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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000782-MR

ASHA PATEL, INDIVIDUALLY; KIRIT PATEL, INDIVIDUALLY; AND ASHA PATEL AND KIRIT PATEL AS PARENTS AND NEXT FRIENDS OF ANGEL PATEL, A MINOR — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 15-CI-00685

ROBERT C. GAME, M.D.; BOWLING GREEN-WARREN COUNTY COMMUNITY HOSPITAL CORPORATION d/b/a THE MEDICAL CENTER; AND COMMONWEALTH HEALTH CORPORATION, INC., d/b/a WOMEN'S HEALTH SPECIALISTS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND DIXON, JUDGES.

CLAYTON, JUDGE: Asha Patel (the mother) and Kirit Patel (the father), individually, and as parents and next friends of Angel Patel, their daughter, appeal

the Warren Circuit Court's grant of summary judgment to Robert C. Game, M.D. (Dr. Game); Bowling Green-Warren County Community Hospital Corporation d/b/a the Medical Center (The Medical Center); and, Commonwealth Health Corporation, Inc., d/b/a Women's Health Specialists (Women's Health) (hereinafter collectively "the Appellees").

This is a medical malpractice case. Angel Patel was born with severe birth defects, for which, the Patels asserted claims in contract and tort against certain medical professionals who provided prenatal care to Angel and her mother. As part of the prenatal care, the mother had a routine ultrasound examination at The Medical Center to evaluate her unborn child. Dr. Game, a radiologist, read and interpreted the ultrasound. Initially, Dr. Game's report stated that the exam revealed no gross fetal abnormalities. But, about an hour later, Dr. Game, dictated an addendum to the initial report and observed that the ultrasound showed that the fetus had congenital anomalies.

Purportedly, neither Dr. Game, the Medical Center, nor Women's Health ever communicated the information about the congenital anomalies to the parents. Accordingly, the Patels contend that since they never received this information, they were denied an opportunity to alter the outcome of the birth, that is, abort the pregnancy.

The trial court granted summary judgment to the Appellees because the Kentucky Supreme Court, in *Grubbs ex rel. Grubbs v. Barbourville Family Health Center*, 120 S.W.3d 682 (Ky. 2003), expressly rejected claims for

"wrongful birth" or "wrongful life." Moreover, a trial court is not authorized to overturn established precedent set by the Supreme Court. *Louisville Trust Co. v. Johns-Manville Products, Corp.*, 580 S.W.2d 497 (Ky. 1979). In addition, the trial court concluded that the Patels did not establish the existence of a contract, and therefore, no breach of contract occurred.

We affirm the decision. The Court of Appeals also does not have the authority to overrule established precedent set by the Supreme Court or its predecessor court. *See Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986). And we concur with the trial court that the Patels did not establish the existence of a contract between them and the Appellees.

BACKGROUND

Asha obtained prenatal treatment from Bowling Green Primary Health Center, Inc., d/b/a Fairview Community Health Center[1] (Fairview) in August 2013. Women's Health furnished Fairview with physicians to provide care to Fairview's patients. As part of her care, Asha was referred for a routine ultrasound to the Department of Radiology at The Medical Center.

An ultrasound was performed on August 26, 2013. It was read by Dr. Game who initially reported that the ultrasound revealed "no gross fetal abnormalities." Nonetheless, about an hour and one-half later that day, Dr. Game dictated an addendum to the report wherein he noted that the ultrasound disclosed

[1] Fairview Community Health Center was initially a party to the action, but because it is a recipient of federal funding, the case was removed to the federal court by the U.S. Attorney under the Federal Tort Claims Act. While the case was in federal court, the claims against Fairview were dismissed, and the case was remanded to Warren Circuit Court.

evidence of meningomyelocele, a type of spina bifida, a birth defect where the spinal canal and the backbone do not close prior to a baby's birth. Additionally, Dr. Game noted in the addendum that the ultrasound disclosed an intra-abdominal wall defect in the unborn child. The Patels contend this information, the contents of the addendum, was never communicated to them by any of the Appellees.

On December 14, 2013, Angel was born. She was diagnosed as having cloacal exstrophy, a birth defect in which the abdominal organs are exposed. The child has undergone several surgeries and likely faces a lifetime of additional procedures and medical care.

