

STATE OF MAINE

**SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

LAW DOCKET NO. FED-16-014

KAYLA DOHERTY

PLAINTIFF/APPELLANT

v.

**MERCK & CO., INC. AND
UNITED STATES OF AMERICA**

DEFENDANTS/APPELLEES

and

**ATTORNEY GENERAL FOR THE STATE OF MAINE
INTERVENOR DEFENDANT/APPELLEE**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF MAINE**

REPLY BRIEF OF PLAINTIFF/APPELLANT

Laura H. White, Esq.
Bar No. 4025
Bergen & Parkinson, LLC
62 Portland Road, Suite 25
Kennebunk, Maine 04043
(207) 985-7000

Attorney for Plaintiff/Appellant,
Kayla Doherty

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. THE FACTS STATED IN APPELLANT KAYLA DOHERTY’S BRIEF ARE ENTIRELY CONSISTENT WITH THE ALLEGATIONS OF HER FIRST AMENDED COMPLAINT	1
II. APPELLEES MISCONSTRUE BASIC CANONS OF STATUTORY CONSTRUCTION.....	3
A. THE WBS APPLIES ONLY TO AN ACTION FOR PROFESSIONAL NEGLIGENCE.....	3
B. NEITHER THE CASE LAW NOR THE WBS ITSELF REQUIRES A PLAINTIFF TO PROVE INTENT TO OBTAIN PERMANENT STERILIZATION.....	5
C. STATUTES IN DEROGATION OF THE COMMON LAW ARE TO BE STRICTLY CONSTRUED	7
D. THE CONSTITUTIONALITY OF A STATUTE IS ALWAYS RIPE FOR CONSIDERATION WHEN CONSTRUING STATUTORY LANGUAGE	10
III. THE WBS IS NOT GENDER NEUTRAL AND THIS COURT HAS NEITHER CONSIDERED NOR DECIDED THAT ISSUE.....	10
IV. SUBSTANTIVE DUE PROCESS PROTECTS NOT JUST THE RIGHT TO HAVE AN ABORTION BUT THE RIGHT TO PRIVACY AND DECISIONAL AUTONOMY WITH REGARD TO FAMILY PLANNING.....	12
A. PLAINTIFF HAS A FUNDAMENTAL RIGHT TO MAKE PRIVATE DECISIONS ABOUT FAMILY PLANNING AND PROCREATION WITHOUT INTERFERENCE FROM THE STATE	12

B.	BECAUSE A FUNDAMENTAL RIGHT IS AT STAKE, STRICT SCRUTINY APPLIES.....	15
C.	STATE ACTION IS PRESENT WHENEVER STATE LEGISLATORS PASS A STATE LAW	17
V.	THE MAINE LEGISLATURE CANNOT REPUDIATE AN ENTIRE CAUSE OF ACTION	17
A.	PLAINTIFF MUST BE AFFORDED A SUBSTANTIVE REMEDY AT LAW	17
B.	THE RIGHT TO A JURY TRIAL IS GUARANTEED BECAUSE PLAINTIFF’S CLAIM EXISTED AT COMMON LAW.....	19
VI.	CONCLUSION: THIS COURT SHOULD FOLLOW MASSACHUSETTS AND CONNECTICUT LAW AND DECLINE TO LIMIT PLAINTIFF’S REMEDY FOR WRONGFUL PREGNANCY.....	20
	CERTIFICATE OF SERVICE.....	21

TABLE OF AUTHORITIES

Cases

<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	2
<i>Batchelder v. Realty Resources Hospitality, LLC</i> , 2007 ME 17, 914 A.2d 1116	8
<i>Beaulieu v. The Aube Corp.</i> , 2002 ME 79, 796 A.2d 683.....	8
<i>Brown v. Augusta School Dept.</i> , 963 F. Supp. 39 (D. Me. 1997)	4
<i>Burns v. Hanson</i> , 734 A.2d 964 (Conn. 1999).....	7, 20
<i>Carey v. Population Services International</i> , 431 U.S. 678 (1977)	14
<i>Choroszy v. Tso</i> , 647 A.2d 803 (Me. 1994)	18
<i>Cook v. Gates</i> , 528 F.3d 42 (1st Cir. 2008).....	16
<i>Davis v. RC & Sons Paving, Inc.</i> , 2011 ME 88, 26 A.3d 787	7
<i>Faucher v. City of Auburn</i> , 465 A.2d 1120 (Me. 1983).....	4
<i>Godbout v. WLB Holding, Inc.</i> , 2010 ME 46, 997 A.2d 92.....	18
<i>Irish v. Gimbel</i> , 1997 ME 50, 691 A.2d 664.....	18, 19
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	14, 15
<i>MacDonald v. MacDonald</i> , 412 A.2d 71 (Me. 1980).....	9
<i>Macomber v. Dillman</i> , 505 A.2d 810 (Me. 1986).....	8, 9, 19, 20
<i>Maietta Constr., Inc. v. Wainwright</i> , 2004 ME 53, 847 A.2d 1169....	8
<i>Maine Med. Ctr. v. Cote</i> , 577 A.2d 1173 (Me. 1990)	18

