

**IN THE SUPREME COURT OF GEORGIA**

---

**WENDY NORMAN, et al.,**

**Plaintiff-Appellants,**

**v.**

**XYTEX CORPORATION, et al.,**

**Defendant-Appellees.**

---

**CASE NO. S19G1486**

---

**BRIEF OF AMICI CURIAE LAW PROFESSORS OF TORT LAW, FAMILY  
LAW, AND HEALTH LAW IN SUPPORT OF PLAINTIFF-APPELLANTS**

---

Timothy D. Lytton  
Ga. State Bar No. 643724  
Distinguished University Professor &  
Professor of Law  
Georgia State University College of Law  
85 Park PI NE  
Atlanta, GA 30303  
(404) 413-9225

*Additional Amici listed inside cover*

## IDENTITY AND INTEREST OF AMICI

Pursuant to Rule 23 of the Georgia Supreme Court Rules, the academic amici file this brief in support of Plaintiff-Appellants recommending this Court sets aside the Court of Appeals' affirmation of the dismissal of practically all Plaintiff-Appellants' claims.

The academic amici are law professors from Georgia law schools, as well as other law schools across the United States, who specialize in tort law, family law, and health law, including the law and policy of reproductive technologies. Amici's sole interest in this case is to ensure that the law pertaining to providers and buyers of reproductive cells is consistent with general principles of Georgia common law and serves the public interest. The following individuals are signatories to this brief:\*

Jamie R. Abrams  
Assistant Dean for Intellectual Life and Professor of Law  
University of Louisville Louis D. Brandeis School of Law

Susan Frelich Appleton  
Lemma Barkeloo & Phoebe Couzins Professor of Law  
Washington University School of Law

Anita Bernstein  
Anita and Stuart Subotnick Professor of Law  
Brooklyn Law School

Kathryn W. Bradley  
Professor of the Practice of Law  
Duke University School of Law

---

\* This amicus brief presents the views of the individual signers. Institutions are listed for identification purposes only. Amici state that no party, party's counsel, or any other person or entity—other than amici—authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief.

Erin Fuse Brown  
Associate Professor of Law  
Georgia State University College of Law

Steve Calandrillo  
Jeffrey & Susan Brotman Professor of Law  
University of Washington School of Law

Alexander M. Capron  
University Professor and Scott H. Bice Chair in Healthcare Law, Policy and Ethics  
University of Southern California

Martha Chamallas  
Robert J. Lynn Chair in Law  
Moritz College of Law, The Ohio State University

Marguerite Chapman  
Professor Emerita of Law  
The University of Tulsa College of Law

Jessica Gabel Cino  
Professor of Law  
Georgia State University College of Law

Andrea A. Curcio  
Professor of Law  
Georgia State University College of Law

Theresa Glennon  
Professor of Law  
Temple University Beasley School of Law

Cynthia Godsoe  
Professor of Law  
Brooklyn Law School

Michael D. Green  
Bess and Walter Williams Distinguished Chair  
Wake Forest University School of Law

Leslie Griffin  
William S. Boyd Professor of Law  
University of Nevada, Las Vegas, School of Law

Susan V. Hazeldean  
Associate Professor of Law  
Brooklyn Law School

Yaniv Heled  
Associate Professor of Law  
Georgia State University College of Law

Laura Hermer  
Professor of Law  
Mitchell Hamline School of Law

Michael B. Kelly  
Professor of Law  
University of San Diego School of Law

Deseriee Kennedy  
Associate Dean of Diversity & Inclusion and Professor of Law  
Touro Law Center

Mary Kay Kisthardt  
Tiera M. Farrow Faculty Scholar and Emerita Professor of Law  
UMKC School of Law

Timothy D. Lytton<sup>†</sup>  
Distinguished University Professor & Professor of Law  
Georgia State University College of Law

Jody Lyneé Madeira  
Professor of Law & Louis F. Niezer Faculty Fellow  
Indiana University Maurer School of Law

---

<sup>†</sup> Licensed in Georgia.

