IN THE SUPREME COURT OF THE STATE OF OREGON

KERRY TOMLINSON and SCOTT TOMLINSON, individually, and KERRY TOMLINSON as guardian ad litem for her minor son Tomlinson,
Plaintiffs-Appellants, Petitioners on Review

v.

METROPOLITAN PEDIATRICS, LLC, an Oregon limited liability corporation; LEGACY CENTER, an Oregon non-profit Corporation, dba Legacy Emanuel Pediatric Development and Rehabilitation Clinic; and MARY K. WAGNER, M.D.,
Defendants-Respondents, Respondents on Review

and

LEGACY EMANUEL HEALTH CENTER, an Oregon non-profit corporation, dba Legacy Emanuel Health Center, and SHARON D. BUTCHER, CPNP,
Defendants.

Multnomah County Circuit Court No. 1109-11971
Court of Appeals No. A151978
Supreme Court No. S063956

PLAINTIFFS' OPENING BRIEF ON THE MERITS

On Review of the Opinion of the Court of Appeals on December 30, 2016
by Haselton, Chief Judge, with Lagesen, Presiding Judge, and Schuman, Senior Judge
in an Appeal from the Judgment of the Multnomah County Circuit Court
The Honorable Jean Kerr Maurer, Judge

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INTRODUCTION

Tomlinson (hereafter is the second child in his immediate family to suffer from Duchenne muscular dystrophy, a catastrophic genetic disorder that dooms him to progressive physical disability and paralysis and an early death. This is life for and it is life with an extraordinarily difficult burden.

and his parents brought this action, alleging that his older brother's physicians, consulted because of his developmental delay, failed to make a timely diagnosis of its cause, information that would have allowed the parents to avoid the substantial risk (a 50/50 chance) that any subsequent male child would suffer from the same disorder. The Court of Appeals recognized the existence of a viable claim by parents, for both economic and noneconomic damages resulting from bearing and caring for a second child afflicted with this disease. *Tomlinson v. Metro. Pediatrics, et al.*, 275 Or App 658, 687 (2015), *rev granted* 359 Or 847 (2016). But when it came to the child's own claim for the post-majority expense of the care he will need in his last years, and for compensation for the pain and suffering of a life burdened by this malady, the court concluded that he suffered no injury the law could recognize. *Id.* at 688. " alleged injury," the court said, "is life itself," and any damages inquiry would require an

impossible comparison between the value of nonexistence and the value of life with Duchenne muscular dystrophy. *Id.* at 689-690.

The only question presented by plaintiffs' Petition, and addressed in this brief, is the validity of the Court of Appeals' holding that "has failed to allege legally cognizable damages." *Id.* at 689. Other questions – the lack of a direct physician-patient relationship between plaintiffs and defendants, and the viability of the parents' claim for noneconomic damages – were raised by defendants petition (Supreme Court No. 063902), and plaintiffs will address them in response to defendants' opening merits brief.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Court of Appeals opinion includes a detailed statement of the facts alleged in plaintiffs' complaint and the procedural history in the trial court. 275 Or App at 661-71; *see also* Plaintiffs' Opening Brief in the Court of Appeals, at 4-8. What follows is a very brief summary.

Before Tomlinson (born in 2003) was two years old, he began to exhibit developmental delay and symptoms of serious illness. His parents sought medical advice from defendants beginning in November 2004, but not until 2010 did defendants diagnose Duchenne muscular dystrophy, "a severe and progressively debilitating neuromuscular disorder characterized

by muscle weakness and wasting, loss of the ability to walk (usually by age 12), progressive paralysis, and premature death." 275 Or at 661, quoting from plaintiffs' complaint. If a couple has a child with the disorder, "the chances are fifty percent that subsequent male children born to that couple" will also have it. *Id.* In 2008, two years before that diagnosis was finally made, was born. He also has Duchenne muscular dystrophy. *Id.* at 662. If defendants had diagnosed the cause of developmental delay in a timely fashion, the Tomlinsons would not have had another child. *Id.* at 663.

Defendants contended that because their patient was their obligation extended only to him. As plaintiffs pointed out in their opening brief to the Court of Appeals, since Duchenne muscular dystrophy is incurable and all treatment is palliative, an early diagnosis is chiefly important not for the difference it will make to the child, but for the information it provides to the parents of that child. Pl Open Br at 4, fn 1. Applying well-established principles of Oregon law, the Court of Appeals concluded that the parents had a cognizable claim for negligence, and could recover both economic and noneconomic damages. Even though defendants did not cause Duchenne muscular dystrophy, plaintiffs alleged their

negligence caused a child to be born to a life burdened with that affliction, and thus alleged an injury to the parents.

