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Reporting on
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CASE LAW DEVELOPMENTS

Majority of Court of Appeals Refuses to Overturn Precedent Limiting Recovery for Damages for Purely Emotional Harm for Prenatal Injuries Dissent Believes Stare Decisis Should Not Stand in the Way of Bringing State's Common Law "in Accord with Justice"

In *Sheppard-Mobley v. King*, 4 N.Y.3d 627 (2005), the Court of Appeals held that a mother could not recover emotional damages for prenatal torts on a cause of action for ordinary (traditional) medical malpractice where the child was *born alive*, in the absence of an independent physical injury to the mother. In *SanMiguel v. Grimaldi*, 2025 N.Y. Slip Op. 05780 (Oct. 21, 2025), the Court of Appeals was faced with two questions: (1) did the *Sheppard-Mobley* ruling apply to medical malpractice claims based on lack of informed consent; and (2) would the Court overrule its holding in *Sheppard-Mobley*.

As to the first question, the judges agreed that that an informed consent claim is a form of medical malpractice, making *Sheppard-Mobley* applicable. However, a narrow majority of the Court refused the entreaty to "revisit" *Sheppard-Mobley* (by the Appellate Division below).

The facts in *SanMiguel* are painful and detailed. Relevant to our discussion here is that after a long and difficult labor, the child was delivered alive via an emergency C-section, following an unsuccessful vacuum extraction. The child was then transported to the neonatal intensive care unit in serious condition, and eight days later died after life support was discontinued.

The majority opinion, written by Judge Singas, noted the history behind the *Sheppard-Mobley* decision. Most significantly, "New York common law has long viewed with suspicion tort claims seeking the recovery of purely emotional damages." Nevertheless the Court has carved out three nar-

row and limited circumstances where a plaintiff can recover for emotional suffering absent physical injury: (1) "in certain special circumstances—such as false reports of a family member's death or serious illness, or the mishandling of a family member's remains"; (2) "where a defendant's breach of a duty of care unreasonably places the plaintiff in fear of physical harm, resulting in emotional harm with 'physical manifestations'"; and (3) where a plaintiff suffers an "emotional injury upon witnessing a physical injury to an immediate family member while the plaintiff is in the 'zone of danger' created by the defendant's negligent conduct." *Id.* at *2.

Subsequent decisions from the Court reflected the reluctance to permit recovery for emotional harm alone, beyond the limited circumstances noted above. In *Broadnax v. Gonzalez*, 2 N.Y.3d 148 (2004), however, the Court established another exception, overruling its precedent in *Tebbutt v. Virostek*, 65 N.Y.2d 931 (1985). The *Broadnax* case held that even where there was no independent physical injury, medical malpractice which resulted in *miscarriage or stillbirth* represented a violation of a duty of care to the expectant mother, entitling her to emotional distress damages. The stated basis for its decision was the necessity "to fill the anomalous gap—arising from the common-law bar on wrongful death or life claims on behalf of a stillborn fetus in combination with the common-law bar on claims for purely emotional damages—whereby a medical provider whose malpractice caused a stillbirth faced no liability at all." *SanMiguel v. Grimaldi*, 2025 N.Y. Slip Op. 05780 at *3.

Notwithstanding the limited scope of the *Broadnax* ruling, some lower courts read it as permitting recovery for purely emotional damages where medical malpractice caused injuries to a fetus in utero, *born alive*. This prompted the *Sheppard-Mobley* decision, *supra*, reiterating that its holding would not apply in that circumstance "because the infant may recover independently for medical malpractice that causes them physical injury." *SanMiguel* at *3.

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The majority in *SanMiguel* addressed the stare decisis doctrine, maintaining that the plaintiff had failed to establish that “anything decisive” had changed since *Sheppard-Mobley* was decided. The Court stressed that the doctrine

instructs that courts should “overrule a prior decision” only “in the rarest of cases,” when “an extraordinary combination of factors undermines” its “reasoning and practical viability.” In conducting this analysis, we often ask whether our “prior holding leads to an unworkable rule, or creates more questions than it resolves”; whether “adher[ing] to a recent precedent involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience”; and whether “a preexisting rule, once thought defensible, no longer serves the ends of justice or withstands the cold light of logic and experience.” . . . [W]e have overruled cases where a tort “rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing.” But “even under the most flexible version of the doctrine of stare decisis, prior decisions should not be overruled unless a compelling justification exists for such a drastic step” (citations omitted).

Id.

The majority insisted that none of those considerations justified overruling *Sheppard-Mobley*. The rule there “is logical and fits comfortably within New York’s tort jurisprudence disfavoring recovery for purely emotional injuries.” The *Broadnax* decision permitting the recovery of purely emotional damages was based on the fact that, as discussed above, doctors would be immunized from their malpractice. The majority characterized its disagreement with Judge Rivera’s dissent as “our adherence to our consistent characterization of *Broadnax* as a narrow fix for a discrete legal problem rather than fundamentally altering the trajectory of our tort law by allowing broader recovery for purely emotional damages (citations omitted).” *Id.* The majority saw no difficulty in applying “*Sheppard-Mobley*’s simple and straightforward bright-line rule.”

