

No. 1-12-3632

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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AMIRA MAJOR,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	07 L 7505
COUNTY OF COOK, DR. STAMATIA	)	
RICHARDSON, DR. OSCAR JARA, and LUIS	)	
SANCHEZ,	)	Honorable
	)	Kathy M. Flanagan,
Defendants-Appellees.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Justice Mason concurred in the judgment.  
Justice Pucinski dissented.

**ORDER**

¶ 1 *Held:* Where no evidence is presented that defendants made an actual diagnosis of a known medical condition that would constitute a hazard to the health or safety of the patient or others, the Tort Immunity Act immunizes a defendant public entity and its employees from liability when there is a complaint (1) about the defendants' failure to adequately perform an examination or tests to determine the presence of a disease, or (2) a complaint about the defendants' failure to diagnose a disease that constitutes a health hazard.

¶ 2 Plaintiff, Amira Major, filed a wrongful birth and negligence complaint against the defendants, County of Cook d/b/a/ Cook County Bureau of Health Services, County of Cook d/b/a Cermak Health Services of Cook County (Cermak), Dr. Stamatia Richardson, Dr. Oscar A. Jara, and physician's assistant, Luis Sanchez, individually and as agents of Cook County.<sup>1</sup> Major alleged that the defendants were negligent when they provided her with prenatal care and treatment while she was incarcerated in the Cook County Department of Corrections (DOC), and as a direct result of defendants' negligence, her baby was born with multiple anatomical abnormalities. The defendants filed a motion for summary judgment contending that they were immune from liability under sections 6-105 and 6-106 of the Local Government and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/6-105, 106 (West 2010)). The trial court granted the motion.

¶ 3 On appeal, Major argues that the defendants were not immune from liability under sections 6-105 and 6-106 of the Tort Immunity Act because defendants diagnosed a fundal height discrepancy, which would suggest a fetal anomaly, and failed to provide Major with appropriate treatment. We find that plaintiff's claims are predicated on the defendants' failure to properly analyze certain tests, to make referrals, and to diagnose the unborn child's anatomical abnormalities. However, because no evidence was presented that defendants

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<sup>1</sup>The complaint also named Thomas Dart, individually and as sheriff of Cook County d/b/a Cook County Department of Corrections, and the University of Chicago Hospitals, but these defendants are not parties to this appeal.

made an actual diagnosis of a known medical condition, we find that the Tort Immunity Act immunizes the defendants for their alleged failure to perform necessary tests or make referrals to determine the presence of a disease, and for their alleged failure to diagnose a disease that constitutes a health hazard. Therefore, we hold that the trial court did not err when it granted the defendants' motion for summary judgment.

¶ 4 Background

¶ 5 Major was incarcerated in the DOC on December 9, 2005, and a pregnancy test revealed that she was pregnant. Pregnant detainees in the DOC are placed in division 3, the pregnancy tier. Inmates on the pregnancy tier are provided with prenatal care at Cermak.

¶ 6 On December 15, 2005, Sanchez, a physician's assistant at Cermak, performed Major's initial prenatal examination and ordered an ultrasound to rule out the possibility of an ectopic pregnancy. The ultrasound was taken on December 15, 2005, and analyzed by Dr. Jara, the chairman of the radiology department at Cermak. Dr. Jara's ultrasound report revealed an intrauterine pregnancy at 4-5 weeks and it noted that no fetal pole was detected.

¶ 7 On December 20, 2005, Dr. Richardson, a family practitioner at Cermak, reviewed the December 15, 2005, ultrasound report, and on December 29, 2005, Dr. Richardson ordered a second ultrasound to determine if the fetus was viable because no fetal pole was detected on the first ultrasound. The second ultrasound was performed on January 3, 2006, and dated the fetus at approximately eight weeks, and confirmed that the fetus was viable.

¶ 8 Dr. Richardson examined Major on January 3, 2006, and discovered a discrepancy between the fundal height and the estimated gestational age of the fetus. The fundal height is the

estimated size of the pregnant uterus based upon an external measurement of the abdomen. The fundal height can be measured by either doing a pelvic examination in early pregnancy or after 12 weeks by measuring the abdomen with a tape measure or a caliper. A fundal height discrepancy occurs when the fundus appears to be higher or lower than expected, given the estimated gestational age of the fetus, which is calculated based on the date of the last menstrual period or the measurement taken during an ultrasound. The fundal height is usually within two to three centimeters of the number of weeks of gestation, and on January 3, 2006, Major's fundal height measurement was six centimeters ahead of the number of weeks of gestation: 21 centimeters at 15 weeks.

