Case Note: Taylor v. Kurapati: The Court of Appeals of Michigan's Decision of Refusing to Recognize the Tort of Wrongful Birth

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INTRODUCTION

The thought of bringing a wrongful birth cause of action against hospitals and physicians has crossed the minds of many parents who unexpectedly gave birth to a child with physical impairments. Since the 1960s, there has been a dramatic increase in medical malpractice litigation arising out of highly technical prenatal testing and also genetic counseling.\(^1\) Many of these medical malpractice actions are often referred to as “wrongful birth” suits.\(^2\)

Wrongful birth is a suit brought by the family of an infant born with birth defects.\(^3\) The issue in a wrongful birth tort is whether the defendant’s actions, or lack thereof, was the proximate cause of the parents’ inability to make an informed decision to either abort the fetus or give birth to a child having defects.\(^4\) Causation in wrongful birth actions “[is] not based on the injuries to the fetus but on the defendant’s failure to diagnose [the plaintiff’s medical condition] and inform her of

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\(^2\)Id.

\(^3\)Gregory G. Sarno, Annotation, Tort Liability for Wrongfully Causing One to be Born, 83 A.L.R. 3d 15 (1978). Plaintiffs in a wrongful birth cause of action often sue both the hospital and the treating physician. Id.

\(^4\)Id. (citing Keel v. Banach, 624 So. 2d 1022, 1029 (Ala. 1993)). The premise of the wrongful birth tort is not based on whether the defendant caused the injury or harm to the child. Id.
A physician can be susceptible to a wrongful birth suit if he does not provide proper counseling during pregnancy, fails to detect or inform the parents of a discoverable defect in the fetus, or interprets prenatal tests incorrectly.

The plaintiffs typically seek recovery for the special medical expenses that arise for supporting a child with a congenital defect. Parents also seek recovery for the pain and suffering which resulted from the inability "to accept or reject a prenatal relationship with the child." Because parents typically seek both damages for medical costs and emotional injury, they must prove these injuries were a direct result of the doctor’s failure to inform the parents of the likelihood their child will be born with a birth defect. Also, the parents must show that had the physician informed them of this defect, they would have chosen to terminate the pregnancy.

At common law, causes of action for wrongful birth or wrongful death were not recognized. Wrongful death suits were first permitted by the passage of Lord Campbell’s Act in the mid-nineteenth century. An action for wrongful birth was not considered until 1967 in the case of Gleitman v. Cosgrove. The plaintiff's child was born with German measles, a viral disease that Mrs. Gleitman suffered from early in her pregnancy. The court in Gleitman determined the defendant physician had misled the plaintiff when he told her that the disease she suffered from would not lead to permanent disfigurement of her child. Even though the court agreed with the plaintiff’s claim that the reason she did not terminate her pregnancy was because she relied on the incorrect advice of the defendant physician, the court rejected the

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5 Robak v. United States, 658 F.2d 471, 477 (7th Cir. 1981).
8 Canesi, 730 A.2d at 811.
9 Id.
10 Id.
12 Lord Campbell’s Act (Fatal Accidents Act), 1846, 9 & 10 Vict. ch. 93.
14 Id. at 691.
15 Gleitman, 227 A2d at 691.
The court’s two major reasons for denying the plaintiff damages under wrongful birth were the difficulty of measuring damages and that abortion was illegal at the time. While abortion is now legal in the United States, the Michigan Court of Appeals correctly decided in *Taylor v. Kurapati* that the tort of wrongful birth should not be recognized.

The first section of this case note will trace the background of the wrongful birth tort. The second section will set forth the case of *Taylor v. Kurapati*. The third section will analyze the Michigan Court of Appeals’ decision in the case. Finally, the fourth section will concentrate on the impact the court’s decision will have on the current state of the law.

**Background**

Courts and legislators from states across the United States have faced the problem of what to do with the wrongful birth tort. This section will describe how different states have addressed the wrongful birth tort over the years and the history of the wrongful birth tort in Michigan.

A number of state courts have taken action to prohibit the tort of wrongful birth. For example, the Georgia Supreme Court ruled on July 6, 1999, the state has no wrongful birth tort. In *Etkind v. Suarez*, the Court of Appeals of Georgia upheld *Atlanta Obstetrics and Gynecology Group v. Abelson* where the Court refused to recognize wrongful birth actions until the state legislature acknowledged such action in a statute. The court in *Abelson* ruled the then-existing medical malpractice statute did not authorize a wrongful birth cause of action. It further stated additional legislation was necessary because “this is an area more suited to legislative action since the legislature offers a forum wherein all issues, policy considerations, and long range consequences of a ‘wrongful birth’ cause of action can be thoroughly and openly debated and ultimately decided.”

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16 *Id.* at 691, 693.
17 *Id.* at 693.
19 *Id.*
21 *Id.* at 211.
23 *Etkind*, 519 S.E.2d at 212.
The court in *Etkind* ruled that their holding would not violate the constitutional rights of the parents of a child with physical impairments. This is because the refusal to recognize a wrongful birth claim absent authorizing legislation would not constitute a substantial obstacle for pregnant women or deter them from exercising their constitutional right to choose to have an abortion. The court explained Georgia has not ordered doctors to interfere with the right to choose abortion. If courts were to decide a state action exists when a state has not addressed an issue, all conduct, both private and public, would be considered a state action. The court in *Etkind* stressed parents still could obtain a remedy for giving birth to a disabled child, but *Abelson* held that a cause of action for wrongful birth must be created by the state legislature, not the courts.

