

IN THE SUPREME COURT OF GEORGIA

WENDY NORMAN, et al.,

Plaintiff-Petitioners,

v.

XYTEX CORPORATION, et al.,

Defendant-Respondents.

CASE NO. _____

**BRIEF OF AMICI CURIAE LAW PROFESSORS OF TORT LAW, FAMILY
LAW, AND HEALTH LAW IN SUPPORT OF PLAINTIFF-PETITIONERS'
PETITION FOR CERTIORARI**

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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-Petitioners' Petition for Writ of Certiorari urging review of the Court of Appeals' decision to affirm the dismissal of practically all Plaintiff-Petitioners' 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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* This amicus brief presents the views of the individual signers. Institutions are listed for identification purposes only. Amici state that no party, party's counsel, or any other person or entity—other than amici—authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief.

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INTRODUCTION

This case presents a novel question of Georgia common law: whether a sperm bank is subject to liability for wrongdoing prior to conception that creates an impaired fetus due to undisclosed abnormalities in sperm sold by the sperm bank. The lower courts have erroneously characterized the issue in this case as wrongful birth, citing this court's holding in *Atlanta Obstetrics & Gynecology Group v. Abelson*, 260 Ga. 711 (Ga. 1990) ("*Abelson*") 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.

However, the rule barring recovery for wrongful birth articulated in *Abelson* does not apply to this case. First, *Abelson* involved wrongdoing on the part of a defendant physician providing prenatal medical care after conception. By contrast, this case involves defendant wrongdoing prior to conception. Second, *Abelson* involved a fetal impairment inherited from the plaintiffs. By contrast, this case involves an impairment which was not inherited from the mother but rather was created by the defendant's wrongdoing.¹ Third, *Abelson* involved a fetal impairment

¹ We use the term "impairment" because it was used in *Abelson*.

that was already in existence when the parents first obtained services from the physician. By contrast, this case involves an impairment that came into existence after the parents entered into a contractual relationship with the defendant and which the defendant's wrongdoing caused. Finally, the essence of the claim in *Abelson* was that the parents were deprived of an opportunity to abort a fetus. In this case, the essence of the claim is that the parents were deprived of information necessary to make an initial informed choice regarding conception and subsequent choices regarding timely and appropriate medical and psychiatric care necessary to protect the health and safety of their child and family.

Regardless of how the Court ultimately decides this case, the common law of Georgia will not be well served by erroneously analogizing this case to a claim for wrongful birth. Rather, this case is better analogized to wrongful conception based on medical malpractice and failure to disclose a serious medical condition prior to adoption.

The question of liability in this case raises issues that merit careful consideration by the Court, including fairness between the parties, the public policy implications of failing to impose liability, and institutional concerns regarding the proper division of labor between courts and legislatures in the development of the common law governing reproductive technologies.

ARGUMENT

I. THE ABELSON RULE DOES NOT APPLY TO THE CASE AT HAND

The case at hand is significantly different from *Abelson* in four ways. First, the wrongful acts for which the plaintiffs in *Abelson* sought relief occurred post-conception, only after an embryo was already in existence and developing in Mrs. Abelson's uterus. By contrast, in the case at hand, the wrongful acts occurred before conception, prior to an embryo coming into existence.

Second, the fetal impairment with which Brittany Abelson, the plaintiffs' daughter, was born—trisomy 21, a.k.a. Down Syndrome—was passed down to her from one of her parents' gametes. By contrast, in the case at hand, the impairments with which the plaintiff's child is afflicted did not pass down to him from his mother but rather were created by the defendant's wrongdoing.

Third, the genetic condition in *Abelson* “was already in existence when the parents first came into contact with the physician.” *Abelson* at 714-15. Thus, this Court held that “the defendants cannot be said to have caused the impairment in Brittany.” This holding played an important part in what the Court viewed as the “breaking down” of “the traditional tort analysis . . . of causation,” which was, ultimately, an essential element in its holding that wrongful birth actions shall not be recognized in Georgia. *Id.* at 715. By contrast, in the case at hand, the embryo was not in existence when the plaintiffs first came into contact with the defendant. Rather,

it was only after the plaintiffs entered into a contractual relationship with the defendant and as a direct result of the defendant's subsequent wrongdoing that an impaired embryo was created. In the case at hand, the defendant's wrongdoing proximately caused the impairments in Plaintiff-Petitioners' child.