The Patels filed this action against The Medical Center, Fairview, Women's Health, and Dr. Game on June 15, 2015. The Patels asserted two claims – negligence and breach of contract. Under these two claims, they seek recovery for the medical providers' alleged failure to accurately apprise them of the fetal anomalies, which were identified and reported by Dr. Game in his addendum to the ultrasound report. In essence, they are seeking an action in "wrongful birth" or "wrongful life." The Patels allege that Angel's congenital abnormalities were never communicated to them by Dr. Game or the other Appellees. Thus, they claim that they suffered an injury, that is, the opportunity to terminate the pregnancy. The Patels ask for general damages including medical expenses, pain and suffering, attorney fees, court costs, and loss of earnings.

The Appellees moved for summary judgment on March 17, 2016. The motions argued that because Kentucky law does not recognize either

"wrongful birth" or "wrongful life" claims, and also, because Kentucky Revised Statutes (KRS) 304.40-300 precludes the breach of contract claim, the case could not proceed to trial. A hearing on the Appellees' motions for summary judgment was held on April 25, 2016.

Following the hearing, by an order entered April 28, 2016, the trial court entered additional requirements for discovery and continued the hearing on the summary judgment motions until June 27, 2016. But, notwithstanding the previous order setting discovery, on May 9, 2016, the trial court entered an order granting the Appellees' summary judgment. The Patels appeal both the April 28, 2016 order and the May 9, 2016 order.

STANDARD OF REVIEW

Our standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03.

The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id*. Furthermore, "[b]ecause summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B. R. Corp.*, 56 S.W.3d 432, 436 (citing *Scifres*, 916 S.W.2d at 781).

ANALYSIS

The gravamen of the Complaint is that the findings, stated in Dr. Game's addendum to the ultrasound report, were not communicated to Asha and Kirit, and as a result, they were deprived of the option of having an abortion. The

Patels maintain that had they been made aware of the findings in the addendum, they would have had an abortion.

The Complaint seeks recovery under two theories. Count I of the Complaint alleges that the Appellees breached a contract with the Patels by failing to accurately inform them of the results of the ultrasound. Count II of the Complaint alleges that each of the Appellees were negligent by virtue of unspecified "acts of omission and/or commission." These acts of omission and or commission were not described with particularity in the Complaint other than the Patels allege the Appellees failed to accurately communicate the results of the ultrasound.

The Appellees' roles in the matter are as follows: The ultrasound was performed at The Medical Center by a technician employed by The Medical Center, which is a large community hospital located in Bowling Green, Kentucky. A department in The Medical Center, the Department of Diagnostic Imaging, routinely performs ultrasound examinations of expectant mothers and their unborn children.

This particular ultrasound was read and interpreted by Dr. Game, a radiologist. He is an employee of Springfield Radiology Associates, which is an entity that provides diagnostic imaging services to patients of The Medical Center under an agreement between it and The Medical Center. Springfield Radiology Associates is not a party in this matter.

Women's Health is a physician group practice that specializes in obstetrics and gynecology and provides physician services to patients of Fairview pursuant to a contract dated April 1, 2009. It is owned by Commonwealth Health Corporation, Inc. Dr. Game was not one of the physicians provided to Fairview by Women's Health. Rather, as indicated above, Dr. Game was an employee of Springfield Radiology Associates and practiced as an independent contractor in The Medical Center's Department of Radiology.

We begin our analysis with a discussion of the tort claim. After addressing this issue, we will turn to the breach of contract claim and the allegation that the trial court prematurely granted summary judgment.

Negligence

To reiterate, Dr. Game, the Medical Center, and Women's Health moved for summary judgment because the negligence claim cannot stand as a matter of law since the Kentucky Supreme Court has rejected "wrongful birth" and "wrongful life" claims in *Grubbs*, which like the instant case, involved an alleged failure of the doctors to advise parents-to-be of birth defects shown on prenatal ultrasounds.

