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SHARON A. SCHORK AND AL SCHORK)
V. 82-SC-467-D }
CHARLES H. HUBER, M. D. }

81-CA-2513-MR
JEFFERSON CIRCUIT COURT 79-CI-11840

STATEMENT IN SUPPORT OF RECOMMENDATION TO DENY BY W. L. CATINNA

The opinion of the Court of Appeals by Judge Hogge is not to be published. *McDonald*

Sharon A. Schork and Al Schork appeal from a partial summary judgment dismissing claimed rights of recovery on certain grounds in their malpractice suit against Charles H. Huber, M. D. The Court of Appeals affirmed.

Dr. Huber performed a sterilization procedure on Sharon A. Schork, assuring her that such procedure was 99% effective in preventing pregnancies. However, as happens on occasions, Sharon became pregnant and in due time gave birth to a normal healthy son.

Sharon and Al thereafter filed an action against Dr. Huber, alleging negligence in the sterilization procedure. They sought, in addition to the usual damages, to recover for the labor and money necessary in rearing their child, as well as damages for disruption of family life, mental suffering, and certain claims on behalf of the father.

By the partial summary judgment, the trial court dismissed the claims above enumerated and the Schorks' appeal. As the Court of Appeals affirmed, they prosecute this motion for review. The issue before this court is stated as follows:

The issue is whether or not a cause of action exists in Kentucky for parents of a child whose birth is a result of pregnancy which occurred because of medical negligence; and, if so, can the parents recover the cost reasonably necessary and required to raise the child.

Actually, these people are testing an area which has been termed "wrongful birth" and the damages that are incident to such "wrongful birth."

On the basic medical malpractice act on the part of Dr. Huber as is evidenced by the birth of a child following his sterilization procedure, of course the Shorks could maintain an action in tort and if successful recover for (1) the expense of the unsuccessful operation; (2) the pain and mental suffering attendant to the unexpected pregnancy; (3) any medical complications stemming from the pregnancy; (4) cost of delivery; (5) loss of wages; and (6) loss of consortium.

However, the question of whether they may recover the costs reasonably necessary and required to raise the child is before this court for the first time. The only guidance we have in Kentucky on the issue is to be found in the recent Court of Appeals opinion of *Maggard v. McKelvey*, Ky.App. 627 S.W.2d 44 (1981), wherein the court held that recovery for such damages is contrary to public policy.

While this answer should prevail in this jurisdiction, the issue is not all that "cut and dried." We find a rather detailed discussion of the problem generally and specifically in an annotation in 83 ALR 3d 15 entitled "Tort Liability for Wrongfully Causing one to be Born." Although this annotation includes

abortions and erroneous diagnoses, along with unsuccessful sterilization procedures, the general impression that one gets from reading the annotation is that any theory of liability or nonliability is "up for grabs." However, "public policy" somehow seems to be a stabilizing factor on the side of no recovery.

After considering the annotation and the many different facets of the issue as presented, it appears to me that the best interest of the public generally is served by holding that the cost reasonably necessary and required to raise a child born under these circumstances is not recoverable as a matter of public policy.

However, the court should be well aware of the fact that this is an issue of first impression before this court, and therefore might justify the granting of review. However, I would recommend that the motion for review be denied.

If we should conclude that the action for "wrongful birth" is in the same category as an action for "wrongful death," then, of course, the issue here is one for the legislature and probably not the courts.

The motion should be denied.