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COURT OF APPEALS

STATE OF NEW YORK

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WALLY G. ,

Appellant ,

-against-

No. 95

NEW YORK CITY HEALTH  
AND HOSPITALS CORPORATION ,

Respondent .

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20 Eagle Street  
Albany, New York 12207  
May 16, 2016

Before :

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances :

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Meir Sabbah  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar  
2 is number 95, Wally G. v. New York City Health and  
3 Hospitals Corporation.

4 Good afternoon, counsel.

5 MR. DALY: Good afternoon, Your Honor.

6 My name is John Daly, I'm of counsel to The  
7 Fitzgerald Law Firm, attorneys for Infant Plaintiff Wally  
8 Gutierrez and his mother.

9 I have a claim against - - -

10 CHIEF JUDGE DIFIORE: Excuse me for  
11 interrupting, counsel, would you like rebuttal time?

12 MR. DALY: Thank you, Your Honor, I would  
13 like two minutes rebuttal, please.

14 CHIEF JUDGE DIFIORE: Certainly.

15 MR. DALY: Thank you very much.

16 CHIEF JUDGE DIFIORE: You're welcome.

17 MR. DALY: We want to first thank the court  
18 for converting this appeal from letter review to full  
19 appellate review, because we think it's a very  
20 important case that represents, and demonstrates, and  
21 is an abuse of discretion by the First Department  
22 that is remarkable.

23 And it also provides an opportunity to give  
24 guidance to the Bar on how to handle cases of premature  
25 infants born at municipal hospitals.

1                   The last such case - - -

2                   JUDGE ABDUS-SALAAM:   Before you - - -

3                   before you get to the merits of this, I'm - - - could

4                   you just explain how the whole system works, where

5                   your - - - your office, particularly, but other

6                   plaintiffs' law firms, or law firms representing

7                   plaintiffs filed these late notices, and then wait

8                   sometimes years to move, to have the notices

9                   accepted.   I'm - - - I'm a little unclear about that.

10                  You file a letter, you know, within - - - I

11                  guess it was maybe right after your client walks into

12                  the office, or his mother - - -

13                  MR. DALY:   That's correct.

14                  JUDGE ABDUS-SALAAM:   - - - and - - - but

15                  you don't seek leave of court.   And then after you've

16                  filed that notice a few years later, then you move to

17                  have the notice filed?

18                  MR. DALY:   Judge, what we do is - - - our

19                  policy, and we handle a lot of these cases in the

20                  City of New York, is when the client walks in the

21                  door and retains us, within three to five business

22                  days, we attempt to file the notice of claim to put

23                  the hospital on notice that there is a claim coming

24                  your way.   Then, the question becomes when should we

25                  - - - when do we move to have that late notice of

1 claim accepted as, you know, timely file.

2 And that's a challenging question. We could  
3 move the very next day, but we have no medical records  
4 yet. How long does it take us to accumulate the documents  
5 that are - - -

6 JUDGE ABDUS-SALAAM: Well, generally, if  
7 you follow the statute that the claim has to be filed  
8 within ninety days, you wouldn't have the medical  
9 records at that point usually, would you?

10 MR. DALY: No, we would not, Judge, but we  
11 wouldn't need them either because the notice of claim  
12 would be timely. If the client comes to us timely,  
13 we file the notice of claim timely. A notice of  
14 claim filed by us is late if the client comes to us  
15 late.

16 And then we are in a predicament, what do  
17 we do, do we immediately file a motion for late  
18 notice of claim? We have no records, we have no  
19 experts, we have no way to support the case. And we  
20 devote the latter third of our reply brief to  
21 addressing all of the concerns that weigh on when to  
22 make the motion. And we have an appendix - - -

23 JUDGE RIVERA: You seek to immediately stop  
24 the clock, and then you make a merits assessment?

25 MR. DALY: Well, what we do is we file the

1 notice of claim, although it's without judicial  
2 approval - - -

3 JUDGE RIVERA: Um-hum.

4 MR. DALY: - - - it serves to put the  
5 hospital on notice that there is a claim coming.  
6 Now, the hospital says, what do you want us to do,  
7 review the files of all of our millions of cases?  
8 No. But when you get a notice of claim, even without  
9 judicial sanction, look at that case. If you want to  
10 interview witnesses, go ahead and interview  
11 witnesses.