The Patels acknowledge that *Grubbs* forecloses their negligence claims, but they argue that Kentucky is in the minority of jurisdictions denying these causes of actions and, as such, it is time to permit such actions in the Commonwealth. Although making the assertion that Kentucky is in the minority of jurisdiction, these cases however, have no precedential value in Kentucky.

Further, in discussing these cases, the Patels point out that there is wide variance across these jurisdictions as to the types of negligence[2] and damages recognized by these states. This information belies the uniformity of the recognition of these actions.

Additionally, the Patels contend that Kentucky's failure to recognize "wrongful birth" and "wrongful life" actions in *Grubbs* violates the Kentucky and United States Constitutions. They specifically cite the "open courts" provision in Kentucky Constitution § 14 and the "equal protection" provisions of the Kentucky Constitution § 1(3) and 3, and the "equal protection" clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

We begin our analysis with the Patels' argument that "wrongful birth" and "wrongful life" cases should be treated as ordinary negligence claims in Kentucky. They frame the questions as whether the Appellees deviated from the standard of care in their interpretation of the ultrasound and this failure resulted in damages suffered by Angel, Asha, and Kirit Patel. And they argue that "wrongful birth" and "wrongful life" actions are really nothing more than traditional *prima facie* negligence actions.

In Kentucky, a plaintiff in a medical malpractice case must demonstrate the same prima facie case as found in any negligence case – duty,

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[2] For example, in *Lininger ex rel. Lininger v. Eisenbaum*, 764 P.2d 1202, 1205 (Colo. 1988), cited by the Patels, "wrongful birth" and/or "wrongful life" represent any number of distinguishable negligent acts including, but not limited to, misdiagnosis of a hereditary condition, the misrepresentation of the risks associated with conception and delivery of a child, the negligent interpretation of diagnostic test, or the negligent performance of a sterilization procedure.

breach, causation, and injury. In addition, a medical malpractice plaintiff must "prove that the treatment given was below the degree of care and skill expected of a reasonably competent practitioner and that the negligence proximately caused injury[.]" *Reams v. Stutler*, 642 S.W.2d 586, 588 (Ky. 1982).

Still, even though the Patels maintain that their action is based on common law negligence, their claim is focused on the alleged failure to inform the parents about Angel's congenital abnormalities, which deprived them of the opportunity for an abortion. This contention is, in fact, the operational definition for a "wrongful birth" action.

A "wrongful birth" action 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." Black's Law Dictionary (10th ed. 2014). And a "wrongful life" action 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." Black's Law Dictionary (10th ed. 2014).

Regardless of arguments positing that this is a traditional negligence case, the Kentucky Supreme Court, as previously cited, explicitly rejected claims for "wrongful birth" or "wrongful life" in the Commonwealth of Kentucky. *See Grubbs*. The Kentucky Supreme Court differentiated "wrongful birth" and "wrongful life" cases from *prima facie* negligence by observing that the alleged

injury claimed is a human life, or stated another way, the loss of an abortion. The Court was unwilling to deem the lack of an abortion opportunity as "causation." As aptly explained, "… we are unwilling to equate the loss of an abortion opportunity resulting in a genetically or congenitally impaired human life, even severely impaired, with a cognizable legal injury." *Grubbs*, 120 S.W.3d at 689.

The Patels' argument that their situation is merely a medical malpractice negligence action is over simplified because they never directly confront the issue of causation as discussed in *Grubbs*. Indeed, the analysis in *Grubbs* did consider common law negligence elements but disavowed the causation between the doctors' actions and the child's birth defects. Sadly, Angel's birth defects would have occurred without any participation on the part of the physician or healthcare providers.

Next, we address the Patels' constitutional arguments wherein they suggest that the courts by failing to recognize the unborn child's condition as an injury, violate both Kentucky and the U.S. Constitutions. The primary constitutional violation is to Section 14 of the Kentucky Constitution. The Patels argue that the outcome of *Grubbs* violates Section 14 of the Kentucky Constitution by preventing them, and other similarly situated individuals, access to the courts. Section 14 of Kentucky's Constitution, commonly referred to as the "open courts" clause, mandates that injured citizens can recover for damages they suffer at the hands of another, that is, citizens have an inherent right of judicial remedy for injury.

