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2 No. 49
Jo'Ell Sheppard-Mobley, &c., et al.,
Respondents,
v.
Leslie King, &c., et al.,
Appellants.

2005 NY Int. 74

May 10, 2005

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Timothy J. O'Shaughnessy, for appellants King, et al.

John Tomaszewski, for appellant Spector.

Steven C. Mandell, for appellants Kumari-Subaiya, et al.

Bruce E. Cohen, for respondents.

University Associates in Obstetrics and Gynecology, P.C.; New York and Presbyterian Hospital, et al.; Beth Israel Medical Center, et al.; New York City Health and Hospitals Corporation; Combined Coordinating Council, Inc.; New York State Trial Lawyers Association, Inc.; Medical Society of the State of New York et al., *AMICI CURIAE*. G.B. SMITH, J.: In *Broadnax v Gonzalez* and *Fahey v Canino* (2 NY3d 148 [2004]), this Court held that medical malpractice resulting in a miscarriage or stillbirth must be construed as a violation of the duty of care to the expectant mother, entitling her to damages for emotional distress. This case calls upon us to determine whether an expectant mother may recover damages for emotional harm where the alleged medical malpractice causes in utero injury to the fetus, subsequently born alive. We hold that, under *Broadnax/Fahey*, she may not.

In July 1999, plaintiff Karen Sheppard met with defendant Dr. Leslie A. King, of defendant Obstetrical & Gynecological Services of Rockville Centre ("OGSRC"), complaining of lower abdominal discomfort. After

conducting various tests, Dr. King informed her both that she was pregnant and that she had large fibroids in her uterus. Dr. King told her that as a result of her fibroids, she was not likely to carry the fetus to term. Sheppard alleges that Dr. King advised her to terminate the pregnancy.

Dr. King subsequently referred Sheppard to Dr. Ira J. Spector for a second opinion concerning the performance of a surgical abortion. She asserts that Dr. Spector informed her that as a result of the fibroids, her pregnancy would not last beyond the fifth month, and that if the fibroids did not abort the pregnancy, "the baby would be terrible." However, Dr. Spector advised her that, given her condition, a surgical abortion would be difficult and dangerous. Thus, Dr. Spector suggested that a non-surgical abortion be accomplished with the drug methotrexate, which breaks down fetal tissue.

In August 1999, while Sheppard was in her seventh week of pregnancy, Dr. King administered the methotrexate. According to Dr. King, he acted in consultation with Dr. Spector, who allegedly advised that the drug be administered in two separate 50-milligram doses, the second dose to be administered one week after the first. Upon administering the second dose, Dr. King allegedly advised Sheppard that she could detect no fetal heartbeat. Shortly thereafter, Sheppard met with defendant Dr. Sheila Kumari-Subaiya, a radiologist and owner of defendant Promedica Imaging, P.C., because although Sheppard believed the pregnancy to be terminated, she was concerned about the absence of fetal discharge. Dr. Kumari-Subaiya performed a sonogram and advised Sheppard that there was no fetal heartbeat.

Sheppard asserts that over the next few months, she experienced abdominal and pelvic discomfort and was concerned about the possibility of ovarian, cervical or uterine cancer. She consulted with a different radiology group, and after a sonogram was performed, learned that the abortion procedure had failed and that she was in her 28th week of pregnancy. Sheppard alleges that Dr. King had given her too small a dose of methotrexate to accomplish the abortion.

When Drs. King and Spector learned that Sheppard was still pregnant and that the fetus was at risk of birth defects due to exposure to methotrexate, they discussed with her the possibility of an out-of-state late-term abortion. Sheppard ultimately rejected that option and decided to carry the child to term. On March 3, 2000, infant plaintiff Jo'Eil Sheppard-Mobley was born, suffering from Fetal Methotrexate Syndrome, manifested through serious congenital impairments. This action was commenced in Supreme Court on behalf of Sheppard, the infant and the infant's father, Lemuel Mobley, alleging malpractice by Drs. King, Spector and Kumari-Subaiya, as well as OGSRC and Promedica. In seven causes of action, the complaint alleges that infant plaintiff suffered severe physical injuries caused by defendants' failure to properly diagnose, care for and treat Sheppard during the course of her pregnancy. The complaint seeks to recover damages on behalf of the infant for his physical injuries and for the parents' loss of the child's services and medical expenses. On

behalf of Sheppard, the complaint alleges physical and emotional injuries caused by defendants' alleged medical malpractice. Finally, as against Dr. King, OGSRC and Dr. Spector, the complaint alleges lack of informed consent in their treatment of Sheppard.

Defendants made motions for summary judgment dismissing various causes of action, the most pertinent of which was their motion to dismiss the sixth cause of action seeking damages for Sheppard's emotional distress. While the trial court granted defendants' motion, the Appellate Division overturned that decision. Noting that during the pendency of the appeal, this Court decided *Broadnax/Fahey* and thereby implicitly overruled *Tebbutt v Virostek* (, [65 NY2d 931](#) [1985]), the Appellate Division concluded that even in the absence of physical injuries, Sheppard could recover damages for emotional distress caused by a violation of the duty of care owed to her while she was being treated during her pregnancy. The court concluded that while *Broadnax/Fahey* involved the stillbirth or miscarriage due to alleged malpractice, this Court's analysis was also applicable to cases involving the live birth of a severely impaired child. Thus, the court reinstated this cause of action, and granted defendants leave to appeal to this Court. We now modify the order of the Appellate Division by dismissing the sixth cause of action with leave to plaintiffs to replead that claim, and otherwise affirm.