¶ 9 Dr. Richardson saw Major again on February 21, 2006, and ordered a third ultrasound to investigate the fundal height discrepancy. Dr. Richardson wrote on the requisition form for the third ultrasound that the purpose was to determine "fetal age" and "fetal growth." The third ultrasound was performed on February 23, 2006, and Dr. Jara's report showed an estimated fetal age of 16 weeks and one day and stated that the fetus was in a breech presentation.

¶ 10 Major was last seen at the Cermak clinic on March 14, 2006. Major was released from the DOC in March 2006, and she continued her prenatal care at the University of Chicago. On July 24, 2006, Major gave birth to a baby boy, Dontrell Coleman, who was born with scoliosis, a hypoplastic upper limb and without a left forearm.

¶ 11 Major's sixth amended complaint alleged that Dr. Richardson and Sanchez, the physician's assistant, failed to "conduct additional and/or appropriate physical and/or diagnostic

examinations to determine the health of the unborn child knowing that there was a large discrepancy in fundal height in proportion to gestational age, which was demonstrated during the third ultrasound and failed to inform plaintiff of this discrepancy." Major also alleged that if she had known that her baby would be born with the defects that he was born with, she would have terminated her pregnancy.

¶ 12 The complaint also alleged that Dr. Jara failed to report the abnormal growth in the fetus in the February 23, 2006, report from the third ultrasound, and that he failed to recommend additional tests or diagnostic exams.

¶ 13 The defendants filed answers and affirmative defenses to Major's complaint. Defendants invoked sections 6-105 and 6-106 of the Tort Immunity Act in their affirmative defenses and argued that they were immunized from liability for their alleged failure to diagnose or treat Major's condition of ill being. The defendants also argued that the Tort Immunity Act immunizes local public entities and public employees from liability when they fail to perform a physical examination or tests to determine whether a person has a disease or physical illness (745 ILCS 10/6-105 (West 2010), or when they fail to diagnose a physical illness. 745 ILCS 10/6-106(a) (West 2010).

¶ 14 At the close of discovery, the defendants moved for summary judgment and maintained that assuming the truth of the facts in plaintiff's complaint and the opinions of plaintiff's experts, they were entitled to a judgment as a matter of law because they were immunized from liability under sections 6-105 and 6-106(a) of the Tort Immunity Act.

¶ 15 In support of their summary judgment motion, defendants attached the depositions of Major's

two medical expert witnesses: (1) Dr. Levin, a family practice doctor, and (2) Dr. Foley, a radiologist. Dr. Levin testified about breaches in the standard of care by Dr. Richardson and Mr. Sanchez. First, concerning Dr. Richardson, Dr. Levin testified, "I think if the ordering request had gone in so that the radiologist would have performed the standard ultrasound, prenatal ultrasound, as opposed to just looking at the growth of the fetus, there may have been the opportunity to discover the abnormal anatomy \*\*\*. [T]he other thing [Dr. Richardson] could have done and that's the referral to an obstetrician, maternal fetal medicine specialist, who presumably would then do the full prenatal ultrasound and identify the missing limbs." Dr. Levin opined that an increased fundal height could indicate a large baby, increased amniotic fluid or mass in the uterus. Dr. Levin also opined that a discrepancy in fundal height simply puts one on notice that something is wrong; it was a red flag that something was not going as expected and it required further evaluation. Finally, Dr. Levin opined that Dr. Richardson's request for the third ultrasound deviated from the standard of care because she did not inform the radiologist about the fundal height discrepancy.

¶ 16 Second, regarding Mr. Sanchez, Dr. Levin testified that the standard of care for a physician's assistant is the same as that of a family practitioner, especially if the physician's assistant does not request a consultation with his physician supervisor. Dr. Levin opined that Mr. Sanchez should have discussed the fundal height discrepancy with his physician supervisor, but he failed to do so.

¶ 17 Dr. Foley testified that the third ultrasound showed that there was abnormal growth of the fetus' right and left arms because they were much shorter than expected. Dr. Foley opined

that Dr. Jara breached the standard of care when he failed to properly analyze the third ultrasound and he failed to note that the fetus' arms were abnormally short and deformed in their appearance.

¶ 18 Major filed a response to defendants' motion for summary judgment and supported her motion with the depositions of Dr. Levin and Dr. Foley, along with the depositions of Dr. Richardson and Dr. Jara. Dr. Richardson testified in her deposition that her concerns about the fundal height discrepancy were alleviated because the third ultrasound showed an estimated fetal age of 16 weeks and one day which was consistent with the approximate 8 weeks gestational age measured on the second ultrasound of January 3, 2006. Dr. Richardson also testified that the difference between the fundal height measurement and the gestational age of the fetus was no indication as to whether or not the fetus was developing normally and she never suspected that Major's baby would be born with any abnormality.

