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## Notes

# Wrongful Conception: When an Unplanned Child Has a Birth Defect, Who Should Pay the Cost?

*Williams v. Van Biber*<sup>1</sup>

### I. INTRODUCTION

Wrongful conception is a medical malpractice claim by parents that arises from the negligent performance of a sterilization procedure.<sup>2</sup> Wrongful birth, on the other hand, is a claim that a health care provider has breached a duty subsequent to conception that results in the birth of an abnormal child.<sup>3</sup> While Missouri recognizes wrongful conception as a valid cause of action,<sup>4</sup> it has statutorily refused to allow a wrongful birth claim.<sup>5</sup>

*Williams v. Van Biber* was an action for wrongful conception, but it involved an aspect of wrongful birth, a birth defect. The case addressed the question of whether parents may recover extraordinary expenses when a negligently performed sterilization procedure results in the birth of a child with defects. This note examines how other jurisdictions have handled the issue, evaluates the *Williams* court's approach, and discusses the policy concerns that surround such a claim.

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1. 886 S.W.2d 10 (Mo. Ct. App. 1994).

2. *Miller v. Duhart*, 637 S.W.2d 183, 188 (Mo. Ct. App. 1982). *See infra* notes 23-27.

3. *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 488 (Wash. 1983).

4. *Miller*, 637 S.W.2d at 188.

5. The statute states that,

No person shall maintain a cause of action or receive an award of damages on behalf of himself or herself based on the claim that but for the negligent conduct of another, he or she would have been aborted. No person shall maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, a child would have been aborted.

MO. REV. STAT. § 188.130 (1986); *see also* *Wilson v. Kuenzi*, 751 S.W.2d 741 (Mo. 1988) (en banc).

## II. FACTS AND HOLDING

Gerald and Tammy Williams filed suit against Jeffrey Van Biber, M.D., for an alleged failed sterilization procedure.<sup>6</sup> Mrs. Williams had experienced several medical problems during a previous pregnancy, including gestational diabetes.<sup>7</sup> Mr. Williams chose to have the sterilization procedure because an obstetrician had cautioned that an additional pregnancy could be dangerous to Mrs. Williams and the baby.<sup>8</sup> On August 25, 1989, Van Biber performed a vasectomy on Mr. Williams.<sup>9</sup> Subsequent to the sterilization procedure, Mrs. Williams became pregnant.<sup>10</sup> She gave birth to Cody Williams on January 21, 1991.<sup>11</sup> Although Cody appeared normal at birth, he was diagnosed with severe heart deformities one month later.<sup>12</sup> Various surgical attempts were made to correct Cody's defects, yet he died approximately seven months following birth.<sup>13</sup> The Williamses were left with medical expenses that exceeded \$211,000.<sup>14</sup>

The Williamses sought to recover their medical expenses, lost income, and damages for emotional distress that resulted from Cody's birth defects.<sup>15</sup> The Williamses asserted that damages associated with Cody's birth defects were recoverable because they were the foreseeable result of the failed sterilization procedure.<sup>16</sup> Van Biber, however, took the position that damages associated with the birth defect were not actionable in Missouri.<sup>17</sup> Van Biber filed a motion to dismiss, or, alternatively, a motion for partial summary judgment for all damages attributed to Cody's defects.<sup>18</sup> The trial court granted the motion to dismiss, and the Williamses appealed to the Western District of the Missouri Court of Appeals.<sup>19</sup>

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6. *Williams*, 886 S.W.2d at 11.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* Mrs. Williams learned that she was pregnant in May of 1990. *Id.* The following month, Van Biber examined Mr. Williams' semen and identified viable sperm. *Id.*

11. *Id.*

12. *Id.* at 11-12.

13. *Id.* at 12.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

The court of appeals affirmed the trial court.<sup>20</sup> The appellate court found that damages associated with correcting the birth defect did not fall in the category of recoverable postnatal medical expenses.<sup>21</sup> The court held that a negligent vasectomy is not the proximate cause of damages resulting from a child's birth defect, and thus, a physician is not liable for costs resulting from such defect.<sup>22</sup>

### III. LEGAL BACKGROUND

#### A. *Development of the Tort of Wrongful Conception*

Wrongful conception or wrongful pregnancy is a "claim by parents for damages arising from the negligent performance of a sterilization procedure or abortion, and the subsequent birth of a child."<sup>23</sup> Courts tend to use the terms "wrongful conception" and "wrongful pregnancy" interchangeably.<sup>24</sup>

The majority of wrongful conception cases involve the unplanned birth of a healthy child.<sup>25</sup> When a deformed child is born, parents generally bring

20. *Id.* at 11 and 14. The case was transferred to the Missouri Supreme Court, and on November 28, 1994, the Missouri Court of Appeals' opinion was readopted.

21. *Id.* at 13.

22. *Id.* at 14.

23. BLACK'S LAW DICTIONARY 1612 (6th ed. 1990); *see also* University of Ariz. Health Sciences Ctr. v. Superior Ct., 667 P.2d 1294, 1296-97 n.1 (Ariz. 1983) (wrongful pregnancy is "an action brought by the parents of a healthy, but unplanned, child"); *cf.* Miller v. Duhart, 637 S.W.2d 183, 188 (Mo. Ct. App. 1982) (siblings did not have wrongful conception action against doctor who negligently performed sterilization procedure on their mother).

The negligent act involved is frequently a sterilization procedure such as a vasectomy or tubal ligation. *See* Wilbur v. Kerr, 628 S.W.2d 568, 569 (Ark. 1982); Custodio v. Bauer, 59 Cal. Rptr. 463, 474-75 (Cal. Ct. App. 1967); Flowers v. District of Columbia, 478 A.2d 1073, 1074 (D.C. 1984); Fassoulas v. Ramey, 450 So. 2d 822, 822-23 (Fla. 1984); Miller v. DuHart, 637 S.W.2d 183, 188 (Mo. Ct. App. 1982). However, the pregnancy can also result from a negligently performed abortion or incorrectly filled contraceptive prescription. *See* Nanke v. Napier, 346 N.W.2d 520, 521 (Iowa 1984); Troppi v. Scarf, 187 N.W.2d 511, 512-13 (Mich. 1971); C.S. v. Nielson, 767 P.2d 504 (Utah 1988); Miller v. Johnson, 343 S.E.2d 301, 302 (Va. 1986).

24. *See, e.g.,* Siemieniec v. Lutheran Gen. Hosp., 512 N.E. 2d 691, 695 (Ill. 1987); Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 654 (Ga. 1984); Hershey v. Brown, 655 S.W.2d 671, 673 n.1 (Mo. Ct. App. 1983).

