SUPREME COURT OF KENTUCKY

File No. 82-SC-467-DG
(81-CA-2513-MR)

SHARON A. SCHORK, et al. - - - **Appellants**

versus

CHARLES H. HUBER, M.D. - - - - **Appellee**

Jefferson Circuit Court 79-CI-12840

BRIEF FOR APPELLEE

WILLIAM P. SWAIN
DOUGLAS H. MORRIS
BOEHL STOPHER GRAVES & DEINDOERFER
2300 United Kentucky Bank Building
One Riverfront Plaza
Louisville, Kentucky 40202
(502) 589-5980
Attorneys for Appellee

It is hereby certified that copies of the within brief were served by mail this 15th day of November, 1982 upon: Hon. Joseph L. White, Suite 100, 730 West Market Street, Louisville, Kentucky 40202, Attorney for Appellants; Hon. Joseph Eckert, Judge, Jefferson Circuit Court, Division One, Jefferson County Hall of Justice, Louisville, Kentucky 40202, Trial Judge; and Hon. John C. Scott, Clerk, Court of Appeals of Kentucky, Bush Building, 403 Wapping Street, Frankfort, Kentucky 40601.

Attorney for Appellee

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

SUPREME COURT OF KENTUCKY

File No. 82-SC-467-D
(81-CA-2513-MR)

SHARON A. SCHORK, et al. - - - *Appellants*

v.

CHARLES H. HUBER, M.D. - - - *Appellee*

JEFFERSON CIRCUIT COURT 79-CI-11840

BRIEF FOR APPELLEE

May it please the Court:

COUNTERSTATEMENT OF THE CASE

This appellee accepts the statement of the case contained in the appellants' brief; and by way of supplement, states as follows:

It is important to bear in mind that the plaintiffs do not complain about Dr. Huber's performance of the sterilization procedure. They were advised that the procedure is not 100% effective; and Mrs. Schork has stated that she finds no fault with the procedure itself.[1] The parents allege that Dr. Huber failed to diagnose a pregnancy and miscarriage which occurred subsequent to the sterilization procedure, thereby lulling them into a false sense of security about the success of the procedure.[2]

---

[1]Sharon A. Schork depo., p. 30.

[2]Plaintiffs' Complaint (Transcript of Record, pp. 1-4); Sharon A. Schork depo., p. 30.

There is no question that the Schorks love this child which they contend has been thrust upon them as a result of Dr. Huber's alleged misdiagnosis. The child is, in the words of counsel, an "unwanted blessing,"[3] but could perhaps be more aptly identified as an "unexpected blessing." Now that the child is here, the Schorks are glad to have him, but since he was not anticipated, and since he will naturally require a certain amount of financial outlay, the Schorks seek to have Dr. Huber reimburse them for their son's needs and education. Mrs. Schork testified that she "definitely wanted two children," but that she did not want three.[4]

The only question presented on this appeal is whether Dr. Huber should be required to pay for the economic loss sustained by the Schorks as a result of the birth of this "unexpected blessing."

ARGUMENT

(I) Public Policy Will Not Permit the Parents' Recovery of Damages Based Upon the Cost of Raising a Healthy But Unexpected Child From a Physician Who Failed to Diagnose Fertility Following an Unsuccessful Tubal Ligation.

Prior to 1967, it was uniformly recognized that regardless of the issue of liability for performance of an unsuccessful sterilization operation, no damages resulted from the birth of a normal child with no permanent harm to the mother on the grounds that the

---

[3]Brief of Movants, Sharon A. Schork and Al Schork, p. 29.
[4]Sharon A. Schork depo., p. 8.

birth of a normal child could not be considered an injury to either the parents or the child, and further that, in any event, the granting of such damages would be against public policy. The first case to state this position was *Christensen* v. *Thornby,* 192 Minn. 123, 255 N. W. 620 (1934). Other decisions followed, adopting varying reasons for the pronouncement of such public policy. *Shaheen* v. *Knight,* 11 Pa. D. & C. 2d 41 (1957); *Ball* v. *Mudge,* 64 Wash. 2d 247, 391 P. 2d 201 (1964); *Gleitman* v. *Cosgrove,* 49 N. J. 22, 227 A. 2d 689 (1967).

