

CASE NO. _____

IN THE SUPREME COURT OF TEXAS

**KRISTEN TURLEY GIBSON AND BILLY GIBSON, INDIVIDUALLY,
AND AS NEXT FRIENDS OF K.G., A MINOR**

Petitioner,

vs.

PLANNED PARENTHOOD GULF COAST,

Respondents.

***ON APPEAL FROM COURT OF APPEALS FOR THE
FOURTEENTH JUDICIAL DISTRICT OF TEXAS
AT HOUSTON, TEXAS
CASE No. 14-18-00498-CV***

PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

COME NOW, KRISTEN TURLEY GIBSON AND BILLY GIBSON,
INDIVIDUALLY, AND AS NEXT FRIENDS OF K.G., A MINOR, Petitioners in
the above-styled cause, and files this Petitioner for Review, and in support thereof
say:

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Billy Gibson, As Next Friend of K.G., a Minor

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STATEMENT OF CASE

<i>Nature of the Case:</i>	This is a medical liability case brought for injuries and damages suffered by K.G., a minor, caused by the alleged negligent placement of an intrauterine device in Kristin Turley by Respondent. (C.R. 64-82.) ¹
<i>Judge Who Signed the Judgment Appealed From:</i>	Hon. Michael Landrum
<i>Trial Court and County:</i>	113 th District Court of Harris County, Texas
<i>Trial Court's Disposition:</i>	The Honorable Michael Landrum, presiding judge of the 113 th Judicial District Court of Harris County, Texas granted summary judgment. (C.R. 1058-1059.)
<i>Parties in Court of Appeals:</i>	Kristen Turley Gibson, As Next Friend of K.G., a Minor; Billy Gibson, As Next Friend of K.G., a Minor; Planned Parenthood Gulf Coast
<i>District of Court of Appeals</i>	14 th District
<i>Justices Who Participated Court of Appeals Decision:</i>	Justices Ken Wise, Kevin Jewell and Meagan Hassan
<i>Citation for Court of Appeals Opinion:</i>	<i>In Re Gibson</i> , 2018 U.S.Dist.LEXIS 1745 (Tex. App. - - Houston [14 th Dist.] 2018)
<i>Disposition by Court of Appeals</i>	On July 30, 2019 affirmed the trial court's judgment; Granted Extension of Time until August 21, 2019 to file motion for rehearing; Motion for Rehearing not filed; No Motion for Rehearing for En Banc Review is Pending

¹Throughout this Brief, citation to the Clerk's Record shall be in the following format: (C.R. page#.).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal because it involves a contention that there is no evidence to support a finding that the negligence of Respondent proximately caused the injuries and damages alleged by Petitioner, which is a question of law over which the Supreme Court has jurisdiction. *Texas Employer's Ins. Assoc. v. Etheredge*, 272 S.W.2d 869, 871 - 872 (Tex. 1954).

Additionally, this appeal involves a question of law that is important to the jurisprudence of the state, that is whether Texas recognizes a cause of action for injuries resulting from conduct occurring before a Plaintiff's conception. Tex. Gov't. Code § 22.001(a).

ISSUES PRESENTED

Briefed, Partially Briefed, and Un-briefed Issues¹

1. Whether the Court of Appeals erred by finding Petitioner presented no evidence that Respondent's negligence proximately caused Petitioner's injuries.
2. Whether the trial court erred by granting Appellee Planned Parenthood Gulf Coast's motion for summary judgment based upon its determination that Texas law did not recognize a cause of action for injuries resulting from conduct occurring before a Plaintiff's conception.
 - Whether Planned Parenthood Gulf Coast owed a legal duty to Kristen Turley's future children to exercise reasonable care in its placement of the intrauterine device
 - Whether the risk of injury from a premature birth caused by improper placement of an intrauterine device was a foreseeable risk arising from the actions of Planned Parenthood Gulf Coast that Planned Parenthood Gulf Coast had a duty to prevent

¹ Petitioner reserves the right to present additional briefing on these issues presented if the Court so requests. Petitioner submits as much argument as possible within the word limitations imposed by the Texas Rules of Appellate Procedure. See TEX. R. APP. P. 9.4(i)

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PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

Comes now, Kristin Turley Gibson and Billy Gibson, as next friends of K.G., a Minor, Appellants herein, and files this brief in opposition to the Court of Appeal's finding there was no evidence that the negligence of Planned Parenthood Gulf Coast caused Petitioner's injuries, and in opposition to the trial court's granting summary judgment in favor of Appellee Planned Parenthood Gulf Coast because Texas recognizes the claims of minors injured due to conduct occurring before the minor

was born and before the minor was conceived.

STATEMENT OF FACTS

A. Underlying Facts

This case arises from the implantation of an intrauterine device (“IUD”) into Kristin Turley Gibson (“Kristen”). (C.R. 64-82.). Kristen went to Planned Parenthood Gulf Coast (“PP”) to have an IUD placed. (C.R. 602-604; 813-814.) The IUD was placed on December 21, 2010, just under six (6) weeks after she had given birth. (C.R. 602.) The position of her uterus and her recent delivery placed her at an unacceptably high risk of suffering a perforation during implantation. (C.R. 546-547; 743-744.) Rather than delay placement of the IUD, PP placed the IUD. (C.R. 554, 589.)

