Georgia State University Law Review

Volume 34
Issue 3 *Spring 2018*

Article 8

5-1-2018

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Recommended Citation
Tatiana E. Posada, *Whose Sperm Is It Anyways In The Wild, Wild West Of The Fertility Industry?*, 34 Ga. St. U. L. Rev. 847 (2018).
Available at: https://readingroom.law.gsu.edu/gsulr/vol34/iss3/8

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WHOSE SPERM IS IT ANYWAYS IN THE WILD, WILD WEST OF THE FERTILITY INDUSTRY?

Tatiana Elizabeth Posada*

INTRODUCTION

Imagine a couple that is unable to conceive a child naturally. Luckily, they had the money and resources available to them to conceive a child through assisted reproductive technology (ART),[1] so they decided to start their family through the use of intrauterine insemination.[2] They selected a sperm bank[3] and began the arduous process of selecting a sperm donor who fit the desired traits and characteristics for their child.[4] The sperm bank matched them with an anonymous donor, Donor 9623, and assured the couple that the donor was "a healthy male with an IQ of 160, a bachelor's of science in

* J.D. Candidate, 2018, Georgia State University College of Law. Thank you, to Dean Wendy Hensel, for all of your invaluable time and guidance on this Note; to the *Georgia State Law Review*, for perfecting this Note; to my friends and peers in law school, for the consistent inspiration and motivation you have provided; to Mariya, Sakinah, and Umarah, for being the best mentors I could ask for; to Jeffrey and Eric, for helping me finish law school by guiding me through one of the most challenging times in my life; and, above all, thank you Sean, for a patience, an understanding, and a love that is not of this world.

1. Assisted reproductive technology encompasses technology used to address infertility problems. *See Selecting Your Assisted Reproductive Technology Program*, AM. PREGNANCY ASS'N, http://americanpregnancy.org/infertility/assisted-rerproductive-technology-program/ [https://perma.cc/7RYX-ZFNM] (last visited Sept. 25, 2016).

2. Intrauterine insemination is a less invasive and cheaper fertility treatment than *in vitro* fertilization and involves a process of "placing sperm inside the woman's uterus to facilitate fertilization." *Intrauterine Insemination: IUI*, AM. PREGNANCY ASS'N, http://americanpregnancy.org/infertility/intrauterine-insemination/ [https://perma.cc/BQ7X-LE6X] (last visited Sept. 25, 2016).

3. "A sperm bank, also referred to as a [cryobank], is a facility that collects, freezes, and stores human sperm." *Sperm Banking*, AM. PREGNANCY ASS'N, http://americanpregnancy.org/infertility/sperm-banking/ [https://perma.cc/9ZWR-26MY] (last visited Sept. 25, 2016).

4. Sperm bank Xytex allows patients looking for a sperm donor to select certain donor attributes they want their donor to have. *Sperm Donor Search*, XYTEX CRYO INT'L, https://www.xytex.com/search-donors [https://perma.cc/69HL-U2MN] (last visited Sept. 25, 2016). Patients can select physical characteristics including: hair color, eye color, height, and weight. *Id.* They can also select nonphysical characteristics including: ethnic origin, religion, blood type, and education level. *Id.* Xytex also provides different levels of donors including: Xytex Donors, Xytex Select Donors, and Xytex Exclusive Donors. *Id.*

neuroscience, a master's degree in artificial intelligence, a Ph.D. in neuroscience engineering on the way, and no criminal history."[5] Given this representation of Donor 9623 as the ideal candidate, the couple moved forward with the intrauterine insemination procedure and successfully conceived a child.[6] After starting their new family, the couple accidentally found out the identity of Donor 9623, James Aggeles,[7] and from a simple Internet search, they uncovered the shocking truth.[8] Instead of their ideal neuroscientist donor, the father of their child was "a college dropout with a felony conviction and diagnosed schizophrenia."[9]

This is Angela Collins and Margaret Hanson's story.[10] This is Jane Doe 1 and Jane Doe 2's story.[11] This is more than fifteen American, Canadian, and British families' stories.[12] Angela Collins and Margaret Hanson believed they had control over the process to start their family and the ability to select the man that would provide half of their child's genetics.[13] The sperm bank, Xytex Corporation (Xytex), also reassured them that this was the case,[14] but in June 2014, Angela and Margaret received the rude awakening that this was indeed not the truth.[15] After finding out the true identity of their sperm donor, the women began notifying other families who also

5. Collins v. Xytex Corp., No. 2015CV259033, 2015 WL 6387328, at *1 (Ga. Super. Ct. Oct. 20, 2015).

6. *Id.*

7. *See id.* "Due to a breach of confidentiality, the identity of BGM 9623 was released by Xytex in June 2014 . . . [as] Defendant James Christian Aggeles." *Id.* at *7 n.3.

8. *See* Complaint at 18, Doe 1 v. Xytex Corp., No. 1:16-CV-01453-TWT, 2017 WL 1036484 (N.D. Ga. Mar. 17, 2017). Angela Collins and Margaret Hanson discovered information about Aggeles through an online search. *Id.*

9. *Collins*, 2015 WL 6387328, at *1. Several facts referenced in the *Collins* and *Doe 1* pleadings—and cited throughout this Note—were confirmed through discovery in the other cases against Xytex nationwide and are on file with the author.

10. *Id.*

11. *See Doe 1*, 2017 WL 1036484, at *1–2.

12. *See* Christine Hauser, *Sperm Donor's Profile Hid Mental Illness and Crime, Lawsuits Say*, N.Y. TIMES (Apr. 17, 2016), https://www.nytimes.com/2016/04/18/world/americas/sperm-donors-profile-hid-mental-illness-and-crime-lawsuits-say.html [https://perma.cc/7MEL-BEJB].

13. *See Sperm Donor Search*, *supra* note 4. Sperm bank Xytex advertises that patients looking for a sperm donor have the ability to select certain donor attributes they want their donor to have. *Id.*

14. *Collins*, 2015 WL 6387328, at *1.

15. *See id.*; Complaint, *supra* note 8, at 18.

used the same anonymous sperm donor to conceive their children.[16] Donor 9623 has allegedly fathered at least thirty-six children under his false identity through the purchase, promotion, and sale of his sperm by Xytex.[17]

Not only were Angela and Margaret shocked to realize the true identity of their sperm donor, but on October 20, 2015, they also found out they would not be able to hold Xytex accountable for its actions when a Georgia court dismissed their claims in *Collins v. Xytex Corporation*.[18] Angela and Margaret brought ten different claims against Xytex: fraud, negligent misrepresentation, strict liability in products liability, negligence in products liability, breach of express warranty, breach of an implied warranty, battery, negligence, unfair business practices, and third party fraud.[19] None of these claims were prenatal tort claims,[20] but a Fulton County Superior Court judge dismissed almost every claim, indicating each claim was a derivative of the prenatal tort of wrongful birth.[21] According to the court's reasoning, Georgia does not recognize a prenatal tort for wrongful birth; therefore, any claims that are derivatives of wrongful birth are also not recognized.[22] Similarly,

16. Complaint, *supra* note 8, at 18.

17. *Id.* at 6.

18. *Collins*, 2015 WL 6387328, at *7.

19. *Id.* at *1.

20. *See Tort*, BLACK'S LAW DICTIONARY (10th ed. 2014). Black's Law Dictionary defines prenatal torts as "[l]oosely, any of several torts relating to reproduction, such as those giving rise to wrongful-birth actions, wrongful-life actions, and wrongful-pregnancy actions." *Id. See also* Kate Wevers, *Prenatal Torts and Pre-Implantation Genetic Diagnosis*, 24 HARV. J.L. & TECH. 257, 257 (2010). "Concurrently with the increasing scope of modern prenatal care, courts have recognized a series of prenatal torts that allow parents, and sometimes children, to pursue claims against their medical providers for damages flowing from an unwanted birth. These prenatal torts include wrongful birth, wrongful life, and wrongful pregnancy." *Id.*

21. *Collins*, 2015 WL 6387328, at *7 (dismissing plaintiffs' claims for fraud, negligent misrepresentation, strict liability in products liability, negligence in products liability, breach of express warranty, breach of an implied warranty, battery, negligence, unfair business practices, and third party fraud after finding all claims impermissibly rooted in a concept of wrongful birth).

22. *Id.* at *7. The court dismissed Plaintiffs' complaint and amended complaint because "Plaintiffs' complaint sets forth ten claims, each with a genesis rooted in the concept of wrongful birth, a claim not recognized under Georgia law." *Id.*

Fulton County State Court also dismissed the majority of a separate lawsuit against Xytex.[23]

Alas, not only have state courts arrived at this analysis and conclusion, a federal court in Georgia has also dismissed all claims in two separate cases against Xytex for the same reasons.[24] In *Doe 1 v. Xytex Corporation*, the United States District Court for the Northern District of Georgia determined the lawsuit against Xytex was a wrongful birth case even though the plaintiffs brought eleven causes of action, none of which were prenatal tort claims.[25] In addition to the two lawsuits filed in Georgia state courts, on December 7, 2016, there were a total of six federal lawsuits regarding Donor 9623 pending against Xytex, and these suits were filed across the nation in California, Florida, Georgia, and Ohio.[26] These cases will collectively be referred to as "the Xytex cases" throughout this Note. In Georgia, these cases have left families without any ability to hold Xytex accountable for its actions and have allowed Xytex to continue to operate in the reproductive health care realm however it chooses.

The purpose of this Note is to assess the need for Georgia to reevaluate prenatal torts due to advances in ART procedures, the increase in use of this technology,[27] and the lack of sperm bank regulations, which have now resulted in the problem evidenced by the Xytex cases. Part I examines the history behind the creation of the three main prenatal torts: wrongful birth, wrongful life, and

23. Greg Land, *2 More Suits Over Flawed Sperm Donor Tossed*, DAILY REP. (Mar. 21, 2017), https://www.law.com/dailyreportonline/almID/1202781717725/ [https://perma.cc/C28B-S6GF].

24. *Id.*

25. *See* Doe 1 v. Xytex Corp., No. 1:16-CV-1453-TWT, 2017 WL 1036484, at *2–3 (N.D. Ga. Mar. 17, 2017) (dismissing the eleven claims as derivatives of wrongful birth); Complaint, *supra* note 8, at 21–29 (listing the eleven causes of action as follows: fraud, negligent misrepresentation, strict liability, products liability negligence, breach of express warranty, breach of implied warranty, battery, negligence, unfair business practices, specific performance, and false advertising).

26. *In re* Xytex Corp. Sperm Donor Prod. Liab. Litig., 223 F. Supp. 3d 1351, 1352–53 (J.P.M.L. 2016).

27. Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance–United States, 2010*, CDC (Dec. 6, 2013), https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6209a1.htm [https://perma.cc/B4GH-NZTG] (last visited Dec. 17, 2016). "Since the first U.S. infant conceived with Assisted Reproductive Technology (ART) was born in 1981, both the use of advanced technologies to overcome infertility and the number of fertility clinics providing ART services have increased steadily in the United States." *Id.*

wrongful conception, followed by an examination of the current sperm bank regulations. Part II analyzes Georgia's evaluation of prenatal torts, Georgia's policy considerations when evaluating prenatal torts, Georgia's interpretation of claims against sperm banks, and Georgia's limited sperm bank regulations. Part III examines several proposals to remedy this issue, while accounting for Georgia's policy concerns, to ensure the state is protecting its citizens' rights and deterring sperm banks from engaging in fraudulent business practices.

I. Background

As evidenced by the Xytex cases, the advancement of ART and the lack of sperm bank regulations have resulted in a need to reexamine Georgia's approach to prenatal tort claims and sperm banks. As technology advances, it is important for states to adapt to these changes to continue protecting fundamental rights surrounding decisions to have a child. This section provides a brief introduction to prenatal torts generally, an explanation of prenatal torts in Georgia, a brief introduction to current sperm bank regulations, and an explanation of the convergence of prenatal torts and sperm bank regulations.