The soundness of this rule was first questioned by a California court in *Custodio* v. *Bauer,* 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), upon which the parents in this case rely as standing for the proposition that a physician whose negligence results in the birth of a healthy child is liable to the parents for the cost of raising and educating the child. The parents would have us believe that the *Custodio* rule is the majority rule in those states which have considered this question. That is not true. Since the *Custodio* decision, numerous cases have held to the contrary, including our own Court of Appeals in *Maggard* v. *McKelvey,* Ky. App., 627 S. W. 2d 44 (1981). Representative of these are: *Coleman* v, *Garrison,* Del Super., 349 A. 2d 8 (1975); *Wilczynski* v. *Goodman,* 73 Ill. App. 3d 51, 29 Ill. Dec. 216, 391 N. E. 2d 479 (1979); *Berman* v. *Allan,* 80 N. J. 421, 404 A. 2d 8 (1979); *Sala* v. *Tomlinson,* 73 A.D. 2d 724, 422 N.Y.S. 2d 506 (1979); *Terrell* v. *Garcia,* Tex. Civ. App., 496 S. W. 2d 124 (1973), cert. den. 415 U. S. 927, 94 S. Ct. 1434, 39 L. Ed.

2d 484 (1974); *Rieck* v. *Medical Protective Co.*, 64 Wis. 2d 514, 219 N. W. 2d 242 (1974); *Clegg* v. *Chase*, 89 Misc. 2d 510, 391 N.Y.S. 2d 966 (1977).

Furthermore, the *Custodio* rule has been rejected in numerous jurisdictions within the last two years. For example, a Federal District Court, sitting in Kansas and seeking to interpret Georgia law, stated:

> Both parents have requested damages for the cost and the physical inconvenience of raising an additional child. In ruling that these are not recoverable damages, *we are following a growing majority* of courts that have refused to allow parents to recover costs to raise a child born after preventive measures have failed. *White* v. *United States*, 510 F. Supp. 146, 149 (D.C. Kan. 1981). (Emphasis added).

A Florida Court, in *Public Health Trust* v. *Brown*, Fla. App., 388 So. 2d 1084 (1980), stated:

> In holding that such a claim should not be recognized, we align ourselves with a clear majority of courts in other jurisdictions which have decided the identical question. 388 So. 2d at 1085.

Other recent decisions which have refused to transform the physician into a surrogate parent are: *Kingsbury* v. *Smith*, N.H., 442 A. 2d 1003 (1982); *J.P.M. & B.M.* v. *Schmid Laboratories, Inc.*, 178 N. J. Super. 122, 428 A. 2d 515 (1981); *Wilbur* v. *Kerr*, Ark., 628 S. W. 2d 568 (1982); *Boone* v. *Mullendore*, Ala., 416 So. 2d 718 (1982); *Sutkin* v. *Beck*, Tex. Civ. App., 629 S. W. 2d 131 (1982).

In *Maggard* v. *McKelvey, supra.,* (1981), our Court of Appeals declined to extend a physician's liability to include the expense of rearing a healthy but unexpected child upon the grounds that such an extension of liability is against our public policy and properly addresses itself to the legislature.

> We view sanctioning such an expansion of a physician's liability to be a question of public policy. *Hanks* v. *McDanell,* 307 Ky. 243, 210 S. W. 2d 784 (1948) explains,
>
> > 'Public Policy' is the community common sense and common conscience extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like; it is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men having due regard to all the circumstances of each particular relation and situation,
> >
> > Common sense tells us that it is in society's best interests to hold physicians to a standard of professional competence and impose liability when they are negligent in treating their patients. But to hold a doctor responsible for the support of a mistakenly conceived child takes him well beyond the scope of his duty to his patient, as commonly thought of by both the lay public and the medical profession. Public policy can, and in this instance does, cut off the legal responsibility of the physician, even though he may have been negligent and the injured be innocent. Without a clear expression of public opinion, some indication from the legislature or an interpretation by our Supreme Court to the contrary, we conclude that our public policy

> prohibits the extension of liability to include these damages. 627 S. W. 2d at 47-48.