But because the parents, had they been informed, would not have conceived the court could not see "injury" as something other than "life itself." Therefore the court could not characterize the burden that life brought with it as a "legally cognizable" harm.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented: Where defendants have negligently failed to diagnose a genetic disorder, resulting in a child being born to a life of progressive incapacity and a premature death, does that child have a viable claim for compensation for his physical and mental suffering and the post-majority expense of his care resulting from the affliction that accompanied his birth?

Proposed Rule of Law: Under Oregon law, defendants are responsible for the foreseeable consequences of their negligence. The risk of another life burdened with this disorder is precisely the reason why defendants' conduct was negligent. The burden that Duchenne muscular dystrophy places on the child's life was foreseeable, and is a legally

cognizable injury for which the child may seek both economic and noneconomic damages.

SUMMARY OF ARGUMENT

Defendants had an obligation to diagnose the cause of developmental delay; had they done so they would have been obligated to inform the parents of the possible consequences; and the parents would have chosen not to risk the birth of another child with the same devastating genetic disorder as Thus the defendants' negligence set in motion a series of events leading directly to birth with an untreatable, progressive and ultimately fatal disorder. On these facts, the Court of Appeals correctly concluded that the parents had stated a viable claim for negligence and could seek economic and non-economic damages. The court erred, however, when it foreclosed recovery by the child who is forced to live painfully and die prematurely; claim fits as comfortably within the same well-established framework of negligence law as does the claim of his parents. It is no more difficult for a factfinder to assess the economic, physical, and emotional consequences of living with that condition in the child's case than it is in the parents' case, or in any other case involving a serious injury. And it is no more difficult in this case than in any other case,

for a factfinder to determine an amount of compensation that will ameliorate the economic and noneconomic burdens that have resulted from the defendants' negligence.

ARGUMENT

The Court of Appeals mischaracterized injury and rejected the claim on thinly-disguised public policy grounds.

The Court of Appeals rejected the "potentially 'loaded' labels" associated with the claims in this case – "wrongful birth," to describe the parents' claim, and "wrongful life" to describe – because the analysis instead "turns on established negligence principles in Oregon." 275 Or App at 665. The problem with the term "wrongful life" is that it suggests that the injury is life itself, rather than the impairment that necessarily accompanied it. *See* Pl Open Br at 37. But despite having rejected the term, the Court of Appeals nonetheless fell into the logical pit the term describes when the court reached the conclusion that " alleged injury is 'life itself.'" 275 Or App at 689.

The Court of Appeals began its discussion of claim by reiterating (five times within the first three sentences addressing the question) that a claim for negligence requires "legally cognizable damage."

275 Or App at 687-88. The court then summarized plaintiffs' allegations of negligence and causation, and stated:

> In other words, alleges that, but for defendants' negligence, he would never have been born. Thus, **alleged injury is life itself.** *Id.* (emphasis added).

The court rejected plaintiffs' argument that the "injury" is the impairment" that necessarily accompanied the life:

> [T]he fundamental problem with that characterization is that does not allege that defendants' negligence caused his *genetic condition*, nor could he. That condition existed upon conception. Rather the amended complaint alleges that would never have been conceived and born – that is, he would never have *been born at all* – but for defendants' negligence. *See Rich v. Foye*, 51 Conn Sup 11, 41, 976 A2d 819, 837 (2007) ("If the purpose of awarding compensatory damages to [the child] is to put her back in the position she would have been were it not for the defendants' alleged negligence, this position would be nonexistence[.]"). Thus, contrary to contentions, we agree with defendants that alleged injury is "life itself." *Id.* at 688-89 (italics in text).

The court then assumed, for the sake of analysis, "that 'life' can be an injury," and yet concluded that had no "legally cognizable damages" because the analysis would be "impossible":

> [A] trier of fact would be required to compare the value of nonexistence--the state that would have been in but for defendants' alleged negligence--and the value of his life with DMD. Simply put, as a matter of law, that comparison is impossible to make. 275 Or App at 689.