<i>Massachusetts v. U.S. Dept. of Health and Human Servs.</i> , 682 F.3d 1 (1st Cir. 2012)	12
<i>Musk v. Nelson</i> , 647 A.2d 1198 (Me. 1994)	4, 11, 18
<i>Nader v. Maine Democratic Party</i> , 2012 ME 57, 41 A.3d 551	10
<i>Northup v. Polling</i> , 2000 ME 199, 761 A.2d 872	17
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015)	14
<i>Personnel Adm’r of Massachusetts v. Feeney</i> , 442 U.S. 256 (1979).....	11
<i>Peters v. Saft</i> , 597 A.2d 50 (Me. 1991).....	9, 18
<i>State v. Bilynsky</i> , 2008 ME 133, 942 A.2d 1244.....	18
<i>State v. Mosher</i> , 2012 ME 133, 58 A.3d 1070	12
<i>Szekeres v. Robinson</i> , 715 P.2d 1076 (Nev. 1986).....	13
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000).....	15
<i>Washington v. Davis</i> , 426 U.S. 229 (1976).....	11
<i>Ziegler v. Amer. Maize-Prods. Co.</i> , 658 A.2d 219 (Me. 1995)	8
 <i>Statutes and Legislative Documents</i>	
24 M.R.S.A § 2931	3
Me. Const. art. I, § 19.....	18
 <i>Court Rules</i>	
F.R. Civ. P. 12(b)(6).....	2

I. THE FACTS STATED IN APPELLANT KAYLA DOHERTY'S BRIEF ARE ENTIRELY CONSISTENT WITH THE ALLEGATIONS OF HER FIRST AMENDED COMPLAINT

Before addressing the arguments raised in response to the Brief of Appellant, it is important to recall the federal court's statement of facts submitted along with the certification order, which provided that:

Primarily, the defendants challenged the plaintiff's ability to characterize her procedure as "sterilization"—the term used in the Wrongful Birth statute and in Macomber. But I denied the defendant's motions to strike and to dismiss, and I conclude as a matter of federal law that the following factual allegations are properly pleaded. The plaintiff's factual allegations are therefore taken as true for the purpose of testing the defendants' argument that Maine law allows no recovery to the plaintiff even if her allegations are proven.

App. at 14.

Disregarding the above, Appellee Merck & Co., Inc.'s Brief ("Brief of Merck") incorrectly frames the factual issues before this Court as though the case involved a denial of summary judgment. Merck argues that Plaintiff has attempted to "inject pages of factual allegations not properly before the Law Court."¹ This argument makes no sense because Plaintiff's First Amended Complaint is part of the record on appeal, pursuant to the Law Court's Order dated January 13, 2016,² as well as the Order dated February 18, 2016: [T]he federal court has made clear that the procedural posture of the matter requires an examination only of the allegations made in Doherty's complaint" and "the amended complaint supersedes

¹Brief of Merck at p. 7. Ironically, as discussed in n.5 below, it is Merck, not Plaintiff, that disregarded this Court's Order concerning the record on appeal.

² The Law Court's January 13, 2016 Order stated that "the record on this certified question shall comprise . . . Doherty's first amended complaint."

Doherty's original complaint." The allegations with which Appellees disagree include the following:

1. This is a wrongful pregnancy action for personal injuries sustained by Plaintiff . . . as a result of a type of sterilization procedure negligently performed by her physician. (App. at 19)
4. The purportedly reliable, long term protection against pregnancy afforded by Implanon and/or Nexplanon is functionally the same as sterilization. (App. at 20).
6. For decades all over the world, physicians have performed either forced, coerced, or agreed upon sterilization of women using the above drugs for reasons such as population control, reduction in poverty, attainment of welfare benefits, conditions of probation, or for women who are incarcerated. (App. at 20).
7. As such, for as long as implantable contraceptives have existed, public policy the world over has treated them as tantamount to sterilization methods such as tubal ligation. (App. at 20).

Merck apparently misapprehends the standard governing a F.R. Civ. P. 12(b)(6) motion to dismiss,³ arguing a factual dispute generated by "Plaintiff's attempts to plead" "unsupported" and "mischaracterized" facts,⁴ but Plaintiff need not introduce factual support for her allegations at this time. Plaintiff has not "attempted" to plead these facts; they have been accepted by the federal court as properly pleaded under the *Iqbal* standard. App. at 14. Therefore, the only information this Court can possibly consider at this stage⁵ comes from the First Amended Complaint, upon which the federal court's statement of facts is based.

