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 EMANUEL HOSPITAL & HEALTH CENTER, dba Legacy Emanuel Pediatric Development and Rehabilitation Clinic; and MARY K. WAGNER, M.D.;
Defendants-Respondents,
Respondents on Review,

and

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

Court of Appeals No. A151978

Supreme Court No. S063956

Multnomah County Circuit Court No. 1109-11971

RESPONDENTS ON REVIEW LEGACY EMANUEL HOSPITAL & HEALTH CENTER, METROPOLITAN PEDIATRICS, LLC, AND MARY K. WAGNER, MD'S JOINT RESPONSE BRIEF ON THE MERITS

On Review of the Decision of the Court of Appeals
December 30, 2015
Before Lagesen, P.J., Haselton, C.J. and Schuman, S.J.
In an Appeal from the Judgment of the Circuit Court
for Multnomah County, Honorable Jean Kerr Maurer, Judge

Lindsey H. Hughes, OSB No. 833875
Hillary A. Taylor, OSB No. 084909
Robert M. Keating, OSB No. 731620
Keating Jones Hughes, P.C.
One SW Columbia, Suite 800
Portland OR 97258
503-222-9955
Attorneys for Defendant-Respondent/Respondent on Review Legacy Emanuel Hospital & Health Center, an Oregon non-profit corporation dba Legacy Emanuel Pediatric Development and Rehabilitation Clinic

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(Continued on following page)

Michael J. Estok, OSB No. 090748
Paul Silver, OSB No. 783791
Nikola Lyn Jones, OSB No. 941013
Lindsay Hart, LLP
1300 SW Fifth Avenue, Suite 3400
Portland OR 97201
503-226-7677
Attorneys for Defendants-Respondents/Respondents on Review
Metropolitan Pediatrics, LLC, and Mary K. Wagner, MD

William A. Gaylord, OSB No. 731043
Linda K. Eyerman, OSB 761306
Gaylord Eyerman Bradley, PC
1400 SW Montgomery
Portland OR 97201
503-222-3526

Craig A. Nichols, OSB No. 830700
Nichols & Associates
4614 SW Kelly Avenue, Suite 200
Portland OR 97239
503-224-3018

Kathryn H. Clarke, OSB No. 791890
P.O. Box 11960
Portland OR 97211
503-460-2870
Attorneys for Plaintiffs-Appellants/Petitioners on Review

Travis Eiva , OSB No. 052440
Zemper Eiva Law
101 E. Broadway, Suite 303
Eugene OR 97401
541-484-2525
Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association

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QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question: Can a physician be liable for *medical malpractice* (here, negligent failure to diagnose a patient) to a third party, including a sibling, who has never been a patient of the defendant physician?

First Proposed Rule of Law: To state a claim for medical malpractice against a physician, the plaintiff must have had a physician-patient relationship with the defendant physician.

Second Question: Does Oregon law recognize a claim for wrongful life?

Second Proposed Rule of Law: Oregon law does not and should not recognize a claim for wrongful life. A child born with a genetic condition that asserts he would have been better off having never been born does not state a claim for relief.

NATURE OF THE ACTION AND RELIEF SOUGHT

This action presents a claim for medical malpractice by plaintiff (“ Tomlinson, through his guardian ad litem Kerry Tomlinson, against a pediatrician (Mary K. Wagner, MD), an associated clinic (Metropolitan Pediatrics), and a pediatric center operated by Legacy.

was born in 2008 and later diagnosed with Duchenne’s muscular dystrophy (“DMD”), a genetic disorder. It is undisputed that has never

had a physician-patient relationship with any defendant, and that no defendant ever undertook to engage in the practice of medicine to any degree toward him.

theory, referred to as a "wrongful life" claim by most jurisdictions and commentators, is that if defendants had not acted negligently, he would not have been born, *i.e.*, his parents would have avoided conceiving him or else would have terminated the pregnancy prior to his birth. The missed opportunity to avoid birth must *not* be viewed from the perspective of his parents, who have alleged their own claims for relief. *See* S063902. Rather, it must be viewed from *own perspective — viz.*, that has been injured and sustained compensable damage by virtue of being born instead of never coming into existence in the first place.

complaint sought to recover both economic and non-economic damages. For economic damages, seeks the "extraordinary costs for the medical care, education and support he will require on account of his genetic condition" after the age of majority, as well as the loss "of all of his future earning capacity." ER 7. also seeks $10 million in non-economic damages for emotional pain and suffering. *Id*.