¶ 19 Dr. Jara testified that Dontrell's abnormalities could not have been discovered from Major's third ultrasound, which was performed at 16 weeks, when everything appeared normal from the third ultrasound.

¶ 20 The trial court found that the allegations in Major's complaint arose from defendants' failure to diagnose fetal abnormalities in Major's unborn child and, if the diagnosis had been made, Major would have terminated the pregnancy. The court also found that Major's pregnancy was not the diagnosed condition which was improperly treated; instead, it was the unborn child's fetal abnormalities which the defendants failed to diagnose that were at issue. The trial court concluded that the defendants were immune from liability under the Tort Immunity

Act. Therefore, the trial court granted the defendants' motion for summary judgment, entered a Rule 304(a) finding, and Major filed this appeal.

¶ 21 Analysis

¶ 22 A trial court is permitted to grant summary judgment only if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). We review a trial court's order that grants a motion for summary judgment *de novo*. *Thompson*, 241 Ill. 2d at 438.

¶ 23 The issue in this case is whether sections 6-105 and 6-106(a) of the Tort Immunity Act immunize the defendants, a public hospital and its employees, from liability for the medical malpractice alleged in plaintiff's complaint. "Local government entities are liable in tort on the same basis as private tortfeasors unless a valid statute dealing with tort immunity imposes limitations upon that liability." *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 503 (2000). The immunities afforded to units of local government under the Tort Immunity Act operate as an affirmative defense, which if properly raised and proven by the public entity, preclude a plaintiff's right to recover damages. *Michigan Avenue Bank*, 191 Ill. 2d at 503. The resolution of the medical malpractice issues in the instant case depends upon our construction of the Tort Immunity Act. The construction of the Tort Immunity Act presents a question of law, which we review *de novo*. *Michigan Avenue Bank*, 191 Ill. 2d at 503.

¶ 24 It is well established that the primary objective of this court when construing the meaning

of a statute is to ascertain and give effect to the legislature's intent. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). In determining the legislature's intent, our inquiry begins with the plain language of the statute. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). The statutory language must be given its plain and ordinary meaning and, where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction. *Michigan Avenue National Bank*, 191 Ill. 2d at 504.

¶ 25 We must interpret two provisions in the Tort Immunity Act:

Section 6-105 provides:

"Neither a local public entity nor a public employee acting within the scope of his employment is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others." 745 ILCS 10/6-105 (West 2010); and

Section 6-106(a) provides:

"Neither a local public entity nor a public employee acting within the scope of his employment is liable for injury resulting from diagnosing or failing to diagnose that a person is afflicted with mental or physical illness or addiction or from failing to prescribe for mental or physical illness or addiction." 745 ILCS 6-106(a) (West 2010).

¶ 26 In *Michigan Avenue Bank*, our supreme court interpreted sections 6-105 and 6-106 of the Tort Immunity Act and addressed similar arguments to those raised in this appeal. In *Michigan Avenue Bank*, plaintiff, special administrator of the estate of Cynthia Collins, brought a medical malpractice action against Cook County regarding the treatment Collins received at Cook County Hospital. Collins made several visits to Cook County Hospital seeking treatment for a lump and pain in her breast, among other gynecological ailments. *Michigan Avenue Bank*, 191 Ill. 2d at 496-98. Collins was diagnosed with fibrocystic breast disease and advised to make follow up appointments to monitor the condition. *Michigan Avenue Bank*, 191 Ill. 2d at 497. A physician at a different hospital advised Collins to undergo a mammogram and a later biopsy revealed that Collins' left breast was cancerous. *Michigan Avenue Bank*, 191 Ill. 2d at 498-99. Collins later died of breast cancer. Plaintiff's complaint alleged that the defendants were negligent for failing to order a mammogram, failing to adequately perform examinations and tests on Collins, failing to perform a biopsy, failing to diagnose Collins' breast cancer and failing to administer proper, appropriate and necessary medical and nursing care to Collins. *Michigan Avenue Bank*, 191 Ill. 2d at 499.

