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COURT OF APPEALS
STATE OF NEW YORK

SANMIGUEL,

Respondent,

-against-

NO. 67

GRIMALDI,

Appellant.

20 Eagle Street
Albany, New York
September 8, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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1 CHIEF JUDGE WILSON: Next case on the calendar is
2 SanMiguel v Grimaldi.

3 MR. BACH: Good afternoon, Your Honor. May it
4 please the court. My name is Charles Bach, from Heidell
5 Pittoni Murphy & Bach. I represent Dr. Meryl Grimaldi, a
6 board-certified obstetrician practicing in Bronx County.
7 In granting leave to this court - - -

8 CHIEF JUDGE WILSON: Do you wish to save any time
9 for rebuttal?

10 MR. BACH: I'm sorry?

11 CHIEF JUDGE WILSON: Do you wish to save any time
12 for rebuttal?

13 MR. BACH: No. No, Your Honor. I'll let my
14 reply brief do the talking for me. In granting leave to
15 appeal to this court, the Appellate Division effectively
16 certified two legal questions. The first is whether or not
17 respondent's claim for lack of informed consent is a
18 species or a form of medical malpractice, thereby invoking
19 this court's unanimous decision in Sheppard-Mobley,
20 precluding recovery for the plaintiff, mother's, emotional
21 distress in an obstetrical case where the child is born
22 alive. So that's the first question. And the second is
23 whether or not this court should overturn the unanimous
24 decision that was reached twenty years ago, authored by
25 George Bundy Smith on a court that has - - - was well

1 respected, and a decision that's been - - -

2 JUDGE TROUTMAN: So could the Appellate - - -

3 MR. BACH: - - - cited over and over again.

4 JUDGE TROUTMAN: Could the Appellate - - -

5 MR. BACH: Yes, Judge.

6 JUDGE TROUTMAN: - - - Division affirm with
7 Sheppard-Mobley applying? Could they properly have
8 affirmed the case?

9 MR. BACH: No. They - - - if Sheppard-Mobley, we
10 say, applies to claims for medical malpractice, everybody
11 agrees with that. They also apply to claim - - - claims -
12 - -

13 JUDGE TROUTMAN: So the dissent - - -

14 MR. BACH: - - - for informed consent.

15 JUDGE TROUTMAN: The dissent, you would argue,
16 was correct?

17 MR. BACH: Is a hundred percent. Alison Renwick
18 got it right. Absolutely. Sheppard-Mobley applies. You
19 cannot - - - let me step back for a second. The claim for
20 lack of informed consent - - -

21 JUDGE RIVERA: Why aren't they different torts?
22 Why isn't med mal and informed consent just two different
23 animals?

24 MR. BACH: They're not.

25 JUDGE RIVERA: Let's cut to the chase.

1 MR. BACH: They're not. Informed consent is a
2 statutory cause of action. 2805-d spells out exactly what
3 a plaintiff must prove to prove a claim for lack of
4 informed consent. The - - - the name of the statute is
5 medical malpractice - - - limitations on medical
6 malpractice actions in the form of informed consent. It's
7 a limitation on the action. It requires an expert to set
8 forth a standard of care for what a - - - a - - - a
9 physician about to perform a procedure gives an informed
10 consent to her or his patient. So it is clearly a form of
11 malpractice. This court recognized that in Karlin - - -

12 JUDGE RIVERA: Because of the title the
13 legislature gave it?

14 MR. BACH: No. Because this is a malpractice
15 case. It's a malpractice case. It's based on a procedure
16 that a physician has performed. Your - - - that plaintiff
17 saying - - -

18 JUDGE RIVERA: Yeah. But the - - - the claim is
19 that the patient really didn't understand - - -

20 MR. BACH: Yeah. So - - -

21 JUDGE RIVERA: - - - and you didn't properly
22 explain to them - - -

23 MR. BACH: Okay.

24 JUDGE RIVERA: - - - the procedure and the risk.
25 That has nothing to do with whether or not your conduct as

1 that physician was one that, otherwise, with respect to
2 whatever procedure you engaged in - - -

3 MR. BACH: Well - - -

4 JUDGE RIVERA: - - - was done within the confines
5 of professional responsible action.

6 MR. BACH: Most respectfully, Judge Rivera, there
7 is a - - - there is a standard of care for obstetricians
8 with respect to mothers in labor. Experts set forth that
9 standard of care both when they talk about departures that
10 result in harm, and the departures could also be in
11 information. So it is the same general ambit of informed
12 consent. This court recognized it in Karlin - - -

13 JUDGE HALLIGAN: They - - - they seem very
14 different, right?

15 MR. BACH: They're not.

16 JUDGE HALLIGAN: Well, let me tell you the
17 respect in which they - - -

18 MR. BACH: They're different theories - - -

19 JUDGE HALLIGAN: - - - they strike me as
20 different.

21 MR. BACH: Yeah. They're different theories, but
22 go ahead.

23 JUDGE HALLIGAN: Okay. You could have a
24 physician who performs whatever the particular procedure is
25 flawlessly, and that procedure could result in certain

1 adverse effects even when performed flawlessly. And if
2 those - - - if the risk of those effects are not adequately
3 explained to the patient, you could have, I assume, a claim
4 for lack of informed consent, right?

5 MR. BACH: Well, you could have that claim.

6 JUDGE HALLIGAN: Okay.

7 MR. BACH: That's true.

8 JUDGE HALLIGAN: And so in that respect, they
9 seem distinct to me because the first has to do with the
10 mechanics of how the procedure is performed, physical,
11 right?

12 MR. BACH: Right.

13 JUDGE HALLIGAN: And the second is, did I tell
14 you in advance what might happen down the road?

15 MR. BACH: But you cannot segregate informed
16 consent and say you're entitled to different types of
17 damages. That's the key to - - - one of the keys to this
18 case.

19 JUDGE HALLIGAN: What exactly do you mean by
20 different types of damages? Because it could be - - - I -
21 - - I would - - - I would think that if I sustain some
22 adverse effect and the procedure was performed flawlessly,
23 but I wasn't advised, and I didn't consent, what would the
24 measure of damages be?

25 MR. BACH: So I - - - so for example, any



1 surgery, you have an adverse effect. You have a scar,
2 right?

3 JUDGE HALLIGAN: Well, let's - - - let's take a
4 different one. Let's assume an inevitable risk of surgery
5 is the risk of infection. And someone sustains an
6 infection - - -

7 MR. BACH: Okay.

8 JUDGE HALLIGAN: - - - and you know, is severely
9 harmed and - - - and was not informed in advance that
10 that's a risk.

11 MR. BACH: I - - - well, then that plaintiff - -
12 - first of all, I can't imagine that actually going to
13 court. But second of all - - -

14 JUDGE HALLIGAN: Okay. But - - -

15 MR. BACH: But - - - but - - - but I'll answer -
16 - -

17 JUDGE HALLIGAN: - - - you know, indulge my
18 hypothetical.

19 MR. BACH: Then that - - - that - - - that
20 plaintiff would have to prove that no reasonable person in
21 that plaintiff's position would have undergone that
22 procedure and would have to prove it wasn't an emergency
23 procedure.

24 JUDGE HALLIGAN: And - - - and if she did, what
25 would the measure of damages be?

1 MR. BACH: What - - - what happened as a
2 consequence of her infection. So if she stayed an extra
3 two days in the hospital, the damages would be the extra -
4 - - the cost of the extra two days in the hospital. But
5 what I'm saying is, the court below said informed consent
6 is a totally different animal, and we're saying it's not,
7 and that courts have universally recognized that informed
8 consent - - -

9 JUDGE TROUTMAN: What do you say with respect to
10 the argument that we should accept the invitation to
11 overturn Sheppard?

12 MR. BACH: Well, I'm glad you asked me that,
13 Judge Troutman, because your court back in 2017 in Brashaw
14 v. Cohen, specifically said, no, no, Sheppard remains good
15 law. And if the plaintiff in the case that you joined all
16 of your colleagues - - - it was a per curiam decision that
17 it was unanimous - - - you specifically said that if - - -
18 if there's going to be an expansion of recovery, that's a
19 matter for the legislature, and that's - - -

20 JUDGE TROUTMAN: What - - -

21 MR. BACH: - - - what we're seeing here.

22 JUDGE TROUTMAN: The court, are you referring to
23 my being on the Fourth Department?

24 MR. BACH: Yes.

25 JUDGE TROUTMAN: And now I'm on the Court of

1 Appeals.

2 MR. BACH: Correct.

3 JUDGE TROUTMAN: So there is a difference between
4 what I could do.

5 MR. BACH: Yes.

6 JUDGE TROUTMAN: I had to follow the Court of
7 Appeals' precedent. So what I'd like to ask you is,
8 Sheppard-Mobley, is that a creation of this court or is it
9 a creation of the legislature?