On June 25, 2011, the trial court (Hon. Jean Maurer) dismissed the case on Rule 21 motions, due to the admitted lack of a physician-patient relationship and also because claim for wrongful life is not legally cognizable under Oregon law. ER 30-35. On December 30, 2015, the Court of Appeals

affirmed the dismissal of claims. Plaintiff filed a petition to this Court which allowed review on June 30, 2016.

SUPPLEMENTAL STATEMENT OF FACTS

Defendants accept the statement of facts set forth in the Court of Appeals' opinion, 275 Or App 658, 664-64, as an accurate representation of the facts alleged.

The characterization of the facts by OTLA in its amicus brief, however, misses the mark. OTLA makes several statements about "genetic counseling," that defendants "violated the standards of genetic counseling," and that defendants were required to "provide reasonable genetic counsel to the Tomlinsons." OTLA Amicus Brief, 1, 2. OTLA appears to misunderstand the facts and allegations in a material way. As the Court of Appeals noted:

> "In this case, there are no allegations of treatment, consultation, or reproductive or genetic counseling or screening involving the Tomlinsons. Further, there are no allegations of affirmative misdiagnoses or representation on which the Tomlinsons relied in deciding to conceive another child."

275 Or App at 678 n 10. It is undisputed that no plaintiff — not nor his parents — alleges an affirmative treatment relationship with any defendant or any relationship or treatment involving genetic counseling. Thus, to the extent OTLA's arguments rely on a mistaken premise, they should be disregarded.

SUMMARY OF ARGUMENT

claim for medical malpractice against medical providers with whom he has had no relationship must fail for the same reasons the claims asserted by his parents fail. *See* S063902.

Additionally, even if could satisfy the requirements needed to state a medical malpractice claim, his claim remains deficient and is not cognizable. Because seeks to recover on a theory that had defendants not been negligent he would not have been born, his claim is for wrongful life. The Court of Appeals correctly ruled that "life," even one with a debilitating genetic condition, is not a compensable harm under the law. This Court should therefore affirm the dismissal of claim.

ARGUMENT

I. Plaintiff fails to state a claim for medical malpractice.

This Court need not reach the question regarding whether a claim for "wrongful life" is a cognizable theory of recovery because the lack of a physician-patient relationship between and any defendant is dispositive.

admits he was never a patient of defendants, and yet the claim asserted in his complaint is unmistakably a claim for medical malpractice. Thus, claim fails because he cannot satisfy this prerequisite to a medical malpractice claim. Just as parents cannot state claims arising from alleged medical malpractice to their elder son Manny, neither can The trial court

correctly dismissed claim on that ground and it serves as an additional basis on which this court should affirm.

In defendants' Joint Brief on the Merits as to the parents' claims in S063902, they set forth the authorities governing the legal standard for medical malpractice cases, including the requirement for a physician-patient relationship, the proper role of foreseeability, and related issues. Defendants incorporate those arguments here, as they equally apply to claim. Rather than address those issues in their Brief on the Merits, plaintiffs reserved their argument on those issues for their response to defendants' merits brief. Pltf's Brief, 2. To avoid redundancy, defendants reserve further argument on those issues and intend to request leave to file a reply in S063902.

II. Oregon law does not allow recovery on a theory of wrongful life.

A. The "wrongful life" theory.

Other jurisdictions have categorized negligence claims related to unwanted children under three theories of recovery: wrongful conception, wrongful birth, and wrongful life. *Kassama v. Magat,* 368 Md 113, 135, 792 A2d 1102, 1115 (2002) (*Kassama II*) (summarizing those three theories). Of course this Court should not decide the case based on the labels attached and defendants do not advocate for such an approach.

The gravamen of a wrongful life claim is the assertion that had the physician not been negligent, the parents would not have conceived or would

have terminated the pregnancy, and the child would never have been born to experience the pain and expense occasioned by the genetic disorder with which he or she was born. Because sought damages for being born with DMD, as compared to not being born at all, his claim is for wrongful life. Defendants describe the claim for what it is—a claim that plaintiff would be better off had he not been born.

