

20100152

Supreme Court No. 20100152

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DEC 20 2010

State of North Dakota  
**In Supreme Court**

STATE OF NORTH DAKOTA B.D.H., by and through his parents, next of friends and  
natural legal guardians, S.K.L. and C.S.H.; and  
S.K.L. and C.S.H., individually,

*Plaintiffs and Appellants,*

v.

Margaret T. Mickelson, M.D., Nathaniel L. Karlins, M.D.,  
MeritCare Health System, a North Dakota corporation, and  
MeritCare Hospital, a North Dakota corporation,

*Defendants and Appellees.*

AN APPEAL OF AN ORDER ENTERED BY THE DISTRICT COURT,  
COUNTY OF CASS, NORTH DAKOTA, CIVIL NO. 09-09-C-01436,  
THE HONORABLE JOHN G. IRBY, PRESIDING

**PETITION FOR REHEARING OF PLAINTIFFS AND APPELLANTS**

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## **STATEMENT OF LEGAL ISSUES**

- I. Does N.D.C.C. § 32-03-43 bar claims for wrongful life in North Dakota?

## **STATEMENT OF THE CASE AND FACTS**

This is a cause of action for medical malpractice.

S.K.L. was a 36-year-old female who delivered B.D.H. in 2007 at MeritCare Hospital. B.D.H. was subsequently diagnosed with Down syndrome, a known increased risk to mothers over 35. S.K.L. had not been offered any maternal serum screening, including amniocentesis during her pregnancy and the failure to perform such tests precluded her from being informed of her fetus's Down syndrome and availing herself of her right to pregnancy termination. (A 21-22).

A Complaint for medical malpractice was filed on April 9, 2009 (A 7) against the Defendants and Appellees. The Complaint alleged a violation of the standard of care for failing to offer maternal serum screening, including amniocentesis and thus depriving S.K.L. and C.S.H. of their constitutional right to elect to terminate S.K.L.'s pregnancy. The Defendants and Appellees answered on May 21, 2009. (A 15) The Defendants and Appellees filed a Motion for Summary Judgment on October 28, 2009 setting the same for hearing before the Court on December 10, 2009 (which was finally heard on February 1, 2010).

The District Court entered an Order on March 22, 2010 on the Motion for Summary Judgment finding that:

1) As to the wrongful life claim by Plaintiff B.D.H., by and through his parents, next of friends and natural legal guardians, S.K.L., and C.S.H., such claim is barred by N.D.C.C. § 32-03-43. Therefore, Defendants' Motion for Summary Judgment as to this claim is **GRANTED**.

A Judgment was entered by the Clerk of the District Court on March 24, 2010.

This appeal ensued.

## **ARGUMENT**

### **I. STANDARD OF REVIEW.**

Rule 56(c) of the North Dakota Rules of Civil Procedure provides that motions for summary judgment "...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."<sup>1</sup> Summary judgment under this rule should be granted only if, after taking the view of the evidence most favorable to the party against whom summary judgment is sought, it appears that there is no genuine issues as to any material facts or conflicting inferences from the facts. Stokka v. Cass County Elec. Coop., 373 N.W.2d 911 (N.D. 1985); Binstock v. Tschider, 374 N.W.2d 81 (N.D. 1985); Poyzer v. Amenia Seed & Grain Co., 381 N.W.2d 192 (N.D. 1986); Production Credit Ass'n v. Klein, 385 N.W.2d 485 (N.D. 1986).

As the Court recently stated in Schmidt v. Gateway Community Fellowship, 2010 ND 69, @ ¶7:

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#### <sup>1</sup> **Rule 56. Summary Judgment.**

(c) **Motion and proceedings thereon.** The motion and supporting papers must be served at least 34 days before the motion may be heard. The adverse party shall have 30 days after service of a brief within which to serve and file an answer brief and supporting papers. Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that reasonably can be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Kappenman v. Klipfel, 2009 ND 89, ¶ 7, 765 N.W.2d 716; Leet v. City of Minot, 2006 ND 191, ¶ 12, 721 N.W.2d 398. Whether the district court properly granted summary judgment is a question of law that we review de novo on the record. Kappenman, at ¶ 7; Leet, at ¶ 12. Summary judgment is appropriate if the issues in the case are such that the resolution of any factual disputes will not alter the result. Leet, at ¶ 12. A party moving for summary judgment must establish there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. Kappenman, at ¶ 7. In determining whether summary judgment is appropriate, we view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which reasonably can be drawn from the record. Kappenman, at ¶ 7; Leet, at ¶ 12.