25. *See* University of Ariz. Health Sciences Ctr. v. Superior Court, 667 P.2d 1294, 1296 n.1 (Ariz. 1983) (wrongful pregnancy action "is distinguished from 'wrongful birth' claim brought by parents of a child born with birth defects"); Lininger

an action for wrongful birth.<sup>26</sup> However, when a child with birth defects results from a failed sterilization procedure, this action has been deemed to be a wrongful conception claim.<sup>27</sup>

The number of wrongful conception cases has increased dramatically in recent years.<sup>28</sup> Some attribute the growth of these cases to the increased number of sterilization procedures that are performed.<sup>29</sup> However, this surge may actually originate with the United States Supreme Court decision of *Roe v. Wade*,<sup>30</sup> which partially legalized abortion.<sup>31</sup> Before this decision, the right to control reproduction through abortion was "generally illegal and the courts were uneasy about encouraging sterilization and family planning."<sup>32</sup>

Today, the majority of jurisdictions recognize wrongful conception as a cause of action and permit some form of recovery.<sup>33</sup> This acceptance can be attributed to the resemblance between wrongful conception actions and traditional medical malpractice cases.<sup>34</sup> However, an unsettled and controversial area of wrongful conception involves the determination of

v. Eisenbaum, 764 P.2d 1202, 1203-04 (Colo. 1988).

26. 62A AM. JUR. 2D *Prenatal Injuries* § 92 (1990).

In a wrongful birth action, a health care provider breaches his or her duty to disclose information or perform medical procedures with due care. Parents allege that such breach deprived them of the opportunity to make a decision about the abortion or conception of a fetus. The result is the birth of an abnormal child. See Lininger v. Eisenbaum, 764 P.2d 1202, 1204 (Colo. 1988); James G. v. Caserta, 332 S.E.2d 872, 875 (W. Va. 1985); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 488 (Wash. 1983).

27. See Garrison v. Foy, 486 N.E.2d 5, 9 (Ind. Ct. App. 1985) (failed sterilization procedure that resulted in birth of abnormal child was labeled wrongful pregnancy action); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1154 (La. 1988) (unsuccessful bilateral tubal ligation that resulted in birth of albino child labeled wrongful conception action).

28. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 370 (5th ed. 1984).

29. A. Lynne Wiggins, *Marciniak v. Lundborg: Physicians as Surrogate Parents? Rolling the Dice for Recovery in Wrongful Conception Cases*, 16 AM. J. TRIAL ADVOC. 839, 839 (1993).

30. 410 U.S. 113 (1973).

31. Elizabeth F. Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework*, 22 J. FAM. L. 677, 693 (1983/1984).

32. *Id.* at 691.

33. KEETON, *supra* note 28, at 372.

34. Speck v. Finegold, 439 A.2d 110, 113 (Pa. 1981) ("action for injuries suffered as a result of negligently performed vasectomy and abortion procedures [is] merely an extension of existing principles of tort law to new facts").

damages.<sup>35</sup> Although there is wide diversity among jurisdictions, essentially four different rules exist: (1) limited damages rule, (2) benefits rule, (3) full recovery, and (4) no recovery.

The majority of jurisdictions have adopted the limited damages rule.<sup>36</sup> This permits recovery for ordinary medical expenses directly associated with pregnancy and childbirth.<sup>37</sup> A minority of states follow the benefits rule,<sup>38</sup> which allows recovery for child-rearing costs minus the beneficial value of the

35. In 1967, a California Court of Appeals was the first to recognize that damages in a wrongful conception case might be "more than nominal." *Custodio v. Bauer*, 59 Cal. Rptr. 463, 477 (Cal. Ct. App. 1967).

36. *Boone v. Mullendore*, 416 So. 2d 718, 720 (Ala. 1982); *Wilbur v. Kerr*, 628 S.W.2d 568, 569 (Ark. 1982); *Coleman v. Garrison*, 349 A.2d 8, 11 (Del. 1975) (overruled on other grounds but apparently still valid authority); *Flowers v. District of Columbia*, 478 A.2d 1073, 1074 (D.C. 1984); *Fassoulas v. Ramey*, 450 So. 2d 822, 822-23 (Fla. 1984); *Public Health Trust v. Brown*, 388 So. 2d 1084, 1084-86 (Fla. Dist. Ct. App. 1980); *Fulton-De Kalb Hosp. Auth. v. Graves*, 314 S.E.2d 653, 654 (Ga. 1984); *Cockrum v. Baumgartner*, 447 N.E.2d 385, 389 (Ill. 1983); *Garrison v. Foy*, 486 N.E.2d 5, 7-8 (Ind. App. 1985); *Nanke v. Napier*, 346 N.W.2d 520, 522 (Iowa 1984); *Byrd v. Wesley Medical Ctr.*, 699 P.2d 459, 462-63 (Kan. 1985); *Schork v. Huber*, 648 S.W.2d 861, 863 (Ky. 1983); *Pitre v. Opelousas General Hosp.*, 530 So. 2d 1151, 1161 (La. 1988); *Macomber v. Dillman*, 505 A.2d 810, 813 (Me. 1986); *Kingsbury v. Smith*, 442 A.2d 1003, 1006 (N.H. 1982); *P. v. Portadin*, 432 A.2d 556, 559 (N.J. App. 1981); *O'Toole v. Greenberg*, 477 N.E.2d 445, 448 (N.Y. 1985); *Jackson v. Bumgardner*, 347 S.E.2d 743, 749 (N.C. 1986); *Johnson v. University Hosps. of Cleveland*, 540 N.E.2d 1370, 1378 (Ohio 1989); *Morris v. Sanchez*, 746 P.2d 184, 188 (Okla. 1987); *Mason v. Western Pennsylvania Hosp.*, 453 A.2d 974, 976 (Pa. 1982); *Smith v. Gore*, 728 S.W.2d 738, 751 (Tenn. 1987); *Terrell v. Garcia*, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973); *C.S. v. Nielson*, 767 P.2d 504, 516 (Utah 1988); *Miller v. Johnson*, 343 S.E.2d 301, 306 (Va. 1986); *McKernan v. Aasheim*, 687 P.2d 850, 856 (Wash. 1984); *James G. v. Caserta*, 332 S.E.2d 872, 878 (W. Va. 1985); *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982).

37. These damages typically include the cost of the first sterilization procedure, of a future sterilization procedure, prenatal and postnatal expenses, and mother's medical expenses. See cases cited *supra* note 36; see also 70 C.J.S. *Physicians and Surgeons* § 128 (1987). Some jurisdictions allow recovery for physical and mental pain, *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 170-71 (Minn. 1977), loss of consortium, *Miller v. Duhart*, 637 S.W.2d 183, 188 (Mo. Ct. App. 1982), and loss of wages, *James G. v. Caserta*, 332 S.E.2d 872, 877 (W. Va. 1985).