The Patels assert that denying them a hearing in this matter is not only contrary to the "open courts" clause but also denies them the equal protection of the law as guaranteed in Sections 1(3) and 3 of the Kentucky Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. A final constitutional grievance proffered by the Patels is that Asha's fundamental right to an abortion, as guaranteed by *Roe v. Wade*, 410 U.S. 113 (1973), is rendered meaningless by the *Grubbs* decision. Based on these constitutional arguments, the Patels maintain that it is time for Kentucky courts to reconsider *Grubbs*.

To address the constitutional claim regarding a lack of access to the courts, we first observe that the Patels' complaint contains no constitutional claims, and thus, the lower court was not allowed to render a decision. Therefore, these arguments have not been preserved. Nonetheless, we will consider them given the gravity of the case.

To have a viable claim under Section 14 of the Kentucky Constitution, one must demonstrate that a legal wrong has occurred before one has a right to access the courts. Here, because of the constraints of the holding in *Grubbs*, wherein the Kentucky Supreme Court unambiguously held that Kentucky does not recognize "wrongful birth" or a "wrongful life" actions, the Patels have not established that they suffered a legal wrong or injury. Thus, they were not deprived of access to the court.

The equal protection claims are also without merit. Equal protection of the law essentially means "that all persons similarly situated should be treated

alike." *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Further, to have an equal protection claim under the 14th Amendment, the complained conduct must be able to be characterized as a "state action." *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 923-924 (1982). Kentucky cases have held that equal protection cases in Kentucky require the same analysis as equal protection matters under the U.S. Constitution's Fourteenth Amendment. *Vision Mining Inc. v. Gardner*, 364 S.W.3d 455 (Ky. 2011).

In the case at bar, the Appellees are not state actors, and thus, an equal protection claim is not implicated. Further, as noted, equal protection requires that similarly-situated individuals be treated in like manner. Here, the Patels have not demonstrated that they were not treated like other similarly-situated persons. Keeping in mind that the Patels bear the burden of proof in establishing that they were treated differently, they must do more than merely suggest an equal protection violation. *See Commonwealth v. Howard*, 969 S.W.2d 700, 703 (Ky. 1998). To assert that one has been discriminated against is insufficient to establish an equal protection violation under either the Kentucky or the United States Constitutions. We determine that no equal protection violation has been proven.

Next, we consider the Patels' assertion that *Grubbs* negatively impacts a woman's right to choose recognized in *Roe.* The Patels provide no analysis to show that *Grubbs* obviates any rights provided in *Roe.* Essentially, *Grubbs* refuses to label the birth of a child as a legally cognizable injury in a medical malpractice case but does not diminish a woman's right to choose an abortion.

Therefore, the grant of summary judgment by the trial court is not in error since *Grubbs* bars "wrongful birth" and "wrongful life" cases, and we, as an intermediate appellate court, are bound by the decisions of the Kentucky Supreme Court.

Breach of Contract

The Patels maintain that, notwithstanding *Grubbs*' denial of the viability of "wrongful birth" and "wrongful life" tort actions in Kentucky, the Supreme Court still allowed breach of contract claims against Kentucky physicians who perform and bill for prenatal diagnostic testing. *Grubbs*, 120 S.W.3d at 691. Therefore, the Patels assert that the trial court's grant of summary judgment was in error. The Patels insist that Dr. Game and the employees, agents, and/or ostensible agents of The Medical Center and Women's Health Specialist undertook to perform a prenatal test – an ultrasound – but did not provide accurate results. The Patels declare that this failure is a breach of contract, and consequently, they are entitled to damages resulting from the breach.

The Medical Center and Women's Health suggest that different considerations are applicable to their contractual obligations versus Dr. Game's contractual obligations. Our evaluation indicates that the Appellees' defenses are intertwined, but we will note differences if necessary.

Initially, Dr. Game counters that the language in *Grubbs* regarding contract claims is merely *dicta*. *Dicta* is not precedent, and hence, not binding. *Commonwealth v. Beard*, 275 S.W.3d 205, 207 (Ky. App. 2008). Moreover, he

observes that for the Patels to prevail on a breach of contract claim, they must first establish that a contract existed. He, and the other Appellees, contend that neither a written contract nor an implied contract exists.

