jersey and Washington permit both types of claims, 27 other states recognize only wrongful birth claims. *Id.*

[67] *Cote*, 513 A.2d at 345–46.

[68] *Id.* For example, amniocentesis, which tests fetal cells for various diseases, was an experimental procedure until it finally became commonplace in the mid–1970s. *Id.* at 346. At that point, "reproductive counseling" became far more important. *Id.* at 345.

[69] *See* Azzolino v. Dingfelder, 337 S.E.2d 528, 534 (N.C. 1985).

[70] *See* Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 691 (Ky. 2003).

[71] *See id.* at 687 ("From the pleadings, the claims sound in traditional medical negligence. Thus, the claims should be analyzed under traditional negligence principles.").

the same elements as other tort actions: duty, breach, causation, and injury.[72]

The doctor owes a duty to his patient (the mother) to inform her fully about her medical condition or, in this case, her pregnancy.[73] This includes an obligation to inform the patient of all risks and dangers so she can make intelligent decisions regarding her condition.[74] Therefore, "[a] misdiagnosis or [a] withholding of medical information . . . [can] be considered a breach of the duty of care" to the mother.[75] This duty, however, does not extend to the unborn child. It has been held that doctors do not owe a duty to the child *in utero* since they are technically not yet in existence.[76] It follows that wrongful birth claims concentrate on the rights of the parent, side–stepping the issue of the child's rights.

In Kentucky, a plaintiff wishing to recover for medical malpractice "must prove that the treatment given was below the degree of care and skill expected of a reasonably competent practitioner, and that the negligence proximately caused injury . . . ."[77] In addition, the "bare possibility" of causation is not enough; there must be a solid link.[78] It is with the final two elements, causation and injury, that the wrongful birth debate begins in earnest. The contention surrounding these pivotal elements is the primary focus of the remaining portions of this note.

## III. *GRUBBS* FROM BEGINNING TO END

### *A. The Tragic Road to Trial*

The events that formed the *Grubbs* case evolved from two similar sets of circumstances. In 1992, Gretchen Bogan underwent an ultrasound

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[72] *See* W. PROSSER & W. KEETON, THE LAW OF TORTS 164, 165 (5th ed. 1984).

[73] 61 AM. JUR. 2D *Physicians, Surgeons and Other Healers* §§ 211–12 (2002).

[74] *Id.*

[75] *Grubbs*, 120 S.W.3d at 688.

[76] According to the *Grubbs* court, the lower court dismissed the wrongful life claims concluding that "there is no separate, independent duty owed by a physician to an unborn child apart from the duty owed to the mother." *Id.* at 687. But this is a major stumbling block when wrongful life claims are examined under tort principles. For a wrongful life claim to proceed in this way, the presiding court would have to find a duty owed to the unborn child. *See* Mark Strasser, *Wrongful Life, Wrongful Birth, Wrongful Death, and the Right to Refuse Treatment: Can Reasonable Jurisdictions Recognize All But One?*, 64 MO. L. REV. 29, 44–46 (1999).

[77] Reams v. Stutler, 642 S.W.2d 586, 588 (Ky. 1982) (citing Blair v. Eblen, 461 S.W.2d 370 (Ky. 1970)).

[78] *Id.*

twenty–two weeks into her pregnancy. Her doctor reviewed the test, informing Mrs. Bogan that everything was normal.[79] Several months later, in March 1993, Nathan Bogan was born prematurely with severe birth defects[80] that rendered him unable to "do anything but exist."[81] Similarly, in 1995, Kimberly Grubbs was informed after an initial ultrasound that her pregnancy "was progressing normally,"[82] but two months later a second ultrasound revealed that her daughter, Carlei, would be born with spina bifida and hydrocephalus.[83] By the time the defect was detected, it was far too late to consider terminating the pregnancy. As a result of the doctors' alleged negligence and the resulting impaired children, the Grubbses and the Bogans asserted wrongful life claims on behalf of their children and wrongful birth claims of their own.[84]

In both trial courts, the wrongful life claims were dismissed.[85] The Grubbses' wrongful birth claim was allowed "to the full extent of damages," while the Bogans were allowed only damages for Mrs. Bogan's physical condition due to Nathan's caesarian birth.[86]

The Kentucky Court of Appeals consolidated the cases to address the overarching question regarding "whether Kentucky law recognizes . . . 'birth–related torts.'"[87] The answer, like those of other state courts before it,[88] was not a simple "yes" or "no." Rather, the court adopted a fragmented response to the issues, making analysis of these claims difficult.

Because this issue was one of first impression both in the state of Kentucky and in the Sixth Circuit, the court had little in the way of immediate guidance. The issue had never been directly addressed by the

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[79] *Grubbs*, 120 S.W.3d at 685.

