First District Recognizes Recovery of Adult Care Damages in Wrongful Birth Causes of Action

The Illinois Appellate Court, First District, recently handed down a decision that expanded the damages recoverable in a “wrongful birth” case. For the first time in Illinois, the court recognized that parents in a wrongful birth case could recover damages for the “extraordinary costs of caring for a child during his or her majority.” Clark v. Children’s Mem. Hosp., 907 N.E.2d 49, 2009 Ill. App. LEXIS 222 (1st Dist. 2009). This holding significantly expands the potential value of damages for wrongful birth, and therefore, could lead to much larger verdicts in those cases.

In Clark, the plaintiffs appealed the dismissal of their third-amended complaint alleging negligence against Children’s Memorial Hospital and Doctor Barbara K. Burton, in connection with their son’s birth with Angelman Syndrome. Specifically, they appealed the dismissal of their “wrongful birth” action relating to the extraordinary costs of caring for their unemancipated, disabled son beyond the age of majority. 2009 Ill. App. LEXIS 222, *1.

The plaintiffs’ first son, Brandon, was born in 1997, and at about 15 months of age, Brandon began showing signs of Angelman Syndrome, a genetic disorder that can be caused by abnormal function of the gene UBE3A. In February 2001, Doctor Burton informed the plaintiffs that all known genetic mechanisms for Angelman Syndrome in Brandon had been ruled out. Because of this news, the plaintiffs conceived another child, Timothy, born in March 2002. A few months after his birth, the plaintiffs noticed that Timothy demonstrated similar mannerisms to Brandon. To complete Timothy’s testing for Angelman Syndrome, the plaintiffs acquired a complete set of Brandon’s medical records, including a copy of Brandon’s UBE3A sequence analysis previously done at Baylor College of Medicine (“Baylor report”). Upon receiving those records, the plaintiffs learned for the first time that Brandon’s UBE3A sequence analysis was “not normal.” Id. *4.

The Baylor report, dated November 8, 2000, indicated that Brandon suffered from Angelman Syndrome due to a UBE3A truncating mutation, and consequently, his siblings had a 50% risk of being born with Angelman Syndrome. Doctor Burton never obtained the results of the Baylor UBE3A sequence analysis. Id. *3.

The plaintiffs filed a 16-count third-amended complaint sounding in wrongful birth and negligent infliction of emotional distress, seeking damages for the extraordinary costs of caring for Timothy during his minority and his majority, as well as for lost wages. The trial court dismissed portions of the complaint, finding that the plaintiffs could only recover damages for the extraordinary costs of caring for Timothy during his minority and could not recover damages for the extraordinary costs of caring for Timothy during his majority (“adult care”). The trial court also dismissed the counts for negligent infliction of emotional distress and lost wages. Id. *4-5.

The plaintiffs then voluntarily dismissed the remainder of their third-amended complaint (the portion alleging damages for the extraordinary expenses of caring for Timothy during his minority) due to a previous
settlement, and appealed the trial court’s order dismissing the claims for adult care, emotional distress, and lost wages.

In determining whether the plaintiffs could recover damages for Timothy’s adult care, the First District first revisited the Illinois Supreme Court’s decision in *Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230, 512 N.E.2d 691 (1987). In *Siemieniec*, the plaintiff’s complaint alleged that, as a proximate result of the defendants’ negligent diagnosis and failure to accurately advise her of the risk of her child being born a hemophiliac, the child was not aborted, to his personal injury and to his parents’ financial injury. *Siemieniec*, 117 Ill. 2d at 233. The supreme court in *Siemieniec* recognized an action for “wrongful birth”, but not “wrongful life”, and explained the difference. Id. at 235.

According to the supreme court, “[w]rongful birth refers to the claim for relief of parents who allege they would have avoided conception or terminated the pregnancy by abortion but for the negligence of those charged with prenatal testing, genetic prognosticating, or counseling parents as to the likelihood of giving birth to a physically or mentally impaired child.” Id. at 235. Wrongful life, on the other hand, is the “corresponding action by or on behalf of an infant who suffers from a genetic or congenital disorder” and alleges that the health-care provider’s breach of the applicable standard of care precluded an informed parental decision to avoid his conception or birth. But for this negligence, the child allegedly would not have been born to experience the pain and suffering attributable to his affliction.” Id. at 236.

In recognizing a cause of action for “wrongful birth” in Illinois, the supreme court found that the plaintiffs were limited in their recovery of damages “to the extraordinary expenses – medical, hospital, institutional, educational and otherwise – which are necessary to properly manage and treat the congenital or genetic disorder.” Id. at 260. The parents in *Siemieniec* sought to recover only those extraordinary expenses that would be incurred prior to the child’s reaching his majority, and thus, the supreme court did not address whether plaintiffs could recover damages for adult care.

The plaintiffs in *Clark* argued that §15(a)(1) of the Rights of Married Persons Act (“Family Expense Act”), 750 ILCS 65/15(a)(1), obligates them to provide adult care for Timothy, and therefore, they should be allowed to recover those expenses. 2009 Ill. App. LEXIS 222, *14.