James Martin Wheeler, M.D. explained that “Planned Parenthood failed to identify Ms. Gibson at high risk for uterine perforation, including the factors of an antepartum uterus requiring a tenaculum, being exactly six weeks postpartum...” (C.R. 546; 743.) Dr. Wheeler further explained “...that the closer to delivery, the boggier the uterus, the easier to perforate is a well-known truth in OB/GYN.” (C.R. 546; 744.)

PP breached the standard of care when it failed to appreciate the increased risks of uterine perforation. (C.R. 546; 553-554; 743-744.) Failing to appreciate the increased risk of perforation, PP breached the standard of care when it placed the

IUD. *Id.*; *see also* (C.R. 545; 741-742; 779-780.)

Dr. Wheeler explained, “It's an almost medical certainty that she was perforated at its placement based on the totality of the records I've reviewed.” (C.R. 547; 744; 754-755.)

In April 2012, Kristen discovered she was pregnant and returned to PP to confirm the pregnancy and remove the IUD. (C.R. 607-608.) PP tried unsuccessfully to remove the IUD. (C.R. 832-833.) The IUD was not removed and Kristin Turley Gibson maintained her pregnancy with the retained IUD. *Id.* A retained IUD during pregnancy can cause infections and premature birth. (C.R. 562-563; 758; 775; 789-790; 803-804.). The improper placement of the IUD resulted in the IUD being imbedded in the uterine wall. (C.R. 704). A retained IUD increases the risk of preterm labor. (C.R. 706). Kristen suffered preterm premature rupture of her membrane. (C.R. 578-579; 696; 758-761; 789-791.). The retained IUD served as a nidus for infection, caused Kristen to suffer from infection, which resulted in the premature rupture, preterm labor and preterm delivery at only 26 weeks gestation (C.R. 569; 776; 801 - 802). Due to her prematurity, Petitioner remained hospitalized for approximately 5 months and suffered respiratory difficulties. (C.R. 817-819; 822-826.). Thus, Petitioner raised genuine issues of material fact.

B. Procedural History

Petitioner filed suit against PP on November 14, 2014. (C.R. 64-83.) After answering on December 23, 2014, PP specially excepted to Petitioner's petition because, "At the time of IUD insertion the minor plaintiff did not exist." (C.R. 85-93; 274-276.) The special exceptions were denied on April 5, 2016. (C.R. 296.)

Thereafter, PP moved for summary judgment on the same grounds. (C.R.479-626.) PP also moved for a no-evidence summary judgment asserting there was no evidence of breach of the standard of care and causation. *Id.* Petitioners filed their response PP's motion for summary judgment. (C.R. 729-834.) The trial court entered an interlocutory order granting PP's motion for summary judgment because "no cause of action has been recognized in Texas for recovery for injuries resulting from conduct that occurred before the Plaintiff's conception." (C.R. 1058-1059.)

Petitioners then resolved their claims against the only other defendant. The trial court entered an order of dismissal which rendered the interlocutory summary judgment final. (C.R. 1160.)

The Court of Appeals affirmed the trial court finding that Petitioner had presented no evidence that the negligence of PP caused Petitioner's injuries. Petitioner presented some evidence that Respondent's negligence in placing the IUD resulted in the IUD being imbedded in the uterine wall and retained, caused infection, which resulted in the premature rupture, which resulted in premature labor

and delivery, which resulted in Petitioner remaining hospitalized for five months.

Therefore, Petitioner presented some evidence that the negligence of Respondent caused Petitioners injuries, and asks this Court to reverse the Court of Appeals.

SUMMARY OF THE ARGUMENT

Petitioner presented more than a scintilla of evidence that the negligence of Planned Parenthood Gulf Coast caused Petitioner's injuries and PP was not entitled to a no-evidence summary judgment.

Contrary to PP's position, Texas law does not prevent a Plaintiff from pursuing a cause of action for conduct that occurred before the Plaintiff was conceived. Rather, regardless of whether a Plaintiff had been conceived, Texas determines whether a duty exists based upon weighing the foreseeable risk of injury from the actions against the burdens placed upon a defendant of bearing the consequences of those actions. If an injury is foreseeable, then the Defendant has a duty to exercise reasonable care to prevent the foreseeable injury. In this case, PP owed a duty to Petitioner. It was foreseeable to PP that its negligence could cause injury to unborn children of Kristin.

ARGUMENT

I. Standard of Review

To be successful on a no-evidence² motion for summary judgment, the movant represents there is no evidence of one or more essential elements of the claims for which the non-movant bears the burden of proof at trial. TEX. R. CIV. P. 166a(i). The Court reviews the evidence in the light most favorable to the non-movant and should disregard all contrary evidence and inferences. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). If the non-movant brings forth more than a scintilla of evidence, a no-evidence motion for summary judgment should be denied. *See King Ranch*, 118 S.W.3d at 751; *see also Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002). Less than a scintilla of evidence exists only when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact. *King Ranch*, 118 S.W.3d at 751. Thus, Plaintiff's production of evidence that merely "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions" requires the denial of a no evidence motion for summary judgment. *Id.*

²Mindful of the Texas Supreme Court's holding that an appellate court shall consider "all grounds presented to the trial court and preserved on appeal," Appellants shall address both the specific grounds upon which the court of appeals affirmed the trial court, as well as the ground on which the trial court granted summary judgment in this case. *See Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005).