[80] *See id.* As a result of a cyst that enlarged Nathan's head, he was born with "no eyes and no brain, although he has an underdeveloped brain stem that supports minimal autonomic functioning. He has a cleft palate and cannot speak. He must be strapped into a wheelchair to sit, and he has no control of his bowels." *Id.* at 686.

[81] *Id.* (quoting the Bogans' appellate brief).

[82] *Id.* at 685.

[83] Hydrocephalus occurs when fluid builds up on the brain, causing mental deficiencies. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 687 (2d ed. 1980). In addition to these conditions, Carlei Grubbs was also born with poor vision, misshapen kidneys, and is a paraplegic. *Grubbs*, 120 S.W.3d at 685.

[84] *Grubbs*, 120 S.W.2d at 685–86.

[85] *Id.*

[86] *Id.* at 686.

[87] *Id.*

[88] *See* discussion *infra* Part II.

Sixth Circuit,[89] and the only relevant precedent Kentucky law had to offer was *Schork v. Huber*,[90] in which the Supreme Court refused to recognize wrongful conception,[91] another birth–related tort.[92] The *Schork* court reasoned that "parents who give birth to a normal *healthy* child are not entitled to their costs of raising the child from the physician" based on his negligence.[93] The *Schork* court also considered whether creating this or other birth–related torts (including wrongful birth and wrongful life) should be left exclusively to the General Assembly, Kentucky's legislative body.[94] However, since the *Schork* court did not directly address wrongful birth and wrongful life, the Kentucky Court of Appeals disregarded its decision and examined the issues in *Grubbs* according to traditional negligence principles.[95] As a result, it held that the children's suits for wrongful life were not actionable[96] but that the parents' claims for wrongful birth could potentially satisfy the traditional four–part test for medical negligence.[97] Therefore, "the Court of Appeals remanded the *Bogan* case for further proceedings."[98] Both the Grubbs and Bogan families subsequently appealed this decision to the Kentucky Supreme Court, which granted discretionary review to the cases.[99]

### *B. The Kentucky Supreme Court: Going Against Accord*

In its opinion, the Kentucky Supreme Court admitted that both families' claims "sound[ed] in traditional medical negligence," and agreed to analyze the claims under traditional negligence principles from the outset.[100] The court stated that it was possible to satisfy the duty and

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[89] *See* France v. United States, No. 99–1650, 2000 WL 1033020 (6th Cir. July 18, 2000). Plaintiff asserted a wrongful birth claim but the merits were not reached, as the Sixth Circuit decided the case was properly dismissed in District Court for lack of subject matter jurisdiction. *Id.* at *3.

[90] *See* Schork v. Huber, 648 S.W.2d 861 (Ky. 1983).

[91] *Id.* at 862.

[92] Courts distinguish wrongful conception cases from wrongful birth suits by "looking at whether the child is healthy but unwanted . . . or unhealthy and unwanted." Beasley, *supra* note 7, at 233.

[93] *Schork*, 648 S.W.2d at 863 (emphasis added).

[94] *Id.*

[95] Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 686 (Ky. 2003).

[96] *Id.* at 687 ("[T]here is no separate, independent duty owed by a physician to an unborn child apart from the duty owed to the mother.").

[97] *See id.* at 686–87. Recall that the Grubbses' claim had been dismissed below due to the statute of limitations; the court of appeals affirmed this decision.

[98] *Id.* at 687.

[99] *Id.* at 684.

[100] *Id.* at 687.

breach requirements if the plaintiffs presented "adequate proof."[101] However, upon reaching the issue of "consequent injury,"[102] the court broke away from what has become prevalent in other states.[103] For support in this endeavor, the court looked to a North Carolina case, *Azzolino v. Dingfelder*,[104] which also bucked the wrongful birth trend.

### 1. Azzolino v. Dingfelder: *The Court's Crutch*

The facts of *Azzolino* are quite similar to those of *Becker*, yet the two courts came to inconsistent conclusions.[105] Michael Azzolino was born with Down's Syndrome, prompting his parents to file suit.[106] The Azzolinos alleged that the defendants "failed to advise [them] properly and incorrectly advised them with respect to the availability of amniocentesis and genetic counseling."[107] Like the Beckers, the Azzolinos claimed that, had they known that Down's Syndrome would afflict their child, they would have "terminated [the] pregnancy by abortion."[108]

The *Azzolino* court rejected the parents' wrongful birth claim for two reasons. First, it acknowledged that most jurisdictions allowed claims for wrongful birth on a negligence theory.[109] Nonetheless, even assuming that duty and breach could be proven, the court was unable to accept that any real injury had occurred.[110] The court said that to recognize wrongful birth in accordance with traditional tort principles:

> [C]ourts must . . . take a step into entirely *untraditional analysis* by holding that the existence of a human life can constitute an injury cognizable at law. Far from being 'traditional' tort analysis, such a step requires a view of human life previously unknown to the law of this

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[101] *See id.* at 688.

