

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

CHANKO,

Appellant,

-against-

No. 44

AMERICAN BROADCASTING
COMPANIES, INC., et al.,

Respondents.

20 Eagle Street
Albany, New York 12207
February 18, 2016

Before:

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:

NORMAN A. OLCH, ESQ.
LAW OFFICES OF MARK J. FOX
Attorneys for Appellant
233 Broadway, Suite 705
New York, NY 10279

MICHAEL S. COHEN, ESQ.
NIXON PEABODY LLP
Attorneys for Respondent Hospital and Schubl
50 Jericho Quadrangle, Suite 300
Jericho, NY 11753

NATHAN SIEGEL, ESQ.
LEVINE SULLIVAN KOCH & SCHULZ, LLP
Attorneys for Respondent ABC
321 West 44th Street, Suite 1000
New York, NY 10036

Meir Sabbah
Official Court Transcriber

1 JUDGE PIGOTT: Case number 44, Chanko v.
2 American Broadcasting Companies Incorporated.

3 Mr. Olch, good afternoon.

4 MR. OLCH: Good afternoon, Your Honor.

5 May it please the court, I'm Norman Olch,
6 counsel for the appellants, and if I may reserve two
7 minutes of time for rebuttal.

8 JUDGE PIGOTT: Yes, sir.

9 MR. OLCH: The order on appeal, if affirmed
10 by this court, would be a historic retreat from the
11 protection of confidentiality this court has given to
12 the physician-patient relationship. I would ask this
13 court not to countenance that retreat, and I would
14 ask this court, therefore, to reverse the order on
15 appeal.

16 There are two causes of action that remain in
17 this case. One is the - - - the fourth cause of action
18 for breach of confidentiality, and then the fifth cause of
19 action relating to the infliction of serious emotional
20 distress.

21 JUDGE RIVERA: What - - - what are the
22 elements of the breach of confidentiality?

23 MR. OLCH: A breach of confidentiality
24 would be a - - - the existence of a physician-patient
25 relationship; the fact that the information conveyed

1 is necessary for the treatment - - - care or
2 treatment, or perhaps analysis of what the treatment
3 should be; and the fact that that information, which
4 is part of that communication, has then been
5 disclosed at least to nonmedical personnel, or people
6 that have nothing to do - - - nonmedical personnel
7 who are not treating this patient.

8 JUDGE STEIN: And damages?

9 MR. OLCH: Excuse me.

10 JUDGE STEIN: What about damages?

11 MR. OLCH: In this particular case, it is
12 alleged in the complaint, on page 42, that the
13 damages that exist which are alleged in the actual
14 cause of action - - - the respondents indicated that
15 the only mention of damages is in the demand clause
16 at the end, but if one looks on page 42, paragraph
17 52, it says that - - - after reciting that there's
18 been this breach, "The defendant's disclosure of the
19 deceased medical information was intended by the
20 defendants to and did deprive him of his legal
21 rights; for this reason plaintiff seeks compensatory
22 and putative damages."

23 JUDGE STEIN: Does that - - - does that
24 affect - - -

25 MR. OLCH: I would say for purpose of

1 pleading, I think that's adequate; if you want to
2 know exactly what those damages are, that's what the
3 bills of particular are about, but at this point,
4 remember, we're dealing with a complaint that hasn't
5 even been answered yet, and I would submit that that
6 - - - in terms of a pleading, that that is adequate,
7 yes.

8 JUDGE GARCIA: What about identity of the
9 patient?

10 MR. OLCH: Excuse me.

11 JUDGE GARCIA: Identity of the patient.

12 MR. OLCH: In this particular case? In
13 this particular case - - - you mean, is that a matter
14 that's covered with the confidentiality; is that your
15 question?

16 JUDGE GARCIA: If you just disclosed that
17 somebody had their, you know - - - we need to
18 amputate somebody's leg because I made a diagnosis
19 that the leg needed to be amputated, without naming
20 or identifying the patient, that wouldn't be a cause
21 of action, right?

22 MR. OLCH: Well, I think - - - I think the
23 answer to that, it depends. I mean, there are
24 physician-patient relationships in which the identity
25 of the patient is part of that relationship; there

1 are people who see doctors under certain
2 circumstances and they don't want anybody to know
3 that. The Randy case, for example, involving the
4 woman - - - the young woman who goes to get the
5 abortion and doesn't want her parents to know that
6 she's involved with this because of their religious
7 convictions and so forth.

8 I think ordinarily, in the ordinary typical
9 situation, I would say that the identity of the
10 patient, probably in a typical relationship is
11 probably known to a lot of people anyway, but I think
12 there can be situations in which the identity of the
13 patient is actually part of the basis of that
14 relationship, yes.

15 JUDGE RIVERA: Was there any identifying
16 information on Mr. Chanko when he was brought into
17 the OR?

18 MR. OLCH: When you say - - -

19 JUDGE RIVERA: Anything on him that might
20 indicate who he was?

21 MR. OLCH: Well, they knew who he was; I
22 mean, the medical records - - -

23 JUDGE RIVERA: I'm saying the crew, not the
24 medical team.

25 MR. OLCH: Oh, you mean the camera crew.

1 JUDGE RIVERA: Yes, the film crew.

2 MR. OLCH: The record does not indicate one
3 way or the other - - - the record does not indicate
4 whether or not he had, for example, a bracelet on his
5 arm that identified him; that would be typical in an
6 emergency room that there was.

7 JUDGE RIVERA: During the editing process?

8 MR. OLCH: Excuse me.

9 JUDGE RIVERA: During the editing process,
10 is there anything there that would have revealed to
11 those who are editing?

12 MR. OLCH: Well, the answer is we don't
13 know that because we only have two minutes of about a
14 fifty-minute tape thing. So one of these things
15 about this case is we don't really know exactly what
16 was going on there and this is why the complaint is -
17 - -

18 JUDGE FAHEY: Well, that - - - that would
19 affect your fifth cause of action, wouldn't it, if it
20 - - - if the identity of what ABC's film crew knew,
21 that if they knew the identity of the person. But,
22 your fourth cause of action against the doctors and
23 the hospital could still survive because it's clear
24 they knew the identity of the person.

25 MR. OLCH: Yeah, I think that's clear. I

1 think with regard to - - -

2 JUDGE FAHEY: The problem I'm having with
3 that, of course is, the damages would seem to be
4 limited to whether or not the accident victim, Mr.
5 Chanko, actually knew that they were there and
6 filming him, and that the doctors had allowed that.

7 And it seems that - - - so if I understand
8 your argument, tell me, what are you saying to us,
9 that you want to be able to have discovery on that
10 issue?