Margaret Middleton<sup>†</sup>  
Assistant Clinical Professor  
Georgia State University College of Law

Seema Mohapatra  
Associate Professor of Law and Dean's Fellow  
Indiana University Robert H. McKinney School of Law

Michelle Oberman  
Katharine and George Alexander Professor of Law  
Santa Clara University School of Law

Jessica L. Roberts  
Professor of Law and Leonard H. Childs Chair of Law  
University of Houston Law Center

Karen Rothenberg  
Marjorie Cook Professor Emeritus of Law  
University of Maryland Carey School of Law

Ana Santos Rutschman  
Assistant Professor  
Saint Louis University School of Law

William M. Sage  
Professor of Law and Medicine  
The University of Texas at Austin

Joseph Sanders  
A. A. White Professor of Law  
University of Houston Law Center

Nadia N. Sawicki  
Georgia Reithal Professor of Law  
Loyola University of Chicago School of Law

Sonia M. Suter  
John and Inge Stafford Faculty Research Professor  
George Washington University Law School

Lance Tibbles  
Professor of Law Emeritus  
Capital University Law School

Liza Vertinsky  
Associate Professor of Law  
Emory University School of Law

Ellen Waldman  
Visiting Professor  
Quinnipiac School of Law

Tanya M. Washington  
Professor of Law  
Georgia State University College of Law

Rhonda Wasserman  
Professor of Law and John E. Murray Faculty Scholar  
University of Pittsburgh School of Law

## TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICI.....	ii
TABLE OF CONTENTS .....	vii
INTRODUCTION.....	1
ARGUMENT .....	3
I.    The Sperm Bank’s Creation of the Risk of Harm Distinguishes this Case from <i>Abelson</i> .....	3
II.   None of the Plaintiff-Appellants’ Causes of Action Characterize the Birth or Life of their Child as an Injury .....	5
A. Compensation for the Extraordinary Costs of Raising a Child Injured by a Defendant’s Wrongdoing is Routine Under Georgia Tort Law .....	6
B. <i>Abelson</i> ’s Preclusion of Compensation for Wrongful Birth does not Foreclose Statutory Remedies for Commercial Misconduct .....	7
1. Unfair Business Practices .....	7
2. Breach of Warranty.....	8
III.  Failure to Reverse the Court of Appeal’s Erroneous Application of <i>Abelson</i> to this Case will Have Negative Consequences for Public Health and Child Welfare.....	9
CONCLUSION.....	12
CERTIFICATE OF SERVICE .....	15

## INTRODUCTION

This case presents a novel question in Georgia law: whether a commercial sperm bank is subject to any form of liability for marketing and selling sperm with readily knowable undisclosed genetic abnormalities which cause genetic abnormalities in a fetus. The lower courts have foreclosed all forms of potential liability by erroneously applying *Atlanta Obstetrics & Gynecology Group v. Abelson*, 260 Ga. 711 (Ga. 1990), to each of the causes of action asserted by Plaintiff-Appellants.

*Abelson* established that “a physician, who has provided postconception prenatal medical care to an expectant mother” is not subject to liability “for an impairment which the child unquestionably inherited from her parents and an impairment which was already in existence when the parents first came into contact with the physician.” *Id.* at 714-15. The plaintiffs in *Abelson* complained that the defendant physician deprived them of an opportunity to terminate the pregnancy that resulted in the birth of their child. This Court declined to recognize the life of a child as a compensable injury in Georgia common law, reasoning that “we are unwilling to say that life, even life with severe [impairments], may ever amount to a legal injury.” *Id.* at 715.

The rule barring recovery for wrongful birth articulated in *Abelson* does not apply to this case for two reasons.

First, *Abelson* involved an “impairment” inherited from the plaintiff parents that existed before the physician provided care. By contrast, this case involves “impairments” that were created by the defendant sperm bank’s deceptive marketing and sale of sperm with readily knowable undisclosed genetic abnormalities.<sup>1</sup> In *Abelson*, the defendant physician merely failed to provide information regarding a preexisting risk of harm that he did not create. In this case, the defendant sperm bank’s alleged wrongful conduct created the risk of harm. It cannot be said in this case, as it was in *Abelson*, that the defendant’s conduct did not cause the harm of which the plaintiffs complain.