[102] *Id.* at 687.

[103] Young, *supra* note 10 (thirty states currently recognize wrongful birth actions in tort).

[104] Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985).

[105] *Compare id.* at 537, *with* Becker v. Schwartz, 386 N.E.2d 807, 813 (N.Y. 1978). (While the *Azzolino* court flatly held that "claims for relief for wrongful birth are not cognizable at law in [its] jurisdiction," the *Becker* court opined that the parents' wrongful birth causes of action "do allege ascertainable damages [for] the pecuniary expense" of raising an unwanted child.).

[106] *Azzolino*, 337 S.E.2d at 530.

[107] *Id.* Plaintiffs also alleged claims for wrongful life on Michael's behalf and claims of emotional hardship/loss of society on behalf of Michael's siblings. *Id.* at 530–31.

[108] *Id.*

[109] *Id.* at 533.

[110] *Id.* at 534.

> jurisdiction. We are unwilling to take any such step because we are unwilling to say that life, even life with severe defects, may ever amount to a legal injury.[111]

Thus, the *Azzolino* court framed the injury as the child's life itself. While this is a widely accepted reason for rejecting wrongful *life* claims, *Azzolino* extended it to justify the rejection of a wrongful *birth* claim as well.

The *Azzolino* court's second reason concerned the issue of damages.[112] The court explained that other jurisdictions had "failed to establish a clear trend or any real trend at all with regard to the measure of damages to be allowed."[113] The opinion noted that, while the typical negligence claim makes the guilty defendant liable for *all* damages resulting from the injury, courts had been unable to go this far in assessing wrongful birth damages.[114] The court interpreted this inconsistency as a sign that these claims should not be recognized and ultimately rejected wrongful birth in its jurisdiction.[115]

### 2. *Following the Outlier*

The Kentucky Supreme Court concurred with *Azzolino* in every respect. Its decision mirrored the North Carolina court's in its wrongful–life–as–wrongful–birth reasoning regarding the existence of an injury,[116] and in its approach to damages.[117]

Specifically, the *Grubbs* court noted that the "uncertainty and lack of uniformity [regarding damages] in jurisdictions recognizing wrongful birth . . . arises from a failure to recognize that the 'injury' they seek to

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[111] *Id.* at 533–34 (emphasis in original).

[112] *See id.* at 534–37.

[113] *Id.* at 534.

[114] *Id.*

[115] *Id.* at 537. The *Azzolino* court cited two other reasons for rejecting the wrongful birth cause of action: the potential for fraud and the burden on physicians. For discussion of these lines of reasoning, see *id.* at 535.

[116] *See* Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 689–90 (Ky. 2003) ("We agree with the [*Azzolino* court's] analysis of the injury element . . . . [W]e are unwilling to equate the loss of an abortion opportunity resulting in a genetically or congenitally impaired human life, even severely impaired, with a cognizable legal injury.").

[117] *Id.* Similar to the *Azzolino* opinion, the *Grubbs* court was skeptical about the proper damage award, noting that "the limits of this new liability . . . can only be confined by drawing arbitrary and artificial boundaries which a majority of the court considers popular and desirable." *Id.*

compensate is not an injury" at all.[118] According to the court's reasoning, one cannot have an injury for which abortion and non–existence is the antidote because it violates the sanctity–of–life notion and does not fit within the traditional tort framework.[119] Consequently, those courts that award anything less than full childrearing damages are not applying tort principles correctly because they do not award damages for "*all* the reasonably foreseeable results of [the physicians'] negligence."[120] Apparently, the *Grubbs* court believed that if these other courts could not fully justify awarding an enormous and unnecessary amount,[121] they should have refrained from doing so altogether.[122]

Finally, the justices of the *Grubbs* majority worried that recognizing a cause of action for wrongful birth would beg the question: *which* "negligently undiagnosed" birth defects would warrant recovery?[123] They feared that parents would begin to sue for even the smallest "defect," from having a child not of the desired gender to actual diseases and deformities, thus "slid[ing] quickly into applied eugenics."[124] Bolstered by this additional concern, the court elected not to allow a cause of action for wrongful birth in Kentucky.[125]

Regarding the Bogans' claim alone,[126] the court allowed a breach of contract action to continue, explaining that "we do not believe physicians should be relieved of any proven *contractual* responsibility to report to patients the accurate results of diagnostic procedures, even if the condition is 'incurable.'"[127] The court also allowed the Bogans' one remaining claim, for pain and suffering connected to Gretchen Bogan's caesarean delivery, to proceed to trial.[128] Even if this claim is successful, it will only provide recovery for items directly related to the birth.[129] It

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[118] *Id.* at 690.

[119] *Id.* at 689.

[120] *Id.* at 690 (emphasis added).

[121] As explained later in this note, full childrearing damages are not the appropriate "reasonably foreseeable" remedy for a wrongful birth action. *See* discussion *infra* Part IV.B.