The evidence submitted by Petitioners was more than a scintilla of evidence as to breach of the standard of care and causation. The trial court could not have granted Appellee's no-evidence motion for summary judgment.

II. The Evidence Raises Genuine Issues of Material Fact that Precluded Planned Parenthood Gulf Coast's Entitlement to a No-Evidence Motion for Summary Judgment

PP asserted there was no-evidence it breached a duty of care or that any breach caused injury. The substantial evidence submitted to the trial court, viewed in the light most favorable to Petitioner, demonstrated genuine issues of material fact that precluded no-evidence summary judgment.

A. More Than a Scintilla of Evidence Exists Establishing that Planned Parenthood Gulf Coast Breached the Standards of Care

Dr. Wheeler testified that PP had a duty to properly insert the IUD taking into account the increased risks of perforation presented by Kristen, and that PP breached the standard of care when it failed to appreciate the increased risks of uterine perforation and improperly placed the IUD in Kristin Turley Gibson on December 21, 2010. *Id*; *see also* (C.R. 545; 741-742; 779-780.)

B. More Than a Scintilla of Evidence Exists Establishing that Planned Parenthood Gulf Coast's Breaches in the Standards of Care Proximately Caused The Premature Birth and Resulting Injuries of K.G., a Minor

The evidence submitted demonstrated genuine issues of material fact regarding causation. Proof of causation does not require evidence that establishes

facts of medical certainty. *See Duff v. Yelin*, 751 S.W.2d 175, 176 (Tex. 1988); *see also Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 399-400 (Tex. 1993). Rather, “[i]n a medical malpractice case, plaintiffs are required to show evidence of a “reasonable medical probability” or “reasonable probability” that their injuries were proximately caused by the negligence of one or more defendants.” *See Ly v. Schmidt*, 2007 Tex. App. LEXIS 7369 (Tex. App. – Austin 2007, no pet.) *citing Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995). Further, “[i]n a causation sense, a plaintiff is not required to exclude every other reasonable hypothesis, *see Marvelli v. Alston*, 100 S.W.3d 460, 470 (Tex. App. – Fort Worth 2003, pet. denied), and more than one proximate cause may exist. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001).” *White v. Scaff*, 2012 Tex. App. LEXIS 5346, *11 (Tex. App. – Corpus Christi July 5, 2012, pet. denied).

The evidence submitted demonstrated that the breach PP caused the IUD to perforate Kristin’s uterus during its placement. (C.R. 743-744.). The IUD became imbedded in the uterine wall (C.R. 704), and was difficult to remove which resulted in Kristin carrying Petitioner with a retained IUD. (C.R. 561-562.) Retention caused Kristin to suffer preterm labor with premature rupture. Due to her prematurity, caused by the IUD perforating the uterus and being retained during pregnancy, Petitioner was hospitalized for five months.

Further, “[i]n a causation sense, a plaintiff is not required to exclude every other reasonable hypothesis, *see Marvelli v. Alston*, 100 S.W.3d 460, 470 (Tex. App. – Fort Worth 2003, pet. denied), and more than one proximate cause may exist. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001).” *White v. Scaff*, 2012 Tex. App. LEXIS 5346, *11 (Tex. App. – Corpus Christi July 5, 2012, pet. denied). There is no evidence that smoking, in reasonable medical probability caused the preterm premature rupture. Thus, Petitioner was not required to exclude smoking as a cause of Petitioner’s injuries. In contrast, the summary judgment evidence shows that in reasonable medical probability, the placement of the IUD caused the rupture that led to the injuries suffered. (C.R. 680).

The summary judgment evidence merely showed that smoking increased Kristen Turley’s risk for preterm premature rupture. (C.R. 697). This is not evidence that smoking, in reasonable medical probability caused the preterm premature rupture. Dr. Wheeler also noted that Kristen smoked through all of her other pregnancies. (C.R. 697). Kristen Turley did not suffer preterm premature rupture with any of her three pregnancies before this pregnancy. (C.R. 769 – 770). Kristen’s smoking not causing preterm premature rupture with any of her other pregnancies is evidence it did not cause the preterm premature rupture during this pregnancy. Even if the smoking had caused the preterm premature rupture, it would have combined with the negligence of Planned Parenthood Gulf Coast to cause Petitioner’s injuries.

III. The Trial Court Erred When it Granted Planned Parenthood Gulf Coast's Motion for Summary Judgment Based Upon its Finding that Texas Did Not Recognize a Claim for Injuries Caused by Preconception Actions

Texas courts recognize causes of action brought by minor plaintiffs for injuries caused by conduct occurring before they were born, or even conceived. *See e.g. Hathcock v. Hankook Tire Am. Corp.*, 330 S.W.3d 733 (Tex. App. – Texarkana 2010, no pet.)(claim brought by minor for product liability arising from tire manufactured two years before minor was born); *see also Findley-Smith v. Smith*, 2008 Tex. App. LEXIS 1466 (Tex. App. – Houston [1st Dist.] February 28, 2008, pet. denied) (claims brought by a minor against a physician for care provided to the mother before the child was conceived); *Herrera v. Holiday*, 2011 Tex. App. LEXIS 1046, *8-*9 (Tex. App.– Houston [14th Dist.] February 15, 2011, no pet.) (claim brought by a minor for medical negligence for care provided to mother while minor was in utero). Rather than focus on whether a child was conceived at the time of the alleged actionable conduct, Texas courts have focused, instead, on whether an analysis of the facts, weighing established factors, demonstrates the existence of a legal duty. *See Nabors drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009).