Second, the parents in this case seek remedies that are not predicated on characterizing the birth or life of their child as an injury. Some of the Appellant-Plaintiffs’ causes of action seek recovery of extraordinary expenses necessary to care for their child. Georgia courts routinely provide compensation to parents for the extraordinary costs of caring for a child injured by a defendant’s wrongdoing. Applying *Abelson* to these causes of action would undermine well-established principles governing the measure of damages in personal injury claims. Appellant-Plaintiffs’ other causes of action seek statutory remedies unrelated to the costs of caring for their child. Applying *Abelson* to these causes of action would create an

---

<sup>1</sup> Consistent with the standard of review in this appeal, we will assume for the purposes of analysis that the facts alleged in the Plaintiff-Appellants’ complaint are true.

unwarranted exception to remedies established by the legislature for commercial misconduct.

## ARGUMENT

### I. THE SPERM BANK'S CREATION OF THE RISK OF HARM DISTINGUISHES THIS CASE FROM *ABELSON*

The plaintiffs' claim in *Abelson* was prompted by their physician's failure to inform them of prenatal tests to identify fetal abnormalities and the subsequent birth of a child with Down Syndrome. This Court rejected the *Abelson* plaintiffs' claim for wrongful birth in part because the genetic abnormality that caused the child's Down Syndrome "was already in existence when the parents first came into contact with the physician" and therefore "the defendants cannot be said to have caused the impairment...." *Abelson* at 714-15. *Abelson* involved a "fetus, to whose existence and to whose impaired condition the defendants in no way contributed." *Abelson* at 716.

The *Abelson* child's disability resulted from a genetic abnormality that was passed down to her from one of her parents' gametes, and the physician's negligent failure to provide information occurred after the formed embryo containing the genetic material was already developing in Mrs. Abelson's uterus. The court rejected the plaintiffs' claims because the defendant's negligence did not create the risk of

harm. The defendant merely failed to mitigate a risk of harm created by the plaintiffs' conduct in conceiving the child.

By contrast, in the present case, the genetic abnormality was not passed down to the child by either parent. Instead, the child's disabilities were caused by genetic abnormalities in sperm improperly marketed and sold by the sperm bank. The sperm bank's misrepresentations did not merely fail to inform the parents of a preexisting risk of harm. The sperm bank's misconduct *created* the risk of harm.

The distinction between inaction that fails to avoid a risk of harm not created by a defendant (often termed "nonfeasance") and active misconduct that creates a risk of harm (often termed "misfeasance") is central to defining the scope of a defendant's civil liability. This boundary is variously referred to as "legal cause," "proximate cause," or "the scope of liability." It is sometimes also analyzed as defining the extent of a defendant's legal duty. Restatement (Third) of Torts: Liability for Physical and Emotional Harm, ch. 6, Special Note on Proximate Cause, § 37, No Duty of Care with Respect to Risks Not Created by Actor; Dobbs' Law of Torts, §198 Introducing the Scope of Liability (Proximate Cause) Requirement. *Delson v. Georgia Dept. of Transp.*, 295 Ga. App. 84, 88(2) (2008) ("A Defendant may be held liable for an injury when the Defendant commits a negligent act that puts other forces in motion or operation resulting in the injury when such other forces are the natural and probable result of the act that the Defendant committed and that

reasonably should have been foreseen by Defendant.”) (paraphrasing Suggested Pattern Jury Instructions, Vol. I: Civil Cases, § 60-202).

The rule in *Abelson* rests on the general principle that a defendant is not normally liable for the failure to mitigate a risk of harm that the defendant did not create. However, the Plaintiff-Appellants’ various causes of action based on intentional wrongdoing, negligence, and strict liability all assert that the Defendant-Appellees’ conduct created the risk of harm.

## **II. NONE OF THE PLAINTIFF-APPELLANTS’ CAUSES OF ACTION CHARACTERIZE THE BIRTH OR LIFE OF THEIR CHILD AS AN INJURY**

The plaintiffs in *Abelson* claimed that they were deprived of an opportunity to abort the pregnancy that resulted in the birth of their child. This Court declined to recognize the life of a child as a compensable injury in Georgia common law, reasoning that “we are unwilling to say that life, even life with severe [impairments], may ever amount to a legal injury.” *Abelson* at 715. Additionally, the Court expressed concerns regarding the practical difficulties of isolating the costs associated with a child’s disability from the general costs of raising the child, offsetting the benefits conferred by having the child, and ensuring that payments for compensation would be used by parents to care for the child. *Abelson* at 716-717.

