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Compensating Post-Conception Prenatal Medical Malpractice While Respecting Life: A Recommendation to North Carolina Legislators

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INTRODUCTION

I don't care if it's a boy or a girl, as long as it's healthy. It is the mantra of almost all expectant parents. The statement explicitly expresses the hope for a healthy child and implicitly expresses the desire not to bear a child with birth defects or disease. Modern medicine allows parents to test themselves before conception for genetic problems that could cause defects and to test the fetus after conception for potential or actual defects.[1] Approximately 3% to 5% of all fetuses will be affected by a birth defect or serious malformation.[2] These defects and disorders account for approximately 30% of infant deaths, and those infants who survive usually face long-term health problems.[3]

With the advent of prenatal diagnostic procedures came the inevitable entanglement with abortion rights after *Roe v. Wade*.[4] As these diagnostic procedures became more reliable after the mid-1960s, they became an accepted component of prenatal medical care.[5]

The most common method of prenatal screening is amniocentesis.[6] This can be used to detect defects at approximately sixteen weeks gestation by examining amniotic fluid.[7] The results arrive in three to four weeks, with only 5% of the tests revealing an abnormality[8] such as Down syndrome.[9] Analysis of the amniotic fluid that

1. Wylie Burke & Ron L. Zimmern, *Ensuring the Appropriate Use of Genetic Tests*, 5 NATURE REVIEWS GENETICS 955, 956 (2004).

2. Anthony Johnson, *New First Trimester Screening Test Can Provide Mothers Reassurance, More Options*, NEWS 14 CAROLINA, Jan. 12, 2004, http://rdu.news14.com/content/headlines/?ArID=41457&SecID=2.

3. *Id.*

4. JUDITH A. BOSS, THE BIRTH LOTTERY 18 (1993); Roe v. Wade, 410 U.S. 113 (1973) (establishing that the right to privacy includes the right to obtain an abortion, but that states may limit this right after the second trimester to protect the mother's health).

5. BOSS, *supra*, note 4, at 18.

6. *Id.* at 45.

7. *Id.* at 46.

8. *Id.* at 48.

9. Down syndrome is a disorder that usually includes multiple defects, including: mental retardation, characteristic physical features, heart defects, vision problems,

shows an elevated alphafetoprotein level indicates a neural tube defect[10] such as spina bifida.[11] Amniocentesis, like the other forms of testing, is frequently used in conjunction with ultrasound, which can reveal physical defects, such as skeletal abnormalities or anencephaly.[12] When used with ultrasound, amniocentesis is 99.5% accurate in diagnosing defects.[13]

Newer techniques include chorionic villus sampling ("CVS") and recombinant DNA analysis.[14] CVS can be performed much earlier in the pregnancy than amniocentesis and yields quicker results, but it is not as accurate and cannot be used to diagnose neural tube defects.[15] Recombinant DNA analysis is not considered extremely reliable, but it is helpful in diagnosing some of the more serious conditions.[16]

Severe, fatal defects can often be diagnosed through prenatal genetic screening.[17] These defects include Tay-Sachs disease,[18] Lesch-Nyhan syndrome,[19] Menkes disease,[20] and anencephaly.[21] Women are faced with the choice of terminating the pregnancy or carrying the

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increased infections, and, in children, an increased risk of thyroid problems and leukemia. *See* March of Dimes, Professionals' & Researchers' Quick References and Fact Sheets, http://www.marchofdimes.com/professionals/14332_1214.asp (last visited Mar. 9, 2007).

10. Boss, *supra* note 4, at 48.

11. Spina bifida is a neural tube defect that affects the spine and spinal cord, potentially causing paralysis, hydrocephalus, learning disabilities, and bowel and bladder problems. *See* National Institute of Neurological Disorders and Stroke, NINDS Spina Bifida Information Page, http://www.ninds.nih.gov/disorders/spina_bifida/spina_bifida.htm (last visited Mar. 9, 2007).

12. Boss, *supra* note 4, at 46, 65.

13. *Id.* at 48.

14. *Id.* at 51, 57.

15. *Id.* at 51, 53-54.

16. *Id.* at 57-59 (e.g., cystic fibrosis, neurofibrosis, Huntington disease, or Duchenne muscular dystrophy).

17. *See generally id.* at 30-44 (discussing various diagnoses possible).

18. Tay-Sachs disease is caused by the lack of an enzyme necessary for breaking down fatty substances in brain and nerve cells. This destroys the central nervous system, and the child becomes blind, deaf, unable to swallow, and paralyzed. The disease usually causes death by age four. *See* National Institute of Neurological Disorders and Stroke, NINDS Tay-Sachs Disease Information Page, http://www.ninds.nih.gov/disorders/taysachs/taysachs.htm (last visited Mar. 9, 2007).

19. Lesch-Nyhan syndrome is caused by an enzyme deficiency that causes an excess accumulation of uric acid in the body, leading to severe gout, poor muscle control, moderate retardation, and involuntary body movements similar to Huntington's disease. Death occurs due to renal failure early in life. *See* National Institute of Neurological Disorders and Stroke, NINDS Lesch-Nyhan Syndrome Information Page, http://www.ninds.nih.gov/disorders/lesch_nyhan/lesch_nyhan.htm (last visited Mar. 9, 2007).

fetus to term knowing it will have a short life expectancy. Researchers have found that women are more likely to terminate the pregnancy when the fetus is diagnosed as having one of these severe or fatal defects.[22] Some diseases, such as Tay-Sachs or Lesch-Nyhan, are so devastating and cause such suffering that there is comparatively little controversy surrounding the testing and termination of afflicted fetuses.[23]

Physicians who counsel expectant parents and perform genetic screening tests have an obligation to inform the parents of all pertinent information, test results, and options available to them.[24] Unfortunately, parents do not always receive the information they need to make a choice about whether to become pregnant or continue their

20. Menkes Disease is caused by a genetic defect that disrupts the metabolism of copper in the body, resulting in severe developmental delays, seizures, and the loss of any skills the infant acquired in the first two to three months of life. Infants fail to physically develop, have neurodegeneration in the gray matter of the brain, and fragile arteries. Infants die before age ten. *See* National Institute of Neurological Disorders and Stroke, NINDS Menkes Disease Information Page, http://www.ninds.nih.gov/disorders/menkes/menkes.htm (last visited Mar. 9, 2007).

21. The neural tube should close between the third and fourth weeks of pregnancy to form the brain and spinal cord of the embryo. Anencephaly occurs when the cephalic end of the neural tube fails to close, which results in the lack of a major portion of the brain, skull, and scalp. "Infants with this disorder are born without a forebrain . . . and a cerebrum (the thinking and coordinating part of the brain). The remaining brain tissue is often exposed – not covered by bone or skin. A baby born with anencephaly is usually blind, deaf, unconscious, and unable to feel pain." National Institute of Neurological Disorders and Stroke, NINDS Anencephaly Information Page, http://www.ninds.nih.gov/disorders/anencephaly/anencephaly.htm (last visited Mar. 9, 2007).

22. *See* BARBARA KATZ ROTHMAN, THE TENTATIVE PREGNANCY 178 (1986) (discussing her finding that the choice to abort was easier for women if the fetus was diagnosed with a fatal defect).

23. Dan W. Brock, *Preventing Genetically Transmitted Disabilities*, *in* QUALITY OF LIFE AND HUMAN DIFFERENCE 67, 70 (David Wasserman et al. eds., 2005).

24. *See* AM. MED. ASSOC. CODE OF ETHICS: E-10.01 FUNDAMENTAL ELEMENTS OF THE PATIENT-PHYSICIAN RELATIONSHIP (2001), *available at* http://www.ama-assn.org/ama/pub/category/2498.html (follow "Current Options" hyperlink; then follow "E-10.00" hyperlink; then follow "E-10.01" hyperlink) ("The patient has the right to receive information from physicians and to discuss the benefits, risks, and costs of appropriate treatment alternatives. Patients should receive guidance from their physicians as to the optimal course of action."); *see also* American Medical Association, Informed Consent, http://www.ama-assn.org/ama/pub/category/4608.html (1998) ("Providing the patient relevant information has long been a physician's ethical obligation.").

pregnancy after a diagnosis.[25] To address this problem, nearly all jurisdictions allow "wrongful conception" or "wrongful pregnancy" claims, which provide damages to parents for pre-conception negligence.[26] For post-conception negligence, a majority of jurisdictions allow parents to pursue damages in a claim for "wrongful birth."[27] At present, four jurisdictions allow "wrongful life" suits, which provide for damages to the child rather than to the parents.[28]

Part I of this Comment will provide an overview of the national perspective on these three types of prenatal negligence claims.[29] Part II will discuss North Carolina's viewpoint and the evolution of its case law addressing prenatal negligence.[30] Part III examines fundamental rights recognized by the United States Supreme Court and related North Carolina laws.[31] Part IV considers the policy issues dominating the debate surrounding prenatal torts.[32] Part V suggests North Carolina should protect the rights of expectant parents through legislation allowing medical malpractice claims for post-conception prenatal negligence.[33]

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25. It should be noted that abortion is only one option. With some diagnoses, such as spina bifida, parents could choose to pursue prenatal surgery to try to correct the physical defect.

26. David Kerrane, *Damages for Wrongful Pregnancy*, 11 J. CONTEMP. LEGAL ISSUES 467, 476 n.3 (1997) (noting that of all the jurisdictions that have addressed the question, only Nevada has denied a medical malpractice action).

27. *See infra* note 44; *see also* Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 328 n.8 (2004) ("[M]ost jurisdictions have allowed the parents' wrongful birth claim, which is generally based on essentially the same argument, i.e., that but for the doctor's medical malpractice, the parents would have been informed about genetic defects and would have avoided conception or aborted the child.").

28. *See* ME. REV. STAT. ANN. tit. 24, § 2931 (2006) (allowing the action for children born unhealthy); Turpin v. Sortini, 643 P.2d 954 (Cal. 1982); Procanik v. Cillo, 478 A.2d 755 (N.J. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983).

29. *See infra* notes 34-80 and accompanying text (discussing the various perspectives in a national overview of wrongful birth, wrongful life, and wrongful conception claims).

30. *See infra* notes 81-184 and accompanying text (discussing North Carolina's case law concerning prenatal negligence claims).

31. *See infra* notes 185-229 and accompanying text (discussing legal rulings affecting the debate over post-conception prenatal negligence claims).

32. *See infra* notes 230-50 and accompanying text (discussing public policy considerations).

33. *See infra* notes 251-72 and accompanying text (discussing North Carolina's duty to ensure equitable compensation for victims of post-conception prenatal negligence).