Many state legislatures have taken the initiative to enact statutes that address the tort of wrongful birth instead of relying on the state court to make the decision as to whether or not wrongful birth should be recognized. For example, Minnesota has taken aggressive legislative action refusing to recognize the tort of wrongful birth. The statute reads, "No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted." In *Hickmann v. Group Health Plan, Inc.*, the Minnesota Supreme Court upheld the statute's constitutionality under both the United States and Minnesota Constitution.

Furthermore, some state legislatures have developed genetic counseling programs by statute that may have an effect on determining

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24 Id. at 211.
25 Id. at 213.
26 Id.
27 Campbell v. United States, 962 F.2d 1579, 1583 (11th Cir. 1992).
28 *Etkind*, 519 S.E.2d at 213.
30 MINN. STAT. § 145.424, subd. 2 (1997).
31 Id.
32 Hickmann v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986).
the appropriate standard of care in negligent genetic counseling cases.\textsuperscript{33} States that have enacted genetic counseling statutes include Alabama, Colorado, Iowa, Missouri, Montana, Nebraska, Nevada, New York, and Tennessee.\textsuperscript{34}

Maine is the only state in the United States that recognizes by statute a cause of action for wrongful birth.\textsuperscript{35} However, Maine recognizes only a limited cause of action for wrongful birth.\textsuperscript{36}

**The History of Wrongful Birth in Michigan**

The complexity of the wrongful birth tort struck Michigan in the early 1980s.\textsuperscript{37} In *Eisbrenner v. Stanley*, the Court of Appeals of Michigan first recognized a cause of action for parents who gave birth to a child with serious birth defects.\textsuperscript{38} The plaintiffs claimed the defendant physician negligently failed to inform Mrs. Eisbrenner’s rubella.\textsuperscript{39} Prior to notifying Eisbrenner that she was a healthy woman, the physician had examined test results that indicated she had the disease.\textsuperscript{40} The plaintiffs claimed the defendant not only failed to warn Mrs. Eisbrenner


\textsuperscript{35}ME. REV. STAT. ANN. tit. 24, § 2931 (West 1997).

\textsuperscript{36}Id. "Damages for the birth of an unhealthy child born as a result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child." Id.


\textsuperscript{38}600 N.W.2d at 684. See Eisbrenner, 308 N.W.2d at 209. These defects were caused by a disease that the baby’s mother suffered from. Id. The disease was identified as rubella. Id.

\textsuperscript{39}600 N.W.2d at 684. See Eisbrenner, 308 N.W.2d at 210. Rubella is commonly referred to as German measles. National Foundation for Infectious Diseases, Facts About Rubella for Adults, at http://www.nfid.org/factsheets/rubellaadult.html (last visited Apr. 16, 2002). Rubella is a virus spread to others when an infected person coughs or sneezes, or by direct contact with nasal or throat secretions. Symptoms include rash, fever, aching joints, headaches, runny nose and reddened eyes. Id. Approximately twenty-five percent of babies whose mothers contract the disease during the first trimester of pregnancy are born with birth defects such as eye defects, heart defects, hearing impairment, mental retardation and cerebral palsy. Center for the Evaluation of Risks to Human Reproduction, Rubella, The National Toxicology Program, at http://cerhr.niehs.nih.gov/genpub/topics/rubella-ccae.html (last visited Apr. 16, 2002).

\textsuperscript{40}Taylor, 600 N.W.2d at 684. See Eisbrenner, 308 N.W.2d at 211.
that she had rubella, but negligently failed to warn the plaintiffs of the
likelihood Mrs. Eisbrenner would give birth to a physically impaired
baby.\textsuperscript{41} The plaintiffs in \textit{Eisbrenner} used the same argument as most
plaintiffs use in wrongful birth claims--the plaintiffs would have chosen
to terminate the pregnancy if the physician had properly informed the
parents of the pre-natal test results.\textsuperscript{42} The court agreed with the trial
court that the plaintiff's claims should not be dismissed.\textsuperscript{43}

Six years later, the court for the first time used the words
"wrongful birth" in the case, \textit{Proffitt v. Bartolo}.\textsuperscript{44} The Michigan
Supreme Court in this case defined the tort of wrongful birth as
follows:

\begin{quote}
If a physician breaches the appropriate duty under the facts of
a case, and it can be established that the parents would have
avoided or terminated the pregnancy, the necessary causal
connection is established. The parents should recover for their
extraordinary medical expenses and the extraordinary costs of
raising the child, as well as the emotional harm they suffered.\textsuperscript{45}
\end{quote}

The court explained if a physician breaches his duty of care and it
can be proven the parents would have terminated the pregnancy,
damages should be awarded to the parents.\textsuperscript{46} In \textit{Proffitt}, the court
decided "as long as abortion remains an option allowed by law, the
physician owes a duty to furnish parents with adequate information for
them to be able to decide whether to choose that course of action."\textsuperscript{47}

The Court of Appeals in \textit{Rouse v. Wesley} upheld \textit{Proffitt}'s
definition of the tort of wrongful birth.\textsuperscript{48} The \textit{Rouse} court stressed
"wrongful birth is a tort action brought by parents of a child with a
birth defect against a doctor or other person whose negligent failure to
inform the parents of the risk of the birth defect deprived the parents of

\textsuperscript{41}Taylor, 600 N.W.2d at 684. See Eisbrenner, 308 N.W.2d at 210.
\textsuperscript{42}600 N.W. 2d at 684. See 308 N.W.2d at 210.
\textsuperscript{43}See 308 N.W.2d at 209.
\textsuperscript{44}Phil Cavanagh, Note: \textit{TORT LAW--A Cause of Action Exists for Wrongful Birth Claim
Where Physician Negligently Fails to Perform Test Which May Have Detected Birth Defects,
Even Though the Likelihood of Detection is Less than Fifty Percent. Blair v. Hutzel Hospital,
\textsuperscript{45}Proffitt, 412 N.W.2d at 238.
\textsuperscript{46}Id.
\textsuperscript{47}Id.
the opportunity to make an informed decision to avoid or terminate the pregnancy."^49