And fourth, the main argument of the plaintiffs in *Abelson* was that they were deprived of the opportunity to abort the pregnancy that resulted in the birth of their daughter, Brittany. By contrast, in the case at hand, the plaintiffs do not argue that they would have aborted the pregnancy that resulted in the birth of their child. Rather, they claim that they were deprived of information necessary to make an initial informed choice regarding conception and, later, choices regarding medical and psychiatric care necessary for the health and safety of their child and the welfare of their family.

In *Abelson*, this court rejected wrongful birth as a cause of action in Georgia because it held that a physician's post-conception care is not the legal cause of a preexisting impairment and that the birth of an impaired child should not be characterized as a harm. *Abelson* at 715. By contrast, in this case, the sperm bank's wrongful failure to disclose genetic determinants associated with serious impairments in the sperm that it sold to its patients/customers deprived them of information necessary to make an informed decision regarding conception, and it was

the legal cause of the impairment in the fetus.² Moreover, the sperm bank's wrongdoing further harmed the parents and the child by depriving them of information necessary to treat the resulting serious blood disease, mental illness, and cognitive impairment suffered by the child. Unlike the wrongful birth claim in *Abelson*, the claims in this case do not lack either the element of proximate cause or the element of compensable harm necessary to establishing liability under Georgia common law.

Lower courts in Georgia have repeatedly and erroneously invoked *Abelson* in adjudicating claims against the Defendant-Respondents arising out of Defendant-Respondents' wrongful conduct. The current case offers this court an opportunity to clarify the proper scope of *Abelson* and the appropriate application of Georgia common law.

II. THIS CASE RAISES SIGNIFICANT ISSUES OF FAIRNESS, THE PUBLIC POLICY IMPLICATIONS OF FAILING TO IMPOSE LIABILITY, AND THE ROLE OF COURTS IN THE DEVELOPMENT OF GEORGIA COMMON LAW

A. Rejection of Plaintiff-Petitioners' Claims is Unjust

The lower courts' rejection of Plaintiff-Petitioners' claims unfairly immunizes Defendant-Respondents from legal responsibility for wrongfully causing harm. Generally, the common law of Georgia imposes liability on individuals who engage

² We have characterized the Plaintiff-Petitioners as both patients and customers because the Defendant-Respondents provided medical and counselling services and sold biomedical products. According to their website, "Xytex Donor Recruiters, Medical and Mental health professionals and Genetic Counselors offer donor sperm that is the industry's most selective and most successful." Xytex website at <https://perma.cc/VQ4F-BTCJ>.

in fraudulent sales, provide professional services that do not meet standards of reasonable care, or sell defective products, when these forms of wrongful conduct directly cause physical and economic harm to others. The rejection of Plaintiff-Petitioners' claims based on an erroneous analogy to *Abelson* renders irresponsible sperm banks who harm parents and children immune from liability simply because the products and services they provide are associated with the birth of children, regardless of how egregious the wrongdoing of the sperm bank or how devastating the harm.

Such immunity from liability is especially unjust in the context of reproductive services. 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. They 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.”³ Virtually all other sperm bank websites make similar promises.⁴

Consumers of reproductive cells engage the services of sperm banks to obtain reliable information about sperm donors. In a study of 1681 sperm buyers, when asked to identify the most important attributes of a sperm donor, 65.2% 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, and 50.8% of all sperm buyers reported that they had, in fact, rejected donors who otherwise met their criteria but had health issues in their background.⁵

In rejecting Plaintiff-Petitioners’ claims, the lower courts ignored these realities, unjustifiably immunizing sperm banks from the legal liability that normally attaches to fraud, professional negligence, and the sale of defective products. That immunity unfairly leaves unsuspecting parents without remedy for the severe and enduring harms that they suffer.

³ See Xytex, Quality Commitment, at <https://www.xytex.com/about-xytex/quality-commitment> (last visited Jul. 2, 2019); Xytex homepage, at https://www.xytex.com/?gclid=cj0kcqjwgezobrdnarisagzefe4nw8dnhcokavvadldzgu1c0xb643oqxqatqsyubsmx4vnld eo40uwaag2mealw_wcb (last visited Jul. 2, 2019).

⁴ See e.g., Cryobank, Donor Selection, at <https://www.cryobank.com/why-use-us/donor-selection/> (last visited Jul. 2, 2019); Cryos, Why Choose Cryos, at <https://usa.cryosinternational.com/about/why-choose-cryos> (last visited Jul. 2, 2019); Fairfax Cryobank, Quality Assurance, at <https://fairfaxcryobank.com/quality-assurance> (last visited Jul. 2, 2019).