A. Prenatal Torts

In the 1973 case *Roe v. Wade*,[28] the Supreme Court of the United States determined a woman possesses a constitutional right to "make an informed decision regarding the procreative options available to her."[29] After the Supreme Court held that a woman has a right to terminate her pregnancy given temporal limitations,[30] the nation

28. Roe v. Wade, 410 U.S. 113, 153 (1973) (finding the constitutional right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

29. Smith v. Cote, 513 A.2d 341, 346 (N.H. 1986).

30. *See id.* (referencing *Roe v. Wade*). The Court found "[d]uring the first trimester of her pregnancy, a woman may make this decision as she sees fit, free from State interference." *Id.*

began to see the development of prenatal torts, to which states have responded differently.[31]

In general, a tort is "a civil wrong, other than [a] breach of contract, for which a remedy may be obtained."[32] There are many different types of torts including, but not limited to, intentional torts and negligent torts, which include claims like medical malpractice.[33] A prenatal tort is simply a type of tort relating to reproduction[34] that is usually characterized as a negligence claim or, more specifically, a medical malpractice claim.[35] The primary prenatal torts include wrongful birth actions, wrongful life actions, and wrongful conception or wrongful pregnancy actions.[36]

1. Wrongful Birth and Wrongful Life

Generally, wrongful birth is "[a] lawsuit brought by parents against a doctor for failing to advise them prospectively about the risks of their having a child with birth defects."[37] A wrongful birth claim is based on the argument that had the doctor properly advised the parents of the child's risk for birth defects, the parents would have opted to not conceive or have an abortion, rather than proceed with the pregnancy.[38] Wrongful birth generally involves a planned

31. *See id.* at 345. In Justice Batchelder's opinion, the Supreme Court of New Hampshire acknowledged *Roe*'s recognition of a woman's right to an abortion as one of "[t]wo developments [that] help explain the trend toward judicial acceptance of wrongful birth actions." *Id.*

32. *Tort*, *supra* note 20.

33. *See id.*; *Malpractice*, BLACK'S LAW DICTIONARY (10th ed. 2014).

34. *Tort*, *supra* note 20.

35. *See, e.g.*, Phillips v. United States, 508 F. Supp. 544, 550 (D.S.C. 1981) (categorizing wrongful birth as within the traditional boundaries of negligence like any medical malpractice action); Burke v. Rivo, 551 N.E.2d 1, 2 (Mass. 1990) (categorizing a negligently performed sterilization, which is a wrongful conception claim, as a medical malpractice claim); Pierce v. Piver, 262 S.E.2d 320, 321 (N.C. Ct. App. 1980) (categorizing wrongful conception as a medical malpractice claim under the umbrella of negligence).

36. *Tort*, *supra* note 20; *see also* Caroline Crosby Owings, *The Right to Recovery for Emotional Distress Arising from a Claim for Wrongful Birth*, 32 AM. J. TRIAL ADVOC. 143, 146 (2008).

37. *Wrongful-Birth Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

38. *See* PREYESH K. MANIKAL, MEDICAL TORTS IN GEORGIA: A HANDBOOK ON STATE AND FEDERAL LAW § 2:13 (2016). Wrongful birth claims involve "the treating physician's failure to give the parents of a potentially impaired child the opportunity to abort the child." *Id.* These claims are "brought by the parents of an impaired child for a child that would have otherwise been aborted." *Id.*

pregnancy resulting in a child born with a genetic deformity or disability.[39] Some states recognize wrongful birth actions,[40] while other states have expressly prohibited the cause of action.[41] Where wrongful birth is recognized, damages usually include "the extraordinary costs associated with raising an unhealthy child until the child attains the age of majority, these same costs beyond the age of the child's majority, damages for parental emotional harm, and compensation for comprehensive child rearing costs."[42]

A wrongful life claim is essentially the same as a wrongful birth claim; however, in a wrongful life claim it is the child or someone on behalf of the child, rather than the parent, who is alleging pain and suffering.[43] Consider the following hypothetical: Dr. *A* fails to prospectively warn patient *B* about the risk of her having a child born with birth defects, so *B* conceives child *C* and proceeds with the pregnancy. *C* is then born with birth defects. *B* (the mother) would

39. *See* Julie F. Kowitz, *Not Your Garden Variety Tort Reform: Statutes Barring Claims for Wrongful Life and Wrongful Birth Are Unconstitutional Under the Purpose Prong of* Planned Parenthood v. Casey, 61 BROOK. L. REV. 235, 253 (1995).

40. *E.g.*, Keel v. Banach, 624 So. 2d 1022, 1031 (Ala. 1993) (recognizing a cause of action for wrongful birth in Alabama); Arche v. U.S. Dep't of Army, 798 P.2d 477, 480 (Kan. 1992) (recognizing a cause of action for wrongful birth in Kansas); Naccash v. Burger, 290 S.E.2d 825, 829–30 (Va. 1982) (recognizing a cause of action for wrongful birth in Virginia).

41. William C. Duncan, *Statutory Responses to "Wrongful Birth" and "Wrongful Life" Actions*, 14 LIFE & LEARNING 3, 3 (2004), http://www.uffl.org/Vol14/Duncan-04.pdf [https://perma.cc/N5Z8-KFNS]. Two examples include Idaho and Michigan. Idaho's statute prohibiting wrongful birth reads as follows: "A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted." *Id.* at 5. Michigan's law reads as follows: "A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born." *Id.* at 6. Indiana, Minnesota, Missouri, North Dakota, Pennsylvania, South Dakota, and Utah all have similar statutes expressly prohibiting wrongful birth. *Id.* at 5–11.

42. Kathleen A. Mahoney, *Malpractice Claims Resulting from Negligent Preconception Genetic Testing: Do These Claims Present a Strain of Wrongful Birth or Wrongful Conception, and Does the Categorization Even Matter?*, 39 SUFFOLK U. L. REV. 782, 782 (2006).

43. *Wrongful-Life Action*, BLACK'S LAW DICTIONARY (10th ed. 2014). Wrongful life is a "lawsuit brought by or on behalf of a child with birth defects, alleging that but for the doctor-defendant's negligent advice, the parents would not have conceived the child or, if they had, would have aborted the fetus to avoid the pain and suffering resulting from the child's congenital defects." *Id.*; s*ee also* James Bopp, Jr. et al., *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 DUQ. L. REV. 461, 461–62 (1989). "A wrongful birth action is brought by parents seeking damages . . . . The wrongful life action is distinct from the wrongful birth action in that a wrongful life claim is brought by or on behalf of a child with disabilities." *Id.*

bring a wrongful birth claim against Dr. *A*, while *C* (the child) would bring a wrongful life claim against Dr. *A*. Both *A* and *C* would be arguing that, but for Dr. *A*'s negligent advice, *B* either would not have conceived or would have aborted *C*, avoiding the pain and suffering resulting from the birth defect. While a variety of states recognize wrongful birth, only four states recognize wrongful life as a valid claim.[44] Where wrongful life is recognized, damages usually include special damages for costs to the child for the extraordinary expenses necessary to treat the birth defect.[45] A detailed discussion of wrongful life is beyond the scope of this Note because the Xytex cases specifically focus on the distinction between wrongful birth and wrongful conception.

2. Wrongful Conception

The third and most widely-accepted prenatal tort is wrongful conception.[46] Generally, a wrongful conception or wrongful pregnancy action is "[a] lawsuit brought by a parent for damages resulting from a pregnancy following a failed sterilization [procedure]."[47] Where wrongful conception is recognized, damages usually include the mother's medical expenses and "emotional distress damages associated with pregnancy and childbirth," but most courts have declined to expand "such damages to the costs of raising the unexpected child to adulthood."[48] Consider the following

44. Kowitz, *supra* note 39, at 255. Courts have upheld the validity of wrongful birth claims almost universally, while wrongful life claims have not fared as well. *Id.* (noting "only four state courts have recognized" wrongful life—California, Colorado, New Jersey, and Washington).

45. Turpin v. Sortini, 643 P.2d 954, 966 (Cal. 1982); Cont'l Cas. Co. v. Empire Cas. Co., 713 P.2d 384, 394 (Colo. App. 1985); Procanik v. Cillo, 478 A.2d 755, 757 (N.J. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496–97 (Wash. 1983).

46. *See* Don C. Smith, Jr., *Cause of Action Against Physician for Wrongful Conception or Wrongful Pregnancy*, *in* 3 CAUSES OF ACTION 83 § 4 (1984, 2017 update). The list of jurisdictions that recognize wrongful conception includes: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

47. *Wrongful-Pregnancy Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

48. Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 151 (2005).

hypothetical: Dr. *X* performs a tubal sterilization procedure[49] on patient Y to prevent future pregnancies, but *Y* conceives a child despite undergoing the procedure. *Y* would bring a wrongful conception claim against Dr. *X* for performing the procedure negligently, resulting in her conception of a child she did not want to conceive.[50]

B. Prenatal Torts in Georgia

Interestingly, several states that expressly prohibit a wrongful birth claim recognize wrongful conception as a valid claim.[51] Georgia is one of those states. The Georgia General Assembly has not expressly recognized wrongful birth, and the Supreme Court of Georgia refuses to recognize this prenatal tort absent the legislature's express mandate.[52] The court, however, has recognized wrongful conception as a valid claim that is a subset of malpractice.[53] It has used the traditional tort analysis to differentiate these two prenatal torts.

Since prenatal torts are usually considered negligence claims or medical malpractice torts, to bring a prenatal tort claim, an individual must satisfy the four elements required in the traditional negligence

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49. In a tubal sterilization procedure, "the fallopian tubes are removed or cut and tied with special thread, closed shut with bands or clips, sealed with an electric current, or blocked with scar tissue formed by small implants" to prevent pregnancy. *Sterilization by Laparoscopy*, AM. C. OBSTETRICIANS & GYNECOLOGISTS, http://www.acog.org/Patients/FAQs/Sterilization-by-Laparoscopy [https://perma.cc/FS9R-CZSP] (last visited Mar. 4, 2018).

50. *See, e.g.*, Coleman v. Garrison, 327 A.2d 757, 760–61 (Del. Super. Ct. 1974) (finding a wrongful pregnancy claim where a woman sued a physician for negligently performing a tubal sterilization procedure consisting of a bilateral tubal ligation, which resulted in an unplanned pregnancy).

51. *See*, *e.g.*, Duncan, *supra* note 41, at 5–7. Some examples include Idaho, Michigan, and Minnesota. Idaho specifically distinguishes the legislative prohibition against a cause of action for wrongful birth from a cause of action for wrongful conception. *Id.* at 5. Michigan differentiates a cause of action for wrongful birth from a cause of action for wrongful conception by providing limited damages for wrongful conception. *Id.* at 6. Minnesota "specifically allows for malpractice actions based on defective contraception or sterilization." *Id.* at 7.

52. Atlanta Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d 557, 560 (Ga. 1990) (finding a breakdown in the traditional tort analysis of a wrongful birth claim and, "[i]n spite of the widespread recognition and, in fact, because of that recognition and the confusion which has followed in its wake," holding "that 'wrongful birth' actions shall not be recognized in Georgia absent a clear mandate for such recognition by the legislature").