In *Lough v. Rolla Women's Clinic, Inc.*, the Supreme Court of Missouri declined to find recovery for all preconception tortious conduct was barred. 866 S.W.2d 851 (Mo. 1993). In *Lough*, the Supreme Court of Missouri recognized the

harsh, inequitable outcomes that such an arbitrary rule would cause and offered the following hypothetical to illustrate those inequities:

Assume a balcony is negligently constructed. Two years later, a mother and her on-year-old child step onto the balcony and it gives way, causing serious injuries to both the mother and the child. It would be ludicrous to suggest that only the mother would have a cause of action against the builder but, because the infant was not conceived at the time of the negligent conduct, no duty of care existed toward the child.

866 S.W.2d 851, 854 (Mo. 1993).

In this case, the facts evidence the existence of a legal duty owed by PP to Petitioner. Accordingly, the trial court erred when it found no duty existed and this Court should act to correct this error by reversing the summary judgment entered by the trial court and remanding this case for further proceedings.

A. Planned Parenthood Gulf Coast Owed a Legal Duty to Kristin Turley AND Her Future Children

“The existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question.” *Midwest v. Harpole*, 293 S.W.3d 770, 776 (Tex. App. – San Antonio 2009, no pet.) *citing Greater Houston Transp. Co.*, 801 S.W.2d at 525. There are several factors that should be weighed to determine whether a legal duty exists including the risk involved, foreseeability and likelihood of injury weighed against the social utility of the actor’s conduct, the magnitude of the burden of guarding against the injury and the consequences of placing the burden on the defendant. *See Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 182

(Tex. 2004); *see also* *Madison v. Williamson*, 241 S.W.3d 145, 152 (Tex. App. – Houston [1st Dist.] 2007, pet. denied). The most significant, and dominant, consideration among these factors is foreseeability of the risk; that is, what a defendant should reasonably anticipate as a consequence of their conduct. *See Midwest v. Harpole*, 293 S.W.3d 770, 779 (Tex. App. – San Antonio 2009, no pet.). Foreseeability means that a person of ordinary prudence and intelligence should have reasonably anticipated the risks their conduct posed to others. *See City of Alton v. Sharyland Water Supply Corp.*, 402 S.W.3d 867, 874 (Tex. App. – Corpus Christi 2013, pet. denied). “Every person has a duty to exercise reasonable care to avoid a foreseeable risk of injury to others.” *Lukasik v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394, 403 (Tex. App. – San Antonio 2000, no pet.).

Dr. Wheeler testified that a reasonable practitioner would have appreciated the risks and deferred placement of the IUD. (C.R. 743-745.) The risk posed by a perforated uterus is that the IUD will be difficult to remove, and a retained IUD will cause an infection that leads to a premature birth injury. (C.R. 741, 744, 756, 781-782.) These risks are what occurred in this case. *Id.*

B. There is No Bright Line Rule in Texas Barring a Child’s Cause of Action for Injuries Sustained from Conduct Occurring Before they Were Conceived

As was recognized by the Supreme Court of Missouri in *Lough*, “[i]ndividual cases involving “preconception torts” can be sensibly analyzed under existing

principles of tort law to determine if a duty exists in a particular case.” 866 S.W.2d at 854. This approach regarding foreseeability to determine whether a duty exists to the unconceived has been recognized by courts in other states. For example, in *Lynch v. Scheininger*, the New Jersey Supreme Court permitted a child to bring a cause of action against the mother’s obstetrician for failing to diagnose a condition in the mother in a prior pregnancy. 744 S.2d 113 (N.J. 2000). This result stands in contrast to the case of *Taylor by Taylor v. Cutler* where the New Jersey Supreme Court held there was no duty to an unconceived child for birth defects caused by a car accident that occurred seven years before conception because of the lack of foreseeability. 703 A.2d 294 (N.J. 1997).

This approach is utilized by Texas Courts. *Ledeaux v. Motorola, Inc.*, 101 N.E.3d 116 (Ill. App. Ct. 2018) (finding preconception torts in a case arising from exposure to toxic substances by the plaintiff’s father before she was conceived were not barred as a matter of law under Texas law); *see also Domion v. Triquint Semiconductor, Inc.*, 2017 U.S. Dist. LEXIS 217694 (D. Or. 2017) (finding foreseeability analysis to be the proper measure for duty under Oregon law in allowing preconception tort arising from father’s toxic exposure to proceed); *Lynch v. Scheininger*, 744 A.2d 113 (N.J. 2000) (finding duty existed under New Jersey law to unconceived child where injury was foreseeable); *Lough v. Rolla Women’s Clinic, Inc.*, 866 S.W.2d 851 (Mo. 1993) (holding duty existed to unconceived child

under Missouri law where injury was foreseeable).

Although the issue of duty was not directly addressed, in *Findley-Smith v. Smith*, a child was allowed to pursue negligence claims against a physician for care provided to the mother before the child was born. 2008 Tex. App. LEXIS 1466 (Tex. App. – Houston [1st Dist.] February 28, 2008, pet. denied); *see also e.g. Hathcock v. Hankook Tire Am. Corp.*, 330 S.W.3d 733 (Tex. App. – Texarkana 2010, no pet.)(involving product liability causes of action brought by a child for injuries caused by a tire blowing out where the tire was manufactured two years before the child was born and, thus, before the child was conceived).

