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NEW YORK, FRIDAY, APRIL 2, 2004

PRICE $3.00

er Must Defend ver Sex Assault

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A masseur's sexual assault of a client was from the standpoint of the spa where he salon is entitled to defense and indemnits insurance carrier, a unanimous Court d yesterday.

n *RJC Realty Holding Corp. v. Republic* nce Co., 26, overturned a lower decision od by its own precedent.

ack to *Agoado Realty Corp. v. United Inter*nce Cos., 95 NY2d 141, where it said that g whether an occurrence is an accident, ew the matter from the perspective of the

he Court, Judge Robert S. Smith said that

the alleged assault, if it occurred, was obviously intended by the masseur. But from the standpoint of the salon, the incident was unexpected and unintended. Consequently, indemnification is required, the Court said.

The decisions begin on page 18.

Also yesterday, the Court:

• Held 5-1 that General Electric s not entitled to a $3.1 million refund on emitted for what turned out to be uncolGE unsuccessfully sought to strike down urring the assignment of sales tax refund l Electric Capital Corp. v. New York State Appeals, 35.

he issue of the admissibility of expert tesain generally the workings of street-level two decisions — *People v. Hicks*, 39, and , 40 — the Court made clear that those must be made on a case-by-case basis. It r that judges who too readily admit such ny are abusing the discretion afforded Court of Appeals ruling.

emmed from an action brought by a cushe Maximus Spa/Salon on Long Island. A aimed she was sexually assaulted by a

Liability Widens for Fetal Death Caused by Doctors

Distress Damages Do Not Require Bodily Harm to Women

BY JOHN CAHER

ALBANY — Overturning a 19-year-old precedent, the Court of Appeals held yesterday that a woman may recover damages for emotional distress for medical malpractice that causes a miscarriage or stillbirth, even if she personally suffers no physical injury.

In a 6-1 opinion, the Court abandoned the rule it adopted in *Tebbutt v. Virostek*, 65 NY2d 931 (1985).

It ruled in an opinion by Judge Albert M. Rosenblatt that "even in the absence of an independent injury, medical malpractice resulting in miscarriage or stillbirth should be construed as a violation of a duty of care to the expectant mother, entitling her to damages for emotional distress."

Judge Rosenblatt

The Court said its decision has no impact on a 1969 ruling that bars wrongful death actions under similar circumstances, *Endresz v. Friedberg*, 24 NY2d 478.

In footnotes, the Court made clear that it is permitting recovery just by the mother, not the father, and only for the emotional distress directly connected to a miscarriage or stillbirth caused by medical malpractice. A dissent said the decision represents only a modest expansion of tort liability.

Still, the ruling in *Broadnax v. Gonzalez*, 30, and *Fahey v. Canino*, 31, undeniably exposes physicians — already infuriated over what they characterize as an out-of-control tort system — to a new threat of litigation.

"This type of decision expands, and potentially very significantly, the exposure of physicians," said Gerard L. Conway, director of governmental affairs for the Medical Society of the State of New York.

Mr. Conway said he was unfamiliar with the facts of the cases and declined to comment on them.

But he said, "Clearly, the facts show there is a crisis, and this will have an impact on the specialty most in crisis, obstetrics. We are very concerned."

Lenore Kramer, past president of the New York State Trial Lawyers Association, said the ruling makes sense from a standpoint of fundamental fairness.

She disputed the contention that yesterday's decision will have any impact on a medical malpractice crisis — or even that there is one.

"This recognizes a reality of these terrible situations and brings the law into conformity with what people's understanding of what justice is," said Ms. Kramer, of Kramer & Dunleavy in Manhattan. "We sincerely believe that there is no malpractice crisis and that it is a trumped-up issue and fraud perpetrated by the insurers."

Broadnax, a Second Department case, involved a pregnant woman in Westchester County.

In 1994, Karen Broadnax called her nurse-

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Judge Offers to Serve as Mediator

Top Court Widens Malpractice Liability

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midwife and reported that her water had broken and she was bleeding from the vagina. The nurse-midwife had her report immediately to the Westchester Birth Center.

At the center, Ms. Broadnax again began to bleed and the nurse-midwife called the patient's obstetrician, Dr. Frederick Gonzalez. He recommended that she be transported to Columbia Presbyterian Allen Pavilion in Manhattan rather than a hospital across the street.

Eventually, Dr. Gonzalez met his patient at the Manhattan hospital. By then two hours had passed since she arrived at the Westchester Birth Center.

Ultimately, Ms. Broadnax delivered a full-term stillborn girl through cesarean section. An autopsy showed the baby had died because of a placental abruption.

The Broadnaxes sued for medical malpractice. Their case was dismissed under *Tebbutt* on the ground that Ms. Broadnax suffered no distinct physical injury.

The second matter, *Fahey v. Camino*, came from the Third Department and grew out of a suit by Debra Ann Fahey, who lost twins in the 18th week of pregnancy and sued alleging failure to diagnose a cervical problem. She claimed emotional damages, and the case was dismissed on *Tebbutt* grounds.

A year later, Ms. Fahey underwent a relatively simple procedure to address the problem and successfully delivered a baby, the Court said.

Tebbutt set a precedent that a mother could recover for emotional injuries related to the stillbirth of her child only if she suffered an independent physical injury due to the negligence of the attending physician.