38. The RESTATEMENT (SECOND) OF TORTS § 920 (1977) states:

When the defendant's tortious conduct has caused harm to the plaintiff . . . and in doing so has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages [to the extent it is equitable].

child.<sup>39</sup> Jurisdictions such as New Mexico<sup>40</sup> and Wisconsin<sup>41</sup> have allowed full recovery of expenses for rearing a child, whereas Nevada has refused to even recognize wrongful conception as a cause of action.<sup>42</sup>

Many early cases refused to recognize wrongful conception because life was positive and the benefit of having a child negated any damage.<sup>43</sup> Today, although most courts recognize wrongful conception, this same reasoning frequently bars recovery of child-rearing costs. Specifically, some courts hold that a parent cannot be damaged by the birth of a healthy child,<sup>44</sup> which is a desired goal in many religious and philosophical beliefs.<sup>45</sup> In addition, the Arkansas Supreme Court expanded this argument by stating if a child learns he or she was unwanted, the child could be harmed and society's desire for healthy family relationships would be undermined.<sup>46</sup>

### B. Recovery of Extraordinary Expenses

Whereas courts normally hold that ordinary child-rearing costs are not recoverable,<sup>47</sup> it is generally recognized that parents may recover

39. University of Arizona Health Sciences Ctr. v. Superior Court, 667 P.2d 1294, 1299 (Ariz. 1983); Morris v. Frudinfeld, 185 Cal.Rptr. 76, 83-84 (Cal. Ct. App. 1982); Ochs v. Borrelli, 445 A.2d 883, 885-86 (Conn. 1982); Jones v. Malinowski, 473 A.2d 429, 436-37 (Md. 1984); Burke v. Rivo, 551 N.E.2d 1, 6 (Mass. 1990).

40. Lovelace Medical Ctr. v. Mendez, 805 P.2d 603, 612 (N.M. 1991).

41. Marciniak v. Lundborg, 450 N.W.2d 243, 248 (Wis. 1990).

42. Szekeres v. Robinson, 715 P.2d 1076, 1077 (Nev. 1986) (although action referred to as wrongful birth, case involved a failed sterilization procedure). The Nevada court distinguished wrongful conception from medical malpractice and stated whereas medical malpractice results in death or disability, the birth of a healthy child does not cause damage. *Id.* at 1078.

43. See KEETON, *supra* note 28, at 372; Christensen v. Thornby, 255 N.W. 620, 622 (Minn. 1934); Szekeres v. Robinson, 715 P.2d 1076, 1077 (Nev. 1986).

44. See Macomber v. Dillman, 505 A.2d 810, 813 (Me. 1986); Jackson v. Bumgardner, 321 S.E.2d 541, 545 (N.C. Ct. App. 1984), *aff'd in part and rev'd in part*, 347 S.E.2d 743 (N.C. 1986).

45. See Rivera v. State, 404 N.Y.S.2d 950, 953 (N.Y. 1978).

46. Wilbur v. Kerr, 628 S.W.2d 568, 571 (Ark. 1982).

47. See Boone v. Mullendore, 416 So. 2d 718, 721 (Ala. 1982); Wilbur v. Kerr, 628 S.W.2d 568, 569 (Ark. 1982); Fassoulas v. Ramey, 450 So. 2d 822, 823 (Fla. 1984); Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 655 (Ga. 1984); Cockrum v. Baumgartner, 447 N.E.2d 385, 389 (Ill. 1983); Nanke v. Napier, 346 N.W.2d 520, 522 (Iowa 1984); Byrd v. Wesley Medical Ctr., 699 P.2d 459, 467 (Kan. 1985); Schork v. Huber, 648 S.W.2d 861, 863 (Ky. 1983); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 173 (Minn. 1977); Kingsbury v. Smith, 442 A.2d 1003, 1006 (N.H. 1982); Mason v. Western Pennsylvania Hosp., 453 A.2d 974, 976 (Pa. 1982);

extraordinary expenses necessary to "treat the birth defect and any additional medical or educational costs attributable to the birth defect."<sup>48</sup> Some courts denying child-rearing costs for a healthy child have indicated that "differing circumstances, including but not limited to the birth of an abnormal or injured child, might lead us to a different conclusion."<sup>49</sup>

In *Fassoulas v. Ramey*, a failed sterilization procedure resulted in the birth of two children.<sup>50</sup> One was healthy and the other had congenital deformities. The court held that child-rearing expenses were not recoverable for the healthy child. However, recovery for extraordinary costs associated with a defective child constituted a viable claim.<sup>51</sup> This holding was based on the rationale that "[s]pecial medical and education expenses . . . are often staggering and quite debilitating to a family's financial and social health."<sup>52</sup>

McKernan v. Aasheim, 687 P.2d 850, 852 (Wash. 1984); Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).

48. James G. v. Caserta, 332 S.E.2d 872, 882 (W. Va. 1985) (wrongful pregnancy); see also Turpin v. Sortini, 643 P.2d 954, 965 (Cal. 1982) (wrongful birth); *Fassoulas v. Ramey*, 450 So. 2d 822, 824 (Fla. 1984) (wrongful conception, although court labeled action wrongful birth); Blake v. Cruz, 698 P.2d 315, 321 (Idaho 1984) (wrongful birth); Schroeder v. Perkel, 432 A.2d 834, 841 (N.J. 1981) (wrongful birth); Becker v. Schwartz, 386 N.E.2d 807, 814 (N.Y. 1978) (wrongful birth, although court labeled action wrongful life); Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975) (wrongful birth); Naccash v. Burger, 290 S.E.2d 825, 830 (Va. 1982) (wrongful birth); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 493 (Wash. 1983) (wrongful birth and wrongful life); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 377 (Wis. 1975) (wrongful birth and wrongful life).

49. Kingsbury v. Smith, 442 A.2d 1003, 1006 (N.H. 1982) (wrongful conception); see also Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982) (Wrongful conception case where the court said decision to deny child-rearing expenses for healthy child "should not be construed as addressing [damages] when the child is born and afflicted with predetermined or readily foreseeable genetic or hereditary defects."); Flanagan v. Williams, 623 N.E.2d 185, 188 (Ohio Ct. App. 1993) (Wrongful birth action where court denied child-rearing expenses for healthy child but stated where child is unhealthy, the logical result is "parents would be entitled to recover the extra costs of raising the child over and above the ordinary child-rearing expenses.").

In *Speck v. Finegold*, 439 A.2d 110 (Pa. 1981), a negligently performed vasectomy, wrongful conception, and negligently performed abortion, wrongful birth, resulted in birth of child. *Id.* at 113. The court held where a physician negligently performed a vasectomy and a genetically defective child resulted, the expense of raising the child was recoverable. *Id.* at 113-14.