NATIONAL OVERVIEW OF PRENATAL NEGLIGENCE CLAIMS

I. WRONGFUL BIRTH

The first post-conception prenatal negligence claims began to be recognized by state courts in the 1970s. One of the first successful wrongful birth suits, *Becker v. Schwartz*, was a consolidated appeal[34] in which one of the plaintiffs asserted that her doctors negligently failed to inform her that her child was more likely to have Down syndrome due to her advanced maternal age of thirty-seven.[35] This plaintiff also asserted that her physician failed to inform her that amniocentesis could detect Down syndrome and provide her with the information she needed to decide whether to continue the pregnancy.[36] The child was born with Down syndrome,[37] and the plaintiff claimed that had the physician properly informed her of the presence of the defect, she would have aborted the fetus.[38] The *Becker* court permitted the wrongful birth claim,[39] noting the right to abortion established in *Roe v. Wade*[40] and the capacity to ascertain damages for wrongful birth.[41]

The court determined the Beckers' claim was based on negligence or medical malpractice and that they had alleged damages that were readily ascertainable, including the financial burden caused by the child's birth and continuing treatment and care.[42] The court held that "it can be said in traditional tort language that but for the defendants' breach of their duty to advise plaintiffs, the latter would not have been required to assume these obligations. Calculation of damages necessary to make plaintiffs whole in relation to these expenditures requires nothing extraordinary."[43]

Since *Becker*, a majority of jurisdictions that have considered the issue have recognized claims for wrongful birth, either as an independent tort or as part of medical malpractice.[44] The basis of the claim is

34. Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978) (denying the companion case's claim for wrongful life and allowing its claim for wrongful conception).

35. *Id.* at 808-09.

36. *Id.*

37. *Id.* at 808.

38. *Id.* at 810.

39. *Id.*

40. Roe v. Wade, 410 U.S. 113 (1973).

41. *Becker*, 386 N.E.2d at 813.

42. *Id.*

43. *Id.*

44. *See, e.g.*, ME. REV. STAT. ANN. tit. 24, § 2931 (2006) (allowing action if child born unhealthy); Keel v. Banach, 624 So. 2d 1022 (Ala. 1993) (recognizing cause of action for negligent failure to detect defect multiple, severe congenital abnormalities); M.A. v. United States, 951 P.2d 851 (Alaska 1998) (allowing claim for negligent failure

commonly recognized as: (1) a child is born with a defect or genetic illness,[45] and (2) either the physician negligently performed a prenatal

to detect pregnancy); Walker *ex rel.* Pizano v. Mart, 790 P.2d 735 (Ariz. 1990) (commenting that court would allow action for wrongful birth); Simmons v. W. Covina Med. Clinic, 260 Cal. Rptr. 772 (Cal. Ct. App. 1989) (allowing action if causation found to a medical certainty, but holding the child may not recover the same damages in separate claim for wrongful life); Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988) (allowing action for child born blind); Chamberland v. Physicians for Women's Health, L.L.C., 40 Conn. L. Rptr. 731 (Conn. Super. Ct. 2006) (allowing action for child with spina bifida); Garrison v. Med. Ctr. of Del., 581 A.2d 288 (Del. 1989) (allowing as common law negligence claim); Haymon v. Wilkerson, 535 A.2d 880 (D.C. 1987) (allowing for child with Down syndrome); Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992) (allowing action for chromosomal abnormality); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987) (allowing action for child with hemophilia); Bader v. Johnson, 732 N.E.2d 1212 (Ind. 2000) (refusing to title the medical malpractice action "wrongful birth"); Arche v. U.S. Dep't of the Army, 798 P.2d 477 (Kan. 1990) (holding child must be severely and permanently handicapped for parents to bring action); Reed v. Campagnolo, 630 A.2d 1145 (Md. 1993) (allowing action using traditional medical malpractice negligence principles); Viccaro v. Milunsky, 551 N.E.2d 8 (Mass. 1990) (recognizing that the jurisdiction allows claims for wrongful birth, but claim at bar was labeled negligent genetic counseling); Shelton v. St. Anthony's Med. Ctr., 781 S.W.2d 48 (Mo. 1989) (allowing action for child with no arms and other congenital anomalies); Greco v. United States, 893 P.2d 345 (Nev. 1995) (allowing action under medical malpractice but refusing to complicate law with new name of wrongful birth); Smith v. Cote, 513 A.2d 341 (N.H. 1986) (allowing action for child with congenital rubella syndrome); Berman v. Allan, 404 A.2d 8 (N.J. 1979) (allowing action for wrongful birth, but overruled on other grounds); Flanagan v. Williams, 623 N.E.2d 185 (Ohio Ct. App. 1993) (allowing action, but overruled on other grounds); Schloss v. Miriam Hosp., No. C.A. 98-2076, 1999 WL 41875 (R.I. Super. Jan. 11, 1999) (allowing the action, predicting the state supreme court would hold accordingly); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (holding action not barred by public policy); Naccash v. Burger, 290 S.E.2d 825 (Va. 1982) (allowing action for child with Tay-Sachs disease); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983) (en banc) (allowing actions for fetal hydantoin syndrome after mother was prescribed Dilantin); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985) (allowing parents to recover extraordinary costs); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975) (allowing parents' recovery for child with rubella syndrome).

45. *See, e.g.*, Smith v. Saraf, 148 F. Supp. 2d 504, 512 (D.N.J. 2001) (reiterating a potential cause of action arises only if the child is born with defects); *Viccaro*, 551 N.E.2d 8 (holding that Massachusetts recognizes wrongful birth if the child is born with a defect). This limitation is still contested, as by a Massachusetts woman who gave birth to a healthy child after physicians performed an abortion procedure that failed; she seeks the costs of child rearing. Jonathan Saltzman, *Suit Seeks Compensation for Botched Abortion*, BOSTON GLOBE, Mar. 7, 2007, *available at* http://www.boston.com/yourlife/health/women/articles/2007/03/07/suit_seeks_compensation_for_botched_abortion/.

diagnostic test which would have revealed the defect,[46] or the physician failed to report the findings of the test to the parents.[47] The negligence of the physician proximately causes injury to the plaintiff-parents by depriving them of the right to choose whether to terminate the pregnancy.[48]

The jurisdictions allowing wrongful birth actions have not developed a standard method for calculating damages.[49] The majority view allows only medical expenses and costs associated with the care of the disabled child.[50] Courts are divided on whether damages may be awarded for "intangible losses;"[51] only a minority of states allow for recovery of the mother's emotional distress.[52] Only a few jurisdictions allow for all damages resulting from the negligence, treating it as any

46. *See, e.g.*, Garrison v. Med. Ctr. of Del., 581 A.2d 288, 292 (Del. 1989) (joining "a majority of jurisdictions who have addressed the subject, recognizing a cause of action for negligent performance or delay in diagnostic testing for birth defects").

47. *See, e.g.*, Munro v. Regents of Univ. of Cal., 215 Cal. App. 3d 977, 982 (Cal. Ct. App. 1989) (alleging "defendants intentionally and maliciously either omitted said tests or if said tests were performed, recklessly disregarded their results and failed to inform plaintiffs . . . that [the fetus] was afflicted with Tay-Sachs disease"). Paula Bernstein, *Fitting a Square Peg in a Round Hole: Why Traditional Tort Principles Do Not Apply to Wrongful Birth Actions*, 18 J. CONTEMP. HEALTH L. & POL'Y 297, 299 (2001).

48. *See, e.g.*, *Garrison*, 581 A.2d at 290 (holding the claim actionable as medical malpractice negligence, the injury arising from physician's depriving parents "of the opportunity to make an informed decision to terminate the pregnancy, requiring them to incur extraordinary expenses in the care and education of their child afflicted with a genetic abnormality").

49. *See* Keel v. Banach, 624 So. 2d 1022, 1029 (Ala. 1993) ("Among the jurisdictions that recognize the cause of action for wrongful birth, there is little agreement on the issue of damages, and a majority does not allow recovery for emotional distress."); *see also* Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985) (prohibiting claim after discussing disagreement among jurisdictions).

50. *See, e.g.*, Fassoulas v. Ramey, 450 So. 2d 822, 824 (Fla. 1984) ("There is no valid policy argument against parents being recompensed for these costs of extraordinary care in raising a deformed child to majority. We hold these special upbringing costs associated with a deformed child to be recoverable."); Smith v. Cote, 513 A.2d 341, 350 ("[P]laintiff in a wrongful birth case may recover the extraordinary medical and educational costs attributable to the child's deformities, but may not recover ordinary child-raising costs.").

51. *See generally*, JACOB A. STEIN, 2 STEIN ON PERSONAL INJURY DAMAGES § 12:7 (3d. ed. 1997).

52. *Compare Keel*, 624 So. 2d 1022 (holding the mental distress suffered by both parents is compensable), *with* Smith v. Cote, 513 A.2d 341, 351 (N.H. 1986) (holding "damages for emotional distress are not recoverable in wrongful birth actions").

other tort.[53] There is also disagreement among the states about offsetting the resulting costs of child rearing with the benefits the parents receive from the child's existence.[54]

II. WRONGFUL LIFE

The California Supreme Court first affirmed a wrongful life cause of action in *Turpin v. Sortini* in 1982.[55] Turpin was conceived and subsequently born deaf after an older sibling was incorrectly diagnosed as having normal hearing.[56] The correct diagnosis would have revealed hereditary deafness.[57]

The court acknowledged the sanctity of life, but it held that this did not prevent the claim, reasoning that it was difficult to believe that "an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society."[58] The court further explained, "while our society and our legal system unquestionably place the highest value on all human life, we do not think that it is accurate to suggest that this state's public policy establishes—as a matter of law—that under all circumstances 'impaired life' is 'preferable' to

53. *See, e.g.*, Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law, holding a negligent tortfeasor in medical malpractice is held liable for all damages proximately caused by his negligence).

54. *Compare* Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983) (offsetting costs with benefits received is appropriate) *and* Bader v. Johnson, 675 N.E.2d 1119 (Ind. Ct. App. 1997) (holding jury's application of benefits rule appropriate) *with* Schroeder v. Perkel, 432 A.2d 834, 842 (N.J. 1981) (criticizing practice of offsetting costs with benefits to parents).

55. Turpin v. Sortini, 643 P.2d 954 (Cal. 1982). California's appellate court had previously allowed a wrongful life suit by a child with Tay-Sachs disease in *Curlender v. Bioscience Lab.*, 165 Cal. Rptr. 477 (Cal. Ct. App. 1980). The appellate court found the claim distinguishable from previous attempts by healthy children to bring wrongful life suits based on illegitimacy. *Id.* at 488. The Supreme Court's decision in *Turpin* affirmed *Curlender* but overruled a portion that held the child could bring an action against *anyone*, including parents, as a statute prohibiting such damages had been enacted in *Curlender*'s wake. *Turpin*, 643 P.2d at 959.

56. *Id.* at 956.

57. *Id.*

58. *Id.* at 961-62.

