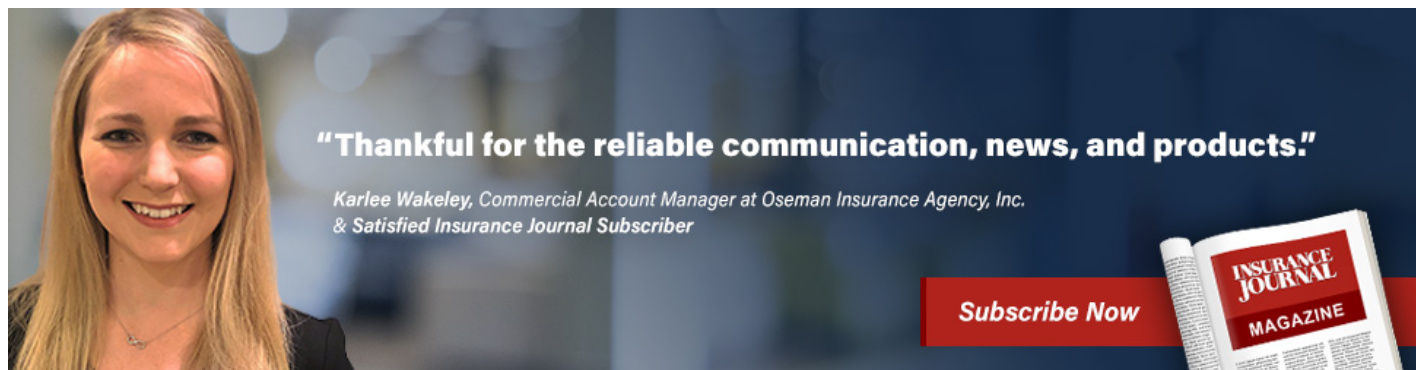




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Kansas Supreme Court Upholds Law Barring 'Wrongful Birth' Suits

Kansas' highest court on April 30 upheld a law barring so-called wrongful birth lawsuits against doctors, in a case in which a couple sued because they weren't told of serious fetal defects until after an abortion could have been obtained.

The state Supreme Court ruled against the parents of a girl born with a severe brain abnormality who said they would have opted for an abortion had they known of their daughter's medical problems months before her May 2014 birth.

The Republican-controlled Legislature and then-GOP Gov. Sam Brownback passed the law against wrongful birth lawsuits in 2013 at the urging of abortion opponents. It overturned a 1990 state Supreme Court ruling saying Kansas law allowed such lawsuits, and current Democratic Gov. Laura Kelly, then a state senator, voted against it.

The parents' attorneys argued that the law violated provisions of the state's bill of rights declaring the right to a jury trial "inviolable" and providing a right to "remedy by due course of law" for injuries. But four of the seven state Supreme Court justices concluded that the state's 1850s founders didn't recognize wrongful birth as a legal concept, making it an "innovation" that isn't covered by those constitutional provisions.

"It is a new species of malpractice action first recognized in 1990," Justice Dan Biles wrote in their opinion.

The decision upholds a policy favored by anti-abortion groups, who've long criticized the court as too liberal. The state Supreme Court declared in 2019 that access to abortion is a "fundamental" right under the state constitution, meaning it would be protected in Kansas if the U.S. Supreme Court overturned its landmark 1973 *Roe v. Wade* decision. But the recent ruling did not cite the 2019 decision or frame the issues in terms of abortion rights.

"The birth of a child should be cause for celebration, not for the law to award damages because the child was 'wrongfully' born," said Attorney General Derek Schmidt, a Republican, who defended the law and is running for governor in 2022.

The four justices were joined in upholding the law by Justice Caleb Stegall, Brownback's only appointee on the court. He was the lone dissenter in the 2019 ruling protecting abortion rights.

Stegall argued that the majority should have simply overturned the 1990 ruling, calling it "one of the worst decisions in our court's history" and a "black mark" on par with a U.S. Supreme Court decision upholding the right to inter Japanese Americans during World War II.

He said that although the 1990 ruling precluded lawsuits when healthy children are born, it promoted "reprehensible discrimination" by allowing lawsuits when a child has "gross deformities."

"The Kansas Supreme Court said quite loudly that under Kansas law, some lives are worth more than others," Stegall wrote.

Chief Justice Marla Luckert and Justice Eric Rosen disagreed with the majority and would have allowed the lawsuit to proceed.

Luckert said the case contained "the essence of a medical malpractice action," with the right to file such a lawsuit already recognized when the Kansas Constitution was written in 1859.

Rosen went further in his own opinion, rejecting the idea that constitutional protections for the right to sue cover only types of lawsuits recognized as valid in 1859.

"I believe that recognizing the injury in cases like the one alleged here simply ensures that patients receive competent medical care or compensation for damages if they do not," Rosen wrote.

A dozen other states besides Kansas have similar laws, according to the Guttmacher Institute, a research organization that supports reproductive rights. It has argued that such laws are part of an “anti-abortion strategy” to deny women information that might lead them to terminate pregnancies.

In the Kansas case, the girl’s brain abnormality left her permanently disabled and unable to ever perform “activities of daily living,” according to court documents. The parents, Alysia Tillman and Storm Fleetwood, said that four months before the birth, Dr. Katherine Goodpasture told them that an ultrasound showed a healthy female fetus.

The parents said the ultrasound actually showed severe deformities and brain defects, something Goodpasture disputed. Another ultrasound a few days before the girl’s birth showed a problem with her brain.

The parents said Tillman was deprived of her right to make an informed decision about her pregnancy and they sued to recover the extra costs of caring for a severely disabled child. A district judge in Riley County in northeastern Kansas dismissed the case after Goodpasture argued that their lawsuit violated the state’s law against wrongful birth lawsuits.

An attorney for the doctor declined to comment on the ruling.

But Lynn Johnson, a Kansas City-area attorney representing the parents, said the court’s majority used “tortured mental gymnastics” to issue a ruling that gives medical providers immunity even if they mislead patients. He worried that it could prompt the Legislature to restrict lawsuits even further.

“What will they ban next?” he said.

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