Unquestionably, defendants did not cause the genetic condition. But defendants' conduct was a cause of a child being born with this implacable burden. When a physician's negligence causes an injury to the fetus during the process of birth, and results in the birth of a child with a disabling condition, a jury is asked to assess the economic and noneconomic impacts of a life with that disability. *See, e.g., Klutschkowski v. Peacehealth,* 354 Or 150, 311 P3d 461 (2013). Likewise, in this case, plaintiffs allege that defendants' negligence resulted in the birth of a child with a disabling condition, and a jury would be asked to assess the economic and noneconomic impacts of a life with that burden. There is no practical difficulty, and there should not be a legal one. To determine plaintiffs' claim for the extraordinary care expenses necessitated by his progressive disability does not require any analysis of "the value of nonexistence;" to say it does simply makes no sense.

Three courts have recognized that the child's claim is consistent with common law principles.

Courts in three jurisdictions – California, Washington and New Jersey – have expressly recognized the validity of the child's claim, at least insofar as it seeks recovery for the extraordinary expenses that will be incurred after the child reaches the age of majority. *Curlender v. Bio-Sciences*

Laboratories, 106 Cal App 3d 811, 165 Cal Rptr 477 (1980) and *Turpin v. Sortini,* 31 Cal 3d 220, 182 Cal Rptr 337 (1982); *Harbeson v. Parke-Davis,* 98 Wn2d 460, 656 P2d 483 (1983); *Procanik v. Cillo,* 97 NJ 339, 478 A2d 755 (1984).

In *Curlender,* a child born with Tay-Sachs disease brought a claim against the laboratories that mistakenly told her parents they were not carriers of the disease. The court phrased the issue as presenting this question:

> What remedy, if any, is available in this state to a severely impaired child – genetically defective – born as the result of defendants' negligence in conducting certain genetic tests of the child's parents – tests which, if properly done, would have disclosed the high probability that the actual, catastrophic result would occur?

The court began with a survey of cases across the country, all of which concluded that the claim was not cognizable, and considered at some length the public policy arguments that had led courts to reject such a claim. 165 Cal Rptr at 481-487. For instance, the court summarized the New Jersey Supreme Court's holding in *Gleitman v. Cosgrove,* 49 NJ 22, 227 A2d 689 (1967) as barring recovery for two reasons: (1) "the perceived impossibility of computing damages" (because it required "measur[ing] the difference between [a] life with defects against the utter void of nonexistence"); and (2) "public policy" (a decision "negating the value of life" was seen as "an

impermissible expression of public policy"). 106 Cal App 3d at 482. And the *Curlender* court emphasized the "vastly different view" expressed by a dissenting opinion in *Gleitman*, which pointed out that permitting "a wrong with serious consequential injury to go wholly undressed" was "neither just nor compatible with" the principles of tort law. *Id.*

The California Court of Appeals concluded that the child's claim was "clearly consistent" with existing tort law principles. The court held that the plaintiff child could recover "damages for the pain and suffering to be enduring during the limited life span available to such a child" as well as "any special pecuniary loss resulting from the impaired condition." 165 Cal Rptr at 489. The court made this comment about the problems perceived by courts that had ruled otherwise:

> The circumstance that the birth and injury have come hand in hand has caused other courts to deal with the problem by barring recovery. The reality of the "wrongful-life" concept is that such a plaintiff both exists and suffers, due to the negligence of others. **It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all.** The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition plaintiff, however impaired she may be, has come into existence as a living person with certain rights.
>
> 106 Cal App 3d at 488 (emphasis added).

In *Turpin v. Sortini,* 31 Cal 3d 220, 643 P2d 954 (1982), the California Supreme Court limited the child's claim to economic damages. While hesitant to conclude "that this state's public policy establishes—as a matter of law—that under all circumstances "impaired life" is "preferable" to "nonlife," 643 P2d at 962, the court nevertheless found that "it is simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born," and "it would be impossible to assess general damages in any fair, nonspeculative manner." The "public policy" that made the court hesitate simply resurfaced as a logical impediment to determining noneconomic damages. Justice Mosk, in dissent, repeated and adopted the *Curlender* court's observation that the terms "pain and suffering" always refer to subjective states, "representing a detriment which can be translated into monetary loss only with great difficulty" but nonetheless "a genuine one that requires compensation," and the issue should be left to the jury in these cases as in any other. 643 P2d at 967 (Mosk, J., dissenting)(quoting *Curlender, supra,* 165 Cal Rptr at 489).