Subject Opinion

Trial Court: Facts

Plaintiffs Brandy and Brian Taylor brought suit against the Defendants Surender Kurapati, M.D and Annapolis Hospital, claiming wrongful birth and negligent infliction of emotional distress.^50 The Taylors alleged that Brandy was a patient of Kurapati, a specialist in radiology at Annapolis Hospital.^51 Dr. Leela Suruli was Brandy’s physician during Brandy’s pregnancy.^52 Suruli recommended Brandy undergo a commonly performed ultrasound during Brandy’s second trimester.^53 Kurapati examined the ultrasound and did not detect any abnormalities with the fetus.^54 Dr. M.B. Cash conducted the second ultrasound and recommended a high-resolution ultrasound be performed to investigate the condition of the baby’s femurs.^55 Suruli informed Brandy that the baby had short femur bones, which would only result in the child being shorter than average.^56 Brandy decided another ultrasound was not necessary.^57 Subsequently, Shelby Taylor was born with “gross anatomical deformities including missing right shoulder, fusion of the left elbow, missing digits on left hand, missing femur on the left leg and short femur on the right.”^58

Trial Court: Reasoning

The Taylors alleged that Kurapati breached his duty of care by failing to locate the physical defects on the fetus during the first

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^49 Id. at 626, 27.
^50 Taylor, 600 N.W.2d at 673.
^51 Id. Kurapati is an agent of Annapolis Hospital.
^52 Id.
^53 Id.
^54 Id. at 673, 674.
^55 Taylor, 600 N.W.2d at 674.
^56 Id.
^57 Id.
^58 Id. This condition is known as femur-fibula-ulna syndrome. Id.
The Taylors claimed the failure to be informed of the disabilities in the fetus deprived the Taylors of their right to make a choice of whether to continue the pregnancy or terminate the pregnancy. The Taylors also claimed they suffered emotional distress from watching the birth of the baby, which was a result of the defendant’s negligence. Annapolis Hospital filed a motion for summary disposition arguing the Taylors did not file their complaint within the statute of limitations. Kurapati also filed a motion for summary disposition.

After a hearing, the trial court decided the Taylor’s medical malpractice claim was not filed within the statute of limitations and dismissed the malpractice claims. The trial court allowed the claim of negligent infliction of emotional distress to proceed because “the parties had not addressed the issues in their briefs.” The defendants were allowed to submit motions for summary disposition addressing the plaintiffs’ negligent infliction of emotional distress claim. The trial court granted summary disposition for the negligent infliction of emotional distress claim. Also, the trial court denied the Taylor’s motion for reconsideration concerning the court’s August 12, 1996 dismissal of the malpractice claim due to their failure to comply with the statutory notice of intent provisions.

Court of Appeals: Majority Opinion
The Court of Appeals of Michigan gave a detailed opinion in Taylor. The court first discussed Michigan’s history of “bad baby” cases. Next, the wrongful birth was compared to the wrongful conception tort. The court went on to introduce the benefits rule. The majority opinion discussed the wrongful life tort in great detail. Then the court looked at

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59 Taylor, 600 N.W.2d at 674.
60 Id.
61 Id.
62 Id. at 674.
63 Taylor, 600 N.W.2d at 674.
64 Id.
65 Id.
66 Id. The trial court made this decision without hearing any oral arguments from either the plaintiff or the defendant. Id.
67 Taylor, 600 N.W.2d at 674.
68 Id.
the origins of the wrongful birth tort in Michigan. The court explained how the decision in *Roe v. Wade* affected the wrongful birth tort. The court then argued the benefits rule presents a slippery slope. Also, the majority addressed the statute of limitations issue. The majority concluded its opinion discussing the negligent infliction of emotional distress claim. Finally, Judge Doctorff concurred in part and dissented in part.

**Michigan's History With “Bad Baby” Cases**

The court first addressed that Michigan has determined that causes of action exist in “bad baby” cases. These cases typically result from a physician’s and/or hospital’s negligence occurring near the time of the birth. Unlike “bad baby” cases, the plaintiffs in a wrongful birth cause of action usually claim the physician and/or hospital were negligent relatively early in the pregnancy in failing to inform the parents of the risk of birth defects. In addition, the plaintiffs in “bad baby” cases do not claim the physician’s negligence denied the parent of the choice to an abortion. The court distinguished "bad baby" cases from wrongful birth claims because “bad baby” cases do not involve allegations that the pregnancy should have been terminated. The plaintiffs in “bad baby” cases claim the fetus would not have developed birth defects if the physician had not acted negligently.

The court then compared the wrongful birth tort with “end of life” cases. End of life cases address a person’s constitutional right to refuse unwanted medical treatment. Under Michigan’s common law doctrine of informed consent, a person has a right to refuse “life sustaining medical treatment.” The similarity between end of life cases and wrongful birth cases stems from “situations involving a once-competent patient, who has utilized a living will or other advance directive or a do-not-resuscitate order to proscribe certain types of

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69 *Taylor*, 600 N.W.2d at 674.
70 *Id.* at 675.
71 *Taylor*, 600 N.W. 2d at 675.
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *Taylor*, 600 N.W. 2d at 675.
77 *Id.* (citing *In Re Martin*, 538 N.W.2d 399 (1995)).
treatment; a once competent patient who has left no such instructions; or a never-competent patient. In wrongful birth causes of action the plaintiffs claim they were denied their right to choose whether or not to terminate the pregnancy. The court stressed however that this comparison is inaccurate. Actions involving end of life decisions do not generally arise in a tort context like wrongful birth causes of action. Also, courts often balance the right to refuse life-prolonging procedures against the state’s interests. These interests include preserving life, preventing suicide, protecting innocent third parties and maintaining the ethical integrity of the medical profession. Courts often determine that these interests do not apply to wrongful birth causes of action.