Two judges, including the present chief judge, Judith S. Kaye, dissented. Judge Kaye complained at the time that the rule was illogical.

"When the law declares that the stillborn child is not a person who can bring suit, then it must follow in the eyes of the law that an injury here was done to the mother," she wrote.

Yesterday, the chief judge and five of her colleagues put *Tebbutt* to rest, concluding that the 1985 decision "has failed to withstand the cold light of logic and experience."

The majority opinion said the Court "is no longer able to defend" the logic or reasoning of the 1985 'Tebbutt' decision that it overturned yesterday.

Judge Rosenblatt wrote that *Tebbutt* "was in keeping with our view that tort liability is not a panacea capable of redressing every substantial wrong." He said the Court is "no longer able to defend *Tebbutt's* logic or reasoning."

Legally Untenable Situation

Judge Rosenblatt observed that *Tebbutt* resulted in the legally untenable situation where doctors were potentially liable for in utero injuries when the fetus lived, yet completely shielded from liability if their malpractice was so severe that the fetus died. He agreed with retired Court of Appeals Judge Matthew J. Jasen, who also wrote a dissent in *Tebbutt*, that the 1985 rule relegated the fetus to a state of "juridical limbo."

"Although in treating a pregnancy, medical professionals owe a duty of care to the developing fetus, they surely owe a duty of care to the expectant mother, who is, after all, the patient," Judge Rosenblatt wrote. "Because the health of the mother and fetus are linked, we will not force them into legalistic pigeonholes."

Judge Susan Phillips Read dissented.

Although she said the ruling neither alters the legal rights of a fetus nor creates new duties for physicians, she expressed concern that the decision's impact is largely a mystery.

"[T]here is no way for us to predict or assess the potential affect of this expansion of liability, however modest it may appear, on the cost and availability of gynecological and obstetrical services in New York State," Judge Read said. She found no good reason for toppling "a bright-line rule, which is easily applied."

Margaret C. Jasper of South Salem argued for the plaintiff, and Janet D. Callahan of Hancock & Estabrook in Syracuse appeared for the defendant in *Broadnax*. Patricia A. Cummings of O'Connor, Gagioch, Pope & Tait in Binghamton represented Ms. Fahey, and Ms. Callahan defended the doctor in *Fahey*.

Kathleen M. Gallagher of the New York State Catholic Conference applauded the ruling and noted the timing: It was handed down on the day that President George W. Bush signed the Unborn Victims of Violence Act, which establishes a crime of harming a fetus during an assault on a pregnant woman.

"This overturns many years of case law that did not recognize unborn children as having any worth at all," she said, referring to the Court's ruling. "The Court is saying they have worth, they have value to the families who lose them — and the families can recover."

Insurer Must Defend Spa Over Sex Assault

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day, the Court of Appeals reversed the Second Department.

The Court relied on *Agoado*, in which in 2000 it said that the murder of a tenant by an unknown assailant qualified as an "accident" within the limits of the landlord's insurance policy.

"Since the masseur's actions here were not RJC's actions for purposes

missioner attempting to collect anything from petitioner," Judge Graffeo wrote. "To the contrary, it is petitioner who wishes to collect a tax refund from the Commissioner."

Judge Smith dissented. He said sales tax is supposed to burden purchasers, not vendors or their successors.

"Indeed, I can think of only one reason for the regulation: it effectively transfers money from private

However, when Mr. Smith was arrested shortly after, he was carrying cocaine but not the cash.

At trial, the undercover officer was permitted to testify as an expert about the various roles of members of a drug ring. That testimony was offered to explain why the buy money was not found on the defendant. The officer told the jury that in drug organizations, some actors are

Mediation R

Continued from page 1

of security material relate
Sept. 11, 2001, terror attac
"compromise national saf
reveals procedures still in us
have been enhanced since t

The decision about what n
should be released is "an a
responsibility," he said.

The Transportation
Administration is a unit of the
ment of Homeland Securi
agency has the responsibility
mine what material may be r
Judge Hellerstein recognize
result, he said, he has no legal
ity over what information sh
released.

Once the security agency
final decision about what ma
release, the plaintiffs recour
take a direct appeal to any
court where one of the parties

Security Procedures Sou

The litigation before Judge
stein involves 102 death cases
property damage cases that
in the wake of the Sept. 11 att

Among the materials the p
are seeking, Mr. Moller said, a
cedures for the screening of
gers; for securing non-public a
airports; and for protecting c
while in flight. The informatio
ical to the plaintiffs' claims t
reasonable exercise of care
have prevented the terrorist a
Mr. Moller said.

He added that he is concern
the Transportation Security
istration will take a rest
approach because it has refu
authorize the release of mate
designates as "sensitive securit
mation" to a committee of 14 pl
lawyers. Those lawyers receive
rity clearances after Judge Hell
suggested they seek them.

Mr. Moller pointed to the d
ties the Sept. 11 panel headed
mer New Jersey Governor Tho
Kean has had getting inforn
from the Bush administration.

"I understand national securi
cerns," he said, "but I am conc
that political concerns are en
the equation."

After a year of effort, Mr. I
said, the defendants are due tc
er by April 12 the first set of d
ery materials that the security a
has approved for release. Those
rials either contain no inform
designated as sensitive, or ser
information has been redact
said.