12 In this case, we filed the notice of claim  
13 fourteen months late. Now, in the hospital's brief,  
14 you're going to see it referred to as a five year delay.  
15 Well, that's - - - that's just - - - just disingenuous,  
16 because what that - - - this regards, is the notice of  
17 claim that they got, which covers every act of malpractice  
18 and every injury that's before this court today.

19 JUDGE PIGOTT: Do you - - - do you find it  
20 difficult to justify the fact that you're saying, we  
21 don't even know if we got a case, but we're telling  
22 the hospital, investigate this case just in case we  
23 decide we have a case and then we're coming after  
24 you. In other words, you're telling them - - -

25 MR. DALY: Yes.

1                   JUDGE PIGOTT:   - - - you may be - - - you  
2 may be on a fool's errand, but that's your fool's  
3 errand, not ours.

4                   MR. DALY:   Yeah.   Judge, what the hospital  
5 proposes in their brief is, what does plaintiff want  
6 us to do, look at every single case.   Our answer is  
7 no, look at the ones where notice of claim is.

8                   JUDGE PIGOTT:   No, I'm saying - - - I'm  
9 saying even that.   I mean, the reason they have the  
10 ninety and the year and ninety is exactly because  
11 things like this.   So, you know, if a client comes to  
12 you and they are four years late, let's say, I know  
13 this isn't that case, you send them home then say,  
14 I'm sorry, but, you know, there's - - - it's too  
15 late, you know, and we don't have a rational basis to  
16 say accept a late notice, or if you do, you do.   But  
17 - - - but - - -

18                   MR. DALY:   That's - - - that's, Judge,  
19 you're hitting the nail on the head.   The challenge  
20 we face, when a client walks in the door, and we have  
21 no rec - - - medical records, what we have is the  
22 client's story.   Okay.   Do we send the client away  
23 when we are within the ten year period?   We don't  
24 think that's the right thing to do.

25                   We want to give the client an opportunity

1 for her day in court, if we're within the statute.  
2 If she comes to us outside of ten years, we say  
3 sorry, we can't help you. But if she comes to us  
4 within ten years, we'll look at the case.

5 We've - - - the Williams case that was last  
6 before the court on this issue, the client walked in  
7 the door with four months remaining on the statute.  
8 And we didn't turn her away, because the legislature  
9 has said, there is a period here that you can make a  
10 - - - file a motion for late notice, and that's what  
11 was done. And that's what was done in that case.

12 CHIEF JUDGE DIFIORE: Counsel, let's move  
13 to the standard.

14 MR. DALY: Yeah. Thank you, Judge. We are  
15 concerned about the First Department's standard; to  
16 the extent it is that we must show the extent to  
17 which the malpractice caused the injuries or caused  
18 them to be more severe. Because these - - - the  
19 injury we are dealing with in this case is a grade 3  
20 bleed.

21 It's a very difficult burden for us to show  
22 the extent to which the malpractice made that injury  
23 worse. It's almost like an indivisible injury. You  
24 can't separate it out. So that's not a fair standard  
25 to impose upon us. A fair standard should be,

1 plaintiff must show that the injury was caused or  
2 aggravated, made worse, by the malpractice that  
3 plaintiff identifies. I think that's a fair  
4 standard.

5 JUDGE RIVERA: But isn't your rule  
6 basically that they have to know they've committed  
7 malpractice because if you looked at the medical  
8 records it would be obvious on its face?

9 MR. DALY: Well, we say that yes, according  
10 to our rule, the malpractice has to be apparent from  
11 the face of the records. Okay. And in this case, it  
12 is apparent from the face of the records.