In *Harbeson, supra,* two children born with birth defects resulting from their mother's ingestion of Dilantin to control seizures brought an action against the prescribing physicians. The Washington Supreme Court,

answering certified questions from the United States District Court, concluded that "future children" were "foreseeably endangered by defendants' failure to take reasonable steps," and therefore recognized that the elements of duty, breach and causation were satisfied. 656 P2d at 496, 497. The court observed that "[t]he most controversial element of the analysis in other jurisdictions has been injury and the extent of damages," and then reiterated the proposition that the value of an impaired life had to be compared to the value of nonexistence. *Id.* at 496. That meant, the court said, that noneconomic (or "general") damages were "beyond computation," "impossible to establish with reasonable certainty," but no such difficulty prevented calculation of the "extraordinary expenses for medical care and special training," and therefore a claim for such economic damages was cognizable. *Id.* at 496-97.

In *Procanik v. Cillo*, *supra*, the New Jersey Supreme Court overruled a 17-year-old contrary precedent and recognized a child's claim for damages after physicians failed to diagnose rubella during the first trimester of his mother's pregnancy, thereby depriving his parents of the choice of terminating the pregnancy. The court concluded that the child could recover "the extraordinary medical expenses attributable to his affliction." 478 A2d at 757. But the court decided that "there is no rational way to measure non-

existence or to compare non-existence with the pain and suffering of his impaired existence," and it therefore made what it straightforwardly termed "a policy choice" that the damages for pain and suffering were too "speculative" to allow the child to claim them. 478 A2d at 763.

In all three jurisdictions, the courts found that a child born with an impairment was a foreseeable consequence of a health care provider's negligence – in other words, that the claim fit well within existing tort principles.

Cases that reject the child's claim, in whole or in part, have consistently reiterated the same "public policy" concerns

In *Lininger v. Eisenbaum,* 764 P2d 1202, 1210 (Colo 1988), the court described the problem as follows:

> [A] person's existence, however handicapped it may be, does not constitute a legally cognizable injury relative to non-existence. Our finding of such an injury would require first, that we value Pierce's present station in life; second, that we ascertain the value to Pierce of his not having been born; and finally, that we determine that the latter value is greater than the former. Because we find it impossible to complete those steps in any rational, principled manner, we cannot find that Pierce has suffered an injury sufficient to support a claim for relief.

The court therefore concluded "that [the child's] life, however impaired and regardless of any attendant expenses, cannot rationally be said to be a

detriment to him when measured against the alternative of his not having existed at all." *Id.* at 1212.

But the court doesn't explain why that comparison is necessary in order to find an injury or assess damages. How many jurors estimate an overall "value of life" as it was before the injury and then compare it with the "value of life" after the injury? The process as described appears woefully abstract. As the *Lininger* court went on to say:

> The relevant question – of what value to [the child] would his non-existence have been? – is entirely too metaphysical to be understood within the confines of law, if indeed, the question has any meaning at all. *Id.* at 1210.

Undoubtedly, the question is too metaphysical. The point is, it doesn't have to be asked.

Another court was particularly eloquent in its delineation of the "nonexistence problem:"

> Because of the nature of the complaint, in which the value of existence (a condition allegedly caused by defendants) is set off against the value of nonexistence (the condition allegedly wrongfully withheld), it is appropriate to compare the value of nonexistence to the plaintiff, as against the value of existence.
> * * *
> Were we to recognize **the child's claim that it was injured by being denied nonexistence**, we would be required to speculate that this child, unlike other similarly situated persons, would be unable to derive any significant meaning, pleasure or satisfaction from its life, and therefore, that its *life* is of such minimal benefit as to constitute an injury.

> Because we have no way of knowing what opportunities will be available to this child or how the child will respond to life in general, we cannot say how the child's pain and suffering will compare to the benefits of its life, and thus, we cannot determine that its life constitutes an injury.
>
> *Ellis v. Sherman,* 512 Pa 14, 515 A2d 1327, 1329 (Pa 1986)(emphasis added).

