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

BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER PLAINTIFF ON REVIEW

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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STATEMENT OF THE CASE

INTRODUCTION

The Court of Appeals in *Tomlinson v. Metro. Pediatrics, LLC*, 275 Or App 658, 366 P3d 370 (2015), erroneously held that a child who suffers profound financial, physical, social, and emotional costs as a result of defendants' negligence has no cognizable injury. *Amicus Curiae* OTLA urges this Court to reverse that decision.

SUMMARY OF ARGUMENT

Defendants' standard of care required that they provide reasonable genetic counsel to the Tomlinsons that if they conceived and bore a male child, he would have a 50% chance of having a severe genetic disorder (Duchenne muscular dystrophy (DMD)). The purpose of such counsel, if given, was so the Tomlinsons would know to avoid another pregnancy and thereby mercifully protect a child from suffering the financial, physical, social, and emotional costs of a life with DMD. However, defendants violated that standard of care, and the Tomlinsons conceived and bore a child, who ended up having DMD. now must bear the severe economic and noneconomic costs of having to live with that disorder. The Court of Appeals held that defendants had no accountability for those costs, even though would not have incurred them but for defendants' negligence.

The court reasoned that although defendants' negligence caused to live in suffering, it also gave him life so "that he will experience benefits as well." *Id.* at 689 n 17 (quoting *Lininger v. Eisenbaum*, 764 P2d 1202, 1210 (Colo 1988)). The court further explained that on the other hand if defendants were not negligent would be subject to the "utter void of nonexistence." *Tomlinson*, 275 Or App at 689-90. In those circumstances, the court continued, the injury was not legally cognizable, because a jury would have to make an "impossible" comparison between the "value of nonexistence" with the "value of [life with DMD." *Id.* at 689.

The court erred in that holding because it prioritized abstract metaphysical conundrums over the obvious fact of foreseeable injuries caused by defendants. That is, defendants' violations of standards of genetic counseling caused to incur severe financial, physical, social, and emotional costs that he otherwise would not have to endure. Contrary to the concerns of the court, there is no requirement that for a jury to recognize foreseeable injuries it must compare those injuries with nonexistence. All a jury must do is see the child in front of them and account for the reasonably foreseeable costs of DMD to that child that would have been avoided if defendants had not been negligent.

The court also erred because the decision undermines the deterrence and accountability objectives of tort law. Instead, it assigns the economic and non-

economic costs of the negligence to the innocent child rather than the culpable party. In light of the above, *Amicus* respectfully requests that this court reverse the court below and allow plaintiff's claims to proceed.

PROPOSED RULE OF LAW

A plaintiff may recover damages that generally correspond with the foreseeable risks of a defendant's negligence.

ARGUMENT IN SUPPORT OF PROPOSED RULE OF LAW

I. Introduction

As an initial matter, *Amicus* agrees with plaintiff's arguments in the petition for review and the brief on the merits. For those reasons alone, this court should reverse.

Amicus writes to emphasize that principles of foreseeability require that a jury be allowed to determine whether defendants' negligence caused to suffer an injury. Likewise, *Amicus* writes to emphasize that leaving the question of damages to juries will insure the societal benefit of negligence deterrence in genetic counseling.

II. Damages from genetic counseling are governed by foreseeability.

Society has come to recognize the benefits of clinical genetics or "genetic counseling" to prevent hereditary and congenital birth defects. Reed E. Pyeritz *et al., The Economics of Clinical Genetics Services I: Preview*, 41 Am J Hum Genet

549, 551 (1987). At its most basic function, genetic counseling involves physicians informing potential parents of the "risk * * * of certain genetic disorders." *Rovinsky & Guttmacher's Medical, Surgical & Gynecologic Complications Of Pregnancy* at 307 (Carol-Lynn Brown ed, 1985). The fundamental purpose of that genetic counseling is so the prospective parents may avoid pregnancy and thereby protect a child from having to endure the financial, physical, social, and emotional costs of a severe genetic disorder. *Id.* at 307-10.

The Court of Appeals in this case appears to struggle with how tort law will address negligence in genetic counseling, because the fundamental purpose behind the professional advice is to avoid bringing a child into existence in the first place. *Amicus* appreciates the weight of such important questions. However, where the court went astray is that it did not view negligence and damages in this medical counseling context through the tried and true lens of foreseeability but instead engaged in a metaphysical equation of balancing the value of a life with the "utter void of nonexistence." *See Tomlinson*, 275 Or App at 689-90 (so suggesting).

In Oregon, for a plaintiff to recover for an injury depends on "whether [the defendant's] conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987). Said differently, a plaintiff may recover for injuries caused by the defendant's conduct, if "the type of harm" suffered by the

plaintiff (1) is a harm that the defendant had a duty to protect against and (2) that harm "generally correspond[s]" with the foreseeable risks of the defendant's conduct. *Piazza v. Kellim*, 360 Or 58, 67, __ P3d __ (2016). To determine whether an injury is cognizable does not require metaphysics. It only requires foreseeability.

Here, a foreseeable risk of defendants' negligent genetic counseling is that a child will be made to bear the financial, physical, social, and emotional costs of a severe genetic disorder. "The type of harm that befell" because of defendants' negligence "generally correspond[s]" with that known foreseeable risk. Indeed, his injury is that exact foreseeable risk realized. Also, interest in avoiding those costs is a specific protected interest in genetic counseling; avoidance of those costs is the fundamental purpose behind the provision of genetic counseling in the first place. In short, injuries are real and protected interests and they directly correspond with the foreseeable risks of defendants' negligence. This court need look no further to recognize that has a legally cognizable injury. *Fazzolari*, 303 Or 1.