Recognizing a wrongful life claim in Oregon would expand physicians' duties beyond their patients to those who are not born or even conceived. Whether such a theory is cognizable is an issue of first impression for this court, although the reasons why the claim fails are controlled by settled principles of Oregon law.

B. The Court of Appeals was correct to affirm the dismissal.

The trial court ruled claim fails for two reasons: (1) it is "not legally cognizable in Oregon," and (2) "there is no yardstick by which to measure [his] damages." ER 29-30. It "agree[d] with the reasoning of those courts [that] have examined such causes of action and conclude[d] that the viability of such claims is better left to policy-makers than to judges and juries." *Id.*

The Court of Appeals affirmed, holding that "under established negligence principles in Oregon, allegations are insufficient to state a cognizable negligence claim because he failed to plead that he suffered legally

cognizable damages." 275 Or App at 687-88 (footnote omitted). The Court of Appeals also agreed there is no "rational, principled manner" by which to calculate damages. *Id*. at 689 n 17 (quoting *Linninger v. Eisenbaum*, 764 P2d 1201, 1210 (Colo 1988)).

The Court of Appeals correctly reached its conclusion, not because of any label or public policy, but because that is what Oregon law required. Nowhere did the court below reference public policy within its holding, which was instead based on the tort requirements of legally cognizable injury and the impossibility of calculating damages. 275 Or App at 688-89. Because life is not a compensable injury to him when the alternative was to have never been born, this Court should affirm. The vast majority of courts have refused to recognize a wrongful life action and this Court should do the same.

C. claim is contrary to Oregon law.

i. Plaintiff cannot allege legally cognizable injury and damage.

To state a claim, plaintiff must allege legally cognizable damage. *Towe v. Sacagawea, Inc.*, 357 Or 74, 86, 347 P3d 766 (2015) (quoting *Brennan v. City of Eugene*, 285 Or 401, 405, 591 P2d 719 (1979)). Plaintiff fails to allege suffered damage because the "alleged injury is life itself." 275 Or App at 688. Plaintiff does not contend that defendants caused genetic condition, which existed from his conception. Rather, the complaint "alleges that would never have been conceived and born—that is, he would never

have *been born at all* — but for defendants' negligence. *Id*. (Emphasis in original). The injury alleged is life itself. *See also, e.g.*, *Kassama v. Magat*, 136 Md App 637, 666, 767 A2d 348, 364 (2001) (*Kassama I*) (opinion by Court of Special Appeals), *aff'd*, 792 A2d 1102 (*Kassama II*) (Court of Appeals) (concluding that it is inescapable that the injury complained of in an action for wrongful life *is life itself*).

This Court should similarly reject plaintiff's contention that injury is anything other than life itself. Plaintiff seemingly concedes that no claim exists where life is the injury. Instead, plaintiff tries to define the injury differently, arguing it is "having to live a life that is limited, burdened and prematurely ended by the genetic disorder that came with it." Pltf's Brief, 16. That is simply a distortion of the issues. Given that defendants did not cause or contribute to any genetic disorder (*see* Pltf's Brief, 8 ("unquestionably, defendants did not cause the genetic condition")), defendants were not responsible for "limit[ing], burden[ing] [or] prematurely end[ing]" life. There can be no comparison of life with DMD and a life without it because there was no other way could have been born. The only circumstance alleged to have "resulted from" defendants' alleged negligence is that was born. Plaintiff cannot slice and parse so finely as to avoid this truth. The refusal to recognize the unavoidable reality renders the entirety of plaintiff's arguments erroneous.

The Court should similarly reject plaintiff's suggestion that because seeks "extraordinary" medical expenses his injury is cognizable. "Extraordinary" medical expenses would be the difference in medical expenses for a person with DMD compared to the medical expenses for a person without DMD. Limiting the claim to one for "extraordinary" medical expenses is logically inconsistent with underlying theory of relief. Because claims he would have been better off never being born, the necessary comparison is between the actual medical expenses in the absence of any negligence ($0, or perhaps the cost of contraception or termination procedure) with the actual (ordinary and extraordinary) medical expenses that have been and will be incurred by given that he has been born. Again, there can be no comparison between expenses attributable to condition and what his expenses would be without DMD because there was no chance for him to experience life that way. In this way, plaintiff attempts to disassociate the alleged injury from the damages sought. Plaintiff attempts to improperly re-define that which is an all or nothing proposition.