In short, there is simply no good reason to adopt a rule barring all preconception torts.

PRAYER

For these reasons, Appellants pray that this Honorable Court accepts this case, reverses the Court of Appeals, reverses the summary judgment entered in favor of Appellee Planned Parenthood Gulf Coast by the trial court and remands this case for further proceedings.

Respectfully submitted,
HOUSSIERE, DURANT & HOUSSIERE, L.L.P.

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF COMPLIANCE

Relying on the word count function in the word processing software used to produce this document, I certify pursuant to TEX. R. APP. P. 9.4(i) the number of words in this motion, excluding the caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certificate of compliance and appendix is 3,093.

/s/ Charles R. Houssiere, III

CHARLES R. HOUSSIERE, III

CERTIFICATE OF SERVICE

This is to certify that on the 13th day of September, 2019, a true and correct copy of the foregoing was served electronically on all counsel of record via email as follows:

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/s/ Charles R. Houssiere, III
CHARLES R. HOUSSIERE, III

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FOURTEENTH JUDICIAL DISTRICT OF TEXAS
AT HOUSTON, TEXAS
CASE No. 14-18-00498-CV***

APPENDIX TO PETITION FOR REVIEW

- A. Order Granting Planned Parenthood Motion for Summary Judgment
(C.R. 1058 – 1059)
- B. Opinion of the Court of Appeals
- C. Tex. R. Civ. P. 166a
- D. Court of Appeals Judgment

CAUSE NO. 2014-36925

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GIBSON, KRISTIN TURLEY	§	IN THE DISTRICT COURT OF
(INDIVIDUALLY AND,	§	
Plaintiff(s),	§	
vs.	§	HARRIS COUNTY, TEXAS
	§	
BHARKSUWAN, SAMMUEL (M D),	§	
Defendant(s).	§	113th JUDICIAL DISTRICT

ORDER

On February 2, 2018, a hearing was held to consider:

Defendant Planned Parenthood Gulf Coast's Sec. 74.403 Objections to the Testimony of James M. Wheeler, M.D., filed August 14, 2017;

Defendant Planned Parenthood Gulf Coast's Motion for Summary Judgment, filed January 12, 2018;

Defendant Planned Parenthood Gulf Coast's Motion to Exclude the Testimony of James M. Wheeler, M.D., filed January 19, 2018; and,

Defendant Samuel Barksuwan's Robinson Challenge and Objections, Motion to Strike, Limit or Exclude the Expert Testimony of James M. Wheeler, M.D., filed January 26, 2018.

Counsel for all parties appeared. In consideration of the documents filed, argument of counsel, and relevant authority, it is

Ordered that the claims brought herein by Kristin Turley Gibson and Billy Gibson on behalf of and as next friend of Korbyn Gibson, a Minor, are dismissed with prejudice, on grounds that no cause of action has been recognized in Texas for recovery for injuries resulting from conduct that occurred before the Plaintiff's conception.

Defendant Planned Parenthood Gulf Coast's complaints concerning the opinions of James M. Wheeler, M.D. are denied as moot. It is further

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1058

Ordered that Defendant Barksuwan's objections to the expert testimony of James M. Wheeler, M.D. are denied.

This is an interlocutory order.

Signed February 8, 2018

A handwritten signature in black ink, appearing to read "Michael Landrum", written over a horizontal line.

Hon. MICHAEL LANDRUM
Judge, 113th District Court

Affirmed and Memorandum Opinion filed July 30, 2019.



In The

Fourteenth Court of Appeals

NO. 14-18-00498-CV

**KRISTIN TURLEY GIBSON AND BILLY GIBSON,
AS NEXT FRIENDS OF K.G., A MINOR, Appellants**

V.

PLANNED PARENTHOOD GULF COAST, Appellee

**On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 2014-36925**

M E M O R A N D U M O P I N I O N

Kristin and Billy Gibson, as next friends of their daughter, K.G., appeal a summary judgment dismissing K.G.'s negligence claims against appellee, Planned Parenthood Gulf Coast. K.G. alleged that Planned Parenthood's employee, while inserting an intrauterine device into Kristin, negligently perforated Kristin's uterus. K.G. claimed she was damaged as a result of Planned Parenthood's negligence, which is alleged to have occurred before K.G. was conceived. On appeal, K.G.

APPENDIX EX. B

argues that the trial court erred in granting summary judgment to Planned Parenthood because (1) Planned Parenthood owed a duty to K.G., before she was conceived, to exercise reasonable care in its placement of the intrauterine device, and (2) K.G. presented evidence that Planned Parenthood's breach of the standard of care proximately caused K.G.'s alleged injuries.

We conclude that K.G. did not present a scintilla of evidence that Planned Parenthood's alleged negligence proximately caused the damages K.G. claims. Our determination on proximate cause renders it unnecessary to address the duty and breach questions raised. We affirm the trial court's judgment.

Background

We summarize the evidence in the light most favorable to appellant, as the summary-judgment nonmovant.¹ On December 21, 2010, Kristin underwent a procedure at Planned Parenthood during which an intrauterine device ("IUD") was placed for contraception. The procedure was performed by a nurse employed by Planned Parenthood. Kristin had given birth to a child six weeks earlier. According to appellant, the position of Kristin's uterus coupled with her recent delivery placed her at an unacceptably high risk of suffering a perforation during placement of an IUD.