The Court of Appeals did not apply the above foreseeability analysis when it determined that injury was not cognizable. This is apparent when the court explained that injury was "life itself." *Tomlinson*, 275 Or App at 688. As explained above, the foreseeable risk of negligent genetic counseling is not "life itself." Similarly, the intended protected interest in reasonable genetic counseling is

not to protect against "life itself."[1] The foreseeable risk to be protected against is that a child would have to endure the severe costs of the disorder.

The Court of Appeals also incorrectly perceived the injury analysis outside of the foreseeability framework when it emphasized that a jury could only determine injury by comparing the costs that must bear from defendants' negligence with his non-existence if defendants had not been negligent. The court explained:

> "Even if we assume for the sake of our analysis that 'life' can be an injury, failed to allege legally cognizable damages. * * * As applied to claim, 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."

Tomlinson, 275 Or App at 689–90. Foreseeability is not concerned with the alternative universe that may have been but for defendants' negligence. Foreseeability only asks whether injury corresponds with a foreseeable risk

[1] Indeed, had a 50% chance of DMD. If he had been born without the disorder, he certainly would not have had a claim for the costs of his life free of the losses associated with the disorder. That is because the costs of a normal life is neither the foreseeable risk of negligent genetic counseling or the protected interest behind reasonable genetic counseling. *But see Zehr v. Haugen*, 318 Or 647, 871 P2d 1006 (1994) (the plaintiff parents could recover "reasonably foreseeable" damages in the form of expenses for "raising the child and providing for the child's college education" because of the defendant physician's failure to perform a tubal ligation).

that the standards of care intended to avoid. *Fazzolari*, 303 Or 1. That test has been satisfied there is no need to wonder about how non-existence fits into the equation.

The Court of Appeals' analysis also missed mark when it noted that there was no "principled" way to recognize claim, because it would require a finding that his non-existence is more valuable than his existence. *Tomlinson*, 275 Or App at 690 n 17 (quoting with approval *Lininger*, 764 P2d at 1210). That is because the result of the holding has the opposite effect; it fails to recognize life as something worthy of protection.

In *Curlender v. Bio-Sci. Labs.*, 106 Cal App 3d 811, 814, 165 Cal Rptr 477, 479 (1980) *overruled in part by Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954 (1982), a California court explained that such metaphysical concerns that recognizing the child's injury may be at odds with the sanctity of life, fail to recognize the sanctity and vulnerability of the life of the child bringing the claim.

> "The reality of th[is type of claim] is that such a plaintiff * * * 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 that [the] plaintiff, however impaired she may be, has come into existence as a living person with certain rights."

Curlender, 106 Cal App 3d at 829. Those rights include the right to recover for costs created by the negligence of others. *Id.* at 829-30.

Lastly, the Court of Appeals' concern that acknowledging injury may not reflect the correct balance of values between nonexistence and life further underscores the decision's lack of adherence to principles of foreseeability. A purpose of "reasonable foreseeability" analysis is to insure such controversies involving competing community values are decided by a jury rather than the judiciary. In *Piazza*, this court explained that "reasonable foreseeability" is the *sine qua non* of claim viability, because it insures the application of the "community's * * * own values" in the resolution of the claims by generally leaving the claims in the hands of "the community's closest proxy in our civil justice system, [the] jury." 360 Or at 94. Or said differently, when the test for a claim's viability is foreseeability it appropriately prevents the "wrongful cut[ting] off [of] claims by substituting a judicial veto for what ordinarily is a jury determination." *Id.* at 86.

The decision of the Court of Appeals is the very "judicial veto" prohibited in *Piazza*. claim should be free from that veto and allowed to go before a jury so that the competing interests at its core can be resolved through the application of the "community's * * * own values." *Id.* at 94

III. The failure to recognize injuries subverts common law principles of deterrence and accountability

As this Court recently explained in in *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 551-52, 340 P3d 27, 33, (2014), the:

> "'[C]ommon,' or public, interest is embodied, in part, in the principles of tort law. As a leading treatise explains: 'It is sometimes said that compensation for losses is the primary function of tort law * * * [but it] is perhaps more accurate to describe the primary function as one of determining when compensation is to be required.
> "* * * * *
>
> "'[Additionally t]he 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer.' A related function of the tort system is to distribute the risk of injury to or among responsible parties."

(Bracket and ellipses in original) (citations omitted) (quoting and citing W. Page Keeton, *Prosser and Keeton on the Law of Tort*s § 4, 20–25 (5th ed 1984)). However, a significant effect of the Court of Appeals' decision is that it rejects "compensation for losses" created and it fails to prevent future harm through "admonition of the wrongdoer."

In the end, the Court of Appeals' decision allows those who have a duty to provide reasonable genetic counseling to avoid accountability to the very people who must bear the greatest costs when that counseling is unreasonable. Instead, the decision assigns the economic and non-economic costs of that negligent counsel to the innocent child.

CONCLUSION

For all the reasons stated in this memorandum, *Amicus* OTLA urges the court to reverse the trial court and Court of Appeals.

DATED: August 18, 2016.

Respectfully submitted,

/S/ *Travis Eiva* .
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Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 2,228 words.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on this date I served the foregoing BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF PETITIONER ON REVIEW on:

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I hereby certify that on this date I filed this BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF PETITIONER ON REVIEW on the:

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