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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000212-MR

NATHAN ROBERT BOGAN, APPELLANTS
by and through his next friends,
GRETCHEN BOGAN and DANIEL BOGAN;
GRETCHEN BOGAN and DANIEL BOGAN,
individually; and CABINET FOR
HEALTH SERVICES

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 94-CI-00434

ALTMAN & MCGUIRE, P.S.C.; APPELLEES
ALTMAN & MCGUIRE; ALTMAN,
MCGUIRE & PIGG, P.S.C.;
ALTMAN, MCGUIRE & PIGG;
ALTMAN, MCGUIRE & MCCLELLAN,
P.S.C.; ALTMAN, MCGUIRE &
MCCLELLAN; ALTMAN, MCGUIRE,
PIGG & MCCLELLAN, P.S.C.;
ALTMAN, MCGUIRE, PIGG & MCCLELLAN;
HARRY E. ALTMAN; TOM O. MCGUIRE;
JAMES R. PIGG; and RICK A. MCCLELLAN

AND

NO. 1999-CA-000468-MR
AND
NO. 1999-CA-000563-MR (CROSS)

CARLEI NACOLE GRUBBS, APPELLANTS/CROSS-APPELLEES
by and through her next friend,
KIMBERLY SUZANE GRUBBS; KIMBERLY
SUZANE GRUBBS, Individually; and
KENNETH CHARLES GRUBBS, Individually

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 97-CI-00277

BARBOURVILLE FAMILY HEALTH APPELLEES/CROSS-APPELLANTS
CENTER, P.S.C.; B.R. JUNG,
M.D., agent, servant and employee

of BARBOURVILLE FAMILY HEALTH
CENTER, P.S.C.; and
B.R. JUNG, M.D., Individually

OPINION
AFFIRMING IN
1999-CA-000468-MR
AND 1999-CA-000563-MR
AFFIRMING IN PART,
REVERSING IN PART
AND REMANDING
IN 1999-CA-000212-MR
** ** * * * * *

BEFORE: COMBS, DYCHE, AND McANULTY, JUDGES.

McANULTY, JUDGE: The consolidated appeals before us involve similar situations in which a woman gave birth to a child with severe birth defects. In both instances, the parents maintain the defects should have been diagnosed by their respective physicians through prenatal tests. The parents further allege that had they been informed of these defects, each would have chosen to terminate the pregnancy.

These fact situations raise the question of whether Kentucky law recognizes what are known as birth-related torts. There are three separate torts in this group. Wrongful conception or wrongful pregnancy applies to the situation in which a negligently performed sterilization procedure results in the birth of a child. Wrongful birth is the cause of action where parents allege that negligence in prenatal testing prevented them from making an informed decision regarding the continuation of the pregnancy. Finally, wrongful life is a cause of action brought on behalf of the disabled child claiming that but for the negligence of a physician, the child would not have been born.

We will briefly discuss the facts and procedural histories of each case. In the case of the Bogans, they allege their group of physicians failed to perform an amniocentesis test and failed to interpret the ultrasound which would have revealed the severe defects possessed by the child, Nathan Bogan. Nathan was delivered by cesarean section because a cyst had so enlarged his head that it was impossible for him to be delivered vaginally. Nathan was born with only a brain stem because of the enormous cyst. He does not have any eyes in his sockets and he is unable to speak or to communicate. Nathan lives at the Home of the Innocents in Louisville, where he receives around the clock care.

The Bogans filed suit in Pike Circuit Court alleging that the failure to perform an amniocentesis test and interpret the ultrasounds of the fetus deprived the Bogans from making an informed decision concerning the continuation of the pregnancy. The Bogans made a similar claim on behalf of Nathan for damages which resulted from his birth. The trial court granted partial summary judgment to the defendants on Nathan's claim, relying on Schork v. Huber, Ky., 648 S.W.2d 861 (1983). The trial court then appeared to vitiate the Bogans' claim on the ground that the physicians did not cause the defects. Nevertheless, the order permitted the parents' cause of action and limited damages to Mrs. Bogan's pain and suffering and permanent scars left as a result of being forced to undergo a cesarean section. The order granting partial summary judgment stated it was final and appealable.

The Bogans filed this appeal, asserting that they are entitled to recover for the damages caused by Nathan's birth. Essentially, they ask this Court to recognize the claims of wrongful birth and wrongful life.

The Grubbses allege the physician providing prenatal care, Dr. Jung, failed to advise them of the availability of prenatal diagnostic tests to indicate the presence of spina bifida and hydrocephalus, and failed to interpret an ultrasound to reveal the presence of these defects. They argue the physician's negligence deprived them of the opportunity to make an informed decision on whether to continue the pregnancy. The Grubbses have also joined the hospital, where Dr. Jung works, as a defendant.

Carlei Nacole Grubbs suffers from a variety of genetic defects, including spina bifida and hydrocephalus. She is paralyzed from the waist down, and has poor vision and misshaped kidneys. The Grubbses instituted the present action in the Knox Circuit Court on their behalf and a cause of action on behalf of Carlei.