11 MR. OLCH: Well, I mean, the question would
12 be, I think there is a big difference, for example,
13 suppose - - - we don't know what was happening, we do
14 know that he was conscious, we do know that he was
15 talking, and suppose he says, what are these cameras
16 doing here filming me? And he actually objects to
17 this, what are these cameras doing here? I think
18 that would change the whole nature of what the
19 damages would be for him. That he is actually
20 objecting, and the doctor, for example, could be
21 saying, no, it's okay, don't worry about it, Mr.
22 Chanko, it's okay, we're just, you know, and - - -
23 and the sense is, and it's certainly suggested in the
24 record - - - although it's not clear because we
25 haven't seen the tape - - - that the camera crew was

1 wearing scrubs; I mean, there was nothing necessarily
2 - - - they weren't wearing street clothes, at least
3 that seems to be suggested in the record. But I
4 think, yes, it is important to know, one of the
5 factors that could come in with respect to the
6 damages, Your Honor, would be the possible reaction
7 of the patient because we do know that he was alert
8 and conscious.

9 JUDGE FAHEY: My point is is that here, it
10 can't be damages to the family, it could only be
11 damages on the breach of confidentiality to Mr.
12 Chanko. And that would mean he'd have to be
13 conscious and aware that he was being filmed, and I
14 watched, you know, the ABC portion of it that's in
15 the record - - -

16 MR. OLCH: Right.

17 JUDGE FAHEY: - - - but I - - - I didn't
18 see anything that would indicate that.

19 MR. OLCH: Indicate what, that he - - -

20 JUDGE FAHEY: Indicate that he - - - he was
21 conscience; as a matter of fact, it struck me, he
22 asked for his wife.

23 MR. OLCH: Yeah, well, I think that would
24 indicate that he was conscious.

25 JUDGE FAHEY: Right.

1 MR. OLCH: Yes, he - - -

2 JUDGE FAHEY: He was - - - clearly he was
3 conscious, but not that he was being filmed. No, but
4 what struck me about it is that he asked for his wife
5 and that the camera crew is there but his wife isn't
6 there.

7 MR. OLCH: Right.

8 JUDGE FAHEY: So that's what struck me
9 about it.

10 MR. OLCH: Yeah.

11 JUDGE FAHEY: But that doesn't necessarily
12 - - - while it's certainly unfortunate, doesn't
13 establish legal damages.

14 MR. OLCH: Well, but again, coming back, we
15 don't know what happened in the other fifty minutes.
16 I mean, what they're doing is they are submitting,
17 I've called it, an edited DVD, which is what it was,
18 more - - -

19 JUDGE FAHEY: So the distinction - - - the
20 distinction line you're drawing is between what was
21 broadcast by ABC and what actually may have happened
22 in other discovery with the hospital defendants, it
23 doesn't have to do with what ABC broadcasted.

24 MR. OLCH: Oh yeah, absolutely, in my view,
25 the - - -

1 JUDGE FAHEY: So that's what the purpose of
2 your discovery is.

3 MR. OLCH: Yeah, the purpose here is that
4 in my view, and I think the view of the plaintiffs,
5 is that whatever breach occurred was the information
6 that the hospital and the surgeon disclosed to ABC.
7 What ABC did with that, in terms of a wider public
8 dissemination, is a separate issue; but the actual
9 breach of confidentiality is occurring right there in
10 the operating room, when they are allowing the
11 filming of a man who is now being diagnosed and
12 treated. I mean, that's when the breach occurs.

13 JUDGE RIVERA: But - - - but - - -

14 MR. OLCH: And the question as to the
15 damages, we don't know exactly what was going on and
16 what - - - and they have submitted an edited DVD; it
17 may well show upon - - - when we see the full DVD - -
18 -

19 JUDGE ABDUS-SALAAM: Did they have to know
20 - - -

21 MR. OLCH: - - - that it's more than
22 edited, it's sanitized, I mean, I don't know
23 actually.

24 JUDGE ABDUS-SALAAM: Did they have to know
25 his name in order to - - -

1 MR. OLCH: Excuse me.

2 JUDGE ABDUS-SALAAM: Does the crew have to
3 know his name in order for him to be identified to
4 them?

5 MR. OLCH: In terms of the breach question?

6 JUDGE ABDUS-SALAAM: In terms of the
7 breach.

8 MR. OLCH: I would say - - - I think that's
9 a close question as to whether or not they would have
10 to know his identity, like who is this man on the
11 operating table, what is his name - - -

12 JUDGE STEIN: But that would also - - -
13 could depend on what, if anything, the film showed or
14 testimony showed that - - - whether records were open
15 and available with name and other identifying
16 information - - -

17 MR. OLCH: Right.

18 JUDGE STEIN: - - - and the actual - - -

19 MR. OLCH: My - - - my experience, which
20 fortunately is limited in terms of hosp - - - it
21 certainly is my understanding that all patients have
22 a bracelet on them, which identifies them, and very
23 often - - - and there's a quick shot of the monitor
24 in the film, but the monitor goes very quickly - - -
25 it's very common in the monitor to actually have the

1 patient's name on the monitor so everybody knows - -
2 - meaning the medical people know exactly which
3 patient we're dealing with.

4 But I think we cannot answer the question
5 as to whether his name was open and apparent, but I
6 would say that - - - I would say the inference would
7 be yes, it was, but we don't know because there is
8 about fifty minutes of film footage that we don't
9 have.

10 JUDGE RIVERA: But - - - but this cause of
11 action, just to be clear - - - I think it's obvious
12 but just to be clear, is personal to Mr. Chanko,
13 correct?

14 MR. OLCH: I think that is - - - that is
15 correct.

16 JUDGE RIVERA: So it's his wife, as the
17 administrator, who is pursuing this on behalf of the
18 estate; but it's - - - it's personal to him - - -

19 MR. OLCH: I think that is correct.

20 JUDGE RIVERA: So the fact that he has
21 passed away creates this obstacle for you to proceed,
22 right, because you don't have any - - - you can't
23 have him saying, this is what happened to me when
24 this what was going on in the operating room, this is
25 what I felt, this is what went on.

1 MR. OLCH: Right, that's correct.

2 JUDGE RIVERA: That's why you get - - -

3 MR. OLCH: But I think it's like - - - you
4 know, in that sense it's like negligent cases, where
5 you have a plaintiff who cannot - - - is unable to
6 testify because of his injuries, et cetera, and the
7 burden on him is lower, and I would say at this
8 point, in that sense, the burden, at least in terms
9 of pleading, should be a bit lower because we have a
10 - - - we have a deceased patient - - -

11 JUDGE FAHEY: Yeah this - - - this isn't a
12 - - -

13 MR. OLCH: - - - and I think, you're
14 correct, we don't have the video.

15 JUDGE FAHEY: This is not a noseworthy
16 situation, that's the rule that you are - - - I think
17 you are making a - - -

18 MR. OLCH: Yeah, it's not - - - it's not a
19 noseworthy situation, but I think the concept is
20 there, and that we have - - - as Judge Rivera is
21 indicating, we have a patient who was deceased. We
22 don't have the videotape, the only people who have
23 access to that at this moment are the defendants - -
24 -

25 JUDGE RIVERA: And I guess that's - - -

1 that's - - - that's what I think is another challenge
2 or obstacle for you, despite the pleading statement
3 in paragraph 52; what damage is there?