Comparing Wrongful Birth with Wrongful Conception

The court in Taylor compared wrongful birth with wrongful conception. In wrongful conception actions, the plaintiffs claim the defendant’s negligent conduct failed to prevent the birth of the child in the following circumstances: “(1) where a physician negligently performs a vasectomy or tubal litigation or when a physician, pharmacist, or other health professional provides any other type of ineffective contraception where the parents conceive, and the birth of a healthy, but unplanned, baby results; (2) where a physician negligently fails to diagnose a pregnancy, thereby denying the mother the choice of termination of the pregnancy at a timely stage, and the birth of a healthy, but unwanted, baby results; and (3) where a physician negligently attempts to terminate the pregnancy and the birth of a healthy, but unwanted, baby results.”

The court first recognized a cause of action for wrongful conception in Troppi v. Scarf. In that case, the parents had seven

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78 Taylor, 600 N.W.2d at 675.
79 Id. at 676.
80 Id.
81 Id.
82 Taylor, 600 N.W.2d at 676.
83 Id.
84 Id.
85 Id. Wrongful conception is also referred to as wrongful pregnancy. Id.
86 Taylor, 600 N.W.2d at 676.
87 Id. (citing Troppi v Scarf, 187 N.W.2d 511 (1971)).
children and decided they did not wish to have any more. The defendant pharmacist gave Mrs. Troppi tranquilizers instead of the oral contraceptives that Mrs. Troppi’s physician prescribed. Mrs. Troppi later gave birth to a healthy child. The Troppis claimed the defendant was negligent and sought the cost of raising an eighth child to the age of majority. The Troppi court ruled the defendant pharmacist breached his duty of care when he filled the wrong prescription. In addition, the court found as a result of the defendant’s mistake, Mrs. Troppi became pregnant. The medical and hospital expenses of Mrs. Troppi’s confinement and her loss of wages arose from the defendant’s failure to fill the prescription properly. The Troppi court stressed pain and suffering has long been recognized as compensable injuries. After discussing public policy and endorsing the application of the “benefits rule,” the court concluded that damages in a wrongful conception case should be calculated “as it would in any other negligent case.”

The Benefits Rule
Parents in wrongful birth causes of action often seek grossly exaggerated damages. The benefits rule is essential in allowing flexibility in the case by case determination of claims that are never the same. The Troppi court simply ignored the problem of placing a dollar amount on the companionship and services of an unwanted child.

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88Taylor, 600 N.W.2d at 676.
89Id. The tranquilizers were not prescribed by the physician. The physician only prescribed oral contraceptives. Id.
90Id.
91Id. at 677.
92Taylor, 600 N.W.2d at 677. The Troppi court reviewed the common law concepts of “breach of duty, causation in fact, and direct and proximate causation resulting in damages.” Id.
93Id. The court found “the possibility that Mrs. Troppi might become pregnant was certainly a foreseeable consequence of the defendant’s failure to fill a prescription for birth control pills.” Id.
94Id.
95Taylor, 600 N.W.2d at 678.
96Id. at 677, 678.
97Id. at 678.
98Id.
99Id.
Courts have not allowed the recovery of the costs of raising a normal, healthy child as an element of damages for many reasons.\(^\text{100}\) The court considered the best reason to not allow these damages were that the costs of raising such a child are outweighed by the value of the child’s life.\(^\text{101}\) Allowing the costs of raising a child as an element of damages, however, logically requires the conclusion that the nonexistence of that child would be a benefit.\(^\text{102}\) “The existence of a normal, healthy life is an esteemed right under our laws rather than a compensable wrong…”\(^\text{103}\) The expenses of raising a child should not overshadow the benefit of the child’s life.\(^\text{104}\)

Another reason for not awarding the costs of raising a physically impaired child is in order to receive these damages parents must prove that they did not desire to give birth to the child and also the child “is of minimal value to them.”\(^\text{105}\) The court stressed concern for parents who were going to belittle their children in public.\(^\text{106}\) The basis for this concern by the court was the fear that the child will understand his parents are suing their physician and/or hospital because they did not want to give birth to him.\(^\text{107}\) The court recognized all human life as being presumptively valuable; “a child should not be considered a ‘harm’ to its parents so as to allow recovery for the customary costs of raising a child.”\(^\text{108}\)

The Wrongful Life Tort
A wrongful life claim is brought on behalf of the child who alleges that she is alive and suffering with a disability because during the pregnancy the physician did not sufficiently inform her parents of her impairments.\(^\text{109}\) The child claims if the physician had properly informed the parents of her condition, she would not have been born

\(^{100}\)Taylor, 600 N.W.2d at 679.

\(^{101}\)Id.

\(^{102}\)Id.

\(^{103}\)Id. at 679-80.

\(^{104}\)Taylor, 600 N.W.2d at 680.

\(^{105}\)Id.

\(^{106}\)Id. (citing Public Health Trust v. Brown, 388 So. 2d 1084, 1086 (Fla. Dist. Ct. App. 1980)). The court did not want comments from parents who were to talk about how their children are of minimal value in an open court. Id.

\(^{107}\)Taylor, 600 N.W. 2d at 680. (citing Wilbur v Kerr, 628 S.W. 2d 568, 570-71 (1982)).

\(^{108}\)Id. at 681. Emphasis in case was deleted. Court in case emphasized this sentence. Id.