While the Patels do not provide a written contract, they maintain the existence of an implied contract between the Appellees and them. Relying on *Thompson v. Hunter Ex'r*, 269 S.W.2d 266, 269 (Ky. App. 1954), they assert, rather broadly, that a contract existed because courts may imply a contract to afford a remedy or right of recovery when money or property has been received. Nonetheless, they provide no other analysis or legal support for this argument.

Besides denying the existence of an implied contract, Dr. Game, The Medical Center and Women's Health respond that the Patels are also not entitled to a breach of contract action for malpractice because of the strictures of KRS 304.40-300. Under Kentucky law, breach of contract actions against health care providers are allowed only in a narrow set of circumstances. KRS 304.40-300 states:

> No malpractice liability shall be imposed upon any health care provider on the basis of an alleged breach of any guaranty, warranty, contract or assurance of results to be obtained from any procedure undertaken in the course of providing health care, unless such guaranty, warranty, contract or assurance is in writing and signed by the provider.

The efficacy of the Patels' contract claim is dependent on the interpretation and application of KRS 304.40-300. We believe that the statutory language negates both the Patels' assertion that an implied contract existed and

also that KRS 304.40-300 is not pertinent. First, the statute states that no malpractice liability shall be imposed on a health care provider unless such "contract" is in writing and signed by the provider. Further, the statute requires that any contract purporting to guarantee or provide a warranty for medical services must expressly do so.

To state the obvious, an implied contract is one without a written document. Therefore, any implied contract, according to KRS 304.40-300, is not actionable because an implied contract, by definition does not have a written document. Without a signed document, there is no contract for the health care providers to breach.

Moreover, we are not persuaded by the Patels' argument that *Grubbs* demonstrates an exception to KRS 304.40-300. Regarding breach of contract, the Court opined:

> Despite our holding denying the tort claim as a matter of law, a physician who contracts and charges for a service, such as a prenatal ultrasound and consequent opinion as to the results of the ultrasound, is liable for any breach of contract in this regard. We do not believe physicians should be relieved of any proven contractual responsibility to report to patients the accurate results of diagnostic procedures, even if the condition is "incurable."

Grubbs, 120 S.W.3d at 691. The Patels make a labored argument that the above-cited statement in *Grubbs* grants an exception to KRS 304.40-300. They argue that the situation in this case was exactly what was referenced in *Grubbs*' discussion of breach of contract matters. The Patels first suggest that the Court was carving out

an exception to KRS 304.40-300. Second, they maintain that the statute is only applicable when a medical provider guarantees outcomes.

Thus, the Patels opine that *Grubbs* permits a breach of contract claim when a medical procedure was not executed according to the appropriate process and without guarantees. But we believe that if the Court so intended, it would have said so. Second, the Court's language itself ("a physician who contracts and charges for a service, such as a prenatal ultrasound and consequent opinion"[3]) mandates the existence of a contract between the physician and the patient. Here, the Patels have not provided a document showing a contract with Dr. Game. There is no contract.

Moreover, a reading of *Grubbs* is consistent with KRS 304.40-300. The case and the statute can be applied at the same time. While *Grubbs* may permit a breach of contract resulting from a failure to diagnose and inform the parents if, as authorized by the statute, a written contract is signed by the physician, *Grubbs* does not address the factors that are a prerequisite to contractual liability. *Grubbs* only opines that its holding does not preclude contract actions. It never obviates the impact of KRS 304.40-300.

Further, we point out that the *Grubbs'* language does not implicate The Medical Center and Women's Health since the Court stated that a breach of contract claim could only be made against a "physician." The Medical Center and Women's Health's argument is bolstered by Dr. Game's status as an independent

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[3] *Grubbs*, 120 S.W.3d at 691.

contractor rather than an agent or employee of The Medical Center or Women's Health. In fact, immediately before the ultrasound, Asha signed a document entitled "General Conditions of Admission, Consent, Assignment of Benefits & Financial Agreement." This document states in bold-face type that Dr. Game was an independent contractor. As such, we conclude that no breach of contract action is actionable against The Medical Center or Women's Health.