Approximately fifteen months later, in April 2012, Kristin believed she was pregnant and returned to Planned Parenthood for confirmation and potential removal of the IUD. The pregnancy was confirmed, and the nurse attempted unsuccessfully to remove the IUD. Planned Parenthood referred Kristin to a higher level of care. The next Monday, Kristin saw Dr. Samuel Bharksuwan, the doctor who delivered her last child, to remove the IUD. Dr. Bharksuwan told Kristin that

¹ Only K.G.'s claims are at issue in this appeal. For convenience, we refer to K.G. simply as "appellant."

he could not see the IUD strings and explained that he thought the device must have “fallen out.” No further removal attempts were made. Contrary to Dr. Bharksuwan’s belief, however, the IUD had not fallen out, and Kristin maintained her pregnancy while retaining the IUD in her uterus.

The following July, Kristin returned to Dr. Bharksuwan with complaints of second trimester bleeding. Dr. Bharksuwan released Kristin to continue her pregnancy at home and did not place her on antibiotics or bed rest. There is no indication in the record that Dr. Bharksuwan detected the IUD’s presence at this time. One week later, on July 19, 2012, Kristin presented to the hospital with signs of an infection. Kristin’s membrane had ruptured prematurely, and she delivered appellant by cesarean section on July 20, 2012, at twenty-six weeks gestation. Appellant remained hospitalized for approximately five months and was discharged on December 23, 2012. According to the record, appellant has not suffered any permanent or long-term injury, and Kristin testified that appellant is meeting her developmental milestones. Kristin has not been told that appellant will be unable to live a healthy life.

Appellant’s expert, Dr. James Martin Wheeler, testified that Planned Parenthood breached the applicable standard of care when its nurse placed the IUD on December 21, 2010 because the placement perforated Kristin’s uterus. He acknowledged, however, that Planned Parenthood properly referred Kristin to a doctor in April 2012, after confirming Kristin’s pregnancy and unsuccessfully attempting to remove the IUD.

Kristin and Billy Gibson filed the present lawsuit, asserting claims individually and as next friends of appellant. The relevant petition named as defendants Samuel Bharksuwan, M.D., an obstetrician; Dr. Bharksuwan’s solo professional association; Teva Pharmaceutical USA, Inc.; Teva Women’s Health,

Inc.;² and Planned Parenthood. The plaintiffs alleged they sustained injuries in the course of prenatal care, treatment, and delivery. With respect to Planned Parenthood, the plaintiffs asserted causes of action for negligence and gross negligence.

As to the parents' individual claims, Planned Parenthood moved for summary judgment on statute of limitations grounds. The trial court granted the motion and dismissed with prejudice the parents' individual claims against Planned Parenthood. The parents have not appealed that ruling, and their individual claims are not before us.

Planned Parenthood also filed a motion for summary judgment as to the claims of the minor child, appellant. The motion was based on both traditional and no-evidence grounds. In the no-evidence portion of the motion, Planned Parenthood argued that appellant could present no evidence of the breach or proximate cause elements of her negligence claim. In the traditional portion of the motion, Planned Parenthood argued that, as a matter of law, it owed no duty to appellant in the placement of a birth control device in the mother prior to appellant's conception. As Planned Parenthood argued, "Texas does not recognize any duty of care owed to the unconceived." The trial court signed an order granting the motion for summary judgment in Planned Parenthood's favor on the specific ground that "no cause of action has been recognized in Texas for recovery for injuries resulting from conduct that occurred before [K.G.]'s conception."

Following summary judgment for Planned Parenthood, only the claims against Dr. Bharksuwan remained, which the trial court set for trial in February

² Teva Pharmaceutical USA, Inc., and Teva Women's Health, Inc., were alleged to be engaged in the design, manufacture, marketing, and sale of the ParaGard IUD at issue. The trial court dismissed the claims against them on summary judgment, and they are not at issue in this appeal.

2018. Shortly before trial was to commence, the plaintiffs and Dr. Bharksuwan reached a confidential settlement. All remaining claims were dismissed.

This appeal followed.

Standard of Review

When a party files both traditional and no-evidence motions for summary judgment, generally we first review the trial court's decision under the no-evidence standard. *See* Tex. R. Civ. P. 166a(i); *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). If we determine that the no-evidence summary judgment was properly granted, we do not reach arguments under the traditional motion for summary judgment. *See Merriman*, 407 S.W.3d at 248; *Ford Motor Co. v. Ridgeway*, 135 S.W.3d 598, 600 (Tex. 2004).

