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 Edward 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' AMENDED REPLY 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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PLAINTIFFS' REPLY TO DEFENDANTS' MERITS BRIEF

Defendants persist in mis-characterizing Teddy's claim for relief.

Plaintiffs introduced their opening brief in the Court of Appeals with a brief discussion of the problems inherent in the use of such labels as "wrongful life" and "wrongful birth" to describe plaintiffs' claims for medical negligence. Pl Open Br at 9-11. In its opinion, the Court of Appeals began its discussion of the procedural history of this lawsuit with the comment: "[W]e eschew the use of those potentially "loaded" labels as unhelpful to our analysis, which turns on established negligence principles in Oregon." *Tomlinson v. Metro. Pediatrics, LLC*, 275 Or App 658, 665 (2015). And this court took the same approach (but without comment) in *Zehr v. Haugen*, 318 Or 647 (1994), where defendants characterized the plaintiffs' claim (involving a failure to perform a tubal ligation after delivering their second child) as one for "wrongful pregnancy;" this court simply held that plaintiffs' allegations met all the requirements of existing negligence law, and therefore stated a viable negligence claim.

But defendants insist on reiterating those labels, going so far as to rephrase the "question presented" by plaintiffs' petition as whether "Oregon law recognizes a claim for wrongful life" (Defs' Resp Merits at 1), rather

than the "question presented" that appears in Plaintiffs' Petition (at 3-4) as well as their Opening Brief on the Merits (at 4):

> 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?

That is the question this court granted review to address. [1]

Teddy does not claim damages for "life itself."

But the "wrongful life" terminology gives defendants the perfect excuse for insisting that Teddy claims damages for "life itself." Teddy does not assert that "life itself" is wrongful; he seeks a remedy to assist with the extraordinary burdens that must accompany the life he must live as a result of defendants' negligence**.**

And the difference can be seen in the nature of the compensation Teddy seeks. Defendants criticize the claim for the "extraordinary

[1] The court's media release on June 30, 2016 described the question presented by plaintiffs' Petition in similar terms, with an additional clause mentioning the parents' uninformed decision as a part of the causal connection: "If defendants are alleged to have negligently failed to diagnose a genetic disorder in a child, with the consequence that the parents of the child gave birth to a sibling with the same genetic disorder, who will experience a life of progressive incapacity and a premature death, does the sibling have a viable claim for compensation for his physical and mental suffering and the post-majority expense of his care resulting from the genetic disorder?"

expenses" resulting from the disorder that afflicts Teddy's life, stating that this is "logically inconsistent" with plaintiffs' "theory of relief" because that "theory" is that "life itself" is the damage and hence plaintiffs should be seeking compensation for all the expenses of living. Defs' Resp Merits at 9. But that's not plaintiffs' "theory of relief," it's defendants' theory, and they state it in those terms in order to create the metaphysical conundrum that leads courts to deny recovery. Teddy is not claiming "that life is not worth living." Defs' Resp Merits at 15. Defendants' continued invocation of the "wrongful life" label is simply a way of avoiding their involvement in sentencing Teddy to an existence of pain, progressive paralysis, and death at a young age. These are the damages for which Teddy seeks compensation.

The descent into "public policy."

Defendants' approach leads inevitably to an analysis rooted in public policy determinations. The Maryland court, for example, states straightforwardly that the claims are rejected because of a "doctrinal unwillingness" to accept that life with a burden "is worse than nonexistence" – an approach that seems broad enough to foreclose any claim at all – or an asserted "metaphysical or practical inability" to measure damages – which it insists requires a comparison between "the value of an impaired life as opposed to utter nonexistence." *Kassama v. Magat,* 368 Md 113, 792 A2d