\(^{109}\)Id. at 682.
and suffered through life because the parents would have chosen to undergo a legal abortion.\textsuperscript{110}

In \textit{Proffitt v. Bartolo}, the court held the wrongful life tort was not recognized in Michigan.\textsuperscript{111} In count I, the parents' action was for wrongful birth; count II involved the parents' action on behalf of their daughter, Maya Proffitt.\textsuperscript{112} Count II involved damages for medical and educational expenses due to the fact that she would not be able to earn an income once she became an adult.\textsuperscript{113} The plaintiffs claimed their physician, Dr. Bartolo, breached his duty of care in his relationship with his patient, Mrs. Proffitt.\textsuperscript{114} Dr. Bartolo allegedly did not conduct the appropriate tests, did not interpret the tests he did take properly, did not order additional tests to determine if there were any infections that could cause defects in the fetus, and did not inform the plaintiffs of the risk of the fetal defects so they could decide whether to terminate the pregnancy.\textsuperscript{115} The plaintiffs claim they would have terminated the pregnancy if they were aware the fetus's condition and received sufficient information regarding the risks to the fetus.\textsuperscript{116} Instead, Maya was born with severe physical impairments.\textsuperscript{117}

The court in \textit{Proffitt} acknowledged the wrongful birth tort by stating "...the \textit{Eisbrenner} holding with regard to wrongful birth remains the law in Michigan until changed by the Legislature or the Supreme Court."\textsuperscript{118} The \textit{Proffitt} court continued by recalling that the court has rejected the wrongful birth tort on three occasions.\textsuperscript{119} As a result, the \textit{Proffitt} court decided to uphold the dismissal of the wrongful life cause of action.\textsuperscript{120}

\textsuperscript{110}Id.
\textsuperscript{111}Id. (citing Proffitt v. Bartolo, 412 N.W.2d 232 (1987)).
\textsuperscript{112}\textit{Taylor}, 600 N.W.2d at 681.
\textsuperscript{113}Id. at 682.
\textsuperscript{114}Id.
\textsuperscript{115}Id.
\textsuperscript{116}Id. at 682-83.
\textsuperscript{117}Id. "Maya was born with microcephaly, mental retardation, severe bilateral eye malformations resulting in blindness, and other severe congenital malformations caused by a rubella infection or another intrauterine viral, parasitic or protozoic infection transmitted to Maya during the early stages of fetal development." \textit{Id.}
\textsuperscript{118}Id.
\textsuperscript{119}\textit{Taylor}, 600 N.W.2d at 683.
\textsuperscript{120}Id. at 684. In 2001, the Michigan state legislature enacted a statute to protect the interests of unborn children. The court may appoint a "suitable person to appear and act as
The Origins of the Wrongful Birth Tort in Michigan

The court went on to discuss the origins of the wrongful birth tort in Michigan.  

121 MCR 7.215 (H) states “this Court must follow the rule of law established by a prior published decision of the Court issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court or by a special conflict panel of this Court.”  

122 Strohmaier, Proffitt, and Rinard were cases that took place before November 1, 1990, and Rouse and Blair took place after November 1, 1990. Therefore, the court must administer the decisions in Rouse and Blair, unless the two cases were overturned, modified, or could be distinguished from Taylor.  

123 Therefore, the court may refuse to recognize the tort of wrongful birth based on the fact that Rouse is distinguishable from Taylor and the Supreme Court overturned the Blair decision.

The Affect of Roe v Wade on Wrongful Birth Torts

Supporters for the recognition of the wrongful birth tort argue the decision in Roe v. Wade enables physicians to be liable for failing to inform their patients of details that have an effect on deciding whether or not to abort the fetus.  

124 The court in Proffitt decided to recognize guardian ad litem of the unborn person.” This person is authorized to do “whatever is necessary to defend and protect the interest of the unborn person.” MCLS S600.2045 (2001).

125 Taylor, 600 N.W.2d at 684-86.

126 Taylor, 600 N.W.2d at 686.

127 Taylor, 600 N.W.2d at 686.

128 Roe v. Wade, 410 U.S. 113 (1973) (ruling statutes restricting abortion violated a woman’s right to privacy. Justice Blackmun’s opinion acknowledged that states had some valid interests in regulating abortion. The opinion divided the pregnancy into 3 trimesters. During the first trimester, the woman had virtually an unrestricted right to have an abortion. During the second trimester, when abortion posed a greater threat to a woman’s health, states could regulate abortion to protect the woman. During the third trimester the states interests in protecting the potential life of a fetus was great enough to implement severe restrictions on
the wrongful birth tort because "as long as abortion remains an option allowed by law, the physician owes a duty to furnish patients with adequate information for them to be able to decide whether to chose that course of action."\textsuperscript{129} The court in \textit{Proffitt} determined that in order to deny a right of recovery to patients who were not informed by their physicians that their child may have birth defects, the right to have an abortion must first be eliminated.\textsuperscript{130} The \textit{Proffitt} argument is erroneous.\textsuperscript{131}

The right of privacy "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion."\textsuperscript{132} The Michigan legislature has not recognized a legal right to an abortion.\textsuperscript{133} Instead, Michigan law encourages giving birth.\textsuperscript{134} The Michigan Constitution does not provide a right to terminate a pregnancy.\textsuperscript{135} The Michigan Supreme Court has held that cases such as \textit{Roe v. Wade} do not force states to have no opinion concerning abortion.\textsuperscript{136} States may favor childbirth over abortion by actions such as not funding abortions.\textsuperscript{137} "Because the state has no obligation to affirmatively aid a woman in obtaining an elective abortion by paying for it, the state similarly has no obligation to take affirmative steps of imposing civil liability on a party for failing to provide a pregnant woman with information that would make her more likely to have an elective and eugenic abortion."\textsuperscript{138}