A trial court must grant a no-evidence motion for summary judgment if: (1) the moving party asserts that there is no evidence of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial; and (2) the respondent produces no summary-judgment evidence raising a genuine issue of material fact on each of the challenged elements. *See* Tex. R. Civ. P. 166a(i). No-evidence points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex. 2010). "When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Id.*

The challenged order states that the trial court dismissed appellant's claims on the specific ground that Texas does not recognize a claim for recovery of damages based on negligence occurring pre-conception. The court did not rule on the other grounds Planned Parenthood asserted in its summary-judgment motion. In *Cincinnati Life Insurance Co. v. Cates*, 927 S.W.2d 623 (Tex. 1996), the Supreme Court of Texas held that, in reviewing a summary judgment, appellate courts should consider all summary-judgment grounds on which the trial court ruled and the movant preserved error that are necessary for final disposition of the appeal. *Id.* at 626. Additionally, in the interest of judicial economy, appellate courts may consider other grounds that the movant preserved for appellate review but the trial court did not make a basis of its summary judgment. *See id.* Accordingly, if the specific ground on which the trial court granted summary judgment is not necessary to final disposition, we need not address that ground when, as here, we can affirm the judgment on alternative grounds the movant preserved for review and briefed in our court even though the trial court did not expressly rule on them. *See id.*; *Paulsen v. Yarrell*, 537 S.W.3d 224, 234-35 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *cf. also Ward v. Lamar Univ.*, 484 S.W.3d 440, 452 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Analysis

Appellant presents two issues. First, she argues that the trial court erred in granting summary judgment on the ground that Texas does not recognize a cause of action for injuries allegedly resulting from conduct occurring prior to a plaintiff's conception. More particularly, appellant contends that Planned Parenthood owed a legal duty to Kristin's unconceived children to exercise reasonable care in the placement of the IUD, including the duty to prevent "injury from a premature birth caused by improper placement of an intrauterine device."

Second, appellant argues that she presented more than a scintilla of evidence in response to Planned Parenthood’s no-evidence summary-judgment motion on the breach and proximate cause elements.

We conclude that appellant offered no evidence to support her allegation that any breach of duty by Planned Parenthood proximately caused the injuries alleged. Our holding renders it unnecessary to address the duty and breach issues.

A. Applicable Law

In a medical negligence case, the plaintiff must prove that (1) the defendant owed her a duty to act according to an applicable standard of care, (2) the defendant breached the applicable standard of care, (3) she suffered an injury, and (4) the defendant’s breach proximately caused her injury. *See Bustamante v. Ponte*, 529 S.W.3d 447, 456 (Tex. 2017). The causation standard in medical malpractice cases is one of “reasonable medical probability” that the plaintiff’s injuries were caused by the negligence of the defendant. *Gunn v. McCoy*, 554 S.W.3d 645, 658 (Tex. 2018); *Jelinek*, 328 S.W.3d at 532-33. This standard requires plaintiffs to prove that it is “more likely than not” that the ultimate harm or condition resulted from the negligence at issue. *Jelinek*, 328 S.W.3d at 533. Claimants must make the required showing through expert testimony. *See id.* at 533-34; *Stamatis v. Methodist Willowbrook Hosp.*, No. 14-15-00829-CV, 2016 WL 4404502, at *4 (Tex. App.—Houston [14th Dist.] Aug. 18, 2016, no pet.) (mem. op.); *Kimbrell v. Mem’l Hermann Hosp. Sys.*, 407 S.W.3d 871, 879 (Tex. App.—Houston [14th Dist.] 2013, no pet.). “It is not enough for an expert simply to opine that the defendant’s negligence caused the plaintiff’s injury.” *Jelinek*, 328 S.W.3d at 536. The expert must also explain, to a reasonable degree of medical probability, how and why the negligence caused the injury. *Id.* The causal connection between the defendant’s negligence and the injuries must be based on

more than conjecture, speculation, or possibility. *See Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703, 706 (Tex. 1970); *Morrell v. Finke*, 184 S.W.3d 257, 272 (Tex. App.—Fort Worth 2005, pet. denied). A defendant's act or omission need not be the sole cause of an injury, as long as it is a substantial factor in bringing about the injury. *Bustamante*, 529 S.W.3d at 457.

Moreover, “when the evidence demonstrates that ‘there are other *plausible* causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty.’” *Bustamante*, 529 S.W.3d at 456 (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997)). In *Jelinek*, the Supreme Court held that when several likely causes for an injury are present, an expert must explain why one cause and not the other was the proximate cause of the injury. *See Jelinek*, 328 S.W.3d at 529.

B. Application

In the no-evidence portion of its summary-judgment motion, Planned Parenthood asserted that no evidence established that any negligence on its part proximately caused appellant's alleged injuries. In her response, appellant asserted that her premature birth was proximately caused (1) by Planned Parenthood's negligence in causing the IUD to perforate Kristin's uterus during placement, and (2) by retention of the IUD during Kristin's pregnancy.³ In support, appellant cited to deposition excerpts of Dr. Wheeler and Kristin.

Because appellant argued that her premature birth had two contributing causes, we first identify the conduct relevant to our causation analysis. Dr. Wheeler did not opine that the IUD was retained in Kristin's uterus because of

³ Appellant also argued that retention of the IUD caused Kristin to suffer an infection. This is an alleged injury to Kristin and is not before us. The summary-judgment response did not assert or cite evidence that appellant suffered an infection.

Planned Parenthood's negligence. When asked if he had any criticisms of Planned Parenthood in referring Kristin to a higher level of care in April 2012 following an unsuccessful attempt to remove the IUD, Dr. Wheeler said he had none, and that Planned Parenthood's referral "was the right thing to do." Kristin did not return to Planned Parenthood but immediately saw her doctor, who did not detect the IUD's presence and did not remove it at that time. Dr. Wheeler believed that when Kristin saw Dr. Bharksuwan on April 18, 2012, the IUD was not "properly placed" but was either in the uterus wall or traversed the wall and protruded into the peritoneal cavity. Dr. Bharksuwan later discovered and removed the IUD after delivering appellant in July 2012. At the time of his deposition, Dr. Wheeler had not formed an opinion faulting Planned Parenthood for the fact that the IUD was not removed in April 2012. Appellant attached no supplemental opinions from Dr. Wheeler concluding that Planned Parenthood breached the applicable standard of care in April 2012.