¶ 27 The *Michigan Avenue Bank* court found that section 6-106(a) delineates three areas of specific conduct for which a local public entity and its employees are immunized from liability: "(1) a diagnosis that a person is afflicted with a mental or physical illness or addiction; (2) failing to diagnose that a person is afflicted with a mental or physical illness or addiction; and/or (3) failing to prescribe for a mental or physical illness or addiction." *Michigan Avenue Bank*, 191 Ill. 2d at 510. Next, the *Michigan Avenue Bank* court analyzed

the words in the Tort Immunity Act and found no ambiguity in the word "diagnosis," and noted several definitions of diagnosis, such as, the "art or act of identifying a disease from its signs or symptoms and the "art of distinguishing one disease from another." *Michigan Avenue Bank*, 191 Ill. 2d at 510 (quoting Webster's Third New International Dictionary 622 (1993); Sloan-Dorland Annotated Medical-Legal Dictionary 199 (1987)). Finally, the court also found the term "treatment" unambiguous and again noted several definitions of treatment, such as, the "action or manner of treating a patient medically or surgically," and "the management and care of a patient for the purpose of combating disease or disorder." *Michigan Avenue Bank*, 191 Ill. 2d at 510 (quoting Webster's Third New International Dictionary 2435 (1993); Sloan-Dorland Annotated Medical-Legal Dictionary 746 (1987)).

¶28 Applying these principles, the *Michigan Avenue Bank* court found that because the gravamen of plaintiff's action against defendants was that defendants failed to perform examinations which would have allowed them to diagnose Collins' breast cancer, the defendants were immune from the allegations of negligence towards Collins. *Michigan Avenue Bank*, 191 Ill. 2d at 512. The court also rejected the argument that plaintiff's cause of action was for negligent treatment because plaintiff's expert testified that defendants' failure to conduct appropriate testing in order to diagnose the breast cancer was the proximate cause of Collins' death. *Michigan Avenue Bank*, 191 Ill. 2d at 514-15. Accordingly, the court held that the immunity provided to local public entities and their employees in section 6-105 and section 6-106(a) of the Tort Immunity Act applied to the defendants. *Michigan Avenue Bank*, 191 Ill. 2d at 522.

¶ 29 In this case, like *Michigan Avenue Bank*, we find that Major's negligence action is premised on defendants' failure to conduct a physical examination or tests on Major that would have enabled Cook County's employees, Dr. Richardson, Dr. Jara and Mr. Sanchez, to discover the anatomical abnormalities in Major's unborn child.

¶ 30 Major's expert witnesses testified that the defendants failed to conduct the appropriate tests or failed to properly interpret the third ultrasound, which led to defendants' failure to diagnose the anatomical abnormalities in Major's unborn child. Dr. Levin testified that Dr. Richardson deviated from the standard of care when she failed to order tests or make referrals to enable her to diagnose the anatomical abnormalities in Major's unborn child. Likewise, Dr. Foley, plaintiff's radiologist, testified that Dr. Jara deviated from the standard of care when he failed to identify the fetus' abnormally formed limbs after the third ultrasound.

¶ 31 We disagree with Major's contention that Dr. Richardson's finding of a fundal height discrepancy was a diagnosis. Dr. Levin testified that a fundal height discrepancy is a mere indication that something might be wrong, which requires further evaluation to determine the underlying cause. Therefore, Dr. Richardson's finding of a fundal height discrepancy in this case was, at most, a sign that something might be wrong with Major's pregnancy, and if thoroughly examined may have led to the diagnosis of a medical illness. See *Michigan Avenue National Bank*, 191 Ill. 2d at 510 (explaining that Section 6-106(a) grants immunity for failure to identify a disease from its signs and symptoms).

¶ 32 The negligence complained about in this case was the failure of defendants to engage in a

course of diagnostic care that would have led them to the unborn child's medical conditions, scoliosis, hypoplastic upper limb, and an absent left forearm. A condition meets the definition of a diagnosis under the Tort Immunity Act only when the condition is specific enough to be classified as a disease or disorder amenable to treatment. See *Michigan Avenue National Bank*, 191 Ill. 2d at 510-12; *American National Bank Trust Company of Chicago v. County of Cook*, 327 Ill. App. 3d 212, 216 (2002). We find the evidence reveals that defendants' finding of a fundal height discrepancy was not a specific diagnosis of the fetus' medical condition, but a finding that something might be wrong with the fetus--further testing might be warranted. We find no evidence that defendants ever made any diagnosis of a specific fetal anatomical abnormality, or a diagnosis that Major's pregnancy constituted a hazard to the health or safety of Major or her fetus. 745 ILCS 10/6-105 (West 2010). With only a finding of fundal height discrepancy, and without any evidence of a specific diagnosis of a fetal anatomical abnormality, there was never a diagnosis of a condition - one that would constitute a hazard to the health or safety of Major or her fetus - for defendants to treat Major or her fetus. Accordingly, we hold the defendants' alleged failure to conduct or adequately perform appropriate physical examinations or tests on Major or to make referrals, and their alleged failure to diagnose the anatomical abnormalities in Major's unborn child, bring the defendants' conduct within the purview of sections 6-105 and 6-106(a) of the Tort Immunity Act and therefore, they are immune from liability. 745 ILCS 6-105, 6-106(a) (West 2010); see *Hemminger v. Nahring*, 399 Ill. App. 3d 1118, 1125-26 (2010) (the court found that a pap smear was a screening test and part of the diagnostic process and held that defendants' failure

to properly interpret the pap smear was precisely the conduct that is immunized from liability under sections 6-105 and 6-106 of the Tort Immunity Act).