³ See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").

⁴ Brief of Merck at p. 7.

⁵ Even though the Law Court expressly rejected Merck's request to supplement the record on certification in its February 18, 2016 Order, the Brief of Merck nonetheless quotes to the federal court's transcript of proceedings. Why Merck would disregard this Court's explicit Order by citing the transcript is unclear, since the quote from oral argument simply references *Iqbal*, and Judge Hornby clearly found that Plaintiff's First Amended Complaint meets that standard. Brief of Merck at p. 7; App. at 14.

Similarly, the United States of America (“USA”) argues that Plaintiff has “taken pains to inappropriately characterize the procedure at issue here as being ‘sterilization,’ and included other surplusage previously removed by the federal court.”⁶ It bears repeating that the allegations of Ms. Doherty’s First Amended Complaint are neither “surplusage” nor inappropriate characterizations—they are the operative set of facts that the Law Court must accept as true for purposes of this certification.

II. APPELLEES MISCONSTRUE BASIC CANONS OF STATUTORY CONSTRUCTION

A. THE WBS APPLIES ONLY TO AN ACTION FOR PROFESSIONAL NEGLIGENCE

Merck boldly asserts that the WBS unambiguously bars “*all*” claims based on the birth of a normal, healthy child. However, the word “all” does not appear anywhere in the statutory language.⁷ Instead, the plain text of the WBS references wrongful medical acts, professional negligence, and medical procedures.⁸ None of these things relates to a products liability claim against a drug company.

Merck has it backwards, arguing that the Legislature did not create an “exception” in the MHSA for product liability claims.⁹ There is no need to create

⁶ Brief of Appellee USA (“Brief of USA”) at p. 1.

⁷ Brief of Merck at p. 1.

⁸ 24 M.R.S. § 2931.

⁹ Brief of Merck at p. 12.

an exception when it is so crystal clear that a claim against a drug manufacturer is not an “action for professional negligence.”¹⁰

In one of the only cases construing the WBS, *Musk v. Nelson*, this Court stated that all sections of the MHSA enacted in 1986 “must be read together.” 647 A.2d 1198, 1201 (Me. 1994). This basic principle of statutory construction applies to all comprehensive statutory schemes, not just the MHSA.¹¹ Furthermore, the WBS did not create a new cause of action, but merely sought to limit the existing cause of action for professional negligence: “Even if [the WBS] were a basis for strict liability, it would still fall within the definition of an action for professional negligence under the Act.” *Id.* Given the above language, Appellees’ arguments must fail.

Not only does *Musk* stand for the proposition that all provisions of a statutory scheme must be read together, but the plaintiff in that case tried to make the very same arguments Merck attempts here, in order to avoid the 3-year statute of limitations in a failed sterilization case. The Law Court stated as follows:

Musk contends that her action based on a failed sterilization is not an action for professional negligence under the Act, because it is an action for damages allowed by the [WBS]. Therefore, says Musk, her action is not subject to the three-year statute of limitations applicable to actions for professional negligence. This argument is not persuasive.

Musk v. Nelson, 647 A.2d 1198, 1200 (Me. 1994) (internal citation omitted).

¹⁰ See *Brown v. Augusta School Dept.*, 963 F. Supp. 39, 40 (D. Me. 1997).

¹¹ See, e.g., *Faucher v. City of Auburn*, 465 A.2d 1120, 1124 (Me. 1983) (noting that to determine legislative intent as to a particular section of a comprehensive statute, courts should consider statutory scheme in its entirety.”).

Finally, Merck argues that the holding of *Macomber v. Dillman* applies “squarely”¹² to products liability claim, but this is the exact opposite of what the Court said in *Macomber*: “Our ruling today is limited to the facts of this case,” none of which involved strict products liability. 505 A.2d at 813.

B. NEITHER THE CASE LAW NOR THE WBS ITSELF REQUIRES A PLAINTIFF TO PROVE INTENT TO OBTAIN PERMANENT STERILIZATION

Both Appellees go to great lengths to read an “intent” requirement into the holding of *Macomber v. Dillman* as well as the WBS. However, no requirement to prove intent actually exists.

The USA contends that the WBS codified *Macomber v. Dillman*, “which solely concerned failed sterilization for the purpose of *permanent* sterilization.”¹³ The USA emphatically argues that Ms. Doherty did not seek *permanent* sterilization. If *Macomber* pertained “solely” to *permanent* sterilization, and if Appellees are correct that permanent sterilization was not intended here, then the only logical conclusion is that WBS has absolutely no bearing on this case whatsoever.

