IN THE SUPREME COURT OF GEORGIA

WENDY NORMAN, et al.,

Plaintiff-Appellants,

v.

XYTEX CORPORATION, et al.,

Defendant-Appellees.

______________________________________________________________
CASE NO. S19G1486

______________________________________________________________
BRIEF OF AMICI CURIAE LAW PROFESSORS OF TORT LAW, FAMILY LAW, AND HEALTH LAW IN SUPPORT OF PLAINTIFF-APPELLANTS

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Additional Amici listed inside cover
IDENTITY AND INTEREST OF AMICI

Pursuant to Rule 23 of the Georgia Supreme Court Rules, the academic amici file this brief in support of Plaintiff-Appellants recommending this Court sets aside the Court of Appeals’ affirmation of the dismissal of practically all Plaintiff-Appellants’ claims.

The academic amici are law professors from Georgia law schools, as well as other law schools across the United States, who specialize in tort law, family law, and health law, including the law and policy of reproductive technologies. Amici’s sole interest in this case is to ensure that the law pertaining to providers and buyers of reproductive cells is consistent with general principles of Georgia common law and serves the public interest. The following individuals are signatories to this brief:*

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INTRODUCTION

This case presents a novel question in Georgia law: whether a commercial sperm bank is subject to any form of liability for marketing and selling sperm with readily knowable undisclosed genetic abnormalities which cause genetic abnormalities in a fetus. The lower courts have foreclosed all forms of potential liability by erroneously applying Atlanta Obstetrics & Gynecology Group v. Abelson, 260 Ga. 711 (Ga. 1990), to each of the causes of action asserted by Plaintiff-Appellants.

Abelson established that “a physician, who has provided postconception prenatal medical care to an expectant mother” is not subject to liability “for an impairment which the child unquestionably inherited from her parents and an impairment which was already in existence when the parents first came into contact with the physician.” Id. at 714-15. The plaintiffs in Abelson complained that the defendant physician deprived them of an opportunity to terminate the pregnancy that resulted in the birth of their child. This Court declined to recognize the life of a child as a compensable injury in Georgia common law, reasoning that “we are unwilling to say that life, even life with severe [impairments], may ever amount to a legal injury.” Id. at 715.

The rule barring recovery for wrongful birth articulated in Abelson does not apply to this case for two reasons.
First, *Abelson* involved an “impairment” inherited from the plaintiff parents that existed before the physician provided care. By contrast, this case involves “impairments” that were created by the defendant sperm bank’s deceptive marketing and sale of sperm with readily knowable undisclosed genetic abnormalities.¹ In *Abelson*, the defendant physician merely failed to provide information regarding a preexisting risk of harm that he did not create. In this case, the defendant sperm bank’s alleged wrongful conduct created the risk of harm. It cannot be said in this case, as it was in *Abelson*, that the defendant’s conduct did not cause the harm of which the plaintiffs complain.

Second, the parents in this case seek remedies that are not predicated on characterizing the birth or life of their child as an injury. Some of the Appellant-Plaintiffs’ causes of action seek recovery of extraordinary expenses necessary to care for their child. Georgia courts routinely provide compensation to parents for the extraordinary costs of caring for a child injured by a defendant’s wrongdoing. Applying *Abelson* to these causes of action would undermine well-established principles governing the measure of damages in personal injury claims. Appellant-Plaintiffs’ other causes of action seek statutory remedies unrelated to the costs of caring for their child. Applying *Abelson* to these causes of action would create an

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¹ Consistent with the standard of review in this appeal, we will assume for the purposes of analysis that the facts alleged in the Plaintiff-Appellants’ complaint are true.
unwarranted exception to remedies established by the legislature for commercial misconduct.

ARGUMENT

I. THE SPERM BANK’S CREATION OF THE RISK OF HARM DISTINGUISHES THIS CASE FROM ABELSON

The plaintiffs’ claim in Abelson was prompted by their physician’s failure to inform them of prenatal tests to identify fetal abnormalities and the subsequent birth of a child with Down Syndrome. This Court rejected the Abelson plaintiffs’ claim for wrongful birth in part because the genetic abnormality that caused the child’s Down Syndrome “was already in existence when the parents first came into contact with the physician” and therefore “the defendants cannot be said to have caused the impairment….” Abelson at 714-15. Abelson involved a “fetus, to whose existence and to whose impaired condition the defendants in no way contributed.” Abelson at 716.

