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## Recent Developments: Reed v. Campagnolo: Maryland Recognized 'Wrongful Birth' Cause of Action When Physician Failed to Inform Patient of Availability of Genetic Testing and Fetus Born with Genetic Deformities

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## *Reed v. Campagnolo*

### **MARYLAND RECOGNIZED 'WRONGFUL BIRTH' CAUSE OF ACTION WHEN PHYSICIAN FAILED TO INFORM PATIENT OF AVAILABILITY OF GENETIC TESTING AND FETUS BORN WITH GENETIC DEFORMITIES.**

In *Reed v. Campagnolo*, 332 Md. 226, 630 A.2d 1145 (1993), the Court of Appeals of Maryland recognized a tort cause of action for wrongful birth arising from a physician's failure to inform a patient of available diagnostic testing which may have revealed possible genetic abnormalities in the fetus. The court of appeals held that a physician may be liable to parents for damages caused them by the birth of a deformed fetus if that physician failed to give the parents adequate information regarding prenatal genetic testing.

Dr. Mary Campagnolo and Dr. Bruce Grund began rendering prenatal care to Mrs. Reed and her unborn child at a Caroline County Health Department maternity clinic during the third month of Mrs. Reed's pregnancy. The two physicians and Mrs. Reed agreed that she was never informed about alpha-fetoprotein ("AFP") testing, which reveals abnormal levels of protein produced by the fetus and tends to indicate genetically caused neural tube defects and spina bifida. The Reeds' child, Ashley Nicole, was born in mid-1986 and suffered from a number of genetically caused abnormalities, including spina bifida.

In August of 1989, the Reeds and Ashley Nicole made a claim through the Health Claims Arbitration Office under the Maryland Health Care Malpractice Claims Act. After the parties waived arbitration in accordance with the Act, the Reeds filed their complaint with the United States District Court for the District of Maryland in February of 1991. The district court submitted two certified questions to the Court of Appeals of Maryland pursuant to the Maryland Uniform Certification of Questions Law Act ("the Act"), Md. Cts. & Jud. Proc. Code Ann., §§ 12-601 through 12-609 (1974, 1989 Repl. Vol.).

In analyzing the first certified question, whether Maryland recognizes a

tort cause of action for wrongful birth when a physician fails to inform a patient of the possibility of prenatal genetic testing, the court looked to a previous decision in which it had recognized "a cause of action in tort based upon traditional medical malpractice principles for negligence in the performance of a sterilization procedure." *Reed*, 332 Md. at 232, 630 A.2d at 1148 (quoting *Jones v. Malinowski*, 299 Md. 257, 263, 473 A.2d 429, 432 (1984)). In *Jones*, the court permitted the trier of fact to award damages to the parents in the form of child rearing costs, recognizing that there could be compensable injury to parents whose child is born as a result of medical negligence. *Id.*

Although the court recognized that *Jones* was not directly on point, it chose to apply the same analysis in *Reed*, utilizing the medical malpractice principles for negligence. *Id.* The court reasoned that under that analysis, the burden of proof is on the plaintiff to demonstrate that the defendant physician's lack of care directly and proximately caused the plaintiff's injury. *Id.* at 232-33, 630 A.2d at 1148 (citing *Suburban Hosp. Assoc. v. Mewhinney*, 230 Md. 480, 485, 187 A.2d 671, 673 (1963)). Therefore, to constitute a tort action for wrongful birth, there must be a duty, a breach of that duty, and an injury proximately caused by that breach. *Id.*

In determining that the defendant physicians owed a duty of care to Ms. Reed, the court pointed out that Dr. Campagnolo and Dr. Grund were "under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which [they belong], acting in the same or similar circumstances." *Reed*, 332 Md. at 233, 630 A.2d at 1148 (quoting *Shilkret v. Annapolis Emergency Hosp.*, 276 Md. 187, 200-01, 349 A.2d 245, 253 (1975)). The court recognized that

this duty also applied to the unborn child. *Id.* (citing *Group Health Assoc. v. Blumenthal*, 295 Md. 104, 53 A.2d 1198 (1983)).