13 JUDGE FAHEY: So - - - so where in the  
14 record? What supports that?

15 MR. DALY: Okay. Well, in this case, there  
16 was a delay in intubation after the child was born.  
17 And I pick that one to start because, is that because  
18 the child was born prematurely? Not necessarily.

19 JUDGE FAHEY: Well, I - - - I kind of  
20 wondered why you start there too. What about her  
21 history? You got her history before she goes in, she  
22 has a history of placental eruptions.

23 MR. DALY: Yes, yes.

24 JUDGE FAHEY: She has three prior problem  
25 pregnancies.

1 MR. DALY: Yes, yes.

2 JUDGE FAHEY: It seems to me that there is  
3 the sonogram question of whether or not they were  
4 accurately read and interpreted.

5 MR. DALY: Sure, yes.

6 JUDGE FAHEY: You know, the post delivery  
7 questions - - -

8 MR. DALY: Judge - - -

9 JUDGE FAHEY: - - - I don't know if they  
10 are as clear as cut as you - - - as it - - -

11 MR. DALY: - - - I started there because  
12 the - - - the obstetrical departures that Your Honor  
13 is mentioning, and they're significant in this case,  
14 but they would be what the hospital would say, it's  
15 simply because of the prematurity; that's why those  
16 are important.

17 It's - - - it's the prematurity that caused the  
18 baby to be, you know, subjected to the types of things  
19 that the OB may or may not have done right at the  
20 hospital. But when you look to the after birth departures  
21 - - -

22 JUDGE FAHEY: I see.

23 MR. DALY: - - - that's more divorced from  
24 the, oh, it's all because of prematurity.

25 JUDGE GARCIA: Counsel, counsel, I know

1 your red light is on, but Chief Judge, if I could  
2 just have one minute.

3 CHIEF JUDGE DIFIORE: Yes, of course.

4 JUDGE GARCIA: This all sounds a lot like a  
5 summary judgment motion, but to get back the  
6 standard, here is abuse of discretion. The courts  
7 below looked at the medical files, and our review  
8 here is, did they abuse their discretion, and should  
9 we really be getting into those medical issues that  
10 you're talking about, and whether or not the  
11 thousands of pages of medical file shows that or  
12 doesn't, and was it an abuse of discretion for a  
13 lower courts not to find that in those thousands of  
14 pages?

15 Aren't we really just looking at this as  
16 whether or not they abused their discretion in  
17 saying, the hos - - - you don't get to file a late  
18 notice, because they didn't have notice of the  
19 malpractice.

20 MR. DALY: Yes.

21 JUDGE GARCIA: And I take your arguments in  
22 a summary judgment.

23 MR. DALY: It's a very good question,  
24 Judge, because the standard is different on a motion  
25 for late notice of claim. And it is an abuse of

1 discretion standard. And we submit that the two  
2 judge dissent at the First Department got it right.  
3 That the three judge majority, they abused their  
4 discretion with all the departures that went on here,  
5 and their relatedness to the injuries, that it was an  
6 abuse of discretion.

7 And that's why we're here, and we ask the  
8 court to reverse.

9 CHIEF JUDGE DIFIORE: Thank you, sir.

10 MR. DALY: Thank you.

11 CHIEF JUDGE DIFIORE: Ms. Ross.

12 Why was this not an abuse of discretion by the  
13 trial judge?

14 MS. ROSS: Your Honor, this was not an  
15 abuse of discretion because, as the trial judge found  
16 looking at the records, at these four thousand pages  
17 of records, the theory behind plaintiff's case is  
18 that a hypothetical or alternative theory course of  
19 treatment should have happened. By definition, that  
20 is not in the records.

21 And as - - - as my colleague admitted, the  
22 negligence, the malpractice attributable to injury to  
23 this child must be apparent from the face of the  
24 records, which again, is actually at odds with - - -  
25 with the dissent here - - -

1 JUDGE RIVERA: So if you look at the  
2 medical records - - -

3 MS. ROSS: - - - which argued that a  
4 suggestion was accurate.

5 JUDGE RIVERA: So if you look at the  
6 medical records, and it could be this history of the  
7 mother, or it could be the conduct, and let's say  
8 they are in equipoise, is that enough to grant the  
9 request for late notice?

