Illinois Supreme Court Adopts Wilson Elser's Argument and Eliminates Wrongful Birth Defendants' Exposure for Post-Majority Damages

Wilson Elser’s innovative defense strategy helped to move the law forward and saved its client more than a year in discovery and related expenses.

In Clark v. Children’s Memorial Hospital, No. 108656, 2011 WL 1733532 (Ill. May 6, 2011), the Illinois Supreme Court ruled as a matter of first impression that parents asserting a claim of wrongful birth may not recover expenses incurred for the care and support of their disabled child after the child reaches the age of majority. The high court reached this result—which significantly reduces potential exposure to wrongful birth defendants—with the amicus curiae assistance of Wilson Elser’s Appellate Practice Group and its co-chair Melissa Murphy-Petros. Clark is a significant victory for all wrongful birth defendants in Illinois and an excellent example of the ways in which our Appellate Practice Group adds value and achieves results for Wilson Elser’s clients both inside and outside the usual appellate process.

Background: The Torts of Wrongful Birth and Wrongful Life in Illinois

First recognized by the Illinois Supreme Court in Siemeniac v. Lutheran General Hospital, 117 Ill. 2d 230 (1987), a wrongful birth claim is the claim of parents “who allege that 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.” Siemeniac, 117 Ill. 2d at 236. “The underlying premise is that prudent medical care would have detected the risk of a congenital or hereditary genetic disorder either prior to conception or during pregnancy. As a proximate result of this negligently performed or omitted genetic counseling or prenatal testing, the parents were foreclosed from making an informed decision whether to conceive a potentially handicapped child or, in the event of a pregnancy, to terminate the same.” Siemeniac, 117 Ill. 2d at 236. Until the appellate court’s decision in Clark (discussed below), the only damages recognized in a wrongful birth action were “the extraordinary expenses – medical, hospital, institutional, educational and otherwise – which are necessary to properly manage and treat the congenital or genetic disorder…prior to the child’s reaching his majority.” Siemeniac, 117 Ill. 2d at 260.

In Siemeniac, the Illinois Supreme Court described wrongful life as “the corresponding action” to a wrongful birth claim, but brought by or on behalf of the child who suffers from a genetic or congenital disorder instead of by his parents. Siemeniac, 117 Ill. 2d at 236. “The essence of the child’s claim is that the medical professional’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.” Siemeniac, 117 Ill. 2d at 236. The economic damages sought in a wrongful life action are the “extraordinary medical expenses,” which the child expects to incur after reaching his majority. Siemeniac, 117 Ill. 2d at 237.

Like most courts across the country presented with potential recognition of this tort, the Illinois Supreme Court, in Siemeniac, rejected wrongful life on two principal grounds:

- First, courts are “unwilling…to hold that a child can recover damages for achieving life. The threshold problem has been the assertion by the infant plaintiffs not that they should not have been born without defects, but that they should not have been born at all….Resting on the belief that human life, no matter how burdened, is, as a matter of law, preferable to nonlife, the courts have been reluctant to find that the infant has suffered a legally cognizable injury by being born with a congenital or genetic impairment as opposed to not being born at all.”
Second, it is difficult, "if not impossib[le]," to measure damages for wrongful life. "In a wrongful life case, there is no allegation that but for the defendant's negligence the child would have had a healthy, unimpaired life. Instead, the claim is that without the defendant's negligence, the child never would have been born. Thus, the cause of action involves a calculation of damages dependent upon the relative benefits of an impaired life as opposed to no life at all, a comparison the law is not equipped to make."

The Facts in Clark

The plaintiffs' first child, Brandon, was born in 1997. He suffers from Angelman Syndrome, a severely disabling condition that may be – but is not always – caused by an inherited gene mutation. Before conceiving a second child, the plaintiffs sought genetic testing to determine if Brandon's condition was caused by a genetic mutation. Based upon the test results, the defendants advised that it was not. Timothy was born in March 2002, and within months he was diagnosed with Angelman Syndrome. At that time it was discovered that the cause of both boys' condition was a genetic mutation inherited from their mother.

The appellate court reasoned that "support obligations for an unemancipated, disabled child over the age of majority" should be determined on a case-by-case basis, and that there was no basis for "automatically foreclosing" such damages in a wrongful birth case. See Clark v. Children's Memorial Hospital, 391 Ill. App. 3d 321 (1st Dist. 2009). The Illinois Supreme Court granted defendants' petition for leave to appeal on September 30, 2009.

The Facts in Wilson Elser's Case

On September 16, 2009, just two weeks before the Supreme Court agreed to hear Clark, Wilson Elser's client, Fertility Centers of Illinois, S.C. (FCI), represented by Michael Vittori of our Medical Malpractice group, was sued for wrongful birth. FCI comprises 11 physicians, who provide fertility treatment at 12 locations throughout the Chicago area. It is one of the largest providers of assisted reproductive technology services in the country.