\textbf{The Slippery Slope of the Benefits Rule}

The court again focused on the benefits rule.\textsuperscript{139} The \textit{Eisbrenner} court "created" the wrongful birth tort by focusing on the benefits rule, which

\textsuperscript{129}Taylor, 600 N.W. 2d at 686, 687 (quoting Proffitt, 412 N.W.2d 232 (1987)).
\textsuperscript{130}Id. at 687.
\textsuperscript{131}Id.
\textsuperscript{132}Id. (quoting Maher v Roe, 432 U.S. 464, 474).
\textsuperscript{133}Taylor, 600 N.W. 2d at 687.
\textsuperscript{134}Id.
\textsuperscript{135}Id. (citing Mahaffey v Attorney General, 564 N.W.2d 104 (1997)).
\textsuperscript{136}Taylor, 600 N.W. 2d at 687.
\textsuperscript{137}Id. (citing Doe, 487 N.W.2d 166. See also Blair, 552 N.W.2d 507 (1996) (O'Connel, J., dissenting).
\textsuperscript{138}Taylor, 600 N.W. 2d at 687.
\textsuperscript{139}Id. at 688.
was adopted in Troppi. The wrongful birth tort the court created in Eisbrenner relies on the benefits rule that was adopted in Troppi. The benefits rule allows the jury in wrongful birth cases to balance the costs to the parents of caring for a disabled child born with physical impairments against the benefits the parents receive for having that child in their life. The jury must “quantify the unquantifiable” when they try to measure the benefits of having a child. The court stressed at the time of the trial that the jury was unaware of the disabled child’s potential, which made determining the benefits to the parents for the child’s entire life an impossible task.

The court in Taylor feared that applying the benefits rule in wrongful birth cases could lead to applied eugenics. The phrase “wrongful birth” suggests it is wrong to give birth to a disabled child. The theory of wrongful birth suggests terminating the birth of a disabled child not only benefits the child’s parents but also society as a whole.

The court in Taylor concluded the court would not further recognize the wrongful birth tort unless the Michigan legislature enacted a statute regarding recognizing causes of action under wrongful birth or the Michigan Supreme Court decides the wrongful birth tort should exist.

Statute of Limitations

The court next addressed the statute of limitations issue. The court did not agree the Taylor’s claim accrued the day Mrs. Taylor gave birth to her child. The act which provided the foundation for the Taylor’s claim was Kurapati’s reading and interpretation of the ultrasound on December 4, 1993. The Taylors had two years from that date to file

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140 Taylor, 600 N.W.2d at 688.  
141 Id.  
142 Id.  
143 Id.  
144 Taylor, 600 N.W.2d at 688.  
145 Id.  
146 Id.  
147 Id.  
148 Taylor, 600 N.W.2d at 691.  
149 Id. at 692.  
150 Id.  
151 Id.
their claim. Therefore, the court held summary disposition was rightfully granted based on the fact that the Taylors did not file their initial complaint until March 26, 1996.

Negligent Infliction of Emotional Distress

The court then looked at the plaintiff’s claim for negligent infliction of emotional distress. The court explained the plaintiff should recover for negligent infliction of emotional distress where: “(1) the injury threatened or inflicted on the third person is a serious one, of a nature to cause severe mental disturbance to the plaintiff, (2) the shock results in actual physical harm, (3) the plaintiff is a member of the third person’s immediate family, and (4) the plaintiff is present at the time of the accident or suffers shock ‘fairly contemporaneous’ with the accident.” The court decided the Taylor’s claim was flawed because both parents admitted that they did not see their child’s physical defects during or immediately after the delivery. Brandy Taylor and her husband both testified that the child was taken out of the room before they had a chance to look at her closely. The court concluded the facts of this case did not meet the criteria for a claim of negligent infliction of emotional distress.

Concurrence/Dissent

Judge Doctoroff concurred with the majority’s decision that the wrongful birth claim was barred by the statute of limitations and summary disposition was appropriate for the negligent infliction of emotional distress claim. He dissented from the majority opinion with respect to the “abolition of the wrongful birth tort where this

\begin{footnotes}
\item[152] Taylor, 600 N.W.2d at 692.
\item[153] Id.
\item[154] Id. at 693.
\item[155] Id. (quoting Wargelin v. Sisters of Mercy Health Corp., 149 Mich. App. 75, 81 (1986)).
\item[156] Id.
\item[157] Taylor, 600 N.W.2d at 693. “Brandy Taylor’s deposition testimony indicated that she did not know anything was wrong with Shelby Taylor and that the doctors swept the child out of the room before she had a chance to see her.” Id. Brian Taylor testified that he noticed something about Shelby Taylor’s arm, but that the child was taken out of the room before he could notice more of the disabilities.” Id.
\item[158] Id.
\item[159] Id.
\end{footnotes}
Court’s recognition of that tort was not challenged by the parties or decided by the trial court.\textsuperscript{160} "[S]tatements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of adjudication."\textsuperscript{161} Judge Doctoroff argued the only issue the court should have addressed was the claim regarding the statute of limitations.\textsuperscript{162} The court’s discussion regarding the history of the wrongful birth tort and the decision that the court would not recognize wrongful birth claims were unnecessary.\textsuperscript{163} Justice Doctoroff stated the court’s waste of time and resources in issuing the majority opinion in \textit{Taylor} was “unnecessary judicial activism.”\textsuperscript{164}

\textbf{Analysis}

This section will expand on the majority’s opinion that the wrongful birth tort should not be recognized. If Michigan recognized causes of action for wrongful birth, the court would face the extremely difficult, if not impossible, burden of determining whether or not the plaintiff would have terminated the pregnancy had she been informed of the child’s defects. Also, as with other physician in wrongful birth suits, the baby’s defects in \textit{Taylor} were not a direct result of the defendant’s actions. Finally, the decision in \textit{Roe v. Wade} does not force states to recognize the tort of wrongful birth.