10 MS. ROSS: It is not, Your Honor.

11 JUDGE RIVERA: Why not?

12 MS. ROSS: It is not because the - - - it  
13 certainly weighs against a finding, strongly ways  
14 against the finding of actual knowledge of the  
15 essential facts of the claim to show apparent - - -

16 JUDGE RIVERA: You've got several experts  
17 that say, you look at these records, it's pretty  
18 obvious.

19 MS. ROSS: And again, the lower courts here  
20 reviewed all of these affidavits, rev - - - and  
21 looked at what the affidavits based their opinions  
22 on. And at a minimum, that analysis should be given  
23 deference by this court, where the standard is abuse  
24 of discretion as a matter of law.

25 JUDGE ABDUS-SALAAM: Yeah, that's true,

1           counsel, but isn't it also true that the trial court  
2           essentially determined that this is summary judgment,  
3           and said, if we were at that stage, I wouldn't grant  
4           summary judgment. We're just looking at, you know,  
5           the notice of claim, and whether that was late or  
6           not. But in actuality, didn't the judge decide on  
7           summary judgment grounds that there was no - - - no  
8           claim?

9                         MS. ROSS: The - - - indeed, it was  
10           definitely reasonable for the court here to  
11           acknowledge that if this was a summary judgment  
12           motion, we would be - - - there are conflicting  
13           expert affidavits, and an analysis should be made as  
14           to how - - - how those should be weighed.

15                        But no, I've - - - I believe, Your Honor,  
16           that the court quite reasonably found that the  
17           inference complications here were so consistent with  
18           prematurity, and that the plaintiff's experts did not  
19           set forth any supported evidence to show otherwise.

20                        JUDGE ABDUS-SALAAM: I think the - - - I  
21           think what the judge said is they were all  
22           attributable to prematurity, as opposed to, there's,  
23           you know, there might have been something here that  
24           was - - - a departure that caused an injury.

25                        MS. ROSS: Yes, Your Honor, the court said

1 "There is insufficient evidence to support the  
2 finding that the infant's condition upon delivery,  
3 and subsequent issues that developed during his NICU  
4 admission were caused by any malpractice, as opposed  
5 to the infant's extreme prematurity." Which again,  
6 we know that it could not have been avoided.

7 And that's a very reasonable analysis, and it's  
8 also supported in the records. Looking at the rec - - -

9 CHIEF JUDGE DIFIORE: Ms. Ross, what kind  
10 of facts would have to appear in the medical records  
11 to give rise to notice? What - - - what would - - -

12 MS. ROSS: Well, we certainly cited a few  
13 cases in our brief - - -

14 CHIEF JUDGE DIFIORE: Um-hum.

15 MS. ROSS: - - - that exemplify cases where  
16 an independent review of the medical records would  
17 show that, based if - - - if one is to solely rely on  
18 medical records to establish notice, that there has  
19 to be an apparent departure. There has to be  
20 something that is evident in the record, such that  
21 the hospital would have known, let's start an  
22 investigation, let's start preserving evidence, let's  
23 start interviewing witnesses. Here, we were never  
24 given that opportunity - - -

25 JUDGE ABDUS-SALAAM: What about the intra -

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MS. ROSS: - - - especially where - - -

JUDGE ABDUS-SALAAM: What about the intraventricular bleed that happened while the child was in the hospital, and then the parents were told, you know, this child is going to have some problems here - - -

MS. ROSS: That, and again - - -

JUDGE ABDUS-SALAAM: - - - going forward. That was just a few - - - that was a few days after the child was born.

MS. ROSS: That's correct, Your Honor, and our expert Dr. Molofsky (ph.) quite specifically addressed the scenario of a brain hemorrhage. In fact, and in that - - - that is a very common occurrence in extremely premature birth. The - - - the mother, in fact, was advised of the risk - - -

JUDGE ABDUS-SALAAM: The expert on the other side said that's not as common as your expert said it is.