¶ 33 Major contends that *American National Bank* supports her position and compels a result different from the one reached by the trial court. We disagree. In *American National Bank*, the plaintiff's doctor determined that her unborn child was in a "transverse lie," a position that could result in lack of oxygen to the child during a vaginal delivery. *American National Bank*, 327 Ill. App. 3d at 213. The plaintiff's complaint alleged that after the original diagnosis had been made, a second doctor was negligent in failing to perform an ultrasound or stress test to ascertain the position of the baby, and failing to perform a C-section on plaintiff prior to the cord prolapse resulted in severe brain damage to the child. *American National Bank*, 327 Ill. App. 3d at 214-15. This court reversed the trial court's grant of summary judgment in favor of the defendants because we found that once a diagnosis of a medical condition is made and treatment of that condition is prescribed and undertaken, any subsequent prescription or examination required to be made pursuant to that condition is part of the patient's treatment." *American National Bank*, 327 Ill. App. 3d at 220.

¶ 34 We find *American National Bank* inapposite because *American National Bank* involved the diagnosis and treatment of transverse lie, a known medical condition, while this case involves a finding of fundal height discrepancy, which may be a symptom of, but is not itself an actual diagnosis of a known medical condition.

¶ 35 The dissent argues that pregnancy is a condition requiring due care in treatment. The problem with the dissent's argument is (1) that the Act is only concerned with diseases or

conditions “that would constitute a hazard to the health or safety of [the patient] or others,” (745 ILCS 10/6-105 (West 2010)), and (2) that there is no “treatment” for fundal height discrepancy. As in *Michigan Avenue* where the plaintiff presented with multiple symptoms, including a lump in her breast, Major here presented with the symptom of fundal height discrepancy. Just as a lump in a woman’s breast requires further testing and examination to determine whether its cause is a treatable medical condition, a fundal height discrepancy may indicate any number of medical diagnoses that may or may not require treatment. But there is no “treatment” for a fundal height discrepancy *per se* and the dissent identifies none.

¶ 36 We disagree with the dissent’s position that once it was determined that Major was pregnant, the County employees named as defendants lost the immunity provided under the Act for their failure to diagnose the abnormalities in Major’s fetus. The dissent’s reasoning proves this point. The dissent maintains that the three ultrasounds performed on Major “enabled defendants to discover the abnormalities.” Assuming this is true, it is undisputed that defendants failed to discover those abnormalities -- a classic example of a missed diagnosis.

¶ 37 Finally, the dissent focuses on a woman’s right to choose whether to terminate a pregnancy and contends that defendants’ conduct deprived her of the information she needed to make an informed decision. We cannot quarrel with this point. The same can be said of a woman who presents with a tumor in her breast – she has the right to be told whether the tumor is cancerous and to be provided the information necessary to elect a course of treatment. But in the Act, the legislature has made a policy decision regarding the scope of the conduct of public health employees that will subject them and their public employer to claims for

damages. The conduct complained of here – the failure to properly read the results of diagnostic tests and, as a result, missing the diagnosis of a medical condition – is within the scope of the immunity afforded under the Act. *Michigan Avenue Bank*, 191 Ill. 2d at 512.

¶ 38 Conclusion

¶ 39 After analyzing the plain language of sections 6-105 and 6-106(a) of the Tort Immunity Act and considering the facts in this case, we find no evidence was presented that defendants made an actual diagnosis of a known medical condition; instead, the evidence shows that defendants failed to examine Major and diagnose the anatomical abnormalities in her unborn child. Therefore, we hold that the Tort Immunity Act immunizes the defendants for their alleged failure to perform necessary tests or make referrals to determine the presence of a disease and for their alleged failure to diagnose Major’s pregnancy as a condition that would constitute a hazard to the health or safety of Major and her fetus. Accordingly, we affirm the trial court’s order that granted summary judgment in favor of the defendants.

¶ 40 Affirmed.

¶ 41 JUSTICE PUCINSKI, dissenting:

¶ 42 I respectfully dissent from the majority’s opinion in this case. There are two issues in this case: (1) what was the diagnosis and medical condition being treated; and (2) does due care include giving accurate information to the patient so that the patient may make an informed decision about her options? Precedent makes clear that the mother was and remained the patient, and that she was owed due care in her treatment after her diagnosis of pregnancy, which includes being fully informed regarding the status of her fetus and the anatomical

abnormalities that were apparent in the tests performed so that she could exercise her constitutional right to determine her options.