10 MR. BACH: Well, no. So Sheppard-Mobley, when it
11 was - - - when the opinion was authored by Judge George
12 Bundy Smith and joined by Judge Kaye in her court, that
13 opinion specifically recognized, you know, common law
14 precedent. That opinion, unlike - - - unlike the - - - the
15 Tebbutt case - - - I'm sorry.

16 JUDGE TROUTMAN: Yeah.

17 MR. BACH: Let's - - - I think we need to go back
18 to Broadnax.

19 JUDGE TROUTMAN: Uh-huh.

20 MR. BACH: So in Broadnax, the same court with
21 the same judges that I've mentioned said, you know what?
22 Tebbutt was a peculiar result. It would allow - - - it
23 would allow recovery when the fetus is damaged in utero.
24 It would allow recovery for the mother's physical injury.
25 If the mother, however, gave birth stillborn before - - -

1 because of obstetrical negligence, it barred recovery.

2 JUDGE TROUTMAN: Uh-huh.

3 MR. BACH: So that peculiar result needed to be
4 fixed and rectified. And that's what the Sheppard-Mobley
5 court said in Broadnax.

6 JUDGE GARCIA: But isn't it something of a
7 peculiar remedy? Because it seems to me - - - and I
8 understand what Broadnax, what they were trying to do. But
9 the measure of damages in the Broadnax case is for the
10 mother's emotional harm, right?

11 MR. BACH: For the - - - for the stillborn,
12 right.

13 JUDGE GARCIA: For the stillborn in utero. If
14 the child is born alive and dies five hours later or a week
15 later, there's a wrongful death claim, the damages that
16 child gets or the estate would be what in that case?

17 MR. BACH: Conscious pain and suffering. And the
18 jury would hear the entire - - - all of the facts.

19 JUDGE GARCIA: But the conscious pain and
20 suffering is of that infant, right?

21 MR. BACH: Yes. Yeah. And that could be
22 substantial - - -

23 JUDGE GARCIA: So it seems - - -

24 MR. BACH: - - - and when the plaintiff's lawyer
25 - - - so - - -

1 JUDGE GARCIA: I'm sorry. I'm sorry.

2 MR. BACH: I'm sorry, Your Honor.

3 JUDGE GARCIA: It seems to me what Broadnax was
4 trying to do was even out two things with two very
5 different measures of damages, right? So in the one case
6 where the child is - - - dies in utero and does not have a
7 wrongful death claim - - -

8 MR. BACH: Right.

9 JUDGE GARCIA: - - - under our law, you get this
10 recovery for your emotional damages, which, to me, are
11 very, very different than the child's pain and suffering.
12 And those emotional damages are the same for the mother
13 whose child dies five days later.

14 MR. BACH: And the emotional damages of a mother
15 whose child survives to adulthood, she's not entitled to
16 recover for emotional damages.

17 JUDGE GARCIA: Right.

18 MR. BACH: And - - - and that - - - that - - -
19 because this court recognizes that there is a - - - you
20 know, it's an amorphous claim, emotional damages. I
21 understand this is an extraordinarily sympathetic case.

22 JUDGE GARCIA: My point is, I see what Broadnax
23 was trying to do.

24 MR. BACH: Right. It's - - -

25 JUDGE GARCIA: Right? And Judge Kaye was trying

1 to do. But it seems that the remedy this court imposed is
2 a - - - doesn't make much sense in terms of the types of
3 damages that you're being compensated for.

4 MR. BACH: Well - - - well, what I would say - -
5 - what the court said in Broadnax was, this is - - -
6 applies to a very narrow class of plaintiffs, plaintiffs
7 who've given birth to stillborns and who have a valid
8 obstetrical claim. That's the - - - right? So now, we
9 have this case before us where the claim - - - labor and
10 delivery case - - - typical labor and delivery case pending
11 in the Bronx. When the plaintiff's lawyer took the case
12 on, he knew that the recovery was going to be limited to
13 the wrongful death claim on behalf of the child.

14 JUDGE GARCIA: My point is that's - - -

15 MR. BACH: That could be substantial. So this -
16 - - so just this mother - - - this mother, in our case, is
17 not without a substantial remedy. That's my point.

18 JUDGE GARCIA: I'm not arguing that.

19 MR. BACH: Okay.

20 JUDGE GARCIA: But if - - - or asking about that.
21 I'm curious that a mother who has - - - let's assume the
22 case - - - mother has - - - there's malpractice. Mother
23 has these types of emotional damages, child dies in utero,
24 can seek compensation. Child dies five hours after birth,
25 you wouldn't say those mothers' - - - that mother's damages

1 goes away, right?

2 MR. BACH: No.

3 JUDGE GARCIA: They're still there. She legally
4 is precluded from bringing a claim for that injury because
5 the child can recover for a different injury.

6 MR. BACH: Yes. She has an avenue of recovery
7 that is substantial, unlike the Broadnax plaintiff - - -

8 JUDGE HALLIGAN: So what - - - what - - - what
9 does that - - - what does - - -

10 MR. BACH: - - - who did not have any recovery.

11 JUDGE HALLIGAN: What does that mean?

12 MR. BACH: I - - - who would not have had a
13 recovery. What does that mean?

14 JUDGE HALLIGAN: Yes.

15 MR. BACH: You go to a - - -

16 JUDGE HALLIGAN: I - - - I thought that it was,
17 as Judge Garcia just laid it out, which is that the
18 recovery is with the child, not with the mother for the - -
19 - for the - - -

20 MR. BACH: The mother is - - - the mother is the
21 administratrix of the estate.

22 JUDGE HALLIGAN: Okay. But - - -

23 MR. BACH: The mother is the plaintiff - - -

24 JUDGE HALLIGAN: But - - -

25 MR. BACH: - - - testifying before a Bronx jury.



1 The mother - - -

2 JUDGE HALLIGAN: Yeah. That - - - that, I
3 understand, but - - -

4 MR. BACH: She can get a big award. That's my
5 point.

6 JUDGE HALLIGAN: Okay. But let's - - - let's - -
7 -

8 JUDGE CANNATARO: But on a different cause of
9 action - - -

10 JUDGE HALLIGAN: And - - - and on - - - and on -
11 - -

12 MR. BACH: Absolutely. Different cause of
13 action, but she's got a remedy, whereas - - - whereas the
14 Tebbutt plaintiffs did not have a remedy. That's what I'm
15 saying. I'm sorry if I didn't make myself clear.

16 And I apologize, Judge Halligan. I didn't mean
17 to cut you off.

18 JUDGE CANNATARO: Well, but the - - - I'm sorry,
19 the other point that you were hearing is that not only is
20 it a different cause of - - - yes, the mother still has a
21 recovery. But not - - -

22 MR. BACH: Right.

23 JUDGE CANNATARO: - - - not only is it a
24 different cause of action, it's a completely different type
25 of damages.

1 MR. BACH: Okay.

2 JUDGE CANNATARO: It's the conscious pain and
3 suffering of the child versus the emotional distress - - -

4 MR. BACH: Right.

5 JUDGE CANNATARO: - - - of the mother. I think
6 the cases would be exceedingly rare, where those two
7 damages are in any sense of the word comparable. Either
8 it's - - -

9 JUDGE HALLIGAN: And presumably along those
10 lines, the way in which you would prove them up would be
11 very different, right?

12 MR. BACH: I - - - I agree with - - -

13 JUDGE HALLIGAN: What someone would testify to as
14 to each would be quite different even if - - - I take it
15 your view is the dollar amounts would be significant in
16 both circumstances, so the differences are not material.

17 MR. BACH: Yeah. I - - - I - - - well, I go back
18 to stare decisis. The question was, should Sheppard-Mobley
19 apply? And the answer is, yes. There's no reason for this
20 court to overturn Sheppard-Mobley. It was controlling
21 precedent in the court below. It was a well thought out
22 and balanced decision.

23 JUDGE RIVERA: Well, let's say we disagree - - -
24 let's - - -

25 MR. BACH: And - - - and only the legislature



1 should - - -

2 JUDGE RIVERA: Excuse me. Excuse me. Let's say
3 we - - -

4 MR. BACH: - - - extend this.

5 JUDGE RIVERA: Let's - - - let's - - -

6 MR. BACH: Go ahead, Judge Rivera. I'm sorry.

7 JUDGE RIVERA: Let's say we have some concerns
8 about Sheppard-Mobley. I mean, look, hasn't the court
9 already found that the doctor has a - - - a duty to both
10 the - - -

11 MR. BACH: Absolutely.

12 JUDGE RIVERA: Excuse me. I didn't finish the
13 sentence.

14 MR. BACH: Absolutely.

15 JUDGE RIVERA: So you - - - how can you answer if
16 I haven't finished the sentence?

17 MR. BACH: Well, I mentioned that first point - -
18 -

19 JUDGE RIVERA: - - - to both the mother - - -

20 MR. BACH: No. I'm agreeing with you. Okay.

21 JUDGE RIVERA: Okay. To the mother and the
22 child. And so then I am having great difficulty
23 understanding why Sheppard-Mobley says that once there's a
24 duty owed, the mother can't recover for damages incurred as
25 a result of the breach of the duty.