4 MR. OLCH: I think the answer is, it's
5 premature to completely answer that question.

6 JUDGE RIVERA: But let's say he's aware of
7 the film crew.

8 MR. OLCH: Yeah, let's say he is aware of
9 it - - -

10 JUDGE RIVERA: Right.

11 MR. OLCH: - - - and I'll go one step
12 further, he objects to it.

13 JUDGE RIVERA: Let's say he does, but
14 what's the - - -

15 MR. OLCH: He says, what are these cameras
16 doing here, where's my wife, what are these cameras
17 doing here, I don't want cameras.

18 JUDGE RIVERA: Yeah, but where does that
19 get us to the damage? I understand, he may be
20 outraged and upset - - -

21 MR. OLCH: Right.

22 JUDGE RIVERA: - - - and he doesn't want- -
23 - or is that what you are arguing; it's an emotional
24 reaction - - -

25 MR. OLCH: Right, right.

1 only, - - -

2 MR. OLCH: Well, no, what - - -

3 JUDGE RIVERA: Because I can understand you
4 have this challenge because he's deceased.

5 MR. OLCH: Well, what I meant is the
6 written - - - the inferences, because remember, one
7 can also look at, in terms of a motion to dismiss,
8 the affidavits that are submitted by the parties, we
9 have a little bit more than the bare bones of the - -
10 - of the complaint. And I think the inferences are,
11 and I think in regard to Judge Fahey's question and
12 the identity question, I think one can infer in a
13 normal medical situation that the people in the room
14 know who this person is, that he had an identifying
15 bracelet, my - - - his name, her name, whoever the
16 patients would be on the monitor, so if identity is
17 an issue, I think it's there, and I think it's reason
18 - - -

19 JUDGE RIVERA: What about damages, are
20 there any inferences that can be drawn regarding what
21 might be damages?

22 MR. OLCH: Not from the two minutes of
23 video, because we don't know, and I think we have - -
24 - we - - -

25 JUDGE RIVERA: Other than the - - -

1 MR. OLCH: - - - I'm speculating that the
2 man - - - I'm speculating that the man is - - - that
3 he became aware of the filming, and I'm speculating
4 that he may well have been - - -

5 JUDGE RIVERA: He was conscious for some
6 period of time, I mean, even the excerpt shows that,
7 correct?

8 MR. OLCH: Well, the excerpt shows - - -

9 JUDGE RIVERA: He wasn't unconscious when
10 he came into the OR, unconscious the whole time.

11 MR. OLCH: He seemed to go in and out of
12 consciousness - - -

13 JUDGE RIVERA: That's what I'm saying - - -

14 MR. OLCH: - - - but he definitely was
15 conscious - - -

16 JUDGE RIVERA: - - - you have - - - yes.

17 MR. OLCH: He was definitely conscious when
18 he's asking for his wife - - -

19 JUDGE RIVERA: Yes.

20 MR. OLCH: - - - he is definitely heard
21 moaning - - -

22 JUDGE RIVERA: Yes.

23 MR. OLCH: - - - he's bes - - - he's heard
24 speaking to the nurse who says, we're going to get
25 you some medication, and such.

1 We don't know, from the little bit that the
2 defendants have provided, what this man may have been
3 doing in the other fifty minutes, in terms of him
4 becoming aware of the fact that he was - - - this was
5 happening, but I think it's - - - in that sense, it's
6 premature to resolve that issue, and certainly, I
7 think, premature to dismiss the complaint, which is
8 what has occurred in this case, without even knowing
9 what was actually going on in the room.

10 And that information, at this point, I
11 think as Your Honor has suggested, is beyond our
12 knowledge because - - -

13 JUDGE RIVERA: So what you need is the raw
14 footage?

15 MR. OLCH: Yeah, the raw footage, exactly.
16 One has to see that to see what is actually going on
17 in the room. What we're seeing is basically ABC's
18 edited account. And I suggest perhaps - - - I'm not
19 saying it was, but it could be a sanitized account of
20 what actually was going on that room. I mean, things
21 - - - fifty minutes is a long time in an operating
22 room, and we see maybe about two minutes of it.

23 JUDGE PIGOTT: Thank you, Mr. Olch. You
24 have your - - - you have your rebuttal time.

25 Mr. Cohen.

1 MR. COHEN: Good afternoon, may it please
2 the court. Michael Cohen and my colleague Michelle
3 Yuen for the New York and Presbyterian Hospital and
4 Dr. Sebastian Schubl. We refer to them collectively
5 as the Hospital Defendants, Your Honors.

6 In fact, the issue as to the fourth cause of
7 action is whether on the basis of the facts alleged in
8 this complaint, appellant, the decedent's estate, has a
9 cause of action for money damages for the alleged breach
10 of a fiduciary duty of confidentiality.

11 JUDGE PIGOTT: Suppose it's a dollar.

12 MR. COHEN: I'm sorry, Your Honor.

13 JUDGE PIGOTT: Suppose it's a dollar, one -
14 - - one dollar.

15 MR. COHEN: Well - - -

16 JUDGE PIGOTT: The reason I say that is
17 this is pretty outrageous. I - - - it would seem to
18 me it would bother a jury to say, you know, your son,
19 your daughter, or your cousin, or your mother,
20 because they want her on the TV show, they, you know,
21 they - - - they decided they're going to film the
22 fact that she or he, you know, was badly injured in
23 an auto accident, screamed and yelled, which makes
24 for good TV, the good doctor came in and took care of
25 it, and then they died. So because they died,

1 there's no damages, you know, it's just like a dog
2 getting killed on the road.

3 MR. COHEN: Judge Smith (sic), this - - -
4 this court has numerous times refused to equate
5 activity with harm and injury, when it is required.

6 JUDGE PIGOTT: I understand, I used to do
7 this work.

8 MR. COHEN: And - - -

9 JUDGE PIGOTT: But what I'm saying is,
10 suppose it's a dollar, suppose people say, you know,
11 all we know is that there is at least damage here,
12 and we're not going to - - - we're not going to give
13 him a million bucks, we're but going to give him a
14 dollar.

15 MR. COHEN: Your Honor, the contents of the
16 pleading itself negate damage and harm.

17 JUDGE PIGOTT: Are you saying they failed
18 to allege a money - - - a money amount?

19 MR. COHEN: Not only did they fail to
20 allege harm - - -

21 MR. COHEN: That's easy amendable, right?

22 MR. COHEN: - - - but, but they - - - yes,
23 Your Honor, but they do affirmatively negate harm by
24 alleging that the decedent was unaware that he was
25 being filmed. They allege that in the initial

1 complaint, it is reiterated in the amended complaint
2 at paragraph 28, and it is reiterated twice in the
3 two briefs submitted to this court.