The WBS itself makes no attempt to define “sterilization”; nor does the Legislative history shed light on what was intended. The USA looks to a 34-year-old definition found in the “Due Process in Sterilization Act of 1982” to argue that

¹² Brief of Merck at p. 2.

¹³ Brief of USA at p. 8 (emphasis added).

the WBS applies only to people intending to render themselves “permanently incapable of procreation.”¹⁴ Of course, given nearly 35 years of medical advancement in the field of contraception, it is clear that tubal ligation itself is a reversible—not a *permanent*—procedure. The USA’s entire argument in this regard is rendered meaningless by the fact that implantable devices like Implanon have a better chance at achieving infertility than tubal ligation, which has a higher failure rate than Implanon.¹⁵

Contrary to these arguments, the WBS did not add a scienter requirement to an ordinary case of medical negligence and/or products liability. This is not a criminal prosecution. Ms. Doherty’s “intent” in seeking to induce infertility is completely immaterial. She contracted with a physician and a drug company for long-term infertility via a contraceptive that is tantamount to sterilization. As such, Plaintiff is no different than myriad other tort victims who have been harmed by defective drugs, regardless of what they “intended” when they took the drug.

Similarly, when a medical provider breaches the standard of care by failing to perform a procedure with the ordinary degree of skill and care expected of her profession, no element of the claim concerns the aggrieved patient’s “intent” in having the procedure in the first place. To make out a *prima facie* case of negligence against either Appellee, Plaintiff must prove only four elements: “duty,

¹⁴ Brief of USA at p. 16.

¹⁵ Brief of Appellant at p. 26-27.

breach, causation, and damages”—not intent. *Davis v. R C & Sons Paving, Inc.*, 2011 ME 88, ¶ 10, 26 A.3d 787, 790.

The Connecticut Supreme Court has considered but rejected similar arguments regarding intent in a wrongful pregnancy case. In *Burns v. Hanson*, the Court saw no good reason to distinguish between negligent advice regarding sterility on the one hand, and a negligently performed sterilization procedure on the other. 734 A.2d 964, 968 (Conn. 1999). The Court therefore rejected the defendant’s arguments that the “reasons for wanting to prevent pregnancy” had any bearing on the damages available to the plaintiff. *Id.* at 969.

The salient point is not why Kayla Doherty sought out Implanon, but merely that she bargained for this drug, underwent this medical procedure, paid for both, and did not get the benefit of her bargain due to the carelessness of both Appellees. The issue of intent in this case is a post-litigation construct contrived by Appellees, not the Maine Legislature or the Law Court in interpreting the WBS.

C. STATUTES IN DEROGATION OF THE COMMON LAW ARE TO BE STRICTLY CONSTRUED

This Court has “long embraced the well-established rule of statutory construction” that legislation in derogation of the common law must be strictly

construed.¹⁶ In other words, the common law is “not to be changed by doubtful implication.”¹⁷

Appellees’ reliance on “other sources”¹⁸ defining sterilization to prove what the Legislature intended in codifying the WBS leads to precisely the kind of “doubtful implications” that are insufficient when a state statute purports to abrogate the common law. “Legislatures are deemed to draft legislation against the backdrop of the common law,” not “displace it without addressing the issue.”¹⁹

History reveals that the WBS’s effect of removing an entire common law cause of action was not the result of careful consideration by the Legislature, but instead an afterthought addition to the MHSA designed to codify the Law Court’s decision in *Macomber v. Dillman*.²⁰ Indeed, neither Appellees nor the State of Maine²¹ seem to grasp the concept that a wrongful pregnancy action existed at common law, as the Court plainly stated in *Macomber*.²² Wrongful pregnancy was not a new cause of action because: “Since the early days of the common law a

¹⁶ *Beaulieu v. The Aube Corp.*, 2002 ME 79, ¶ 19, 796 A.2d 683, 689; *Batchelder v. Realty Resources Hospitality, LLC*, 2007 ME 17, ¶ 23, 914 A.2d 1116, 1124.

¹⁷ *Id.*

¹⁸ Brief of Merck at p. 20.

¹⁹ *Maietta Constr., Inc. v. Wainwright*, 2004 ME 53, ¶ 10, 847 A.2d 1169, 1170. See also *Ziegler v. Amer. Maize-Prods. Co.*, 658 A.2d 219, 223 (Me. 1995) (“A legislative pronouncement . . . alters common law only to the extent that the Legislature has made that purpose clear.”).

²⁰ Brief of Appellant at p. 17-18.

²¹ See Brief of Intervenor Attorney General of the State of Maine (“Brief of State”) at p. 12.