'nonlife.'"[59] However, the court conceded that Turpin's deafness was unlikely to be found "worse than not being born at all" by a jury.[60]

Only two other courts have adopted the tort since *Turpin*,[61] even though it has been addressed elsewhere.[62] Maine's statutes allow a claim for wrongful life, provided the child is not born healthy.[63] Other jurisdictions have stated various reasons for rejecting the cause of action, usually finding that it is impossible to measure an impaired life against non-existence, and thus, there must be no injury cognizable at law.[64] One court that allowed the action noted, "One reason for the

59. *Id.* at 962. As evidence of this policy, the court pointed to statutes in the Health and Safety Code section 7186, recognizing patient autonomy in deciding whether to accept life-prolonging treatment. *Id.*

60. *Id.*

61. Procanik v. Cillo, 478 A.2d 755 (N.J. 1984); Harbeson v. Parke-Davis, 656 P.2d 483 (Wash. 1983).

62. *See, e.g.*, Garrison v. Med. Ctr. of Del., 581 A.2d 288 (Del. 1989) (holding child's claim for wrongful life was not actionable); Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992) (holding tort of wrongful life not cognizable under state law); Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557 (Ga. 1990) (implying wrongful life claims would not be cognizable); Goldberg v. Ruskin, 499 N.E.2d 406 (Ill. 1986) (holding child may not recover general damages for pain and suffering); Cowe v. Forum Group, 575 N.E.2d 630 (Ind. 1991) (holding damages for wrongful life not cognizable under state law); Bruggeman v. Schimke, 718 P.2d 635 (Kan. 1986) (holding there was no recognized cause of action for wrongful life); Kassama v. Magat, 792 A.2d 1102 (Md. Ct. Spec. App. 2002) (holding life cannot be an injury for tort law); Taylor v. Kurapati, 600 N.W.2d 670 (Mich. Ct. App. 1999) (holding wrongful life not recognized in Michigan); Greco v. United States, 893 P.2d 345 (Nev. 1995) (holding no action for wrongful life exists); Smith v. Cote, 513 A.2d 341 (N.H. 1986) (holding child could not maintain action); Karlsons v. Guerinot, 394 N.Y.S.2d 933 (N.Y. App. Div. 1977) (holding child could not recover for wrongful life); Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985) (holding life cannot be an injury); Hester v. Dwivedi 733 N.E.2d 1161 (Ohio 2000) (holding judges and juries are incapable of weighing a life with defects against nonbeing); Ellis v. Sherman, 515 A.2d 1327 (Pa. 1986) (holding child suffered no legal injury and thus could not recover); Willis v. Wu, 607 S.E.2d 63 (S.C. 2004) (holding the tort was not cognizable); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) (holding there was no cause of action in Texas); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985) (holding that absent a statute allowing it, there was no cause of action); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975) (holding child had no cause of action since damages could not be measured).

63. ME. REV. STAT. ANN. tit. 24, § 2931 (2006).

64. *See, e.g.*, Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988) (agreeing with "overwhelming majority" of courts that existence, however impaired, cannot be "a legally cognizable injury relative to nonexistence"); *Garrison*, 581 A.2d 288 (holding the child's life is not a legally cognizable injury, even if impaired); Blake v. Cruz, 698 P.2d 315 (Idaho 1984) ("Basic to our culture is the precept that life is precious. As a society, therefore, our laws have as their driving force the purpose of protecting,

reluctance of other jurisdictions to recognize a duty to the child appears to be the attitude that to do so would represent a disavowal of the sanctity of a less-than-perfect human life."[65] Nine states have gone a step further and prohibited wrongful life torts by statute.[66] Even in the jurisdictions recognizing the action, only special damages may be awarded.[67]

III. WRONGFUL CONCEPTION

Wilbur v. Kerr[68] represents the majority view of wrongful conception claims. The plaintiffs brought a claim against a physician who negligently performed two unsuccessful vasectomies on the plaintiff-father, who was not informed that the procedures had failed.[69] The plaintiff-wife then became pregnant and delivered a healthy baby.[70]

The court examined other jurisdictions' reasoning and found two major lines of cases: those allowing all foreseeable damages resulting from a negligent sterilization, including child-rearing expenses, and

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preserving and improving the quality of human existence. To recognize wrongful life as a tort would do violence to that purpose and is completely contradictory to the belief that life is precious."), *superseded by statute*, IDAHO CODE ANN. § 5-334 (2006); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987) (discussing the view that an impaired life cannot constitute an injury at law as a primary reason to prohibit the action); *Bruggeman*, 718 P.2d 635 (following reasoning of other jurisdictions finding life is precious); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983) ("[R]ecovery for such damages is contrary to public policy. . . . That a child can be considered as an injury offends fundamental concepts attached to human life."); Proffitt v. Bartolo, 412 N.W.2d 232 (Mich. Ct. App. 1987) (holding it "logically impossible" to weigh an impaired life against nonexistence); Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978) (holding the child did not have a fundamental right to be born "a whole, functional human being").

65. *Harbeson*, 656 P.2d at 496.

66. IDAHO CODE ANN. § 5-334 (2006); IND. CODE ANN. § 34-12-1-1 (West 2006); MICH. COMP. LAWS ANN. § 600.2971 (West 2006); MINN. STAT. ANN. § 145.424 (West 2006); MO. ANN. STAT. § 188.130 (West 2006); N.D. CENT. CODE § 32-03-43 (2006); 42 PA. CONS. STAT. ANN. § 8305(B) (West 2006); S.D. CODIFIED LAWS § 21-55-1 (2006); UTAH CODE ANN. § 78-11-24 (2006).

67. *See* ME. REV. STAT. ANN. tit. 24, § 2931 (limiting damages to that which is "associated with the disease, defect or handicap suffered by the child"); *Turpin*, 643 P.2d at 963-64 (holding jury could calculate special damages but not general damages); *Harbeson*, 656 P.2d at 496 (allowing damages in wrongful life claim for extraordinary out-of-pocket expenses past child's majority to deter negligent conduct); *Procanik*, 478 A.2d at 763-64 (holding it too speculative to allow anything but special damages).

68. Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982) (allowing the claim for damages associated with pregnancy).

69. *Id.* at 569.

70. *Id.*

those prohibiting damages for child-rearing, as it would be against public policy.[71] Ultimately agreeing that it was better public policy to allow damages only for expenses related to pregnancy and childbirth, the court denied the plaintiffs' claim for child-rearing expenses.[72] The court was concerned about emotionally damaging a child who learns that he was an "unwanted or 'emotional bastard,'" whose parents did not want him and "went to court to force someone else to pay for [his] raising[.]"[73] Damages for the costs related to the operation and the pregnancy would have been allowed had the plaintiffs made this claim.[74]

Wrongful conception actions may be brought after the negligence of a health care provider causes a woman to become pregnant, either by performing a faulty sterilization procedure[75] or by incorrectly dispensing oral contraceptives.[76] Wrongful conception has been recognized as a tort action in every jurisdiction that has considered the claim, except for Nevada, which recognized only a potential action for breach of contract.[77] A child in these actions is typically born healthy,

71. *Id.* at 569-70. The court also noted that some jurisdictions tried to find a middle ground by allowing child-rearing expenses but offsetting them by the benefits received as parents. *Id* at 571. Still other courts pondered the parents' responsibility to mitigate damages by placing the child for adoption or aborting it, but this had never been made the rule. *Id.* at 570.

72. *Id.* at 571.

73. *Id.*

74. *Id.*

75. *See, e.g.*, Jackson v. Bumgardner, 347 S.E.2d 743 (N.C. 1986) (allowing action for physician's failure to replace birth control device resulting pregnancy); Taylor v. Kurapati, 600 N.W.2d 670 (Mich. Ct. App. 1999) (discussing the multiple forms of wrongful conception cases).

76. Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971) (allowing action after pharmacist negligently dispensed tranquilizers rather than oral contraceptives).

77. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2971 (West 2006) (allowing action only if acts were intentional or grossly negligent); Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982) (treating claim as medical malpractice action); Univ. Ariz. Health Sciences Ctr. v. Super. Ct. of Maricopa County, 667 P.2d 1294 (Ariz. 1983) (determining appropriate damages for negligence); Custodio v. Bauer, 59 Cal. Rptr. 463 (Cal. Ct. App. 1967) (allowing for both tort and breach of contract); Camacho v. Mennonite Bd. of Missions, 703 P.2d 598 (Colo. Ct. App. 1985) (recognizing cause of action for negligence); Ochs v. Borrelli, 445 A.2d 883 (Conn. 1982); Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974); Flowers v. Dist. of Columbia, 478 A.2d 1073 (D.C. 1984) (describing action for negligent sterilization as "wrongful birth," but refusing to include the "negligence action" as a type of medical malpractice so as not to apply the avoidable consequences doctrine); Jackson v. Anderson, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970) (allowing breach of contract); Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980) (describing action for negligent sterilization as "wrongful birth"); Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653 (Ga. 1984)

leading most courts, as in *Wilbur*, to deny recovery for the normal expenses of child-rearing.[78] Damages are generally limited to the med-

(stating the action is "no more than a species of malpractice and should be recognized"); Doerr v. Villate, 220 N.E.2d 767 (Ill. App. Ct. 1966) (allowing action as either tort or breach of contract); Garrison v. Foy, 486 N.E.2d 5 (Ind. Ct. App. 1985) (noting the action requires only the application of medical negligence laws); Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984) (allowing action following negligently performed therapeutic abortion); Byrd v. Wesley Med. Ctr., 699 P.2d 459 (Kan. 1985) (treating as a medical malpractice action); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983) (allowing as medical malpractice claim); Conner v. Stelly, 02-549 (La. App. 3 Cir. Oct. 30, 2002), 830 So. 2d 1102 (treating the tort as medical malpractice action); Musk v. Nelson, 647 A.2d 1198 (Me. 1994) (holding Maine's wrongful birth/wrongful life statute did not create separate cause of action for wrongful conception, as it was a type of professional negligence action); Dehn v. Edgecomb, 865 A.2d 603, 610 (Md. 2005) (stating the action is "to be treated like any other medical malpractice tort, that is, as a traditional negligence claim"); Burke v. Rivo, 551 N.E.2d 1 (Mass. 1990) (holding physician may be held liable for medical malpractice or breach of warranty); Christensen v. Thornby, 255 N.W. 620 (Minn. 1934) (earliest case standing for proposition that cause of action exists for improperly performed sterilization); Hudson v. Parvin, 582 So. 2d 403 (Miss. 1991) (allowing actions for medical malpractice and breach of guarantee) (overruled on other grounds); Miller v. Duhart, 637 S.W.2d 183 (Mo. Ct. App. 1982) (holding the action is a form of malpractice); Hitzemann v. Adam, 518 N.W.2d 102 (Neb. 1994) (recognizing as a medical malpractice claim); Szekeres v. Robinson, 715 P.2d 1076 (Nev. 1986) (allowing action for breach of contract but not tort); P. v. Portadin, 432 A.2d 556 (N.J. Super. Ct. App. Div. 1981) (allowing action under tort law); Lovelace Med. Ctr. v. Mendez, 805 P.2d 603 (N.M. 1991) (applying tort principles); Weintraub v. Brown, 98 A.D.2d 339 (N.Y. App. Div. 1983) (allowing as a medical malpractice claim); Jackson v. Bumgardner, 347 S.E.2d 743 (N.C. 1986) (holding a wrongful conception claim is "indistinguishable from an ordinary medical malpractice action"); Bowman v. Davis, 356 N.E.2d 496 (Ohio 1976) (holding the claim was "a traditional negligence action"); Morris v. Sanchez, 746 P.2d 184 (Okla. 1987) (recognizing action as a medical malpractice claim); Zehr v. Haugen, 871 P.2d 1006 (Or. 1994) (allowing claims for breach of contract and negligence); Hatter v. Landsberg, 563 A.2d 146 (Penn. Super. Ct. 1989) (holding statute barring wrongful birth and wrongful life did not bar wrongful conception); Emerson v. Magendantz, 689 A.2d 409 (R.I. 1997) (holding the action is a tort); Smith v. Gore, 728 S.W.2d 738 (Tenn. 1987) (recognizing claim as a tort); Crawford v. Kirk, 929 S.W.2d 633 (Tex. 1996) (holding wrongful pregnancy is a valid medical malpractice claim); Miller v. Johnson, 343 S.E.2d 301 (Va. 1986) (holding traditional tort principles should be applied); McKernan v. Aasheim, 687 P.2d 850 (Wash. 1984) (allowing as tort action); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985) (recognizing the cause of action as a tort); Marciniak v. Lundborg, 450 N.W.2d 243 (Wis. 1990) (recognizing the action as the tort of negligent sterilization); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982) (noting the action is necessary component of medical malpractice law).