The court's analysis then focused on whether or not this standard of care was breached during the treatment of Mrs. Reed. *Id.* at 234, 630 A.2d at 1148. The court reasoned that if the applicable standard required that the AFP test be offered to the patient and performed upon request, then the standard of care was violated by the defendant physicians. *Id.* at 234, 630 A.2d at 1149. However, the court declined to decide that factual issue, stating that the necessary proof was not before the court on the certified question. *Id.*

The court also found that if the facts alleged by the Reeds were supported by evidence, such facts constituted the requisite proximate cause. *Reed*, 332 Md. at 235, 630 A.2d at 1149. The court recognized that plaintiffs in these actions must prove causation "in the sense that they must convince the fact finder that they would in fact have acted as alleged, had the information concerning testing been made available." *Id.* Since the Reeds did allege that had they known of genetic deformities they would have chosen to terminate the pregnancy, the court found that they had alleged the appropriate causal nexus to support a finding of proximate cause. *Id.*

In resolving the issue of legal injury, the court emphasized that the majority of courts which have considered medical malpractice cases similar to the Reeds' cause of action have determined that "there is legally cognizable injury, proximately caused by a breach of duty." *Id.* While acknowledging that those courts do not agree on the measure of damages to be awarded in such cases, the court found it sufficient for the purposes of this certified question that there is economic hardship to parents who have a

child as a result of some type of medical negligence. *Id.* at 235, 630 A.2d at 1150.

The court explicitly rejected the defendant's arguments that the Reeds had not suffered legally cognizable injuries. *Id.* 237-38, 630 A.2d at 1150. The defendant physicians contended that to extend the tort analysis to wrongful birth actions would necessitate holding that the very existence of human life may constitute a legally recognizable injury. *Id.* In rejecting this argument, the court of appeals referred to its decision in *Jones v. Malinowski*, 299 Md. at 269, 473 A.2d at 435, in which it declined to adopt a *per se* rule denying recovery by parents of the costs associated with raising a child whose birth was a result of a physician's negligence, and held that the trier of fact may consider child rearing costs as a compensable element of damages in negligent sterilization cases. *Reed*, 332 Md. at 238, 630 A.2d at 1151.

The court similarly rejected defendants' contention that they were not liable for the Reeds' damages because they did not cause Ashley Nicole's abnormalities. *Id.* at 239, 630 A.2d at 1151. The court stated that this argument "takes too narrow a view of proximate or legal cause," and reasoned that even though the physical causes of Ashley's defects were already at work at the time of the alleged negligence of Drs. Campagnolo and Grund, the physicians could have prevented the harm to the Reeds. *Id.* at 240, 630 A.2d at 1152. The court opined that if the allegations were proven, a trier of fact could certainly find that the negligence of the physicians was a substantial factor in causing the harm to the Reeds. *Id.*

The second certified question involved the issue of whether or not the continuation of pregnancy is a decision requiring the informed consent of the patient which can give rise to a tort

cause of action for lack of informed consent. The court held that no such cause of action exists, reasoning that one's informed consent must be to some treatment. *Id.* at 240-41, 630 A.2d at 1152. The court found that in the present situation, the defendants never proposed that the tests be done. *Id.* The resultant harm, therefore, did not arise as a result of any of the defendant's affirmative actions, but rather as a condition of pregnancy itself. *Id.* at 242-43, 630 A.2d at 1153. "Allegations such as these have traditionally formed the basis of actions in medical malpractice and not informed consent." *Id.* at 243, 630 A.2d at 1153 (quoting *Karlsons v. Geurinot*, 57 A.D.2d 73, 82, 394 N.Y.S.2d 933, 939 (N.Y.App.Div. 1977)).

In *Reed v. Campagnolo*, the Court of Appeals of Maryland recognized a tort cause of action for wrongful birth when a physician fails to inform a pregnant patient about available diagnostic testing for genetic defects and that patient gives birth to a genetically abnormal infant. This holding imposes a greater responsibility on physicians who practice obstetric medicine to fully disclose to their patients both the risks and benefits of all possible prenatal genetic testing. While such a decision may well result in more informed patients, it is also likely to result in the practice of more defensive medicine as physicians strive to predict all future possibilities in an attempt to avoid liability for the unforeseen.

- Laura V. Bearsch