The Abelson child’s disability resulted from a genetic abnormality that was passed down to her from one of her parents’ gametes, and the physician’s negligent failure to provide information occurred after the formed embryo containing the genetic material was already developing in Mrs. Abelson’s uterus. The court rejected the plaintiffs’ claims because the defendant’s negligence did not create the risk of
harm. The defendant merely failed to mitigate a risk of harm created by the plaintiffs’ conduct in conceiving the child.

By contrast, in the present case, the genetic abnormality was not passed down to the child by either parent. Instead, the child’s disabilities were caused by genetic abnormalities in sperm improperly marketed and sold by the sperm bank. The sperm bank’s misrepresentations did not merely fail to inform the parents of a preexisting risk of harm. The sperm bank’s misconduct created the risk of harm.

The distinction between inaction that fails to avoid a risk of harm not created by a defendant (often termed “nonfeasance”) and active misconduct that creates a risk of harm (often termed “misfeasance”) is central to defining the scope of a defendant’s civil liability. This boundary is variously referred to as “legal cause,” “proximate cause,” or “the scope of liability.” It is sometimes also analyzed as defining the extent of a defendant’s legal duty. Restatement (Third) of Torts: Liability for Physical and Emotional Harm, ch. 6, Special Note on Proximate Cause, § 37, No Duty of Care with Respect to Risks Not Created by Actor; Dobbs’ Law of Torts, §198 Introducing the Scope of Liability (Proximate Cause) Requirement. Delson v. Georgia Dept. of Transp., 295 Ga. App. 84, 88(2) (2008) (“A Defendant may be held liable for an injury when the Defendant commits a negligent act that puts other forces in motion or operation resulting in the injury when such other forces are the natural and probable result of the act that the Defendant committed and that
reasonably should have been foreseen by Defendant.”) (paraphrasing Suggested Pattern Jury Instructions, Vol. I: Civil Cases, § 60-202).

The rule in *Abelson* rests on the general principle that a defendant is not normally liable for the failure to mitigate a risk of harm that the defendant did not create. However, the Plaintiff-Appellants’ various causes of action based on intentional wrongdoing, negligence, and strict liability all assert that the Defendant-Appellees’ conduct created the risk of harm.

II. **NONE OF THE PLAINTIFF-APPELLANTS’ CAUSES OF ACTION CHARACTERIZE THE BIRTH OR LIFE OF THEIR CHILD AS AN INJURY**

The plaintiffs in *Abelson* claimed that they were deprived of an opportunity to abort the pregnancy that resulted in the birth of their child. This Court declined to recognize the life of a child as a compensable injury in Georgia common law, reasoning that “we are unwilling to say that life, even life with severe [impairments], may ever amount to a legal injury.” *Abelson* at 715. Additionally, the Court expressed concerns regarding the practical difficulties of isolating the costs associated with a child’s disability from the general costs of raising the child, offsetting the benefits conferred by having the child, and ensuring that payments for compensation would be used by parents to care for the child. *Abelson* at 716-717.
A. Compensation for the Extraordinary Costs of Raising a Child Injured by a Defendant’s Wrongdoing is Routine Under Georgia Tort Law

In the present case, the plaintiffs have never characterized the birth or existence of their child as an injury. Rather, they claim that the defendant’s wrongdoing caused specific, medically verified disabilities that require extraordinary expenditures necessary for the health and safety of their child and the welfare of their family. These expenditures include paying for psychotherapy, psychiatric care, and medical testing related to diagnosis and treatment of the child’s particular disability. Such costs are all easily distinguishable from the normal costs of raising a child and readily verifiable. Moreover, Georgia courts do not typically offset the benefits of having a child against the costs of paying for treatment of an injury to the child caused by a defendant’s wrongdoing. Nor do courts typically deny recovery based on speculation about how plaintiffs awarded money damages will spend those funds.