*A. Compensation for the Extraordinary Costs of Raising a Child Injured by a Defendant's Wrongdoing is Routine Under Georgia Tort Law*

In the present case, the plaintiffs have never characterized the birth or existence of their child as an injury. Rather, they claim that the defendant's wrongdoing caused specific, medically verified disabilities that require extraordinary expenditures necessary for the health and safety of their child and the welfare of their family. These expenditures include paying for psychotherapy, psychiatric care, and medical testing related to diagnosis and treatment of the child's particular disability. Such costs are all easily distinguishable from the normal costs of raising a child and readily verifiable. Moreover, Georgia courts do not typically offset the benefits of having a child against the costs of paying for treatment of an injury to the child caused by a defendant's wrongdoing. Nor do courts typically deny recovery based on speculation about how plaintiffs awarded money damages will spend those funds.

Georgia courts routinely award compensation to parents for wrongdoing that causes their children to be born with impairments. Such legal remedies do not imply that having a child is an injury. To the contrary, the payment of money damages to support parents in raising an impaired child affirms the value and dignity of the child.

*B. Abelson's Preclusion of Compensation for Wrongful Birth does not Foreclose Statutory Remedies for Commercial Misconduct*

1. Unfair Business Practices

Georgia's Fair Business Practices Act of 1975 makes it unlawful to represent goods or services as having characteristics and benefits that they lack or to represent that goods or services are of a particular standard or quality if they are of another. O.C.G.A. § 10-1-393(b)(5), (7). The Act provides that "[a]ny person who suffers injury or damages as a result of [a] violation ... may bring an action ... to recover his or her general and exemplary damages sustained as a consequence thereof." O.C.G.A. § 10-1-399(a). The Act further instructs courts to "award three times actual damages for an intentional violation ... irrespective of the amount in controversy" as well as reasonable attorneys' fees and expenses of litigation. O.C.G.A. § 10-1-399(c), (d). Finally, the Act makes clear that "remedies provided for [by the Act] shall be in addition to any other ... remedies ... in any other law." O.C.G.A. § 10-1-407.

The preclusion of recovery for costs associated with raising an unwanted child under *Abelson* does not apply to claims by the Plaintiff-Appellants' for recovery of losses associated with their purchase of sperm or the costs of medical procedures to become impregnated with the sperm. Under Georgia's Fair Business Practices Act, such damages—no matter how small—are recoverable and may be supplemented by exemplary damages, reasonable attorneys' fees, and expenses of litigation.

The Georgia Legislature admonished the courts against limiting such recovery though judicially-crafted exceptions by expressly stating that “[i]t is the intent of the General Assembly that ... this part shall be liberally construed and applied to promote its underlying purposes and policies.” O.C.G.A. § 10-1-391(a). The Court of Appeals application of *Abelson* to preclude the Plaintiff-Appellants’ unfair business practices claims contravenes the plain meaning of the statutory text, the intent of the legislature, and the express purpose of the Act.<sup>2</sup>

## 2. Breach of Warranty

The Plaintiff-Appellants have alleged breach of express and implied warranties under Georgia Law. With respect to such claims, Georgia law provides that “[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.” O.C.G.A. § 11-2-714(2). Georgia law further allows for recovery of a buyer’s incidental and consequential damages resulting from the seller’s breach of warranty, including “any other reasonable expense incident to the ... breach” and “injury to person or property proximately resulting from any breach of warranty.” O.C.G.A. § 11-2-715.

---

<sup>2</sup> When the Georgia Legislature wishes to immunize certain industries or businesses from liability, it does so explicitly and in a limited manner, as it did in the case of blood banks. *See* O.C.G.A. §§ 51-1-28 and 11-2-316(5).

The preclusion of recovery for costs associated with raising an unwanted child under *Abelson* does not apply to claims by the Plaintiff-Appellants' for recovery of the difference between the price they paid for the sperm they purchased and the value of the sperm or for incidental and consequential damages based on the defendant's breach of express and implied warranties. These losses do not evoke symbolic concerns about characterizing the birth of a child as an injury or raise practical concerns about assessing the measure of damages.