One of the more persuasive arguments against recognition of an economic-loss rule is found in *Rieck* v. *Medical Protective Co., supra.,* (1974), wherein the parents sought to recover the cost of rearing a child against the clinic and obstetrician who had allegedly failed to diagnose the mother's pregnancy in time to permit an abortion. The Court observed that there was no allegation that the child, once born, would be an unwelcome member of the household or that the parents had sought to place the child for adoption. In recognizing that the case raised serious questions of public policy, the Wisconsin Court acknowledged that an unbroken sequence of events establishing cause-in-fact does not always lead to a determination of liability. Public policy is involved in a determination of legal or proximate cause. For example, the injury may be too remote or out of proportion to the culpability. Furthermore, liability will not be imposed where it will place an unreasonable burden upon defendants similarly situated or where it would open the door to numerous fraudulent claims. In denying the parents' recovery, the Wisconsin Court stated:

> To permit the parents to keep their child and shift the entire cost of its upbringing to a physician who failed to determine or inform them of the fact of pregnancy would be to create a new category of surrogate parent. Every child's smile, every bond of love and affection, every reason for parental pride in a child's achievements, every contribution by the child to the welfare and well-

being of the family and parents, is to remain with the mother and father. For the most part, these are intangible benefits, but they are nonetheless real. On the other hand, every financial cost or detriment — what the complaint terms "hard money damages" — including the cost of food, clothing and education, would be shifted to the physician who allegedly failed to timely diagnose the fact of pregnancy. We hold that such result would be wholly out of proportion to the culpability involved, and that the allowance of recovery would place too unreasonable a burden upon physicians, under the facts and circumstances here alleged. 219 N. W. 2d at 244-45.

* * *

On this appeal the issued raised as to a duty on the part of parents, claiming that a child of theirs is unwanted, to take steps to terminate their parental rights and place the child for adoption. The issue is raised in reference to mitigation of damages. On the public policy issue, the absence of steps to terminate parental rights is material only as reflecting parental intent to keep and raise the child involved. It is such retention of benefits — the parents keeping their child, and seeking to transfer only the financial costs of its upbringing to the doctor — that is a relevant factor in evaluating the public policy considerations involved. As one court has put it, "To allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy and affection which plaintiff . . . will have in the rearing and educating of this, defendant's fifth child. Many people would be willing to support this child were they given the right of custody and adoption, but according to plaintiff's statement, plaintiff does not want such. He wants to have the

> child and wants the doctor to support it. In our opinion to allow such damages would be against public policy." We agree. 219 N. W. 2d at 245.

The identical question before the Court in the case *sub judice* was presented to the Texas Court in *Terrell* v. *Garcia, supra.,* (1973), wherein the parents of a normal healthy child born following unsuccessful tubal ligation sought to recover the economic loss, including the cost of rearing and educating the child, from the physician who performed the ligation. After discussing the short judicial history of the question presented and the various public policy considerations militating against awarding such damages, the Court stated:

> Who can place a price tag on a child's smile or the parental pride in a child's achievement? Even if we consider only the economic point of view, a child is some security for the parents' old age. Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child. We see no compelling reason to change such rule at this time. 496 S. W. 2d at 128.

The *Terrell* decision was reaffirmed by the Texas Court in *Sutkin* v. *Beck, supra.,* (1982).

This Court has followed the universal rule that remote, uncertain and speculative damages are not recoverable. *Barley's Adm'x.* v. *Clover Splint Coal Co.,* 286 Ky. 218, 150 S. W. 2d 670 (1941); *Kentucky-West Virginia Gas Co.* v. *Frazier,* 302 Ky. 642, 195 S. W. 2d 271 (1946); *Western Union Telegraph Co.* v. *Guard,* 283 Ky. 187, 139 S. W. 2d 722 (1940).

Several courts have denied the award of the cost of rearing and educating an unexpected child to the parents upon the reasoning that the damages sought are too remote and speculative. In *Coleman* v. *Garrison, supra.,* (1975), the Delaware Court observed that it is not for certain that the monetary cost of an infant's life is worth more than its value. The Court observed that in balancing the value of the infant's life to the parents as against the monetary cost to the parents, it would be appropriate — if at all — to wait and apply such a test at the end of the child's life rather than at the beginning. The Court described any attempt to weigh these imponderables at birth as a mere "exercise in prophecy." The *Coleman* Court concluded its opinion as follows:

> The child who is the subject of this legal controversy may one day read what is written here and what has been said about him and his circumstances by lawyers and judges. We say to him, and we emphasize this, that we regard this case, not as one founded on rejection of him as a person, but simply as a sounding for the "outlimits of physician liability" in malpractice action. 349 A. 2d at 14.