[122] *Grubbs*, 120 S.W.3d at 690. The court opined that the legislature was best able to handle this potentially new cause of action, stating that "these cases pose a problem which can only be properly resolved by a legislative body, and not by courts of law." *Id.*

[123] *Id.* at 690–91.

[124] *Id.*

[125] *Id.* at 691.

[126] The court upheld the Knox Circuit Court's dismissal of the Grubbses' claim for statute–of–limitations reasons. *Id.*

[127] *Id.* (emphasis added).

[128] *Id.*

[129] *Id.*

will not compensate for the multitude of expenses and suffering that are involved in trying to care for Nathan the rest of his life. Thus, while entirely shutting the door on birth–related tort recovery, the Kentucky Supreme Court left a narrow crack through which plaintiffs could receive some small measure of reparation. However, this opening is too small to provide the adequate compensation that the Bogans and other such plaintiffs deserve.

## IV. FLAWED FRAMING AND DAMAGES

The Kentucky Supreme Court's decision in *Grubbs*, while reasonable, goes against the common opinion and logic of most courts across the country that have rendered opinions on the issue of wrongful birth.[130] The court could have provided relief for parents who have suffered as a result of prenatal negligence, but a variety of interpretive mistakes were made along the way which effectively precluded any substantial recovery.

Two errors in particular led the court in the wrong direction. First, the court, by following *Azzolino,* did not frame the injury issue correctly, going against the solid foundations that have been laid in this area over the last twenty–five years.[131] Second, it made the molehill of calculating damages seem like a mountain. As a result, the Kentucky Supreme Court's decision "will prevent future parents in this position from recovering *any* tort damages for their physicians' negligence."[132]

### *A. Misframing the Injury Issue*

The Kentucky Supreme Court erred when it relied heavily on *Azzolino* by adopting its reasoning against wrongful life to justify a condemnation of wrongful birth.[133] Other jurisdictions have found this reasoning erroneous.[134] Wrongful life and wrongful birth are two

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[130] *See* discussion *supra* notes 55–67 and accompanying text.

[131] See discussion, *infra* Part IV.A, that explores many courts' decisions subsequent to *Roe v. Wade* and its progeny. Those courts framed the wrongful birth issue in terms of medical negligence. In particular, they framed the injury issue as one of a loss of the choice to abort a defective fetus, rather than treating life itself as the injury.

[132] *See Grubbs*, 120 S.W.3d at 697 (Keller, J., dissenting).

[133] *See* discussion *supra* Part III.B.

[134] Courts that have upheld a cause of action for wrongful birth did *not* hold that life itself was a cognizable injury. *See, e.g.*, Lininger v. Eisenbaum, 764 P.2d 1202, 1206 (Colo. 1988) ("[W]e need not find that 'life, even life with severe defects,' constitutes a legal injury in order to recognize [wrongful birth as a cause of action]."); Smith v. Cote,

different torts; the rationale criticizing one will not suffice to condemn the other.[135] The *Grubbs* majority indicated that it was "unwilling" to treat a life as an injury[136] and that the physician "cannot be said to have caused the [child's] defect[s]."[137] This is, of course, a perfectly valid conviction, but it is possible for the court to remain true to this principle while still providing a cause of action and appropriate relief for the suffering plaintiffs. While wrongful birth claims are admittedly a delicate subject, these claims need not focus upon the impossible dilemma of whether life is an injury. As Justice Keller noted in his dissent in *Grubbs*, "we need not find that 'life, even life with severe defects,' constitutes a legal injury in order to recognize the . . . claim for relief."[138]

The key to recognition of this claim lies in another controversial decision: *Roe v. Wade*.[139] According to *Roe*, a woman has a right to terminate her pregnancy prior to viability for any reason she might choose or for no reason at all.[140] Doctors cannot hinder this process, but they must provide information that allows the woman to make an informed choice.[141] Failure to do so can rob the woman or the parents of information crucial to such a decision.[142]

While it has polarized the nation, *Roe* remains the law of the land; a woman's right to an informed choice to terminate her pregnancy is constitutionally protected.[143] As a decision by our nation's highest court, lower federal and state courts alike must abide by this decision to protect the right to an abortion, even when they find it repugnant.[144] This right

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513 A.2d 341, 348 (N.H. 1986) (holding that the court did not have to reach the issue of whether life itself can constitute a legal injury while recognizing wrongful birth causes of action).

[135] *See* discussion *supra* Part II.A–B.

[136] *See Grubbs*, 120 S.W.3d at 689.

[137] *Id.* (quoting Becker v. Schwartz, 386 N.E.2d 807, 816 (N.Y. 1978) (Wachtler, J., dissenting)).

[138] *Id.* at 695 (Keller, J., dissenting) (quoting *Lininger*, 764 P.2d at 1206).