But the child doesn't claim "that it was injured by being denied nonexistence" or that its very life constitutes an injury. The child claims an injury because it must live with an enormous burden of progressive incapacity, a burden put in place as an unavoidable component of his life by the defendants' negligence. As stated by a dissenting justice: "'Any argument that **this life of suffering** is not the natural and probable consequence of [the doctor's] misconduct is rank sophistry.'" 515 A2d at 1330 (Larsen, J., dissenting)(quoting *Speck v. Finegold,* 497 Pa 77, 439 A2d 110, 118 (1981)(emphasis added).

Courts that have rejected the child's cause of action have suggested that recognizing such a claim would be "inconsistent with more fundamental principles that sanctify life," or would "denigrate the rights and dignity of disabled persons," and would involve "a value judgment about life itself" that would be too immersed in individual philosophy and theology to be a reasoned verdict. *Kassama v. Magat,* 368 Md 113, 792 A2d 1102, 1117, 1123-24 (2002); *see also Phillips v. United States,* 508 FSupp 537, 543 (D

SC 1980)(the "fundamental policy" of "the preciousness and sanctity of human life" precludes a "wrongful life" claim). One court has suggested that "even a jury collectively imbued with the wisdom of Solomon would be unable to weigh the fact of being born with a defective condition against the fact of not being born at all." *Willis v. Wu*, 362 SC 146, 607 SE2d 63, 71 (2004). Whether phrased as a lack of a "legal injury,"[1] or articulated as "policy reasons" (*Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill2d 230, 512 NE2d 691, 695 (1987)), or re-phrased as an asserted "impossibility" of calculating damages,[2] every objection to a negligence claim such as

> is inevitably lost in the metaphysical shoals, foundering on the fact that the child would not have been born at all if the defendants had not been negligent.
>
> injury is not life itself; it is having to live a life that is limited, burdened and prematurely ended by the genetic disorder that came with it. Damages in this action would be no more or less difficult for the factfinder to assess than damages in any personal injury action.

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[1] *See, e.g., Ellis v. Sherman, supr.a* 515 A2d at 1329; *Kassama, supra*, 792 A2d at 1123.

[2] *See, e.g., Kassama, supra*, 792 A2d at 1123-24 (stating that it is "an impossible task to calculate damages based on a comparison between life in an impaired state and non-existence").

"Public policy" is not a sufficient basis for declining to recognize the child's claim.

As demonstrated above, "public policy" has repeatedly been the express basis for rejecting the child's claim for damages.

This court has repeatedly held that "public policy" is not an acceptable basis for carving out an exception to the application of common law principles. In *G.L. v. Kaiser Foundation Hospitals, Inc.*, 306 Or 54, 59, 757 P2d 1347 (1988), the plaintiff attempted to hold defendant hospital vicariously liable for a sexual assault by an employee. The court declined to expand the well-established rules of vicarious liability, stating that "judicial fashion or personal policy preference * * * are not sufficient grounds" for modifying common law principles. The court pointed out that in *Donaca v. Curry County*, 303 Or 30, 36, 734 P2d 1339 (1987), it had refused to modify the potential liability of the county "in all cases involving the trimming of roadside brush on the 'policy' ground that such potential liability would impose additional costs on the scarce resources of the county." 306 Or at 58. In *Donaca*, in refusing to affirm the Court of Appeals' policy rationale for rejecting the plaintiff's claim, the court said:

> [W]e have not embraced freewheeling judicial "policy declarations" in other cases. In recent years, for instance, this court has declined to explain tort liability for injuries from defective products by a "loss-spreading" rationale, *Wights v. Staff Jennings, Inc.*, 241 Or 301, 309-10, 405 P2d

> 624 (1965), to decide for or against intrafamily immunity from negligence liability by assessing the defendant's potential conflict of interest when his or her liability is covered by insurance, *Winn v. Gilroy*, 296 Or 718, 728, 681 P2d 776 (1984), or to consider either the use of liability insurance or possible burdens on the courts as factors in defining substantive claims and duties, *Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or 543, 652 P2d 318 (1982).
>
> 303 Or at 36.

See also Keltner v. Washington County, 310 Or 499, 800 P2d 752 (1990)(Asserted "public policy" was not a sufficient basis for changing the well-established rule that mental distress damages cannot be recovered in an action for breach of contract.).