²² “Contrary to the defendants’ contention, the plaintiffs’ action [for wrongful pregnancy] does not represent a new cause of action in the State of Maine.” 505 A.2d 810, 812 (Me. 1986).

cause of action in tort has been recognized to exist when the negligence of one person is the proximate cause of damage to another person.”²³

More importantly, abrogation of an entire cause of action was not central to the holding in *Macomber*, because the Law Court limited its holding “to the facts of this case,” and allowed the plaintiff’s claim to proceed instead of eliminating her cause of action. In light of the above, Appellees are misguided in casually arguing that the WBS leaves Plaintiff “no cause of action in the first instance for a court to decide,”²⁴ or that the Legislature “specifically proscribed” Ms. Doherty’s claim as “irremediable.”²⁵

The State is similarly misguided in relying on *Peters v. Saft* to establish that the Legislature has free reign to abrogate the common law and completely eliminate a cause of action.²⁶ *Peters* dealt with a statutory cap on damages, not utter elimination of a cause of action. 597 A.2d 50, 53-54 (Me. 1991). Although the Law Court stated that a plaintiff does not have the right to an “unlimited remedy,” this case still stands for the proposition that the Open Courts provision of the Maine Constitution must afford “a speedy remedy for every wrong recognized by law as remediable in a court.” *Id.* at 54.

²³ *Id.* See also *MacDonald v. MacDonald*, 412 A.2d 71, 75 (Me. 1980) (“We therefore decide that the general rule of tort law that one person injured by the tortious conduct of another person may maintain a civil action to recover damages from the tortfeasor is not rendered inapplicable solely because the injured person and the tortfeasor were husband and wife when the tort was committed.”).

²⁴ Brief of USA at p. 32.

²⁵ Brief of USA at p. 30.

²⁶ Brief of State at p. 11.

D. THE CONSTITUTIONALITY OF A STATUTE IS ALWAYS RIPE FOR CONSIDERATION WHEN CONSTRUING STATUTORY LANGUAGE

Merck contends that the federal court “did not certify constitutional questions to this Court,” and therefore “constitutional issues” should not be evaluated on certification.²⁷ On the contrary, however, the federal court’s statement of facts makes direct reference to Maine’s Open Courts provision. App. at 11. Merck’s argument furthermore begs the question: If Constitutional questions were not at play here, why would the federal court have granted the State of Maine intervenor status to argue the constitutionality of this state law?

Whenever “constitutional rights are implicated in the application of a statute,” this Court will construe the statute “to preserve its constitutionality, or to avoid an unconstitutional application of the statute, if at all possible.” *Nader v. Maine Democratic Party*, 2012 ME 57, ¶ 19, 41 A.3d 551, 558. Accordingly, the construction of the WBS, and whether it can be read as constitutional, are matters unmistakably ripe for decision by this Court based on the Certified Questions.

III. THE WBS IS NOT GENDER NEUTRAL AND THIS COURT HAS NEITHER CONSIDERED NOR DECIDED THAT ISSUE

Aside from the gender neutral statute of limitations under the MHSA, this Court has never considered whether the WBS is “gender neutral” and

²⁷ Brief of Merck at p. 9-10.

“constitutional under the rational basis test.”²⁸ *Musk v. Nelson* was a wrongful pregnancy case that challenged only the statute of limitations under the MHSA, not the WBS’s applicability to the plaintiff’s cause of action in general.²⁹ The plaintiff argued that “if the Court interprets the statute of limitations to bar her claim, she will be unconstitutionally denied a remedy for her injury.” *Id.* The Court rejected this argument because the 3-year statute of limitations for medical negligence applies to a claimant under the MHSA without regard to gender. This is a different question than whether the remedial limitation of the WBS has a disparate impact on women.

The WBS’s declaration of “public policy” is undeniably gender specific, not gender neutral. Under § 2931(1), the “birth” of a healthy child is not considered harm. Of course, it is a scientific impossibility for men to be equally impacted by this “public policy,” because men cannot give birth.

In bold face and italics, Merck misrepresents the law applicable to statutes having a disparate impact on gender: “A *disparate impact* on a suspect class *never* invokes heightened scrutiny under equal protection analysis.”³⁰ Again, Merck is just plain wrong on the law³¹: “Gender-based classifications invoke intermediate

²⁸ Brief of Merck at p. 40.

²⁹ 647 A.2d 1198, 1202 (Me. 1994).

³⁰ Brief of Merck at p. 40.

³¹ *Washington v. Davis* had nothing to do with gender, and as such it has no bearing on this case. See *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 260 (1979) (“The *Davis* case held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially

scrutiny and must be substantially related to achieving an important governmental objective. Both are far more demanding than rational basis review as conventionally applied in routine matters of commercial, tax and like regulation.” *Mass. v. U.S. Dept. of Health and Human Services*, 682 F.3d 1, 9 (1st Cir. 2012).