\textit{The Impossibility of Determining Whether the Plaintiffs would have Terminated the Pregnancy}

Under a wrongful birth action, the plaintiffs must decide whether to have an abortion.\textsuperscript{165} The problem with this requirement is that the parents make the decision after their child is born.\textsuperscript{166} Plaintiffs would experience tremendous difficulty in proving post facto that they would have chosen to terminate the pregnancy. If one plaintiff says she would have terminated the pregnancy instead of giving birth, she can seek damages against the defendant physician and/or hospital.\textsuperscript{167} If another

\begin{itemize}
  \item \textsuperscript{160}Id. at 693-94.
  \item \textsuperscript{161}Id. at 694.
  \item \textsuperscript{162}\textit{Taylor}, 600 N.W.2d at 694.
  \item \textsuperscript{163}Id.
  \item \textsuperscript{164}Id.
  \item \textsuperscript{165}Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 16 (Simonett, J., concurring).
  \item \textsuperscript{166}Id.
  \item \textsuperscript{167}Id.
\end{itemize}
plaintiff says she would still have given birth to the disabled child, she cannot sue.\textsuperscript{168} Both women gave birth to a physically impaired child, but only one can seek damages as a result of the birth.\textsuperscript{169}

**The Injury was not a Direct Result of the Physician’s Actions**

In *Ellis v. Sherman*,\textsuperscript{170} the Supreme Court of Pennsylvania suggested when “life comes into being unimpeded by outside forces, and is formed solely by its own internal controls, that life cannot be said to constitute an injury.”\textsuperscript{171} The court was commenting that the presence of unusual characteristics alone would not result in legal harm.\textsuperscript{172} The court in *Ellis* stated a person “is not injured by being born with poor vision, or by catching the flu, or by contracting cancer. These maladies...are unfortunate occurrences, but in the absence of circumstances in which the poor vision, the flu or the cancer are inflicted by the acts of another, these conditions are not legal injuries.”\textsuperscript{173} These circumstances are “simply a part of life.”\textsuperscript{174}

A physician who was negligent in performing surgery on a fetus resulting in harm to the fetus would be liable.\textsuperscript{175} On the other hand, a physician should not be liable for failing to locate a physical abnormality in the fetus.\textsuperscript{176} The physician’s negligent mistake in the first hypothetical caused the child’s defects, but the physician’s actions in the second hypothetical did not cause any injury to the fetus.\textsuperscript{177}

The plaintiffs may have suffered an injury by having to raise a disabled child, however, this injury was not a result of the doctor’s actions. Also, there is some doubt as to whether to even consider the situation as an injury to the plaintiffs, which will be discussed under “eugenics” later in this case note.\textsuperscript{178}

\textsuperscript{168}Hickman, 396 N.W.2d at 16.

\textsuperscript{169}Id.

\textsuperscript{170}Ellis v. Sherman, 515 A.2d 1327 (Pa. 1986).


\textsuperscript{172}Id.

\textsuperscript{173}Ellis, 515 A.2d at 1329.

\textsuperscript{174}Id.

\textsuperscript{175}Strasser, *supra* note 171 at 52.

\textsuperscript{176}Id.

\textsuperscript{177}Id.

\textsuperscript{178}See discussion *infra* Part IV.
The Effect Roe v. Wade has on the Tort of Wrongful Birth.

"[W]rongful birth cases are not abortion cases." Plaintiffs argue that denial of the use of the wrongful birth tort is unconstitutional under Roe v. Wade. However, Roe v. Wade should not be the determining factor in deciding whether or not to recognize the tort of wrongful birth.

The decision in Eisbrenner would have been the same even if Roe were decided differently because Eisbrenner based its decision on Troppi, which was decided before Roe. Troppi involved a negligent, wrongful act by the defendant, which directly and proximately caused injury to the plaintiffs.

The Proffitt decision to recognize the wrongful birth tort because a woman has a legal right to an abortion is erroneous. A state must directly affect or impose a significant burden on a woman's right to an abortion in order to be in violation or Roe. State statutes that require doctors to provide clients with information that support giving birth instead of having an abortion and use medical procedures that could put maternal health at risk for the benefit of a fetus have been struck down by the Court. The United States Supreme Court has determined that "although government may not place obstacles in the path of a woman's exercise of freedom of choice, it need not remove those not of its own creation."

The right of privacy does not forbid a state to make a judgment favoring childbirth over abortion. Michigan law provides no right to an abortion. Michigan law favors childbirth over abortion through

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179 Taylor, 600 N.W.2d at 687.
180 Roe, 410 U.S. 113.
181 Taylor, 600 N.W.2d at 687.
182 Id. In Troppi, the plaintiff was prescribed oral contraceptives by her physician in order to refrain from having more children. Id. at 676 (citing Troppi v. Scarf, 187 N.W.2d 511 (1971)). The plaintiff later gave birth to a healthy child. Id. The plaintiff was awarded by the court of appeals of Michigan costs to raise this child until the age of eighteen. Id. at 677.
183 Taylor 600 N.W.2d at 676-77.
184 Id. at 687.
188 Taylor, 600 N.W.2d at 687.
legislation such as MCL 400.109a, which prohibits the use of Medicaid funds to pay for an abortion unless the abortion was necessary to save the life of another. In addition, federal law imposes no obligation on government to be neutral regarding abortion.