78. *See, e.g., Flowers*, 478 A.2d 1073 (denying child-rearing expenses according to public policy); Fassoulas v. Ramey, 450 So. 2d 822 (Fla. 1984) (denying ordinary child-rearing costs for all children, but allowing extraordinary child-rearing costs for

ical expenses associated with the pregnancy and delivery, the associated pain and suffering of the mother, and sometimes loss of consortium for the father.[79] Only a few jurisdictions have allowed parents to recover the costs of rearing a healthy child.[80]

NORTH CAROLINA CASE LAW

I. WRONGFUL BIRTH AND WRONGFUL LIFE

A. *North Carolina Court of Appeals Allows Claims*

North Carolina's legal positions on wrongful birth and wrongful life were decided in *Azzolino v. Dingfelder* more than twenty years ago.[81] The Azzolino family complained of negligence after a nurse practitioner and a physician failed to inform Mrs. Azzolino about the utility of amniocentesis.[82] The test would have revealed the thirty-six-year-old woman's fetus had birth defects.[83] The Azzolinos argued they were deprived of the choice of terminating the pregnancy, and as a result, the child was born with Down syndrome.[84]

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child born with defects); Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653 (Ga. 1984) (holding costs of raising a child cannot be recovered); Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984) (holding parents of healthy child could not recover child-rearing expenses); *Byrd*, 699 P.2d 459 (holding mother could not recover expected child-rearing costs for healthy child).

79. *See, e.g., Boone*, 416 So.2d 718; *Coleman*, 327 A.2d 757; Macomber v. Dillman, 505 A.2d 810 (Me. 1986); *Weintraub*, 98 A.D.2d 339 (allowing for loss of consortium for husband but not for wife).

80. *See, e.g.*, Jones v. Malinowski, 473 A.2d 429 (Md. 1984) (allowing claim but offsetting benefits to parents); Burke v. Rivo, 551 N.E.2d 1 (Mass. 1990) (allowing damages for costs of rearing healthy child to majority if sterilization was sought for economic reasons); *Marciniak*, 450 N.W.2d 243 (holding it would not be equitable to offset benefits).

81. Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985).

82. *See* Azzolino v. Dingfelder, 322 S.E.2d 567, 573-74 (N.C. Ct. App. 1984), *decision aff'd in part, rev'd in part*, 337 S.E.2d 528 (N.C. 1985) ("In response to a direct question from Mrs. Azzolino regarding the advisability of this procedure, defendant . . . spoke of her own personal and religious prejudices, and those of her husband, against the use of amniocentesis. She advised Mrs. Azzolino of the medical risks associated with amniocentesis, without setting those risks in the context of a complete risk-benefit analysis and thus unduly emphasized those risks. In response to a similar question addressed to him, Dr. Dingfelder advised Mrs. Azzolino that she need not worry about amniocentesis because it was not necessary or advisable for her as the upswing was for women [thirty-seven] years of age or older.").

83. *Id.*

84. *Id.* at 574. The complaint alleged that had they known the child would have Down syndrome, they would have terminated the pregnancy by abortion. *Id.*

After the trial court dismissed the plaintiffs' claims,[85] the court of appeals unanimously recognized actions for wrongful birth and wrongful life.[86] The court of appeals first defined wrongful life as an action "brought by or on behalf of an impaired child who alleges that but for the defendant doctor or health care provider's negligent advice to or treatment of his parents, the child would not have been born."[87]

The court of appeals determined that in order to successfully pursue the claim for wrongful life, the Azzolino child "must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party," which are the same elements required of any negligence action.[88] The court of appeals held the defendants had a duty to inform the plaintiffs of the genetic risk to "make them aware of the possibility or probability that their future children will be genetically impaired and give[ ] them an opportunity to decide whether life is best for the child."[89] This duty had been extended to the child in *Stetson v. Easterling*,[90] a decision allowing infants to recover for a physician's prenatal negligence.[91] Thus, the defendants had the responsibility to provide the infant with "an opportunity to be relieved of a life with impairments."[92]

Finally, the court of appeals held "the complaint state[d] a sufficient causal relationship between the defendants' alleged negligence in advising Mrs. Azzolino about amniocentesis and the subsequent birth of [the child]."[93] After examining the modern trend among other jurisdictions,[94] the court of appeals held the child could "recover as special damages the extraordinary expenses to be incurred during his lifetime as a result of his impairment."[95] The court added, "We are unwilling, and indeed, unable to say as a matter of law that life even with the

85. *Id.* at 572. The trial court dismissed the child's claim for wrongful life and the siblings' claim for damages, allowed defendants' summary judgment motion on punitive damages, and allowed defendants' motion for directed verdict thereby dismissing parents' wrongful birth claim. *Id.*

86. *Id.* at 588.

87. *Id.* at 573.

88. *Id.* at 574.

89. *Id.*

90. Stetson v. Easterling, 161 S.E.2d 531 (N.C. 1968).

91. *Azzolino*, 322 S.E.2d at 574.

92. *Id.* at 574-75.

93. *Id.* at 575.

94. *See* Turpin v. Sortini, 643 P.2d 954 (Cal. 1982); Procanik v. Cillo, 478 A.2d 755 (N.J. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983).

95. *Azzolino*, 322 S.E.2d at 575-76.

most severe and debilitating of impairments is always preferable to nonexistence."[96]

The court of appeals then examined the parents' claim for wrongful birth, defining it as "an action brought by parents against a physician or other health care provider who allegedly failed to inform them of the increased possibility that the mother would give birth to a child suffering from birth defects thereby precluding an informed decision about whether to have the child."[97] This claim also had the required elements for a tort—duty, breach, proximate cause, and damages—and was recognized as a viable action.[98] The final element, however, was again the most troublesome due to the wide variance among jurisdictions as to the appropriate measure of recovery.[99] The parents sought to recover:

> . . . damages for the medical and hospital expenses of the pregnancy and childbirth; damages for the nervousness, inconvenience, physical restrictions, loss of consortium, and anxiety suffered by them because of the pregnancy and childbirth; damages for the mental anguish which they have endured and will continue to endure because they have brought into the world a child afflicted with Down's Syndrome; the ordinary and extraordinary cost of supporting, educating, and providing the attention for [their child] which he requires; damages for past and future loss or diminution of the consortium of each other because of the extraordinary demands placed on them by [their child]; damages for Mrs. Azzolino's lost earnings occasioned by her pregnancy and by the need for her to care for [their child] on a daily basis; and other miscellaneous damages.[100]

The court of appeals held that to allow the parents to recover all they were seeking would be "wholly disproportionate to the culpability" of the defendants,[101] and allowed recovery only for mental anguish, as the child could recover for his extraordinary expenses in his own claim.[102] Punitive damages were not allowed under the facts of the case.[103]

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96. *Id.* at 576.

97. *Id.* at 580.

98. *Id.*

99. *Id.* at 581.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 587-88 (stating aggravating behavior did not occur at the time of the tortious conduct).

B. North Carolina Supreme Court Reverses and Prohibits Claims

The North Carolina Supreme Court accepted *Azzolino* for discretionary review and reversed the North Carolina Court of Appeals in a 4-3 decision, finding neither the parents nor the child stated a claim upon which relief could be granted.[104]

The supreme court defined wrongful life as "a claim for relief by or on behalf of a defective child who alleges that but for the defendant's negligent treatment or advice to its parents, the child would not have been born."[105] Such a claim would necessarily be intertwined with a claim for wrongful birth, as the "filaments of family life, although individually spun, create a web of interconnected legal interests."[106] The supreme court also noted that the jurisdictions allowing claims for wrongful life had recognized it would be "anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care."[107]

The supreme court attempted to analyze the claim for wrongful life as if it were a traditional tort, assuming the physician owed a duty to the fetus,[108] and had the Azzolinos been properly informed of the birth defect, they would have had an abortion.[109] The traditional analysis stopped there, however, as the injury at issue was the child's *life*.[110] The supreme court noted the lower court's attempt to make an equitable decision: "We are aware that the decision of the Court of Appeals recognizing [the child's] claim for relief for wrongful life represents an honest and principled effort by that court to address and resolve genuine social problems thrust upon the courts by recent developments in science and medicine."[111]

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104. Azzolino v. Dingfelder, 337 S.E.2d 528, 530 (N.C. 1985) (denying siblings' claim in addition to parents' and child's claims).

105. *Id.* at 531.

106. *Id.* at 532 (citing Procanik v. Cillo, 478 A. 2d 755, 762 (N.J. 1984)).

107. *Id.* (citing Turpin v. Sortini, 643 P. 2d 954, 965 (Cal. 1982)).

108. North Carolina first established a physician's duty to a fetus at the point of viability, allowing a wrongful death suit in *DiDonato v. Wortman*, 358 S.E.2d 489, 491-92 (N.C. 1987) (*construing* N.C. GEN. STAT. § 28A-18-2 (1984)). However, the state refused to extend this recognition to allow a homicide prosecution for causing the death of a viable fetus in *State v. Beale*, 376 S.E.2d 1 (N.C. 1989). North Carolina may, however, prosecute for willfully causing the death of a fetus with drugs or instruments under N.C. GEN. STAT. §§ 14-44, 14-45 (2006), notwithstanding the provisions of N.C. GEN. STAT. § 14-45.1.

109. *Azzolino*, 337 S.E.2d at 532.

