Supreme Court of Kentucky

82-SC-467-DG

SHARON A. SCHORK and
AL SCHORK

MOVANTS

-VS-

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH ECKERT, JUDGE
#79-CI-11840

CHARLES M. HUBER, M.D.

RESPONDANT

DISSENTING OPINION BY JUSTICE LEIBSON

Sharon A. Schork and Al Schork, her husband, appeal from a partial summary judgment dismissing part of their negligence claim against Dr. Charles H. Huber. The Schorks allege that Mrs. Schork conceived a child after the doctor performed an unsuccessful sterilization procedure on Mrs. Schork. The Schorks claim that after the surgery the mother advised the doctor of symptoms indicating that she had suffered a miscarriage, but the doctor negligently failed to test to determine whether the sterilization procedure had been successful, and as a result conception and birth occurred.

For purposes of summary judgment we must assume that the doctor was negligent, as alleged, in failing to perform the required test and in advising Mrs. Schork that she was sterile when in fact she was fertile.

The trial court's partial summary judgment specified

"that the allegations of the plaintiffs' complaint which seek recovery for the labor and money necessary in rearing the child of the parties whose conception and birth is the subject of this litigation be stricken from the complaint as well as allegations dealing with the disruption of family life, mental suffering and any claims on behalf of the plaintiff, Allen Schork."

The portion of the complaint relating to the mother's medical expenses, pain and suffering, and loss of earnings in connection with the child's birth were not stricken.

The Kentucky Court of Appeals upheld the trial court's partial summary judgment, citing its own previous decision in Maggard v. McKelvey, Ky. App., 627 S.W.2d 44 (1981), a decision based on that court's view of "public policy." In Maggard, the Court of Appeals stated:

> "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."

Careful consideration of the subject of "public policy" as a basis for denying damages, leads me to a contrary opinion. In my view:

> "(I)t would be antithetical to the protected right not to procreate, as well as to the custom of widespread use of contraceptives, for courts to hold, as a matter of law, that no damage can result from an unwanted pregnancy where precautions were taken to avoid that pregnancy." Carroll, Recovery for Wrongful Conception: Who Gets the Benefit--The Parents or the Public?, 14(4) New England L.Rev., 784 (1979).

In Sherlock v. Stillwater Clinic, Minn., 260 N.W.2d 169 (1977), a case widely cited and followed on this subject, the Minnesota Supreme Court allowed recovery for the costs of raising a child following negligent performance of a tubal ligation. The court held that it would be "myopic" today to declare that the benefits of parenthood outweigh the costs as a matter of law.

In Bowman v. Davis, Ohio, 356 N.E.2d 496 (1976), at 499, the court states:

> "The choice not to procreate, as part of one's right to privacy, has become (subject to certain limitations) a Constitutional guarantee. See Griswold v. Connecticut (1965), 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510; Roe v. Wade (1973), 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147; and Doe v. Bolton (1973), 410 U.S. 179, 93 S.Ct. 755, 35 L.Ed.2d 147. For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations except those involving sterilization would constitute an impermissible infringement of a fundamental right."

The duty of this court is to follow public policy, not to formulate it. In Maggard, the Kentucky Court of Appeals formulated policy. It reasoned from the absence of "a clear expression of public policy (or) some indication from the legislature" to the conclusion "that our public policy prohibits the extension of liability to include these damages." My view is just the opposite; that public policy should not flow from the opinions and beliefs of judges, however well-meaning, absent "a clear expression of public opinion or some indication from the legislature."

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> "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." Fann v. McGuffey, Ky., 534 S.W.2d 770, 779 (1975).

Public policy should not extend to making a judgment, as a matter of law, that persons have suffered no damages from the foreseeable consequences of a medical procedure, even though we judges may believe that the emotional benefits of parenting outweigh the economic consequences.

In Ochs v. Borrelli, Conn., 445 A.2d 883 (1982) at 885, the Supreme Court of Connecticut says:

> "In our view, the better rule is to allow parents to recover for the expenses of rearing an unplanned child to majority when the child's birth results from negligent medical care. The defendants ask us to carve out an exception, grounded in public policy, to the normal duty of a tortfeasor to assume liability for all the damages that he has proximately caused . . . But public policy cannot support an exception to tort liability when the impact of such an exception would impair the exercise of a constitutionally protected right."

The issue in this case is not public policy, but a much narrower one: Is this court being called upon to create a new cause of action, or simply to recognize an old one? A cause of action in negligence is almost as old as the common law.

Historically, in an agricultural society and in the early days of the industrial revolution when child labor was the rule rather than the exception, children were recognized as an

economic benefit. That once logical proposition has certainly become illogical in our modern society. Today, the cost of rearing a child is not only foreseeable, it is unavoidable, as a natural and probable consequence of the act of negligence which is alleged in this case. The damages that flow from a negligent act, that are reasonably foreseeable from negligent conduct, change over time. But this does not mean that recognizing the existence of these new consequences is creating a new cause of action.

The economic loss attendant to bearing and raising children in our time is as foreseeable and reasonably determinable as the economic loss from physical injury that causes impairment or destruction of earning power or the prospect of future medical expenses. As stated in Sherlock, supra, at 174:

> "Where the purpose of the physician's actions is to prevent conception or birth, elementary justice requires the he be held legally responsible for the consequences which have in fact occurred."

The opinions from sister states reflect conflicting views on the subject at issue. But the greater weight of authority, and the better reasoning, supports refusing to create a different rule for one type of damages than for another, when both reasonably are foreseeable as a natural and probable consequence of the negligence alleged.