The New Jersey Court followed the same line of reasoning in *Gleitman* v. *Cosgrove, supra.,* (1967), involving a child with birth defects, and concluded as follows:

> Though we sympathize with the unfortunate situation in which these parents find themselves, we firmly believe the right of their child to live is greater than and precludes their right not to endure

> emotional and financial injury. We hold therefore that the second and third counts of the complaint are not actionable because the conduct complained of, even if true, does not give rise to damages cognizable at law; and even if such alleged damages were cognizable, a claim for them would be precluded by the countervailing public policy supporting the preciousness of human life. 227 A. 2d at 693.

In the most recent decision on the question presented, the Alabama Court, in *Boone* v. *Mullendore, supra.,* (June 30, 1982), followed the *Coleman* decision in limiting damages to the actual expenses and injury attending the unexpected pregnancy while denying damages for the cost of raising the child. The Alabama Court, after reviewing all of the earlier decisions, stated:

> As indicated, numerous courts have addressed these issues in recent years and have come to various conclusions. A large number, however, have held that for public policy and other reasons the expenses of rearing a child to the age of majority should be denied. 416 So. 2d at 721.

In a concurring opinion, two of the Justices pointed out that since the parental decision to bear a child is never "economically motivated," the damages for rearing the child can never be "economically measured." These Justices also observed as follows:

> Today, we adopt as the measure of damages in an action of this type essentially the standard set out in *Coleman* v. *Garrison,* 327 A. 2d 757 (Del. Super. Ct. 1974), *aff'd,* 349 A. 2d 8 (Del. 1975).

> This Court believes that damages should be limited to the actual expenses and the injury attending the unexpected pregnancy. Thus, the damages recoverable would include: (1) The physical pain and suffering, and mental anguish of the mother as a result of her pregnancy; (2) the loss to the husband of the comfort, companionship, services, and consortium of the wife during her pregnancy and immediately after the birth; and (3) the medical expenses incurred by the parents as a result of the pregnancy. Any additional damages would tend to be extremely speculative in nature, and awarding such damages could have a significant impact on the stability of the family unit and the subject child. 416 So. 2d at 721.

The Supreme Court of New Hampshire in addressing the damages recoverable in a wrongful death claim, upon certification of that question from the U. S. District Court, in *Kingsbury* v. *Smith, supra.,* (March 10, 1982), held as follows:

> However, we reject the approach that allows unlimited recovery for the costs of raising the child.
>
> * * *
>
> Having today recognized a wrongful conception action as a part of our body of law, we join those jurisdictions which, for public policy reasons, limit the recovery of damages, where applicable, to the hospital and medical expenses of the pregnancy, the cost of sterilization, pain and suffering connected with the pregnancy, and loss of the mother's wages during that time. * * * We believe that we have adopted the humane and common sense view which allows recovery for the tortfeasor's negligence without placing an unrea-

> sonable burden upon him and creating a windfall to the parents. 442 A. 2d at 1006.

The Arkansas Court, in *Wilbur* v. *Kerr, supra.,* (March 8, 1982), in denying the parents' claim for the expense of raising their unexpected child, or in the words of that Court, "their emotional bastard," enunciated its public policy considerations as follows:

> It is a question that searches the nature and validity of our civil law system which allows money damages to compensate for wrongs that are intangible, such as wrongful death or emotional anguish, things which cannot really be made right by money. Courts denying recovery because of "public policy" are bothered by the idea that a normal, healthy life should be the basis for a compensable wrong.
>
> * * *
>
> It is a question which meddles with the concept of life and the stability of the family unit. Litigation cannot answer every question; every question cannot be answered in terms of dollars and cents. We are also convinced that the damage to the child will be significant; that being an unwanted or "emotional bastard," who will some day learn that its parents did not want it and, in fact, went to court to force someone else to pay for its raising, will be harmful to that child. It will undermine society's need for a strong and healthy family relationship. We have not become so sophisticated a society to dismiss that emotional trauma as nonsense.
>
> * * *
>
> We join those courts which recognize these as valid damages that may be recovered in such cases.

> It is the expense of raising an unwanted, healthy child that we find should not be allowed. We must deny that claim as against public policy. 628 S. W. 2d at 571.

In *Public Health Trust* v. *Brown, supra.,* (1980), the Florida Court, in aligning itself with the majority, felt that since the parents did not choose to abort the pregnancy or place the unexpected child for adoption, it could be conclusively presumed that the "benefits" of parenthood outweigh the monetary burdens involved. The Court stated:

> It is a rare but happy instance in which a specific judicial decision can be based solely upon a reflection of one of the humane ideals which form the foundation of our entire legal system. This, we believe, is just such a case. 388 So. 2d at 1086.