1 MR. BACH: Because it's a policy decision about
2 the extent - - -

3 JUDGE RIVERA: And we might revisit that.

4 MR. BACH: - - - of recovering. Well, I'm - - -

5 JUDGE RIVERA: We might revisit that. We do that
6 all the time on these common law cases.

7 MR. BACH: You do that when there's compelling
8 justification to do that. When there's been a major
9 societal change - - -

10 JUDGE RIVERA: And maybe some of what you heard
11 in the questioning suggests that there may be the - - -

12 MR. BACH: Well, I'm - - - I'm - - -

13 JUDGE RIVERA: - - - there's a compelling
14 justification.

15 MR. BACH: I'm hopeful that this court would say,
16 you know what? If we're going to extend damages in an
17 obstetrical case where our obstetricians in this state are
18 paying the most premium - - - the highest premiums in the
19 United States of America, the most subject to suit, leaving
20 the practice quite in droves - - -

21 JUDGE RIVERA: You could - - - you could argue
22 that to the legislature.

23 MR. BACH: Well, that's what I'm saying.

24 JUDGE RIVERA: We've been talking about - - - I'm
25 - - - I'm - - -

1 MR. BACH: The legislature has to consider all of
2 that.

3 JUDGE RIVERA: Excuse me. I'm talking about the
4 logic if the court has already held that there is a duty of
5 care owed to the pregnant woman and to the fetus.

6 MR. BACH: You have to - - - it's not just you
7 have to prove duty of care, which we agree. You have to
8 prove breach of a duty. And the breach of the duty in the
9 course of delivering - - -

10 JUDGE RIVERA: Yeah.

11 MR. BACH: - - - Judge Halligan recognized, is
12 different from the breach of the duty in the course of
13 informing a patient.

14 JUDGE RIVERA: But the - - -

15 MR. BACH: In this case, the - - -

16 JUDGE RIVERA: - - - information is about the
17 delivery. And unfortunately, you have a doctor who says, I
18 do it in the moment.

19 MR. BACH: Well, this was an emergency situation,
20 so maybe informed consent doesn't even apply when my client
21 came into the room.

22 JUDGE RIVERA: Yeah. But the - - - you can get -
23 - -

24 MR. BACH: But - - -

25 JUDGE RIVERA: - - - to the merits if the cause

1 of action survives.

2 MR. BACH: Yeah. So - - - so what - - - what - -
3 - what I'm saying - - - what - - - what I'm saying is that
4 the statute that created informed consent was created to
5 limit, not expand the liability of physicians.

6 CHIEF JUDGE WILSON: Could I - - - could I - - -

7 MR. BACH: So now, I - - - I think it's a - - - a
8 - - - a great irony to say that now we're going to expand
9 it based on that statute. Yes, Your Honor.

10 CHIEF JUDGE WILSON: Could I - - - could I ask
11 you something? I - - - I'm not - - - I didn't ever
12 practice in this area. So when you say that the - - - an
13 eight-day - - - a child lives to eight days would have a
14 substantial recovery, what - - - what, on average, would
15 you expect that to be? And how would that be different
16 from, let's say, a child who has the same problems but
17 lives a whole year?

18 MR. BACH: The - - - the testimony from a
19 plaintiff's expert - - - and I've tried several of these
20 cases - - -

21 CHIEF JUDGE WILSON: Uh-huh. That's why I'm
22 asking you.

23 MR. BACH: - - - is any minimal level of
24 awareness entitles the - - - the patient or the plaintiff
25 to recover from conscious pain and suffering - - - it's

1 just a - - - any minimal level of awareness.

2 CHIEF JUDGE WILSON: Right. For the - - - for
3 the period of time that that person is alive?

4 MR. BACH: And - - - right. So - - - so Lee case
5 from - - -

6 CHIEF JUDGE WILSON: So even by me not knowing
7 anything - - -

8 MR. BACH: - - - the Second Depart - - -

9 CHIEF JUDGE WILSON: - - - about it, but I would
10 think that eight days is a pretty short time compared to a
11 year of pain and suffering?

12 MR. BACH: Well, the Second Department in the Lee
13 case say three days was worth \$3 million, so maybe eight
14 cases - - - and this is what I'm saying, Judge, one, what
15 I'm saying is, these get to be very, very expensive cases
16 to defend. They have resulted in some - - - and - - - and
17 - - - and overruling a well-reasoned decision that was
18 unanimous from this court twenty years ago - - -

19 CHIEF JUDGE WILSON: But I will stop you there
20 for a second because - - -

21 MR. BACH: - - - we'll - - - we'll - - - we'll be
22 careful what we ask for.

23 CHIEF JUDGE WILSON: - - - because you are having
24 to defend the case vis-a-vis the infant already. So I'm
25 not sure how much incremental expense there is to defending

1 the case.

2 MR. BACH: No. No. What I mean is - - - I mean
3 judgment costs.

4 CHIEF JUDGE WILSON: Ah.

5 MR. BACH: Every - - - every line that you put on
6 a jury verdict sheet - - -

7 CHIEF JUDGE WILSON: Uh-huh. I understand.

8 MR. BACH: - - - creates a bigger judgment. And
9 there's been real concern in the State of New York with
10 respect to emotional damages. I'm sure you all agree with
11 me there because it's amorphous, and someone could award
12 some jury could award millions and millions for this mom's
13 emotional damages. Now, what I'm saying, that extends the
14 cost of liability. And that's for the legislature to talk
15 about. We have the wrongful death statute that's been
16 passed three times by the present legislature and vetoed by
17 the governor.

18 CHIEF JUDGE WILSON: That's much more expansive
19 than this, right?

20 MR. BACH: Much more expansive. But it's the
21 same - - - to - - - to me, it's very analogous. What I'm
22 saying is, since there are no compelling justifications to
23 overrule, frankly, a decision that I've only heard good
24 things about - - - every court, including the Fourth
25 Department, cited with - - -

1 JUDGE TROUTMAN: Is it consistent - - - is that
2 decision consistent with the national trend?

3 MR. BACH: You know, Judge, the national trend is
4 to put caps on - - - on verdicts. That's the national
5 trend. So I think we should - - -

6 JUDGE TROUTMAN: But do they allow recovery to
7 the mother?

8 MR. BACH: Well, my adversary cited cases which
9 would indicate that the majority of jurisdictions do not
10 allow emotional distress recovery. So the mother is
11 allowed recovery for the - - - the - - - the actual injury
12 that she suffered. So if there was a C-section and she got
13 septic and had a horrific course, and God forbid, you know,
14 really serious injuries, and the baby also was
15 neurologically impaired, then she would have a separate
16 right of recovery that would be very, very substantial.
17 And what I'm saying is to - - - to this court - - -

18 JUDGE TROUTMAN: But are you also saying nation -
19 - -

20 MR. BACH: - - - please defer - - - defer to the
21 legislature.

22 JUDGE TROUTMAN: - - - nationally, there is no
23 right of recovery for the mother if the baby survives for
24 five hours?

25 MR. BACH: No. There are states that - - - there



1 are states that allow recovery. And I'm saying many of
2 those states put caps. So right now - - -

3 JUDGE RIVERA: So that allows an argument to the
4 legislature, correct?

5 MR. BACH: This whole - - - this whole thing
6 should be deferred to - - -

7 JUDGE RIVERA: Pass the argument for the
8 legislature?

9 MR. BACH: This whole thing should be deferred to
10 the legislature.

11 JUDGE RIVERA: Well, not - - - not - - - not - -
12 - not this - - -

13 MR. BACH: But I don't think I'll ever see - - -

14 JUDGE RIVERA: Excuse me. Not - - -

15 MR. BACH: I don't think - - -

16 JUDGE RIVERA: Excuse me. Not this court's
17 decision to expand or contract the common law.

18 MR. BACH: If - - - if this court were to
19 overturn its own precedent, it seems to me, under this
20 court's prior rulings would have to say, we have compelling
21 reasons to do so, circumstances over the last twenty years
22 have drastically changed, and none of that exists. And
23 that's what I'm saying. Follow the - - - follow the - - -

24 JUDGE RIVERA: But the - - - they made - - -

25 JUDGE TROUTMAN: So - - -

1 JUDGE RIVERA: - - - made plain - - - made - - -

2 MR. BACH: - - - precedent. It was a - - -

3 JUDGE RIVERA: - - - made - - -

4 MR. BACH: It was a good decision.

5 JUDGE RIVERA: - - - made plain the illogic of
6 the - - -

7 MR. BACH: Excuse me?

8 JUDGE RIVERA: - - - made plain the illogic of
9 the reasoning in Sheppard v. Mosley (sic), as demonstrated
10 by the facts of the case.