The defendants denied that the Family Expense Act obligates parents to support their children after they reach the age of majority. Further, the defendants argued that because the plaintiffs have no legal liability for Timothy’s adult care costs, recovery for such costs should be rejected by the court. Id. *14. In support, defendants cited *Tully v. Cuddy*, 139 Ill. App. 3d 697 (1985) and *Ragan v. Protko*, 66 Ill. App. 3d 257 (1978), which both held that for parents to recover for their child’s medical expenses, they must be legally liable for the charges. The basis for such liability must exist prior to the creation of the charges and not arise due to a voluntary assumption of financial responsibility after the fact. *Tully*, 139 Ill. App. 3d at 699, *Ragan*, 66 Ill. App. 3d at 261. The *Clark* defendants also contended that no Illinois statute requires parents to support their children after they reach the age of majority, even if the children are disabled and unemancipated.

The plaintiffs argued that they could be ordered to provide support for Timothy pursuant to §513(a)(1) of the Illinois Marriage and Dissolution of Marriage Act, which allows the trial court to determine “as equity may require” whether to award sums of money from the parties in a dissolution proceeding for the support of the disabled child. 750 ILCS 5/513(a)(1). The court in *Clark* reasoned that §513(a)(1) demonstrated “the legislature’s reluctance to draw an arbitrary line at the age of majority in determining when support obligations for unemancipated, disabled children must cease,” and saw “no cause why a different set of rules should apply here.” 2009 Ill. App. LEXIS 222, *17.

The defendants contended such a holding would have “negative, far-reaching implications in Illinois,” and argued that “if the law required parents to ‘own’ the obligation for adult care of their unwanted, disabled child, the same obligation would have to extend to all parents of disabled children.” Id. *17-18. Defendants argued that the “parents’ legal liability for these costs would rationally imply that the child would have no basis to recover them on his own, even in ordinary negligence cases where children have been entitled to recover for their medical expenses for decades.” Id. They also argued that “judicial recognition of a parental obligation to pay for the expenses incurred by adult disabled children would lead to a flood of litigation whereby individuals
and businesses who provide uncompensated or under-compensated care for adults with disabilities proceed against the parents of those individuals on the basis that the parents have an independent obligation to pay these costs.” *Id.* The defendants also argued that the plaintiffs should not be allowed to recover under a wrongful birth theory the damages that Timothy is precluded from recovering under a wrongful life theory. *Id.* *18.

In rejecting the defendants’ arguments, the appellate court stated it was not holding “that parents always ‘own’ the obligation for adult care of their disabled child, nor are we holding that medical providers have a cause of action against the parents of disabled children over the age of majority. Rather, our holding here is limited to answering ‘yes’ to the question of whether plaintiffs may plead a cause of action for wrongful birth against a tortfeasor to recover damages for [adult care].” *Id.* *18-19.* The court further stated that the refusal of the supreme court in *Siemieniec* to recognize wrongful life as a cause of action does not prevent an award of future care to the parents because “[s]uch an award does not constitute damages for achieving life, nor does it constitute a recognition or admission the child would have been better off never having been born; rather, the damages rightfully compensate the parents for the costs they will incur for caring for their disabled child.” *Id.* *19-20.*

The appellate court found that the plaintiffs properly pled causes of action for wrongful birth and adequately alleged damages for adult care. *Id.* *20.* It, therefore, reversed the trial court’s order dismissing portions of the plaintiffs’ third-amended complaint and remanded for further proceedings. *Id.* *20-21.*

The appellate court also found that the plaintiffs had adequately pled a cause of action for negligent infliction of emotional distress against the defendants. Examining the facts pled under the zone-of-physical-danger rule explained in *Siemieniec*, the First District found that the plaintiffs had pled they were subject to physical pain, exhaustion, and emotional distress from caring for Timothy. Thus, they asserted they were within the zone-of-physical-danger caused by the defendants’ alleged negligence. *Id.* *23.* Therefore, the appellate court reversed the order of the trial court dismissing the negligent infliction counts of the third-amended complaint and remanded the matter for further proceedings. *Id.* *23-24.*

Finally, the appellate court found that because the plaintiffs could recover for Timothy’s adult care, they could not recover for lost wages as a result of being required to stay home and supervise and care for Timothy themselves. “Any recovery for lost wages would be duplicative to the damages for [adult care].” *Id.* *17-18.* Therefore, the court affirmed the trial court’s dismissal of the lost wage counts in the plaintiffs’ third-amended complaint. *Id.* *18.*

As a final statement, the appellate court pronounced: “[t]his case presents perplexing issues over which many will differ, as we have differed from the able and learned trial judge here. We are mindful of the gravity of our words and this holding and we are eager for our supreme court and General Assembly to address these issues.” *Id.* *25-26.*

Until the Illinois Supreme Court or the General Assembly take up the appellate court’s challenge, we, as defense counsel, need to determine how we respond to this new element of damages in wrongful birth cases. At the very least, we can expect to see more elaborate life-care plans in these cases, such as those already present in birth injury cases. Attacking those life-care plans and limiting the claimed damages is the first and most important step in defending these new claims. The question remains, however, how are the parents compensated for future services that they may never be liable to provide to the adult child, especially when the damages awarded are to the parents and not the child. Such damages seem to be quite speculative, and therefore, open to future challenge.

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