

Supreme Court of Kentucky

82-SC-467-DG

SHARON A. SCHORK AND
AL SCHORK

MOVANTS

v. ON REVIEW FROM THE COURT OF APPEALS
No. 81-CA-2513-MR
Appeal from Jefferson Circuit Court
Civil Action No. 79-CI-11840

CHARLES M. HUBER, M.D.

RESPONDENT

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER

AFFIRMING

* * *

This appeal is from an opinion by the Court of Appeals affirming the circuit court which granted a partial summary judgment in an action for negligence determining that the parents of a child cannot recover the costs of rearing a child born pursuant to an unsuccessful sterilization. We affirm.

Dr. Huber performed a sterilization procedure on Sharon A. Schork in 1977, assuring her that such a procedure

was 99 percent effective in preventing pregnancy. After sterilization, she returned to the doctor for a checkup, and he advised her she was sterile. Shortly thereafter she began to experience what she thought was a miscarriage, but the doctor again reassured her that she was sterile without any testing. Several months later she discovered that she was pregnant. A healthy boy was born in 1978. Subsequently the parents sued the doctor alleging negligence in the sterilization procedure and the post-operative treatment. In addition to the usual claims for damages resulting from medical malpractice, the parents sought to recover the costs of raising the child and damages for disruption of family life, mental suffering and various claims by the father. The trial court dismissed the claim in a partial summary judgment. The Court of Appeals affirmed.

This Court affirms the opinion of the Court of Appeals because parents cannot recover damages based on the costs of raising a healthy but unexpected child from a doctor following an unsuccessful sterilization procedure.

The parents of a normal healthy child whom they now love have not suffered any injury or damage. The benefits conferred by the child's existence clearly outweigh any economic burden involved. The claimed injury is far too speculative and remote to be reasonably connected to the alleged negligence. Additionally, in a pure legal sense the parents have failed to mitigate the damages which they charge.

It has been previously held by the Court of Appeals in Maggard v. McKelvey, Ky. App., 627 S.W.2d 44 (1981), that recovery for such damages is contrary to public policy. We fully agree. That a child can be considered as an injury offends fundamental concepts attached to human life.

Our research indicates that prior to 1967, it was generally recognized that regardless of the question of liability for performance of an unsuccessful sterilization, no damages resulted from the birth of a normal child without permanent harm to the mother of some kind. An early case indicating this position was Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934). The propriety of this position was first challenged by a California court in Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). Since the Custodio decision, numerous cases have held to the contrary including Kentucky in Maggard, supra. Also see, 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 S. Ct. 1434, 39 L. Ed. 2d 484; 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).

Generally this Court has followed the rule that remote,

uncertain and speculative damages are not recoverable. In regard to this aspect of the claim, a good discussion may be found in the Delaware decision in Coleman, supra, and the Alabama case cited in Boone v. Mullendore, Ala., 416 So. 2d 718 (1982). There is no reason to allow the parents to recover for the costs of raising a child and then place an unreasonable financial burden upon the doctor for a misdiagnosis or possible negligence in performing sterilization. The parents would retain the benefit of having the child while seeking to place the enormous expenses of his raising on the physician.

For an additional discussion of this question, see, Annot., Tort Liability for Wrongfully Causing One to be Born, 83 A.L.R.3d 15.

A careful examination of that annotation and various other cases cited by the parties herein indicates that the questions of "wrongful life," "wrongful birth" and "wrongful conception" have troubled the courts of this country for half a century. Our analysis indicates that the majority of decisions have concluded that parents who give birth to a normal healthy child are not entitled to their costs of raising the child from the physician.

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.

While the negligent post-operative treatment of sterilization by the physician may be considered a substantial factor in the birth of a child, that fact alone does not set out recoverable damages for its raising. Certainly the injured could recover compensation from the negligent, but public policy considerations limit the responsibility of those negligent. Deutsch v. Shein, Ky., 597 S.W.2d 141 (1980); Maggard, supra.

It is the holding of this Court that parents cannot recover damages based on the cost of raising a child from a physician for his alleged negligence. The opinion of the Court of Appeals is affirmed.

Stephens, C.J., Aker, Gant, Stephenson and Wintersheimer, JJ., concur. Leibson and Vance, JJ., dissent.

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