[139] *See* Roe v. Wade, 410 U.S. 113 (1973).

[140] *See supra* notes 56–57 and accompanying text.

[141] *See* Planned Parenthood v. Casey, 505 U.S. 833, 881–84 (1992); 61 AM. JUR. 2D *Physicians, Surgeons and Other Healers* §§ 211–12 (2002).

[142] *See Casey*, 505 U.S. at 882–84.

[143] *Roe*, 410 U.S. at 153 (noting that the right to abortion is part of the greater right to privacy implicit in the Constitution).

[144] *See* Azzolino v. Dingfelder, 337 S.E.2d 528, 538 (N.C. 1985) (Exum, J., dissenting) ("Although I might personally believe that life in any condition is always preferable to nonexistence, I am not willing to accept the majority's stance that this philosophy precludes the recognition of a cognizable and compensable legal injury . . . .").

frames the injury of which parents complain in a wrongful birth claim. It is not the *life*, but the *loss of a choice*, that constitutes the injury.[145]

If the argument is framed in this manner, the concept of life as an injury becomes irrelevant.[146] The denial of the parents' right to an informed abortion decision becomes the central issue. The court need not address the issue of life as an injury, the non–existence paradox, nor the question of what defects in the child the physician may actually have caused. The cause of action rests safely "within the confines of common law negligence,"[147] where it should have been from the outset.

From this point of view, it is straightforward to reach the conclusion that wrongful birth is a cognizable injury, and to award damages for that injury. The Supreme Court of Colorado, directly disagreeing with *Azzolino*, came to just such a conclusion in *Lininger v. Eisenbaum*, which provides a good illustration of the proper formulation of the wrongful birth issue, carried to its logical conclusion.[148]

### 1. *The Correct Solution:* Lininger v. Eisenbaum

The facts of *Lininger* are somewhat different than those of other wrongful birth cases, but the differences are not substantial enough to distinguish it. Stephen Lininger was born with an optical problem that rendered him virtually blind.[149] His parents, concerned that his blindness might be the result of heredity or a genetic defect, did not want to have another child without a physician's assurance that a second child would be likely to have normal sight.[150] The Lininger's physicians informed

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[145] *See, e.g.*, *id.* at 538 (Exum, J., dissenting) (holding that the plaintiffs were injured "when they were deprived of information they needed to make an informed choice whether to allow their children to come to term"); *see also* Smith v. Cote, 513 A.2d 341, 344 (N.H. 1986) (in recognizing wrongful birth causes of action, the court framed the plaintiff's injury as the preclusion of an informed decision as to whether to have the child); Canesi v. Wilson, 730 A.2d 805, 818 (N.J. 1999) (holding that the injury plaintiffs sustained was the loss of the "option to terminate the pregnancy," which was the "widely accepted [standard] in jurisdictions recognizing wrongful birth actions").

[146] *See* Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 696 (Ky. 2003) (Keller, J., dissenting).

[147] Lininger v. Eisenbaum, 764 P.2d 1202, 1208 (Colo. 1988).

[148] *See generally id.* The *Lininger* court ultimately held that it would recognize wrongful birth as a cause of action. In refuting *Azzolino*, the *Lininger* court stated that "contrary to Azzolino's suggestion, we need not find that 'life, even life with severe defects,' constitutes a legal injury in order to recognize the Liningers' claim for relief." *Id.* at 1206.

[149] *Id.* at 1203.

[150] *Id.*

them that Stephen's blindness was not hereditary, so they chose to have another child.[151] However, when their second son, Pierce, was born, he too was blind.[152] Thereafter, "both children were subsequently diagnosed with . . . [a] hereditary form of blindness."[153]

The Liningers filed a wrongful birth/wrongful life suit, alleging that the defendant physicians were negligent for not only failing initially to diagnose Stephen's blindness correctly when they examined him, but also for "communicating the misdiagnosis . . . and finally, in advising them that Stephen's affliction was not hereditary."[154] But for this negligence, the Liningers alleged that they would have either avoided conception of a second child or terminated the pregnancy.[155] They sought compensation for past and future medical expenses for Pierce, special education equipment for the blind, lost wages, and emotional distress.[156]

The court analyzed the Liningers' claim in terms of medical negligence.[157] Like other courts before it, this court established duty, breach and causation without difficulty.[158] On the issue of injury, the defendant physicians urged the court to follow *Azzolino*.[159] The court was not persuaded by the doctors' arguments, likening the situation to a personal injury claim instead of framing the injury as life itself:

> The Liningers allege, at a minimum, that but for the defendants' negligence they would not be burdened by extraordinary medical and education expenses associated with the treatment of Pierce's blindness. That monetary burden is no different from medical or rehabilitation expenses associated with any personal injury and, contrary to Azzolino's suggestion, we need not find that 'life, even life with severe defects' constitutes a legal injury in order to recognize the Liningers' claim for relief. . . . We conclude, therefore, that the Liningers may

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[151] *Id.* at 1203–04.