4 JUDGE PIGOTT: So - - - so if I'm - - - if
5 I'm taking a shower and I don't know somebody is
6 filming me, there's no damage.

7 MR. COHEN: Well, Your Honor, in the - - -
8 in the recent case, Foster v. Svenson, that's exactly
9 right, an intentional infliction claim - - -

10 JUDGE FAHEY: I thought - - - I thought
11 that - - - is that the - - - the damage - - - filming
12 the people going to the bathroom or something, is
13 that the case, Foster?

14 MR. COHEN: There's an intentional
15 infliction case, yes.

16 JUDGE FAHEY: Thank you for bringing it up
17 in court, but okay.

18 MR. COHEN: But - - -

19 JUDGE RIVERA: Is - - - is it possible for
20 him to not know they're recording but know that there
21 are people in the room who shouldn't be?

22 MR. COHEN: It doesn't - - -

23 JUDGE RIVERA: Why is that not an
24 appropriate reading of the complaint?

25 MR. COHEN: Yes, Judge Rivera, it's not the

1 - - - a question of what those non-caregivers were
2 doing, it's a question of whether the patient was
3 aware that his information was being disclosed, and
4 if he were not - - -

5 JUDGE PIGOTT: You mean, if he doesn't
6 know, it's okay? If I don't know my medical records
7 are being distributed, it's okay to do it?

8 MR. COHEN: No, it's not okay to do it - -
9 -

10 JUDGE PIGOTT: Okay.

11 MR. COHEN: - - - because this is a matter
12 that is regulated by numerous statutes and
13 regulations; it is not okay to do it. But in these
14 circumstances, in this sui generis case, where the
15 patient died while he was being - - -

16 JUDGE PIGOTT: But I'm trying to - - - I'm
17 trying to frame this, I mean, you're saying, lucky
18 us, he died.

19 MR. COHEN: No, not at all lucky us, but -
20 - - but, Your Honor - - -

21 JUDGE PIGOTT: I'm trying to figure out who
22 - - - who gets in their mind, you know, hey, look,
23 good news, a little boy just got run over by a
24 garbage truck and he's still alive, let's go film it,
25 but let's not make - - - let's make sure his parents

1 don't know, and let's film him from behind so he
2 doesn't know, and then, if he dies in the street, we
3 can film that and there's no damages, and therefore
4 we're cl - - - we're free and clear; am I miss - - -
5 am I misunderstanding the standard of care here?

6 MR. COHEN: Well, no, no, Judge Smith
7 (sic), but the fact is that we take this case - - -

8 JUDGE RIVERA: Judge Pigott, counsel, it's
9 Judge Pigott.

10 MR. COHEN: I apologize, I apologize.

11 JUDGE PIGOTT: No, I approve - - - Smith is
12 a better judge.

13 MR. COHEN: Not at all, I need a better
14 pen, actually.

15 JUDGE FAHEY: Well, listen, let's take that
16 - - - let's take that one step further; he's in the
17 room and there - - - there is no camera, there is a
18 live feed, but it's hidden from the person, and they
19 go ahead and they perform the surgery; would you say
20 that - - - that he then could not - - - but he lives
21 and he finds out later, there was a live feed, it was
22 hidden from him, he wasn't conscious of it while it
23 was happening, but he became conscious later; no
24 damages?

25 MR. COHEN: There may very well, in those

1 circumstances, be damages, that's the - - - those are
2 the cases - - -

3 JUDGE FAHEY: So the distinction would be -
4 - -

5 MR. COHEN: - - - referenced.

6 JUDGE FAHEY: - - - so the distinction
7 would be, going back to what the Judge had referred
8 to before, is - - - is the fact that Mr. Chanko
9 passed away.

10 MR. COHEN: That he passed away without
11 knowing that he was being - - -

12 JUDGE FAHEY: And how - - -

13 MR. COHEN: - - - that his information is -
14 - -

15 JUDGE FAHEY: - - - how does the plaintiff
16 know that unless they look at all of the raw footage?

17 MR. COHEN: Well, how - - - what I would
18 say is, based on the record, which the plaintiffs
19 introduced - - -

20 JUDGE FAHEY: But this is - - - this is a
21 3211 motion - - - there's nothing here really.

22 MR. COHEN: It is, but plaintiff said - - -

23 JUDGE FAHEY: They haven't deposed any of
24 the nurses in the room, you haven't done any of this
25 stuff, this is all pretty basic stuff.

1 MR. COHEN: But, Your Honor, appellants
2 made an allegation and repeated it and repeated it,
3 and if you look at the record, Mr. Chanko - - -

4 JUDGE FAHEY: Well, I think you're right
5 about that they should of phrased that better; I
6 would - - - I would accept that. But, let's look at
7 the heart of it for second, and read the complaint as
8 a whole, and I'm having a hard time seeing how
9 without them being given all the evidence that's
10 available, that we can make a determination as to
11 there being no dam - - - being no damages.

12 MR. COHEN: Your Honor, what I would say is
13 the evidence that is available includes the record
14 submitted by appellants, and that shows that in the
15 fifty-four minutes between Mr. Chanko's arrival at
16 the hospital and his unfortunate demise, his - - -
17 his heart stopped three times, he coded three times,
18 he was given fentanyl for pain, he was given propofol
19 for sedation, he was lying prone; the notion that he
20 noted among the team of trauma physicians and nurses
21 attending to him that there may have been others
22 holding cameras elsewhere in the room and - - - is
23 remote, and that he was damaged, harmed, upset by
24 that is even more remote - - -

25 JUDGE FAHEY: That's true - - - I think

1 that's true.

2 MR. COHEN: - - - it's entirely
3 speculative, Your Honor.

4 JUDGE FAHEY: But let me just finish this
5 thought, though; the problem with the truth of that
6 it goes back to the fundamental question that Judge
7 Pigott brought up before, which is, we are confronted
8 with one of the most intimate moments of someone's
9 life - - -

10 MR. COHEN: Certainly.

11 JUDGE FAHEY: - - - I think we would all
12 accept that, everyone here.

13 MR. COHEN: Sure.

14 JUDGE FAHEY: You know, when someone is
15 born, when they're conceived, and when they pass
16 away; those are the most intimate moments of their
17 life. You're videotaping that moment; your
18 consciousness in those moments are - - - are entitled
19 to a certain amount of respect, a certain amount of
20 privacy, but we can't measure that in these most
21 intimate moments unless all of the available proof is
22 put forward on the table and then somebody decides.

23 MR. COHEN: Your Honor, I would point out
24 that appellants did not seek discovery prior to the
25 commencement of the case; they - - - they - - -

1 unaware he was being filmed.