Georgia courts routinely award compensation to parents for wrongdoing that causes their children to be born with impairments. Such legal remedies do not imply that having a child is an injury. To the contrary, the payment of money damages to support parents in raising an impaired child affirms the value and dignity of the child.
B. Abelson’s Preclusion of Compensation for Wrongful Birth does not Foreclose Statutory Remedies for Commercial Misconduct

1. Unfair Business Practices

Georgia’s Fair Business Practices Act of 1975 makes it unlawful to represent goods or services as having characteristics and benefits that they lack or to represent that goods or services are of a particular standard or quality if they are of another. O.C.G.A. § 10-1-393(b)(5), (7). The Act provides that “[a]ny person who suffers injury or damages as a result of [a] violation … may bring an action … to recover his or her general and exemplary damages sustained as a consequence thereof.” O.C.G.A. § 10-1-399(a). The Act further instructs courts to “award three times actual damages for an intentional violation … irrespective of the amount in controversy” as well as reasonable attorneys’ fees and expenses of litigation. O.C.G.A. § 10-1-399(c), (d). Finally, the Act makes clear that “remedies provided for [by the Act] shall be in addition to any other … remedies … in any other law.” O.C.G.A. § 10-1-407.

The preclusion of recovery for costs associated with raising an unwanted child under Abelson does not apply to claims by the Plaintiff-Appellants’ for recovery of losses associated with their purchase of sperm or the costs of medical procedures to become impregnated with the sperm. Under Georgia’s Fair Business Practices Act, such damages—no matter how small—are recoverable and may be supplemented by exemplary damages, reasonable attorneys’ fees, and expenses of litigation.
The Georgia Legislature admonished the courts against limiting such recovery though judicially-crafted exceptions by expressly stating that “[i]t is the intent of the General Assembly that … this part shall be liberally construed and applied to promote its underlying purposes and policies.” O.C.G.A. § 10-1-391(a). The Court of Appeals application of *Abelson* to preclude the Plaintiff-Appellants’ unfair business practices claims contravenes the plain meaning of the statutory text, the intent of the legislature, and the express purpose of the Act. ²

2. Breach of Warranty

The Plaintiff-Appellants have alleged breach of express and implied warranties under Georgia Law. With respect to such claims, Georgia law provides that “[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.” O.C.G.A. § 11-2-714(2). Georgia law further allows for recovery of a buyer’s incidental and consequential damages resulting from the seller’s breach of warranty, including “any other reasonable expense incident to the … breach” and “injury to person or property proximately resulting from any breach of warranty.” O.C.G.A. § 11-2-715.

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² When the Georgia Legislature wishes to immunize certain industries or businesses from liability, it does so explicitly and in a limited manner, as it did in the case of blood banks. See O.C.G.A. §§ 51-1-28 and 11-2-316(5).
The preclusion of recovery for costs associated with raising an unwanted child under *Abelson* does not apply to claims by the Plaintiff-Appellants’ for recovery of the difference between the price they paid for the sperm they purchased and the value of the sperm or for incidental and consequential damages based on the defendant’s breach of express and implied warranties. These losses do not evoke symbolic concerns about characterizing the birth of a child as an injury or raise practical concerns about assessing the measure of damages.

III. **Failure to Reverse the Court of Appeal’s Erroneous Application of Abelson to This Case Will Have Negative Consequences for Public Health and Child Welfare**

The citizens of Georgia have an interest in ensuring that sperm bank clients obtain accurate information about donors. Inaccurate information results in uninformed decisions to conceive, avoidable genetic abnormalities (and associated family costs), and may even lead to unwanted fetuses and abortion. Exposing sperm banks to liability will give them a powerful incentive to exercise reasonable care in vetting donors and providing accurate information to clients.

Sperm banks are uniquely situated to obtain and convey accurate information about the source and characteristics of reproductive cells. Since donors often wish to remain fully or partly anonymous, sperm banks have exclusive access to donor information. Moreover, sperm banks possess specialized understanding of genetics and reproductive science. Finally, sperm banks centralize the process of collecting
and analyzing donor information and, as repeat players, can do so more efficiently than individual donor recipients. Thus, exposing sperm banks to tort liability is the most effective and efficient way to reduce the risk of harms that result from inaccurate information regarding donor sperm. The failure to expose sperm banks to civil liability for intentional misconduct, negligence, and avoidable mistakes leaves a very large number of families vulnerable to devastating consequences.