The absurd lengths to which litigation of this type can reach is demonstrated by the New Jersey decision in *J.P.M. & B.M.* v. *Schmid Laboratories, Inc., supra.,* (1981). In that case, a husband and wife brought a product liability action against the manufacturer of "Fourex Natural Skins" condoms, alleging that the product was defective and that the defect caused the wife to become pregnant and give birth to normal, healthy twin daughters. The co-defendant retailer filed a counterclaim against the husband for contribution, alleging misuse of the product. The Court held that the retailer could properly pursue its claim for contribution, but as to the issue at hand, agreed with the majority of the courts that the damages for wrongful life or wrongful birth could not include the cost of rearing and educating the children.

In seeking to interpret the public policy of Georgia, a Federal Court in Kansas, while denying the recovery of economic loss to the parents, commented upon the various considerations as follows:

> Allowing the parents to recover for the costs of raising a child constitutes a windfall to the parents and an unreasonable financial burden upon physicians. * * * (citing authority). The parents retain the benefits of having the child while "saddling defendants with the enormous expenses attendant upon [his] rearing." * * * (citing authority). Some courts have attempted to alleviate this concern by applying a "benefits rule" to the allowance of the costs of raising a child. * * * (citing authorities). We reject this approach as too speculative to remedy the excessive burden upon the defendant. The Court in *Public Health Trust* v. *Brown, supra,* noted the speculative nature of the benefits:
>
> > " . . . an unhandsome, colicky or otherwise 'undesirable' child would provide fewer offsetting benefits, and would therefore presumably be worth more monetarily in a 'wrongful birth' case. The adoption of that rule would thus engender the unseemingly spectacle of parents disparaging the 'value' of their children or the degree of their affection for them in open court." 388 So. 2d at 1086, n. 4.
>
> In addition, to assess the physician the cost of raising a normal, healthy child to majority is to inflict a penalty on the defendant that is out of all proportion to the amount of his culpability. *White* v. *United States,* 510 F. Supp. 146, 149-50 (D.C. Kan. 1981).

The issue under discussion is annotated in Annot., *Tort Liability For Wrongfully Causing One To Be Born,* 83 A.L.R. 3d 15, and as will be observed from an examination of that Annotation and the cases discussed therein, the courts have wrestled with the concept of wrongful life, wrongful birth, wrongful conception or what have you since 1934. The majority of these decisions have concluded that parents who have given birth to a normal, healthy child are not entitled to recover their costs of raising the child from the physician. This has been accepted as a statement of public policy by a majority of the jurisdictions which have considered the issue. Wrongful life is a contradiction in terms. Unless the judiciary adheres to the principle that the benefits of existence outweigh the financial burden of raising and educating one's child, the door is open for all sorts of absurd possibilities. For example, can a husband sue his wife for forgetting to take the pill? Or can a husband insist upon not supporting his child, following a separation, upon the grounds that his wife negligently failed to take the necessary precautions to prevent conception?

In the case at bar, should Dr. Huber be permitted to file a third-party complaint against the child for indemnity? After all, according to the parents' theory of this case, the child owes his very existence to Dr. Huber; and if Dr. Huber is going to be required to raise and educate this child, why shouldn't the child, after reaching his majority, be required to reimburse Dr. Huber? If Dr. Huber is not entitled to indemnity, is he entitled to the child's earnings and services dur-

ing the period of his minority? His parents are entitled to his earnings and services; but, of course, these parents are unique in that they seek to shift the responsibiilty for raising the child to Dr. Huber. Is a defendant who is liable in a wrongful death action entitled to take credit against damages due the parents for the costs of raising the child which the parents would have incurred but for the fact that the defendant's negligence caused the death of the child? Or, suppose a defendant, at the last instant, stops just short of killing a child. Could the parents force that defendant to raise the child since if it were not for the fact that the defendant stopped short of killing the child, the parents would have avoided the economic loss in raising him?

