

Litigation

New York's Top Court Declines Invitation to Expand Allowable Recovery for Mental Suffering

Under the Empire State's top court's decision, New York law will continue to prevent recoveries for emotional suffering in medical malpractice claims involving in-utero injuries to a child born alive. The four-judge majority cited what it said was the need to adhere to stare decisis. The other three judges were open to eliminating the limitation.

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Associate judge of the New York Court of Appeals Madeline Singas. Photo: Ryland West/ALM

A split decision by New York's highest court assured that stare decisis will go undisturbed in preventing a birthing mother from recovering damages for emotional suffering in a medical malpractice lawsuit involving in-utero injuries to a child born alive.

The New York Court of Appeals' 4-3 ruling on Tuesday dismissed a mother's prenatal tort claim against St. Barnabas Hospital in the Bronx.

On a broader scale, the ruling declined an invitation by the Appellate Division, First Department, to overturn the top court's own precedent established in 2005, while punting the primary legal question to the state legislature, as the governor continues to mull the Grieving Families Act.

In an interview with the New York Law Journal and law.com, Pillsbury Winthrop Shaw Pittman partner Rolando Acosta, who co-led the firm's appeal on behalf of the safety-net hospital, said:

"I think it was a wise decision for the Court of Appeals to adhere to its 20-year-old precedent, drawing very bright but difficult lines with respect to emotional damages for prenatal torts, and frankly, letting the legislature and the governor figure out where the lines are."

The majority decision, written by Judge Madeline Singas, considered the mother's request for emotional damages upon an allegation her infant's death had been caused by an obstetrician's failure to obtain an informed consent.

The expectant mother had been admitted to the hospital in July 2012, after she didn't enter labor by her due date. An obstetrician and nursing staff induced labor. Two days later, the doctor attempted a delivery by vacuum extraction that was unsuccessful. The doctor then performed an emergency C-section, delivering the baby alive, but in critical condition. He suffered brain damage and was taken off life support at eight days old.

While expressing sensitivities toward the tragic circumstances, Singas nonetheless explained there was no cause to overturn *Sheppard-Mobley*, a unanimous 2005 Court of Appeals decision that was the culmination of decades of precedent at the intersection of obstetrical malpractice and recovery for purely emotional damages.

Singas noted that the "simple and straightforward bright-line rule" of that case was "logical" and "fit ... comfortably within New York's tort jurisprudence disfavoring recovery for purely emotional injuries."

Judge Jenny Rivera wrote a dissent in which she was joined by Judge Shirley Troutman. Chief Judge Rowan Wilson dissented separately.

Pillsbury partner James Catterson, a former Appellate Division, First Department justice, argued the case to the top court on Sept. 8.

In the face of the Appellate Division, First Department's 4-1 holding that deemed the *Sheppard-Mobley* precedent "unjust, as well as opposed to experience and logic," Acosta credited Catterson for doing "a great job on the stare decisis piece of the argument."

“Remember, these are tough emotional, difficult issues,” Acosta said. “But these are the same issues that are being debated by the legislature and the governor in the Grieving Families Act.”

It's a pending bill that proposes to expand the state's wrongful death statute, to allow recovery for damages for grief and anguish. Many legal observers suggest Hochul isn't likely to sign the bill, because she's vetoed version in three consecutive years, and the latest proposal contains slight revisions.

“As Judge Singas said in her decision,” Acosta said, “what type of recovery exists? What damages are available for parties? It's a legislative process. It's something for the legislature to do. So, hopefully the governor and the legislature will reach a solution, and the governor will sign the Grieving Families Act, and the court will reaffirm its role to determine whether the statute is constitutional.”

At the same time, Acosta saluted the decision for preventing an expansion of tort liability for facilities that serve disadvantaged communities.

Safety-net hospitals are already under difficult circumstances, given cuts to Medicaid and decisions being made by the federal administration, Acosta said.

“Some of those hospitals have had to declare bankruptcy,” he said. “I think that a decision by the court to accept the invitation of the First Department... would have resulted in very difficult financial choices for the safety-net hospitals. It is, with respect to my client, talking about continuing to serve the South Bronx and the Bronx community that has very limited access to medical help. It's a win-win, I think.”

New York State Trial Lawyers Association president Andrew Finkelstein lauded the three Court of Appeals judges who dissented.

“Judges Rivera, Troutman and Chief Judge Wilson got it right,” he said. “New York will honor grief over a pet, but not over your newborn — if the child lived even briefly before dying from malpractice, the law casts aside a mother's grief. NYSTLA joins the majority's call for the governor to join the legislature in signing the Grieving Families Act to finally correct this cruel and senseless inequity.”

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