¶ 43 The majority holds that no evidence was presented that defendants made an actual diagnosis of a known medical condition. But the "medical condition" in this case was pregnancy. This was the condition plaintiff was being treated for. The examinations performed – the blood tests, the physical exams, the manual palpations, the fundal height measurement and the ultrasounds – were indeed for a known medical condition: pregnancy. The diagnosis here was pregnancy, not the actual disability of the fetus. Pregnancy is a condition requiring due care in treatment. Failure to diagnose or perform an examination is immunized, but negligent diagnosis and treatment *after* the public employees decide to perform an examination or decides to provide treatment after a diagnosis is not immunized. 745 ILCS 10/6-105, 6-106 (West 2006). Once defendants diagnosed plaintiff's pregnancy and decided to perform examinations and to render treatment to plaintiff for her pregnancy, the defendants were bound to do so with due care.

¶ 44 *Michigan Avenue Bank's* definition of "condition" is not limited to a "disease or disorder" as the majority suggests. *Michigan Avenue Bank* provided several alternate definitions by way of example, and also defined "diagnosis" as "[t]he determination of a *medical condition* (*such as* disease) by physical examination or by study of its symptoms." (Emphasis added.) *Michigan Avenue Bank*, 191 Ill. 2d at 510 (quoting Black's Law Dictionary 464 (7th ed. 1999)). Thus, a "condition" is broader than "disease." It includes, but is not limited to, disease. *Michigan Avenue Bank* also defined "treatment" as "[t]he medical or surgical

*management* of a patient." (Emphasis added.) *Michigan Avenue Bank*, 191 Ill. 2d at 512 (quoting Stedman's Medical Dictionary 1626 (25th ed. 1990)). The supreme court in *Michigan Avenue Bank* held that section 6-106 "was not meant to grant blanket immunity for negligent treatment of a specific medical condition." *Michigan Avenue Bank*, 191 Ill. 2d at 511. The ultimate holding against the plaintiff in *Michigan Avenue Bank*, however, hinged on the defendants initial failure to order a mammogram and, thus, failure to perform examinations at all (*Michigan Avenue Bank*, 191 Ill. 2d at 512), which is immunized. Here, on the contrary, the blood tests, physical examinations, manual palpations, fundal height measurement, and ultrasounds – *were* performed, but the ensuing treatment of the pregnancy was negligent, which is not immunized under the Act.

¶ 45 Pregnancy is a diagnosed medical condition. A normal pregnancy is not a "disability" or "sickness" (see *Illinois Bell Telephone Co. v. Fair Employment Practices Commission*, 81 Ill. 2d 136, 141 (1980)), but it is a condition. See *Miller v. American Infertility Group of Illinois, S.C.*, 386 Ill. App. 3d 141, 149 (2008) (defining "pregnancy" as "[t]he condition of a woman having an embryo or fetus in her body, usually in the uterus, lasting from the time of conception to the time of childbirth, abortion, etc.' ") (quoting 5 J. Schmidt, Attorneys' Dictionary of Medicine p. 403 (2007)). See also Black's Law Dictionary 1061 (5th ed. 1979) (defining "pregnancy" as "[t]he condition resulting from the fertilized ovum. The existence of the condition beginning at the moment of conception and terminating with delivery of the child."). The Pregnancy Discrimination Act of 1978 prohibits discrimination against women on the basis of "*pregnancy, childbirth, or related medical conditions.*" (Emphasis added.)

42 U.S.C. §2000e(k).

¶ 46 The majority cites to *Hemminger*, a Third District case, in which the defendants performed a pap smear test but failed to diagnose the plaintiff's cancer. The Third District Appellate Court held that "the essence of plaintiff's action is that defendants failed to adequately examine and/or diagnose cervical cancer." *Hemminger*, 399 Ill. App. 3d at 1125. The Third District thus lumped diagnosis after an examination along with the performance of the examination itself. The court then held that "a screening test" is "part of" the "diagnostic process" and was immunized under sections 6-105 and 6-106. *Hemminger*, 399 Ill. App. 3d at 1126. The doctors in *Hemminger* completely failed to diagnose the plaintiff's cancer. Here, however, the defendants in fact diagnosed plaintiff's pregnancy but gave her negligent care after this diagnosis.