11 MR. BACH: And Sheppard v. Mobley (sic) was
12 logical and continues to be so.

13 JUDGE RIVERA: Well, how can it be when - - -

14 MR. BACH: And - - - and - - -

15 JUDGE RIVERA: - - - when you've already conceded
16 to me that the court has already recognized a duty of care
17 to the mother?

18 MR. BACH: It's - - - I'm sorry. Most
19 respectfully, Your Honor, that's not the issue here, duty
20 of care to the mother. That's a given. The issue here is
21 whether or not this court is going to allow a new avenue, a
22 new line on a verdict sheet, new element of damages.
23 That's the issue here. And what I'm saying is, you - - -
24 the - - - the court below was bound by Sheppard-Mobley. It
25 was a good precedent twenty years ago. And it continues to

1 be good precedent by a very distinguished court. And I'm
2 asking Your Honors to please tell the courts below, follow
3 our precedent.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. BACH: Thank you.

6 MR. CATTERSON: May it please the court. James
7 M. Catterson, along with Danielle Stefanucci, for Pillsbury
8 Winthrop Shaw Pittman, on behalf of St. Barnabas Hospital.
9 I'm in an unusual position of - - -

10 CHIEF JUDGE WILSON: Sorry, Mr. Catterson. Do
11 you also want no rebuttal time?

12 MR. CATTERSON: I'm sorry, Judge. If I could
13 reserve four minutes for rebuttal.

14 CHIEF JUDGE WILSON: Four.

15 MR. CATTERSON: I will try and be brief because I
16 know the hour is already late. And while I wanted to weigh
17 in on the earlier argument, I didn't. I'm in an unusual
18 position - - -

19 JUDGE RIVERA: Much appreciated.

20 MR. CATTERSON: Thank you, Judge. I'm in an
21 unusual position of asking this court to uphold its own
22 well-settled precedent. I understand that there are
23 questions about Sheppard-Mobley. I do. This court and its
24 relationship with stare decisis has always been exceedingly
25 clear. A long-settled rule should only be reexamined if,

1 one, the policy concerns underlying it are outdated, or
2 two, the rule has proved unworkable.

3 JUDGE HALLIGAN: On - - - on the unworkable
4 point.

5 MR. CATTERSON: Yes, Judge.

6 JUDGE HALLIGAN: So to - - - to return to an
7 exchange we were having with - - - with your co-counsel, it
8 does seem to me that the nature of damages sustained by a
9 mother and an infant is inevitably different. And I'm
10 trying to understand specifically with informed consent,
11 right? My understanding is that a claim on behalf of the
12 child for informed consent is still pending; is that right?

13 MR. CATTERSON: Yes, Judge.

14 JUDGE HALLIGAN: Okay. So - - - so how would you
15 go about proving up damages for informed consent on behalf
16 of a child as opposed to a mother? And I understand the
17 mother may be the administrator of the estate, but setting
18 all that aside, what - - - what does a breach of informed
19 consent claim look like for the child as opposed to the
20 mother?

21 MR. CATTERSON: I doubt, Judge, that there would
22 be any difference in proof in terms of - - - although the
23 court has characterized it as wrongful death, it's not,
24 it's medical malpractice, I doubt that there's any
25 difference in how a - - - an attorney puts that case on - -

1 -

2 JUDGE HALLIGAN: So obviously, the - - - the - -
3 - the child can't consent, right?

4 MR. CATTERSON: Correct.

5 JUDGE HALLIGAN: Or not. So the proof would be,
6 did the mother engage in informed consent?

7 MR. CATTERSON: Yes, Judge.

8 JUDGE HALLIGAN: And - - - and so what then would
9 the metric of damages be? Would it be that the - - - you
10 know, a reasonable person in the mother's shoes wouldn't
11 have consented, and therefore, the procedure wouldn't have
12 taken place? Is there any difference in how we would
13 assess damages for a claim on behalf of the mother versus
14 the child?

15 MR. CATTERSON: No, Judge. I don't think there
16 would be any real difference. But to be fair about this,
17 that is, in my view, mixing the difference of the quantum
18 of proof versus whether or not the claim exists. And the
19 question - - -

20 JUDGE HALLIGAN: I do understand that. Although
21 - - -

22 MR. CATTERSON: I know you do, Judge.

23 JUDGE HALLIGAN: No. But if we look at Tebbutt
24 and Broadnax and Sheppard-Mobley, right? Part of what the
25 court seems to be concerned about, and this is why I - - -

1 I'm thinking about the unworkability question is - - - is
2 ensuring that there are not peculiar results that seem
3 unfair because there are certain injuries that - - - for
4 which recovery is unavailable and that - - - and that that
5 seems ill advised. And so that's why I'm trying to
6 understand whether the - - - the - - - an allegation of a
7 lack of informed consent still can give rise to recovery,
8 whether it's on behalf of the mother or the child, which
9 seems to - - - to - - - to sound in - - - in the questions
10 that are at play in Tebbutt and Broadnax and Sheppard-
11 Mobley.

12 MR. CATTERSON: I - - - I would suggest, Judge,
13 it can't be that we decide to jettison stare decisis
14 because the claim for the mother is worth more and more
15 susceptible of proof. It can't be. This court has
16 recognized over and over and over again that you have to
17 draw lines. You have to draw lines.

18 JUDGE SINGAS: Yeah. But this court has also
19 made exceptions. So why isn't this case an exception to
20 that?

21 MR. CATTERSON: There's always going to be - - -
22 and that's the problem with line drawing - - - there's
23 always going to be somebody who's an exception or somebody
24 who has a worse set of facts, who wants to be on the other
25 side of the line.

1 CHIEF JUDGE WILSON: Well, we have - - - we have
2 - - -

3 MR. CATTERSON: That happens in every single
4 demarcation in tort law.

5 CHIEF JUDGE WILSON: So we have drawn a line
6 here, right?

7 MR. CATTERSON: Yes, Judge.

8 CHIEF JUDGE WILSON: And you'd like us to keep
9 that line. In - - - in Sheppard-Mobley, how long did the
10 child survive? Do you recall?

11 MR. CATTERSON: I don't know the answer to that,
12 Judge.

13 CHIEF JUDGE WILSON: Was it into adulthood?

14 MR. CATTERSON: I - - - I don't - - -

15 CHIEF JUDGE WILSON: Not sure.

16 MR. CATTERSON: I don't know the answer, Judge.

17 CHIEF JUDGE WILSON: So let me ask it bluntly.
18 Would it be possible to retain Sheppard-Mobley and say this
19 is closer to being stillborn, living for eight days, than
20 living many, many years?

21 MR. CATTERSON: Judge, the answer to that is what
22 I alluded to earlier. In all seriousness, is it thirty
23 seconds? Is it twenty minutes? Is it one day? Is it five
24 days? Is it eight days? I don't - - - I don't know the
25 answer to that and how any court draws that line. I do

1 know that this court observed there can be no doubt - - -
2 and - - - and this is from Howard against Fletcher. It's
3 quoting Tebbutt. And I know you're all familiar with the
4 case. There could be no doubt the plaintiffs have
5 suffered, and the temptation is great to offer them some
6 form of relief. There's no doubt about that. Ideally,
7 there should be a remedy for every wrong. This is not the
8 function of the law, however, for every injury has
9 ramifying consequences like the rippling of the water
10 without end. The problems for the law is to limit the
11 legal consequences of wrong to a controllable degree.

12 And it's - - - I know my light's on, Judge. If I
13 could just finish that. That problem has bedeviled this
14 court over and over again. And this court, in all of the
15 zone of danger cases, which, by the way, have never been
16 imported to medical malpractice in New York history, but in
17 all of the zone of danger cases, this court made plain that
18 you can't consider just the harm to the plaintiff. You
19 need to consider the harm to all of the stakeholders in
20 this. And on my rebuttal, I'll get to that.

21 But let me leave on stare decisis with this. And
22 it's - - - Judge Rivera, it's your dissent in People
23 against Wortham, which, Judge Wilson, you joined, where you
24 said, quote - - - quoting Matter of Brooks, another case
25 from this court in 2016. And this was a hard-fought case.

1 I know you remember it because there was a long writing on
2 stare decisis. In the rarest of cases, we may overrule a
3 prior decision if an extraordinary combination of factors
4 undermines the reasoning and practical viability of our
5 prior decision, an extraordinary combination of factors.

6 And what did the First Department say was that
7 extraordinary combination of factors? Common sense justice
8 or redress for substantial wrongs. What did the plaintiff
9 say about that? By the way, the plaintiff never urged in
10 Supreme Court that Sheppard-Mobley should be overturned,
11 and the plaintiff didn't urge it in the Appellate Division.
12 The plaintiff said, well, we now have greater value on
13 women and children.

