5.50F WRONGFUL BIRTH AND LIFE (Updated)[1] (Approved 7/02)

NOTE TO JUDGE

In *Canesi v Wilson*, 158 *N.J.* 490 (1999), the Supreme Court mandated that an informed consent charge be given in every wrongful birth case. The standard for counseling in all wrongful birth cases was expressly found to be the reasonable patient standard and not the professional standard of care. The *Canesi* Court held that a physician is required to ascertain enough of a patient's background "to assess what information might be useful to the patient's deliberative process and then to discuss that information with her . . . the reasonably prudent patient standard thus takes into account each woman's unique circumstances." *Id*. at 510. The Court explained that "because the patient's protectable interest is the personal right of self-determination, the doctor's duty of disclosure must be sufficient to enable her to make an informed and meaningful decision concerning whether or not to continue the pregnancy." *Id*. at 502.

The *Canesi* Court instructed that "[t]he violation of the interest in self-determination that undergirds a wrongful birth cause of action consists of the parents' lost opportunity to make the personal decision of whether or not to give birth to a child who might have birth defects." *Schroeder v. Perkel, supra,* 87 *N.J*. at 66. The claim in a wrongful birth action can arise when a physician fails to provide adequate genetic counseling, *see id*. at 63, fails to detect a discoverable fetal defect or to inform the parents thereof, *see Berman v. Allan*, 80 *N.J*. 421 (1979), fails to interpret test results properly, *see Procanik v. Cillo*, 97 *N.J.* 339 (1984), or fails to warn of a child being born with a defect, see *Harbeson v. Parke-Davis, Inc.*, 656 *P*.2d 483, 491 (Wash. 1983); *see also Williams v. University of Chicago Hosp*., 688 *N.E*.2d 130, 133 (Ill. 1997) (stating that in wrongful birth actions, parents allege that they would not have carried fetus "to term if it had not been for the defendant's negligence in prenatal testing, genetic prognosticating, or counseling [them] as to the likelihood of giving birth to a physically or mentally impaired child") (internal quotation and citation omitted.)) *Canesi, supra*, 158 *N.J*. at 501-502.

This case involves a claim that the defendant is liable for the wrongful birth or life of the plaintiff's child. The plaintiff contends that the defendant failed to tell her that by continuing her pregnancy she ran the risk of [*here state the condition*], and that

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[1] *Canesi v. Wilson*, 158 *N.J*. 490 (1999); *Procanik v. Cillo*, 97 *N.J.* 339 (1984); *Schroeder v. Perkel*,

had she known of the risk, she would have terminated the pregnancy. A woman has the right to decide for herself whether to continue or terminate her pregnancy.[2] The claim here is that the plaintiff was deprived of the right to make the personal decision of whether to give birth to a child who might have birth defects.[3] In this case Dr. [*here insert physician's name*] had a duty to explain, in words the patient could understand, all material information and risks necessary for the plaintiff to have made an informed decision concerning whether or not to continue the pregnancy.[4] A doctor is required to obtain enough information about a patient's background and her reasons for seeing the doctor to determine what information is material to the patient and to

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87 *N.J*. 53 (1981); and *Berman v. Allen*, 80 *N.J*. 421 (1979).

[2] "A wrongful birth cause of action is predicated on a woman's right to determine for herself whether or not to continue or terminate her pregnancy." *Id*. at 501.

[3] "The violation of the interest in self-determination that undergirds a wrongful birth cause of action consists of the parents' lost opportunity to make the personal decision of whether or not to give birth to a child who might have birth defects." *Schroeder, supra*, 87 *N.J*. at 66. The claim in a wrongful birth action can arise when a physician fails to provide adequate genetic counseling, *see id*. at 63; fails to detect a discoverable fetal defect or to inform the parents thereof, *see Berman v. Allan*, 80 *N.J*. 421 (1979); fails to interpret test results properly, *see Procanik v. Cillo*, 97 *N.J*. 339 (1984); or fails to warn of a child being born with a defect, *see Harbeson v. Parke-Davis, Inc*., 656 *P*.2d 483, 491 (Wash. 1983); *see also Williams v. University of Chicago Hosp*., 688 *N.E*.2d 130, 133 (Ill. 1997) (stating that in wrongful birth actions, parents allege that they would not have carried fetus" to term if it had not been for the defendant's negligence in prenatal testing, genetic prognosticating, or counseling [them] as to the likelihood of giving birth to a physically or mentally impaired child") (internal quotation and citation omitted)). *Id*.

[4] "Because the patient's protectable interest is the personal right of self-determination, the doctor's duty of disclosure must be sufficient to enable her to make an informed and meaningful decision concerning whether or not to continue the pregnancy." *Id.* at 502.

discuss that information with her.[5] Medical information is "material" when a reasonable woman, in what the physician knows or should know to be the patient's position, could attach significance to a risk of a birth defect in deciding whether to terminate the pregnancy or give birth to the child.[6]

Option A: [**Use option A where the claim is that the defendant failed to recommend or provide sufficient information about genetic counseling or screening; failed to perform a prenatal test, negligently interpreted the prenatal test, failed to perform follow-up testing *et cetera*.**]