MS. ROSS: And again, Your Honor, if we were on a summary judgment motion, this would be something that would be analyzed in that kind of posture.

JUDGE FAHEY: But the problem with that

1 logic is, is that - - - is that by saying that you  
2 couldn't grant summary judgment, you're saying that  
3 there's a question of fact. Okay. We all agree on  
4 that. So if you're saying there is a question of  
5 fact, that means that experts can look at these  
6 records and say, there is a claim here.

7 Now, what the response was, whether it  
8 constituted malpractice, that's a separate question.  
9 But whether or not you should be on notice of there  
10 being a claim, everyone who looked at the record  
11 seems to see that there was a problem here.

12 The question - - - so to say that it's not  
13 - - - it's not - - - it seems like you're arguing  
14 that it is not proof for summary judgment for medical  
15 malpractice rather than notice. I'm having a  
16 difficult time seeing how this doesn't constitute  
17 notice in some form.

18 MS. ROSS: Right.

19 JUDGE FAHEY: If - - - if your expert says,  
20 well, no, it's not legal malpractice, but it occurs  
21 occasionally and it's a question of fact, well, that  
22 would seem to put you on notice that you're going to  
23 have a claim here.

24 MS. ROSS: Well, as this court has held in  
25 Williams, the record - - -

1 JUDGE FAHEY: Right, I read Williams.

2 MS. ROSS: Yes.

3 JUDGE FAHEY: I understand - - - I  
4 understand Williams. I don't know if it's as strong  
5 for you to think - - - that suggests language is  
6 difficult, and in the language, it suggests in  
7 Williams - - - I'm not sure that I think that we  
8 should use that language, suggest, I think that to  
9 rely on that may be enough. Maybe it needs to be a  
10 little stronger, maybe the court needs to clarify  
11 that from point of view - - - for physicians and for  
12 hospitals. But this may meebeat the standard even  
13 without suggest.

14 MS. ROSS: The evinced language, Your  
15 Honor, definitely better captures the standard that  
16 should be applicable here.

17 JUDGE FAHEY: You may be right about that,  
18 but - - - so let's assume - - - let's assume we're  
19 operating under that. There is a lot here that  
20 evince - - - that evinces the possibility of a  
21 medical malpractice action. I counted ten different  
22 ~~incidences~~ instances in going through the records.

23 I am no expert but - - - but it seems - - -  
24 it seems compelling to me anyway, and it's - - - it's  
25 difficult in oral argument to singularly respond to

1 those issues, but - - - but at the logic of summary  
2 judgment, it just doesn't seem to hold here.

3 MS. ROSS: Well - - -

4 JUDGE PIGOTT: One of the points you made,  
5 not to interrupt you before you get a chance to talk,  
6 is that we have the rule, it's ninety, and then a  
7 year, and ninety, and if you - - - if you don't do  
8 it, you got to make an application, and show good  
9 cause why you haven't complied with the statute.

10 MS. ROSS: That's their burden, yes.

11 JUDGE PIGOTT: And I think in your papers -  
12 - -

13 Pardon me?

14 MS. ROSS: That is the burden.

15 JUDGE PIGOTT: Right, on this - - - yeah,  
16 on the plaintiff, and I think you made the point that  
17 this notice is what, five years late?

18 MS. ROSS: Yes, Your Honor. The - - -  
19 obviously, the January '07 notice of claim, it's well  
20 established that was a legal nullity. And - - -

21 JUDGE STEIN: Well, how - - - how could - -  
22 - but how could the plaintiff, if - - - if they moved  
23 at fourteen months after the ninety day period  
24 expired, how could they have shown that the hospital  
25 had actual notice, if they had - - - didn't - - -

1 hadn't seen the records set?