110. *Id.*

111. *Id.*

For the supreme court, the need to address new problems where law and medicine converge was outweighed by the dilemma juries would face in trying to decide whether non-existence would be better than an impaired life and what the corresponding economic damages would be.[112] The supreme court found the reasoning of the New York Court of Appeals[113] compelling, as it also focused on the comparison between life and non-existence, and the staggering implications of trying to determine which would be better.[114] Concluding that "life, even life with severe defects, may not be an injury in the legal sense," the supreme court closed the door on wrongful life claims.[115]

Turning to the claim for wrongful birth, the Supreme Court defined it as a claim made by parents "who allege that the negligent treatment or advice deprived them of the choice of terminating pregnancy by abortion and preventing the birth of the defective child."[116] The supreme court began its analysis by assuming *arguendo* that duty and breach of duty existed and further assumed that the defendants' negligence was the proximate cause of the child's birth.[117] But at this point in its evaluation, the court determined that in recognizing wrongful birth as a tort, other jurisdictions had to find that life itself could constitute an injury at law.[118] The supreme court observed, "Far from being 'traditional' tort analysis, such a step requires a view of human life previously unknown to the law of this jurisdiction."[119] The supreme court again held that "life, even life with severe defects" could not be a legally cognizable injury.[120]

The supreme court viewed the disagreement among other jurisdictions regarding the methods used to calculate damages as further proof of the claim's poor fit for traditional tort analysis, noting that the injury for which courts are trying to compensate is "the existence of a human life."[121] In a traditional tort action, "defendants are liable for all of the reasonably foreseeable results of their negligent acts or omissions," but few jurisdictions recognized this as an appropriate measure for wrongful birth.[122] Related problems with calculating damages

112. *Id.* at 533.
113. Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978).
114. *Azzolino*, 337 S.E.2d at 533.
115. *Id.* at 532.
116. *Id.* at 531.
117. *Id.* at 533.
118. *Id.* at 533-34.
119. *Id.* at 534.
120. *Id.*
121. *Id.*
122. *Id.*

would include the questions of whether the parents had a duty to place the child up for adoption, or whether the damages should be offset by the intangible benefits they would receive from their child.[123] Further, the supreme court stated that wrongful birth would be "peculiarly subject to fraudulent claims," as parents could easily invent a prenatal desire to abort the fetus or deny the possibility they would have considered bearing the child knowing of the defect.[124]

Public policy concerns were central to the supreme court's refusal to recognize wrongful birth as a tort. The court expressed its fear of the slippery slope in allowing wrongful birth actions, foretelling claims for infants born "of one sex rather than the other" or for infants born with carrier genes.[125] The court was also concerned that physicians, uncertain of the distress parents might feel about bearing a child with genetic abnormalities, would resort to recommending abortion, fearing a wrongful birth lawsuit.[126]

Thus, the North Carolina Supreme Court held that claims for wrongful birth would not be recognized "absent a clear mandate by the legislature."[127] Unlike the courts, the General Assembly could "provide an appropriate forum for a full and open debate of all of the issues . . . at one time and do so without being required to attempt to squeeze its results into the mold of conventional tort concepts which clearly do not fit."[128]

The three dissenting justices each wrote separately in support of recognizing wrongful birth actions in North Carolina.[129] Justice Exum first expressed that this case, and others like it, should be viewed in its simplest and most basic terms, eliminating the "thorny moral, philosophical, and theological questions."[130] The injury was the woman's deprivation of the choice to terminate her pregnancy, as North Carolina's abortion statute placed the right to choose in the hands of the

123. *Id.*

124. *Id.* at 535.

125. *Id.*

126. *Id.*

127. *Id.* at 533.

128. *Id.* at 537 (sharing the view of dissenting Justice Wachtler in Becker v. Schwartz, 386 N.E. 2d 807, 816-19 (1978) that "[t]he heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor. . . . The child's handicap is an inexorable result of conception and birth.").

129. *Id.* at 537-42 (Exum, J., dissenting; Frye, J., dissenting; and Martin, J., dissenting, but concurring with the majority opinion prohibiting wrongful life claims and siblings' claims for damages).

130. *Id.* at 537 (Exum, J., dissenting).

parents.[131] Damages could be properly measured by comparing the parent's unexpected reality to their former expectations.[132] This would entitle the parents to extraordinary damages and the pain, suffering, and mental anguish caused by the birth defect but not the ordinary costs of child-rearing.[133] Justice Exum specifically did not support offsetting damages by intangible benefits, reasoning that if parents bear the financial costs for a healthy child, they would be entitled to the benefits.[134]

Justice Frye noted that the majority of jurisdictions allow claims for wrongful birth, and the court should have adopted the claim and allowed the "appropriate measure of damages."[135] Unlike the majority opinion, Justice Frye recommended allowing the claim through the courts unless the legislature passed a statute barring it.[136]

Justice Martin wrote the strongest dissent, stating that wrongful birth should be a malpractice action based upon the physician's negligent genetic counseling and treatment of the pregnant woman, depriving her of the opportunity to make an informed decision on whether to abort the fetus.[137] He also disagreed as to the injury at issue: suggesting that the *birth of the child* was the injury, not the *existence of life*.[138]

Justice Martin also pointed out that North Carolina's statute governing informed consent[139] should be applied to these situations.[140] As with traditional torts, the parents would be entitled to all damages proximately resulting from the injury, which would consist of the costs of childbirth, physical pain and suffering, mental anguish, and the extraordinary expenses of rearing a child with a birth defect.[141] Unlike Justice Exum, Justice Martin recommended offsetting damages with the benefits the parents would receive.[142] Finally, Justice Martin stated the denial of this claim was a violation of the parents' constitu-

131. *Id.* at 538.

132. *Id.*

133. *Id.* at 539.

134. *Id.*

135. *Id.* (Frye, J., dissenting).

136. *Id.*

137. *Id.* at 540 (Martin, J., dissenting, but concurring with the majority opinion prohibiting wrongful life claims and siblings' claims for damages).

138. *Id.*

139. N.C. GEN. STAT. § 90-21.13 (2006).

140. *Azzolino*, 337 S.E.2d at 540.

141. *Id.* at 541.

142. *Id.*

tional rights, as a valid cause of action is protected by the open courts clause of the state constitution.[143]

II. WRONGFUL CONCEPTION

A. *New Claim for Medical Malpractice - 1986*

North Carolina recognizes a wrongful conception claim, an action typically brought after a physician negligently performs a sterilization procedure that results in pregnancy.[144] The first case establishing the claim was *Jackson v. Bumgardner*,[145] in which a physician twice performed surgery on a woman who asked that her intrauterine device ("IUD") be replaced if it were removed during the surgeries.[146] The couple told the doctor that they could not afford another child.[147] In the second surgery, the doctor failed to replace the IUD but informed the couple that it was in place.[148] The woman then became pregnant and delivered a healthy child.[149] After the trial court dismissed for failure to state a claim upon which relief may be granted, the North Carolina Court of Appeals reversed.[150]

Upon discretionary review, the North Carolina Supreme Court determined that "the vast majority of courts which have considered wrongful conception cases have viewed the case as being indistinguishable from an ordinary medical malpractice action where the plaintiff alleges a breach of duty on the part of a physician and resulting injury for failure to perform that duty."[151] The defendant had a duty to treat the plaintiff with the necessary standard of care for her medical condition and breached that duty by failing to replace the IUD.[152] He withheld this information from her, knowing she was relying on the procedure and this information to avoid pregnancy, and as a result, she became pregnant, suffering the very injury she had sought his help to avoid.[153]

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143. *Id.* at 542.

144. *See* McAllister v. Ha, 496 S.E.2d 577 (N.C. 1998) (distinguishing wrongful conception or wrongful pregnancy claims from wrongful birth and wrongful life claims).

145. Jackson v. Bumgardner, 347 S.E.2d 743 (N.C. 1986).

146. *Id.* at 745.

147. *Id.*

148. *Id.*

149. *Id.*

150. Jackson v. Bumgardner, 321 S.E.2d 541 (N.C. Ct. App. 1984) *aff'd in part, rev'd in part*, 347 S.E.2d 743 (N.C. 1986).

151. *Jackson*, 347 S.E.2d at 747.

152. *Id.*

153. *Id.*

The fact that the plaintiff gave birth to a healthy child was not material to the court's analysis. Specifically, "it [wa]s the fact of the pregnancy *as a medical condition* that [gave] rise to compensable damages and complete[d] the elements for a claim of negligence."[154] The holding of *Azzolino* did not preclude the wrongful conception claim, as the Jacksons sought damages for a medical condition rather than for their child's life.[155] The *Jackson* court allowed the mother to proceed with her medical malpractice claim, but she would not be allowed to recover the costs of rearing the child, which would be contrary to the rationale of *Azzolino*.[156]

B. *Genetic Counseling Cases Arrive - 1988*

The claim for wrongful conception has also been successful under North Carolina law after a physician failed to provide correct genetic screening results, resulting in the birth of a child with defects.[157] In *Gallagher v. Duke*, the plaintiffs were parents of two girls, each born with multiple, severe birth defects.[158] The first child died less than three weeks after birth.[159] Cytogeneticists reported to the parents that there were no genetic abnormalities found, and their chances of conceiving a child without defects would be the same as the general population.[160]

Relying on this advice, the Gallaghers conceived a second child.[161] They were then referred to the University of North Carolina Genetic Counseling Department, where the department used the previous test results to counsel the Gallaghers that amniocentesis was unnecessary.[162] The Gallaghers' second child was subsequently born with severe birth defects, and more genetic testing was performed.[163] This time genetic abnormalities were found.[164] When these results were compared to the first child's samples, they found the first child had the same or similar genetic abnormalities, which should have been detected when first examined.[165]

154. *Id.* at 748 (emphasis in original).
155. *Id.*
156. *Id.* at 750, 752.
157. Gallagher v. Duke Univ., 852 F.2d 773 (M.D.N.C. 1988).
158. *Id.* at 774-75.
159. *Id.* at 775.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*

The Middle District of North Carolina held that a medical malpractice action based on wrongful conception would be recognized in North Carolina when a child was born with genetic defects since the North Carolina Supreme Court had recognized an action for wrongful conception in *Jackson* when a healthy child was born.[166] Thus, in North Carolina, the health of the child born is irrelevant in a claim for wrongful conception.[167] Ultimately, the court permitted damages for the costs of rearing a child with medical and special care needs[168] and claims for emotional distress.[169]

C. *Breaking New Ground with Negligent Infliction of Emotional Distress - 1998*

The state supreme court decided a similar case to *Gallagher*, *McAllister v. Ha*,[170] ten years later. After having a child in May 1991, the McAllisters received notice from the State Health Department that they should be tested for sickle-cell disease because of possible genetic traits which their son could have inherited.[171] The defendant physician took blood samples for testing and told the McAllisters he would call them if there was a problem, and if they did not hear from him, there was no cause for concern.[172] The physician never informed the family of the test results that showed the father was a carrier of the disease, even though Mrs. McAllister saw him four times before she conceived a second child.[173] This child was born with sickle-cell disease, causing the child to need special medical care and daily medication until the age of five.[174]

The supreme court allowed the McAllisters to proceed with their claims against the physician for medical malpractice and negligent infliction of emotional distress. Basing their decision partly on *Jackson*, the court first held the McAllisters' claim for medical malpractice was more properly classified as wrongful conception than wrongful birth, as the negligence technically occurred pre-conception.[175]

Negligent infliction of emotional distress was also held to be a proper claim, as "[p]laintiffs alleged that defendant's negligence

166. *Id.* at 776.
167. *Id.*
168. *Id.* at 777.
169. *Id.* at 779.
170. McAllister v. Ha, 496 S.E.2d 577 (N.C. 1998).
171. *Id.* at 580.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 582.

caused them 'extreme mental and emotional distress,' specifically referring to plaintiff-wife's fears regarding her son's health and her resultant sleeplessness."[176] Because of the physician's negligence, the McAllisters did not know of their child's disease prior to his birth and believed that the child was healthy. Therefore, the mother's severe emotional distress from worrying about her son's health could have only occurred after he was born. This holding broke new ground, as it allowed parents to pursue the claim of negligent infliction of emotional distress resulting from the live birth of their child with birth defects for the first time in North Carolina.