2 JUDGE RIVERA: No, but that doesn't mean -

3 - -

4 MR. COHEN: He was unaware that his

5 information - - -

6 JUDGE RIVERA: But that doesn't mean he's

7 unaware of the people who are in the room. Being

8 filmed - - -

9 MR. COHEN: Are you suggesting that he was

10 aware that there were individuals, but not aware that

11 - - -

12 JUDGE RIVERA: I'm not suggesting anything;

13 I'm asking you about the inferences.

14 MR. COHEN: It's entirely speculative, Your

15 Honor. There needs to be a good faith basis to make

16 an allegation in a pleading, and there is none here.

17 And the facts, as referenced in the medical record

18 annexed by appellant, shows that this individual was

19 in extremis, he suffered - - -

20 JUDGE PIGOTT: It's a very valid point, but

21 one of - - - one of the things we - - - one of our

22 favorite phrases, I guess, is not whether they've

23 stated a cause of action but whether they have one.

24 In other words - - -

25 MR. COHEN: Certainly.

1 JUDGE FAHEY: - - - it's poorly pleaded,
2 you know, but you can tease something out.

3 Your 3211 could have had the other fifty
4 minutes attached and said, here it is.

5 MR. COHEN: Had there - - - Your Honor,
6 that's a - - - that's a - - -

7 JUDGE PIGOTT: Then - - - then we would be
8 looking at it and we would be saying, gee, you're
9 absolutely right, there's nothing - - -

10 MR. COHEN: Had plaintiff - - - had appellants
11 made the point in re - - - in response to the motion
12 that, wait a second, we really don't know this
13 information, we need discovery, that might've played
14 out that way; but they haven't. That allegation has
15 been - - - was made and stuck to - - -

16 JUDGE STEIN: But they don't have to do
17 that, if - - - if we find that a cause of action - -
18 -

19 MR. COHEN: Right.

20 JUDGE STEIN: - - - is stated.

21 MR. COHEN: But - - - but this court has
22 recently, in *Madden v. Creative Services*, there was
23 an action that raised the question of a third-party
24 intrusion on an attorney-client privilege. In fact,
25 it related to the breaking in of an attorney's

1 office, a former partner of my own, in - - - in
2 Rochester, and this court said, we're not prepared
3 yet to - - - to create a new cause of action for a
4 third-party intrusion on attorney-client privilege,
5 but if we did, there would at least have to be
6 damages flowing from the wrongful conduct. Damages
7 is required to state a cause of action in tort. They
8 have not been alleged in this - - - in this pleading
9 - - -

10 JUDGE RIVERA: But if - - - if the
11 gentleman is aware - - - if you draw that inference,
12 there might have been awareness of people in the room
13 who shouldn't be in the room, isn't the next natural
14 inference that he would be outraged? He's fighting
15 for his life. And there - - - those people are in
16 the room, and his wife is not or his children are not
17 in the last moments before he breathes that last
18 breath on this earth? Why is that not an appropriate
19 inference?

20 MR. COHEN: Judge Rivera, he was being
21 frantic - - - the institution and the doctors and
22 nurses were frantically trying to save his life - - -

23 JUDGE RIVERA: No, I understand that.

24 MR. COHEN: - - - and he, like any
25 emergency patient - - -

1 JUDGE STEIN: But you have the evidence of
2 what actually was going on in there.

3 MR. COHEN: Well - - -

4 JUDGE STEIN: So we can all sit here and
5 speculate as to whether he was - - - he was
6 conscience or he wasn't conscious or how much or when
7 they gave him the - - - the sedative, or any of this
8 stuff that we're talking about, but the fact of the
9 matter is is that the way we can tell, is to view
10 that footage and that may be the end of the case.

11 MR. COHEN: Well, that footage - - -

12 JUDGE STEIN: Why shouldn't - - - why
13 shouldn't we see it?

14 MR. COHEN: Because even with footage, how
15 will - - - you cannot, we assert, import the fiction,
16 the legal fiction of nominal damages. It should not
17 be done here.

18 JUDGE STEIN: I understand, but maybe it's
19 not just - - -

20 MR. COHEN: This court has rejected that.

21 JUDGE STEIN: If it's nominal, as I said,
22 it may be the end of the case, but - - -

23 MR. COHEN: But - - - but - - - but even if
24 you could - - - if a tape indicated awareness, you
25 still have to have harm. There must be emotional, or

1 psychological, or pecuniary harm; you will not be
2 able to ascertain any of that.

3 JUDGE FAHEY: So it seems to me, for your
4 argument to be successful, you have to say that that
5 tape couldn't show any damages.

6 MR. COHEN: It couldn't show damages. All
7 - - - all it could possibly show might be - - - and
8 again, it's entirely speculative, that perhaps there
9 was a some understanding or awareness, but not that
10 there was emotional, psychological, or pecuniary
11 harm.

12 JUDGE RIVERA: You're - - - you're saying
13 as a matter of law, if a person who is an operating
14 room is aware that there are people in that room that
15 they do not want there, because they're not medical
16 personnel, medical stuff, and so forth, that that - -
17 - that that does not then translate to a damage that
18 that individual has experienced, an injury that they
19 have incurred - - -

20 MR. COHEN: Not necessary - - -

21 JUDGE RIVERA: - - - as a result of these
22 people simply being in the room, even if they don't
23 want them there.

24 MR. COHEN: Not necessarily, I mean, in
25 fact, if a plaintiff - - - in the cases we review in

1 our brief, every single case included an allegation
2 of expli - - - explicit allegation of harm; I was
3 psychologically injured, my marriage was ruined, my
4 parents - - -

5 JUDGE RIVERA: But he's deceased; he can't
6 say those things now.

7 MR. COHEN: That's correct, and if he did
8 not know - - -

9 JUDGE STEIN: But what if the film - - -

10 JUDGE FAHEY: Conscious pain - - - con - -
11 -

12 JUDGE RIVERA: But the question is, might
13 there be something on the footage that shows conduct
14 or some expression that would allow for that
15 appropriate inference?