The dissent by Judge Rivera (and joined by Judge Troutman) saw *Sheppard-Mobley* as drawing an arbitrary line between a circumstance where the alleged medical malpractice results in a stillbirth and where a child is born alive, but dies 15 minutes later. In the former, the mother can recover emotional distress damages absent a separate physical injury, while in the latter the mother cannot.

The holding cannot be justified by logic, coherent reasoning, or traditional tort law principles. It is also out of line with an emerging scientific consensus about the trauma associated with childbirth and the physical manifestations of illnesses like PTSD, along with our evolving tort jurisprudence more generally.

Id.

Judge Rivera stressed that the law has progressed over time on the treatment of emotional damages and an infant’s ability

to seek damages for injuries suffered in utero. She concluded that stare decisis should not prevent the Court from bringing the state’s common law “into accord with justice.”

In a separate dissenting opinion, Chief Judge Wilson suggested an alternative, which would not require the overturning of *Sheppard-Mobley*. CJ Wilson insisted that “the most faithful application” of the rationale underlying both *Sheppard-Mobley* and *Broadnax v. Gonzalez* “would lead us to hold that plaintiffs like Ms. SanMiguel can recover because their children are born with minimal, if any, consciousness and are not able to survive independent of life support. That is for the simple reason—the one motivating *Broadnax* and *Sheppard-Mobley* alike—that there is effectively no remedy available for a child who has likely never attained consciousness.” *Id.* at *18.

Court Clarifies That Two Requirements Under FOIL Should Not Be Conflated

Requirement that Records Be “Reasonably Described” Is Distinct from Agency’s Obligation to Search for Electronic Records “With Reasonable Effort”

The Freedom of Information Law (FOIL) obligates a person seeking records from a government agency to submit a written request where the records sought are “reasonably described” (Public Officers Law § 89 [3] [a]). Once an agency receives such a request for electronic records, it must “retrieve or extract” those records if it can “with reasonable effort.” In *Matter of Wagner v. New York City Dept. of Educ.*, 2025 N.Y. Slip Op. 05783 (Oct. 21, 2025), the Court of Appeals sought to clarify that these two requirements are separate and distinct. Thus, courts should not conflate them (adopting, in essence, a single test that merges them) as some lower courts have, including the Appellate Division in this case, and the New York City Department of Education (DOE) did here.

The petitioner had requested all emails between the DOE and a certain domain name during a 17-month period. The DOE responded that the documents sought were “not reasonably described” because it could not “launch an effective search to locate and identify the records sought with reasonable effort.” Specifically, the DOE maintained that its efforts to search its emails “failed to execute” using the parameters that the petitioner provided.

The petitioner brought this CPLR article 78 proceeding seeking the documents. The DOE asserted that its search of emails “timed out because there were over one million email accounts to search.” The trial court denied the petition and the Appellate Division affirmed, holding that “the documents were not ‘reasonably described’ as required under Public Officers Law § 89 (3) (a) because ‘[t]he administrative record and the DOE’s proffered affidavits demonstrate “that the descriptions provided are insufficient for purposes of extracting or retrieving the requested document[s] from the virtual files through an electronic word search . . . [by] name or other reasonable technological effort”’ (citations omitted).” *Id.* at *1.

The Court of Appeals reversed, finding that both the DOE and the Appellate Division “conflated petitioner’s obligation

to reasonably describe the documents with the agency's obligation to retrieve the documents if it has the ability to do so with reasonable effort." *Id.* The "reasonably described" records requirement assures "that the responding agency has the ability to locate the records sought." In this case, The DOE conceded that it understood what the petitioner was seeking and where to search electronically.

Conversely, "[w]hether the DOE can retrieve those documents with reasonable effort is a separate question," which the Court of Appeals did not decide here. "If it can retrieve the documents with reasonable effort, it must do so (citation omitted)." *Id.* The Court noted that the adoption of a single test has led to confusion and "inconsistent outcomes."

Whether a requestor has reasonably described an electronic record does not turn on the degree of effort necessary to retrieve it, and the inability of an agency to retrieve a document with reasonable effort does not implicate whether the description in the request was sufficient to allow the agency to locate it.

Id. at *2.

As a result, the Court of Appeals concluded that "the matter should be remanded to the DOE for a new determination under the proper standard." *Id.* at *2.

Court of Appeals Rejects Blanket Exemption for OCA Records and Materials

OCA Fails to Establish Elements of Attorney-Client Relationship

Matter of New York Civ. Liberties Union v. New York State Off. of Ct. Admin., 2025 N.Y. Slip Op. 05784 (Oct. 21, 2025), is another FOIL-related case. There, the New York Civil Liberties Union (NYCLU) made a FOIL request to the Office of Court Administration (OCA) seeking records and materials in which the OCA advised judges how to interpret, analyze, and apply court decisions, statutes, or regulations. The request was prompted by a prior leak of an internal OCA memorandum, suggesting a narrow reading of a recent court decision, which had apparently been distributed to judges in the Unified Court System (UCS). The OCA's Records Access Officer denied the request on the ground relevant here that any responsive documents were exempt from disclosure as intra-agency materials and privileged as attorney-client communications and work product. The administrative appeal was denied.