Merck also ignores *State v. Mosher*, which involved a gender neutral Maine statute that nonetheless had a disparate impact on men.³² This Court clearly stated that: “Gender-based classifications are subject to intermediate equal protection scrutiny.”³³ Even if the WBS were gender neutral on its face, Appellees have presented no argument for why this gender-based classification holds up under intermediate equal protection scrutiny.

Ironically, the only important governmental objective Merck could possibly cite would be the underlying purpose of the MHSA itself, which is to curtail rising healthcare costs—a governmental interest that has nothing to do with Merck.

IV. SUBSTANTIVE DUE PROCESS PROTECTS NOT JUST THE RIGHT TO HAVE AN ABORTION BUT THE RIGHT TO PRIVACY AND DECISIONAL AUTONOMY WITH REGARD TO FAMILY PLANNING

A. PLAINTIFF HAS A FUNDAMENTAL RIGHT TO MAKE PRIVATE DECISIONS ABOUT FAMILY PLANNING WITHOUT INTERFERENCE FROM THE STATE

disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race.”).

³² 2012 ME 133, ¶ 2, 58 A.3d 1070, 1072.

³³ *Id.* at ¶ 11.

Under the Equal Protection Clause, Merck claims that Plaintiff has failed “to cite even a single case where a court applied heightened scrutiny to a wrongful birth statute.”³⁴ However, most jurisdictions need not analyze the constitutionality of similar statutes because those statutes still afford the plaintiff a remedy in one form or another. For instance, even in *Szekeres v. Robinson*, a case upon which Merck relies, the Nevada Supreme Court stated that:

The denial of a tort remedy [for wrongful pregnancy] does not mean that there is no remedy in such a case. . . . If a physician or someone else is found to have contracted to prevent a pregnancy from occurring, certainly it was within the contemplation of the contracting parties that failure to carry out the process in the manner promised would result in an award.

Szekeres v. Robinson, 715 P.2d 1076, 1079 (Nev. 1986).

For its part, the USA glosses over the history of reproductive rights jurisprudence cited by Appellant,³⁵ and spins the U.S. Supreme Court precedent in this area as though it stands for only the narrow premise that women are allowed to seek contraceptives and abortions. This simplified, myopic view of the case law is incorrect. Kayla Doherty is not asserting a fundamental right to be compensated. Instead, she asks this Court to strike down the WBS’s discriminatory “public policy” because it infringes on a woman’s right to privacy and personal liberty. Kayla Doherty has a fundamental right to make decisions regarding “whether or

³⁴ Brief of Merck at p. 39.

³⁵ See Brief of USA at p. 25.

not to beget or bear a child”—a decision that the U.S. Supreme Court recognizes as “among the most private and sensitive.”³⁶

The Maine Legislature has attempted to remove this decisional autonomy by declaring that no harm flows from the birth of a normal, healthy child. The WBS’s public policy directly contravenes multiple statements made by the U.S. Supreme Court,³⁷ with regard to fundamental liberty interests that go beyond simply the abortion decision. For instance, in *Obergefell v. Hodges*, the U.S. Supreme Court explained that these fundamental liberties:

[E]xtend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.³⁸

Substantive due process is broader than Appellees and the State contend, and it includes freedom from having “personal identity and beliefs” dictated by the State. In *Lawrence v. Texas*, the U.S. Supreme Court made it clear that substantive due process “protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition, the State is not omnipresent in the home.” 539 U.S. 558, 562 (2003). Similarly, the State should not intrude into a woman’s life by deciding for her whether motherhood is considered a benefit or a detriment. Presumably most women who seek long-term infertility do not want to

³⁶ *Carey v. Population Services International*, 431 U.S. 678, 685 (1977).

³⁷ See Brief of Appellant at p. 39.

³⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

be mothers at the time they contract for a means to achieve that infertility. It is not for the state to dictate whether their decision deserves respect under the law. *See id.* at 583 (“Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause.”).

In fact, a woman’s right to determine for herself the “care, custody and control” of her offspring is “perhaps the oldest of the fundamental liberty interests recognized” by the Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Ultimately, the WBS is a veiled attempt to remove the longstanding fundamental liberty interests set forth above, via an opinion-driven predetermination that all women are blessed with rather than harmed by motherhood, regardless of their circumstances. For these reasons, the WBS must be struck down consistent with the U.S. Supreme Court’s reproductive rights jurisprudence.

B. BECAUSE A FUNDAMENTAL RIGHT IS AT STAKE, STRICT SCRUTINY APPLIES

Appellees skip over any analysis of strict scrutiny by making the conclusory assertion that no fundamental rights are at play. Therefore, the briefs focus on rational basis review. However, strict scrutiny is the appropriate analysis because

a “protected liberty interest is implicated”³⁹ by the WBS. Therefore, rational basis review is “not the proper standard.”⁴⁰

Even if rational basis review were the proper standard, it would still fail. It is never rational for the government to deprive a citizen of due process and foreclose all remedy for a young aggrieved mother like Kayla Doherty, simply to protect negligent medical providers, liability insurers, and drug companies.