Many of the courts that have declined to award economic loss to the parents have expressed concern about the burden which is to be placed upon the medical profession which they find to be disproportionate to the negligence involved. Most of these cases deal with negligence in the surgical procedure itself. However, in the case at bar, the plaintiffs acknowledge that the procedure was skillfully done, but allege negligence in Dr. Huber's failure to diagnose the subsequent pregnancy and miscarriage. It would seem to us that it would place an extreme burden upon the medical profession to make the physician an insurer of his diagnosis each time a woman consults him regarding the possibility of her being pregnant. In each instance, what is to prevent the woman from complaining that, had she been correctly informed of the pregnancy, she

would have sought and obtained an abortion and that the physician is therefore required to raise and educate her child? The damages sought are clearly disproportionate to the negligence involved, and their allowance would open the door to fraudulent claims and place upon the medical profession an insurmountable burden.

It does not follow in our system of jurisprudence that any cause-in-fact sequence inevitably leads to an award for damages. Before damages can be justified, an injury must be established. If, for example, I say of "X" that he is an honorable man, when in fact he is not, I have stated a falsehood; but "X" has not been damaged since society values honor. Are Dr. Huber's parents responsible for the birth of the plaintiff's child? If not for Dr. Huber's parents, he could not have misdiagnosed Mrs. Schork's pregnancy. This is certainly a cause-in-fact relationship, but it is obviously not a proximate cause, since the law, for public policy reasons, does not recognize remote consequences. The entire concept of proximate cause is in itself a recognition of public policy; and it is not preposterous to suggest that damages of the nature herein sought should and must be denied.

If Mr. and Mrs. Schork were asked whether the benefits of having and raising this child outweigh the financial burden involved, we are sure that they would answer in the affirmative. If Solomon were to ask them: "Would you rather have the child or the money?" there is no doubt that they would choose to retain the child. It is not absurd to suggest that the

public policy of the Commonwealth of Kentucky establishes that life is inalienable and that the question of "to be or not to be" cannot be measured in dollars and cents. We have reached a sad and confusing stage of development when we award damages both for wrongful life and for wrongful death. We cannot do both.

(II) The Creation of a Cause of Action Based Upon the Concept of Wrongful Life or Wrongful Birth Is Properly Within the Province of the Legislature Rather Than the Judiciary.

In determining that a radical departure from the common law which would permit a cause of action for wrongful life should "await legislative sanction," a New York Court, in *Clegg* v. *Chase, supra.,* (1977), stated:

> It is not within the providence of the judiciary to decide that the existence of life, and in this case a normal healthy life, is a *wrong* for which damages can be recovered. . . . 391 N. Y. S. 2d at 968.

The General Assembly enunciates our public policy. *Morgan* v. *City of Winchester,* Ky., 411 S. W. 2d 682 (1967); *Fann* v. *McGuffey,* Ky., 534 S. W. 2d 770 (1975); *Commonwealth, Department of Child Welfare* v. *Jarboe,* Ky., 464 S. W. 2d 287 (1971). That right is subject only to the public policy of the people as expressed in the Constitution. *Happy* v. *Erwin,* Ky., 330 S. W. 2d 412 (1959). It is up to the courts to interpret the law — not to enact legislation. *Chapman* v. *Chap-*

man, Ky., 498 S. W. 2d 134 (1973); *City of Louisville* v. *Melton Food Marts, Inc.,* Ky. App., 564 S. W. 2d 849 (1978); *Fitzpatrick* v. *Crestfield Farm, Inc.,* Ky., 582 S. W. 2d 44 (1978).

In *Fann* v. *McGuffey, supra.,* this Court stated:

> It is elementary that the legislative branch of government has the prerogative of declaring public policy, and that the mere wisdom of its choice in that respect is not subject to the judgment of a court. 534 S. W. 2d at 779.

See also *Bishop* v. *All State Insurance Company,* Ky., 623 S. W. 2d 865 (1981).

In *Hays* v. *Hays' Adm'r.,* Ky., 290 S. W. 2d 795 (1956), this Court recognized that the common law rule of disability arising from coverture was eliminated as being contrary to the public policy evident in the legislature's enactment of the Married Women's Act (KRS 404.020) which authorized married women to sue and be sued as single women. It is important, however, that the courts did not act until the legislature had enunciated the public policy. Also, at common law, there could be no contribution among joint tortfeasors. It was the legislature and not the courts which changed this principle with the enactment of the Contribution Among Joint Tortfeasors Act. KRS 412.030; KRS 454.040; *Elpers* v. *Kimbel,* Ky., 366 S. W. 2d 157 (1963).