50. 450 So. 2d 822 (Fla. 1984) (action labeled wrongful birth, but birth of defective child resulted from negligent performance of sterilization procedure, which is wrongful conception).

51. *Id.* at 823.

52. *Id.* at 824.



In some cases where a child is born with a birth defect, courts have allowed recovery for support and maintenance costs beyond the age of majority.<sup>53</sup> This holding is typically based on the fact that where a child is incapable of supporting himself or herself because of a disability, parents are obligated to provide support post-majority.<sup>54</sup>

Because wrongful conception is rarely applicable to a case where the child is born with a birth defect, the area of wrongful birth must be examined in order to fully explore the recoverability of extraordinary costs.<sup>55</sup> The rationale for allowing extraordinary costs yet denying ordinary child-rearing costs has been addressed in several wrongful birth cases. As noted by one court, "divid[ing] a plaintiff's pecuniary losses into two categories, ordinary costs and extraordinary costs, and treat[ing] [only] the latter category as compensable . . . seems [at first glance] difficult to justify."<sup>56</sup> However, limiting recovery to extraordinary expenses is "neither illogical nor unprecedented."<sup>57</sup> Three basic explanations justify the disparity. First, in a wrongful birth context, this special rule applies the expectancy rule of damages in a breach of contract case.<sup>58</sup> Basically, plaintiffs in a wrongful birth case planned to have a child, yet defendant's negligence interfered with their expectations.<sup>59</sup> The extraordinary costs rule puts plaintiffs in the position they expected to be prior to the negligent act.<sup>60</sup>

A second justification is that by limiting recovery to extraordinary damages, plaintiffs receive damages proportionate to defendant's wrongful act. Thus, plaintiffs do not receive a windfall.<sup>61</sup> Parents of healthy children

53. See *Kush v. Lloyd*, 616 So. 2d 415, 424 (Fla. 1992) (wrongful birth); *Blake v. Cruz*, 698 P.2d 315, 321 (Idaho 1984) (wrongful birth); *Smith v. Cote*, 513 A.2d 341, 350 (N.H. 1986) (wrongful birth); *James G. v. Caserta*, 332 S.E.2d 872, 881 (W. Va. 1985) (wrongful pregnancy); cf. *Bani-Esraili v. Lerman*, 505 N.E.2d 947, 948 (N.Y. 1987) (wrongful birth—parents' obligation of support terminates when child reaches majority).

54. See *Blake v. Cruz*, 698 P.2d 315, 321 (Idaho 1984) (wrongful birth); *James G. v. Caserta*, 332 S.E.2d 872, 882 (W. Va. 1985) (wrongful pregnancy); see also *Lieberman v. Lieberman*, 517 S.W.2d 478, 480 (Mo. Ct. App. 1974) (duty to provide post-majority support arises from condition of child seeking benefit).

55. Most cases discussing extraordinary expenses are wrongful birth actions. *James G. v. Caserta*, 332 S.E.2d 872, 875 (W. Va. 1985).

56. *Smith v. Cote*, 513 A.2d 341, 349 (N.H. 1986) (wrongful birth).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* (citing Patrick J. Kelley, *Wrongful Life, Wrongful Birth and Justice in Tort Law*, 1979 WASH. U. L.Q. 919, 954 (1979)).

61. See *Haymon v. Wilkerson*, 535 A.2d 880, 886 (D.C. 1987) (wrongful birth); *Schroeder v. Perkel*, 432 A.2d 834, 841 (N.J. 1981) (wrongful birth).

derive pleasure from children, yet a parent of an abnormal child "receive[s] no compensating pleasure from incurring extraordinary medical expenses."<sup>62</sup>

Finally, many courts have noted that awarding extraordinary costs avoids the speculative nature of damages that is associated with a healthy child.<sup>63</sup> In *Kush v. Lloyd*, the court stated that extraordinary expenses are "quantifiable with reasonable certainty."<sup>64</sup>

On the other hand, some jurisdictions have refused recovery of extraordinary damages. For instance, in *LaPoint v. Shirley* the court found where an attending physician does not increase the probability that a child will be born with a defect, expenses related to the defect are not recoverable.<sup>65</sup> In *Azzolino v. Dingfelder*,<sup>66</sup> the court stated wrongful birth cases fail to recognize that the 'injury' for which [plaintiffs] seek compensation is the "existence of a human life."<sup>67</sup>

### C. *Wrongful Conception in Missouri*

In 1982, wrongful conception was first recognized as a cause of action in Missouri.<sup>68</sup> In *Miller v. Duhart*, Mrs. Miller underwent a sterilization procedure, yet she subsequently gave birth to a child.<sup>69</sup> The Eastern District of the Missouri Court of Appeals noted wrongful conception is not a novel cause of action, but rather, it is a form of malpractice<sup>70</sup> that gives rise to "*compensatory damages that are measurable*."<sup>71</sup> Such recoverable damages could include prenatal and postnatal medical expenses, pain and suffering, loss of consortium, and the cost of a second sterilization procedure.<sup>72</sup>

62. *Haymon*, 535 A.2d at 886 (quoting *Schroeder v. Perkel*, 432 A.2d 834, 842 (N.J. 1981)).

63. *Id.*; see also *James G. v. Caserta*, 332 S.E.2d 872, 878 (W. Va. 1985).

64. 616 So. 2d 415, 424 (Fla. 1992) (wrongful birth).

65. 409 F. Supp. 118, 120-21 (W.D. Tex. 1976) (action labeled wrongful birth but child resulted from unsuccessful tubal ligation, which is wrongful conception action).

66. 337 S.E.2d 528 (N.C. 1985) (wrongful birth and wrongful life). A child was born with Down's Syndrome when a doctor, nurse and health care facility negligently failed to advise parents of the availability of amniocentesis and genetic counseling. *Id.* at 530. The court refused to recognize the tort of wrongful birth, and consequently, extraordinary expenses were not awarded. *Id.* at 537.

67. *Id.* at 534.

68. *Miller v. Duhart*, 637 S.W.2d 183 (Mo. Ct. App. 1982).

69. *Id.* at 184.

70. *Id.* at 188.

71. *Id.* (emphasis added).