14 JUDGE TROUTMAN: So do you argue that it's not
15 preserved?

16 MR. CATTERSON: Well, it's not preserved, Judge.
17 It's not.

18 JUDGE TROUTMAN: And well, could they have - - -

19 JUDGE RIVERA: And we're - - - were the only ones
20 who could overturn it.

21 MR. CATTERSON: I agree, Judge. I agree.
22 Although the First Department seems to think it could have.
23 It did.

24 JUDGE RIVERA: No. They said even under
25 Sheppard-Mobley, but the Court of Appeals should consider

1 it. We're granting leave.

2 MR. CATTERSON: That was the alternative holding,
3 Judge. It knew that it couldn't do what it did.

4 JUDGE RIVERA: Sure.

5 MR. CATTERSON: It knew it. It did it anyway.
6 The question - - - and I know I'm imposing on your
7 patience. There are no extraordinary combination of
8 factors here that would lead you to depart from stare
9 decisis. In the twenty years since Sheppard-Mobley was
10 issued, it's been cited 225 times. Not one court has said
11 that Sheppard-Mobley was wrongly decided. The rule is
12 workable. Nobody likes it. I get that. Nobody likes it
13 because these cases are all horrible. They just are. But
14 it's not just the plaintiff.

15 JUDGE RIVERA: 2 - - - I'm sorry, 225 citations -
16 - -

17 MR. CATTERSON: Cited 225 times.

18 JUDGE RIVERA: - - - over twenty some odd years,
19 not a lot of cases.

20 MR. CATTERSON: I - - -

21 JUDGE RIVERA: I guess it's a small population
22 that would be affected - - -

23 MR. CATTERSON: I - - - I - - -

24 JUDGE RIVERA: - - - if we chose to overrule
25 Sheppard-Mobley.

1 MR. CATTERSON: I don't know if it's a small
2 population, Judge, because the effects will trickle down.
3 And I'll get to that in rebuttal for my client. But thank
4 you very much for your time.

5 JUDGE RIVERA: Fair enough.

6 MS. HASAPIDIS: May it please the court. I'm
7 Annette Hasapidis, Hasapidis Law Offices, with trial
8 counsel, Marea Wachsman, of Schreier & Wachsman, appearing
9 for the plaintiff. The plaintiff asked that this court
10 hold that Sheppard-Mobley is now opposed to logic and
11 experience. And I'd like to, if the court would indulge me
12 for a minute, address some of the concerns from the court
13 about the discussion of precedent. We are - - - so are you
14 as - - -

15 JUDGE HALLIGAN: Are you ask - - -

16 JUDGE SINGAS: So is your position - - - I'm
17 sorry. Is your position that Sheppard-Mobley should be
18 overturned or that there should be a distinction for
19 informed consent versus regular malpractice - - -

20 MS. HASAPIDIS: I'd submit - - -

21 JUDGE SINGAS: - - - medical malpractice?

22 MS. HASAPIDIS: - - - to rule in favor of my
23 clients, the court can find the distinction as found by the
24 First Department. However, in the interest of consistency
25 and logic, it should be overturned altogether. The in - -

1 -

2 JUDGE SINGAS: Okay. Now, you didn't - - - you
3 didn't argue that below, correct? So - - -

4 MS. HASAPIDIS: I'm sorry?

5 JUDGE SINGAS: You didn't argue that below?

6 MS. HASAPIDIS: What we argued below in - - - in
7 the Supreme Court for preservation purposes, is that what
8 you're referring to, Judge Singas?

9 JUDGE SINGAS: Yeah. I'm trying to figure out if
10 maybe the claim is waived, honestly.

11 MS. HASAPIDIS: It - - - it was - - - at page
12 2075 of the record at paragraph 45 of counsel's
13 affirmation, he stated that the failure to obtain
14 plaintiff's informed consent to the use of the extractor
15 and the violation of her physical integrity by its use not
16 once but twice, gives rise to her emotional damages.
17 Defendants understood this to be the claim because in a
18 reply affirmation at page 2103, counsel insisted that
19 because plaintiff didn't claim that the use of the vacuum
20 extractor caused her any physical injury and she did not
21 cite an independent physical injury, her claims were
22 precluded. So respectfully, the claim is preserved.
23 Defendants understood it as seeking a deviation from
24 Sheppard-Mobley, which would - - -

25 JUDGE SINGAS: Okay, well, I mean, fair point.

1 But a deviation and overruling a precedent are two
2 different things. So are you proceeding on both of those
3 now? I'm just trying to see - - -

4 MS. HASAPIDIS: Yes.

5 JUDGE SINGAS: I'm just trying to frame your
6 argument.

7 MS. HASAPIDIS: Yes.

8 JUDGE SINGAS: Okay.

9 MS. HASAPIDIS: Yes. The - - - the limitations
10 of Sheppard-Mobley should no longer be followed. The - - -
11 the - - - the reason that this precedent is - - - that
12 we're here today is because of the way that this precedent
13 has developed. First of all, cases involving childbirth
14 between a woman and a child have developed in a separate
15 niche apart from other tort cases. We have negligent
16 infliction of emotional distress cases where there are no
17 limitations on proofs in - - - such as proving an
18 independent physical injury as we have in this case. Plus,
19 this is uniquely an area confined to the common law. So
20 this court addresses disputes as they arise. And that's
21 why we wind up with sometimes illogical results.

22 JUDGE RIVERA: So - - - so has there been a
23 change in the case law, the jurisprudence, since Sheppard-
24 Mobley when it comes to emotional damages - - - damages?

25 MS. HASAPIDIS: Well, we've - - - we've expanded.

1 In the last twenty years since Broadnax, there has been an
2 expansion in our recognition of emotional distress damages.
3 The Grieving Families Act is a great example. The
4 legislature has thrice said that - - -

5 JUDGE RIVERA: But it hasn't passed. I'm talking
6 about the case law.

7 MS. HASAPIDIS: In the case law, Your Honor,
8 well, in Greene, this court held that - - -

9 JUDGE RIVERA: They - - - they - - - they are
10 correct that you've got to have a reason beyond, I didn't
11 like the decision - - -

12 MS. HASAPIDIS: No.

13 JUDGE RIVERA: - - - for overturning precedent.

14 MS. HASAPIDIS: Yes. The - - - the reason is, is
15 that the status of women and children have changed in our
16 world in the twenty years since Sheppard-Mobley.

17 JUDGE RIVERA: How is that?

18 MS. HASAPIDIS: We've passed the Equal Rights
19 Amendment. The legislature passed the Child Victims Act,
20 giving recognition to the status of children. You have to
21 remember when this line of precedent began - - -

22 JUDGE GARCIA: Isn't that an argument for giving
23 a wrongful death claim to a child that dies in utero if
24 you're saying the rights of children have changed?

25 MS. HASAPIDIS: It is - - - it is the value - - -

1 JUDGE GARCIA: That would even things out, right?

2 MS. HASAPIDIS: No. No. In this case - - - and
3 I must take exception to counsel's argument that there
4 would be a substantial award in this case. If this case -
5 - -

6 JUDGE HALLIGAN: I wonder - - - just to go back
7 to the statutes for a moment.

8 MS. HASAPIDIS: Yes.

9 JUDGE HALLIGAN: I wonder if that doesn't weigh
10 in favor of - - - of a view that the legislature is
11 attentive to these questions, and so a change like the one
12 you're proposing could come from the legislature, which, as
13 you noted, has - - - has considered it.

14 MS. HASAPIDIS: Well, I - - - I would point out
15 this. This is uniquely an area of the common law. It has
16 always been addressed by this court in terms of the common
17 law.

18 JUDGE HALLIGAN: But I think that's why we're - -
19 - we're trying to understand - - - or I'm trying to
20 understand, are there shifts in our case law or in the case
21 law of the Appellate Divisions that would warrant - - -
22 you're asking us to overturn Sheppard-Mobley entirely. So
23 - - - so what in our - - - in the development of our common
24 law would warrant taking that step?

25 MS. HASAPIDIS: Well, I would ask the court to

1 look at the 2007 decision. It was from the Supreme Court,
2 Bronx County, but it was from Judge Renwick before she was
3 a presiding judge and when she sat in Supreme Bronx. And
4 the case is Mendez. In Mendez, the child was born, lived
5 very briefly, and the mother pressed a claim for emotional
6 distress damages. And in that case, Judge Renwick held,
7 this court finds that the considerations in the case are
8 identical to those in Broadnax, and the outcome should be
9 the same. In this case, it's uncontroverted that the baby
10 had no consciousness or awareness. As a result, the estate
11 cannot claim damages, in which case there can be no
12 recovery since there can be no recovery for conscious pain
13 and suffering without some level of awareness. And so the
14 considerations of Broadnax apply in this case because this
15 child was never conscious.