16 JUDGE STEIN: What if the film showed him
17 screaming, get these people out of here, I don't want
18 these people in here, you know - - -

19 MR. COHEN: Your Hon - - - Your Honors - -
20 -

21 JUDGE STEIN: - - - would - - - would that
22 show some emotional damage?

23 MR. COHEN: I would say no, and the fact is
24 that at this stage of the game, three years removed
25 from the commencement of this action, where

1 appellants never sought pre-action discovery, never
2 opposed the motion practice on the basis of the lack
3 of discovery, but, nevertheless stuck to - - -

4 JUDGE RIVERA: Do you still have the raw
5 footage?

6 JUDGE PIGOTT: No, we're going to - - -
7 we're going to hear from Mr. Siegel in a minute - - -

8 MR. COHEN: Your Honor, it's not the
9 hospital that would have that.

10 JUDGE PIGOTT: - - - I think he's the man
11 with the film.

12 JUDGE RIVERA: Oh, ABC, I'm sorry, yes, I'm
13 sorry, ABC - - -

14 MR. COHEN: But - - - but, the fact is, we
15 are so far down the road that - - -

16 JUDGE FAHEY: No, I just - - - I just - - -
17 one final thought, because I know your time is up
18 here, but I think a conscious pain and suffering, and
19 what this strikes me as is all the time, in cases,
20 money is awarded for conscious pain and suffering for
21 minuscule periods of time, and what strikes me is
22 automobile - - - or not automobile but airplane
23 accidents, all the time, and in thirty seconds, in
24 one minute, someone can go through an entire lifetime
25 of experience, and they're conscious, so therefore

1 it's compensable. And of course there's no video of
2 that - - -

3 MR. COHEN: Right.

4 JUDGE FAHEY: - - - but they are able to
5 discern that from the facts of the case. Here, we
6 can go a step further and - - - I'm having a hard
7 time getting around my airplane analogy - - -

8 MR. COHEN: Your Honor, maybe I can help.
9 In this instance, this individual unfortunately
10 sustained grievous injuries on a public street in
11 Manhattan, right.

12 JUDGE FAHEY: No, I saw it, it was a
13 terrible accident.

14 MR. COHEN: Okay. So he was in,
15 unfortunately - - - and I'm sure it's not something
16 that his - - - his family is - - - is anxious to
17 hear, but he was in extremis, he was in grievous
18 condition. The notion that anyone could ever
19 separate out a - - - a - - - his - - - the impact of
20 those ultimately disastrous injuries from a momentary
21 glimpse or recognition that someone is in the room
22 and I don't know who that is and it's not a doctor
23 and I'm upset about that, is impossible; it's - - -

24 JUDGE PIGOTT: This is (indiscernible), I
25 was going to - - - never mind.

1 MR. COHEN: I'm sorry, Your Honor.

2 JUDGE PIGOTT: I was going to give another
3 example and get Judge Fahey out of his airplane, but
4 I'll save it for - - -

5 MR. COHEN: It - - - and the notion that
6 this matter should proceed to discovery, and that the
7 litigation should continue and - - - without any
8 legitimate good faith basis that such a thing might
9 exist or be capable of proof or ascertainment, is - -
10 - should not happen at this stage of litigation, Your
11 Honors.

12 JUDGE PIGOTT: Thank you, thank you very
13 much.

14 MR. COHEN: Thank you very much.

15 JUDGE PIGOTT: Mr. Siegel, good afternoon.

16 MR. SIEGEL: Good afternoon, Your Honors.
17 May it please the court. I'm Nathan Siegel.

18 JUDGE RIVERA: You still have the raw
19 footage?

20 MR. SIEGEL: Yes. I figured that would be
21 the first question.

22 JUDGE RIVERA: Just checking.

23 MR. SIEGEL: I mean, I believe so, Your
24 Honor.

25 JUDGE PIGOTT: Don't destroy the tapes.

1 MR. SIEGEL: This is not something we've
2 checked on, but - - - yes, we know not to destroy the
3 tapes.

4 I'm going to address the intentional infliction
5 cause of action, which is the only one that we believe was
6 properly presented with respect to ABC.

7 This court has, on numerous occasions,
8 recognized the particular danger that that theory poses to
9 speech and to news gathering, because of its inherent
10 vagueness, its inherent malleability, its inherent
11 subjectivity. And just in brief, I think the
12 circumstances presented by this case raised all of those
13 concerns.

14 JUDGE RIVERA: The film crew is there in
15 the operating room - - -

16 MR. SIEGEL: Yes.

17 JUDGE RIVERA: - - - and while the surgeon
18 is actually - - - and the medical team is actually
19 working on Mr. Chanko - - -

20 MR. SIEGEL: Yes.

21 JUDGE RIVERA: - - - and the film crew
22 says, I'm sorry, could you just move a little bit to
23 the left, I don't have a good angle - - - not you,
24 the film crew says that to the surgeon; does that get
25 you the cause of action? Is that such outrageous

1 conduct, to ask the doctors to conduct themselves in
2 a particular way in the in the middle of trying to
3 save someone's life?

4 MR. SIEGEL: In and of itself?

5 JUDGE RIVERA: Yes.

6 MR. SIEGEL: Not necessarily.

7 JUDGE RIVERA: Why not?

8 MR. SIEGEL: If you can demonstrate that
9 that - - - somehow or another that - - - that ABC was
10 consciously and actively interfering with Mr. Chanko.
11 But in this case - - -

12 JUDGE RIVERA: Uh-huh.

13 MR. SIEGEL: - - - would it give rise to a
14 cause of action? No, because the plaintiffs are Mr.
15 Chanko's family members.

16 JUDGE RIVERA: No, I understand that - - -

17 MR. SIEGEL: Right?

18 JUDGE RIVERA: - - - but if they saw that
19 on the film, right?

20 MR. COHEN: But they didn't see that on the
21 film.

22 JUDGE RIVERA: I understand that, because
23 they don't have the raw footage, I understand they
24 haven't seen that yet.

25 MR. SIEGEL: Well, but then you would be

1 raising a claim for intentional infliction of
2 emotional distress for distress that you haven't
3 suffered.

4 JUDGE RIVERA: Uh-huh.

5 MR. SIEGEL: Right, there is - - - there's
6 - - - it's important to recognize that the
7 plaintiffs, with respect to this cause of action, are
8 the family.

9 JUDGE RIVERA: Uh-huh.

10 MR. SIEGEL: And - - -

11 JUDGE RIVERA: Well, what they do see is
12 the doctor - - -

13 MR. SIEGEL: - - - so my short answer would
14 be, no.

15 JUDGE RIVERA: What they do see is the
16 doctor describing what he's doing, right?

17 MR. SIEGEL: I'm not sure, actually, what
18 they mean by that.

19 JUDGE RIVERA: Okay.

20 MR. SIEGEL: I don't believe so; I mean,
21 there is a - - - there is a - - - there's an
22 interview that's obviously shot after the fact - - -

23 JUDGE RIVERA: Yes.

24 MR. SIEGEL: - - - where the doctor
25 generically says, you know, this is - - - these are

1 the issues that we face in trauma care, but, while
2 the treatment was going on, no.

3 JUDGE RIVERA: Because he's describing just
4 what he needs for the team to work on Mr. Chanko; is
5 that what you mean?

6 MR. SIEGEL: Yes, I mean, I'm not sure what
7 they mean by that - - -

8 JUDGE RIVERA: Uh-huh.

9 MR. SIEGEL: - - - because if there's no
10 indication there that the doctors were giving an
11 interview as he's treating the patient.