This holding was supported by *Johnson v. Ruark Obstetrics & Gynecology Associates*, which allowed both parents to pursue a claim for negligent infliction of emotional distress after a physician's poor prenatal care caused the death of a fetus and its stillbirth.[177] *Johnson* held that in order to state a claim for negligent infliction of emotional distress, a plaintiff must allege: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as 'mental anguish'), and (3) the conduct did in fact cause the plaintiff severe emotional distress."[178] The *McAllister* court held that while the allegations were sparse, the McAllisters sufficiently alleged the elements of the claim: "Plaintiffs here alleged that plaintiff-wife became pregnant and gave birth to a child with sickle-cell disease as a result of defendant's negligence[,]" causing Mrs. McAllister to suffer severe emotional distress.[179] The court did not comment on the merits of the claim, stating, "Whether defendant's alleged negligence in fact caused either of the plaintiffs to suffer severe emotional distress is a question for the trier of fact."[180]

To complete the claim, it must also be alleged that the defendant's negligence was the foreseeable and proximate cause of the severe emotional distress, but "neither a physical impact, a physical injury, nor a subsequent physical manifestation of emotional distress is an element of the tort of negligent infliction of emotional distress."[181] Importantly for the McAllisters' claim, the *Johnson* court held "a plaintiff may recover for his or her severe emotional distress arising due to concern for another person, *if* the plaintiff can prove that he or she has suffered

176. *Id.* at 583.
177. Johnson v. Ruark Obstetrics & Gynecology Assocs., 395 S.E.2d 85 (N.C. 1990).
178. *Id.* at 97.
179. *McAllister*, 496 S.E.2d at 583.
180. *Id.*
181. *Johnson*, 395 S.E.2d at 97.

such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence."[182]

The *McAllister* court did not allow the parents to pursue damages for child-rearing in their medical malpractice claim, citing *Azzolino* as controlling the analysis.[183] As life could not constitute an injury at law, the McAllisters could not seek damages for the costs of their child's extraordinary care.[184]

LEGAL PRECEDENTS AND PERSPECTIVES

I. FUNDAMENTAL RIGHTS FURTHER DEFINED SINCE *AZZOLINO*

A. Planned Parenthood v. Casey

The restrictions on abortion in North Carolina and other states are allowed despite *Roe v. Wade*[185] because of *Planned Parenthood v. Casey*.[186] While *Casey* reaffirmed *Roe v. Wade* by recognizing a woman's right to choose an abortion prior to the fetus's viability, it eliminated the trimester framework and created a new standard that allowed states to restrict abortion unless it created an "undue burden" on a woman "seeking an abortion of a nonviable fetus."[187]

North Carolina legislators have wanted to push the boundaries of states' abilities to restrict abortion. There were multiple bills in the 2005-2006 session of the General Assembly that indicated lawmakers' desire to further reduce the availability of abortions,[188] including a bill prohibiting the State Employee Health Plan from reimbursing for any abortion,[189] a bill imposing a twenty-four hour waiting period prior to obtaining an abortion,[190] and a bill imposing a notarized consent requirement for minors.[191]

182. *Id.*

183. *McAllister*, 496 S.E.2d at 584.

184. *Id.* at 583-84.

185. Roe v. Wade, 410 U.S. 113 (1973) (establishing the trimester framework to delineate when the state may or may not interfere with a woman's fundamental right to terminate her pregnancy).

186. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

187. *Id.* at 877.

188. As of the close of the 2005-2006 session, none of the bills had been enacted.

189. S.B. 106, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2006); *see also* H.B. 289, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2006) (providing no coverage for abortion in State Employee Health Plan unless mother's life is in danger or pregnancy resulted from incest or rape).

190. H.B. 1488, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005); S.B. 549, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).

191. H.B. 1200, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005); S.B. 1135, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).

One particular House bill proposed an amendment to the abortion statute that would provide immunity for any health care provider who, due to a moral objection to abortion, failed to participate in the care of a woman seeking medical procedures relating to abortion.[192] This bill, if it were to become law, could result in the lack of any legal recourse for a woman whose medical provider knowingly acted to prevent the woman from exercising her right to have an abortion. For example, a physician or other health care worker morally opposed to abortion could knowingly withhold from a patient her genetic screening results to prevent her from aborting the fetus, and there would be no legal recourse for the physician's failure to provide the patient with informed care and treatment options.[193]

Despite these attempts to curb access to abortion, the procedure is still legal for any woman, for any reason, until the twentieth week of pregnancy.[194] After the twentieth week, a woman may obtain an abortion only if continuing the pregnancy gravely impairs her health or places her life at risk.[195] A woman may not obtain an abortion after the twentieth week for the sole purpose of terminating a fetus with severe birth defects.[196]

B. Cruzan v. Director, Missouri Department of Health

In *Cruzan*, the Supreme Court faced for the first time the question of whether the Constitution provides the "right to die."[197] In its decision, the Court recognized that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."[198] The right to make this "deeply personal decision"[199] is based in a Fourteenth Amendment liberty interest rather than in the right to privacy.[200] For an incompetent person such as Nancy Cruzan, the exercise of this right could be through a surrogate decision-maker.[201]

However, states may still protect an incompetent individual against abuse "through the imposition of heightened evidentiary

192. H.B. 1407, 2005-2006 Gen. Assem., Reg. Sess. (N.C. 2005).
193. *See* AM. MED. ASSOC., *supra* note 24 (describing the Association's position as stated in its Code of Ethics).
194. N.C. GEN. STAT. § 14-45.1(a) (2006).
195. N.C. GEN. STAT. § 14-45.1(b) (2006).
196. 48 Op. N.C. Att'y Gen. 136 (1979).
197. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277 (1990).
198. *Id.* at 278.
199. *Id.* at 281.
200. *Id.* at 279 n.7.
201. *Id.* at 280.

requirements" to ensure that cessation of medical interventions would be in the person's best interests.[202] The *Cruzan* decision supported the *Planned Parenthood v. Casey* holding that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims."[203]

Since *Cruzan*, the Supreme Court has been asked to extend the right to die by allowing terminally ill individuals to choose assisted suicide, but it declined to extend its holding in two 1997 cases, *Washington v. Glucksberg*[204] *and Vacco v. Quill.*[205] However, in neither case did the Court proscribe assisted suicide; it only proclaimed that a state's prohibition of it was not unconstitutional.[206] States were thus not prohibited from explicitly allowing assisted suicide,[207] as Oregon had done in 1995 with its Death with Dignity Act.[208]

II. NORTH CAROLINA LAW

A. *The Right to a Natural Death*

Even before *Cruzan* declared that the "right to die" by refusing life-sustaining treatment was protected by the Constitution, North Carolina recognized an individual's right to refuse life-sustaining treatment. The General Assembly established in 1977 that "as a matter of public policy . . . an individual's rights include the right to a peaceful and natural death . . . ."[209] An individual or his representative[210] may exercise this right when the individual is diagnosed as "terminal and incurable" or in a "persistent vegetative state."[211]

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202. *Id.* at 281.

203. Planned Parenthood v. Casey, 505 U.S. 833, 835 (1992) (discussing that this view of life had been echoed in the Court's decisions following *Roe v. Wade*, 410 U.S. 113 (1973)).

204. Washington v. Glucksberg, 521 U.S. 702, 723 (1997) (deciding "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so").

205. Vacco v. Quill, 521 U.S. 793 (1997) (deciding the question of whether New York's ban on assisted suicide violated the Equal Protection clause of the Fourteenth Amendment).

206. *Glucksberg*, 521 U.S. at 735.

207. *Id.* at 788 (Souter, J., concurring in judgment).

208. OR. REV. STAT. ANN. §§ 127.800 to 127.897 (West 2006).

209. *See* N.C. GEN. STAT. § 90-320(a) (2006) (allowing for a "natural death"); *but cf.* N.C. Gen. Stat. § 90-320(b) (2006) (prohibiting deliberate actions that directly lead to the end of life, as in assisted suicide).

210. *Id.*

211. N.C. GEN. STAT. § 90-321(b)(1) (2006).

The North Carolina Legislature was prompted to codify the right to a natural death by the New Jersey case *In re Quinlan*,[212] in which a father sought guardianship of his adult daughter who was in a persistent vegetative state in order to terminate all extraordinary life-sustaining measures.[213] The *Quinlan* court held that the father, as guardian, was entitled to act on his daughter's behalf and terminate all extraordinary measures if her doctors concluded that she was likely to never emerge from her comatose state.[214]

The public policy behind the law recognizes that for some people, life is *not* preferable to death in certain situations. This proposition clearly supports the North Carolina Court of Appeals's holding in *Azzolino*; the court was "unwilling, and indeed, unable to say as a matter of law that life even with the most severe and debilitating of impairments is always preferable to nonexistence."[215] Reversing the decision, the North Carolina Supreme Court held, *contrary* to North Carolina's public policy, that "life, even life with severe defects, cannot be an injury in the legal sense."[216]

This public policy is also reflected in other laws. An individual may appoint an agent who may exercise the principal's right to terminate medical treatment under the health care power of attorney statutes.[217] Similarly, a guardian may be appointed in order to ensure an incompetent individual can exercise his rights, including the right to a natural death.[218]

The North Carolina General Assembly also recognized "as a matter of public policy the fundamental right of an individual to control the decisions relating to his or her medical care, and that this right may be exercised on behalf of the individual by an agent chosen by the individual."[219] Medical care includes prenatal care and abortions. Thus, North Carolina recognizes it is a woman's fundamental right to control decisions relating to her pregnancy and its termination.

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212. *In re* Quinlan, 355 A.2d 647 (N.J. 1976).

213. Op. N.C. Att'y Gen. 1995 WL 321858.

214. *In re Quinlan,* 355 A.2d at 671-72.