Similarly, claim for noneconomic damages is not based on a comparison of the pain and suffering of a child with DMD versus a healthy child; rather, it would be based on a hypothetical comparison between a child with DMD, which includes both the joys of life as well as the struggles of

having a genetic disease, and a nonexistent person who never experienced life at all.

There is no way to differentiate life with DMD from one without it because he could not have been born any other way regardless of the conduct of defendants. Further, even if life could be an injury, it is impossible for a jury to quantify that injury as a matter of law. 767 A2d at 689. That is, it is simply impossible and inappropriate to compare and value the difference between current life with DMD and never having come into existence. This Court should affirm because there is no place under Oregon law for this cause of action.

ii. theory is not like Zehr *or a birth-injury claim.*

No "anomaly" results from an affirmance of the dismissal here. The Court should reject plaintiff's argument that *Zehr v. Haugen*, 318 Or 647, 871 P2d 1006 (1994), supports a wrongful life claim. There, the court allowed a claim against a physician who failed to perform a sterilization procedure on his patient resulting in the birth of a child. Aside from the factual distinctions between *Zehr* and this case, notably the lack of physician-patient relationship, plaintiff misses the point. *Zehr* was not concerned with comparing nonlife and life or whether the life of a child was an injury to him and not worth living. *Zehr* does not dictate a different result than the trial court and Court of Appeals reached in this case. The argument that both parents and the child should have

a claim is also unavailing. Both fail as a general matter under *Zehr* because of the lack of physician-patient relationship. The only inconsistency at issue is that the Court of Appeals disregarded a multitude of precedent to recognize a claim for the parents while affirming the dismissal of claim when neither should be permitted.

Plaintiff also attempts to analogize to claims involving the injury of an infant during birth. Pltf's Brief, 8. However, "birth-injury" cases have no common ground with the allegations here. First, in birth-injury cases, the infant is injured by a medical provider who is caring for him or her directly. Such a relationship or duty is absent here. There is no defendant physician caring for whose negligent conduct caused his genetic condition. Second, where a physical injury occurs during birth as a result of the provider's negligent act or omission, the plaintiff must prove that, but for the defendant's negligence, the infant would not have suffered the injury alleged. *Joshi v. Providence*, 342 Or 152, 162, 149 P3d 1164 (2006). That is markedly different from here where plaintiff argues he would not have been born had defendant not been negligent.

D. Recognizing plaintiff's proposed theory of recovery would result in an unwarranted expansion of liability.

As explained in defendants' Brief on the Merits regarding the parents' asserted claims, expanding liability for medical malpractice beyond those whom a physician has undertaken to treat would have significant ramifications. Def's Brief on the Merits, S063902 30-39. Allowing this claim would

compound that error and further weaken Oregon law that defines and limits sources of duties and the scope of liability. Allowing claim would expand a physician's duty to those who are not born or even conceived. It would raise questions about "duties" to fetuses or the not-yet-conceived that implicate much more than civil tort liability. *See State v. Cervantes,* 232 Or App 567, 587-88, 223 P3d 425 (2009) (holding that by ingesting methamphetamine while pregnant, the defendant could not be convicted under ORS 163.195 for recklessly endangering another person because at the time of her conduct, the fetus was not "a person" in existence within the spatial zone of danger who could be harmed, and recognizing a host of conduct that would be considered criminal under ORS 163.195 if engaged in by a pregnant woman, if the court ruled otherwise, including "*becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death*." (Emphasis added.)).

Allowing claim would raise troubling questions of which genetic conditions will support a claim. How severe must the condition be to allow the child to claim that life is not worth living, or would any genetic condition do, for example, blindness, deafness, Down syndrome or cleft palate? What about genetic predispositions? Could a child sue a physician if he or she is genetically predisposed to a certain disease, *e.g.*, cancer, alcoholism, diabetes, and develops the disease later in life? Recognizing wrongful life claims would

put courts in the position of determining which genetic conditions or diseases support a claim that life with them is not worth living. It is a dangerous step for the courts to take, weighing in on a determination that some lives do not matter and have lesser value. *See* W. Ryan Schuster, *Rights Gone Wrong: A Case Against Wrongful Life*, 57 Wm & Mary L Rev 2329, 2355 (2016) (Comparing wrongful death and wrongful life claims: "Wrongful life, by contrast, requires courts to cordon off a subset of individual lives that are not valuable goods whose loss requires restitution, but compensable harms in themselves. Wrongful life does not depend upon wrongful death's upward sliding scale of appreciating value of lives, but rather a downward sliding scale of depreciating value. Courts evaluating wrongful life suits would then have to determine the point on the scale below which life itself becomes an injury.").