¶ 47 The majority finds that plaintiff's negligence action "is premised on defendants' failure to conduct a physical examination or tests" that "would have enabled Cook County's employees, Dr. Richardson, Dr. Jara and Mr. Sanchez, to discover the anatomical abnormalities in Major's unborn child." But the undisputed facts establish that the physical examination and tests *were* performed. The CCDOC performed a total of three ultrasounds. Plaintiff's experts testified that the ultrasounds indeed enabled defendants to discover the abnormalities. Plaintiff does not allege the failure to perform an examination. Rather, plaintiff alleges the examinations – ultrasounds – were performed, but with ensuing negligent treatment, including the failure to tell her, the patient, that there was a fundal height discrepancy, and what that could mean, and the failure to tell her after the third ultrasound that the fetus had

anatomical abnormalities. Plaintiff's experts testified that plaintiff was owed due care in the treatment of her pregnancy. Dr. Levin further testified that the failure to inform the mother that there was a major discrepancy between the fundal height and gestational age fell below the standard of care because the mother had little or no information.

¶ 48 The majority maintains that the "medical condition" refers to the condition of the fetus alone and, by implication, the tests were only to assess the condition of the fetus and that only the fetus was owed due care. The majority misses the point that the mother, and not just the fetus, remains entitled to due care throughout the condition of pregnancy. Dr. Richardson testified that upon intake, a pregnancy test revealed that plaintiff was pregnant. Upon this diagnosis of pregnancy, Cook County, through the Cook County Department of Corrections, then undertook to provide pregnancy care for plaintiff which included, according to Dr. Richardson, transferring plaintiff to a specific "pregnancy tier," where she received special care and treatment from a "case manager," was put on a prenatal diet, and was "prescribed" supplemental vitamins, iron, and calcium. For plaintiff's first ultrasound, the doctors could not see the baby well enough and plaintiff was told to come back a second time because they could not tell how far along she was and they "wanted to make sure the baby was growing at a normal rate and [that] everything was perfectly fine." One of the purposes for this first ultrasound was to make sure the fetus was not in plaintiff's fallopian tubes, and the ultrasound indicated the fetus was not. The need for an ultrasound indicated the need not only to assess the health of the fetus, but also to ensure the health of plaintiff as the mother. The "diagnosis" here was pregnancy. That's what the doctors were treating her for; that's

why the ultrasounds were performed. Plaintiff received treatment and management of care for her pregnancy. Tests were done. Exams were performed. Ultrasounds were performed. Under the Act, once defendants undertook this treatment of plaintiff's pregnancy, they had to do so with "due care."

¶ 49 Even a rudimentary understanding of prenatal health care makes clear that both the health of the woman and the health of the fetus are being treated during pregnancy. A woman cannot be pregnant without a fetus; a fetus cannot exist without the pregnant woman. Both the woman and the fetus are monitored and treated for potential problems and complications that can endanger the health of either or both. The fetus cannot be treated without the woman coming in for examination and treatment. The ultrasound shows the condition of the fetus but cannot be done without being performed on the woman. The majority's holding defies all logic and common sense.

¶ 50 In reaffirming *Roe*, the United States Supreme Court also reaffirmed the third principle of *Roe* "that the State has legitimate interests from the outset of the pregnancy in protecting the *health of the woman and the life of the fetus* that may become a child." (Emphasis added.) *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). Both the woman and the fetus are protected. Illinois law is also clear that "the law will not treat a fetus as an entity which is entirely separate from its mother." *Stallman*, 125 Ill. 2d at 277. "It would be a legal fiction to treat the fetus as a separate legal person." *Stallman*, 125 Ill. 2d at 278.

¶ 51 The state may not override a pregnant woman's competent treatment decision, including the refusal of recommended invasive medical procedures, to potentially save the life of the viable

fetus. *In re Brown*, 294 Ill. App. 3d 159 (1997), *appeal denied*, 177 Ill. 2d 570 (1998). "The woman retains the same right to refuse invasive treatment, even of lifesaving or other beneficial nature, that she can exercise when she is not pregnant. The potential impact upon the fetus is not legally relevant." *In re Baby Boy Doe*, 260 Ill. App. 3d 392, 401 (1994). A woman can trump her husband's decision to have a child. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 71 (1976) (between a husband and a wife, "[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."). A woman can also refuse based on her religious beliefs to get medical treatment to save the life of her viable fetus. See *In re Doe*, 260 Ill. App. 3d 392 (1994) (the State cannot override a woman's competent treatment decision to refuse a blood transfusion on religious grounds to potentially save the life of a viable fetus).

¶ 52 Under the law, it simply is not the case that plaintiff's fetus only, and not plaintiff, was the subject of diagnosis and care. The majority's holding essentially claims that only the fetus is being treated during pregnancy.