Our decision in *Broadnax/Fahey* was intended to fill a gap created by our previous decision in *Tebbutt* which concerned the medical malpractice performed upon the body of an expectant mother resulting in a miscarriage or stillbirth. Our jurisprudence has long permitted infants who suffer a legally cognizable injury in the womb and survive the pregnancy to seek damages for their injuries (see *Woods v Lancet*, 303 NY 349[1951]). We also have long permitted a pregnant mother who suffered an independent injury as a result of malpractice to bring suit for her own personal injuries (see *Ferrara v Bernstein*, , [81 NY2d 895](#) [1993]; *Martinez v Long Island Jewish Hillside Medical Center, et al.*, , [70 NY2d 697](#) [1987])). However, where medical malpractice caused a miscarriage or stillbirth, no claim for wrongful death existed on behalf of the child (see *Endresz v Friedberg*, , [24 NY2d 478](#) [1969]). As we held in *Tebbutt*, the expectant mother could not bring a cause of action for negligently causing a miscarriage or stillbirth (65 2 931 [1985]).

As we recognized in *Broadnax/Fahey*, our tort jurisprudence in this area created a "peculiar result" in that "it exposed medical care givers to malpractice liability for in utero injuries when the fetus survived, but immunized them against any liability when their malpractice caused a miscarriage or stillbirth" (2 3 at 154). Moreover, we recognized the injustice created by "categorically denying recovery to a narrow, but indisputably aggrieved, class of plaintiffs" (*id.*). It was this particular injustice that we sought to rectify when we held that a mother could recover for emotional injuries when medical malpractice caused a stillbirth or a miscarriage, even without a showing that she suffered an independent physical injury. In other words, our holding in *Broadnax/Fahey* is a narrow one, intended to permit a cause of action

where otherwise none would be available to redress the wrongdoing that resulted in a miscarriage or stillbirth.

In the case now before us, the Appellate Division improperly extended our decision in *Broadnax/Fahey* by reinstating Sheppard's sixth cause of action seeking damages for emotional harm based on the birth of a live infant with physical injuries. The rule pronounced in *Broadnax/Fahey* does not apply here, where infant plaintiff was injured in utero, but carried to term and born alive. After all, as we stated in *Woods v Lancet*, a child born alive may bring a medical malpractice action for physical injuries inflicted in the womb (303 NY 349).

However, as defendants conceded during oral argument, Sheppard's sixth cause of action can proceed to the extent that she seeks damages for emotional harm that she suffered as a result of an independent injury (*see Ferrara*, 81 NY2d at 898 [plaintiff permitted to recover emotional damages caused by negligent abortion services and the defendant's failure to inform her of the incomplete abortion and the need to promptly return to the medical facility]; *Martinez*, 70 NY2d at 699 [plaintiff entitled to recover damages for mental anguish suffered as a result of the defendant's breach of duty to her in negligently advising her that her child would be born with severe congenital defects, thus convincing her to obtain an unnecessary abortion, contrary to her strongly held beliefs]). Sheppard now alleges that as a result of defendants' breach of their duties owed directly to her, she suffered mental anguish resulting from an independent injury. Specifically, Sheppard claimed that she was advised that due to fibroids, she would not be able to carry her child to term. Relying on defendants' advice, she underwent a chemical abortion. She was subsequently informed that the procedure was a success when, in fact, it had failed. Upon learning that she was carrying a compromised fetus, she had to decide whether to seek an out-of- state late-term abortion or give birth to a child likely to have congenital defects due to exposure to methotrexate. Such allegations may support a finding of injury independent of the birth of an impaired child. Because the complaint does not set forth these independent allegations, however, we dismiss the sixth cause of action and remit for Sheppard to amend her complaint to plead such injury. Finally, we conclude that the Appellate Division properly reinstated the first two causes of action against Drs. King and Spector brought on behalf of infant plaintiff. To be sure, a cause of action may not be maintained on behalf of an infant plaintiff based on a claim of "wrongful life" or the assertion that but for the negligence of the healthcare provider, the parent would have aborted the fetus rather than giving birth to a child with abnormalities (*see Alquijay v St. Luke's-Roosevelt Hosp Ctr*, , [63 NY2d 978](#) 1984]; *Becker v Schwartz*, , [46 NY2d 401](#) [1978]). However, as the Appellate Division properly concluded, the first two causes of action are not limited to wrongful life claims. Thus, infant plaintiff does not claim that defendant doctors negligently failed to administer the proper dosage of methotrexate in order to abort the pregnancy. Rather, he has alleged that his injuries were caused by defendants' erroneous advice to Sheppard that she would not be able to

carry the fetus to term and thereby wrongly advised her to undergo the chemical abortion. Infant plaintiff claims that had defendants not been negligent in this regard, Sheppard would not have undergone methotrexate treatments and she would have given birth to a healthy child. These claims are sufficient to overcome defendants' motion to dismiss (see *Woods*, 303 NY at 356-357).

Accordingly, the order of the Appellate Division should be modified, without costs, and the case remitted to Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed. The certified question should be answered in the negative.

Order modified, without costs, and case remitted to Supreme Court, Kings County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Certified question answered in the negative. Opinion by Judge G.B. Smith. Chief Judge Kaye and Judges Ciparick, Rosenblatt, Graffeo, Read and R.S. Smith concur.

Decided May 10, 2005

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