The defendants filed a motion for summary judgment alleging that Kentucky law does not recognize the causes of action filed by the Grubbses. The trial court analyzed the issues and determined that the Grubbses's claim was not a new tort but merely a claim of medical malpractice. The court, therefore, denied summary judgment on that issue. However, the trial court opined that to recognize the claim filed on Carlei's behalf would be to determine it is better never to have been born

at all than to have been born disabled. The Knox Circuit Court, therefore, concluded it would be against public policy to permit Carlei's cause of action and granted summary judgment to the physician and hospital on this issue.

Subsequently, the defendants in the Grubbs case filed a second motion for summary judgment on the grounds of violation of the statute of limitations. The Grubbses had testified they first learned their physician had failed to diagnose the defects when Mrs. Grubbs saw a specialist who reviewed the ultrasounds in Lexington on June 27, 1996. The specialist informed her then that her unborn child suffered from spina bifida and hydrocephalus. The trial court granted summary judgment on this issue, stating the proper time to file suit would have been within a year from the date the specialist informed them of Carlei's condition, not one year after her birth.

The Grubbses appeal the issues concerning the application of the statute of limitations to bar their claims and the granting of summary judgment on the causes of action of wrongful birth and wrongful life. Their appeal of the wrongful birth issue is somewhat perplexing, as we interpret the trial court's order as recognizing the validity of the claim and denying summary judgment to the physician and hospital. Moreover, the physician and hospital have cross-appealed, asserting that the trial court erred in denying summary judgment on the wrongful birth issue.

We first address the causes of action for wrongful birth and wrongful life. The appellate courts in Kentucky have

not previously faced the precise issues now before us. The decision in Schork v. Huber, supra, upon which the trial courts relied, concerned the factual scenario in which an impregnated couple sued the physician who had performed an unsuccessful sterilization procedure. This cause of action is known as wrongful conception. Schork held that "parents cannot recover damages based on the costs of raising a healthy but unexpected child from a doctor following an unsuccessful sterilization procedure." Schork at 862. In so concluding, the majority opinion discussed the causes of action known as wrongful birth and wrongful life and opined as follows:

Wrongful life is a contradiction in terms. It is contrary to the public policy of this State as expressed by the legislature and interpreted by the courts.

The establishment of a cause of action based on the matter of wrongful conception, wrongful life or wrongful birth is clearly within the purview of the legislature only. The enunciation of public policy is the domain of the General Assembly. We do not propose to invade their jurisdiction in any respect. The courts interpret the law. They do not enact legislation.

Id. at 863. The trial court in the Bogan case determined that the Schork decision barred the claims of both the parents and the child. Conversely, the trial court in the Grubbs case decided that the above language was simply dicta.

We conclude that we are not bound by the language in Schork. The issues of wrongful birth and wrongful life were not before the Schork court at the time. Therefore, the discussion of these torts is clearly dicta. Cawood v. Hensley, Ky. App., 247 S.W.2d 27, 29 (1952). Accordingly, the viability of the

causes of action known as wrongful birth and wrongful life are issues of first impression.

While dicta is not controlling, it may be used as a guide. However, upon our review of the decisions of many other jurisdictions, we are more persuaded by the logic employed in the Schorck dissents. Therein, two justices contended that the wrongful conception case before the court involved traditional negligence principles and did not call for the court to create a new cause of action. Schorck at 865. (Leibson, J., dissenting). In that regard, we find that recognizing the claims set forth in the case at bar requires not the establishment of some new cause of action, but only a re-examination of the claims under existing negligence principles. Relief may come in the form of traditional damages without introducing a new tort to Kentucky law.

An examination of the allegations which constitute a claim for wrongful birth reveals that the cause of action, no matter by what name it is called, sounds purely in medical negligence. This view has been adopted by many courts in assessing the viability of wrongful birth claims. For example, the Seventh Circuit Court of Appeals, in applying Alabama law, concluded that the tort of wrongful birth "involves a failure by a physician to meet a required standard of care, which resulted in specific damages to the plaintiffs." Robak v. United States, 658 F.2d 471, 476 (7th Cir. 1981). The Court further opined:

As in any other tort case, the defendant must bear the burden for injuries resulting from its own negligence. "Any other ruling would in effect immunize from liability those in

the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses, which, if born, would suffer from genetic [or other] defects." (Citation omitted.)

Id. In that respect, we believe the legislature in Kentucky has already spoken by implicitly recognizing actions against physicians for negligence or malpractice. KRS 413.140(1)(e).

Further, the Nevada Supreme Court has similarly declared:

"[W]e see no reason for compounding or complicating our medical malpractice jurisprudence by according this particular form of professional negligence action some special status apart from presently recognized medical malpractice or by giving it the new name of 'wrongful birth.'" Greco v. United States, 893 P.2d 345, 348 (Nev. 1995).

Accordingly, we hold parents who allege negligence on the part of a physician deprived them of information necessary to make a decision regarding the continuation of pregnancy have stated a viable cause of action for medical negligence. Our Supreme Court has stated:

In any negligence case, it is necessary to show that the defendant failed to discharge a legal duty or conform his conduct to the standard required. W. Prosser, LAW OF TORTS § 30 (1971). In the arena of medical negligence, controlling Kentucky authority imposes upon a physician the duty to "use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which [the physician] belongs acting in the same or similar circumstances." Blair v. Eblen, Ky., 461 S.W.2d 370, 373 (1970).