Regarding any contractual relationship with Dr. Game, the Patels signed an informed consent prior to the prenatal ultrasound. This informed consent is not a legally binding contract and contains no guarantees. In fact, the consent form states specifically that "I acknowledge that no guarantee has been made to me as to the results of examination and treatment in the hospital." Additionally, the services indicated in the consent form, a prenatal ultrasound, were performed.

Returning to the statutory requirements for a breach of contract action, in this case, Dr. Game provided no guaranty, no contract, and no signature. Again, KRS 304.40-300 obviates any contract between Dr. Game and the Patels since it mandates an actual warranty, in writing, and signed. The informed consent is the opposite of such a guarantee. Thus, no contract existed for Dr. Game to breach.

In sum, the Patels' breach of contract claim against the Appellees is squarely precluded by KRS 304.40-300, which prohibits the imposition of liability based on an alleged breach of an "implied" contract. The trial court did not err in granting summary judgment on the breach of contract claim.

Lastly, we address the Patels' argument in which they argue, given that they are a working-class family, it is the Commonwealth, through Medicaid, which will actually bear the costs of the medical damages. Therefore, they argue that they should be allowed to sue in order to recover on behalf of the Commonwealth under KRS 205.624-29.

The Patels assert that it is against public policy for identifiable third parties to escape liability and have the state bear the burden of the cost for someone's disabilities. We do not find that this argument is persuasive. Notwithstanding any actions by the health care providers, Angel would have been born with these birth defects. Because of her defects, she was entitled to medical services.

Moreover, as the Appellees explain, any right of the Cabinet to recover through subrogation is limited to the right of the medical service recipient's right to recover. Here, the Patels have no right of recovery under a "wrongful birth" or "wrongful life" action. Therefore, if the Patels have no right of recovery for damages at law, neither does the Cabinet, and KRS 205.624(2) is not pertinent.

Further, the Patels insinuate that if our Court should allow the filing of a "wrongful birth or "wrongful life" complaint, the fact that Angel is a Medicaid recipient should not be used to offset their expenses. This assertion somewhat contradicts their public policy argument for the Commonwealth. But we will not

address their purported damages since Kentucky does recognize such actions, and hence, compensation for such damages is not a legally cognizable question.

Summary Judgment

The Patels aver that since they were not provided sufficient time for discovery, the trial court's grant of summary judgment was premature. They suggest that they were not given sufficient time to conduct meaningful discovery. The Patels maintain that their efforts at discovery were thwarted particularly in their efforts to schedule depositions with the ultrasound technician and Dr. Game. In addition, the Patels contend that the trial court erred by entering summary judgment prior to a scheduled motion hour because, by doing so, their due process rights were violated.

We disagree. The controlling precedent compels a determination that the Appellees are entitled to summary judgment. Risking redundancy, we again observe that the Kentucky Supreme Court has expressly rejected claims for "wrongful birth" or "wrongful life." *See Grubbs*, 120 S.W.3d 682. Further, the Patels were not able to establish a contractual relationship with the health care providers that met the statutory requisites of KRS 304.40-300.

While the trial court granted the summary judgment before the time for discovery had elapsed, the error was harmless. The purpose of summary judgment is to expedite the disposition of cases and avoid unnecessary trials where no genuine issue of material facts are raised and the moving party is entitled to judgment as a matter of law. *Steelvest*, 807 S.W.2d at 480; CR 56.03. Here, it is

impossible for the Patels to produce evidence at the trial supporting a verdict in their favor.

No amount of additional discovery would have made any difference in the case. If there was error, it is harmless. And since the error was harmless, the trial court's grant of summary judgment was not in error, and we affirm. *Vittitow v. Carpenter*, 291 S.W.2d 34, 36 (Ky. 1956).

CONCLUSION

The Patels asserted two causes of action – one in tort and one in contract. Regarding the tort claim, controlling case law rejects “wrongful birth” and/or “wrongful life” actions in the Commonwealth. And the contract claim is invalidated based on the statutory requirements of KRS 304.40-300.

Thus, we affirm the decision of the Warren Circuit Court granting Dr. Game, the Medical Center, and Women’s Health summary judgment. No genuine issue of material fact exists and the Appellees are entitled to judgment as a matter of law.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

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