16 JUDGE GARCIA: Still the rule, you would concede
17 in a case, that there can be no pain and suffering under
18 those conditions?

19 MS. HASAPIDIS: Excuse me, Your Honor?

20 JUDGE GARCIA: You would concede in a case you
21 brought that there could be no pain and suffering award
22 under those conditions today?

23 MS. HASAPIDIS: Not for the child, yes. And I -
24 - - and I disagree with counsel in stating that there would
25 be a substantial award. If this case were tried to a jury

1 tomorrow, counsel would argue that the child had APGAR
2 scores of 0, 3, and 4 at birth; and at ten minutes, 1, 5,
3 and 10. I would refer the court - - - excuse me - - - to
4 our expert affirmation in page 2084 of the record, where he
5 cites that the baby was denied oxygen in utero. He had a
6 significant - - -

7 JUDGE TROUTMAN: But in any event, harm to the
8 mother - - - damage to her, in the instance that you're
9 asking for, is distinct from the harm to the child.

10 MS. HASAPIDIS: That's correct. But that is a -
11 - - a distinction. And a - - -

12 JUDGE TROUTMAN: But it doesn't necessarily - - -
13 are you arguing to mean that she should not have her
14 independent right to recover?

15 MS. HASAPIDIS: That's correct. That requirement
16 discriminates only against women in childbirth. To press a
17 negligent infliction for an emotional distress claim, a
18 party does not have to prove that they suffered independent
19 injury.

20 JUDGE HALLIGAN: What - - - what about the
21 informed consent claim? So - - - so it is right that the
22 claim on behalf of the child is still underway. Is that -
23 - - is that correct?

24 MS. HASAPIDIS: Yes.

25 JUDGE HALLIGAN: So how - - - how is that

1 distinct from the claim on behalf of the mother for
2 informed consent?

3 MS. HASAPIDIS: Well, the mother, when she gave
4 her consent, not realizing that she was not informed of all
5 the risks and alternatives - - -

6 JUDGE HALLIGAN: Right.

7 MS. HASAPIDIS: - - - she agreed to a violation
8 of her physical integrity.

9 JUDGE HALLIGAN: Yes. Yes. I - - - I - - - I
10 don't think I asked the question very - - - very precisely.
11 How would a claim on behalf of the child, for lack of
12 informed consent, be different from what you just described
13 in terms of the mother?

14 MS. HASAPIDIS: Well, the - - - the injuries to
15 the child would be - - - would be limited. The child lived
16 eight days. As - - - as I was alluding to earlier, the - -
17 - the - - -

18 JUDGE HALLIGAN: So if - - - if - - - if the
19 mother were allowed to proceed on the informed consent
20 claim, right?

21 MS. HASAPIDIS: For her emotional damages.

22 JUDGE HALLIGAN: So - - -

23 MS. HASAPIDIS: Yes.

24 JUDGE HALLIGAN: So the distinction would be
25 recovery for emotional damages, not anything tied to the

1 consequence of the procedure and whether or not, you know,
2 reasonable person would have agreed to undergo the
3 procedure if they fully understood the risks?

4 MS. HASAPIDIS: Yes. My client had sought out
5 and provided informed consent for a caesarean section. She
6 requested a caesarean - - -

7 JUDGE HALLIGAN: I'm just trying to understand
8 the - - -

9 MS. HASAPIDIS: Yes.

10 JUDGE HALLIGAN: - - - the theory of damages.

11 MS. HASAPIDIS: Yes. That is - - -

12 JUDGE HALLIGAN: The - - -

13 MS. HASAPIDIS: That's the theory of damages.

14 JUDGE HALLIGAN: Okay. So emotional damage is
15 for the mother. And for the child, if an informed consent
16 claim proceeds, how do you go about assessing the damage -
17 - -

18 MS. HASAPIDIS: Well, you - - -

19 JUDGE HALLIGAN: - - - and quantifying the
20 damages?

21 MS. HASAPIDIS: Well, under the - - - under the
22 cause of action, you'd have to - - - we'd have to establish
23 that how the child would have otherwise survived. And the
24 defendants would likely argue that that was speculative in
25 any event because the goal is to put the person back in the

1 position they would have been in. Had the proper advice
2 been given, she would have had a C-section and a healthy -
3 - -

4 JUDGE HALLIGAN: So in that respect, similar to
5 the way - - - again - - - again, I - - - I have not
6 practiced in this area.

7 MS. HASAPIDIS: Yes.

8 JUDGE HALLIGAN: So - - - so I'm just trying to
9 understand the - - -

10 MS. HASAPIDIS: Yes.

11 JUDGE HALLIGAN: - - - basic parameters.

12 MS. HASAPIDIS: Yes.

13 JUDGE HALLIGAN: It would be similar to the
14 measure of damages for a more traditional medical
15 malpractice claim in that regard, I take it?

16 MS. HASAPIDIS: Yes. But - - - but again, to - -
17 - to just bring it back, it's a legal fiction to assert
18 that there is redress here against the tortfeasors if the
19 purpose of the tort law is to ensure that people comply
20 with their duties of care to others. It is not achieved by
21 going to trial.

22 JUDGE GARCIA: That was true twenty years ago.
23 The problem I have that I'm struggling with with Broadnax
24 is, the goal of the court - - - and - - - and Chief Judge
25 Kaye was to do some justice there, right? There was a

1 claim. If the child died in utero, there was no claim.
2 The child lived two days, there was a claim. And the court
3 was trying to even that out a bit. The way they did that,
4 to me, was to give a claim for something that isn't exactly
5 the same, as I think you're saying, with what the claim is
6 that the child - - -

7 MS. HASAPIDIS: Right.

8 JUDGE GARCIA: - - - hasn't survived. But the
9 court, twenty years ago, knew that, and they made that
10 decision. And I think there's a footnote saying, yeah, we
11 know we still haven't given a wrongful death claim. In
12 other states, they do that too to give a full recovery.
13 We're not doing that.

14 MS. HASAPIDIS: Right.

15 JUDGE GARCIA: They struck a balance. Now, you
16 can say it's a rough balance, right? You can say it's not
17 an equal balance, but that's where the court struck the
18 balance. The arguments that seem to resonate are that
19 there's something wrong with that formula - - -

20 MS. HASAPIDIS: Yes. Yes.

21 JUDGE GARCIA: - - - today. But it was wrong
22 then. So - - - and the court knew it wasn't an equal type
23 of measure, but they were doing the best they could to make
24 up for the fact that these other problems existed in the
25 law. Why should we overturn that case today because we do

1 that calculation differently?

2 MS. HASAPIDIS: Because wisdom and experience
3 have shown us that there are many child (sic) who take one
4 heartbeat, and that precludes recovery. It has shown us
5 that there is no logical connection - - -

6 JUDGE GARCIA: But we - - - they didn't know that
7 twenty years ago?

8 MS. HASAPIDIS: Yes. But it was - - - but it was
9 one year after Broadnax, and change comes slowly. And it
10 is not surprising that one year after sustaining claims for
11 emotional distress as a result of a stillborn child, the
12 court was reluctant to move the law.

13 JUDGE GARCIA: That's a very hard line to draw.
14 And I agree, this court draws lines. We've - - - we've
15 talked about that. But there's a clear line. And then
16 what's the other line? I think the Chief Judge was asking
17 this earlier, you know, should we say a week? Should we
18 say two weeks? Should we say - - - you know, where would
19 we draw that type of line? And again, we are sometimes in
20 the business of drawing lines, but there has to be some
21 basis for it. So - - -

22 MS. HASAPIDIS: Well - - - yeah.

23 JUDGE GARCIA: - - - how could we do that?

24 MS. HASAPIDIS: I didn't mean to interrupt.

25 JUDGE GARCIA: No, no, no.



1 MS. HASAPIDIS: No. Your Honor, we allow juries
2 to make these decisions every day. Because of the way this
3 case law has developed and because of the fact that we've
4 grappled with in-utero injuries, we've drawn line in - - -
5 lines in this area. But every day, emotional distress,
6 pain and suffering claims go to a jury where defendants
7 argue that some - - -

8 JUDGE RIVERA: Okay. So let's get to that
9 because now you're getting to the question I asked before.
10 I still didn't get my answer. What has changed is part of
11 what you're already hearing several members of the court
12 ask between when Sheppard-Mobley was decided and today
13 beyond some members of the court may think it was wrongly
14 decided? Is there something else?

15 MS. HASAPIDIS: In terms of precedent, we have
16 seen Judge Renwick in Mendez holding that Broadnax - - -
17 the considerations of Broadnax apply here. You had the
18 Second Department - - -

19 JUDGE SINGAS: Okay. Can I - - - can I - - - can
20 I ask another - - - maybe another way? So you're asking
21 for a subset on informed consent for mothers giving birth;
22 is that right? Or are you making a more broad ask of us in
23 informed consent cases?