[152] *Id.* at 1204.

[153] *Id.* at 1204. Stephen and Pierce were diagnosed with Leber's congenital amaurosis, a hereditary form of blindness. Since Stephen was born with the disease, the likelihood that any younger siblings "would also suffer a similar disability was one in four." *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* at 1205–06. Notice that the Liningers did not make these claims regarding Stephen; they are not claiming that his birth and his blindness are the result of physicians' negligence. He was born with that condition by accident. In contrast, the Liningers would never have become pregnant with Pierce absent the negligent assurances of their doctors that he would not suffer his brother's fate.

[157] *Id.* at 1205.

[158] *See id.*

[159] *Id.* at 1206.

> prove and recover those extraordinary medical and education expenses occasioned by Pierce's blindness.[160]

With this declaration, the *Lininger* court properly removed the emotional issues and focused on what really matters: that parents who relied on their physician's negligent conduct now must shoulder enormous financial burdens to provide their impaired child with the appropriate medical care, and that these burdens should be appropriately compensated.

### 2. *One Step at a Time: Correctly Navigating Tort Principles*

Plaintiffs can easily prove that a doctor–patient relationship existed between the mother and the physician overseeing her prenatal care, thus effectively establishing the first element of a cause of action in tort: a duty of care. Specifically, *Roe* requires that physicians "ensure [the mother] ha[s] an opportunity to make an informed decision regarding the procreative options available to her."[161] To establish the second element, breach of a duty, a plaintiff must show that the physician did not fulfill this obligation by failing to diagnose or to inform the plaintiff fully of her options, thus violating the standard of care.[162]

The third element, causation, "is only slightly more troublesome."[163] It must be found that the plaintiff would have terminated her pregnancy if she had the information of which she was deprived.[164] Thus, this element considers what might have or should have been *but for* the defendant's breach (if the mother had received the correct information to inform her decision), rather than what actually *did* happen (she did not receive the information and thus did not have the benefit of that knowledge when making the decision to carry the child to term). This element is not insurmountable: "[t]his circumstance . . . does not entail

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[160] *Id.* at 1206–07 (quoting Azzolino v. Dingfelder, 337 S.E.2d 528, 532 (N.C. 1985)). A brief discussion of the "benefit rule" is omitted from this quotation. The defense contended that "the benefits the Liningers derived from having a second child cannot be measured in any rational way against the injuries they claim to have suffered" and that consequently they should not be allowed to recover any damages. The court, however, believed that the financial burden the Liningers were forced to shoulder because of the defendants' negligence was "sufficiently unrelated to the pleasure they will derive from raising Pierce as to preclude operation of the benefit rule." *Id.* at 1206–07.

[161] Smith v. Cote, 513 A.2d 341, 346 (N.H. 1986).

[162] *See* 61 AM. JUR. 2D *Physicians, Surgeons and Other Healers* §§ 211–12 (2002).

[163] *Cote*, 513 A.2d at 347.

[164] *See id.*

inability to establish such proof; it is present in every informed consent case involving a subjective standard of causation."[165] That is, courts *must* look at the hypothetical "what if?" in addition to the actual outcome to determine its cause. Therefore, plaintiffs meet their burden of proof if "[they] show that, but for the defendants' negligent failure to inform [them] of the risks of bearing a child with birth defects, [they] would have obtained an abortion."[166]

While proving the causation element is rather subjective,[167] subjectivity alone is not enough to preclude a cause of action. Further, many courts have simply assumed *arguendo* that the physicians' misdiagnosis or failure to inform is the proximate cause of the parents' loss of their abortion decision,[168] enabling them to reach the damages issue more readily.

The fourth and final requirement, injury, has been redefined in more useful terms: the loss of the ability to make an informed decision regarding whether to parent an impaired child, and bearing a child without benefit of that choice.[169] This solution deftly sidesteps the life and abortion issues altogether and allows the court to award relief based on a pragmatically defined concept of injury.

This analysis, which the *Grubbs* court chose to reject, is not a difficult one and could easily have been satisfied had the plaintiffs' cases been allowed to proceed to trial.[170] It cannot be said that, as a matter of law, there was no injury to the parents or that breach or causation could not be established. Those questions should have been allowed to reach a jury.