72. *Id.*

In *Wilson v. Kuenzi*, plaintiffs asserted wrongful birth and wrongful life actions rather than wrongful conception.<sup>73</sup> Although the court expressly refused to recognize these claimed torts, the Missouri Supreme Court discussed the unsettled area of recoverable damages.<sup>74</sup> The *Wilson* court cited with approval Judge Wachler's opinion in the New York case of *Becker v. Schwartz*.<sup>75</sup> Judge Wachler stated that holding a physician liable for a genetic defect essentially disregards fundamental legal principles.<sup>76</sup> Furthermore, requiring a doctor to pay for a genetically defective child creates a "medical paternity suit."<sup>77</sup> Although the court did not give a definitive answer regarding recoverable damages, it suggested that recovery for damages associated with a birth defect would not occur without solid proof of causation.<sup>78</sup>

In *Girdley v. Coats*,<sup>79</sup> the Supreme Court of Missouri affirmed the types of recoverable damages set forth by the court in *Miller*.<sup>80</sup> In *Girdley*, Mrs. Girdley had a bilateral tubal ligation, yet she later became pregnant and gave birth to a child.<sup>81</sup> The court defined wrongful conception as "a medical

73. 751 S.W.2d 741, 741 (Mo. 1988) (en banc).

A wrongful life action is brought by or on behalf of a child who claims that "were it not for the negligence of the defendant, he or she would not have been born." *Id.* at 743. See *supra* note 26 for discussion of wrongful birth. See also *infra* note 82.

In *Wilson*, the child was born with a genetic disorder, Down's syndrome. The parents brought suit on their own behalf and on the child's behalf against the physician for not performing an amniocentesis during pregnancy or advising them of the availability of such test. *Wilson*, 751 S.W.2d at 741-42.

74. *Id.* at 744; see also MO. REV. STAT. § 188.130 (Supp. 1996) (effective 1986) (no person shall maintain cause of action or receive damages based on claim that but for negligent conduct of another, a child would have been aborted).

In *Shelton v. St. Anthony's Medical Ctr.*, 781 S.W.2d 48 (Mo. 1989), a parent brought a malpractice action for failure to read an ultrasound correctly and advise that fetus was developing with abnormalities. The Missouri statute, *supra*, precluded wrongful birth claim. However, neither *Wilson* nor the statute barred a claim for damages that resulted after the birth and "as a result of the shock of not being adequately informed and prepared for the birth of the deformed child." *Id.* at 50.

75. 386 N.E.2d 807, 816-19 (N.Y. 1978) (Wachler, J., concurring and dissenting).

76. *Wilson*, 751 S.W.2d at 744 (quoting *Becker v. Schwartz*, 386 N.E.2d 807, 816 (N.Y. 1978)).

77. *Id.* at 745.

78. *Id.*

79. 825 S.W.2d 295 (Mo. 1992) (en banc).

80. *Id.* at 298. See *supra* text accompanying note 70.

81. *Id.* at 295-96.

malpractice action brought by the parents of a child born after a physician negligently performed a sterilization procedure.<sup>82</sup>

The *Girdley* court accepted wrongful conception as a cause of action, and it confronted the issue of whether a plaintiff may recover "the expenses of raising and educating" a healthy child.<sup>83</sup> The court noted most states have adopted the limited damages rule, which bars recovery of ordinary child-rearing expenses.<sup>84</sup> In addition, the court discussed policy concerns supporting adoption of the limited damages rule.<sup>85</sup> The court was particularly persuaded by the Kansas Supreme Court, which held the birth of a healthy child cannot constitute a legal harm, even if such child is the result of a negligent sterilization.<sup>86</sup>

The *Girdley* court cited *Wilbur v. Kerr*, which stands for the proposition that granting ordinary child-rearing damages would intrude the family unit and make the child feel like an unwanted "emotional bastard."<sup>87</sup> Finally, the *Girdley* court reasoned that respect for life is the center of civilization and that neither human life nor parenthood are compensable losses.<sup>88</sup> The discussion ended with a statement that general tort principles oppose the full recovery rule.<sup>89</sup>

Many policy concerns caused the *Girdley* court to find that recoverable damages in a wrongful conception case do not include ordinary child-rearing expenses.<sup>90</sup> Although the recoverable damages listed in *Miller* were affirmed, the *Girdley* court added plaintiffs may recover damages due to emotional distress, loss of wages, pain and suffering from the second sterilization procedure and any permanent impairment suffered by the parents.<sup>91</sup>

Two judges dissented from the court's holding that child-rearing costs resulting from a physician's negligence should not be recoverable.<sup>92</sup> The dissenting opinion stated this case should not be about "the right to life, the

82. *Id.* Wrongful birth is a claim initiated by parents when a defective child is born, and wrongful life is a claim filed by a child who suffers from birth defects. *Id.* at 296.

83. *Id.* at 296.

84. *Id.*

85. *Id.* at 297.

86. *Id.* (quoting *Byrd v. Wesley Medical Ctr.*, 699 P.2d 459, 468 (Kan. 1985)).

87. *Id.* (quoting *Wilbur v. Kerr*, 628 S.W.2d 568, 571 (Ark. 1982)).

88. *Id.* (quoting *Cockrum v. Baumgartner*, 447 N.E.2d 385 (Ill. 1983)).

89. *Id.* at 298.

90. *Id.*

91. *Id.*; see *supra* text accompanying note 74.

92. *Id.* at 299 (Turnage, J., concurring and dissenting). Judge Rendlen concurred in the opinion of Special Judge Turnage.

right to an abortion, the value of human life, or the value of the family as an integral unit of our society."<sup>93</sup> Rather, this medical malpractice case is regarding whether an exception will be "carved out to exonerate physicians" who negligently perform sterilization procedures.<sup>94</sup>

*Girdley* established guidelines for determining damages in a wrongful conception case involving a healthy child.<sup>95</sup> By refusing to allow recovery of normal child-rearing costs, the court implicitly left open the issue of recoverability of special damages in a wrongful conception case. Thus, *Girdley* set the stage for the later case of *Williams v. Van Biber*.<sup>96</sup>

#### IV. INSTANT DECISION

In *Williams v. Van Biber*, the Missouri Court of Appeals began its analysis by summarizing the brief history of the tort of wrongful conception.<sup>97</sup> The court said a wrongful conception cause of action was first recognized by Missouri in *Miller v. Duhart*,<sup>98</sup> which was later affirmed by the Supreme Court of Missouri in *Girdley v. Coats*.<sup>99</sup> The court noted that *Girdley* refused to allow recovery for the expenses of raising a healthy child.<sup>100</sup> The court then stated that recoverable damages, as set out by *Girdley* and *Miller*, are as follows:

prenatal and postnatal medical expenses; the mother's pain and suffering during pregnancy and delivery; loss of consortium; the cost of a second, corrective sterilization procedure; emotional distress; loss of wages; pain and suffering associated with the second corrective procedure; and any permanent impairment . . . suffered by the parents as a result of the pregnancy, delivery or second corrective procedure.<sup>101</sup>

The court cited a dictionary definition that described "postnatal" as "relat[ing] to an infant immediately after birth."<sup>102</sup> The court reasoned that

93. *Id.*

94. *Id.*

95. *Id.*

96. 886 S.W.2d 10 (Mo. Ct. App. 1994).

97. *Id.* at 12.