Mitchell v. Hadl, Ky., 816 S.W.2d 183, 185 (1991). Moreover, should the plaintiffs prove the elements of medical negligence,

including duty, breach, injury and causation, they are entitled to compensation for the damages that flow from the negligence.

We now turn to the issue of wrongful life, the cause of action brought on behalf of the disabled child. Once again this cause of action sounds in negligence. The gist of the claim is that the child has suffered harm due to the negligence of the defendants. Regardless, there is no question that the courts have struggled with the issues raised by this claim. The difficulty is found in the type of harm alleged. Inasmuch as the alleged negligence of the defendants did not cause the actual defects from which Nathan Bogan and Carlei Grubbs now suffer, we must determine whether Kentucky law will recognize that the children have suffered a cognizable injury at law merely by being born rather than aborted.

Many courts have refused to recognize this action because the disabled child is effectively asserting it would have been better not to have been born at all than to be born with disabilities and the accompanying pain and suffering. However, we do not reach the question of weighing human life because we conclude the claim fails on the first element of negligence – duty.

While it is without question that the physician owes a duty to the patient, it is not so clear whether the doctor owes an independent duty to the unborn child. Recognizing a cause of action for wrongful life would require such a duty; the doctor would become negligent for causing the unborn child to be brought into life. Justice Leibson recognizes this in Schorck, stating

the cause of action for wrongful life creates "a new duty to a new person where none previously existed." Schorck at 865. (Leibson, J., dissenting). We are inclined to agree. A physician who undertakes to care for a pregnant woman owes a duty *to the woman* to care for her and her unborn child. We hold that a child with disabilities does not state a cause of action when he alleges that but for the negligence of a medical provider he would not have been born.

Finally, we must address whether the trial court erred in dismissing the Grubbses's claim for failure to file within the statute of limitations. The parties agree that the appropriate statute is KRS 413.140(1)(e), which provides that an action against a physician or hospital for negligence or malpractice must be brought within one year. The question in this case is when the time limitation began to run. Kentucky has adopted a discovery rule requiring the limitation period to run from the date of the discovery of the injury or from the date it should, in the exercise of ordinary care and diligence, have been discovered. Hackworth v. Hart, Ky., 474 S.W.2d 377 (1971).

Mrs. Grubbs testified that Dr. Jung performed several ultrasound tests throughout her pregnancy with Carlei. After the last ultrasound, he referred her to a University of Kentucky specialist because he observed that the fetus's head was larger than it should be. The specialist, Dr. Milligan, viewed the ultrasounds and immediately identified Carlei's disabilities. In fact, Mrs. Grubbs stated that Dr. Milligan remarked that "he couldn't believe [Dr. Jung] had missed it, right there it was."

As such, the trial court determined that the Grubbses discovered the injury on the date they saw Dr. Milligan in Lexington.

On appeal, the Grubbses insist we should hold that they could not have discovered the injury until Carlei was born, because they could not have been aware of the extent of her physical defects until then. While we appreciate that argument, we believe it contradicts the law. The discovery rule does not require a person to be aware of the full extent of the injury before the statute begins to run, only that the person discover, or should reasonably discover, that he or she has been wronged. In other words, it was enough that the Grubbses knew Dr. Jung had missed the diagnosis of the defects. It was not required that they knew the full extent of Carlei's disabilities.

The Grubbses also contend that whether they brought the action within the statute of limitations is a question for the jury. They rely on Hackworth v. Hart, supra, for this proposition. However, we believe Hackworth concludes that there is a jury issue for the discovery rule only when there is a factual discrepancy regarding whether the plaintiff knew or should have known. In this case, Mrs. Grubbs has testified that Dr. Milligan informed her during the ultrasound that Dr. Jung should have seen the defects earlier. There is no such discrepancy and therefore, no issue for the jury. Farmer's Bank & Trust Co. v. Rice, Ky., 674 S.W.2d 510 (1984). Accordingly, we cannot conclude that the trial court erred in granting summary judgment to the defendants on the grounds that the Grubbses' claim was time-barred.

For the foregoing reasons, the order of the Pike Circuit Court is affirmed in part, reversed in part and remanded for proceedings on Mr. and Mrs. Bogan's claim. The orders of the Knox Circuit Court are affirmed.

DYCHE, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

COMBS, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the extremely well-reasoned majority opinion on all issues but one – that of the discovery date/statute of limitations controversy involving the Grubbses. Although Dr. Milligan's review of Dr. Jung's ultrasound tests confirmed that Dr. Jung had mis-diagnosed Carlei's disabilities, no physician is omniscient – despite the almost miraculous ability of modern testing to predict birth defects. Only the event of birth itself could reveal for certain the existence and extent of the predicted defects.

Consequently, I differ from the majority opinion on this one issue and would set the date of birth as the event triggering the running of the statute of limitations and would not hold the Grubbses' claim to be time-barred.

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