This should be particularly true when the asserted policy is more a tenet of personal philosophy than a proposition of law.

has a progressive, debilitating and ultimately fatal disorder. There is no cure; there is simply palliative care. His older brother has the same disorder, and he will have to watch it take first, knowing he will have the same experience. He will watch his parents grieve, and participate in that grief, and know that they will suffer again as he gets closer to the end. Life is precious, but this is a life with a tragic burden. And the burden that rests on that life and will eventually extinguish it was the foreseeable result of the defendants' failure to diagnose As in any

other negligence case, parts of that burden can be alleviated by an award of damages for the cost of his maintenance and care and for the physical and mental suffering he is doomed to experience. No social policy or personal philosophy should foreclose this claim.

A refusal to recognize claim results in unacceptable anomalies.

In *Zehr v. Haugen*, 318 Or 647, 871 P2d 1006 (1994), this court held that a husband and wife had a viable claim against an obstetrician who failed to perform a requested tubal ligation at the time of the wife's cesarean section delivery. As a result, the Zehrs had a third child, and sought economic damages for the cost of raising and educating that child, as well as noneconomic damages "related to emotional suffering and to plaintiffs' changed family situation." 318 Or at 650. Defendants in that case argued that "the birth of a healthy, normal child cannot be 'harm.'" 318 Or at 657. This court disagreed: the fact "that other people reasonably may consider the birth of a child to be a beneficial event" did not foreclose a claim for damages. *Id.*

Consistent with such a case as *Zehr*, the Court of Appeals has properly held in this case that the Tomlinsons can seek damages stemming from the birth of a child with a genetic disorder that condemns him to progressive incapacity and a premature death. The birth – the "life itself" –

of a child who is not "healthy" and "normal" can also be the basis for a damages claim by the parents.

Why, then, cannot the child—who necessarily carries the burden of the genetic condition he was born with—not recover compensation for its effects? The Court of Appeals answer is that his injury is "life itself" and cannot be measured. That answer simply creates an anomaly: it cannot be reconciled with the holding in *Zehr*, or with the Court of Appeals' own holding regarding the parents' claim. That was the conclusion of the California Supreme Court in *Turpin v. Sortini*, *supra*: "[I]t would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care." 31 Cal 3d at 348. *See also Lininger v. Eisenbaum*, 764 P2d 1202 (Colo 1988)(Mullarky, J., dissenting)("Since the claims of [the child] and his parents are so closely related and, indeed, mutually dependent, I see no reason to deny one while allowing the other to stand."); *Procanik v. Cillo, supra,* 478 A2d at 762, suggesting a slightly different rationale: "Whatever logic inheres in permitting parents to recover for the cost of extraordinary medical care incurred by a birth-defective child, but in denying the child's own right to recover those expenses, must yield to the inherent injustice of that result."

As one commentator has said, such an approach simply "turns a blind eye to considerations of compassion and fairness for plaintiffs who must live with birth defects attributable to negligent conduct." Hanson, *Suits for Wrongful Life, Counterfactuals, and the Nonexistence Problem,* 5 So Cal Interdisciplinary L J 1, 6 (1996). In *Procanik, supra,* the New Jersey court stated:

> Law is more than an exercise in logic, and logical analysis, although essential to a system of ordered justice, should not become a[n] instrument of injustice. * * * We need not become preoccupied * * * with these metaphysical considerations. Our decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living. We seek only to respond to the call of the living for help in bearing the burden of their affliction. 478 A2d at 762-63.

Thus all three courts that have recognized the validity of the child's claim have set aside the "nonexistence conundrum," at least as to the claim for economic damages, and have concluded that "the action conforms comfortably to the structure of tort principles." *Harbeson, supra,* 656 P2d at 488. That is the theme reiterated by many of the academic commentators. *See, e.g.,* Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence,* 55 Ala L. Rev 327, 371 (2004)("Wrongful life cases should be analyzed under basic negligence principles."); Jackson, *Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England,* 17 Loy.

L.A. Int'l & Comp L. Rev. 535, 543-44 (1995)(arguing that "wrongful life" actions satisfy "each of the requirements for a traditional tort action" and "substantial injustice" results when courts refuse to recognize them.); Kelly, *The Rightful Position in "Wrongful Life" Actions*, 42 Hastings L.J. 505, 507-08 (1991)(arguing that the theories underlying traditional tort principles support recovery for "wrongful life").