Invoking *Abelson* to confer blanket immunity from liability is especially unfair in the context of sperm donation. Sperm banks are in the business of “vetting” sperm, and they actively encourage their clients to rely on their representations concerning their products. Xytex’s website, for example, promises prospective purchasers “donor sperm that is the industry’s most selective, most tested, and most successful.” It further warrants that “all donors must pass a rigorous screening and testing process” and “are evaluated for medical, personality, and behavioral characteristics” and that “Xytex evaluates donors for hereditary conditions through an extensive medical and family history questionnaire and genetic testing for the most common inherited genetic conditions.” The website assures clients that “donors are continually tested while in the program thorough physical exams, urinalysis and bloodwork, ensuring you receive the healthiest sperm” and that patients/customers will “sleep
well knowing [they]’ve chosen well.”

Consumers of reproductive cells purchase the services of sperm banks to obtain reliable information about sperm donors. In a recent study of 1681 sperm buyers, when asked to identify the most important attributes of a sperm donor, 65% of all responses identified the donor’s health. More than 82% of all sperm buyers indicated that they would not have been prepared to buy the sperm of a donor with no medical record provided. Fifty percent of all sperm buyers reported that they had, in fact, rejected donors who otherwise met their criteria but had health issues in their background.

Commercial sperm banks like Xytex have, traditionally, not disclosed to their consumers the identities of donors. Consequently, consumers of sperm from anonymous donation must rely entirely on sperm banks for reliable information about the source and characteristics of reproductive cells.

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6 While this is the most common scenario, sperm banks have recently started offering donations from non-anonymous donors. Xytex’s website, for instance, offers donations from donors who agree to have their identity disclosed to children conceived using their sperm once they reach the age of 18. See Donor Options, https://perma.cc/5GR8-UGPE. Further, according to Xytex’s website, as of August 2018, Xytex no longer accepts donors who wish to remain fully anonymous. See id.
In erroneously applying *Abelson* to this case, the Court of Appeals ignored these realities, unjustifiably immunizing sperm banks from legal liability even in cases of egregious wrongdoing, such as intentional fraud. Sperm banks have exclusive control over information regarding their products and consumers rely completely on their representations. Unsuspecting parents should have a legal remedy for the severe and enduring harms that they suffer at the hands of Georgia sperm banks.

**CONCLUSION**

The Court of Appeals erred in applying *Abelson* to each of the Plaintiff-Appellants’ causes of action in this case. *Abelson* does not apply to the Plaintiff-Appellants’ tort causes of action for two reasons. First, whereas the parents’ claims in *Abelson* were predicated on the defendant-physician’s failure to warn them of a preexisting risk of harm that he did not create, the parents’ claims in this case are predicated on the defendant-sperm bank’s misleading marketing and sales practices which created the risk of harm.

Second, whereas the parents in *Abelson* complained that the defendant-physician’s negligence deprived them of an opportunity to abort the fetus, the parents in this case do not argue that they would have terminated the pregnancy that resulted in the birth of their child, nor do they claim that the opportunity to raise their child constitutes an injury. Rather, they claim that the defendant’s wrongdoing caused

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specific, medically verified disabilities that require extraordinary expenditures necessary for the health and safety of their child and the welfare of their family.

The Plaintiff-Appellants have not characterized the birth or life of their child as an injury, and neither should the courts. The Plaintiff-Appellants are seeking compensation for the wrong done to them in order to care for their child. Denying them recovery based on *Abelson* to make a symbolic gesture regarding preciousness of every child would produce a cruel irony.

Finally, the application of *Abelson* to preclude recovery for losses unrelated to the costs of raising the child under Georgia’s Fair Trade Practices Act and Commercial Code would represent a radical expansion of the holding in that case and an unjustified encroachment on this state’s broad statutory protections for consumers.

We therefore respectfully recommend that this Court reverse the Court of Appeals’ application of *Abelson* to the Plaintiff-Appellants’ claims and remand this case for trial.

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