In this case, the plaintiff contends that the doctor failed to [*here describe the allegations, i.e., failed to provide the information that a reasonable patient would expect to be told about genetic counseling or screening, failed to recommend or provide sufficient information about genetic counseling or screening, failed to do follow up testing, failed to interpret an ultrasound or other prenatal test properly, et cetera*]. As a result, the plaintiff was not advised that by continuing her pregnancy she ran the risk of giving birth to a child with [*state the condition*], and that had she known of the risk of the birth defect she would have terminated the pregnancy. To

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[5] "A physician . . . could reasonably be expected to ascertain enough of a patient's background, [and] her reasons for seeking pregnancy counseling . . . to assess what information might be useful to the patient's deliberative process and then to discuss that information with her." *Id.* at 510.

prevail in a wrongful birth claim, the plaintiff must prove all of the following elements:

(1) the defendant negligently [*describe the allegation, e.g., failed to recommend or provide sufficient information that a reasonable patient would expect to be told about genetic counseling or screening, failed to perform a prenatal test, negligently interpreted the prenatal test, failed to perform follow-up testing et cetera*]; and

(2) if the test was properly performed [*or interpreted et cetera*], in some cases it would have disclosed the possibility of [*state the condition*];[7] and

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[6] *Id*. at 509.

[7] In *Gardner v. Pawliw*, 150 *N.J*. 359 (1997), the Court held:

> When the prevailing standard of care indicates that a diagnostic test should be performed and that it is a deviation not to perform it, but it is unknown whether performing the test would have helped to diagnose or treat a pre-existent condition, the first prong of *Scafidi* does not require that the plaintiff demonstrate a reasonable medical probability that the test would have resulted in avoiding the harm. Rather, the plaintiff must demonstrate to a reasonable degree of medical probability that the failure to give the test increased the risk of harm from the pre-existent condition. A plaintiff may demonstrate an increased risk of harm even if such tests are helpful in a small proportion of cases. We reach that conclusion to avoid the unacceptable result that would accrue if trial courts in such circumstances invariably denied plaintiffs the right to reach the jury, thereby permitting defendants to benefit from the negligent failure to test and the evidentiary uncertainties that the failure to test created. *Id.* at 387.

(3) if the plaintiff was advised of the possibility of a [*state the condition*] birth defect, she would have terminated the pregnancy.

Option B: [**Use option B only where the allegation is that the defendant failed to disclose the risks of a birth defect associated with taking a particular medicine while pregnant.**]

In this case, the plaintiff contends that the doctor failed to [*describe the allegations, e.g., failed to disclose the risks of a birth defect associated with taking a particular medicine while pregnant et cetera*]. As a result, the plaintiff was not advised that by continuing her pregnancy she ran the risk of giving birth to a child with [*state the condition*], and that had she known of the risk of the birth defect she would have terminated the pregnancy.

To prevail in a wrongful birth claim involving a birth defect resulting from taking a prescribed medicine while pregnant, the plaintiff must prove all of the following elements:

(1) that the undisclosed risk of the medication was material to a woman in the plaintiff's position;

(2) that the risk materialized; and

See also, Reynolds v. Gonzales, N. J. (2002), holding, "[A] plaintiff may demonstrate an increased risk even if the test would have been helpful in just a small proportion of cases." (Citing *Gardner, supra*, 150 *N.J.* at 387.)

(3) had the plaintiff known of that risk, she would have terminated her pregnancy.[8]

[*The remainder of charge -- all cases:*]

The plaintiff does not have to prove that any doctor's negligence caused her child's birth defect. The question is whether the doctor's failure to disclose the risk of a birth defect deprived the plaintiff(s) of [*her or their*] right to decide whether to give birth to a child who could possibly have a birth defect.[9] [10] If you conclude that the plaintiff would have had an abortion, if warned of the risk of a birth defect, the plaintiff is entitled to damages consisting of both:

(1) the special medical expenses and other extraordinary expenses attributable to raising a child with a birth defect over the child's lifetime; and

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[8] "[A] plaintiff need not prove that the doctor's negligence caused her child's birth defect. Rather, the test of proximate causation is satisfied by showing that an undisclosed fetal risk was material to a woman in her position; the risk materialized, was reasonably foreseeable and not remote in relation to the doctor's negligence; and, had plaintiff known of that risk, she would have terminated her pregnancy." *Id*. at 506.

[9] "The appropriate proximate cause question ... is whether the doctors' inadequate disclosure deprived the parents of their deeply personal right to decide for themselves whether to give birth to a child who could possibly be afflicted with a physical abnormality." *Id*. at 515.

[10] In *Lynch v. Scheininger*, 162 *N. J*. 209 (2000), the Court held that where plaintiff is aware of the probability of a birth defect while plaintiff is still able to terminate the pregnancy, the jury may consider whether the plaintiff's decision to give birth to the child should be considered in mitigation of damages.

(2) the emotional injury and anguish that the plaintiffs have suffered and will suffer in the future caused by losing the option to terminate the pregnancy and being compelled to take on the lifetime tasks and burdens of raising a disabled child.[11]

[11] "[A] woman asserting a wrongful birth claim who proves that she herself would have had an abortion if apprised of the risk of fetal defect is entitled to damages consisting of both the special medical expenses attributable to raising a child with a congenital impairment and the emotional injury attributable to the deprivation of the option to accept or reject a parental relationship with the child." *Canesi, supra*, 158 *N.J.* at 517-518.