More germane to the issue involved in the case at bar is the recognized fact that at common law there was no cause of action for wrongful death. It was felt that monetary damages for the loss of a life were

too remote and speculative to be the subject of judicial inquiry. In the absence of subsequent statutory provisions, one was not liable for causing the death of another. *Eden* v. *Lexington & F. R. Co.,* 53 Ky. 204, 14 B. Mon. 204 (1853); *O'Donoghue* v. *Aikin,* 63 Ky. 478, 2 Duv. 478 (1866); *Smith's Adm'r.* v. *National Coal & Iron Co.,* 135 Ky. 67, 117 S. W. 280 (1909); *Totten* v. *Parker,* Ky., 428 S. W. 2d 231 (1967); *Stewart's Adm'x.* v. *Bacon,* 253 Ky. 748, 70 S. W. 2d 522 (1934); *Sturgeon* v. *Baker,* 312 Ky. 338, 227 S. W. 2d 202 (1950). Also, until the adoption of the appropriate legislation, maritime law did not allow recovery for wrongful death. Death On The High Seas Act, §1 et. seq.; 42 U.S.C. §761 et. seq.; *Levinson* v. *Deupree,* 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953). The cause of action for wongful death is provided for in Section 241 of the Kentucky Constitution and in KRS 411.130.

However, as to other causes of action, Section 233 of the Kentucky Constitution incorporates into the law of Kentucky the common law of England in force and effect there before March 24, 1607 as it was given force and effect by and in Virginia at its convention in 1776. *Aetna Insurance Co.* v. *Commonwealth,* 106 Ky. 864, 21 K. L. R. 503, 51 S. W. 624 (1899).

Since the cause of action for wrongful life, or wrongful birth, or whatever the plaintiffs seek to call it, was not recognized at common law, is not provided for in our Constitution and has not been enacted into law by our legislature, it would seem to follow that it is not a part of the public policy of the Common-

wealth of Kentucky and that it would not be proper for this Court to depart from the established public policy and to recognize the existence of such a cause of action.

In an analogous situation, where a discharged employee sought to establish a cause of action for wrongful discharge after being fired without good reason, the Court of Appeals, speaking through Judge Vance, stated:

> The issue here is one of public policy which is first and foremost a matter for legislative determination. The legislature has not seen fit to establish any policy in this area, and we are not convinced that this is a proper area for the exercise of judicial activism. *Scroghan* v. *Kraftco Corp.*, Ky. App., 551 S. W. 2d 811, 812 (1977).

We would respectfully suggest that any such radical departure from established policy, as is suggested by the plaintiffs, should await legislative sanction.

CONCLUSION

The important consideration in the case at bar is one of public policy. Justice Oliver Wendell Holmes, Jr. has stated:

> Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. HOLMES, THE COMMON LAW, pp. 35-36, (3d ed., 1923).

The purpose of this lawsuit is not to punish Dr. Huber or to hold the medical profession accountable for the birth of the Schorks' child. It is to compensate the plaintiffs for their injury—for the wrong committed. We would earnestly urge the Court to hold that wrongful life is a contradiction in terms; that wrongful life and wrongful death cannot coexist in the same community of principles. We would urge the Court to affirm the decision of the Court of Appeals for any one or all of the following reasons:

(1) The parents, having given birth to a normal, healthy child whom they love have not been wronged.

(2) The benefits conferred by the child's existence *far* outweigh the economic burden involved.

(3) Whether or not to permit the relief sought is a question which addresses itself exclusively to the legislature.

(4) The injury is too remote from the negligence.

(5) The damages are too remote from the injury.

(6) The injury claimed and damages sought are totally disproportionate to the culpability involved.

(7) The parents have failed to mitigate the damages sought.

(8) Allowance of recovery of this type would place too unreasonable a burden upon the medical profession and upon manufacturers and retailers of contraceptive devices.

(9) Allowance of recovery would be too likely to open the way for fraudulent claims.

(10) Allowance of recovery would result in increased litigation in the field of medical malpractice and would be contrary to the legislature's attempted statement of public policy in its enactment of KRS 311.377, as amended, and KRS 304-40-330. *McGuffey* v. *Hall,* Ky., 557 S. W. 2d 401 (1977).

(11) The theory relied upon by the appellants makes no sense.

It is therefore respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

BOEHL STOPHER GRAVES & DEINDOERFER
By _____
WILLIAM P. SWAIN
2300 United Kentucky Bank Building
One Riverfront Plaza
Louisville, Kentucky 40202
(502) 589-5980
Attorneys for Appellee