**III. FAILURE TO REVERSE THE COURT OF APPEAL'S ERRONEOUS APPLICATION OF *ABELSON* TO THIS CASE WILL HAVE NEGATIVE CONSEQUENCES FOR PUBLIC HEALTH AND CHILD WELFARE**

The citizens of Georgia have an interest in ensuring that sperm bank clients obtain accurate information about donors. Inaccurate information results in uninformed decisions to conceive, avoidable genetic abnormalities (and associated family costs), and may even lead to unwanted fetuses and abortion. Exposing sperm banks to liability will give them a powerful incentive to exercise reasonable care in vetting donors and providing accurate information to clients.

Sperm banks are uniquely situated to obtain and convey accurate information about the source and characteristics of reproductive cells. Since donors often wish to remain fully or partly anonymous, sperm banks have exclusive access to donor information. Moreover, sperm banks possess specialized understanding of genetics and reproductive science. Finally, sperm banks centralize the process of collecting

and analyzing donor information and, as repeat players, can do so more efficiently than individual donor recipients. Thus, exposing sperm banks to tort liability is the most effective and efficient way to reduce the risk of harms that result from inaccurate information regarding donor sperm. The failure to expose sperm banks to civil liability for intentional misconduct, negligence, and avoidable mistakes leaves a very large number of families vulnerable to devastating consequences.

Invoking *Abelson* to confer blanket immunity from liability is especially unfair in the context of sperm donation. Sperm banks are in the business of “vetting” sperm, and they actively encourage their clients to rely on their representations concerning their products. Xytex’s website, for example, promises prospective purchasers “donor sperm that is the industry’s most selective, most tested, and most successful.” It further warrants that “all donors must pass a rigorous screening and testing process” and “are evaluated for medical, personality, and behavioral characteristics” and that “Xytex evaluates donors for hereditary conditions through an extensive medical and family history questionnaire and genetic testing for the most common inherited genetic conditions.” The website assures clients that “donors are continually tested while in the program thorough physical exams, urinalysis and bloodwork, ensuring you receive the healthiest sperm” and that patients/customers will “sleep

well knowing [they]’ve chosen well.”<sup>3</sup> Virtually all other sperm bank websites make similar promises.<sup>4</sup>

Consumers of reproductive cells purchase the services of sperm banks to obtain reliable information about sperm donors. In a recent study of 1681 sperm buyers, when asked to identify the most important attributes of a sperm donor, 65% of all responses identified the donor’s health. More than 82% of all sperm buyers indicated that they would not have been prepared to buy the sperm of a donor with no medical record provided. Fifty percent of all sperm buyers reported that they had, in fact, rejected donors who otherwise met their criteria but had health issues in their background.<sup>5</sup>

Commercial sperm banks like Xytex have, traditionally, not disclosed to their consumers the identities of donors.<sup>6</sup> Consequently, consumers of sperm from anonymous donation must rely entirely on sperm banks for reliable information about the source and characteristics of reproductive cells.

---

<sup>3</sup> See Xytex, Quality Commitment, at <https://perma.cc/4BMV-PDBG> (last visited July 25, 2019); Xytex homepage, at <https://perma.cc/3TVX-WRE9> (last visited July 25, 2019).

<sup>4</sup> See e.g., Cryobank, Donor Selection, at <https://perma.cc/F495-VH3A> (last visited July 25, 2019); Cryos, Why Choose Cryos, at <https://perma.cc/C2XW-NF5F> (last visited July 25, 2019); Fairfax Cryobank, Quality Assurance, at <https://perma.cc/B3JR-6QJH> (last visited July 25, 2019).

<sup>5</sup> Neroli Sawyer et al., *A Survey of 1700 Women Who Formed Their Families Using Donor Spermatozoa*, REPROD. BIOMED. ONLINE (2013), <http://dx.doi.org/10.1016/j.rbmo.2013.07.009>.