215. Azzolino v. Dingfelder, 322 S.E. 2d, 567, 576 (N.C. Ct. App. 1984).

216. Azzolino v. Dingfelder, 337 S.E.2d 528, 532 (N.C. 1985).

217. *See* N.C. GEN. STAT. §§ 32A-15, 19, 25 to 26 (2006) (delineating powers of health care attorney-in-fact).

218. N.C. GEN. STAT. § 35A-1201 (2006) (stating a guardian may exercise the personal rights of an individual).

219. N.C. GEN. STAT. § 32A-15(a) (2006); *see also* N.C. GEN. STAT. § 32A-15(b) (2006) ("The purpose of this article is to establish an additional, nonexclusive method for an individual to exercise his or her right to give, withhold, or withdraw consent to medical treatment. . . .").

B. *Negligent Infliction of Emotional Distress*

As North Carolina courts have recognized, "to state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress, and (3) the conduct did in fact cause the plaintiff severe emotional distress."[220] Additionally, "a plaintiff may recover for his or her severe emotional distress arising due to concern for another person, *if* the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence."[221]

By recognizing an action for the negligent infliction of emotional distress after the live birth of a child with birth defects, our supreme court took a step closer to permitting wrongful birth claims. While the *McAllister* court purportedly did not overrule *Azzolino*, its holding does not harmonize with the *Azzolino* rule that life can never constitute an injury at law.

The *Azzolino* rule resulted only from the court's struggle with the "thorny moral, philosophical, and theological questions" it saw in the wrongful birth claim,[222] as the court recognized that jurisdictions allowing wrongful birth claims were attempting to address a valid problem.[223] As a result of *Azzolino* and *McAllister*, our courts are now allowing parents to recover for subjective emotional distress over the fact that their child has birth defects, while inexplicably prohibiting them from recovering for the objective financial harm that resulted from negligent medical care. These two rulings must be reconciled by the legislature to allow equitable recovery for post-conception prenatal negligence.

C. *Medical Malpractice*

The current statutes reflect the state's desire to minimize medical malpractice suits, containing stringent requirements for expert certification to support a plaintiff's claim to avoid dismissal.[224] After this initial hurdle, a medical malpractice claim must sufficiently allege "(1)

220. McAllister v. Ha, 496 S.E.2d 577, 582-83 (N.C. 1998).

221. *Id.* at 583.

222. Azzolino v. Dingfelder, 337 S.E.2d 528, 537 (N.C. 1985) (Exum, J., dissenting).

223. *Id.* at 536.

224. *See* N.C. GEN. STAT. § 1A-1, Rule 9(j) (2006) (stating the pleading must specifically assert that the medical care has been reviewed by an expert who is willing to testify that the medical care did not comply with the applicable standard of care unless pleading establishes negligence under res ipsa loquitur).

the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff."[225] In addition, there is a four-year statute of limitation for non-apparent injuries and a ten-year period when foreign objects have been left inside a patient.[226] These limitations are "consistent with the purpose and spirit of the medical malpractice act, that is, to decrease the number and severity of medical malpractice claims in an effort to decrease the cost of medical malpractice insurance."[227]

Medical malpractice claims alleging lack of informed consent are governed by statute, which prohibits claims where: (1) the action of the health care provider met the required standards of practice when consent was obtained from the patient; and (2) a reasonable person would have a general understanding of the proposed treatment and risks involved based on the information given by the health care provider; or (3) a reasonable person would have then undergone the proposed medical care had she been advised according to (1) and (2).[228] This provision for informed consent is in accordance with the standard for all medical malpractice actions, which requires the plaintiff to prove the physician acted outside "the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action."[229]

PUBLIC POLICY AND OTHER CONCERNS

I. THE MEDICAL MALPRACTICE DEBATE

North Carolina has a legitimate interest in reducing the number of frivolous medical malpractice lawsuits.[230] There is, however, an ongoing debate as to whether an overabundance of such claims even exists.[231] The Medical Mutual Insurance Company argues it is the

225. Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp., 624 S.E.2d 380, 383 (N.C. Ct. App. 2006) (citing Weatherford v. Glassman, 500 S.E.2d 466, 468 (N.C. Ct. App. 1998)).

226. N.C. GEN. STAT. § 1-15(c) (2006) (establishing one-year period to commence action from time of discovery).

227. Black v. Littlejohn, 325 S.E.2d 469, 475 (N.C. 1985).

228. N.C. GEN. STAT. § 90-21.13 (2006).

229. N.C. GEN. STAT. § 90-21.12 (2006).

230. Preston v. Thompson, 280 S.E.2d 780, 784 (N.C. Ct. App. 1981).

231. Burton Craige, *The Medical Malpractice "Crisis": Myth and Reality*, N.C. ST. BAR J., Summer 2004, at 8 (arguing the drive to reform medical malpractice is based on "myths, none of which have any basis in reality").

high cost of litigation that has increased medical malpractice insurance rates and has driven up the cost of health care.[232] On the other hand, the North Carolina Academy of Trial Lawyers ("NCATL") argues that a recent study[233] disproves the notion that the system is overrun with frivolous litigation.[234] A report by NCATL on the medical malpractice statistics kept by the Administrative Office of the Courts revealed that only 0.3% of all civil cases were medical malpractice suits.[235] Contrary to the fears of malpractice insurers, the growth in the number of physicians in North Carolina has outpaced the growth of the general population, proving that litigation is not driving health care providers from the state.[236]

North Carolina recognizes wrongful conception as a medical malpractice claim.[237] There is no indication that this recognition has created a burden on either the legal system or the medical profession. The North Carolina Medical Board acknowledges a physician's obligation to always provide ethical medical care to patients:

> Having assumed care of a patient, the physician may not neglect that patient nor fail for any reason to prescribe the full care that patient requires in accord with the standards of acceptable medical practice. . . .
>
> Therefore, it is the position of the North Carolina Medical Board that any act by a physician that violates or may violate the trust a patient places in the physician places the relationship between physician and patient at risk. . . .
>
> * * *
>
> The Board believes the interests and health of the people of North Carolina are best served when the physician-patient relationship, founded on patient trust, is considered sacred, and when the elements crucial to that relationship and to that trust—communication, patient primacy, confidentiality, competence, patient autonomy, compassion, selfless-

232. David P. Sousa, *N.C. Medical Malpractice Insurance Data v. Plaintiffs' Attorneys, Can Fact Prevail Over Fiction?*, 64 N.C. MED. J. 182, 184 (2003).

233. David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024 (2006).

234. Press Release, N.C. Acad. Trial Law., New Study Finds "Frivolous" Litigation Unlikely in Medical Malpractice Lawsuits (May 12, 2006), *available at* http://www.ncatl.org/file_depot/0-10000000/0-10000/9208/folder/51285/5.12.06.pdf.

235. N.C. ACAD. TRIAL LAW., MEDICAL MALPRACTICE LAWSUITS IN NORTH CAROLINA, 1998-2005 (2006), *available at* http://ncatl.org/file_depot/0-10000000/0-10000/9208/folder/18824/MedMalReport06.

236. *Id.*

237. McAllister v. Ha, 496 S.E.2d 577 (N.C. 1998); Jackson v. Bumgardner, 347 S.E.2d 743 (N.C. 1986).

> ness, appropriate care—are foremost in the hearts, minds, and actions of the physicians licensed by the Board.[238]

These guidelines also instruct that the physician is to have adequate communication with his patients and to have no conflicts of interest, as trust between physician and patient is fundamental.[239] Thus, the Medical Board itself recognizes that the negligent failure to communicate screening results is wrong. However, disciplinary action by the Board against a negligent physician is insufficient compensation for the parents faced with the exorbitant cost of health care for a disabled child. There must be legal recourse to recover for the financial harm created by a physician's post-conception prenatal negligence.

II. EUGENIC ABORTIONS

To many critics, genetic screening represents the "Nazification of medicine."[240] Routine prenatal care that incorporates genetic screening may be just a few steps away from widespread eugenics.[241] With the possibility of a genetically perfect child, parents would discard anything less.[242]

Medical advancements in genetic screening will continue regardless of whether courts allow claims for wrongful birth or wrongful life. Prenatal screening will continue to become an integrated part of prenatal care, demanded by parents wanting to avoid having children with birth defects.[243] The courts cannot change parents' hopes and expec-

238. N.C. MED. BD., POSITION STATEMENT, THE PHYSICIAN-PATIENT RELATIONSHIP (Sept. 2006), *available at* http://www.ncmedboard.org/ (follow "For Physicians" hyperlink; then follow "Board Position Statements" hyperlink).

239. *Id.*; *see also* Johnson, *supra* note 2 (stating that first trimester screening "should be considered by those who want prenatal screening and diagnosis as early as possible. However, they should understand that second-trimester screening remains the standard of care. And while it is the health care provider's obligation to fully inform the mother of her options, it is up to her to decide whether first-trimester testing will be done.").

240. *Health Warning Over "Nazi" Genetic Screening,* BBC NEWS, Aug. 9, 1999, http://news.bbc.co.uk/1/hi/health/415136.stm.

241. JOAN ROTHSCHILD, THE DREAM OF THE PERFECT CHILD 6-7, 62-64 (2005) (discussing "reformed eugenics").

242. *Id.* at 6 ("I argue that the discourse of the perfect child, as it aggregates slowly, will give rise to a health hierarchy of birth, setting criteria for the imperfect, and for the perfect. These criteria will be imbalanced economically, racially, ethnically, culturally, and by gender.").

243. The March of Dimes supports the January 2007 recommendation from the American College of Obstetricians and Gynecologists that "every pregnant woman, regardless of age, be offered an improved method of screening for Down syndrome" that involves a blood test and a special ultrasound. *See* March of Dimes, Professionals'

tations for healthy children by carving out an exception to medical malpractice. Prohibiting claims does not encourage the acceptance of children with birth defects; it only leaves women unprotected from the negligence of their prenatal health care workers. The current stance even holds physicians harmless for active attempts to withhold information or medical procedures from patients in an effort to prevent abortion.[244] While the state does not have to encourage abortion,[245] it should not sanction fraudulent, unethical medical care.

III. DISABILITY DISCRIMINATION

It is not surprising that people with disabilities could be offended by claims entitled "wrongful birth" or "wrongful life." Some people interpret the basis of the action as a statement that it would have been better to have been aborted than born with a defect.[246] This implies that the defect is the single most important aspect of the individual, neglecting the holistic view of the person.[247] Wendy Hensel argues that allowing the claims will set back the entire disability rights movement, as individuals will emphasize their unique situations to win damages rather than unite in "the shared experience of stigmatization."[248] Some courts, in refusing the claims, explain that allowing them could be construed as "the state's view that a handicapped child should not be deemed better off dead and of less value than a 'normal' child."[249]

& Researchers' Quick References and Fact Sheets, http://www.marchofdimes.com/professionals/14332_1214.asp (last visited Mar. 9, 2007).