98. 637 S.W.2d 183 (Mo. Ct. App. 1982); *see supra* notes 68-72 and accompanying text.

99. *Williams*, 886 S.W.2d at 12; *Girdley v. Coats*, 825 S.W.2d 295, 296 (Mo. 1992) (en banc). *See supra* notes 79-91 and accompanying text.

100. *Williams*, 886 S.W.2d at 12.

101. *Id.* at 12-13.

102. *Id.* at 12 n.2 (quoting WEBSTER'S 3RD NEW INT'L DICTIONARY 1773 (1971)).

because procedures to repair the child's birth defect were performed after Cody was discharged from the hospital, they did not constitute immediate postnatal medical expenses.<sup>103</sup> Consequently, the court found that the Williamses' expenses associated with Cody's defect were not recoverable.<sup>104</sup> According to the court, individual case facts and circumstances must determine what time span the term "postnatal" encompasses.<sup>105</sup>

Although the court found that under *Girdley* an award of extraordinary damages was precluded, the court went on to discuss whether Van Biber was "liable for Cody's heart defect."<sup>106</sup> In order to make this determination, the court reviewed the issue of causation.<sup>107</sup>

The court began by stating that Van Biber's alleged negligence did not cause the birth defects.<sup>108</sup> As support for this assertion, the court quoted *Wilson v. Kuenzi*,<sup>109</sup> which stated where the disorder is genetic, it is not the result of any injury negligently inflicted by the doctor.<sup>110</sup> The court also noted the *Wilson* court criticized cases that have "closed their eyes to traditional tort causation."<sup>111</sup> The court said other jurisdictions have rejected claims similar to the Williamses' because the defendant did not cause the abnormality.<sup>112</sup> Two cases were cited by the court in which "lack of foreseeability was a major factor in the courts' decision to not find causation."<sup>113</sup>

The court stated that "[b]ut for" the allegedly negligent vasectomy, Cody would not have been born and not having been born he could not have had congenital heart defects.<sup>114</sup> However, the court added that proximate cause involves more than the "but for" causation test, which only excludes that which is not causal in fact.<sup>115</sup> By incorporating the reasoning of *Callahan v. Cardinal Glennon Hosp.*,<sup>116</sup> the court noted that some items that are

103. *Id.* at 13.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Wilson*, 751 S.W.2d at 744-45 (quoting *Becker v. Schwartz*, 386 N.E.2d 807, 816-19 (N.Y. 1978) (Wachler, J., concurring and dissenting)).

110. *Williams*, 886 S.W.2d at 13.

111. *Id.*

112. *Id.*

113. *Id.* at 13-14 n.3.

114. *Id.* at 14.

115. *Id.*

116. 863 S.W.2d 852 (Mo. 1993) (en banc).

causal in fact are too far removed from the injury to be a basis for liability.<sup>117</sup> Consequently, the court reasoned that "but for" causation is an absolute minimum.<sup>118</sup> The court further said Missouri has not applied a pure foreseeability test.<sup>119</sup> Rather, the court noted an injury must be the reasonable and probable consequence of the defendant's act.<sup>120</sup> The court found as a matter of law a negligent vasectomy is not a reasonable and probable cause of a child's birth defect.<sup>121</sup>

The court reasoned because the negligent performance of the vasectomy was an act too far removed from Cody's birth defect, such negligence did not cause the damage.<sup>122</sup> The court found Van Biber's negligent performance of the sterilization procedure was not the proximate cause of Cody's medical expenses associated with the birth defect.<sup>123</sup> Consequently, the court concluded that Van Biber was not liable for expenses resulting from Cody's birth defect.<sup>124</sup>

## V. COMMENT

The case of *Williams v. Van Biber* was the first Missouri wrongful conception case confronting the recoverability of extraordinary expenses for a child's birth defect. The court's decision to bar the recovery of damages associated with a birth defect followed the subtle trend of recent Missouri cases. For instance, *Girdley v. Coats*<sup>125</sup> denied recovery for ordinary child-rearing expenses in a wrongful conception case. Furthermore, *Wilson v. Kuenzi*<sup>126</sup> criticized the benefit-offset rule<sup>127</sup> and refused to recognize a wrongful birth tort.<sup>128</sup> In consideration of past Missouri decisions, the precedent set by *Williams* is not surprising. However, in its opinion the court

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117. *Williams*, 886 S.W.2d at 14.

118. *Id.*

119. *Id.*

120. *Id.* "This is generally a 'look back' test but, to the extent it requires that the injury be 'natural and probable' it probably includes a sprinkling of foreseeability." *Id.* (quoting *Callahan*, 863 S.W.2d at 865).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. 825 S.W.2d 295, 298 (Mo. Ct. App. 1982).

126. 751 S.W.2d 741 (Mo. 1988) (en banc).

127. *Id.* at 744 (offsetting the benefit of a child against tort damages forces a parent to assert that the child is unwanted).

128. *Id.* at 746; see *supra* note 26 and text accompanying notes 73-78.

of appeals used a formalistic approach, misconstrued the plaintiffs' theory, and failed to uphold the traditional objectives of tort law.

In a 1945 case, Judge Learned Hand remarked that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary."<sup>129</sup> Contrary to this guidance, the *Williams* court footnoted a dictionary definition of the word "postnatal" and declared that medical expenses to treat Cody's birth defect did not fall within such definition.<sup>130</sup>

This formalistic approach disposed of the issue within one sentence,<sup>131</sup> yet it left no clear guidance for future cases. The court arbitrarily determined that because Cody had been "discharged from the hospital in an apparently healthy condition" his medical expenses were not recoverable postnatal damages.<sup>132</sup> Inversely, does this imply that if the deformity had been discovered before release that all costs would have been recoverable? Allowing the same medical expenses to be recoverable in one instance yet not the other goes against a basic sense of fairness. Essentially, there was no argument that the defect developed after discharge from the hospital; rather, the defect was merely discovered after such time. If a defect is not "discovered" until after hospital release, the physician escapes financial responsibility. The court noted that the time span encompassed by "postnatal" should be limited to the facts of each case,<sup>133</sup> yet this still suggests that "postnatal" is a race against the clock.

This arbitrary and unjustified rule could have negative financial effects for parents, hospitals, insurance companies and public assistance programs. Essentially, *Williams* encourages parents of children born after a failed sterilization procedure to demand that every available test be performed on a newborn before hospital release. Such action ensures that any unforeseeable medical expenses will be recoverable.

The second issue the court confronted was whether Van Biber was liable for Cody's heart defects.<sup>134</sup> In determining this matter, the court stated that "Van Biber's alleged negligence did not cause the birth defects."<sup>135</sup> However, this statement and the court's entire analysis misconstrued the *Williamses'* action. The *Williamses* never argued that Van Biber *caused* their

129. *Cabell v. Markham*, 148 F.2d 737, 739 (2nd Cir. 1945), *aff'd*, 326 U.S. 404 (1995).