In this newly filed case, the plaintiffs asserted that they underwent in vitro fertilization treatments at FCI, that FCI failed to recommend pre-implantation cystic fibrosis testing, and that their daughter was born in April 2009 with cystic fibrosis. Represented by the same counsel as the Clarks, these plaintiffs sought, among other things, damages for the extraordinary expenses related to the care and treatment of their daughter's condition beyond the age of her majority.

Wilson Elser's Amicus Involvement in Clark

FCI had until December 7, 2009, to either answer the complaint against it or file a pre-answer motion to dismiss for failure to state a claim. Pursuant to the appellate court's opinion in Clark, which was then still in effect, the plaintiffs properly stated a claim for post-majority expenses. Although the Supreme Court had agreed to review Clark, the briefing was ongoing at that time, so its ultimate ruling would be months, if not years, away.
In order to relieve FCI of discovery obligations pertaining to the post-majority expense claim – obligations the Supreme Court could moot with its opinion in Clark – Ms. Murphy-Petros and Mr. Vittori devised the following strategy:

- Mr. Vittori moved to dismiss the complaint against FCI, asserting that post-majority expenses are not recoverable by the wrongful birth plaintiff parents as a matter of law, calling the trial court’s attention to the fact that the appellate court’s opinion on this point in Clark was under review.

- Ms. Murphy-Petros then moved in the Supreme Court for FCI’s leave to participate in Clark as amicus curiae. If granted, this motion would allow FCI to play a substantive role in the Supreme Court’s decision, instead of litigating the case against it while awaiting the Supreme Court’s ruling in Clark.

The strategy worked. On Mr. Vittori’s motion, the trial judge ordered all discovery and proceedings relating to post-majority damages to be held in abeyance pending the Supreme Court’s decision in Clark, and the Supreme Court granted Ms. Murphy-Petros’s motion, allowing FCI to file a brief on the merits in Clark. Ms. Murphy-Petros filed FCI’s brief on December 22, 2009.

**The Supreme Court’s Analysis in Clark**

The Supreme Court handed down its opinion in Clark on May 6, 2011. The court ruled that post-majority expenses are not recoverable by wrongful birth plaintiff parents for two reasons:

- First, the court found that no Illinois common law or statute imposes a duty on any parent to support a disabled, dependent child beyond the age of majority. The court reasoned that absent such a legal obligation “these expenses are not legal harms suffered by the parents, despite their commitment to care for their [child] throughout his [or her] life and their willingness to assume these costs voluntarily.” This was the primary argument made by the defendants in Clark.

- Second, the court found that if it were to hold that wrongful birth defendants are liable to plaintiff parents for a disabled child’s post-majority expenses, then “we would obscure the distinction we made in Siemeniac between wrongful birth and wrongful life, a distinction that the legislature has not seen fit to alter”:

The distinction between claims for wrongful life, medical negligence causing injury to a child, and wrongful birth illustrates the public policy of this state with regard to damages in tort. The injured plaintiff is to be made whole and the defendant is to be held responsible for all harm proximately caused by his negligence.

In the wrongful life context, there is no cause of action because the child, while burdened, cannot be said to have suffered a legal wrong. In the medical negligence context, costs incurred during the injured child’s minority are damages to the parents while costs incurred after the age of majority are damages to the child himself. In the wrongful birth context, the nature of the harm is not that the defendant caused the child’s condition, but that the defendant deprived the parents of the opportunity to make an informed decision. The defendant is liable for all harms proximately caused to the plaintiff parents, which does not include any expenditure they voluntarily make for the support of their child as an adult.

We conclude that based on our constitution, statutes, and common law, the public policy of the State of Illinois favors preserving this distinction.

This was the primary argument made by Wilson Elser in its amicus brief on FCI’s behalf, and it was not made by the other parties to the appeal.
Conclusion

_Clarke_ is an outstanding development for all wrongful birth defendants in Illinois because it greatly reduces exposure in cases that are often based on heartbreaking circumstances with great emotional appeal to juries. Wilson Elser’s Appellate Practice Group is pleased to have been a part of moving the law forward for the defense in this regard while saving its client, FCI, more than one year’s worth of time and a substantial amount of money by participating in discovery on post-majority expenses, which would all have been for naught.

Download the _Clarke_ opinion.

To discuss how Wilson Elser’s Appellate Practice Group may be of service, please contact either of our co-chairs

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1 In a wrongful life claim, the child alleges that the physician “(1) failed to accurately perform genetic screening tests prior to conception or to correctly inform the prospective parents of the hereditary nature of certain genetic disorders; (2) failed to accurately advise, counsel, or test his parents during pregnancy concerning genetic or teratogenic risks associated with childbirth suggested by maternal age, physical condition, family medical history, or other circumstances particular to the parents; or (3) failed to perform a surgical procedure intended to prevent the birth of a congenitally or genetically defective child.” _Siemeniac_, 117 Ill. 2d at 236.