244. *See, e.g.*, Azzolino v. Dingfelder, 322 S.E.2d 567, 573-74 (N.C. Ct. App. 1984) ("In response to a direct question from Mrs. Azzolino regarding the advisability of this procedure, defendant . . . spoke of her own personal and religious prejudices, and those of her husband, against the use of amniocentesis. She advised Mrs. Azzolino of the medical risks associated with amniocentesis, without setting those risks in the context of a complete risk-benefit analysis and thus unduly emphasized those risks.").

245. Maher v. Roe, 432 U.S. 464, 474 (1977) (holding the states may "make a value judgment favoring childbirth over abortion").

246. Brock, *supra* note 23, at 79; *see also* Tom Shakespeare, *The Social Context of Individual Choice*, *in* QUALITY OF LIFE AND HUMAN DIFFERENCE 217, 226 (David Wasserman et al. eds., 2005) (discussing the "assumption that 'disability' makes life not worth living, and that it would be better to be dead than disabled").

247. Wendy Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 144, 146-47 (2005) (discussing the implicitly discriminatory medical model of health followed in America by most practitioners).

248. *Id.* at 194-95.

249. Dansby v. Thomas Jefferson Univ. Hosp., 623 A.2d 816, 820 (Pa. Super. Ct. 1993); *see also* Hensel, *supra* note 247, at 176 ("Recovery in wrongful birth and wrongful life suits, on the other hand, does not affirm the value of the plaintiff's life -

It is true that allowing claims for wrongful birth and wrongful life will signify that health is preferred over disabilities or defects. Americans follow the "medical model" of health, in which the treatment and prevention of illness is the goal, rather than the acceptance of what some view as a mere difference.[250] Accepting these claims as regular medical malpractice claims and eliminating "wrongful" from the vocabulary of such actions would be less patently insulting to people with disabilities. The state cannot be so sensitive to the feelings of some individuals with disabilities that it does not hold physicians liable for malpractice. For instance, it would be unthinkable to prohibit a claim for malpractice where a physician negligently amputated a person's limb, as people without limbs would be insulted that their physical condition could be considered an injury.

NORTH CAROLINA'S DUTY TO RESPECT AND PROTECT PARENTAL RIGHTS

North Carolina recognizes an individual's fundamental right to control the course of his or her medical care[251] but does not provide legal recourse when a prenatal health care provider willfully or negligently interferes with this right. The legislature must remedy North Carolina's judicially-created policy of ambivalence toward prenatal negligence. The North Carolina Supreme Court acknowledged in *McAllister*,[252] contrary to the policy it declared in *Azzolino*,[253] that parents were harmed by the birth of a child with defects and deserved to pursue claims for the emotional distress resulting from the physician's negligence.[254] The court decisions addressing this area of medical malpractice have resulted in conflicting outcomes, with hollow distinc-

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instead, it negates it. This effect is most apparent in the wrongful life context, where recovery turns on the jury's conclusion that life with impairments is objectively worse than non-existence.").

250. Hensel, *supra* note 247, at 147.

251. N.C. GEN. STAT. § 32A-15(a) (2006) ("The General Assembly recognizes as a matter of public policy the fundamental right of an individual to control the decisions relating to his or her medical care, and that this right may be exercised on behalf of the individual by an agent chosen by the individual.").

252. McAllister v. Ha, 496 S.E.2d 577 (N.C. 1998).

253. Azzolino v. Dingfelder, 337 S.E.2d 528, 532 (N.C. 1985) (holding "life, even life with severe defects, cannot be an injury in the legal sense").

254. *McAllister*, 496 S.E.2d at 583 ("Plaintiffs alleged that defendant's negligence caused them 'extreme mental and emotional distress,' specifically referring to plaintiff-wife's fears regarding her son's health and her resultant sleeplessness. . . . [P]laintiffs' allegations here, while sparse, are sufficient to state a claim for negligent infliction of emotional distress.").

tions made between pre-conception and post-conception negligence[255] and between emotional and financial damages.[256]

At present, Maine is the only state with a statute specifically allowing wrongful birth and wrongful life claims following the birth of a child with defects.[257] It first declares that "the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child."[258] Thus, claims for damages following the birth of a healthy child are prohibited.[259] Wrongful birth and wrongful life claims following the birth of an "unhealthy child" are allowed, but damages are limited to expenses "associated with the disease, defect or handicap suffered by the child."[260] Finally, the statute clarifies that traditional medical malpractice claims related to injuries to or the death of the mother or fetus are not precluded by its language.[261]

The North Carolina supreme court recommended such a statute several times in *Azzolino* as the best way for parents to pursue claims for post-conception negligence.[262] Thus, the legislature should amend the medical malpractice statute to allow actions for medical malpractice based on the prenatal, post-conception negligence of a health care provider without using the terms wrongful birth or wrongful life. These malpractice claims could be based on lack of informed consent or negligence and would specifically provide a method for the plaintiff, whether the parents or the child, to recover for the extraordinary costs of necessary medical care and support for the child.

Unlike Maine's statute, a further limitation should be made in order to maintain North Carolina's respect for people with disabilities and to guard against frivolous lawsuits. North Carolina recognizes that individuals with terminal and incurable illnesses may decide that

255. *See* Gallagher v. Duke Univ., 852 F.2d 773 (4th Cir. 1988) (allowing claim for pre-conception negligence even though parents wanted to become pregnant with a healthy child).

256. *Compare McAllister*, 496 S.E.2d 577 (allowing claim for negligent infliction of emotional distress), *with Azzolino*, 337 S.E.2d 528 (prohibiting damages for economic injury).

257. ME. REV. STAT. ANN. tit. 24, § 2931 (2006).

258. § 2931(1).

259. § 2931(2) (allowing exception for damages following a "failed sterilization procedure," but damages are limited to medical expenses, pain and suffering, and loss of earnings related to pregnancy).

260. § 2931(3).

261. § 2931(4).

262. Azzolino v. Dingfelder, 337 S.E.2d 528, 537 (N.C. 1985).

death is preferable to life.[263] While some people may assert they would not want to live with a disability, our statutes clearly differentiate a disability from a terminal condition. Thus, this medical malpractice action should only be available to families and children born with conditions that a physician has diagnosed as terminal and incurable.

This limitation would allow parents or children to recover for the most devastating illnesses, such as Tay-Sachs disease, anencephaly, or Lesch-Nyhan syndrome, while preventing claims for conditions where individuals may live fulfilling, rewarding lives. Only if a child is born with such a severe defect that a physician could diagnose it as fatal would the family be able to pursue legal remedies. The family would also need to prove that it conveyed to the physician that in the event a severe defect was detected, the mother would terminate the pregnancy.

Like North Carolina, Maine legislators were concerned with escalating medical malpractice litigation; the purpose of the statute was to *limit* such claims.[264] Yet, Maine properly found a way to both limit claims and ensure that true victims of medical malpractice had legal recourse for the resulting extraordinary costs of health care.

Maine did not define "unhealthy child" for legal purposes.[265] This leaves the statute available to all persons claiming damage from the birth of a subjectively abnormal child. Critics of these statute-based claims would still fear the slippery slope. Claims for superficial traits of the child would soon follow claims for true birth defects.[266] Disability rights advocates would find flaws not only with recognizing disability as an injury but also with the language that implies disabled people are not considered normal.[267]

In its opinion denying claims for wrongful birth and wrongful life, the North Carolina Supreme Court expressed its fears that physicians would be subject to seemingly endless liability based on parents' fraudulent claims or capricious judgments about defects.[268] The court could foresee lawsuits over children born the "wrong" gender or as

263. N.C. GEN. STAT. § 90-320 (2006).

264. Musk v. Nelson, 647 A.2d 1198, 1200-01 (Me. 1994) (interpreting legislative effort to "repudiate[ ] certain types of actions" and limit damages for other actions by statute).

265. ME. REV. STAT. ANN. tit. 24, § 2931(3).

266. *See, e.g., Azzolino*, 337 S.E.2d 528, 535 ("When will parents in those jurisdictions be allowed to decide that their child is so "defective" that given a chance they would have aborted it while still a fetus and, as a result, then be allowed to hold their physician civilly liable?").

267. *See* Bernstein, *supra* note 47, at 321 (arguing that allowing claims sends a message that "the state places a higher value on its 'normal' citizens").

268. *Azzolino*, 337 S.E.2d at 535.

healthy carriers of a "deleterious gene."[269] A statute limiting the acceptable causes of action would ensure the *Azzolino* court's fears would not be realized.[270]

The proposed statute would not be as broad as Maine's statute—it would compensate parents or children for the medical expenses and other financial burdens associated with the child's terminal illness. Only those parents who sought genetic screening and shared their intent to abort a fetus found to have fatal defects could claim they were deprived of the option to terminate the pregnancy.

While North Carolina statutes do not force physicians or nurses "to perform or participate in medical procedures which result in an abortion" if they object on religious, ethical, or moral grounds,[271] those providers still have a duty of care to their patients and should not be allowed to commit medical malpractice based on any personal objection. If providers have an objection to a specific case, it is their duty to remove themselves from that patient's case in a manner that assures continuity of care.[272] Our statutes must recognize, as the medical profession itself does, that medical malpractice is never acceptable.

CONCLUSION

The future of prenatal medical technology is fast approaching, as scientists have more options among methods of diagnosis and are refining prenatal surgery.[273] The most advanced prenatal treatment is not yet widely available or reliable, and until it is, most parents are left with pregnancy termination as the only alternative to bearing a child with severe birth defects. It is time for North Carolina to acknowledge that prenatal, post-conception care is an increasingly routine medical specialty and allow parents and children to sue for malpractice if it occurs.

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269. *Id.*

270. *Id.* (discussing the possibility of lawsuits for children born the wrong gender or as carriers of defective genes).

271. N.C. GEN. STAT. § 14-45.1(e) (2006).

272. N.C. MED. BD., POSITION STATEMENT, THE PHYSICIAN-PATIENT RELATIONSHIP (Sept. 2006), *available at* http://www.ncmedboard.org/ (follow "For Physicians" hyperlink; then follow "Board Position Statements" hyperlink) ("[T]ermination of the physician-patient relationship must be done in compliance with the physician's obligation to support continuity of care for the patient.").

273. *See generally* Aris Antsaklis, *Fetal Surgery: New Developments*, 4 ULTRASOUND REV. OBSTET. & GYN. 245 (2004) (discussing cases in which prenatal surgery is now the best option to correct defects).

Our courts have already taken one step closer to the majority of other jurisdictions that recognize these claims, but this has resulted in an inequitable distribution of damages to parents who claim to be emotionally injured. There must also be recourse for those families who have emotionally accepted the child's condition but who need to be compensated for the financial injuries the physician's negligence caused. Maine's statute is a good starting point, but adjusting it to further limit claims only for fatal and incurable defects will balance North Carolina's public policy to respect life, while protecting the rights of parents who would have chosen to spare their child the pain of a terminal existence.

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