53. Fulton-Dekalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 654 (Ga. 1984).

analysis.[54] The individual must prove: (1) the tortfeasor had a duty to the individual; (2) the tortfeasor breached the tortfeasor's duty to the individual; (3) the tortfeasor's actions caused the individual's injury; and (4) the individual sustained some injury.[55] Thus, wrongful birth and wrongful conception claims must be able to satisfy these four elements to be recognizable claims. The Supreme Court of Georgia has determined it is impossible to satisfy all of these elements in a wrongful birth claim; therefore, it cannot recognize wrongful birth as a valid claim.[56] The court has found it is, however, possible to satisfy all four traditional tort analysis elements in a wrongful conception claim; therefore, it can recognize wrongful conception as a valid claim.[57]

C. Applying the Traditional Tort Analysis to Wrongful Birth

The Supreme Court of Georgia has defined wrongful birth as a claim where the parents of an impaired child bring a lawsuit alleging "but for the treatment or advice provided by the defendant, the parents would have aborted the fetus, thereby preventing the birth of the child."[58] In other words, the child would not have been born but for the physician's actions. If the child was aborted, the parents would not have had to incur the mental and emotional strains of having a disabled child, nor would they have the monetary expenses

54. *See Negligence*, BLACK'S LAW DICTIONARY (10th ed. 2014). Black's Law Dictionary defines negligence as a tort that is usually "expressed in terms of the following elements: duty, breach of duty, causation, and damages," and it includes malpractice (professional negligence) as a claim under the umbrella of negligence. *Id.*; *see also* Hutton Brown et al., *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 727 (1986) (explaining how the broad acceptance of wrongful pregnancy actions (wrongful conception actions) stems from its similarity to medical malpractice and the courts' ability to "identify and consider the traditional tort elements of duty, breach, proximate cause, and injury"); Owings, *supra* note 36, at 148 (explaining how "most jurisdictions agree that the cause of action [for wrongful birth] involves, at a minimum, the prima facie elements of negligence: duty, breach of duty, causation, and injury").

55. *See* Zaldivar v. Prickett, 774 S.E.2d 688, 693–94 (Ga. 2015) (restating the unquestionable rule "that liability in tort requires proof that the defendant owed a legal duty, that she breached that duty, and that her breach was a proximate cause of the injury sustained by the plaintiff").

56. *See Abelson*, 398 S.E.2d at 560–61.

57. *See Graves*, 314 S.E.2d at 654.

58. *Abelson*, 398 S.E.2d at 560.

associated with the care of a disabled child.[59] Further, the child would not have had to suffer the mental, emotional, and health issues associated with being disabled.[60]

The Supreme Court of Georgia first considered wrongful birth in *Atlanta Obstetrics & Gynecology Group v. Abelson*.[61] In *Abelson*, the plaintiffs' child was born with Down syndrome, and they brought a lawsuit against the physician who provided the postconception obstetrical care and treatment.[62] The plaintiffs filed the suit on behalf of themselves and their daughter alleging the defendants failed to properly counsel the plaintiffs about the risks of the pregnancy and failed to inform them about the availability of an amniocentesis test.[63] The plaintiffs sought personal damages for the pregnancy and delivery; pain and suffering, mental and emotional anguish, lost wages; loss of consortium; and the "reasonable and necessary costs of rearing, educating and otherwise providing for [their child] including medical expenses."[64] They also sought damages on behalf of their child.[65]

When applying the traditional tort analysis to the wrongful birth claim, the court found that, in general, plaintiffs can satisfy the first two elements, duty and breach, in such a cause of action.[66] Duty and breach can be satisfied because medical practitioners have a duty to disclose information regarding genetic deformities to their patients, and by not disclosing this information the physician breaches the

59. *See id.* at 558. Plaintiffs sought damages for "pain and suffering; mental and emotional anguish . . . and the 'reasonable and necessary costs of rearing, educating and otherwise providing for [their child] including medical expenses'" due to the genetic disorder. *Id.*

60. *See id.* Plaintiffs also sought damages on behalf of their daughter for her own pain and suffering, as well as the costs to her for her medical expenses associated with the genetic disorder. *Id.*

61. *See id.* at 559–61 (explaining the court's precedent recognizing wrongful conception as a valid tort and detailing how wrongful birth is different from wrongful conception to explain why the court will now choose not to extend the same ruling to wrongful birth).

62. *Id.* at 558.

63. *Abelson*, 398 S.E.2d at 558.

64. *Id.*

65. *Id.*

66. *Id.* at 560 (noting "[t]he first two prongs of the four pronged traditional tort analysis, those of duty and breach, do not present so great a problem" when applying the traditional tort principles to wrongful birth).

physician's duty to the patient.[67] However, causation and damages are the two elements the court determined plaintiffs cannot prove when applying the traditional tort analysis to wrongful birth claims.[68]

1. Causation and Damages Preventing the Recognition of Wrongful Birth

First, the court found plaintiffs cannot successfully establish causation in a wrongful birth action because the physician's failure to disclose the possibility of genetic deformities cannot be the "but for" cause of the child's genetic deformity;[69] a child's development and genetic composition is inherited from the child's parents, and a failure to disclose certain information does not change this fact.[70] However, even if the plaintiffs could satisfy causation, the court found the traditional tort analysis would still fail because plaintiffs cannot prove damages.[71] In a wrongful birth action, plaintiffs are claiming the child as their injury, but the Supreme Court of Georgia is unwilling to define a child as an injury because of the policy implications of such an action.[72] The court determined that without defining the child as an injury, plaintiffs cannot prove damages in a wrongful birth case. Thus, plaintiffs cannot prove the third or fourth elements—causation and damages—of the traditional tort analysis that the court requires to recognize wrongful birth as a valid claim.

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67. *See id.* at 560–61 (noting "a physician has been recognized to have a generalized duty to impart relevant information to a patient concerning his or her medical condition").

68. *Id.* at 561 (noting the traditional tort analysis begins to break down with the injury prong and breaks down even further with the causation prong).

69. *Abelson*, 398 S.E.2d at 561.

70. *Id.*

> The [impairment] is genetic and not the result of any injury negligently inflicted by the [defendants]. In addition it is incurable and was incurable from the moment of conception. Thus the [defendants'] alleged negligent failure to detect it during prenatal examination cannot be considered a cause of the condition by analogy to those cases in which the doctor has failed to make a timely diagnosis of a curable disease. The child's [impairment] is an inexorable result of conception and birth.

Id. (quoting Becker v. Schwartz, 386 N.E.2d 807, 816 (N.Y. 1978) (Watchler, J. dissenting)).

71. *See id.*

72. *See id.* at 561, 563; *see also* Campbell v. United States, 795 F. Supp. 1127, 1129 (N.D. Ga. 1991) (noting the Supreme Court of Georgia's refusal "to recognize the life of a child as a legal injury").

2. The Policy Considerations Preventing the Recognition of Wrongful Birth

Ultimately, the court was unwilling to recognize wrongful birth as a legitimate tort claim because of the policy implications associated with finding causation and damages in such a claim.[73] In *Abelson*, the court explained the policy considerations and long-range consequences of recognizing wrongful birth, which are important to note since they ultimately resulted in the decision against recognizing a cause of action for wrongful birth.[74]

First, the court expressed policy concerns regarding causation. Finding causation in wrongful birth would increase obstetricians' exposure to liability and thus increase medical malpractice claims against obstetricians, which the court believed was bad for the public.[75] The court also feared that this increased burden on obstetricians—trying to determine what information they should share with patients—would encourage physicians to recommend an abortion where there is any chance of the child having a genetic abnormality, simply to avoid liability.[76]

Second, the court expressed policy concerns regarding damages. Finding damages involves the policy implication of life, and such policy issues enter the realm of philosophical questions regarding

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73. *See Abelson*, 398 S.E.2d at 563.

74. *See id.* at 560 nn.4–5 (discussing the philosophical implications on life and the policy implications on obstetricians' liability exposure that would result from recognizing a cause of action for wrongful birth).

75. *Id.* at 560 n.5 (finding "[a] valid concern underlying the legislative curtailment of 'wrongful birth' actions is the probability that 'wrongful birth' claims will give rise to increased medical malpractice litigation, with obstetricians' liability exposure being so broad as to inhibit the practice of obstetrics and thereby damage the public good"). The court noted that this policy concern is of particular importance to Georgia because in "its 1990 session, the General Assembly [enacted] a statute establishing a gubernatorial commission to investigate an 'obstetrical crisis,' . . . created by 'a significant decrease in the number of physicians who practice obstetrics,'" which proved to the court the need for "a thorough assessment of all of the public policy considerations involved in recognition of 'wrongful birth.'" *Id.*

76. *Id.* at 563 n.9 (quoting Azzolino v. Dingfelder, 337 S.E.2d 528, 535 (N.C. 1985)) (noting "[i]nevitably [recognizing wrongful birth] will place increased pressure upon physicians to take the 'safe' course by recommending abortion" to avoid liability when determining what information is important to provide to parents to obtain their informed consent).

life, which extends beyond the court's responsibility.[77] There is a strong belief that every child's life is precious, and the Supreme Court of Georgia "recoil[s]" from recognizing the birth of a child as an injury.[78] In general, there are also issues surrounding the policy implications on the disabled community, specifically because recognizing a cause of action for wrongful birth, in essence, places a value judgment on living with a disability versus not living at all.[79] This can have negative effects not only on the child's psyche, but also on the disabled community's psyche.[80]

The Supreme Court of Georgia believes these types of policy questions are only proper for the legislature to examine as a "forum wherein all of the issues, policy considerations and long-range consequences involved in recognition of the novel concept of a 'wrongful birth' cause of action can be thoroughly and openly debated and ultimately decided."[81] Thus, until the Georgia General Assembly decides to recognize wrongful birth as a valid claim, the claim will continue to fail in Georgia.

D. Applying the Traditional Tort Analysis to Wrongful Conception

Although the Supreme Court of Georgia has recoiled from recognizing wrongful birth, it has taken a different approach with

77. *See id.* at 559, 560 n.4 (quoting Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 655 (Ga. 1984)) (noting that evaluating the costs of raising a child with an impairment to find damages in a wrongful birth claim requires the court to "consider the value which our society places upon human life in general and on the lives of children in particular"). The court also noted it is not the place of the court to put a valuation on the difference between a life born with an impairment versus having never been born at all. *See Abelson*, 398 S.E.2d at 560 n.4.

78. *Id.* at 559 (quoting *Graves*, 314 S.E.2d at 655) (noting the court "instinctively recoil[s] from the notion that parents may suffer a compensable injury on the birth of a child").

79. Hensel, *supra* note 47, at 144 (discussing how "[j]uries in such actions are required to evaluate whether a particular disability is so horrible, from the nondisabled perspective, as to make plausible the choice of abortion or contraconception by the parent, or non-existence by the disabled child").

80. *See generally id.* at 171–81; *see also* Letter from Autistic Self Advocacy Network to Anthony Romero, Exec. Director, ACLU, and Susan Herman, President, ACLU (May 25, 2012), http://autisticadvocacy.org/2012/05/letter-to-aclu-on-wrongful-birth-and-life-statements/ [https://perma.cc/W9SQ-MGTT].

81. *Abelson*, 398 S.E.2d at 563.

wrongful conception claims. The basis for a wrongful conception claim differs from wrongful birth claims because these prenatal torts generally involve an unplanned pregnancy typically resulting in a healthy child.[82] The parents are arguing that but for the physician's negligence, the mother would never have *conceived* the child, rather than arguing the mother would have *aborted* the child had she known of a genetic deformity.[83] In other words, the action is for the lost opportunity to *avoid* a pregnancy, rather than the lost opportunity to *terminate* the pregnancy.[84] Accordingly, the Supreme Court of Georgia views these two prenatal torts differently.[85]

1. Causation and Damages Resulting in the Recognition of Wrongful Conception

The Supreme Court of Georgia first considered wrongful conception in *Fulton-Dekalb Hospital Authority v. Graves*.[86] In *Graves*, the plaintiff gave birth to a child with a clubfoot after having her physician perform a sterilization procedure specifically to prevent childbirth.[87] The plaintiff filed suit for negligence and fraudulent misrepresentation.[88] The court framed the case as one of first

82. Mahoney, *supra* note 42, at 775 (noting "[w]rongful birth cases tend to involve a planned pregnancy, postconception negligence, negligent neonatal testing or care, the birth of an unhealthy child and a parental action for the lost opportunity to terminate the pregnancy," while "[w]rongful conception cases, in contrast, typically involve preconception malpractice, an unplanned pregnancy resulting in the birth [of] a healthy child, negligence in sterilizations, abortion procedures, pregnancy diagnoses or contraception administration and a parental action for the lost opportunity to avoid a pregnancy").