2 MS. ROSS: Well, I - - - I would - - - I  
3 would dispute that, Your Honor, because I understand  
4 even from plaintiff's reply brief that within five  
5 months, a good number of records were already  
6 received by the plaintiff. So - - -

7 But putting that aside, it's not our burden to -  
8 - - to - - - it's his burden to - - -

9 JUDGE STEIN: No, no, it's not a question  
10 of burden, but - - - but if - - - if you're saying -  
11 - - I mean, what they're saying is, is that the  
12 client comes in, they know it's late, but they, boom,  
13 they send out that - - - that notice of claim, so now  
14 the hospital is on notice for sure. So I'm not sure  
15 why we're talking about five years, because - - -

16 MS. ROSS: Well - - -

17 JUDGE STEIN: - - - whether or not they  
18 had gotten that permission, and whether they had  
19 enough support for an application for late notice, is  
20 different to me from the question of, did - - - did  
21 the hospital actually have notice, and when did they  
22 have it. Did they have it at the time of birth, did  
23 they have it fourteen months later, you know - - -

24 MS. ROSS: Right. Well, Your Honor, I  
25 would respond to that by saying that, again, the - -

1 - it's unclear what the plaintiff would expect us to  
2 do in - - - in that kind of a situation, given the  
3 volume and - - - and the - - - the hundreds of timely  
4 notices of claim that were served with.

5 JUDGE STEIN: So what you're saying is, is  
6 that - - - so what you're saying is that you would  
7 then be forced to look at every notice of claim filed  
8 by anybody, no matter how long after the - - - the  
9 incident.

10 MS. ROSS: Yes.

11 JUDGE RIVERA: But isn't that what you're  
12 stuck with anyway? If you want to call it being  
13 stuck with something, because the statute provides  
14 for the opportunity for late notices to nevertheless  
15 be recognized by the court.

16 MS. ROSS: Yes, Your Honor.

17 JUDGE RIVERA: So you do not know when a  
18 court will indeed permit this late notice nunc pro  
19 tunc, so you're stuck with it, right?

20 MS. ROSS: It's - - - it's a difficult  
21 situation, definitely to be in, and - - -

22 CHIEF JUDGE DIFIORE: If the late notice  
23 were permitted, and the case were to go forward, what  
24 actual prejudice would the hospital suffer?

25 MS. ROSS: Well, I think that there is a -

1           - - it's clear that there are certain cases where  
2           prejudice doesn't really come into play, where, for  
3           example, records are - - - are not - - - are  
4           available, and they're - - - they are - - - they  
5           don't dissipate with time.

6                         But here, we're at the opposite end of that  
7           spectrum. We have not had the chance to interview  
8           the physicians that were there that day.  
9           Particularly when, again, the theory here is about  
10          paths not taken by the doctors. And so we don't have  
11          the ability to ask, why did you choose this method  
12          over that method, what was your thought process - - -  
13          processes that went into that decision. And so,  
14          we've been deprived of that ability to conduct prompt  
15          investigations.

16                        And also in terms of the NICU stay, these  
17          doctors deliver hundreds and hundreds of babies. I mean,  
18          it's - - - it's unrealistic to - - - to expect that we  
19          can, now, at this late date, get an accurate picture as to  
20          what happened in order to successfully defend.

21                        JUDGE RIVERA: Understood, but again, the  
22          statute provides for these late notices, so that's  
23          possible at any point in time, right?

24                        MS. ROSS: Yes, but that - - - that would  
25          be the prejudice that - - -

1 JUDGE RIVERA: Understood.

2 MS. ROSS: - - - and it's quite extreme in  
3 this case.

4 CHIEF JUDGE DIFIORE: Thank you, Ms. Ross.

5 MS. ROSS: Thank you, Your Honors.

6 CHIEF JUDGE DIFIORE: Mr. Daly.

7 JUDGE GARCIA: Counsel - - -

8 JUDGE STEIN: Counselor, if we agree with  
9 you - - -

10 Sorry.

11 If we agree with you, then in every difficult  
12 birth where there are problems, are you saying that the  
13 hospital is on notice of a potential malpractice claim?