<sup>6</sup> While this is the most common scenario, sperm banks have recently started offering donations from non-anonymous donors. Xytex’s website, for instance, offers donations from donors who agree to have their identity disclosed to children conceived using their sperm once they reach the age of 18. See Donor Options, <https://perma.cc/5GR8-UGPE>. Further, according to Xytex’s website, as of August 2018, Xytex no longer accepts donors who wish to remain fully anonymous. See *id.*

In erroneously applying *Abelson* to this case, the Court of Appeals ignored these realities, unjustifiably immunizing sperm banks from legal liability even in cases of egregious wrongdoing, such as intentional fraud. Sperm banks have exclusive control over information regarding their products and consumers rely completely on their representations. Unsuspecting parents should have a legal remedy for the severe and enduring harms that they suffer at the hands of Georgia sperm banks.

## CONCLUSION

The Court of Appeals erred in applying *Abelson* to each of the Plaintiff-Appellants' causes of action in this case. *Abelson* does not apply to the Plaintiff-Appellants' tort causes of action for two reasons. First, whereas the parents' claims in *Abelson* were predicated on the defendant-physician's failure to warn them of a preexisting risk of harm that he did not create, the parents' claims in this case are predicated on the defendant-sperm bank's misleading marketing and sales practices which created the risk of harm.

Second, whereas the parents in *Abelson* complained that the defendant-physician's negligence deprived them of an opportunity to abort the fetus, the parents in this case do not argue that they would have terminated the pregnancy that resulted in the birth of their child, nor do they claim that the opportunity to raise their child constitutes an injury. Rather, they claim that the defendant's wrongdoing caused

specific, medically verified disabilities that require extraordinary expenditures necessary for the health and safety of their child and the welfare of their family.

The Plaintiff-Appellants have not characterized the birth or life of their child as an injury, and neither should the courts. The Plaintiff-Appellants are seeking compensation for the wrong done to them in order to care for their child. Denying them recovery based on *Abelson* to make a symbolic gesture regarding preciousness of every child would produce a cruel irony.

Finally, the application of *Abelson* to preclude recovery for losses unrelated to the costs of raising the child under Georgia's Fair Trade Practices Act and Commercial Code would represent a radical expansion of the holding in that case and an unjustified encroachment on this state's broad statutory protections for consumers.

We therefore respectfully recommend that this Court reverse the Court of Appeals' application of *Abelson* to the Plaintiff-Appellants' claims and remand this case for trial.

Respectfully submitted February 26, 2020.

A handwritten signature in black ink, reading "Timothy D. Lytton". The signature is written in a cursive style with a horizontal line underneath it.

---

Timothy D. Lytton  
Ga. State Bar # 643724  
Georgia State University College of Law  
85 Park Pl NE,  
Atlanta, GA 30303  
(404) 413-9225

*For Amici Curiae Law Professors of Tort Law, Family Law, and Health Law*

**CERTIFICATE OF SERVICE**

I hereby certify that on this day, I served a true and correct copy of the within **BRIEF OF AMICI CURIAE LAW PROFESSORS OF TORT LAW, FAMILY LAW, AND HEALTH LAW IN SUPPORT OF PLAINTIFF-PETITIONERS'** by depositing the same with the United States Postal Service, properly addressed and with adequate postage thereon to the following addresses and via Statutory Electronic Service by sending the aforementioned to the following email addresses:

Thomas E. Lavender III  
FISHERBROYLES, LLP  
945 East Paces Ferry Road, Suite 2000  
Atlanta, Georgia 30326  
ted.lavender@fisherbroyles.com

David Newdorf  
NEWDORF LEGAL  
630 Thomas L. Berkley Way, Suite 103  
Oakland, CA 94612  
david@newdorf.com

James F. McDonough, III  
HENINGER GARRISON DAVIS  
3621 Vinings Slope, Suite 4320  
Atlanta, GA 30339  
jmcdonough@hgdllawfirm.com

Nancy Hersh  
HERSH & HERSH  
601 Van Ness Avenue, Suite 2080  
San Francisco, CA 94102-6396  
nhersh@hershlaw.com

W. Lewis Garrison, Jr.  
HENINGER GARRISON DAVIS  
2224 First Avenue North  
Birmingham, AL 35203  
wlgarrison@hgdllawfirm.com

Dated: February 26, 2020



---

Timothy D. Lytton