83. *See* Don C. Smith, Jr., *supra* note 46, § 2 (noting the focus for injury in a wrongful conception claim "is at the point of conception"); *see also* Lisa A. Podewils, *Traditional Tort Principles and Wrongful Conception Child-Rearing Damages*, 73 B.U. L. REV. 407, 425 n.2 (1993).

> Wrongful conception or wrongful pregnancy lawsuits may be distinguished from wrongful birth . . . actions. In wrongful birth lawsuits, the parents of unhealthy infants seek to recover the cost of caring for the disabled infant. Recovery is based on the premise that the parents would have aborted if they had known that the child was going to be disabled, or that the child's impairment was caused by the physician's negligence.

Id.

84. Mahoney, *supra* note 42, at 775.

85. *See* Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 653–54 (Ga. 1984).

86. *Id.*

87. *Id.* at 654.

88. *Id.*

impression presenting two questions: "(1) [w]hether Georgia will recognize a cause of action for wrongful pregnancy or wrongful conception and, if so, (2) whether the damages recoverable include the cost of rearing and educating the child."[89]

When applying the traditional tort analysis to the wrongful conception claim, the court found that, in general, plaintiffs can satisfy all four of the required elements in the traditional tort analysis. The court recognized wrongful conception as a subset of malpractice that does satisfy duty, breach, causation, and damages.[90] Duty and breach can be satisfied because the medical practitioner has a duty to perform a procedure to prevent pregnancy, and the practitioner breaches that duty by negligently performing the procedure, which results in an unplanned pregnancy.[91] Causation is satisfied because but for the practitioner's negligence in performing the procedure, the child would never have been *conceived*.[92] Lastly, the damages element is satisfied because damages in a wrongful conception claim can be tailored to revolve around the procedure itself and the mother herself, rather than the child.[93] The court chose to limit damages in this way by including in the damages calculation the mother's costs for the procedure, for medical complications, and for the delivery, while refusing to include the cost of raising the child.[94] Including the cost of raising the child would require the court to make value judgments on life.[95] Limiting damages to the procedure, however, allowed the court to find damages satisfied when applying the traditional tort analysis to wrongful conception without implicating policy considerations regarding life.[96] Thus, because wrongful

89. *Id.* at 653–54.

90. *Id.* at 654 (finding "no reason why an action for wrongful pregnancy or wrongful conception should not be recognized in Georgia [because] [s]uch an action is no more than a species of malpractice which allows recovery from a tortfeasor in the presence of an injury caused by intentional or negligent conduct").

91. *See Graves*, 314 S.E.2d at 654.

92. *See id.*

93. *See id.*

94. *See id.* at 654–55.

95. *Id.* at 655.

96. *See id.* at 654–55 (ultimately recognizing a cause of action for wrongful pregnancy because

conception satisfies the traditional tort analysis, the courts recognizes it as a valid claim in Georgia.

2. No Policy Considerations Preventing the Recognition of Wrongful Conception

In addition to satisfying all four elements of the traditional tort analysis, there were no policy considerations that prevented the Supreme Court of Georgia from recognizing wrongful conception as a tort. In *Graves*, the court only provided a limited analysis in its opinion recognizing wrongful conception as a valid claim in Georgia.[97] However, the court did briefly mention a few policy concerns that have been argued against recognizing this prenatal tort, including the following: "recognition of such a cause of action would open the door to fraudulent claims, that the injury is remote from the negligence, [and] that recovery would be out of proportion to the defendant's culpability."[98] But, rather than expounding upon any of these concerns, the court simply dismissed them by acknowledging that these same arguments have been made against countless other tort claims, and they have all been "dealt with in the course of traditional tort litigation."[99] The only policy concern the court took the time to consider was the implication of including the costs of raising the child in the damages calculation for a wrongful conception claim.[100] It ultimately rejected this request because "given the values cherished by our society, a parent cannot be said to have suffered an injury in the birth of a child," and including the costs of raising the child in the damages calculation is synonymous with

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damages limited to "expenses for the unsuccessful medical procedure which led to conception or pregnancy, for pain and suffering, medical complications, costs of delivery, lost wages, and loss of consortium" are consistent with damages under other medical malpractice claims and do not deviate from traditional tort remedies).

97. *Compare Graves*, 314 S.E.2d at 653–56 (recognizing wrongful conception as a valid cause of action in a three-page opinion), *with* Atlanta Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d at 557, 557–67 (Ga. 1990) (declining to recognize wrongful birth as a valid cause of action in a ten-page opinion).

98. *Graves*, 314 S.E.2d at 654.

99. *Id.*

100. *See id.* at 655–56.

considering the child an injury.[101] The court ultimately concluded that all of these considerations do not prevent the recognition of wrongful conception as a valid cause of action, so long as damages are limited to not include the costs of raising the child.[102]

E. The Convergence of Prenatal Torts and Sperm Bank Regulations

As ART rapidly advances,[103] the law governing this technology continues to lag.[104] Advances in technology, such as genetic testing and in vitro fertilization, have only recently pushed some states to consider sperm bank regulation.[105] The Xytex cases illustrate the convergence of prenatal torts and sperm bank regulation. There have been few cases against sperm banks for negligence and medical malpractice.[106] The Xytex cases, however, depict how sperm banks may be named as defendants in various lawsuits, but the absence of statutory guidelines[107]—combined with judicial interpretations of

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101. *Id.*

102. *See id.* at 654–55 (finding "no reason why an action for wrongful pregnancy or wrongful conception should not be recognized in Georgia" but limiting damages to not include the cost of rearing the child).

103. *See In Vitro Maturation: IVM*, AM. PREGNANCY ASS'N, http://americanpregnancy.org/infertility/ivm-in-vitro-maturation/ [https://perma.cc/8GFW-3PM2] (last visited Sept. 25, 2016). Advances in technology have led to a variety of infertility treatments, such as zygote intrafallopian transfer, intracytoplasmic sperm injection, gamete intrafallopian tube transfer, donor insemination, and in vitro maturation. *Id.*

104. Collins v. Xytex Corp., No. 2015CV259033, 2015 WL 6387328, at *2 (Ga. Super. Ct. Oct. 20, 2015).

> Because the science that brought us the wonders (and attendant moral and legal challenges) of artificial insemination, *in vitro* fertilization, and embryo transplantation has developed much faster than the laws we rely on to regulate such procedures (and the business models that have sprung up around them), discussion of the issues raised by this litigation is complicated and careful use of terminology is critical.

Id.

105. *See* Daniel J. Penofsky, *Liability of Sperm Banks*, *in* 50 AM. JUR. TRIALS 1, § 1 (1994, updated 2017) (discussing how "[o]ver the past decade, remarkable advances have been made in the fields of cryogenics and molecular biology" leading to the proliferation of sperm banks, yet "there is an astonishing absence of state and federal laws regulating sperm banks and artificial insemination practitioners" and less than half of the states have enacted regulations).

106. Amy L. Fracassini, *The Regulation of Sperm Banks and Fertility Doctors: A Cry for Prophylactic Measures,* 8 J. CONTEMP. HEALTH L. & POL'Y 275, 284 (1992).

107. *Id.* at 279 (noting sperm bank facilities are vulnerable to lawsuits for various claims regarding

prenatal torts—creates a gap in which sperm banks largely operate invisibly, and are untouchable, in the reproductive health care realm.

The United States is known as the "Wild, Wild West"[108] of the fertility industry because, for the most part, sperm banks across the nation currently operate unregulated.[109] The federal government's sperm bank regulations are very limited in scope.[110] The United States Food and Drug Administration (FDA) only requires sperm banks to specifically screen for a limited number of diseases including: human immunodeficiency virus, Hepatitis B virus, Hepatitis C virus, human transmissible spongiform encephalopathy, treponema pallidum, communicable disease risks associated with xenotransplantation, viable leukocyte-rich cells, and infection due to limited communicable diseases of the genitourinary tract.[111] Sperm

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wrongful insemination, transmission of diseases, and breach of privacy rights or duties of confidentiality and "state legislatures must address the legal duties of those performing inseminations and delineate the responsibilities of sperm storage facilities in order to effectively respond to reproductive trends in modern society").

108. Kimberly M. Mutcherson, *Welcome to the Wild West: Protecting Access to Cross Border Fertility Care in the United States*, 22 CORNELL J.L. & PUB. POL'Y 349, 361 (2012) (noting the United States' "well-documented if not completely deserved reputation as the Wild West of fertility treatment because of its comparative lack of strong regulation of the multi-billion dollar fertility industry"); Michael Ollove, *States Not Eager to Regulate Fertility Industry*, PEW CHARITABLE TRS. (Mar. 18, 2015), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/3/18/states-not-eager-to-regulate-fertility-industry [https://perma.cc/DGY6-SAWW] (noting the federal and state governments in the United States have done little to oversee the ART industry compared to many other industrialized nations, which has led to the common description by many critics of the United States as "the Wild West of the fertility industry"); Debora L. Spar, *Fertility Industry Is a Wild West*, N.Y. TIMES (Sept. 13, 2011), http://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies/fertility-industry-is-a-wild-west [https://perma.cc/9CB6-DLJ7] (noting the United States lives in a "Wild West of procreative possibility").

109. Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 379 (2009) (noting the limited federal sperm donation regulations and few, limited-scope state laws and regulations); Tamar Lewin, *Sperm Banks Accused of Losing Samples and Lying About Donors*, N.Y. TIMES (July 21, 2016), http://www.nytimes.com/2016/07/22/us/sperm-banks-accused-of-losing-samples-and-lying-about-donors.html?_r=0 [https://perma.cc/4J98-226A] (reporting on how "sperm banks are lightly regulated").

110. *See What You Should Know–Reproductive Tissue Donation*, FDA (Nov. 5, 2010), https://www.fda.gov/BiologicsBloodVaccines/SafetyAvailability/TissueSafety/ucm232876.htm [https://perma.cc/VUH5-JLM3] (noting Food and Drug Administration's (FDA) sperm bank regulations are limited to requiring facilities to register with the FDA, requiring facilities to review a donor's risk factors for relevant communicable disease, and requiring facilities actually test donors for a limited number of infectious diseases); Pi, *supra* note 109, at 379 (noting "there is currently little federal regulation of sperm donation").

111. 21 C.F.R. § 1271.75 (2006); *What You Should Know–Reproductive Tissue Donation*, *supra* note

banks are not required by the federal government to actually test sperm donor applicants for anything outside of this list of diseases.[112] These regulations also do not require or impose on sperm banks any standard of care or any duty to ART patients.[113]

There are some private, professional organizations, such as the American Society of Reproductive Medicine (ASRM), the American Association of Tissue Banks (AATB), and the American Fertility Society (AFS) that attempt to address the problem of limited federal regulations.[114] The ASRM, AATB, and AFS issue more specific guidelines for sperm banks, but sperm banks are not required to be members of these organizations or comply with these guidelines.[115] Thus, some states have created their own regulations for sperm banks by requiring special state licensure and onsite inspections,[116] but Georgia has not implemented any special regulations specifically for sperm banks outside of facility requirements.[117] Georgia's Department of Community Health (the Department) only requires sperm banks to have a general clinical laboratory license.[118] The Department's requirements for the license include staff, record keeping, collection, and storage requirements, as well as specific education and experience requirements for the director of the lab and

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112. *See* 21 C.F.R. § 1271.75; *What You Should Know–Reproductive Tissue Donation*, *supra* note 110.

113. *See* 21 C.F.R. § 1271.75.