Dr. Wheeler expressed an opinion, however, as to whether Planned Parenthood's conduct in December 2010 breached the standard of care. According to Dr. Wheeler, Planned Parenthood breached the standard of care by perforating Kristin's uterus when placing the IUD. Because Planned Parenthood's conduct in December 2010 is the only conduct about which Dr. Wheeler opined that Planned Parenthood breached the standard of care, we must determine whether appellant presented a scintilla of evidence that Planned Parenthood's alleged negligence in perforating Kristin's uterus while placing the IUD proximately caused appellant's premature birth.⁴

We have reviewed all the evidence appellant attached to her summary-

⁴ We do not presume that appellant has a valid cause of action against Planned Parenthood based on its alleged negligent act occurring before appellant was conceived.

judgment response and find no evidence that Planned Parenthood's breach of the standard of care in December 2010 proximately caused appellant's premature birth. In the deposition testimony attached to appellant's response, Dr. Wheeler does not opine that to a reasonable medical probability Planned Parenthood's December 2010 conduct caused appellant's premature birth. *See Gunn*, 554 S.W.3d at 658. Additionally, appellant attached the deposition of Dr. Bharksuwan, who opined that appellant's premature birth was caused by something else: Kristin's smoking during pregnancy. Dr. Wheeler acknowledged that Kristin smoked ten cigarettes a day during her pregnancy, but he did not make any effort to explain based on scientific principles why Kristin's smoking, as another plausible cause of appellant's premature birth, could be excluded with reasonable certainty. *See Bustamante*, 529 S.W.3d at 456; *Jelinek*, 328 S.W.3d at 536.

Appellant also attached Dr. Wheeler's expert report to her summary-judgment response. Planned Parenthood objected to the report on several grounds and the trial court apparently did not rule on the objections. Presuming we can consider the report, it too does not explain to a reasonable degree of medical probability how and why Planned Parenthood's negligence caused appellant's premature delivery. *See Jelinek*, 328 S.W.3d at 536. The report states merely that but for Planned Parenthood's negligence, "Mrs. Gibson would not have conceived" and "the resulting pregnancy would not have delivered prematurely." This is the extent of the report's reference to causation relating to Planned Parenthood's asserted breaches of the standard of care, but the statement is conclusory and constitutes no evidence. *See Windrum v. Kareh*, No. 17-0328, —S.W.3d—, 2019 WL 321925, at *3 (Tex. Jan. 25, 2019); *see also Bustamante*, 529 S.W.3d at 462. Bare or baseless opinions cannot support a judgment, even if admitted without objection. *See Windrum*, 2019 WL 321925, at *3; *Gunn*, 554 S.W.3d at 662; *City*

of *San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). In short, appellant presented no evidence that Planned Parenthood's negligence in December 2010 proximately caused appellant's premature birth.

Appellant also argued in her summary-judgment response that the IUD was less effective because it perforated Kristin's uterus and that Kristin became pregnant with appellant as a result. Appellant argues similarly on appeal, though it is not clear whether appellant is contending that Planned Parenthood's negligence in perforating Kristin's uterus with the IUD caused appellant injury by the fact of her conception. Conception is not an injury to the conceived. There exists no cause of action in Texas for wrongful life. *Nelson v. Krusen*, 678 S.W.2d 918, 925 (Tex. 1984). Even so, the summary-judgment evidence presented contains no expert testimony establishing that, to a reasonable medical probability, Planned Parenthood's alleged negligence in placing the IUD and perforating Kristin's uterus proximately caused appellant's conception.

We overrule appellant's second issue. Due to our disposition, we need not address her first issue.

Conclusion

We affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Wise, Jewell, and Hassan.

RULE 166a. SUMMARY JUDGMENT

- (a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.
- (b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
- (c) **Motion and Proceedings Thereon.** The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.
- (d) **Appendices, References and Other Use of Discovery Not Otherwise on File.** Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

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- (e) **Case Not Fully Adjudicated on Motion.** If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the hearing examine the pleadings and the evidence on file, interrogate counsel, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.
- (f) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.
- (g) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.
- (h) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.
- (i) **No-Evidence Motion.** After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

July 30, 2019



JUDGMENT

The Fourteenth Court of Appeals

KRISTEN TURLEY GIBSON AND BILLY GIBSON, AS NEXT FRIENDS OF
K.G., A MINOR, Appellants

NO. 14-18-00498-CV

V.

PLANNED PARENTHOOD GULF COAST, Appellee

This cause, an appeal from the order in favor of appellee, Planned Parenthood Gulf Coast, signed February 8, 2018 and made final by the judgment signed May 15, 2018, was heard on the appellate record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED**.

We order appellants, Kristen Turley Gibson and Billy Gibson, as next friends of K.G., a minor, jointly and severally, to pay all costs incurred in this appeal.

We further order this decision certified below for observance.

Judgment Rendered July 30, 2019.

Panel Consists of Justices Wise, Hassan, and Jewell. Opinion delivered by Justice Jewell.

APPENDIX EX. D