A law may fail even rational basis review if “the state’s objectives are themselves invalid.” *Id.* Limiting medical malpractice premiums may be a legitimate goal of the Legislature, but not at the expense of young women earning low wages who are suddenly forced into dire economic straits and public assistance by unintended motherhood that they specifically contracted to avoid.

The purportedly “legitimate state interests”⁴¹ here are not rational, because unintended motherhood forces women like Plaintiff into welfare. Those public assistance benefits are ultimately paid for by the citizens of Maine. Prioritization of the financial interests of drug companies and medical insurers at the expense of Maine citizens would be absurd.

³⁹ *Cook v. Gates*, 528 F.3d 42, 55 (1st Cir. 2008).

⁴⁰ *Id.*

⁴¹ Brief of State at p. 6-7.

C. STATE ACTION IS PRESENT WHENEVER STATE LEGISLATORS PASS A STATE LAW

It defies logic that Appellees can argue the absence of state action in this case. The Maine Legislature has already decided for all women that having a baby is a blessing via the pronouncement of “public policy” in the first subsection of the WBS. It is difficult to conceive of a closer synonym to “state action” than “public policy” determined by a state Legislature.

Without question, this public policy was enacted by state actors—i.e., state officials—and therefore there is no straight-faced dispute that state action exists here. *See Northup v. Polling*, 2000 ME 199, ¶ 12, 761 A.2d 872, 876 (noting that state action requires “overt, significant assistance of state officials”).

V. THE MAINE LEGISLATURE CANNOT REPUDIATE AN ENTIRE CAUSE OF ACTION

A. PLAINTIFF MUST BE AFFORDED A SUBSTANTIVE REMEDY AT LAW

Again failing the straight-faced test, Merck claims the WBS does not violate the Open Courts provision of the Maine Constitution because Ms. Doherty has “access to” the courts, regardless of whether she has a legal remedy.⁴² Despite this illogical argument, the basic fact from which Appellees cannot escape is that every citizen of Maine is guaranteed that they “shall have remedy by due course of

⁴² Brief of Merck at p. 28.

law.”⁴³ Merck argues that “no court has ever stricken or declined to apply a Maine statute based on the open courts provision,”⁴⁴ but this is only because the Legislature typically knows better than to enact a law foreclosing all substantive right to a civil remedy. The right to bring a cause of action is the right to seek a remedy, not have a case dismissed outright.

The difference between a substantive and a procedural bar to recovery is critical here, because it distinguishes this case entirely from *Maine Medical Center v. Cote*, *Choroszy v. Tso*, *Peters v. Saft*, *Musk v. Nelson*, *Irish v. Gimbel*, *Godbout v. WLB Holding, Inc.*, *State v. Bilynsky*, and myriad others dealing with procedural limitations on actions.⁴⁵ The USA claims that: “Appellant’s characterization of this result as imposing a “substantive, absolute bar changes nothing.”⁴⁶ In so contending, the USA ignores the critical distinguishing factor between this case and all of those cited above. The relevant question is whether the WBS deprives Ms. Doherty of “meaningful access to judicial process.”⁴⁷ In *Choroszy*, a three year statute of limitations did not unreasonably deny the plaintiff access to the judicial process. Here, the WBS’s substantive bar to recovery as interpreted by Appellees deprives Plaintiff of any meaningful access to court.

⁴³ Art. I, § 19 of the Maine Constitution; Brief of Merck at p. 27.

⁴⁴ Brief of Merck at p. 27.

⁴⁵ See Brief of Merck at p. 27-28 and Brief of USA at p. 30.

⁴⁶ Brief of USA at p. 30.

⁴⁷ *Choroszy v. Tso*, 647 A.2d 803, 806 (Me. 1994).

B. THE RIGHT TO A JURY TRIAL IS GUARANTEED BECAUSE PLAINTIFF’S CLAIM EXISTED AT COMMON LAW

The State argues that Ms. Doherty has failed to cite any “authority for her assertion that the recovery for the tort of wrongful conception for the birth of [a] healthy child existed in 1820.”⁴⁸ This argument is incorrect, because *Macomber v. Dillman* establishes that Ms. Doherty would have had a remedy available to her at common law.⁴⁹ More importantly, however, the State misconstrues the burden of proof when a litigant is robbed of all remedy for a civil action. The State and Appellees, not the Plaintiff, must affirmatively prove Ms. Doherty would not have been entitled to a jury trial in 1820. In *Irish v. Gimbel*, this Court made it clear that: “A party has a right to a jury trial in all civil actions unless it is affirmatively shown that jury trials were unavailable in such a case in 1820.”⁵⁰ Appellees’ failure to come forward with such affirmative proof necessarily compels the conclusion that their reading of the WBS violates Plaintiff’s constitutional right to a jury trial.