114. John K. Critser, *Current Status of Semen Banking in the USA*, 13 HUMAN REPRODUCTION 55, 55 (1998), http://humrep.oxfordjournals.org/content/13/suppl_2/55.full.pdf [https://perma.cc/8VCY-XKP7] (noting "[g]uidelines for anonymous donor sperm banking practices have been established by the American Society for Reproductive Medicine and standards have been established by the American Association of Tissue Banks (AATB)"); Pi, *supra* note 109, at 387–88 (noting "[p]rofessional organizations attempt to govern important aspects of the sperm donation process by publishing standards and guidelines aimed at adequate screening, control over children per donor and monitoring of a donor's genetic and medical history").

115. Pi, *supra* note 109, at 387 (noting sperm banks can *choose* to associate with these professional organizations or not, so these guidelines are nonbinding suggestions).

116. *Id.* at 384 (noting some states have passed regulations requiring supervision by licensed physicians, testing, licensing, and registration).

117. *See* GA. COMP. R. & REGS. 111-8-10-.17 (2016) (regulating sperm banks as a clinical laboratory under healthcare facility regulations).

118. *See id.*

certain employees within the lab.[119] It also includes requirements for documentation and three basic requirements for collecting donor history.[120] Similar to federal regulations, however, these regulations also do not require or impose on sperm banks any standard of care or any duty to ART patients.[121]

Thus, between federal and state regulations, sperm banks are operating in the reproductive health care realm by providing services for ART procedures, but they are not being held to the same standards as the physicians they work alongside. Medical professionals (physicians) are generally held to a higher standard of care than nonprofessionals (sperm banks in this case) in negligence actions.[122] Under the law, physicians owe certain duties to their patients that sperm banks do not owe to the *same* patients.[123] Physicians have "a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which [the practitioner] belongs, acting in the same or similar circumstances."[124] Without similar laws and regulations governing sperm banks, it is difficult to determine what, *if any*, duty or standard of care sperm banks must provide in their relationship with patients using their services.[125] This is important to note because even if

119. *Id.* (requiring that staff be "trained in the most current methods of cryobanking," records contain "a donor release and a complete history," special identification codes be used in the storage process, sperm be processed within one hour of collection, and directors and supervisors meet minimum training and experience requirements).

120. *Id.* (requiring clinics document certain factors such as the criteria for assessing fertilization; insemination schedules; the volume and quality of sperm used for insemination; requiring donor histories to include an interview; examination of personal, physical, sexual, and genetic histories; and an "examination of semen to ensure viability and motility, freedom from infection and/or foreign cells and freezing survival capabilities").

121. *See id.*

122. Fracassini, *supra* note 106, at 290.

123. *Id.*

124. *Id.* (quoting DOUGLAS K CUSINE, NEW REPRODUCTIVE TECHNIQUES: A LEGAL PROSPECTIVE 104 (1988)).

125. *Id.* Fracassini states the following:

A standard of care is difficult to define in the field of cryobanking because it is a new medical field that lacks established guidelines and regulatory oversight. The only consistent source of standards are guidelines promulgated by the AFS and the American Association of Tissue Banks (AATB). The problem inherent in the use of these guidelines is that although adherence to these standards is strongly suggested, it remains a voluntary decision.

plaintiffs could validly bring a negligence action against a sperm bank in Georgia, this reality—sperm banks seemingly having no heightened professional duty to ART patients—may greatly impact the court's ability to find a duty and a breach, which would ultimately determine the outcome of the lawsuit.

In Georgia, the lack of professional care and duty required of sperm banks, combined with the courts' prenatal torts analyses, has created a gap in the law. The Xytex cases indicate families are unable to hold sperm banks accountable for the health services they provide. This combination essentially leaves no mechanism in place to adequately protect Georgia citizens from negligent or fraudulent business practices nor has the combination provided any mechanism to hold the sperm banks accountable for the reproductive services they offer to the public.

II. Analysis

As the use of ART increases,[126] states must find a way to protect their citizens while deterring sperm banks from operating under negligent or fraudulent business practices. This issue is particularly new for Georgia, but the Xytex cases demonstrate the need and importance of reevaluating prenatal torts in the state.[127] Part II of this Note first compares Georgia's refusal to recognize wrongful birth claims with its acceptance of wrongful conception claims and then analyzes the claims brought against Xytex in the Xytex cases, as well as the lack of sperm bank regulations in Georgia.

Id.

126. *Intrauterine Insemination*, *supra* note 2.

127. Collins v. Xytex Corp., No. 2015CV259033, 2015 WL 6387328, at *3 (Ga. Super. Ct. Oct. 20, 2015). In *Collins*, the court mentions the time is ripe for a cause of action to be recognized that would allow plaintiffs to pursue negligence claims against Xytex. *Id.*

A. Comparing the Court's Considerations for Wrongful Conception in Graves *with Wrongful Birth in* Abelson

It is important to compare the Supreme Court of Georgia's reasoning for rejecting wrongful birth to its reasoning for accepting wrongful conception to better understand where the Xytex cases fall within prenatal torts. Six years after recognizing a cause of action for wrongful conception in *Graves*, the court rejected the recognition of wrongful birth in *Abelson*.[128] However, the court wrote a much more in-depth analysis regarding the policy considerations in *Abelson* than it did in *Graves*.[129] Given the amount of time the court devoted to discussing the policy implications of recognizing wrongful birth in *Abelson*, unlike wrongful conception in *Graves*, it seems the court does not believe wrongful conception implicates the extensive policy concerns that wrongful birth implicates and, vice versa, that wrongful birth implicates more than the general policy concerns associated with traditional torts that normally can be addressed in traditional tort litigation.[130] The policy considerations these prenatal torts implicate include concerns regarding exposure to liability, recommendations for abortions, the impact on the disabled community, and placing valuations on the life of a child.

The court's first policy consideration that prevented recognition of wrongful birth but did not prevent the recognition of wrongful conception is exposure to liability. Recognizing a cause of action for wrongful conception does not raise judicial concerns regarding increasing exposure to liability and medical malpractice claims because wrongful conception focuses on an actual procedure the

128. Atlanta Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d 557, 557 (Ga. 1990); Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 653 (Ga. 1984).

129. *Compare Abelson*, 398 S.E.2d at 557–67 (declining to recognize wrongful birth as a valid cause of action in a ten-page opinion), *with Graves*, 314 S.E.2d at 653–56 (recognizing wrongful conception as a valid cause of action in a three-page opinion).

130. *Compare Abelson*, 398 S.E.2d at 560 nn.4–5, 563 n.9 (taking time to discuss the philosophical implications on life and the policy implications on obstetricians' liability exposure that would result from recognizing a cause of action for wrongful birth), *with Graves*, 314 S.E.2d at 654 (discounting policy concerns regarding liability exposure, remote injury, and out of proportion damages in two sentences).

medical practitioner conducts rather than what information the practitioner discloses to the parents.[131] In other words, wrongful conception does not hold the practitioner accountable for anything more than the procedure for which the practitioner should be held accountable.[132] The court expressed concern that wrongful birth, on other hand, would create uncertainty surrounding what the practitioner is required to disclose to the patient, increasing liability exposure because practitioners could be sued for not disclosing certain information they did not know they were required to disclose.[133]

The court's second policy consideration that prevented recognition of wrongful birth but did not prevent the recognition of wrongful conception follows from concerns regarding exposure liability: abortion recommendations. Because wrongful conception does not deal with disclosing information to patients and increasing liability, the court is not concerned that practitioners would suggest the patient get an abortion in order to protect themselves from liability, which is a concern that exists for wrongful birth.[134] The court's third policy consideration that prevented recognition of wrongful birth but did not prevent the recognition of wrongful conception is the impact on the disabled community. Generally, because wrongful conception cases usually involve healthy children, not children with disabilities like in wrongful birth cases, there is also no concern that recognizing the

131. *See Graves*, 314 S.E.2d at 654. The court notes damages that include the cost of the "unsuccessful medical procedure which led to conception or pregnancy, for pain and suffering, medical complications, costs of delivery, lost wages, and loss of consortium" are consistent with malpractice cases and traditional tort remedies. *Id.* These damages focus on the procedure rather than what the physician tells the patient. *Id.*

132. *See id.* (noting "[s]uch an action is no more than a species of malpractice which allows recovery from a tortfeasor in the presence of an injury caused by intentional or negligent conduct").

133. *Abelson*, 398 S.E.2d at 560 n.5, 563 n.9 (noting concerns that the uncertainty surrounding what information must be disclosed to the patient to receive proper informed consent would cause an increase of liability exposure and result in practitioners advising patients to undergo an abortion in order to avoid liability).

134. *Compare id.* at 560 (defining wrongful birth as a claim for negligent treatment *or advice*, and *advice* does implicate what the physician *verbally* discloses or suggests to the patient), *with Graves*, 314 S.E.2d at 654 (defining wrongful conception as a claim for negligently *performing* a sterilization or abortion, and the focus on *performance* does not implicate what the physician *verbally* discloses or suggest to the patient).

cause of action would impact the disabled community in a negative manner.[135] Finally, unlike wrongful birth, the court does not think policy concerns surrounding life and children are an issue in wrongful conception claims because the focus is not the abortion of a child; the focus is the failure of a procedure, and limited damages excluding the costs of raising the child ensure the court does not cross this line with calculations involving life or recognizing the child as a burden.[136]

B. Applying the Court's Considerations to the Xytex Cases

The Xytex cases are the first of their kind to implicate these prenatal torts in an unexpected and detrimental way. These decisions suggest it will be extremely difficult for parents to successfully bring any claims—tort, contract, products liability, or otherwise—against a sperm bank in Georgia because of how the state and federal courts have analyzed such claims.[137] Because the Xytex cases include multiple state and federal cases that involve the same facts, the same outcome, and similar arguments described in the Introduction, this section will consider the judicial analysis in only two of these cases—*Collins v. Xytex* and *Doe 1 v. Xytex*—to provide an example of how the courts at the state and federal levels have used a derivative analysis in these cases.

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135. *See* Don C. Smith, Jr., *supra* note 46 (defining a wrongful birth action as one "brought by the parents of a severely unhealthy child"); Kimberly D. Wilcoxon, *Statutory Remedies for Judicial Torts: The Need for Wrongful Birth Legislation*, 69 U. CIN. L. REV. 1023, 1028 (2001) (defining wrongful conception as actions where "there is usually no claim that the baby has birth defects, but merely that the baby was born").

136. *Compare Abelson*, 398 S.E.2d at 561–63 (finding a cause of action for wrongful birth is unrecognizable because it *necessarily* deviates from traditional tort remedies by implicating questions of abortion and valuations on life), *with Graves*, 314 S.E.2d at 654 (recognizing a cause of action for wrongful conception that allows recovery for costs associated with the medical procedure because this does not deviate from traditional tort remedies by implicating questions of abortion or the value of life).

137. *See* Collins v. Xytex Corp., No. 2015CV259033, 2015 WL 6387328, at *7 (Ga. Super. Ct. Oct. 20, 2015). The court dismissed tort, contract, and products liability claims by analyzing them all as derivatives of a cause of action for wrongful birth, so whether there are any other claims that could be brought that would not be susceptible to this derivative analysis is difficult to conceive. *Id.*

1. Georgia's Analysis of Claims as Derivatives of Wrongful Birth

a. Collins v. Xytex

Although the plaintiffs in *Collins* did not bring any prenatal tort claims against Xytex,[138] the Fulton County Superior Court's decision to analyze each claim as a derivative of a wrongful birth claim prevented the women from bringing any tort, contract, or products liability claims against Xytex.[139] The trial court primarily focused on two aspects of the case: damages and the fact that the case involved a planned pregnancy.[140] First, the superior court determined that no matter what tort or contract claims the plaintiff brings, all of these claims are derivatives of a prenatal tort because the damages involve a child.[141] If the damages involve the birth of a child, this is the signature of a prenatal tort no matter what the claims are disguised as, so the claims must be treated as such given all of the social issues and policy implications associated with evaluating the birth of a child as a damage.[142] Second, because the superior court determined these claims were derivatives of a prenatal tort, the court needed to determine which prenatal tort the claims were a derivate of: wrongful birth or wrongful conception. The superior court acknowledged that the plaintiffs were not claiming that but for Xytex they would have aborted the child, but nevertheless, the fact that this was a planned

138. *Id.* at *1. The Collins' claims included fraud, negligent misrepresentation, strict liability in products liability, negligence in products liability, breach of express warranty, breach of an implied warranty, battery, negligence, and unfair business practices. *Id.*

139. *Id.* at *7 (dismissing all tort, contracts, and products liability claims as impermissibly "rooted in the concept of wrongful birth").

