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Recent Developments: Kassama v. Magat: Maryland Does Not Recognize a Child-Plaintiff's Tort Law Cause of Action For "Wrongful Life"

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Kassama v. Magat:
Maryland Does Not Recognize a Child-Plaintiff's Tort Law Cause of Action for "Wrongful Life"

By: Bryan Hughes

The Court of Appeals of Maryland held the State of Maryland does not recognize a child-plaintiff's tort law cause of action for "wrongful life." *Kassama v. Magat*, 368 Md. 113, 148, 792 A.2d 1102, 1123 (2002). The court further held the trial judge did not err in submitting the issue of the mother's contributory negligence to the jury, or in refusing her request for a "last clear chance" jury instruction. *Id.* at 127-33, 792 A.2d at 1111-14.

Millicent Kassama ("Kassama") learned she was pregnant with Ibrion Kassama ("Ibrion") in February, 1995. She was referred by her primary care physician to respondent, Aaron Magat ("Dr. Magat") for obstetrical care. Dr. Magat first examined Kassama on April 19 and estimated that Ibrion was approximately seventeen weeks, and five days old. Noting she came to his office late in her pregnancy, Dr. Magat referred Kassama for standard obstetrical laboratory testing the very next day. These tests included an alpha-fetaprotein test ("AFP test"), which served as a screening device for certain fetal disorders. Kassama neglected to have the AFP test performed until May 16. Dr. Magat did not receive the results until May 25, when Kassama was twenty-two weeks and four days pregnant. The AFP test results indicated a significantly elevated risk that her child had Down's Syndrome. Standard medical procedure required the mother to promptly undergo amniocentesis to identify whether the child had Down's Syndrome. The test results, however, would not have been available for two weeks, at which time Kassama would have been over twenty-four weeks pregnant and unable to terminate the pregnancy in Maryland.

Ibrion was born with Down's Syndrome, and Kassama filed a complaint in the Circuit Court for Baltimore County on behalf of herself and the child. Only Kassama's negligence claim was submitted to the jury, which found, in a special verdict, Dr. Magat was negligent and Kassama was contributorily negligent. Kassama appealed to the Court of Special Appeals of Maryland, which affirmed the trial court. The court of appeals granted certiorari to consider petitioner's claims that the trial judge erred in giving a contributory negligence jury instruction, in failing to instruct the jury on the doctrine of last clear chance, and in dismissing Ibrion's "wrongful life" claim against Dr. Magat.

The court first considered Kassama's claim that Dr. Magat's negligence precluded a finding of any negligence on her part, and consequently, that the contributory negligence instruction should not have been given to the jury. *Id.* at 127-28, 792 A.2d at 1110-11. The court found Kassama's argument rested on the erroneous assumption that the jury returned a specific finding of negligence on the part of both parties, when the jury's findings were general. *Id.* at 129, 792 A.2d at 1111. The jury did not specify what conduct by Dr. Magat or Kassama it considered negligent, and there were a number of possibilities that would have allowed a consistent finding of primary and contributory negligence. *Id.* at 130-31, 792 A.2d at 1112-13. Further holding there was sufficient evidence to warrant such an instruction, the court affirmed the trial court. *Id.* at 131, 792 A.2d at 1113.

The court next examined Kassama's contention that the trial judge erred in denying her requested jury instruction on the doctrine of "last clear chance." *Kassama*, 368 Md. at 132, 792 A.2d at 1113 (2002). Kassama claimed even if the jury could have found her contributorily negligent, Magat still had the last clear chance to avert the injury "by advising her of the abnormal result, to obtain amniocentesis, and allow her to terminate the pregnancy." *Id.* at 132, 792 A.2d at 1113. Again, the court held Kassama's argument mistakenly depended on specific findings of

negligence by the jury when its actual findings were only general. *Id.* at 133, 792 A.2d at 1114. The court affirmed the decision of the court of special appeals, finding "there was a smorgasbord of possibilities [here] and, as to most of them, the instruction requested by petitioner was inapplicable." *Id.* at 133, 792 A.2d at 1114.

Finally, the court turned its attention to the claim for "wrongful life" brought on behalf of Ibrion. *Id.* at 133, 792 A.2d at 1114. The Arizona Supreme Court distinguished "wrongful life" claims from other tort law claims arising from the birth of a child. *Id.* at 136, 792 A.2d at 1116 (*citing Walker v. Pizano v. Mart*, 790 P.2d 735 (Ariz. 1990)). These claims were brought by children, not parents, for alleged injuries caused by children being born rather than aborted. *Kassama*, 368 Md. at 136, 792 A.2d at 1116 (2002). Thus, in the instant case, the injury claimed by Ibrion was not caused by Dr. Magat, but resulted from being allowed to live "the injury of life itself." *Id.* at 136, 792 A.2d at 1116.

The court recognized twenty-eight states currently deny recovery for these actions, while only three provide for a limited recovery. *Id.* at 137-38, 792 A.2d at 1116-17. Among the first to address this issue was the New Jersey Supreme Court in *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967), holding such claims required courts to measure the difference between "life with defects against the utter void of non-existence," and that such a determination "is impossible to make." *Id.* at 139, 792 A.2d at 1117 (*quoting Gleitman*, 227 A.2d at 692). The vast majority of courts have been unwilling to accept that impaired life is worse than non-life, and have rejected the "wrongful life" cause of action on the ground that a child's life cannot be a legally cognizable injury. *Id.* at 141, 227 A.2d at 1119. Even in the three states recognizing a limited recovery for such claims, recovery is limited to "the extraordinary expenses of dealing with the impairment," and awards of general damages are denied. *Id.* at 144, 792 A.2d at 1121 (2002). Therefore, the court of appeals held "for purposes of tort law, an impaired life is *not* worse than non-life, and, for that reason, life is not, and cannot be, an injury." *Kassama*, 368 Md. at 148, 792 A.2d at 1123 (2002) (emphasis in original).

In *Kassama v. Magat*, the Court of Appeals of Maryland aligned itself with the vast majority of states refusing to recognize a child-plaintiff's cause of action for "wrongful life." A finding that an injury has occurred in such a case requires a determination that non-life is preferable to living with an impairment, such as Down's Syndrome. While other jurisdictions maintain such a determination is beyond the scope of the judiciary, the court of appeals went a step further by adopting an impaired life is not worse than non-life. The court's decision is likely to have far-reaching implications on Maryland medical malpractice litigation, as it precludes a child-plaintiff from claiming a number of possible causes of action stemming from a doctor's negligence. Life itself cannot be a cognizable injury in the State of Maryland; thus, a cause of action for "wrongful life" does not exist.