Further, if a child has a claim against a medical provider who did not treat him or his parents, what about situations where parents knowingly give birth to a child that will have a disability? What if one parent disagrees with the decision to carry a child to term? Could that parent sue the other? Could the child sue the parents for the decision to give birth and the consequences for his or her life?

Societal concepts of family and parenthood continue to evolve, as do the capabilities of medicine and science to identify genetic predispositions or even to pre-screen embryos to avoid conception or implantation of fetuses with

genetic conditions. *See Brooke S.B. v. Elizabeth A. C.C.,* 2016 WL 4507780 (NY 2016) (reconsidering definition of "parent" and ruling that non-biological, non-adoptive caretaker of child has standing to seek visitation and custody rights). Clinical genetics is a relatively new specialty as is the ability to diagnose genetic disorders at all, particularly in embryos or fetuses. The advent of in-vitro fertilization (IVF), artificial reproductive technology (ART), and preimplantation genetic diagnosis (PGD) only complicate questions of how life comes into being and the claims that may flow from associated acts or omissions. *See e.g.*, Marley McClean, *Children's Anatomy v. Children's Autonomy: A Precarious Balancing Act with Preimplantation Genetic Diagnosis and the Creation of "Savior Siblings,"* 43 Pepp L Rev 837 (2016). Interposing courts into this complex and evolving science by recognizing a claim for wrongful life would be a far-reaching mistake, the consequences of which cannot be fully known or understood yet.

III. The majority of jurisdictions have renounced these claims.

A. The law of other states supports rejection of this theory of recovery.

Finding no foothold for recognition of this claim under Oregon law, plaintiff relies extensively on the law of other states. However, when reviewed, almost all other states to consider this issue have rejected wrongful life as a theory of recovery. 275 Or App at 688 n 15 ("For an overview of the cases

from other jurisdictions rejecting such a claim, s*ee Willis v. Wu*, 362 SC 146, 607 SE2d 63 (2004), and *Lininger v. Eisenbaum*, 764 P2d 1202."). Also, at least 10 states have enacted legislation prohibiting wrongful life actions. *See* Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 Harv CR-CL Rev 161-62 (2005) (providing a list of numerous cases and statutes); Schuster, 57 Wm & Mary L Rev at 2367 ("It seems that in the end, the majority of courts have adopted the correct rule in refusing to recognize wrongful life claims. Proposed justifications from negligence, contract, and strict liability fail to circumvent the problem of having to define the child's very existence as an injury. Furthermore, * * * any recognition of wrongful life claims requires impermissible judicial valuation of human life, and an unwieldy notion of individual rights that undermines wrongful life's foundation in *Roe v. Wade*.").

There are three primary reasons courts express for rejecting these claims: (1) a child being born does not suffer legally cognizable injury by virtue of being born; (2) the impossibility of calculating damages; and (3) the preciousness of life. With regard to the first reason, in *Ellis v. Sherman*, 512 Pa 14, 19, 515 A2d 1327, 1329 (Pa 1986), the court explained:

> "[A]n 'injury' is a harm that is *inflicted* upon one person or entity by another. The condition about which the plaintiff complains, a diseased life, was inflicted upon the plaintiff not by any person, but by plaintiff's genetic constitution. Thus, it may not be said that the plaintiff has suffered a legal injury, for even though his physical

> and mental condition is unfortunate, and even though this condition presumably would constitute a legal injury if it had been *inflicted* by some negligent or intentional act of another, in this case, *the condition was caused not by another* but by natural processes. It is not, therefore, a legal injury."

(Emphasis in original.)