140. *See id.* at *2 (reasoning the Collins' claims were more similar to wrongful birth, even though abortion was never an option since the sperm selection process is considered preconception, but because the pregnancy was planned and concluded in an unwanted result—a child with genetic traits that the family did not want—this aligns more with wrongful birth, although not perfectly).

141. *Collins*, 2015 WL 6387328, at *2 (noting "simple nomenclature cannot transform one type of tort into another. Others have tried this approach in this context—and failed").

142. *Id.* at *2 (finding "despite their alternative characterizations of Defendants' allegedly tortious actions, Plaintiffs at base are challenging the purported negligence that resulted in a wanted conception with unwanted results. This claim most closely (though by no means perfectly) fits a claim for wrongful birth—and so is not allowed").

pregnancy greatly impacted the court's decision to classify the claims as derivatives of wrongful birth claims.[143] The court decided that, because this situation involved a planned pregnancy and not an unplanned pregnancy, the facts aligned more with a wrongful birth claim rather than a wrongful conception claim.[144] Accordingly, the superior court dismissed all of the claims because Georgia does not recognize wrongful birth as a cause of action.[145]

b. Doe 1 v. Xytex

Although the plaintiffs in *Doe 1* did not bring any prenatal tort claims against Xytex, the United States District Court for the Northern District of Georgia's decision to analyze each claim as a derivative of a wrongful birth claim similarly prevented the plaintiffs from being able to bring any tort, contract, fraud, or products liability claims against Xytex.[146] In *Doe 1*, however, the plaintiffs did attempt to persuade the court that their case was one for wrongful conception rather than wrongful birth, but the court was not satisfied with their argument.[147] The plaintiffs argued that "the functional differences between [wrongful birth and wrongful conception] are (1) the timing of the tort (i.e., pre- or post-conception), and (2) whether a defendant's actions directly or indirectly caused the injury."[148] Thus, because the wrong here occurred prior to conception and directly caused harm, the case is more similar to a wrongful conception case. But, the district court chose to focus on damages to evaluate the plaintiffs' argument. The court stated, "The true difference between [wrongful birth and wrongful conception] is the measure of

143. *Id.* at *2 (noting Georgia defines wrongful conception as a situation involving a sterilization procedure and an unplanned pregnancy, and this case does not present such a claim).

144. *Id.*

145. *Id.* at *7.

146. *See* Doe 1 v. Xytex Corp., No. 1:16-CV-1453-TWT, 2017 WL 1036484, at *2–3 (N.D. Ga. Mar. 17, 2017) (dismissing the eleven claims as derivatives of wrongful birth); Complaint, *supra* note 8, at 21–29 (listing the eleven causes of action as follows: fraud, negligent misrepresentation, strict liability, products liability negligence, breach of express warranty, breach of implied warranty, battery, negligence, unfair business practices, specific performance, and false advertising).

147. *Doe 1*, 2017 WL 1036484, at *2.

148. *Id.*

damages," not the timing of the tort and whether the injury was direct, as suggested by the plaintiffs, and the court disfavors wrongful birth claims specifically "because they require the court to decide between the value of a life with disabilities and the value of no life at all."[149] With this in mind, the court determined no matter how the plaintiffs attempted to describe the situation, avoiding the use of the donor's sperm would not mean the plaintiffs' children would be healthier.[150] It would mean the child *would not exist*, which is the essence of a wrongful birth claim.[151] Thus, the district court dismissed all of the claims because Georgia does not recognize wrongful birth.[152]

2. *Why the Xytex Cases Are Different from* Abelson *and* Graves

The issue presented in the Xytex cases is different than what Georgia courts have experienced with prenatal torts thus far because the cases do not fit squarely into one of the above-described prenatal tort claims. Wrongful birth cases involve planned pregnancies, postconception negligence, indirect causation, and unhealthy children, whereas wrongful conception cases involve *un*planned pregnancies, *pre*conception negligence, *direct* causation, and *healthy* children.[153] The Xytex cases, however, involve a planned pregnancy (a signature of wrongful birth), preconception negligence (a signature of wrongful conception), and otherwise healthy children (a signature of wrongful conception). Therefore, the Xytex cases involve elements of both wrongful birth and wrongful conception. The courts, however, have not considered all of these elements. In *Collins*, the superior court placed heavy emphasis on the fact that this was a planned pregnancy.[154] Although a planned pregnancy is more

149. *Id.* at *3.
150. *Id.*
151. *Id.*
152. *Id.*
153. Mahoney, *supra* note 42, at 775.
154. *See* Collins v. Xytex Corp., No. 2015CV259033, 2015 WL 6387328, at *2 (Ga. Super. Ct. Oct. 20, 2015).

consistent with the court's understanding of wrongful birth claims than wrongful conception claims, this should not be the sole determining factor in analyzing these claims as derivatives of wrongful birth. In *Doe 1*, the district court placed a heavy emphasis on the damages being the children's nonexistence.[155] While defining a child's life as a damage is more consistent with the court's understanding of wrongful birth claims than with wrongful conception claims, again, this should not be the sole determining factor in analyzing these claims as derivatives of wrongful birth.

If Georgia courts are going to analyze claims against a sperm bank as derivatives of prenatal torts, *all* of the above signature elements should be considered, not just one element, because they all implicate the Supreme Court of Georgia's initial considerations that resulted in the *Abelson* and *Graves* decisions. Thus, in order to determine which prenatal tort the Xytex cases are most similar to, the following four factors must be considered: (1) the timing of the tort relative to conception, (2) causation, (3) the health of the child, and (4) damages. When accounting for *all* of these factors, it is clear the Xytex cases align with wrongful conception more than with wrongful birth because they involve the following: (1) preconception conduct, (2) a direct cause, (3) a healthy child, and (4) damages that can be limited to not include the cost of the child.

a. Timing: Preconception Versus Postconception

The first element that must be considered is the timing of the tort relative to conception: does the case involve preconception or postconception conduct? The plaintiffs in these cases are focused on the negligence that occurred preconception, not postconception, which aligns more with a claim for wrongful conception. The plaintiffs are not arguing that, but for Xytex, they would have aborted the child. They are arguing that, but for Xytex, they would not have *conceived* the child to begin with.[156] In other words, the basis of the

155. *Doe 1*, 2017 WL 1036484, at *3.

156. *Collins*, 2015 WL 6387328, at *1. Plaintiffs' contention in *Collins* is "had they known the true

argument is not that, had Xytex disclosed true information about the donor, the plaintiffs would have opted for an abortion. Instead, the basis of the argument is that, had Xytex taken appropriate steps to ensure the donor was indeed the person the company was advertising, Xytex would have learned the donor was not a match *before* the intrauterine insemination procedure. This would have resulted in the plaintiffs not proceeding with the donor selection and ART procedure and, hence, never reaching conception. Thus, Xytex's negligence occurred preconception. Although the Supreme Court of Georgia did not explicitly discuss the differences between preconception and postconception in *Abelson* and *Graves*, this factor is important because it implicates the other considerations in *Abelson* and *Graves*, which impacted the Xytex decisions.

When the plaintiffs in *Doe 1* attempted to focus on the fact that this was a preconception issue, the district court equated their argument—that the plaintiffs would have never used the sperm to conceive—with the fact that this essentially means the children would not exist, which makes the case a wrongful birth case.[157] This conclusion, however, is a fallacy because anyone could arrive at the same conclusion for a true wrongful conception case: if the physician conducted the sterilization procedure correctly, this essentially means the child would not exist. The court's analysis completely disregards the fact that it can limit damages. In *Graves*, it was precisely because wrongful conception can also be viewed as defining the child as a damage that the Supreme Court of Georgia specifically limited damages so that it could recognize wrongful conception as a prenatal tort that fits within the bounds of the traditional tort analysis.[158] The court decided to limit damages in order to focus on the procedure and decided not to include damages for raising the child so that it could recognize a claim *without* implicating questions regarding the child's

characteristics of BGM 9623 *when they should have*—that is, at the time Xytex rendered its services—A.C. would not have been *conceived*." *Id.* (emphasis in original); *see also Doe 1*, 2017 WL 1036484, at *2. Plaintiffs' contention in *Doe 1* is that the case is one for wrongful conception. *Id.*

157. *Doe 1*, 2017 WL 1036484, at *3.

158. *See* Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 654–55 (Ga. 1984).

existence. Thus, the fact that the children would not exist, on its own, neither negates the reality that the issue at hand occurred preconception, nor does it automatically make the case one for wrongful birth. The other elements must also be analyzed to determine which prenatal tort these cases most align with.

b. Causation: Direct Causation Versus Indirect Causation

The second element that must be considered is causation: does the case involve direct causation or indirect causation? Courts can find direct causation in the Xytex cases, which aligns more with a claim for wrongful conception. In *Abelson*, the Supreme Court of Georgia determined causation cannot be met in a wrongful birth claim because a physician cannot be the cause of a genetic condition inherited by the child.[159] The court expressed concerns that finding such attenuated, indirect causation would increase medical malpractice claims and liability exposure.[160] The Xytex plaintiffs, however, were not simply trying to hold a person accountable for an inherited genetic condition because the children in those cases were healthy.[161] Instead, the plaintiffs were trying to hold a company accountable for its direct actions that constituted a significant part of the ART procedures the plaintiffs received.

Recognizing the plaintiffs' claims against Xytex would not increase exposure to liability due to attenuated causation because the claims' focus is on Xytex's actual sperm donation procedures. The plaintiffs argued Xytex had an obligation to not participate in fraudulent business practices and to match the plaintiffs with sperm donors who met specific qualifications like the company advertised. Xytex breached that obligation by not thoroughly investigating their donors—as Xytex claims it does—falsely advertising specific donor

159. Atlanta Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d 557, 561 (Ga. 1990).

160. *Id.* at 560 n.5.

161. *See Collins*, 2015 WL 6387328, at *4 (noting the child's current healthy state, "Plaintiffs do not allege a present injury but rather an apprehension of a future injury to A.C.—that he *may* in time become schizophrenic"); Complaint, *supra* note 8, at 30 (including a medical monitoring fund in the prayer for relief to monitor the child's health).

qualifications, encouraging the applicant to lie about his credentials in order to get his sperm to sell, and matching the plaintiffs with a donor who was not who Xytex said he was.[162] Xytex's breach resulted in the plaintiffs selecting one specific donor for their ART procedures. Had Xytex not breached its legal obligations, the families would never have been matched with this donor for their ART procedures. In other words, Xytex's actions directly resulted in the selection and pairing of the donor with the plaintiffs. This causation is direct, not attenuated, because Xytex's business involves providing an essential component of ART procedures; without sperm, an intrauterine procedure cannot be conducted.[163] Thus, the plaintiffs are not trying to hold the sperm bank accountable for anything more than its part in an ART procedure for which the sperm bank should be held accountable. Further, recognizing the plaintiffs' claims against Xytex would not increase medical malpractice claims because the plaintiffs are suing a company for its services, not the physician conducting the medical procedure.