Appellees’ attempts to muddy the waters do not change this fact. Merck claims that the WBS places no limitation on the right to a jury trial, while at the same time asking the federal court to dismiss Ms. Doherty’s claims entirely because the WBS intended to “categorically” prohibit her claim.⁵¹ Appellees claim that the WBS does not “limit access to the court process,” it “merely defines what

⁴⁸ Brief of State at p. 12.

⁴⁹ See Notes 22 and 23, above.

⁵⁰ 1997 ME 50, ¶ 7, 691 A.2d 664, 669 (emphasis added).

⁵¹ Brief of Merck at p. 5.

claims are recognized under Maine substantive law.”⁵² This is a superfluous distinction without a difference.

VI. CONCLUSION: THIS COURT SHOULD FOLLOW MASSACHUSETTS AND CONNECTICUT LAW AND DECLINE TO LIMIT PLAINTIFF’S REMEDY FOR WRONGFUL PREGNANCY

The State of Maine should follow jurisdictions like Massachusetts, Connecticut, Georgia, and others that have carefully considered the damages to be awarded in a wrongful pregnancy case. Cases from these jurisdictions have echoed Justice Scolnik’s dissenting opinion in *Macomber*, and rejected the WBS’s public policy.⁵³ The Connecticut Supreme Court explained as follows:

We declined to carve out any exception, grounded in public policy, to the normal duty of a tortfeasor to assume liability for all the damages that he or she has caused. We held that any such exception would improperly burden the exercise of a constitutionally protected right to employ contraceptive measures to limit the size of one’s family.

Burns v. Hanson, 734 A.2d 964, 969 (Conn. 1999).

Merck pejoratively accuses Plaintiff of “show[ing] her true colors”⁵⁴ by exercising her right to pursue this civil action. But in reality, Ms. Doherty simply seeks to have a jury hear her case and award whatever damages they think she deserves for the harm suffered because of Appellees’ negligence.⁵⁵ The Constitution affords her that right, and this Court should as well.

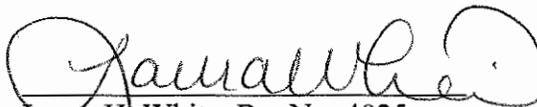
⁵² Brief of Merck at p. 11.

⁵³ See Brief of Appellant at p. 32; 39-40.

⁵⁴ Brief of Merck at p. 26.

⁵⁵ For some of the same reasons underlying the WBS, a jury may return a huge verdict or just a nominal award for Ms. Doherty, since motherhood still brings love and joy to her life despite the economic hardship. Either way, this question is for a jury, not the State, to decide.

Dated at Kennebunk, Maine this 11th day of May, 2016.

A handwritten signature in cursive script, appearing to read "Laura H. White".

Laura H. White, Bar No. 4025

Attorney for Appellant Kayla Doherty

BERGEN & PARKINSON, LLC

62 Portland Rd., Suite 25

Kennebunk, ME 04043

(207) 985-7000

lwhite@bergenparkinson.com

CERTIFICATE OF SERVICE

I, Laura H. White, attorney of record for Plaintiff/Appellant, hereby certify that I have this 11th day of May, 2016 caused two (2) copies of the foregoing Reply Brief of Plaintiff/Appellant to be served upon counsel of record in this action, by depositing the same in the United States mail, postage prepaid, addressed as follows:

Andrew K. Lizotte, AUSA
United States Attorney's Office
100 Middle Street
East Tower, 6th Floor
Portland, ME 04101

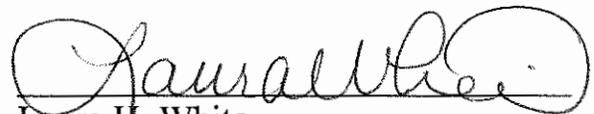
Paul McDonald, Esq.
Bernstein Shur
100 Middle Street, 6th Fl
P.O. Box 9729
Portland, ME 04101

Thomas J. Yoo, Esq.
Reed Smith, LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071-1514

Lynn A. Combs, Esq.
Reed Smith, LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659

Susan P. Herman, Esq.
Deputy Attorney General
6 State House Station
Augusta, ME 04333-0006

Dated at Kennebunk, Maine this 11th day of May, 2016.



Laura H. White
Attorney for Plaintiff/Appellant
BERGEN & PARKINSON, LLC
62 Portland Road, Suite 25
Kennebunk, ME 04043
Phone: (207) 985-7000
lwhite@bergenparkinson.com