14 MR. DALY: No, no, Judge, not in every  
15 case. But this - - -

16 JUDGE STEIN: Okay. What makes this case  
17 different? So you have a - - - you have a severely  
18 premature birth - - -

19 MR. DALY: Um-hum.

20 JUDGE STEIN: - - - you have a mother with  
21 lots of complications, and you have things that I  
22 think you will agree are consistent with, either  
23 malpractice, or simply this - - - the nature of this  
24 type of birth. So how - - - where does the hospital  
25 draw the line in terms of what it investigates, in

1 terms of these - - - these kinds of birth?

2 MR. DALY: The medical records in this case  
3 demonstrated that the mother had been to the hospital  
4 repeatedly, claiming that she was bleeding. Okay.  
5 And they turn her away. She was bleeding and passing  
6 blood clots. Okay. Those are the signs of a - - -  
7 of an abruption, okay, which - - - a separation of  
8 the placenta from the wall of the womb, and it  
9 adversely affects oxygen going to the baby.

10 So you have a mother coming there and  
11 saying, I'm bleeding, let me in, and they say, go  
12 away, go away, go away; they repeatedly turn her  
13 away. That - - - that, in and of itself, ought to  
14 raise an alarm that, what's going on here? -

15 And then when the child - - - mother is  
16 finally admitted to the hospital, they don't deliver  
17 her right away. They - - - they delay. And counsel  
18 says that we're arguing different therapies; we're  
19 not at all. We're not saying they should have done  
20 something different. They should have not delayed.  
21 Don't delay in doing the ~~Caesar~~ C-sec - - -

22 JUDGE STEIN: That's doing something  
23 different. That's - - - that's doing the C-section.

24 MR. DALY: Well - - -

25 JUDGE GARCIA: And to go back to the - - -

1 the standard here, it seems like in these cases, you  
2 have a four thousand page record, you will get an  
3 expert that comes in and says, that's the worst  
4 malpractice I've ever seen, they did this, they  
5 didn't do this. The hospital invariably will get an  
6 expert that comes in and says, no, this was fine.

7 So either, if we go with you, we're going  
8 to have to have a rule that says, you've put that in  
9 issue, so you get to file a late notice, because my  
10 expert says, this is the worst malpractice I've ever  
11 seen, and that creates kind of this issue of fact  
12 here. Or we're going to say, okay, you filed this, a  
13 hospital invariably files what they're going to file  
14 in response, and the judge's role is to look at those  
15 under an abuse of discretion standard and determine  
16 only one thing really on that, which is, did they  
17 have notice based on these medical records.

18 So this idea that, well, our expert says  
19 this and that, isn't so much to who did what here, in  
20 terms of committed malpractice, it's what did the  
21 record show, right?

22 MR. DALY: That's correct.

23 JUDGE GARCIA: So to argue, you know, well,  
24 our expert was saying this, and if you look at this  
25 particular procedure or delay, all of that just goes

1 to, did they have notice, right?

2 MR. DALY: Yes, Judge.

3 JUDGE GARCIA: So why would it be an abuse  
4 of discretion here for a judge to look at that here,  
5 look at your competing experts and say, you know  
6 what, this - - - yeah, it could go this way, it could  
7 go this way, but on this record, and these competing  
8 medical views of what happened here, it's not notice  
9 to have four thousand pages already.

10 MR. DALY: In this - - - in this particular  
11 case, the judge, any judge, but in this case, looks  
12 at the - - - has to look at the affidavits prepared  
13 by the experts. We have three affidavits. And Dr.  
14 Trifiletti (ph.) is extremely well credentialed, and  
15 they are - - -

16 JUDGE GARCIA: Maybe a jury would believe  
17 they committed malpractice, but the judge is only  
18 looking at one issue here, right, from these medical  
19 records; it's whether or not they had notice?

20 MR. DALY: Whether they give notice of  
21 malpractice causing injury to the hospital.

22 JUDGE GARCIA: Right.

23 MR. DALY: And in this case, it's  
24 overwhelming that notice was given, Judge, and I see  
25 my red light is on, and I thank the court for

1 entertaining our argument.

2 CHIEF JUDGE DIFIORE: Thank you.

3 (Court is adjourned)

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## C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Wally G. v. New York City Health and Hospitals Corporation, No. 95 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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