1102, 1117 (2002) (quoted in Defs' Resp Merits at 16). The Colorado Supreme Court also threw up its hands in terminal dismay at the idea that a jury would have to decide "what value" nonexistence would have, finding it "entirely too metaphysical" to have meaning. *Lininger v. Eisenbaum*, 764 P2d 1202, 1210 (Colo 1988) (quoted in Pls' Open Merits at 13-14). Defendants even suggest that recognizing the validity of this child's claim for damages denigrates or "stigmatizes" those who live with disabilities, and could even impair "efforts to advance the equal treatment of disabled persons." Defs Resp Merits at 18. Putting aside the offensive proposition that the Tomlinsons, by seeking compensation to alleviate their son's burdens, are suggesting that his life has no worth, this court has stated clearly that such policy considerations should have no role to play in determining whether a claim is cognizable. *G.L v. Kaiser Foundation Hospitals, Inc.*, 306 Or 54, 59 (1988) (rejecting an invitation "to write new policy for hospital liability" based on "judicial fashion or personal policy preference").

The asserted difficulty in assessing damages is mythical.

Teddy's claim does not require a "hypothetical comparison" between life with Duchenne muscular dystrophy and "nonexistence" (Def's Resp Merits at 9), any more than it requires a determination that "life itself" is

"not worth living." *Id.* at 10. The factfinder may indeed compare the difficulties of life with this genetic disorder and a life without it – exactly the comparison a jury might make in a birth injury case. And in a birth injury case, as in this case, the factfinder may have no way to determine exactly what shape that life would have taken had it not been for the injury that accompanied his birth. As plaintiffs have repeatedly pointed out (most recently in Pls' Open Merits at 23-25), there is no rule that requires a jury to compare "life as it would have been" with "life as it is now" when it determines the amount of damage that resulted from the defendants' negligence; the uniform jury instructions discuss the elements of damages, but do not prescribe a method of analysis that the jury is compelled to follow in reaching its figures. *See, e.g.,* Uniform Civil Jury Instruction 70.02.

In fact, defendants' phrasing betrays their argument: They say that "[t]here can be no comparison of *Teddy's* life with DMD and *a life* without it, because there was no other way *Teddy* could have been born." Defs Resp Merits at 8, italics added. But the fact that this genetic disorder is part of Teddy's genetic identity does not mean that the jury can't do what it often does: it can compare Teddy's life, with the burdens that result from that genetic disorder, to "*a life*" without such burdens. A jury in this case would

do exactly what a jury does in any other injury case: assess the economic and noneconomic consequences resulting from defendants' negligence.

Conclusion

Defendants urge this court to disregard the brief submitted by *Amicus Curiae* Oregon Trial Lawyers Association, claiming that the author's reference to "negligent genetic counseling" is a fatal and material discrepancy from the facts. Plaintiffs allege, and will prove, that when defendants undertook to diagnose and treat Manny, the standard of care required the test that would have disclosed the genetic disorder responsible for his problems, and the reason it does so is to prevent what happened here – the birth of Teddy. Plaintiffs even allege that defendants were negligent "in failing to advise and counsel" them regarding the danger that another child would be afflicted. ER 5 (Amended Complaint, ¶11(e)). What OTLA addresses in its brief is the legal principle at the heart of plaintiffs' arguments: foreseeability. Defendants' concerns with labels are designed to obscure the fact that Teddy's birth with this debilitating and ultimately fatal genetic disorder was the foreseeable consequence of their failure to diagnose his brother's developmental delay, and was precisely the reason their conduct violated the standard of care.

Teddy Tomlinson has stated a viable claim for the economic and noneconomic consequences of living with and dying prematurely from Duchenne muscular dystrophy. The judgment for defendants should be reversed and the case remanded for trial.

Respectfully submitted,

/s/Kathryn H. Clarke

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CERTIFICATE OF COMPLIANCE

Brief length:

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and the word count of this brief is 1395 words.

Type size:

I hereby certify that the size of the type in this brief is not smaller than 14 point for both text and footnotes as required by ORAP 5.05(4)(f).

CERTIFICATE OF SERVICE AND FILING

I certify that on this date I electronically filed the foregoing **Plaintiffs' Amended Reply 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 19th day of October 2016.

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