12 JUDGE RIVERA: Uh-huh, okay.

13 JUDGE STEIN: Can - - - can - - -

14 MR. SIEGEL: Yes.

15 JUDGE STEIN: Can we determine the
16 applicability of the newsworthiness exception here;
17 can it be determined as a matter of law or is that a
18 factual issue?

19 MR. SIEGEL: It's absolutely a matter of
20 law, Your Honor, and it's - - - it has virtually
21 always been treated as a matter of law in this
22 court's cases. And the key issue is this, that it's
23 the, what I would call the relationship issue, right,
24 does the - - - the story of Mr. Chanko's treatment
25 relate to a matter of public concern. And to do

1 that, the law is clear that you have to look at the
2 context of the entire program. And within that
3 context, the answer is clearly, yes, I mean, this is
4 - - -

5 JUDGE PIGOTT: Have we - - - have we - - -
6 I'm just not that familiar with all of this, but
7 we've seemed to get into a reality TV show milieu
8 these days, and - - - let's move this case aside but
9 would anybody - - - any situation like this that was
10 in a reality TV show be deemed newsworthy simply
11 because it was in a reality TV show?

12 MR. SIEGEL: There are lots of cases in
13 which - - - well, I'm going to take a step back.

14 JUDGE PIGOTT: Okay.

15 MR. SIEGEL: I think it's important not to
16 get caught up in labels, right; what is a
17 documentary? A documentary is something that
18 documents real life. What is a reality TV show?
19 It's something that depicts real life. So the label
20 that you put on - - -

21 JUDGE FAHEY: A lot of people would argue
22 with you on that, but, okay.

23 MR. SIEGEL: What's that?

24 JUDGE FAHEY: A lot of people would argue
25 with you that - - -

1 MR. SIEGEL: Well, I would understand that
2 they would - - -

3 JUDGE FAHEY: - - - reality TV showing real
4 life, but okay.

5 MR. SIEGEL: Well, I would understand that
6 they would argue that, but I think that to draw a
7 distinction between those labels as to what type of
8 your speech you are going to protect and what type
9 you're not, is - - - would be extremely dangerous,
10 and I do think it's clear, I mean, whatever you want
11 to call this program - - -

12 JUDGE FAHEY: Uh-huh.

13 MR. SIEGEL: - - - this is a program that
14 is depicting the treatment of actual patients in a
15 hospital. It is not Survivor.

16 JUDGE FAHEY: Listen, if there is
17 intentional - - - if we determine that there was a -
18 - - that you don't meet the intentional infliction of
19 emotional stress standard, that this behavior was not
20 outside the bounds of civilized behavior, then we
21 don't really get to the newsworthy issue - - -
22 newsworthiness issue at all; do we?

23 MR. SIEGEL: Yes, that's right.

24 JUDGE FAHEY: Okay. Thank you.

25 JUDGE ABDUS-SALAAM: If we do reach it - -

1 - I'm just curious, does the newsworthiness issue
2 address, for example, some undercover journalist
3 going into an abortion clinic - - - just a slight,
4 you know, sort of variation on the earlier case about
5 the nurse calling this young woman's home after she
6 had an abortion, when she advised them not to call
7 her home, she lived with their parents, and they
8 didn't want to know. So instead of calling her home,
9 somebody - - - you know, some journalist goes into an
10 abortion clinic and starts filming; is that something
11 - - - because abortion is a debatable issue, would
12 you say that that kind of conduct, if someone were
13 placed on film, somehow, you know, that that would be
14 not outrageous and - - - and extreme, to show someone
15 actually going into an abortion clinic, or getting an
16 abortion, or something like that?

17 MR. SIEGEL: I think it would depend on
18 what they were doing and what the context of it was.
19 There have been many programs that involve undercover
20 medical reporting. You know, often it's to try to
21 show doctors who were doing something wrong.

22 JUDGE ABDUS-SALAAM: Uh-huh.

23 MR. SIEGEL: And so I certainly wouldn't
24 say that - - - that undercover medical reporting is
25 somehow, per se, problematic. And that actually

1 illustrates, I think, the problem with trying to draw
2 these broad categories in this case, right. Even to,
3 Judge Pigott, your garbage truck example that you - -
4 - that you put. The truth is, a news camera could
5 cover that, right, and they - - - and they do
6 sometimes, and they cover disaster areas, and they
7 cover war zones, and they discover all kinds of
8 situations which may involve medical treatment,
9 injuries, death, and footage that is terribly
10 distressing, undoubtedly, to close family members.

11 But to - - - to draw a rule saying that
12 there is something, you know, presumptively or
13 inherently outrageous or extreme about that would
14 call into question all sorts of reporting about
15 difficult situations; and the same thing is true with
16 respect to the proposition that because what was
17 involved here, they argue, was medical confidenti - -
18 - I'm sorry, medical confidenti - - - medically
19 confidential information. There are all kinds of
20 situations in which journalists report information
21 that is confidential to somebody else or that - - -

22 JUDGE RIVERA: Is there - - - is there a
23 reason ABC didn't seek consent from the family?

24 MR. SIEGEL: I don't know the answer to
25 that, Your Honor. I honestly don't, I don't want to

1 testify for them. Obviously - - - I mean, I think
2 it's obvious that what ABC tried to do here was to
3 not reveal the identities of who was involved here;
4 when that didn't work, they corrected it immediately,
5 and I think that - - - I do think that the - - - the
6 sensitivity that ABC did display - - - I'm sorry, the
7 recognition of the sensitivity of the content that
8 ABC did display here in doing that also actually even
9 sets us apart from cases like *Howell v. New York*
10 *Post*, for example, where the director of the hospital
11 called up the newspaper and said, please don't
12 publish that picture because that could be terribly
13 damaging to the patient, and they did it anyway.
14 Nonetheless, not only did the court conclude that it
15 wasn't extreme and outrageous, but it included - - -
16 it concluded that it was newsworthy even though that
17 person had absolutely nothing to do with the direct
18 subject matter of the story.

19 JUDGE RIVERA: The ABC practice have been
20 not to seek consent in advance, because you've - - -
21 you've refer in the briefs to other shows, right,
22 other award-winning shows and so forth, I just - - -
23 I'm just trying to clarify.

24 MR. SIEGEL: No, that's fair, I mean, the
25 vast majority of people that are depicted on these

1 shows have given consent. I think that's even
2 apparent from the - - - from the - - - if you watch
3 the whole hour, I think that's, you know, that's
4 apparent. Why that didn't happen in this particular
5 case, I don't know, and I can't just say - - - I'd be
6 reluctant to try to - - - to testify for that.