A state is allowed to favor childbirth over abortion. For example, the New Jersey Supreme Court in Gleitman v. Cosgrove decided to refuse to allow the plaintiff to recover damages for wrongful birth because "substantial policy reasons prevent[ed] [the Court] from allowing tort damages for the denial of the opportunity to take an embryonic life." Because the state does not have an obligation to affirmatively aid a woman in obtaining an abortion and paying for it, the state similarly has no obligation to take the affirmative step of imposing civil liability on a party for failing to provide a pregnant woman with information that would make her more likely to have an elective abortion.

IMPACT

Some courts examine public policy concerns instead of concentrating on harms suffered by individual families for cases involving whether a physician is liable for a child bearing disabilities at birth. Wrongful birth presents many public policy problems, including placing a heavy burden on physicians, difficulty in ascertaining damages, and the theory under the eugenics movement concerning whether birth defects should be considered injuries to the parents of the child.

The Heavy Burden on Obstetricians and Gynecologists

Recognition of the wrongful birth tort would cause increased costs of prenatal care due to the increased amount of testing. There are more than four hundred and fifty tests for genetic disorders, making it impossible for physicians to conduct every test due to both time and

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191 Id. at 173.
193 Doe, 487 N.W.2d at 179.
194 STRASSER, supra note 192, at 174.
money constraints.\textsuperscript{195} Some tests only show that there is a possibility the child has a physical disability, they do not show exactly what is wrong with the child.\textsuperscript{196} If tort liability is expanded to cover wrongful birth, courts will experience more administrative problems as a result of the flood of parents taking physicians to court.\textsuperscript{197} Also, the number of abortions on healthy fetuses will increase because of risk management by physicians.\textsuperscript{198}

As technology has become more enhanced, some parents think that their new-born child’s physical impairment is someone else’s fault.\textsuperscript{199} Permitting plaintiffs to recover from a wrongful birth claim would place an unreasonable burden on doctors, since it would likely result in many fraudulent claims and have no sensible or just stopping point.\textsuperscript{200}

**The Slippery Slope of the Benefits Rule**

How does a jury measure the benefits of the whole life of a disabled child? A jury most likely will not be able to tell what the potential of that child would be. These situations are not identified as conventional tort principles, which produce easily calculable damages.\textsuperscript{201} In jurisdictions that recognize the wrongful birth tort, the courts have found themselves confronted with the extremely difficult task of determining damages required to redress the injury suffered by the parents as a result of the doctor’s negligence.\textsuperscript{202} Currently, these courts use a case-by-case analysis.\textsuperscript{203} Childrearing expenses and damages are

\textsuperscript{195}Etkind, 519 S.E.2d at 216. (Fletcher, J., concurring).
\textsuperscript{197}Id.
\textsuperscript{198}Keel, 624 So. 2d at 1028.
\textsuperscript{201}Etkind, 519 S.E.2d at 213-14.
\textsuperscript{202}Milsteen, *supra* note 200.
\textsuperscript{203}Id.
too speculative.\textsuperscript{204} In order to award damages, juries would have to distinguish between lives that merit living and lives that are not worth continuing. Juries would have an extremely difficult time trying to calculate how much the life of a disabled child is worth.

The Eugenics Movement
Furthermore, the concept of wrongful birth will result in parents demanding not only that their children are in good health, but that they are perfect. The tort of wrongful birth presents the image that children who have disabilities are injuries to their parents.

Advances in genetic testing mean doctors can reveal every feature of the unborn child. If the parents are unhappy with what is in the womb, they often choose abortion. Disability advocates would stress that these decisions imply that people with disabilities are not valued in our society.\textsuperscript{205} Eventually, instead of conducting genetic tests to prevent serious illnesses, parents will want doctors to perform these tests to see if their child has physical traits that are considered desirable by their culture. The business of testing a fetus will be based on trivial cultural standards. Parents run to the justice system when they claim their physician did not sufficiently inform them about the child’s disability.\textsuperscript{206} "Such lawsuits are directly contrary to national and state policies promoting the lives and livelihoods of people with disabilities. We are dealing here with the promotion of eugenics as a birth policy whereby doctors are sued for not weeding out the unfit."\textsuperscript{207}

CONCLUSION
The Court of Appeals of Michigan correctly refused to recognize the wrongful birth tort. If the wrongful birth tort were recognized, courts would face the impossible task of determining whether the plaintiffs intended to terminate the pregnancy.\textsuperscript{208} Also, the injury plaintiffs

\textsuperscript{204} MILSTEEN, supra note 200.
\textsuperscript{207} Id. (quoting Clarke Forsythe, President of Chicago-based Americans United for Life).
\textsuperscript{208} See supra pp. 334-35.
suffer from these causes of action are not direct results of their physician's actions.\textsuperscript{209} The decision in \textit{Roe v Wade} does not require the wrongful birth tort to be recognized.\textsuperscript{210} In addition, if the wrongful birth tort were to be recognized, a heavy burden would be placed on physicians in informing patients and conducting thousands of tests that are available in the twenty-first century.\textsuperscript{211} Furthermore, juries would have an extremely difficult time in determining damages.\textsuperscript{212} Finally, recognition of the tort of wrongful birth would present the image that children who have disabilities are considered injuries to their parents.\textsuperscript{213} Through all of these factors, the court in \textit{Taylor} saw overwhelming problems in the theory that parents should be compensated if they were not able to abort their disabled child.

\textsuperscript{209}See supra p. 335.
\textsuperscript{210}See supra p. 336.
\textsuperscript{211}See supra pp. 337-38.
\textsuperscript{212}See supra pp. 338-39.
\textsuperscript{213}See supra p. 339.