130. *Williams*, 886 S.W.2d at 13. *See also* Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994) (court use of dictionary definitions has increased although dictionaries are not perfect sources).

131. *Williams*, 886 S.W.2d at 13.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*



son's birth defect. Rather, plaintiffs contended that if the doctor had not breached his duty to render proper medical treatment, the child would not have been conceived or born.<sup>136</sup> Consequently, they would not have been injured in the form of medical expenses, lost income and emotional distress.<sup>137</sup>

By applying the court's analysis to the appropriate injury, the soundness of the decision is called into question. Following the court's path, one must first ask whether the Williamses' injuries were causal in fact. The traditional test is the "but for test": a defendant's negligence is a cause of an injury where the injury would not have occurred but for defendant's negligent conduct.<sup>138</sup> Thus, "but for" the allegedly negligent vasectomy, Cody would not have been born.<sup>139</sup> The direct causation requirement is arguably met. Assuming Van Biber was negligent, he directly caused or contributed to cause Cody's birth, which resulted in the Williamses' medical expenses. However, as the court notes, "but for" is an absolute minimum for causation.<sup>140</sup>

Therefore, the second question is whether the injury was "a reasonable and probable consequence of the act or omission of the defendant."<sup>141</sup> "This is generally a 'look back' test but . . . it probably includes a sprinkling of foreseeability."<sup>142</sup> If the physician negligently performed the sterilization operation, he breached his or her duty to the patient. The natural and probable consequence of the defendant's omission is the birth of a child and the parents incurring damages as a result of the medical and hospital costs associated with the child's birth.

One may argue that extraordinary costs are simply "too far removed" from a physician's negligence. However, assuming that the parents' injuries resulted from the unplanned birth of a child, *Callahan* states that "it is sufficient for liability if a reasonable defendant could foresee the person who would be injured as opposed to the nature of the injury."<sup>143</sup> Essentially, a

136. It is worth noting that neither Van Biber nor the Williamses made a causation argument. This may be some indication that the court's initiation of this argument was improper. See Brief for Appellants and Brief for Respondent.

137. *Id.*; see also *Speck v. Finegold*, 408 A.2d 496, 508-09 (Pa. Super. 1979), *aff'd in part* and *rev'd in part*, 439 A.2d 110, 111-12 (Pa. 1981).

138. *Heacox v. Robbins Educ. Tours, Inc.*, 829 S.W.2d 600, 603 (Mo. Ct. App. 1992).

139. *Williams*, 886 S.W.2d at 14.

140. *Id.* (quoting *Callahan*, 863 S.W.2d at 862).

141. *Id.* (quoting *Callahan*, 863 S.W.2d at 865).

142. *Id.* (quoting *Callahan*, 863 S.W.2d at 865).

143. *Callahan*, 863 S.W.2d at 865.

reasonable physician could foresee that by negligently performing a vasectomy, the parents would be damaged. The form of such injury is irrelevant. Delivery costs, prenatal medical expenses and extraordinary expenses all result from the physician's negligence.

Even if the court insists that the nature of the injury be foreseeable, the child's birth defect in *Williams* was foreseeable. The Williamses allege that they informed Van Biber that they wanted a vasectomy due to problems with "Mrs. Williams' previous two pregnancies and because her obstetrician told them that future pregnancies would be high risk for her and the baby."<sup>144</sup> According to a 1989 Missouri Supreme Court case, "[f]oreseeability is established when a defendant is shown to have knowledge, actual or constructive, that there is some probability of injury sufficiently serious that an ordinary person would take precautions to avoid it."<sup>145</sup> Thus, because

One commentator suggests by focusing on the "product" of the negligence, the birth of a child, courts fail to address the real injury. Jeff L. Milsteen, Comment, *Recovery of Childrearing Expenses in Wrongful Birth Cases: A Motivational Analysis*, 32 EMORY L.J. 1167, 1169 (1983). A more equitable result could be reached through a motivational analysis. *Id.* at 1169-70. Courts should investigate parents' motivation for avoiding childbirth. *Id.* Because the law is "'directed toward the compensation of individuals . . . for losses which they have suffered in respect of all their legally recognized interests,' a determination of the specific interests the parent(s) sought to protect . . . would relate to the appropriateness of the damages to be awarded." *Id.* at 1170 (quoting W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 1 (4th ed. 1971)).

Courts have identified three different motives for why parents seek to have a sterilization procedure performed: (1) therapeutic, to prevent harm to the mother, *Hartke v. McKelway*, 707 F.2d 1544 (D.C. Cir. 1983), (2) eugenic, to avoid the birth of a defective child, *Speck v. Finegold*, 408 A.2d 496, 499 (Pa. Super. 1979), *aff'd in part and rev'd in part*, 439 A.2d 110 (Pa. 1981), and (3) socioeconomic, to avoid the economic burden of rearing a child or the interference with lifestyle, *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 (Minn. 1977).

Courts should look at the interests a plaintiff sought to preserve and determine if injury due to the physician's negligence resulted. Milsteen, *supra*, at 1197. For instance, if an eugenically motivated sterilization procedure fails and a defective child results, the parents' interest injured is the "financial and emotional 'expense' of raising an impaired child." *Id.* at 1193. Parents should recover extraordinary child-rearing expenses for "special medical costs necessitated by the child's impaired condition . . . ." Milsteen, *supra*, at 1192-93.

*See also* *Burke v. Rivo*, 551 N.E.2d 1, 5 (Mass. 1990) (if parents' desire to avoid birth of child was based on eugenic or therapeutic reasons, justification for allowing recovery of child-rearing costs was "less than when, to conserve family resources, the parents sought unsuccessfully to avoid conceiving another child").

144. *Williams*, 886 S.W.2d at 14.

145. *Pierce v. Platte-Clay Elec. Co-Op, Inc.*, 769 S.W.2d 769, 776 (Mo. 1989) (en banc). *See also* Brief for Appellants at 9.

Van Biber knew Mrs. Williams or the baby was at risk, the happening of a birth defect was foreseeable.