Finally, the court was also concerned that, because finding causation would increase liability exposure, it would also incentivize practitioners to recommend abortions in order to protect themselves against liability.[164] In the Xytex cases, however, recognizing the plaintiffs' claims against Xytex would not incentivize practitioners to recommend abortions because these cases involve the sperm bank providing services for the procedure, not the practitioner performing the ART procedure. Further, at this point in the process—sperm donor selection—the child has not even been conceived yet, so abortion is not an option. All of these factors mirror a claim for wrongful conception.

162. Complaint, *supra* note 8, at 6–8, 10–11, 13, 29.
163. *Intrauterine Insemination: IUI*, *supra* note 2.
164. *Abelson*, 398 S.E.2d at 563 n.9.

c. Health: A Healthy Child Versus an Unhealthy Child

The third element that must be considered is the health of the child: is the child healthy or unhealthy? The children in the Xytex cases are currently healthy, which aligns more with wrongful conception. As mentioned above, these children were born healthy, not with any serious genetic disability, and a healthy child is indicative of a wrongful conception claim, not a wrongful birth claim.[165] This factor is important because it implicates one of the Supreme Court of Georgia's major policy considerations in *Abelson* and *Graves*: the policy implications surrounding life. *Doe 1* summarized this concern by stating, "Wrongful birth claims are disfavored because they require the court to decide between the value of a life with disabilities and the value of no life at all."[166]

In the Xytex cases, however, recognizing the plaintiffs' claims against Xytex would not impact the disabled community negatively because the children are currently healthy. It can be argued that because the families sought funds to monitor the children's health for the *development* of an impairment,[167] this would still negatively impact the disabled community because the court would be placing a value on the costs associated with caring for a child that might develop an impairment. It is possible, however, for the courts to avoid this issue altogether. If the courts chose to analyze the claims as wrongful conception claims, the families would not be allowed to seek such damages because wrongful conception damages exclude future costs of raising the child.[168] Allowing such future costs is what sends a message to the disabled community that a disabled life is somehow less valuable than no life at all. If the families' damages only included those allowed in a wrongful conception claim—costs

165. Mahoney, *supra* note 42, at 775.

166. Doe 1 v. Xytex Corp., No. 1:16-CV-01453-TWT, 2017 WL 1036484, at *3 (N.D. Ga. Mar. 17, 2017).

167. Collins v. Xytex Corp., No. 2015CV259033, 2015 WL 6387328, at *4 (Ga. Super. Ct. Oct. 20, 2015); Complaint, *supra* note 8, at 30.

168. *See* Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 655 (Ga. 1984) (finding damages in a wrongful conception claim do not include the costs of raising the child).

for the procedure, medical complications, and delivery—the family would not be receiving any costs associating the child's possible development of a disability with the damage. Families would only be receiving costs for the services they were sold that turned out not to be what they contracted for. Thus, the courts would not be sending a message to the disabled community that the disabled life is somehow less valuable. This ties into the fourth element: damages.

d. Damages: Including the Child Versus Excluding the Child

The final element that must be considered is damages: does a finding of damages require including the cost of the child as a damage? Damages in the Xytex cases can be limited to not include the cost of the child, which aligns more with wrongful conception. As mentioned above, damages implicate one of the Supreme Court of Georgia's major policy considerations in *Abelson* and *Graves*: the policy implications surrounding life. All of the courts in these cases have referenced the Supreme Court of Georgia's refusal to recognize that a child's life amounts to a legal injury because of the policy implications.[169] However, these policy concerns are not a problem in the Xytex cases because the issue in these cases is not the abortion of an unhealthy child; the main issue is a company's failure to provide the services the plaintiffs agreed to. The harm in a wrongful conception case is the impact on the woman's right to plan the size of her family, not the child.[170] Similarly, here, the harm is not the child. The harm is the impact on women's right to make an informed decision regarding the procreative options available to them, which included ART procedures that required the selection of a sperm donor and insemination with the sperm of a person to whom the women have consented. This aligns with the basis of a wrongful conception claim.

169. *See id.*; *Abelson*, 398 S.E.2d at 559; *Collins*, 2015 WL 6387328, at * 2; *Doe 1*, 2017 WL 1036484, at *3.

170. *See Graves*, 314 S.E.2d at 654 (noting that in *Roe v. Wade* the United States Supreme Court "recognized that a woman has the right to plan the size of her family," and choosing to recognize a claim for wrongful conception regardless of the practical considerations raised).

Although the plaintiffs did request costs for monitoring the children for the development of any mental impairment as they get older, this was only one line item in the damages sought and is one that the court can limit.[171] The Supreme Court of Georgia's recognition of wrongful conception in *Graves* provides the perfect example of how courts can recognize claims via limited damages because the court chose to recognize the plaintiffs' claims even though they asked for future child-rearing costs. By limiting damages to exclude the costs of raising a child, wrongful conception ensures the court does not cross a philosophical line with calculations involving life or recognizing the child as a burden. The same argument and method can be applied in the Xytex cases.

Overall, the Xytex cases align more closely with wrongful conception because they do not implicate all of the policy concerns that prevented the Supreme Court of Georgia from recognizing wrongful birth. The underlying focus of wrongful conception is a procedure that results in an outcome that is not consistent with what the patient consented to.[172] Although the Xytex cases do not involve a sterilization procedure or an abortion procedure, they involve intrauterine insemination procedures that were not consistent with what the women consented to in preparation for the procedure.[173]

C. Georgia's Lack of Regulation

Whether the Xytex claims are analyzed as derivatives of any prenatal tort, however, requires returning to the issue of sperm bank

171. Complaint, *supra* note 8, at 30. Plaintiffs sought damages for pain and suffering, financial losses, attorneys' fees, costs of the lawsuit, a medical monitoring fund, injunctive relief, and punitive damages. *Id.*

172. *See* Mahoney, *supra* note 42, at 775 (noting wrongful conception can encompass more procedures than sterilization and abortion, such as contraception administration and preconception genetic testing).

173. *Collins*, 2015 WL 6387328, at *1. In *Collins*, Plaintiffs consented to a sperm donor with specific qualities for their intrauterine insemination. *Id.* Defendants reassured Plaintiffs that they were getting sperm with those specific qualities, but, in fact, Plaintiffs were not. *Id.*; *see also* Complaint, *supra* note 8, at 8–10. Similarly, in *Doe 1*, Plaintiffs consented to a sperm donor with specific qualities for their artificial insemination, and Defendants reassured Plaintiffs that they were getting sperm with those specific qualities, but, in fact, Plaintiffs were not. *Id.*

regulation. If contract, tort, and products liability claims are all analyzed as derivatives of a prenatal tort, plaintiffs would need to satisfy the four elements of the traditional tort analysis to succeed in any of their claims. As mentioned in Part I, the first element that plaintiffs must satisfy is duty. The Supreme Court of Georgia has found a duty in wrongful birth and wrongful conception claims because medical practitioners have a duty to disclose information regarding genetic deformities to their patients, and medical practitioners have a duty to perform the medical procedure agreed to.[174] Sperm banks, however, do not have the same duties as medical practitioners because they are not regulated in the same manner.

As discussed in Part I, federal sperm bank regulations are limited to requiring sperm banks to conduct screening for a limited number of diseases, leaving it up to the states to implement regulations requiring more stringent sperm bank standards, duties, and methods of donor screening. While Georgia requires sperm banks to have a clinical laboratory license, the regulations governing these licenses only set standards for the operation of the lab, the education of the employees in the lab, and documentation processes.[175] This regulation does not set any additional sperm bank standards or donor screening requirements, nor does the regulation create any heightened or professional duty, relationship, or standard of care between a sperm bank and the ART patients.[176] It is important to note that whether a plaintiff can prove a sperm bank has certain duties to the patient undergoing the ART procedure is yet to be seen and might be hindered by this lack of regulation. Even if courts find a duty exists, it still might be difficult to prove the sperm bank breached its duty during the sperm bank's donor screening, selection, and matching processes because the sperm bank's standard of care when conducting these processes will likely be that which is considered reasonable within the industry. Thus, courts could find that Xytex is

174. *Abelson*, 398 S.E.2d at 560–61.
175. GA. COMP. R. & REGS. 111-8-10.17 (2016).
176. *Id.*

acting reasonably in accordance with industry standards because the industry basically has no standards.

III. Proposal

Prenatal torts are extremely complex because of the many policy concerns involved with these claims; however, precisely because of their complexity, this area of the law cannot be ignored as ART continues to advance. The Xytex cases exemplify just how important it is for the law to advance with technology. The Xytex cases allege that Xytex not only negligently paired the plaintiffs with a donor who was not what Xytex advertised, but also intentionally suggested to the donor that he falsify his application according to what sperm sells best on the market.[177] Although such business practices should be considered unacceptable, it is no surprise that Xytex might engage in these practices considering the company can presumably charge higher rates for sperm donors with higher qualifications.[178]

Xytex's attempt to transfer the cases filed against the company in other states to Georgia—its principal place of business and home to its headquarters—and its attempt to consolidate all the federal cases in Georgia[179] indicate the company may purposefully be hiding from the law in a state that lacks the pistols for a duel. Georgia should no longer harbor such outlaws by allowing them to take advantage of state laws at the expense of individual rights, not even out of a desire to limit the regulation of businesses. Solving this issue while accounting for the complex public policy concerns, however, will take a multi-branch approach. Thus, this Note proposes a combination of (1) the Georgia judiciary's acceptance of certain claims in the Xytex cases and an expansion of the wrongful

177. Complaint, *supra* note 8, at 10–11.

178. *Pricing*, XYTEX CRYO INT'L, https://www.xytex.com/patient-information/pricing/ [https://perma.cc/JL6N-CJCT] (last visited Sept. 25, 2016) (charging more expensive rates for patients to obtain premium access to the company's enhanced donor profiles to select their sperm donor).

179. *See* Doe v. Xytex Corp., No. C 16-02935 WHA, 2016 WL 3902577, at *3 (N.D. Cal. July 19, 2016) (Xytex moving to transfer the case to the Southern District of Georgia); *In re* Xytex Corp. Sperm Donor Prod. Liab. Litig., 223 F. Supp. 3d 1351, 1352–53 (J.P.M.L. 2016) (Xytex moving to centralize pretrial proceedings in this litigation in the Northern District of Georgia).

conception claim to include more than sterilization procedures, and (2) the Georgia General Assembly's implementation of more stringent state laws governing sperm banks.

A. Accepting Certain Claims and Expanding Wrongful Conception

First, in order to compensate families and to hold companies like Xytex accountable for their procedures, Georgia courts should change their analysis of claims against sperm banks. Instead of analyzing these claims as derivatives of wrongful birth, the court should take the following dual approach: (1) analyze the plaintiff's claims as claims that already have limited damages built into them rather than as derivative claims, and (2) analyze only the remaining claims that do not already have limited damages as derivatives of wrongful conception. If the courts adopted this dual approach, it would give the Xytex families the opportunity to bring all of their claims against Xytex.

First, as discussed in Parts I and II, the Georgia courts' main reason for differentiating between wrongful birth and wrongful conception is the issue of damages because of the policy implications that arise from recognizing a child as a damage. Thus, the Supreme Court of Georgia recognizes wrongful conception specifically because of the limited damages. Some of the claims the Xytex parties brought, however, already have limited damages built into the claim. For example, in *Doe 1*, the plaintiffs brought a cause of action for unfair business practices under the Georgia Fair Business Act (GFBA).[180] Under the GFBA, individuals have a private right to sue a company for unfair business practices to recover injunctive relieve, general damages, and exemplary damages where the violation was intentional.[181] Because the GFBA does not allow plaintiffs to recover special damages, the damages would already be limited to the direct and necessary damages—pain and suffering, emotional distress, and

180. Complaint, *supra* note 8, at 27.
181. O.C.G.A. § 10-1-399 (2018).

the cost of the services.[182] Such claims already limit the damages in the same manner as wrongful conception, so courts could analyze these claims as-is rather than as a derivative of a prenatal tort because the damages will not implicate political questions regarding life.