24 MS. HASAPIDIS: It - - - it is really - - - it is
25 really both the - - - the - - - the line drawing of the

1 requirements of Sheppard-Mobley that there be an
2 independent physical injury.

3 JUDGE SINGAS: Well, it can't be both. I mean,
4 it has to be women who are giving birth.

5 MS. HASAPIDIS: And the - - -

6 JUDGE SINGAS: And then - - - and then I'm going
7 to say to you, times have changed, and there are
8 surrogates. So what would happen if a surrogate is giving
9 birth? Who has the right of action there?

10 MS. HASAPIDIS: The surrogate. It's her physical
11 integrity.

12 JUDGE SINGAS: Well, what about the mother who's
13 going to - - - whose baby that is, whose egg was - - -

14 MS. HASAPIDIS: Because - - - because - - -

15 JUDGE SINGAS: - - - inseminated?

16 MS. HASAPIDIS: I apologize. Because the duty of
17 care and providing informed consent runs from the doctor to
18 the patient.

19 JUDGE SINGAS: But for - - - for emotional
20 distress purposes, why wouldn't it be the - - - the - - -
21 the person whose egg it is?

22 MS. HASAPIDIS: Because then, that would fall in
23 the nature of negligent infliction of emotional distress
24 claim, Your Honor. There is no - - - and - - - but again,
25 they would have to - - - that mother who owned the egg

1 would have to argue that the duty of care ran to her from
2 the doctor as well with respect to the egg. And - - - and
3 I would submit that that is tenuous.

4 JUDGE SINGAS: So again, my question is, is it -
5 - - are you asking for a broader informed consent exception
6 to the ban on emotional damages, or are you strictly asking
7 us to look at women who are giving birth?

8 MS. HASAPIDIS: We are asking that you look at
9 women who are giving birth at a time when mother and child
10 are one. You could not be - - - I mean, if you were to
11 analogize this to a zone of danger, you could not impose -
12 - -

13 JUDGE HALLIGAN: But I thought you were asking us
14 to overrule Sheppard-Mobley entirely, which I would assume
15 would apply both to informed consent claims and more
16 traditional medical malpractice claims. Did I
17 misunderstand that?

18 MS. HASAPIDIS: Your Honor, as a threshold
19 matter, to - - - to rule on my client's case, we - - - you
20 could rule solely on lack of informed consent. However, it
21 is our position that logic and reasoning that support our
22 position also apply to overrule Sheppard-Mobley altogether.

23 JUDGE HALLIGAN: So if we're going to - - - if we
24 were going to take the first path and distinguish informed
25 consent from traditional medical malpractice - - -

1 MS. HASAPIDIS: Yes.

2 JUDGE HALLIGAN: - - - and not overrule Sheppard-
3 Mobley, but say it doesn't apply to informed consent, what
4 would the basis be for treating them differently?

5 MS. HASAPIDIS: The mother's role in the process.
6 As - - - as you pointed out earlier, medical malpractice
7 arises from a doctor's receipt of informed consent from - -
8 -

9 JUDGE HALLIGAN: So the notion would be that the
10 - - - that the act of consent - - -

11 MS. HASAPIDIS: Yes.

12 JUDGE HALLIGAN: - - - inflicts uniquely - - -

13 MS. HASAPIDIS: Yes.

14 JUDGE HALLIGAN: - - - serious emotional damages?

15 MS. HASAPIDIS: Yes. In my client's case, she
16 feels - - - felt enormous guilt from not having stopped Dr.
17 Grimaldi from using the vacuum extractor, from not pleading
18 more for a cesarean section.

19 JUDGE CANNATARO: Counsel, I'd like to - - - I'd
20 like you to answer before you go because you were asked,
21 and I didn't hear it. If we're going to redraw the line
22 that Sheppard-Mobley drew, where are we going to draw it?

23 MS. HASAPIDIS: I'm - - - I'm sorry, Your Honor.
24 If you - - -

25 JUDGE CANNATARO: If - - - if birth isn't the

1 cutoff - - -

2 MS. HASAPIDIS: No.

3 JUDGE CANNATARO: - - - or delivery isn't the
4 cutoff, where - - - where is the line now for - - - for
5 these claims?

6 MS. HASAPIDIS: No. We ask that you draw the
7 line at birth, that the emotional distress claims suffered
8 as a result of torts committed during childbirth be
9 sustained. I - - - I did want to point out - - -

10 JUDGE CANNATARO: No, no, no. But if - - - if
11 the mother's recovery is now allowed to a child who's born
12 alive - - -

13 MS. HASAPIDIS: Yes.

14 JUDGE CANNATARO: - - - how long - - - how far
15 after the birth does that claim last?

16 MS. HASAPIDIS: That is for a jury to decide
17 based on the evidence before it.

18 JUDGE CANNATARO: For a jury to decide?

19 MS. HASAPIDIS: Uh-huh.

20 JUDGE CANNATARO: So if the child lives for five
21 years, the mother has a claim for emotional damages caused
22 by the doctor's lack of informed consent or malpractice
23 five years later?

24 MS. HASAPIDIS: Your Honor, we decide these
25 issues every - - - we allow juries to decide these issues

1 every day. They're a guard rails to be placed.

2 JUDGE CANNATARO: But we decided this question as
3 a matter of law previously just twenty years ago in
4 Sheppard-Mobley. Now you're saying it's not a question of
5 law, it's - - - it's - - - it's a question of fact?

6 MS. HASAPIDIS: No. No. It - - - it is the - -
7 - the recover - - - the - - - the claim can be recognized.
8 The amount of an award would be left to a jury.

9 JUDGE CANNATARO: I'm not talking about - - - the
10 amount of the award could be whatever the jury says is
11 right. I'm saying, when does the mother's viable claim for
12 emotional damages where she has not sustained an injury and
13 the child has been born alive, how long does that claim
14 exist for before we say, as a matter of law, it's too far
15 removed from - - - from any compensable injury to the
16 mother?

17 MS. HASAPIDIS: Well, Your Honor - - -

18 JUDGE CANNATARO: Is it a week? Is it a month?
19 Is it a year? How long?

20 MS. HASAPIDIS: We - - - we have not posited that
21 because, as in negligent infliction of emotional distress
22 cases, we allow juries to decide this. We have - - - can I
23 just - - -

24 JUDGE CANNATARO: But Counsel, we have - - -

25 MS. HASAPIDIS: Yeah.

1 JUDGE CANNATARO: - - - to draw a line. We've
2 all - - -

3 MS. HASAPIDIS: Yes.

4 JUDGE CANNATARO: - - - agreed that we - - - we
5 are the line drawers. The line was previously drawn, you
6 know, at the - - - at - - - at the point of birth.

7 MS. HASAPIDIS: Well, the - - -

8 JUDGE CANNATARO: Now you're asking us to redraw
9 it. Please give us some guidance.

10 MS. HASAPIDIS: Okay. Your Honor, I would answer
11 it this way. According to CDC guidelines, which we cited
12 in our response to the amicus briefs, 21,000 children per
13 year die within the first year of birth nationwide. So
14 that, when you consider the fifty states, is a relatively
15 small number. The New York State Academy of Trial Lawyers
16 has asked that the court put a cap on this for one year.
17 But I submit to you that, again, you're discriminating
18 against women in childbirth by imposing a limitation when
19 we don't do it in other cases - - -

20 CHIEF JUDGE WILSON: I unders - - -

21 MS. HASAPIDIS: - - - where purely emotional
22 damage - - -

23 CHIEF JUDGE WILSON: I understand this is not the
24 rule you would like, but could this case be decided by
25 saying this child was effectively born dead because the

1 child was immediately put on life support, had these APGAR
2 scores, et cetera, that you reported, and as soon as the
3 child was taken off life support eight days later, the
4 child was declared dead, so effectively this child was born
5 dead. Is that - - -

6 MS. HASAPIDIS: Yes.

7 CHIEF JUDGE WILSON: - - - a possible outcome
8 here?

9 MS. HASAPIDIS: That is - - - that was actually
10 what occurred in the case of Waring, decided by the Second
11 Department, where the parties engaged in the,
12 unfortunately, abhorrent task of presenting expert opinion
13 testimony as to whether or not the child should be
14 considered dead for all intents and purposes. And this
15 court - - - and the Second Department was constrained by
16 this court's earlier decision and held that the mother was
17 not entitled to recover emotional distress damages. So
18 this court could rule that based on the fact that the child
19 was never - - - that there was no evidence that the child
20 ever gained any consciousness and - - -

21 CHIEF JUDGE WILSON: Well, a little different,
22 that - - - that any child who is immediately put on life
23 support and then is declared dead as soon as life support
24 is taken off, is effectively born dead.