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[165] *Id.*

[166] *Id.*

[167] *See id.*

[168] *See, e.g.*, Lininger v. Eisenbaum, 764 P.2d 1202, 1205 (Colo. 1988) (finding, with no disagreement from the parties, that "the defendants' purported negligence proximately caused the birth of Pierce since the Liningers would not have conceived a second child (or would have terminated the pregnancy) had they accurately been apprised of the possibility that a second child would suffer the same affliction"); *Cote*, 513 A.2d at 347 ("No logical obstacle precludes proof of causation. . . . Such proof is furnished if the plaintiff[s] can show that, but for the defendants' negligent failure to inform [them] of the risks of bearing a child with birth defects, [they] would have obtained an abortion."); Azzolino v. Dingfelder, 337 S.E.2d 528, 533 (N.C. 1985) ("We also assume *arguendo* . . . that the birth of Michael Azzolino [because of his parents' loss of choice] was the proximate result of the defendants' negligence.").

[169] *See supra* notes 143–47 and accompanying text.

[170] Both plaintiffs sufficiently stated in their complaint that the defendant doctors' negligence caused the parents to lose an opportunity to abort their defective fetuses. *See* Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 685–86 (Ky. 2003).

### B. *Damages Are Not a Stumbling Block*

It is not as difficult to quantify damages for wrongful birth as the *Grubbs* court suggests. Even if it were, such a claim is valid, as "mere difficulty in the ascertainment of damages" would be insufficient to preclude the action.[171] It has already become clear that wrongful birth is easily recognizable as a valid cause of action.[172] Thus the only remaining issue, that of damages, poses no real obstacle.

First, consider the difference between damages for a lost choice and damages for the unwanted life of a child. Comparing the costs of raising an impaired child with those of raising a healthy child is far simpler than comparing them with the prospect of a child's total nonexistence. This very problem was addressed by the Supreme Court of Texas in *Jacobs v. Thiemer*:[173]

> The objection is to an award based upon speculation as to the quality of life [of the child] and as to the pluses and minuses of parental mind and emotion.
>
> The economic burden . . . is a different matter which is free from the above objection. These expenses lie within the methods of proof by which the courts are accustomed to determine awards in personal injury cases. No public policy obstacle should be interposed to that recovery.[174]

Thus, removal of the philosophical and emotional issues significantly reduces the challenge of determining damages.

According to traditional tort principles, tort defendants are liable for all "reasonably foreseeable results of their negligence."[175] This suggests that physicians, if liable, must pay all expenses related to raising the impaired child resulting from the physician's negligence. However, "few if any jurisdictions appear ready to apply this traditional rule of damages

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[171] Phillips v. United States, 508 F. Supp. 544, 550 (D.S.C. 1981); *see also* Mark Strasser, *Misconceptions and Wrongful Births: A Call for a Principled Jurisprudence*, 31 ARIZ. ST. L.J. 161, 185 (1999).

[172] *See supra* notes 58–72 and accompanying text.

[173] Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975). The facts of *Jacobs* are very similar to those of *Gleitman*, and in fact *Gleitman* was cited for that reason in *Jacobs*. *Id.* at 849.

[174] *Id.*

[175] *Grubbs*, 120 S.W.3d at 690.

with full vigor in wrongful birth cases."[176] In fact, only one has actually done so.[177] Instead, lesser awards, such as for "extraordinary costs" or for medical expenses, have been made in varying amounts.[178] This departure from the traditional outcome, and the further lack of consensus as to how damages *should* be quantified, was entirely unacceptable to the Kentucky Supreme Court.[179]

However, there need not be a general consensus among other jurisdictions to "evaluate the compensation due to an injured Kentucky plaintiff."[180] Furthermore, contrary to the court's observation, there *are* consistencies among other jurisdictions. While most courts have allowed recovery for the extraordinary medical, educational, and special treatment expenses that stem directly from the child's physical impairment or disability,[181] many have not allowed recovery solely for parents' emotional suffering.[182] Several justifications support this cautious approach. Removing the emotional and ideological elements from the balance results in calculation of costs based solely on the child's

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[176] Smith v. Cote, 513 A.2d 341, 348 (N.H. 1986) (quoting Azzolino v. Dingfelder, 337 S.E.2d 528, 534 (N.C. 1985)).

[177] *See* Robak v. United States, 658 F.2d 471, 478 (7th Cir. 1981). The *Robak* court allowed damages as follows:

> the cost of residential education and care to age 21 . . . ; the cost of a qualified companion, skilled in sign language and experienced in dealing with emotionally disturbed persons, for the remainder of [the child's] adult life, or comparable institutional care . . . ; and the cost of maintaining her for her adult life, since she will never be self–supporting.

*Id.* at 478.

[178] For examples of "lesser" awards that do not go the full tort damages distance, see cases cited *infra* notes 181–82. For an explanation of why this is a prudent approach, see *infra* notes 183–86 and accompanying text.

[179] *See Grubbs*, 120 S.W.3d at 690–91.

[180] *Id.* at 697 (Keller, J., dissenting).