## **II. WRONGFUL LIFE CLAIMS ARE NOT BARRED IN NORTH DAKOTA BY N.D.C.C. § 32-03-43.**

This Court in its opinion of December 7, 2010 has upheld the District Court's finding in its' Order of March 22, 2010 that wrongful life claim by the Plaintiff B.D.H., the infant in this matter is barred by N.D.C.C. § 32-03-43<sup>2</sup>. This Court has stated in its decision:

When read as a whole, N.D.C.C. § 32-03-43 says "[n]o person may maintain a claim for relief or receive an award for damages on that person's own behalf based on the claim that, but for the act or omission of another, that person would have been aborted." That language precludes a person from maintaining a claim or receiving an award for damages on the person's own behalf, which is precisely what a wrongful life action on behalf of a child seeks. Moreover, the plaintiffs' interpretation ignores North Dakota requirements for a minor to sue and defend an action under

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<sup>2</sup> **32-03-43. Wrongful life action prohibited – Definition.**

No person may maintain a claim for relief or receive an award for damages on that person's own behalf based on the claim that, but for the act or omission of another, that person would have been aborted. As used in this section "abortion" means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead embryo or fetus.

N.D.C.C. § 14-10-04. which says a “minor may enforce the minor’s rights by civil action ... in the same manner as an adult, except that a guardian ad litem must be appointed to conduct the same.” See also N.D.R.Civ.P. 17(b) (outlining procedure for actions by infants). The plaintiffs’ interpretation unreasonably construes the phrase “on that person’s own behalf” and ignores other language in N.D.C.C. § 32-03-43 for receiving an award and also ignores the requirement that a minor’s legal proceedings must be conducted by an appointed guardian or by a next friend. We construe those provisions together, and we hold the plain language of N.D.C.C. § 32-03-43 precludes a child or others from bringing a wrongful life claim on the child’s behalf.

The Court suggests that the Plaintiffs-Appellants’ argument ignores N.D.C.C. § 14-10-04 which states a “minor may enforce the minor’s rights by civil action ... in the same manner as an adult, except that a guardian ad litem must be appointed to conduct the same.” This is a statute which provides for a representative for a minor in North Dakota Courts. Johnson v. Johnson, 2000 ND 170, ¶ 145, 617 N.W.2d 97. A representative is “one who stands for or acts **on behalf of another**”. Black’s Law Dictionary 1304 (7<sup>th</sup> ed. 1999). (Emphasis supplied.) See also Hunt v. Washington Apple Advertising Comm’n, 432 U.S. 333, 342-343, 97 S. Ct. 2434 (1977) where the Supreme Court of the United States found that a representative brings suit **on behalf of another**. The American Heritage Dictionary of the English Language 162 (4<sup>th</sup> ed. 2009) describes “*on behalf of*” (under behalf) as “‘the agent of, on the part of,’ as in *The guardian signed the contract on behalf of the minor child.*” The statute recognizes that a child cannot bring the action on his own behalf that it must be brought by another on his behalf.

This interpretation that an infant cannot bring an action on his own behalf has been followed as a law in this country. 42 Am Jur 2d, Infants § 150 and § 160 the treatise provides:



An infant is under a legal disability and is not competent to personally bring an action on his own behalf, ...

The Court also places emphasis on the issue that it is the minor that will be receiving the award. But it is not. It is the guardian who will receive the award. Pursuant to N.D.C.C. § 30.1-28-12 a guardian of an incapacitated person is to receive money and intangible property for the ward when a conservator has not been appointed. N.D.C.C. § 30.1-27-09 provides that a guardian of a minor may receive all monies payable for the support of his ward and N.D.C.C. § 28-03-05 provides that a guardian ad litem who is to receive money or property of the ward must give sufficient security. In this case, as in almost all of these cases, the child suffers from severe impairments of Down syndrome with incapacitating physical handicaps and mental retardation and will never be able to take care of themselves nor manage their own affairs and will need full time care and assistance and a permanent guardian or conservator.