Other claims the plaintiffs brought, such as the products liability and tort claims, do not have limited damages.[183] Thus, these claims could potentially invoke damages that classify the child as an injury. Rather than just outright dismissing these claims, however, the court could analyze these claims as wrongful conception derivatives in order to achieve their limited damages goals. The Georgia judiciary can accomplish this by expanding wrongful conception similar to what Minnesota and North Carolina courts have done.

1. Adopting the Minnesota and North Carolina Wrongful Conception Approach

Given that the Xytex cases align more with wrongful conception than wrongful birth, the Georgia courts should expand wrongful conception to encompass preconception negligence in assisted reproductive procedures and could do so without disrupting Georgia's policy concerns. In Minnesota and North Carolina, a claim similarly consisting of both wrongful birth and wrongful conception characteristics shows that courts can classify these situations as derivatives of wrongful conception instead of wrongful birth.

Minnesota and North Carolina are similar to Georgia because these states also recognize a prenatal tort for wrongful conception while refusing to recognize a prenatal tort for wrongful birth.[184] Both of these states considered the same policy concerns as Georgia in deciding not to recognize wrongful birth. The Minnesota legislature

182. *See Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014) (differentiating between general damages as those damages that are so reasonably expected they do not require proof and special damages as particular or extraordinary damages that must be proven).

183. O.C.G.A. § 51-12-2 (2018) (defining the damages allowed in tort actions under Georgia law, which include both general damages and special damages).

184. Mahoney, *supra* note 42, at 784–785 (analyzing Minnesota and North Carolina as states that do not recognize wrongful birth but do recognize a broad interpretation of wrongful conception).

completely banned wrongful birth presumably because the legislature believes it is never appropriate to consider the birth of a child as a damage.[185] The North Carolina Supreme Court came to the same conclusion as Georgia: given all of the policy implications and consequences of recognizing such an action, it is the responsibility of the state legislature to determine whether such an action should exist.[186]

The wrongful conception prenatal tort in Minnesota and North Carolina, however, encompasses more than just sterilization and abortion procedures.[187] It also includes pregnancy diagnoses, contraceptive administration, and negligent genetic testing.[188] In recent years, several states have addressed negligent preconception genetic testing, another prenatal claim that has arisen due to advances in genetic testing technology.[189] This prenatal claim is also defined by a combination of wrongful birth and wrongful conception characteristics. It typically involves a planned pregnancy resulting in the birth of an unhealthy child (i.e., wrongful birth), but it also involves negligence that occurs preconception (i.e., wrongful conception).[190] Some states have been analyzing this claim as a derivative of wrongful birth because the situation involves a planned

185. *See* Duncan, *supra* note 41, at 6–7 (analyzing Minnesota within a list of other states that specifically deny claims for wrongful birth by statute).

186. Azzolino v. Dingfelder, 337 S.E.2d 528, 537 (N.C. 1985).

> The General Assembly of North Carolina, as a coordinate and equal branch of our government, is better suited than this Court to address the issues raised by this case. Only that body can provide an appropriate forum for a full and open debate of all of the issues arising from the related theories of "wrongful" birth and "wrongful" life. Unlike courts of law, the General Assembly can address all of the issues at one time and do so without being required to attempt to squeeze its results into the mold of conventional tort concepts which clearly do not fit.

Id.

187. Mahoney, *supra* note 42, at 784 (noting "[t]hese states have expanded wrongful conception from the contexts of negligent sterilizations, abortions, pregnancy diagnoses, or contraceptive administration, to circumstances involving negligent genetic testing").

188. *Id.*

189. *Id.* at 775–76.

190. *Id.* (noting "[b]ecause this strain of parental claims factually implicates aspects associated with both wrongful birth and wrongful conception, courts have varied in their approaches to this specific prenatal issue").

pregnancy and an unhealthy child.[191] Minnesota and North Carolina, however, have instead expanded the wrongful conception claim to encompass these situations because negligent preconception genetic testing involves negligence that occurs before conception.[192] Even though these states do not recognize wrongful birth, the state courts have been able to expand wrongful conception while balancing policy concerns to adapt to technological advances. The Xytex cases (which involve preconception negligence, direct liability, and healthy children) involve more characteristics of wrongful conception than negligent preconception genetic testing cases (which only involve preconception negligence). Thus, the Xytex cases arguably align more with wrongful conception than negligent preconception genetic testing does, which favors the expansion of wrongful conception in Georgia.

The Georgia courts could follow Minnesota and North Carolina by focusing on the fact that the negligent act occurred preconception, and it involves direct liability, an otherwise healthy child, and damages that courts can limit to the cost of the sperm bank's services, the ART procedure, or both. Had the sperm bank acted reasonably in its donor screening process, the plaintiffs would never have conceived their children because the donor did not match the plaintiffs' application preferences. Thus, the donor would not have been selected for their ART procedure. In other words, but for Xytex's negligence in processing sperm donors and matching them with applications, the children would never have been conceived. Minnesota and North Carolina are examples of how state courts can expand the wrongful conception analysis without impacting the policy concerns that the courts and legislature took into consideration when deciding not to recognize wrongful birth.

191. *Id.*

192. *Id.* at 785 (noting "[t]hough negligent preconception genetic testing appears to involve aspects associated with the wrongful birth action, the courts in these two states label these claims as wrongful conception").

2. Accounting for Previous Policy Concerns

This dual approach would account for the policy concerns that the Supreme Court of Georgia considered in *Abelson* and *Graves*: the policy implications regarding life, increasing medical malpractice lawsuits, and increasing liability. First, for those claims that already have limited damages, plaintiffs would not be able to recover damages for the cost of raising the child, so the claims would not implicate valuations of life or send a negative message regarding life to the disabled community.

Second, regardless of what damages are normally allowed in the remaining claims, the damages would automatically be limited to wrongful conception damages because the court would analyze the claims as derivatives of wrongful conception. Thus, the damages would be limited to expenses for the "medical procedure which led to conception or pregnancy, for pain and suffering, medical complications, costs of delivery, lost wages, and loss of consortium."[193] This protects against crossing the line into wrongful birth territory where damages include a valuation on life and negatively impact the disabled community. Although families will not obtain all of the costs they originally wanted (e.g., the costs of monitoring the child's health), this will at least provide an avenue to receive some costs associated with their ART procedures and hold companies like Xytex accountable for their actions.

Third, since the lawsuits are against the sperm banks, not the physicians, there is no concern that this would result in an increase in medical malpractice lawsuits. Lastly, while this approach would increase liability for sperm banks, sperm banks should be at risk for liability because they are currently participating in ART procedures in a fairly unregulated manner and without liability risks.

193. Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 654 (Ga. 1984).

3. Accounting for New Policy Concerns

Although the original policy concerns would be accounted for, new policy concerns might arise. First, allowing plaintiffs to bring products liability claims against sperm banks might present a moral and ethical dilemma by considering sperm a "product." Under a products liability analysis, several theories of liability require a showing of a defective product.[194] Finding an individual's sperm "defective" because of a mental illness, a disability, a disease, or a criminal history might negatively impact several communities that are already stigmatized (e.g., the mentally ill community, the disabled community, and the ex-convict community). However, if the courts apply the method described above, they can avoid implicating such moral and ethical questions. Products liability claims would likely fall under the category of claims that do not already have limited damages, so the court would analyze the claims as derivatives of wrongful conception. In conducting the traditional wrongful conception analysis there is no discussion regarding whether a product is defective, so the court would not need to engage in a question of whether an individual's sperm is defective. The focus would remain on the sperm bank's screening and matching processes and the harm to the woman's right to make an informed decision regarding the procreative options available to her.

Another policy concern is whether allowing plaintiffs to bring these claims against sperm banks would open the floodgates of litigation. Sperm banks allow individuals to select sperm donors with very specific qualities ranging from eye color to education level. Allowing plaintiffs to bring suit against sperm banks might open the door to lawsuits for discrepancies over minor donor characteristics such as eye color. However, in anonymous donor cases like the Xytex cases, the families usually never find out the name of the donor. Thus, unless a company makes a mistake, families that use anonymous sperm donors likely will not find out if any discrepancies

194. *Product Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014).

between the donor and the donor's application actually exist. But, families would need to learn about a discrepancy in order to file a lawsuit over the discrepancy, so an essential component required for opening the floodgates of litigation is unlikely to occur. Further, arguments distinguishing between breaches of material donor characteristics that actually cause harm to the woman's right to make an informed decision regarding the procreative options available to her versus breaches of immaterial donor characteristics that do not cause such harm can be dealt with in the course of traditional litigation.

B. Georgia Regulations

While the judiciary should alter its approach to the Xytex cases, this change might not be enough to solve the problem. As mentioned in Part II, finding duty and breach in these cases might be difficult without any laws in place that establish the sperm bank's duty to ART patients. This could impact the court's analysis of any claims that are derivatives of wrongful conception by making it difficult for the court to find duty and breach. Further, sperm banks offer anonymous sperm donations, such as the donations in the Xytex cases. The only reason the plaintiffs discovered the truth about their donor is because Xytex *accidentally* notified them of the donor's true identity, and from there, the plaintiffs conducted their own investigation. Thus, the only reason the plaintiffs were even able to bring suits against Xytex in the first place was all because of an *accident*. This begs the question: how many other families have been impacted by Xytex's misrepresentations and negligence? While changing the judicial analysis would allow the courts to ensure accountability and compensation in the Xytex cases, that same accountability and compensation would not be afforded to any other families that Xytex paired with false donor applications unbeknownst to the families. If the state only changes the judicial analysis, Xytex could continue their unacceptable practices because they can simply hide behind anonymous donors, gambling on the reality that no other suits will be brought against them because anonymous donors usually

remain anonymous. In other words, the chance of any other families finding out that their donor was not who Xytex advertised them to be is very limited. Therefore, to protect *all* families using sperm donations, it is important for the Georgia General Assembly to affirmatively establish explicit duties and standards that sperm banks are legally required to follow.

The Georgia General Assembly should adopt laws that both expand a sperm bank's duties during the donor screening process and establish a duty owed to ART patients. To expand a sperm bank's duties during the donor screening process, the legislature should pass a law that requires sperm banks to develop reasonable measures to ensure a sperm donor is not lying on the application to become a sperm donor. Such measures could include conducting background checks and employment verification for all donor applicants, as well as conducting multiple in-person interviews of donor applicants. The legislature should also establish procedures in the event that, at some point after accepting the donor applicant as a sperm donor, the sperm bank discovers a major discrepancy with a material fact used to advertise and promote the donor (e.g., the donor does not have certain illnesses, diseases, or a felony record). Such procedures could include requirements for sperm banks to immediately update the sperm donor's profile with the relevant information and immediately notify sperm recipients who were matched or are about to be matched with that sperm donor.

To establish a duty owed to the ART patients, the AFS and AATB have suggested legislatures pass laws that hold sperm banks to standards similar to those imposed on doctors.[195] Because sperms banks are operating in a field required for advanced reproductive medical procedures, the legislature should pass a law that establishes sperm banks owe a heightened duty to ART patients, which includes a professional standard of care, rather than the reasonable standard of care found within the industry. The legislature could also use this opportunity to include in the law a private cause of action against

195. Fracassini, *supra* note 106, at 302–04.

sperm banks that breach the specified duty, for which damages shall exclude any costs associated with raising or caring for the child.

CONCLUSION

The United States is known as the Wild, Wild West of the fertility industry for a reason, and as sperm banks continue to take advantage of the lack of federal regulations, the pressure will fall on the states to remedy the situation. The combination of an inability to pursue adequate legal claims against a sperm bank and no regulations implementing adequate sperm bank standards essentially leaves no mechanism in place to protect individual rights. No one is holding the sperm banks accountable for the reproductive procedures they facilitate. By shifting the analysis to a wrongful conception analysis and creating sperm banks regulations, Georgia has an opportunity to not only remedy the situation, but to lead the nation in reigning in the Wild, Wild West.