⁵ Neroli Sawyer et al., *A Survey of 1700 Women Who Formed Their Families Using Donor Spermatozoa*, REPROD. BIOMED. ONLINE (2013), <http://dx.doi.org/10.1016/j.rbmo.2013.07.009>.

B. Rejecting Plaintiff-Petitioners' Claims Will Have Negative Consequences for Public Health and Child Welfare

1. Risk Deterrence

The citizens of Georgia have an interest in ensuring that sperm bank patients/customers obtain accurate information about donors. Inaccurate information results in uninformed decisions to conceive, avoidable genetic impairments and associated family costs, and may even lead to unwanted fetuses and abortion. Exposing sperm banks to tort 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 because they cultivate relationships with both donors and recipients, and they possess specialized understanding of genetics and reproductive science. Moreover, sperm banks have relatively more economic resources than donor recipients, which makes it easier for sperm banks to collect and analyze relevant donor information. 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.

2. Loss Spreading

In addition to risk reduction, imposing tort liability on sperm banks is the best way to spread the resulting costs. For individual families, the costs of raising children with severe impairments presents a crushing burden that affects all family members. Liability exposure will incentivize sperm banks to obtain readily available liability insurance coverage and pass the cost of that insurance on to their many clients in the form of modest fee increases. This will spread injury costs otherwise imposed on individual families among all families using sperm banks, protecting them against the otherwise heavy financial hardships of falling victim to an unscrupulous or careless sperm bank.

C. This Case Presents the Court with an Opportunity to Clarify the Common Law of Georgia as it Applies to Reproductive Technologies.

In *Abelson*, this Court rejected recovery for wrongful birth, in part, because it considered the characterization of birth as a loss beyond the traditional definition of compensable loss in tort law and because of the complexity of calculating the measure of damages. Moreover, the plaintiffs' claim in *Abelson* that they were deprived of the opportunity to abort a fetus may have influenced this Court's sense that resolution of the issues raised by that case was better suited to the political branches of government. This case presents no such complexities or political issues. The issues it raises fall squarely in the domain of common law torts.

Tort law has traditionally played a primary role in compensating individuals harmed by the wrongful conduct of others. By doing justice in individual cases, tort liability creates incentives that reduce unwarranted risk and, through liability insurance, spreads the cost of compensable injuries. The current case presents familiar claims of fraud, negligence, and product defect that fall squarely within the domain of the common law courts. The injuries alleged include wrongful conception and wrongful deprivation of vital health information by Xytex’s “medical and mental health professionals and genetic counselors”⁶ to a paying client—both entirely familiar to the courts of this and every other state. Although the facts in this case present new questions, the underlying legal issues raised by these claims are not novel, nor are they more complex than typical tort claims involving commercial transactions and medical services that involve harms related to long-term health effects of a defendant’s misfeasance. The issues raised by the current case are neither complex nor political in ways that would make them better suited for resolution by a political branch of government.

Moreover, neither voluntary industry self-regulation nor government regulation has proven adequate to protect unsuspecting victims like Plaintiff-Petitioners. It is the job of the common law courts of Georgia to do justice in this

⁶ Xytex homepage, at https://www.xytex.com/?gclid=cj0kcqjwpphobrc3arisalfx-_it33x8i0b1-zwjmgrrrugwueb8nm6o7c8cc5bbsjuj9ccea4oimzsaajb9ealw_wcb (last visited Jul. 2, 2019).

case and to thereby create incentives that will reduce the risk that others will suffer a similar injury.

CONCLUSION

The current case presents this Court with an opportunity to clarify the application of well-established principles of Georgia common law to reproductive technologies. The erroneous dismissal of Plaintiff-Petitioners' claims by lower court decisions mischaracterizing them as claims for wrongful birth has distorted the proper scope of this Court's decision in *Abelson*, reached an unfair result in this case, and perverted incentives for the proper conduct of sperm banks. Rectifying this unfair result and clarifying the common law of Georgia in this case falls squarely within the purview of this Court's traditional role as the ultimate arbiter of state common law disputes and the final authority on the proper interpretation of state law.

We therefore respectfully request this Court to grant a Writ of Certiorari in this case.

Respectfully submitted July __, 2019.

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