The court cites two cases supporting its argument that Van Biber did not legally cause the abnormality. However, these cases can be distinguished from *Williams*, and therefore, they lend no support to the court's holding. For instance, *Garrison v. Foy*<sup>146</sup> involved a failed vasectomy that resulted in the birth of an abnormal child. The *Garrison* court noted that cases involving a birth defect are, "by definition, within the wrongful birth characterization" and therefore, there is a "paucity of case law dealing with recovery for a defect in the wrongful pregnancy context."<sup>147</sup> The court even stated that recovery of extraordinary expenses has generally been allowed where a defect is likely to appear in offspring, parents sought sterilization to avoid producing a child with a defect, and yet an abnormal child is born.<sup>148</sup> However, in *Garrison* there was no known defect that had a high probability of affecting future children.<sup>149</sup>

Likewise in *LaPoint v. Shirley*,<sup>150</sup> the other case cited by the *Williams* court, there is no evidence that the parents sought sterilization to avoid bearing a child with a birth defect or that the physician knew of such motive.<sup>151</sup> This factor distinguishes both of these cases from *Williams*. The *Williams* court, however, ignores that Van Biber was allegedly aware of the *Williamses'* reason for seeking sterilization.

By inferring that the birth of a child is damaging, some courts have misinterpreted this as implying that plaintiffs seek compensation for the "existence of a human life."<sup>152</sup> However, it is "not the birth of the child that is the harm 'but' the invasion of the parents' interest in the financial security of their family—an invasion clearly foreseeable . . . by the doctor as the probable consequence of his negligence in performing the procedure."<sup>153</sup>

By refusing to award extraordinary damages, the court accomplished two possible objectives. First, the court avoided the expansion of tort liability.<sup>154</sup>

146. 486 N.E.2d 5, 7 (Ind. Ct. App. 1985).

147. *Id.* at 9.

148. *Id.*

149. *Id.*

150. 409 F. Supp. 118 (W.D. Tex. 1976).

151. This case involved an unsuccessful sterilization procedure that resulted in the birth of an abnormal child. *Id.* at 119. The court stated that foreseeability is required in medical malpractice cases and that "a physician can only be held liable if harmful consequences could have been anticipated." *Id.* at 121.

152. *Azzolino*, 337 S.E.2d at 534.

153. *Girdley*, 825 S.W.2d at 300 (Turnage, J., concurring and dissenting) (quoting *Lovelace Medical Ctr. v. Mendez*, 805 P.2d 603, 609 (N.M. 1991)).

154. *Wilson*, 751 S.W.2d at 749 (Billings, J., dissenting) ("enactment of so-called

Second, the court supported Missouri's pro-life policy.<sup>155</sup> Both goals may be valid, yet their merit is diminished when balanced against the public policy concerns that were not addressed.

The court ignored and frustrated the traditional objectives of tort law: compensation for harm, punishment and deterrence of wrongful behavior.<sup>156</sup> The parents in this case were faultless, yet Van Biber's negligence resulted in harm to them. Where one party was negligent, the other should not have to bear the burden.<sup>157</sup> Achieving fairness is the reason for liability when an accident occurs.<sup>158</sup> Denial of recovery deviates from the "generic proposition" that there is a remedy for every wrong.<sup>159</sup> Missouri has already recognized that wrongful conception is a wrong.<sup>160</sup> It has just declined to provide full remedy to those who are injured.

The court elevated a traditional view of parental responsibility above traditional tort theory. A traditional view of parental responsibility stems from society's interest in life.<sup>161</sup> This view is demonstrated by states that have held one cannot be damaged by the birth of a child.<sup>162</sup> In fact, the court in *Cockrum v. Baumgartner* stated that life's significance should not be outweighed by the cost of supporting it and that life is at the heart of the legal system.<sup>163</sup> Wrongful birth actions, rather than wrongful conception cases, traditionally confront these obstacles. Additionally, as noted by *Garrison and LaPoint*, cases dealing with recovery for a child's birth defect are within the

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'tort reform' legislation" should not control or influence the decision of the court).

155. See Jennifer Mee, *Wrongful Conception: The Emergence of a Full Recovery Rule*, 70 WASH. U. L.Q. 887, 912 (1992).

156. See RESTATEMENT (SECOND) OF TORTS § 901 (1979); *Finegold*, 439 A.2d at 114, 116; *Girdley*, 825 S.W.2d at 300; *Smith v. Cote*, 513 A.2d 341, 348 (N.H. 1986).

157. Shari S. Weinman, *Birth Related Torts: Can They Fit the Malpractice Mold?*, 56 MO. L. REV. 175, 191 (1991).

158. JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, *THE TORTS PROCESS* 41 (3rd ed. 1988) (quoting Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972)).

159. *Finegold*, 439 A.2d at 116. The court noted that an injury is a wrong, which is a violation of one's right, and for every wrong there is a remedy. *Id.*

160. *Miller*, 637 S.W.2d at 188.

161. Mee, *supra* note 155, at 911.

162. *Szekeres v. Robinson*, 715 P.2d 1076, 1077 (Nev. 1986); *Byrd v. Wesley Medical Center*, 699 P.2d 459, 468 (Kan. 1985).

163. 447 N.E.2d 385, 389 (Ill. 1983). This case was cited by *Girdley* as a public policy reason for denying full recovery in Missouri.

purview of wrongful birth. However, an action for wrongful birth is not allowed in Missouri.<sup>164</sup>

Even though *Williams* involved a failed sterilization procedure and was therefore an action for wrongful conception, the Williamses sought damages related to an aspect of wrongful birth—a birth defect. The court implicitly reached the conclusion that benefits of parenting outweigh even extraordinary costs. Consequently, although the tort of wrongful conception has been allowed,<sup>165</sup> the court has severely limited recovery.

If the court was disturbed about contradicting Missouri policy or entering the purview of wrongful birth, it merely should have expressed such concern. By employing a formalistic approach and misapplying their causation analysis, the court confused the issues at hand and left little room for precedential effect.

## VI. CONCLUSION

The *Williams* court denied recoverability for extraordinary damages in a wrongful conception case. However, this holding lacks strong foundation.<sup>166</sup> When the next case involving this issue arises, hopefully the court will reconsider its position. Many jurisdictions have decided this issue differently,<sup>167</sup> and by examining the reasoning in those cases, the court may better understand the issue presented in *Williams*. Essentially, the question should be "when a physician's negligence results in the birth of a child with defects, may parents recover for measurable damages," and not whether a physician caused the child's birth defects.

The court may continue to agree with the holding in *Williams*. However, future decisions should be based on sound reasoning or policy judgments, rather than a formalistic and unjustified rationale or mischaracterized causation analysis.

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164. See *supra* notes 73-74 and accompanying text. Missouri has traditionally been pro-life, which is illustrated by its statute codifying a pro-life policy. See *Mee*, *supra* note 155, at 911. The Missouri statute states "life of each human being begins at conception" and state laws "shall be interpreted and construed to acknowledge on behalf of the unborn child . . . all the rights, privileges, and immunities available to other persons, citizens and residents of this state." MO. REV. STAT. § 1.205 (Supp. 1996) (effective 1986).

165. *Miller*, 637 S.W.2d at 188.

166. See *supra* notes 131-153.

167. See *supra* notes 47-64 and accompanying text.