Most courts, like the Court of Appeals and the court in *Ellis*, reject the cause of action because the child has not suffered a legally cognizable injury as a result of being born. *Kassama II*, 792 A2d at 1119. The reasoning of this theory rests "on either a doctrinal unwillingness to accept that life, even in an impaired state, is worse than non-existence, or on the metaphysical or practical inability to measure the value of an impaired life as opposed to utter non-existence." *Id.* (citations omitted).

Next, the majority of states reject wrongful life claims "based on the belief that it would be an impossible task to calculate damages based on a comparison between life in an impaired state and non-existence." *Kassama I*, 767 A2d at 365. In *Kassama II*, the court's rejection was premised on several conclusions, including:

> "Allowing a recovery of extraordinary life expenses on some theory of fairness – that the doctor or his or her insurance company should pay not because the doctor caused the injury or impairment but because the child was born – ignores this fundamental issue and strikes us as simply a hard, sympathetic case making bad law."

792 A2d at 1123-24. At least one court has expounded that the comparison and calculation that would be required if such a claim were allowed is "simply beyond the human experience." *Willis v. Wu*, 362 SC at 162.

Still other courts have rejected the claim for policy reasons. In *Phillips v. United States*, 508 F Supp 537, 543-44, (D SC 1980), the court held that public policy precluded wrongful life claims based on the "preciousness and sanctity of human life." Idaho, Kansas, and Alabama have reached similar conclusions. *See Blake v. Cruz*, 108 Idaho 253, 698 P2d 315 (1984); *Bruggeman v. Schimke*, 239 Kan 245, 718 P2d 635 (Kan 1986); *Elliott v. Brown*, 361 So2d 546 (Ala 1978).

Another consideration advising against recognition of this type of claim is the potential negative impact on society and disabled communities. Professor Hensel explains in *The Disabling Impact of Wrongful Birth and Wrongful Life Actions* how the precursors to granting relief make clear that any benefits come at great expense to the disabled community:

> "Wrongful birth and life actions do not offer compensation to all individuals who suffer as a result of defendant's negligence, nor do they compensate all individuals with disabilities in need of relief. Instead, assistance is provided only to those willing to openly disavow their self-worth and dignity. Children must testify that they should have been aborted by their mothers. Mothers must testify that they would have aborted their children or prevented conception if only the defendant had presented them the opportunity. No matter how compelling the need, or how gross the negligence involved, no assistance will be extended to the family

> who would have chosen to embrace or simply accept the impaired child prior to his birth."

Hensel, 40 Harv CR-CL L Rev at 171-72 (footnote omitted). The concern is that allowing such claims results in an "unseemly spectacle" and entails "a community pronouncement, via a government institution, that an individual's life with impairments is worse than non-existence, or that a reasonable person would have aborted a now-living child." *Id*. at 172-73. This has been said to have a profoundly negative impact on the efforts to advance the equal treatment of disabled persons. "Whereas the shared stigmatization of all people with disabilities serves as a uniting force under the civil rights model of disability, here it pits the community against itself in the drive for compensation." *Id*. at 175.

B. Thirty-year-old precedent from three states.

Only three states — New Jersey, California, and Washington — have allowed a claim for wrongful life in favor of an infant. *Procanik v. Cillo*, 97 NJ 339, 478 A2d 755 (NJ 1984); *Turpin v. Sortini*, 31 Cal3d 220, 643 P2d 954 (1982); *Harbeson v. Parke-Davis, Inc.*, 98 Wash2d 460, 656 P2d 483 (1983). This minority view has been widely criticized. As summarized by the Maryland Supreme Court in 2002:

> "These three cases are now 18 to 20 years old. No other appellate court has agreed with them. Some have noted but simply declined to follow them. Others have been outright critical of their reasoning. Two courts regarded them as

> 'discarding established principles of tort law *sub silentio* in an attempt to reach a "right" result' and as premised on 'an unexplained gap in the decisional reasoning.' * * * The Arizona court concluded that the limited recovery approach 'exhibits a fundamental casuistry in the reasoning.' The New Hampshire court concluded that the primary deficiency in the reasoning of those courts is that 'it imposes liability even if the defendant has caused no harm' and that '[i]f the child cannot prove injury, "it is unfair and unjust to charge the doctors with the infant's medical expenses."'"

Kassama II, 792 A2d at 1123-24 (brackets in original; citations omitted).