25 MS. HASAPIDIS: Yes.

1 CHIEF JUDGE WILSON: And that doesn't require an
2 overruling of Sheppard-Mobley perhaps?

3 JUDGE RIVERA: What - - - what impact, if any,
4 would that have on the claim for the child?

5 MS. HASAPIDIS: For the claim - - - the child's
6 claim is - - - again, is a legal fiction. So that would be
7 - - -

8 JUDGE RIVERA: That - - - I'm sorry. That didn't
9 help me.

10 MS. HASAPIDIS: I'm sorry?

11 JUDGE RIVERA: I didn't understand that answer.
12 I'm sorry. Does the - - -

13 MS. HASAPIDIS: Perhaps I misunderstood the
14 question.

15 JUDGE RIVERA: Does the claim change or not with
16 respect to the child? The child's claim.

17 MS. HASAPIDIS: If the child - - - if the child
18 is considered effectively dead?

19 JUDGE RIVERA: Yes.

20 MS. HASAPIDIS: No. Because the - - - because
21 the claim has really no value. The child was never
22 conscious. It's akin to the - - - the Mendez case, but the
23 - - - it's more important the mother was the true victim
24 here. The mother suffered extreme emotional distress.

25 JUDGE GARCIA: So then you're basically swapping

1 out a wrongful death claim for the - - - a different claim?

2 MS. HASAPIDIS: But it's not wrongful death. I
3 mean, well, the - - -

4 JUDGE GARCIA: I mean, you're swapping out - - -

5 MS. HASAPIDIS: Yes.

6 JUDGE GARCIA: - - - the child's claim for a
7 mother's claim, right? We're doing what we did in
8 Broadnax. We're just swapping claims out, right?

9 MS. HASAPIDIS: Well, so - - -

10 JUDGE RIVERA: That's what I'm asking. Is there
11 any claim on behalf of the child if you go down the road of
12 the suggestion that the Chief Judge has made? That was my
13 question.

14 MS. HASAPIDIS: I was - - -

15 JUDGE RIVERA: I'm sorry if - - -

16 MS. HASAPIDIS: I - - -

17 JUDGE RIVERA: - - - I was not clear.

18 MS. HASAPIDIS: No. No. I apologize, Your
19 Honor. I'm - - - I'm now reading it.

20 JUDGE CANNATARO: If the child is deemed born
21 dead, the child - - -

22 MS. HASAPIDIS: Yes.

23 JUDGE CANNATARO: - - - can't have a claim.

24 MS. HASAPIDIS: Yes.

25 JUDGE CANNATARO: Right?

1 MS. HASAPIDIS: Yes. I mean - - - and that has
2 been our position, that the - - - that the contention - - -

3 JUDGE CANNATARO: Whether it's fiction or not.

4 MS. HASAPIDIS: - - - that there would be a
5 substantial award is - - - is unsupported by - - -

6 JUDGE RIVERA: That's about the damages, nothing
7 to do - - -

8 MS. HASAPIDIS: Yes.

9 JUDGE RIVERA: - - - with whether or - - -

10 MS. HASAPIDIS: Yes.

11 JUDGE RIVERA: - - - not there's a claim.

12 MS. HASAPIDIS: So they would - - - yes. There
13 would effectively be no cause of action, and therefore, her
14 emotional distress - - -

15 JUDGE RIVERA: It's not a wrongful death claim?

16 MS. HASAPIDIS: No.

17 JUDGE RIVERA: Okay.

18 CHIEF JUDGE WILSON: Thank you.

19 MS. HASAPIDIS: Thank you.

20 MR. CATTERSON: I'll try to shrink the four
21 minutes as small as possible, Judge. I promise. Lack of
22 informed consent. Just to put this once and for all,
23 hopefully, off the table, my adversary started talking
24 about - - - until a question popped up, about violation of
25 physical integrity. That, of course, is the basis for a

1 lack of informed consent claim not being medical
2 malpractice. This state has rejected that since 1974. No
3 case since 1974 has held that lack of informed consent is
4 not medical malpractice.

5 You asked, what has happened about our
6 understanding and expansion of our understanding of - - -
7 of emotional harm? You heard nothing whatsoever about how
8 the common law has evolved on emotional harm in the last
9 twenty years. And I would submit it's because it hasn't.

10 The Grieving Families Act. I understand, Judge
11 Wilson, that it is more expansive than this case presents.
12 It is the quintessential legislative function that is going
13 on now, that if this court steps in the middle, would
14 essentially override the governor's veto. You would be
15 taking all the chess pieces off the board. I say that
16 because the governor specifically vetoed every iteration of
17 the Grieving Families Act up until the latest one. She
18 hasn't gotten to that yet. I expect, because it's the same
19 as the last version, she will veto it again.

20 JUDGE TROUTMAN: So are you saying that the - - -
21 the nature of a claim involving a mother and a child are
22 the same as that which they're debating in the legislature
23 on the - - -

24 MR. CATTERSON: Certainly - - -

25 JUDGE TROUTMAN: - - - Grieving Families Act?



1 MR. CATTERSON: Certainly, Judge Troutman. If -
2 - - if Grieving Families Act passes, it would take this
3 question off the table because it would allow the claim.

4 CHIEF JUDGE WILSON: But this is a - - -

5 JUDGE TROUTMAN: But currently, you're - - - the
6 - - - the argument is that we overrule our own common law.
7 It's not statutory.

8 MR. CATTERSON: You're - - - you're absolutely -
9 - - if you act now, you're overruling your own common law
10 in violation of every principle of stare decisis this court
11 has ever uttered in the last eighty years. More
12 importantly, I wasn't being facetious about taking the
13 governor - - - overruling the governor's veto. In the
14 governor's veto message, she specifically - - -
15 specifically articulated that this is particularly
16 challenging for struggling hospitals in the - - - in
17 underserved communities. My client is that hospital.

18 CHIEF JUDGE WILSON: This - - - this is a small
19 subset of what the Grieving Families Act covers.

20 MR. CATTERSON: I agree, Judge.

21 CHIEF JUDGE WILSON: Is that fair? Yeah.

22 MR. CATTERSON: It is. It is. But when the
23 governor vetoed it, the governor vetoed it specifically, at
24 least in part, on the effect it would have with all of
25 these hospitals in the state. I know you've read the

1 amicus briefs, and I won't repeat the stats, which are, in
2 my view, utterly astounding about the number of
3 obstetricians who are either now or have been defendants in
4 obstetrical malpractice cases, or that New York has the
5 single highest malpractice premiums on the planet, that
6 California, yes, California took a different - - -

7 JUDGE TROUTMAN: And how would the impact - - -
8 if the court were to rule in the way that's being asked,
9 could not the legislature impose caps with respect to
10 recovery to deal with what you are concerned about?

11 MR. CATTERSON: Judge, if I was - - - if I was
12 altruistic and less cynical than I am, I would agree with
13 that premise because that's exactly what California did.
14 California allowed emotional harm in any manner of case.
15 But at the same time, they imposed - - - when they imposed,
16 the limit was \$250,000, it's gone up, on noneconomic harm.

17 JUDGE TROUTMAN: Uh-huh.

18 MR. CATTERSON: New York has never done that.
19 And do I think that there's a - - - the proverbial, I'll
20 use an old Latin expression, snowflake's chance in hell
21 that that will ever happen? No. The only constitutional -
22 - - unlike the last case, the only constitutional question
23 in this case is actually an important one because it does
24 go to separation of powers. And the question is, why has
25 the legislature not invoked Article IV, Section 7 of the

1 Constitution to override the governor's veto? They've had
2 a veto proof majority for fifteen years.

3 JUDGE RIVERA: But then you're arguing that the
4 politics across the street trumps our common law, our - - -
5 our obligation to develop the common law?

6 MR. CATTERSON: No, Judge. I'm not - - - I'm not
7 arguing that at all. What I'm saying is, there has been an
8 evolution of the common law from 1921 to 2005. That's the
9 evolution of the common law. Right now, they're debating
10 in the legislature, that which the legislature is empowered
11 to do, what the common law - - -

12 JUDGE RIVERA: Wait a minute. What happened - -
13 - what happened to the other two decades?

14 MR. CATTERSON: Well, again - - -

15 JUDGE RIVERA: Isn't that - - - isn't that for
16 this court - - -

17 MR. CATTERSON: - - - that's how I started out,
18 Judge.

19 JUDGE RIVERA: - - - to figure out?

20 MR. CATTERSON: That's how I started out, Judge.
21 I don't see any articulation by anybody - - -

22 JUDGE RIVERA: Okay.

23 MR. CATTERSON: - - - about how there's been any
24 change in the common law.

25 JUDGE RIVERA: Okay.

1 MR. CATTERSON: Thank you very much for your
2 time. I know it's very late.

3 CHIEF JUDGE WILSON: Thank you.

4 MR. CATTERSON: I appreciate it.

5 CHIEF JUDGE WILSON: Thank you.

6 (Court is adjourned)

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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of SanMiguel v. Grimaldi, No. 67 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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