There is no parallel between the present case and the statutory cause of action for wrongful death. Wrongful death was a new cause of action, not existing at common law. "Wrongful life," meaning a cause of action for damages by or on behalf of the child (not the parents) claiming that the child was born into a disadvantageous life by reason of another's negligence, would be a new duty to a new person where none previously existed. But the right of the parents to recover for their costs in rearing their child is simply an additional element of expense where the duty and the persons to whom it is owed already exist. (For discussion of the difference, see Wilmoth, Wrongful Life and Wrongful Birth Causes of Action--Suggestions for a Consistent Analysis, 63 Marquette L.Rev. 611 (1980); Carroll, Recovery for Wrongful Conception: Who Gets the Benefit--The Parents or the Public?, supra; Annot., 83 ALR 3d 15, 19.) A child, regardless of circumstances, has no legal right to complain against being born. The circumstances of the child given life, and the parents given expense, are not corresponding.

This court has already recognized the existence of a cause of action for damages based upon an allegation of a negligent sterilization procedure. In Hackworth v. Hart, Ky., 474 S.W.2d 377 (1971), we reversed a directed verdict in favor of a physician alleged to have negligently performed a vasectomy and negligently failed to test thereafter as to whether sterility had been accomplished, deciding that the claim of negligence and damages should be submitted to the jury. Unfortunately that case is silent on the issue that presently confronts us: what elements

of damages should be considered by the jury.

In Nazareth Literary and Benevolent Inst. v. Stephenson, Ky., 503 S.W.2d 177 (1973), the issue was whether this court should declare a public policy creating a privilege for the benefit of physicians against discovery of the records of peer review procedures conducted in the hospital. Reasons were advanced why such was necessary for the benefit of the medical profession and the general public. This court wrote, p. 179:

> "Although this might be regarded as an initially appealing argument, on reflection, one might well debate wherein the public interest lies. Claims of privilege are carefully scrutinized, . . . In any event, we find no applicable privilege expressed in either the general law of evidence existing in this state or in the statutes of this state expressing any protection of confidentiality in the situation presented."

The underlying philosophy that would restrain this court from constructing a rule limiting discovery to benefit the medical profession would apply with equal force to constructing a rule limiting damages to benefit the medical profession. It is for the legislature, not the court, to debate and decide if such a rule is necessary in the public interest.

Viewed simply as a negligence case, we cannot escape the conclusion that the negligent physician is liable for expenses reasonably foreseeable in connection with rearing the child. But for the same reason, because this is a negligence case, no recovery should be permitted on the claim for emotional and mental suffering in connection with rearing the child. Child bearing

has elements of physical injury and physical pain to support the additional claim for mental suffering attendant thereto. Child rearing has no such physical injury upon which to base a claim for mental suffering or emotional distress.

It is a rule of longstanding in this jurisdiction that we do not permit damages for mental suffering unless accompanied by physical contact or injury; that such damages are presumably "too remote and speculative." Morgan v. Hightower's Adm'r., 291 Ky. 58, 163 S.W.2d 21 (1942). Although the scope of what should be considered as related to, and the direct and natural consequence of, physical contact or injury, has been expanded by Deutsch v. Shein, Ky., 597 S.W.2d 141 (1980) and Wilson v. Redken Laboratories, Inc., Ky., 562 S.W.2d 633 (1978), the rule has not been abandoned. Emotional distress, or psychic injury, must still bear some direct relationship to physical contact or injury. Concern for the "remote and speculative" nature of psychic injury is an insurmountable problem when the claim is for future emotional distress anticipated in connection with raising a child.

It follows that it is likewise inappropriate to consider permitting the defendant to set off potential emotional benefits. Who knows to whether the joys from rearing a child will outweigh the heartaches? We cannot offset the well recognized, foreseeable expenses of child rearing with the joy we can only hope for. We cannot disregard the parents' claim that they expect emotional distress from the disruption of their careful family planning, but allow the tortfeasor an offset for the bundle of joy he hopes to

have contributed to their lives. Both the positive emotional benefit and the negative emotional detriment of child rearing are too speculative and conjectural, too subjective and personal, to fit within the parameters of the subject of damages.

Next we turn to the rather specious claim that the parents should be required to mitigate damages by abortion or adoption. We quote from Troppi v. Scarf, Mich. App., 187 N.W.2d 511 (1971):

> "The doctrine which requires a plaintiff to take measures to minimize the financial consequences of a defendant's negligence requires only that reasonable measures be taken."

Both the best interest of the child, and the natural instincts of the parent, make it unreasonable to require parents to submit the child in the womb to abortion, or the child in the crib to adoption. The defendant has no right to insist that the victims of his negligence have the emotional and mental makeup to abort or place the child for adoption. As stated in Troppi, p. 520:

> "While the reasonableness of a plaintiff's efforts to mitigate is ordinarily to be decided by the trier of fact, we are persuaded to rule, as a matter of law, that no mother, wed or unwed, can reasonably be required to abort (even if legal) or place her child for adoption. . . . (T)he jury may not, in computing the amount, if any, of the plaintiff's damages, take into consideration the fact that the plaintiffs might have aborted the child or placed the child for adoption."

In our world there are many businesses and professions whose negligent acts can cause great harm and damage. They are still held accountable in terms of civil liability. Airplanes

loaded with passengers crash in midair. An overhanging walkway collapses to the floor of a crowded hotel lobby. A defective product, or a chemical spill, causes serious injury or death to a vast number of people. The continued availability of traditional tort remedies protect the victims in cases much more burdensome than the present one, and continue to provide incentive for reasonable care. We cannot absolve a physician of liability for the expense reasonably foreseeable for the cost of raising the child simply because it may be burdensome. To do so is to limit the action to a relatively insignificant portion of the damages caused by his negligence. The physician who undertakes to provide medical treatment in the form of sterilization should not be afforded immunity from the major consequences of his negligence.

I would reverse the summary judgment and permit recovery for the potential costs of rearing the child.