7 JUDGE PIGOTT: Thank you, Mr. Siegel.

8 MR. SIEGEL: Thank you.

9 JUDGE PIGOTT: Mr. Olch.

10 MR. OLCH: If I may, a few points. First,
11 with regard to what the medical records show that we
12 should just rely on these and this man was going
13 through difficult times; specifically, the medical
14 records do not indicate what we all know is a fact,
15 that there was cameras in - - - in that operating
16 room. I mean, that's not mentioned in my review of
17 the medical record. So they alone simply don't tell
18 us exactly what was going on, and the fact that this
19 man was suffering, I think in no way eliminates the
20 notion as counsel is arguing is a matter of law, he
21 could not also have been conscious of what was around
22 him, and objecting perhaps to the cameras, and so
23 forth.

24 Second, the ABC's notion that the film doesn't
25 indicate what was going on, that - - - what the doctor was

1 saying was not in the presence of the patient; no, the
2 doctor is seen right there in the operating room, talking
3 to his crew that his leg has to come off, his cavity is
4 filling; this is not post-operative discussion, this is
5 going right then and there, and in fact, one of the
6 plaintiffs, who is a doctor, his objection to this was is
7 that the doctor is in the room, the patient is there, and
8 he's talking to the camera - - - the surgeon - - - instead
9 of actually attending to the patient, I mean, that - - -

10 JUDGE RIVERA: So you're saying that those
11 comments are not for purposes of furthering the
12 medical services that are being provided in that
13 moment.

14 MR. OLCH: Yeah, well, the camera - - -

15 JUDGE RIVERA: The performance.

16 MR. OLCH: One of - - - in my reply brief,
17 I cite the standards of the American College of
18 Emergency Physicians, and one of the things that I
19 saw that jumps off the page at their starting point
20 is, is that cameras - - - commercial cameras in an
21 operating room have nothing to do with the treatment
22 of a patient; that's - - - they are not there for
23 medical purposes. And then the question is, why are
24 they there.

25 And in this particular situation, at least

1 for one of the plaintiffs who is a doctor, what
2 caught his attention was that the doctor is in the
3 room with the patient, he's standing there - - - and
4 I noticed that too, he's talking to the patient, the
5 patient is on the table in the back, and the team is
6 around him, and the surgeon, who is presumably in
7 charge, is not in fact attending to the patient.

8 With regard to ABC's first amendment point,
9 I think what's - - - what they are overlooking, and
10 which the Appellate Division did not overlook, is
11 that the complaint with regard to emotional distress
12 has two ingredients to it. One ingredient is the
13 dissemination, the actual program itself that, as the
14 Appellate Division says and as the allegations in the
15 claim made clear, the defendant's conduct in
16 producing and televising the program; there's the
17 production side which the newsgathering side of it,
18 and then there's the eventual show that is shown on
19 television.

20 The complaint is alleging that the shock
21 came - - - one, they're shocked that their fath - - -
22 and as they think the ABC would characterize it,
23 their shock that their father or husband was a
24 subject of a TV show. But what the complaint is
25 alleging is they are shocked by what they saw on this

1 program, because this program gave in a window into
2 what was going on while their father, her husband,
3 was in fact in this operating room.

4 And it talks about their conduct, and
5 that's that the Appellate Division says, they were
6 objecting to the conduct of the way this was
7 produced. And although ABC clearly has a First
8 Amendment right to gather information, and gather
9 news, in our situ - - - we - - - we are alleging, we
10 contend, and it was contended in the trial court,
11 that they are aiding and abetting what constitutes a
12 violation of the patient-physician relationship.

13 They are right there, they're providing all
14 the mechanical equipment to do this, they are the
15 ones who wire the doctor for sound to go in and
16 interview and - - - and speak to the family after the
17 death; this is a very different situation. ABC
18 posits itself as the passive journalist who receives
19 perhaps confidential information from an insider or
20 from a whistleblower; this is not the situation.

21 ABC is right in there, working with the
22 physicians, working with the doctors to breach this
23 person's confidential relationship with the doctors.
24 It's a very different situation and the Appellate
25 Division specifically notes that there are two

1 ingredients to all of this, and certainly I believe
2 the more forceful ingredient is the way in which ABC
3 went around working with the doctors to do this, and
4 that's why the Appellate Division - - -

5 JUDGE RIVERA: Is that - - - is that why on
6 that last cause - - - is that your argument for the
7 last cause, meeting that high bar for that standard
8 of intentional infliction of emotional - - -

9 MR. OLCH: I'm sorry, I missed - - -

10 JUDGE RIVERA: I'm sorry, is that what you
11 are saying, lets you - - - at least at the pleading
12 stage - - -

13 MR. OLCH: Yes.

14 JUDGE RIVERA: - - - for purposes of the
15 cause of action against ABC, to get past the high bar
16 of that standard on intentional infliction of
17 emotional distress; is that - - - is that the
18 difference?

19 MR. OLCH: Yeah, well, my - - - my starting
20 point on this, is what this court said over a hundred
21 years ago, and I quite - - - I quoted in my brief
22 that the release of medical information shocks our
23 sense of decency and propriety. That that's the
24 starting point - - - we said this a hundred years ago
25 - - - and this court said this over a hundred years

1 ago, and I think that's more true today than it was
2 back then, because of all the attention that's paid
3 to it, the intensive government regulation of this,
4 which is trying to keep a lid on the disclosure of
5 private medical information, I think this - - - it's
6 even more so today than it is - - - and secondly on
7 top of this, you have a situation of a news
8 organization not simply passively receiving this kind
9 of - - -

10 JUDGE PIGOTT: Your red light is on, Mr.
11 Olch - - -

12 MR. OLCH: I'm sorry, passively - - -

13 JUDGE ABDUS-SALAAM: I just have one
14 question, Mr. Olch - - -

15 JUDGE PIGOTT: I'm sorry.

16 JUDGE ABDUS-SALAAM: - - - because, before
17 you sit down, you mentioned that you - - - you argued
18 in the trial court the aiding and abetting - - -

19 MR. OLCH: Yes, on page 59 of the record -
20 - - on page 59 of the record, the bottom - - - the
21 very bottom, it says - - - and it goes over to page
22 60, "The defendant, ABC, acted in concert with
23 defendant NYP" - - - meaning, New York Presbyterian -
24 - - "as part of a joint venture, a partnership, et
25 cetera, for produ - - - for the purpose of producing

1 this television show."

2 I've called it aiding and abetting because
3 I think that better characterizes it, but that was
4 why I sent the court a letter about the Telaro case,
5 this notion, because the objection of ABC was - - -
6 is that it wasn't raised in the Appellate Division,
7 this phrase, acting - - - aiding and abetting, or
8 acting in concert, but it was raised at the trial
9 level as an argument, and that argument under the
10 Telaro case, and Telaro's progeny is that it can be
11 raised again before this court.

12 JUDGE PIGOTT: Thank you, sir.

13 MR. OLCH: Thank you very much, Your
14 Honors.

15 (Court is adjourned)

16

17

18

19

20

21

22

23

24

25

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Chanko v. American Broadcasting Companies, Inc., et al., No. 44 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: February 24, 2016