Despite plaintiff's reliance on these cases, each case arose from distinguishable facts. In *Procanik*, an obstetrician counseled and tested a pregnant mother for German measles. This relationship provided the basis for the New Jersey Supreme Court to summarily rule that the physician's duty to the mother extended to the unborn child. 97 NJ at 348. Further, underlying the court's reasoning in *Procanik* was the fact that the parents' own claim for the same injury was time-barred. *Id.* at 352.

In *Turpin*, where the child was born deaf due to a genetic condition, the parents alleged that they conceived the child in reliance on the physician's representation that their first daughter had normal hearing. 31 Cal3d at 224. Lastly, in *Harbeson*, a husband and wife consulted with three doctors about the risks of continuing to use Dilantin during pregnancy, none of whom warned the parents of the risk from that medication of birth defects. 98 Wash2d

at 462-63. Tellingly, no states have recognized a cause of action for wrongful life since *Procanik* in 1984. This Court should not be the first.

Further, of the three states permitting recovery, they have limited it to economic damages finding non-economic damages too speculative. *Procanik*, 97 NJ at 334; *Turpin*, 31 Cal3d at 238; *Harbeson*, 98 Wash2d at 479-80. Plaintiff's claim seeks to expand on what those three courts permitted by seeking recovery of both economic *and* non-economic damages, which no court has done and which should not be allowed. For all of the reasons it is impossible to calculate economic damages, the same is true for non-economic damages.

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/ / /

CONCLUSION

Based on the foregoing and defendants' briefing submitted in case No. S063956, defendants ask this court to accept their proposed rules of law and affirm the dismissal of plaintiff's claim on behalf.

DATED this 22nd day of September, 2016.

KEATING JONES HUGHES, P.C.

s/ Hillary A. Taylor
Hillary A. Taylor, OSB No. 084909
htaylor@keatingjones.com; FAX 503-796-0699
Lindsey H. Hughes, OSB No. 833875
lhughes@keatingjones.com; FAX 503-796-0699

Of Attorneys for Defendant-Respondent Legacy Emanuel Hospital & Health Center, an Oregon non-profit corporation dba Legacy Emanuel Pediatric Development and Rehabilitation Clinic

LINDSAY HART, LLP

s/ Michael J. Estok
Michael J. Estok, OSB No. 090748
mestok@lindsayhart.com;; FAX 503-226-7697

Attorneys for Defendants-Respondents Metropolitan Pediatrics, LLC, and Mary K. Wagner, MD

Certificate of Compliance

I certify that this memorandum complies with the word count limitation for briefs pursuant to ORAP 5.05(2)(b); the word count is 5,963 words. I further certify that this brief is produced in a type font not smaller than 14 point in both text and footnotes pursuant to ORAP 5.05(2)(d).

In addition, I certify that this document was converted into a searchable PDF format from the original Word document for electronic filing and was scanned for viruses.

s/ Hillary A. Taylor
Hillary A. Taylor, OSB No. 084909

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I served the foregoing **RESPONDENTS ON REVIEW LEGACY EMANUEL HOSPITAL & HEALTH CENTER, METROPOLITAN PEDIATRICS, LLC, AND MARY K. WAGNER, MD'S JOINT RESPONSE BRIEF ON THE MERITS** on the following attorneys on the date indicated below by electronic delivery from the Supreme Court e-filing system:

Michael J. Estok – mestok@lindsayhart.com
Paul Silver – psilver@lindsayhart.com
Nikola Lyn Jones –njones@lindsayhart.com
Kathryn H. Clarke – kathrynclarke@mac.com
William A. Gaylord –bill@gaylordeyereman.com
Linda K. Eyerman – linda@gayloardeyereman.com
Craig A. Nichols – craig@craignicholslaw.com
Travis Eiva -- travis@zempereiva.com

DATED this 22nd day of September 2016.

KEATING JONES HUGHES, P.C.

s/ Hillary A. Taylor
Lindsey H. Hughes, OSB No. 833875
lhughes@keatingjones.com; FAX 503-796-0699
Hillary A. Taylor, OSB No. 084909
htaylor@keatingjones.com; FAX 503-796-0699
Of Attorneys for Defendant-Respondent Legacy Emanuel Hospital & Health Center, an Oregon non-profit corporation dba Legacy Emanuel Pediatric Development and Rehabilitation Clinic