Although all three courts that have recognized the validity of the child's claim for economic damages have nonetheless rejected the claim for pain and suffering, they have done so for the same reasons they find insufficient to justify rejecting the claim for an economic injury. Thus the anomaly that they reject – recognizing the parent's claim but not the child's – resurfaces when they use the same arguments to justify a failure to recognize a claim for noneconomic damages that they had found insufficient to justify a failure to recognize the child's claim in the first place. As the dissenting justice remarked in *Procanik v. Cillo, supra*: the asserted "preference for nonlife over life" that troubled the court when analyzing the child's claim for noneconomic damages was simply "a self-created hypothesis." 478 A2d at 765 (Handler, J., dissenting). This makes no sense.

There are no insuperable impediments to the assessment of damages, either economic and noneconomic.

Every damages award requires a jury to look at the evidence and calculate what effect this disability has and will have on a person's ability to conduct a normal life; and in this case as in any other, there will be evidence about the effects of the disability, the costs of living with that disability, and the amount of physical and emotional suffering that results from it.

The Court of Appeals' first mistake was the assumption that the injury in this case was "life itself." The Court of Appeals compounded that error when it conflated one method of assessing the damage in an injury case – comparison of "the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence" – with the question of whether or not the damage is compensable, and because the court finds it "impossible to make" a comparison between "life in an impaired condition and the utter void of nonexistence," it then concludes there is no actionable harm. 275 Or App at 689, quoting in part *Berman v. Allan,* 80 NJ 421, 404 A2d 8, 11-12 (1979). But such a comparison is not a *sine qua non* of a damages computation. It may be equally "impossible" for jurors to determine what the quality of life would have been for a child that suffered a brain injury at birth, had that injury not occurred, and yet jurors find it possible to make some

measurement of the suffering involved in living with the injury that did occur.

Indeed, it simply isn't true that the purpose of awarding compensatory damages must be to return the plaintiff to the position he would have occupied were it not for the defendant's negligence. 275 Or App at 689 (quoted *supra*). That model can work with economic damages; money can replace money. But it does not work at all as a mental construct for noneconomic damages. The lost limb, the capacity for movement, the physical and mental health – they can't be returned. Money can ameliorate, but it can't replace; and so the compensation the law envisages is a monetary award, a financial benefit, sufficient to provide opportunities, comforts and distractions that would otherwise probably not have been needed or even wanted.

And the asserted "impossibility" of assessing damages just doesn't survive scrutiny. In *Sylvia v. Gobeille*, 220 A2d 222 (RI 1966), the mother's physician negligently failed to prescribe gamma globulin notwithstanding her exposure to rubella (German measles). In *Walker v. Mart*, 790 P2d 735 (Ariz 1990), the mother's obstetrician failed to perform tests that would have revealed her exposure to rubella, and failed to warn of the potential damage to the fetus that she would have aborted had she known of the risk. In both

cases the children were born with severe birth defects stemming from rubella syndrome. The only material difference between the two cases is that in the Rhode Island case, the administration of gamma globulin could have avoided the injury; and in the Arizona case the only remedy was abortion, or not being born at all. In the Rhode Island case, the child had a right of action for a prenatal tort; in the Arizona case the child had no claim. And yet the damages were exactly the same. This inconsistency is indefensible. In both instances, the defendant's negligence resulted in a life that is burdened with extraordinary difficulties, and the foreseeability of that burdened life is precisely what made the defendant's conduct negligent. In both instances, a jury would face precisely the same inquiry in assessing damages, and would be invited to posit what a "normal" life would have looked like and to measure that against the added burdens that resulted from the defendant's negligence.

The United States Supreme Court remarked *Story Parchment Co. v. Paterson Paper Co.*, 282 US 555, 563 (1931).

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show that extent of the damages as a matter of just and reasonable

> inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

There is no logical impediment to a jury's assessment of the economic and noneconomic effects of the genetic disorder that afflicts life.

CONCLUSION

Defendants' neglect of their responsibility to diagnose the cause of Tomlinson's developmental delay resulted, as was foreseeable, in another life with extraordinary burdens. The only question is whether the law will place on defendants the responsibility to compensate for having to live that circumscribed life. Plaintiffs urge the court to reverse the Court of Appeals on this question, hold that has alleged a claim for a legally cognizable injury, and allow him to seek from a jury an award that will ameliorate the burden the defendants' negligence has sentenced him to carry.

Respectfully submitted,

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I certify that on this date I electronically filed the foregoing **Plaintiffs' Opening Brief on the Merits** with the State Court Administrator and on this same date I served that document by conventional email on:

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DATED this 18th day of August, 2016.

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