[181] *See Cote*, 513 A.2d at 349 ("A special rule of damages has emerged; in most jurisdictions the parents may recover only the extraordinary . . . costs attributable to the birth defects.") (citing James v. Caserta, 332 S.E.2d 872, 882 (W. Va. 1985)); *see also* Lininger v. Eisenbaum, 764 P.2d 1202, 1206–07 (Colo. 1988); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 706–07 (Ill. 1987); Viccaro v. Milunsky, 551 N.E.2d 8, 11 (Mass. 1990); Greco v. United States, 893 P.2d 345, 353 (Nev. 1995). The *Cote* court clarified that allowable extraordinary costs *can* include parental emotional suffering or distress, but there is a caveat: it must have resulted in tangible pecuniary losses, such as medical expenses or counseling fees. *Cote* 513 A.2d at 350. Otherwise, intangible emotional suffering is often precluded as a measure of damages; *see* note 182 and accompanying text.

[182] *See Siemieniec*, 512 N.E. at 707; Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978); Howard v. Lecher, 366 N.E.2d 64 (N.Y. 1977); Jacobs v. Thiemer, 519 S.W.2d 486 (Tex. 1975).

disabilities. Far from being arbitrary and artificial, such a boundary limits recovery somewhat, so that physicians are not unjustly penalized.

Awarding only extraordinary costs is "neither illogical nor unprecedented."[183] While damages typically aim to place plaintiffs in the position they would have been in had the wrong never occurred, the goal of wrongful birth is slightly different. Wrongful birth plaintiffs typically want a child and are prepared to shoulder the costs of raising one. But when this goal is "frustrated by the defendant's negligence, the extraordinary costs rule 'merely attempts to put the plaintiffs in the position they *expected* to be in.'"[184] Under this rule, awarding the costs of raising an ordinary, healthy child would result in a "windfall" to the plaintiffs, who were prepared to spend those amounts anyway.[185] Awarding the extraordinary costs of raising an impaired child puts the parents in the same financial position they expected to occupy after the birth of a healthy child.[186] This is the proper operation of the law.

The Bogans sought compensation for pain, suffering and permanent scarring resulting from Nathan's caesarean birth, present and future medical expenses for his continuous care, emotional suffering, and lost wages resulting from the fact that one or both of the Bogans must remain at home to care for Nathan.[187] There is no reason why they should not recover most of these damages. Recovery for pain and suffering is permissible under current Kentucky precedent as long as the injuries from which they stem were directly related to the birth; likewise, it can be argued that some amount of lost wages are also a direct result of the pregnancy and birth.[188] Present and future medical expenses should be elementary if calculated under the extraordinary costs rule. Thus, the only compensation the Bogans would not receive is that for their own emotional suffering.

It is absurd to refuse to recognize a cause of action in part because damages may require extra effort to measure. That consideration should be left to a trial jury; it should not be forgotten that this body is continually trusted to decide many types of cases, some involving injuries far more quantitatively complex than this. Following those decisions they award damages, which often involve painstaking

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[183] *Cote*, 513 A.2d at 349.

[184] *Id.* (emphasis added in original).

[185] *See* Azzolino v. Dingfelder, 337 S.E.2d 528, 539 (N.C. 1985) (Exum, J., dissenting).

[186] *See id.*

[187] *See* Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 697 (Ky. 2003).

[188] *Id.* at 698 n.23 (Keller, J., dissenting) (discussing Kentucky cases that allow such recovery).

calculations. How can the court say that a wrongful birth claim would be too difficult?

## V. CONCLUSION

The bottom line is simple: the Kentucky Supreme Court decided *Grubbs* incorrectly. While the court relied on respected authority to guide its decision, there is a very good reason why its opinion is in the minority. Technology and genetic testing create an expectation of avoidance of birth defects or certainly of the right to make an informed decision whether to continue the pregnancy if defects are detected. It is imperative that there be adequate recourse for plaintiffs who, through a physician's negligence, did not receive the benefits that this technology promises.

Parents who have been denied their rights at the hands of a negligent physician should have better recourse than a mere contract claim and recovery for pain in childbearing. The Kentucky plaintiffs in *Grubbs* did nothing more than conceive a child and look to their physicians for adequate prenatal care. However, because of the physicians' negligence, the parents must care for a child who is severely impaired and were robbed of the choice to avoid the situation. Yet, as a result of *Grubbs*, the negligent physicians will lose little as a result of their carelessness. This is not justice. Justice Reavley of the Supreme Court of Texas summed up this argument in *Jacobs*:

> It is impossible for us to justify a policy which at once deprives the parents of information by which they could elect to terminate the pregnancy likely to produce a child with a defective body, a policy which in effect requires that the deficient embryo be carried to full gestation until the deficient child is born, and which policy then denies recovery from the tort–feasor of costs of treating and caring for the defects of the child.[189]

Rather than preventing the wrongful birth claim at the outset, the issues of whether an injury has occurred and, if so, what damages are appropriate, should be placed in the hands of a jury. Although these are difficult issues, the jury system must be trusted to produce the right result.

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[189] Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975).