¶ 53 Part of plaintiff's negligence and wrongful birth claims is the defendants' failure to exercise due care in failing to fully inform her of the status of the pregnancy. Plaintiff had a right to be fully informed regarding the status of her pregnancy so that she could exercise her constitutional right to determine her options. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), established that the right to abortion is based on the federal due process clause and reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973), which

held that a woman has a right to abortion under the federal constitution before viability "without undue interference from the State." The constitutional right to choose recognized in *Roe* and reaffirmed in *Casey* is "the woman's right to make the ultimate decision." *Id.* at 877. The Illinois Abortion Law of 1975 provides that "[v]iability' means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support." 720 ILCS 510/2(1) (West 2004).

¶ 54 Plaintiff's experts testified that plaintiff's fetus was not viable at the time of the third ultrasound, when plaintiff still had time for an elective abortion, thereby supporting her negligent birth claim. " 'Wrongful birth' refers to the claim for relief of parents who allege they would have avoided conception or terminated the pregnancy by abortion but for the negligence" of medical personnel in "prenatal testing, genetic prognosticating, or counseling parents as to the likelihood of giving birth to a physically or mentally impaired child." *Williams v. University of Chicago Hospitals*, 281 Ill. App. 3d 1057, 1061 (1996) (quoting *Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230, 235 (1987)). The tort of wrongful birth can also implicate a claim for emotional distress damages for the mother as a direct victim of the tort of wrongful birth. *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 101.

¶ 55 Defendants performed ultrasounds, performed them correctly, but negligently read the results and failed to inform plaintiff that her fetus had severe physical defects. One of plaintiff's

experts, Dr. Foley, a radiologist, testified that the current state of the art of ultrasounds is that one can see abnormalities in an ultrasound at 15-16 weeks or less now. Plaintiff's third ultrasound was performed on February 23, which was at approximately 16 weeks' gestation. Dr. Foley testified that this ultrasound showed plaintiff's fetus had only a stump on its right side, and no arm at all on its left side. Dr. Foley indicated this was shown clearly in ultrasound image #10 and image #5. Dr. Foley testified that defendants should have seen these abnormalities in the performed ultrasound. Dr. Levin testified that a fundal height discrepancy is an indication that something might be wrong which requires further evaluation. Due care required further evaluation. At most, defendants at their depositions testified that they could not recall many of the discussions, thereby leaving plaintiff's deposition testimony that the doctors told her repeatedly that the pregnancy was progressing well, except for the baby being in breech position which would resolve itself, and that everything was "fine." Regarding the third ultrasound, plaintiff testified that she asked defendant Dr. Richardson, "Is everything okay?" and that Dr. Richardson said, "Yes." Plaintiff had no idea her baby would be born with these defects until the delivery room, when she first saw her baby was missing limbs. To say that plaintiff suffered emotional distress would be an understatement. Curiously, these ultrasound images are not part of the record.

¶ 56 Plaintiff received negligent care in the treatment of her pregnancy because she did not receive the information needed to make an informed decision. The majority's analysis completely bypasses *plaintiff's* right to due care concerning her own body and condition of her pregnancy and plaintiff's constitutional right to make an informed decision regarding that pregnancy,

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*i.e.*, to decide whether to keep the baby and make necessary family, home, emotional and financial plans to care for him, to proceed with adoption planning, or to terminate the pregnancy.

¶ 57 I note that the standard of care provided is particularly troubling when the mother is incarcerated. Women in jail have no other option than the treatment provided there. They cannot go and get a second opinion. They cannot demand more tests, or change doctors. The plaintiff had no option but to rely on the family medicine doctor assigned to her at CCDOC.

¶ 58 Incarcerated women are entitled to the same due care as other patients treated at public hospitals. As the Illinois Supreme Court stated:

"In practice, the reproduction of our species is necessarily carried out by individual women who become pregnant. No one lives but that he or she was at one time a fetus in the womb of its mother. Pregnancy does not come only to those women who have within their means all that is necessary to effectuate the best possible prenatal environment: any female of child-bearing age may become pregnant. Within this pool \*\*\* are representatives of all socio-economic backgrounds: the well-educated and the ignorant; the rich and the poor; those women who have access to good health care and good prenatal care and those who, for an infinite number of reasons, have not had access to any health care services." *Stallman*, 125 Ill. 2d at 279.

¶ 59 Plaintiff was entitled to due care in all treatment concerning her diagnosed condition of

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pregnancy, including her right to be fully informed so that she could have exercised her constitutional right to make an informed decision about her options. Given the directly contrary expert testimony on plaintiff's behalf supporting her cause of action for both negligence and wrongful birth, and the fact that the ultrasound images are inexplicably missing from the record, there are many genuine issues of material fact precluding summary judgment in this case.