The Court further states “That language precludes a person from maintaining a claim or receiving an award for damages on the person’s own behalf, which is precisely what a wrongful life action on behalf of a child seeks.” But the Court, in making this holding, has to utilize verbiage of “... what a wrongful life action **on behalf of a child** seeks.” Thus, if it is on behalf of a child it cannot be on the child’s **own** behalf. It is respectfully suggested that this is begging the question. As Professors Corbett and Eberly state in Corbett, E., and Eberly, R. (2000). The Elements of Reasoning, (2<sup>nd</sup> ed). at page 125: “Begging the question occurs when a reasoner makes a statement that assumes the very thing he wants to persuade a reasoning partner or audience of in his reasoning. Circular reasoning is an extreme example of begging the question:

‘Obviously, Saabs are for snobs because the people who drive Saabs are snobs.’ Both the claim and the support say the same thing.”

The Court also states “The plaintiffs’ interpretation unreasonably construes the phrase ‘on that person’s own behalf’ and ignores other language in N.D.C.C. § 32-03-43 for receiving an award ...”. Grammatically speaking the phrase “upon that person’s own behalf” describes both the claim for relief and receiving an award for damages. More simply put it states that no person may maintain a claim for relief on that person’s own behalf and no person may receive an award for damages on that person’s own behalf. The Court, to reach this premise, is only using the descriptive phrase on the person’s own behalf for describing maintaining a claim not for receiving an award for damages. To be grammatically correct, as the Court interprets the language, the statute would have to say no person may maintain a claim for relief on that person’s own behalf or receive an award for damages, but for the act or omissions of another a person (or any person) would have been aborted. Note that there has to be a change from the “that person would have been aborted” to “a person (or any person) would have been aborted”. The Court, in effect, is saying that a claim maybe maintained by another on his behalf but another cannot receive property on his behalf. It is respectfully submitted that this construction is not interpreted in context and according to the rules of grammar, giving meaning and effect to every word, phrase and sentence under N.D.C.C. § 1-02-03 and § 1-02-38 (2), nor to the statutory authority as to guardians described above.

This Court, though, has made a decision in this case on a point or premise which was not argued before the Court by either parties, nor briefed. Furthermore, the District

Court did not address this issue in making its' decision. Thus, it is suggested that such issue needs to be briefed and argued in fairness to both parties.

### CONCLUSION

This Court should grant a rehearing on its decision of December 7, 2010 and provide further briefing on this point or in the alternative enter an Order on Rehearing reversing the judgment of the District Court and remanding for further proceedings including trial.

Dated: \_\_\_\_\_

12/20/10

Respectfully submitted,

By \_\_\_\_\_

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Re: B.D.H., by and through his parents, next of friends and natural legal guardians, S.K.L., and C.S.H.; and S.K.L. and C.S.H., individually vs. Margaret T. Mickelson, MD, Nathaniel L. Karlins, MD, MeritCare Health System, a North Dakota corporation, and MeritCare Hospital, a North Dakota corporation

Case County File No. 09-09-C-01436  
Supreme Court No. 20100152

STATE OF MINNESOTA )  
 ) ss.  
COUNTY OF OTTER TAIL )

**AFFIDAVIT OF SERVICE  
BY MAIL AND E-MAIL**

Jennifer Johnston, being first duly sworn on oath, deposes and states: she is a resident of the City of Bluffton, Minnesota, of legal age, and not a party to the above-entitled matter.

On December 20, 2010, affiant served a true and correct copy of the following document(s):

**Petition for Rehearing of Plaintiffs and Appellants**

A copy of the foregoing were securely enclosed in an envelope and addressed as follows:

E-mail and mail to:  
Angie E. Lord  
Vogel Law Firm  
218 NP Avenue  
P.O. Box 1389  
Fargo, ND 58107-1389  
Email: alord@vogellaw.com

and causing them to be placed in the mail at Henning, Minnesota, with first-class postage prepaid.

  
Jennifer Johnston

Subscribed and sworn to before me this 20 day of December, 2010.



  
Notary Public