The NYCLU brought this article 78 proceeding. The trial court ordered disclosure of all responsive documents, but the Appellate Division reversed, holding that the records were exempt under the attorney-client and work-product privileges. The Court of Appeals reversed, holding that the OCA was not entitled to a blanket exemption, based on an attorney-client relationship with all UCS judges. In fact, the OCA "has not demonstrated, on this record, an attorney-client relationship between Counsel's Office and all UCS judges." The Court distinguished the cases cited by the OCA, as they involved circumstances where there was no dispute as to

whether there was an attorney-client privilege and the claims of privilege were directed to particular documents:

Indeed, those cases illustrate the problem with OCA's sweeping claim here. We have explained that "whether a particular document is or is not protected is necessarily a fact-specific determination, most often requiring in camera review." Without having identified or produced any documents for in camera review, OCA cannot assert a blanket privilege over the entire universe of potentially responsive documents (citation omitted).

Id. at *4.

Thus, the Court held that the OCA had failed to sustain its preliminary burden of establishing an attorney-client relationship with all UCS judges. The majority left the door open on remittal, however, for the OCA to assert a privilege with respect to specific documents.

Judge Rivera dissented in part. While she agreed with the majority that the OCA had not carried its burden to establish an attorney-client relationship, she felt that the remittal was unwarranted "because any possible claim of a nonexistent attorney-client privilege is meritless. I would therefore reverse and order that OCA disclose the documents without further delay." *Id.* at *5.

The dissent noted that "UCS judges are not OCA's clients for the purposes of rendering legal advice"; "the privilege cannot apply to UCS judges in their role as neutral arbiters of matters filed in the New York courts"; [o]ur state judges' role as independent adjudicators with no personal stake in the outcome of cases is at odds with OCA's claim that these judges are its clients, even in their adjudicatory capacity"; and the judges' "duty to conduct themselves in a manner that inspires public confidence in the integrity, fair-mindedness and impartiality of the judiciary" is undermined by the OCA's confidential memoranda. *Id.* at *6.

Majority of Court of Appeals Rules That Guarantor's Liability Terminated When Tenant Vacated Premises

Dissent Believes That Liability Ends Only When Landlord Accepts Surrender

A "good guy" guaranty in a commercial lease clause provides that a guarantor agrees to be personally liable for rent only up to the point that the tenant surrenders the premises to the landlord. At that point, the tenant becomes solely responsible for the rent going forward. The issue in *1995 CAM LLC v. West Side Advisors, LLC*, 2025 N.Y. Slip Op. 05782 (Oct. 21, 2025) was whether the tenant's failure to obtain the landlord's acceptance of the surrender of the premises precluded the guarantor's avoidance of liability. The Court split 5-2 on this issue, with the majority holding that the guarantor's liability terminated when the tenant vacated the premises and, under the terms of the guaranty, was *not* conditioned on the landlord's acceptance of that surrender.

The analysis focused on the interplay between the lease agreement and the guaranty. Briefly, in November 2004,

WSA, as tenant, entered into a lease agreement with the landlord and owner, 1995 CAM LLC, for office space in a Manhattan building (the “Premises”). The original lease agreement consisted of a Standard Form of Office Lease and a rider (the “Lease”). The Lease was extended and modified on two occasions, the latest through February 28, 2023, and included a limited personal guaranty by Gary Lieberman, an WSA officer.

WSA stopped paying certain utilities in March 2020, and four months later stopped paying rent. In late 2020, WSA notified 1995 CAM of its intent to surrender the Premises as of November 30, 2020, when it vacated the Premises, and conducted a walkthrough with the building superintendent, to whom it gave the keys. In October 2021, 1995 CAM brought this action against WSA and Mr. Lieberman to recover unpaid rent and expenses accrued prior to and after WSA surrendered the Premises, and attorneys’ fees.

A majority of the Court of Appeals pointed out that while the guaranty did not define the word “surrender,” it expressly incorporated “the terms of the Lease,” which contained provisions relevant to the tenant’s surrender. The majority found that conditioning the guarantor’s liability on the landlord’s acceptance of surrender

would render most of the language in the guaranty superfluous. The language in the guaranty after “that have accrued under the terms of the Lease” conditions Mr. Lieberman’s liability on WSA’s actions. If Mr. Lieberman’s liability were intended to be fully coterminous with that of WSA—that is, a full guaranty—all of the conditional language in the guaranty would be superfluous. “We have long and consistently ruled against any construction which would render a contractual provision meaningless or without force or effect.” Relatedly, paragraph 22 of the REBNY Lease requires that at lease end, the tenant deliver the Premises vacant and broom clean. If the guaranty continued until the end of the Lease, there would be no need to reiterate the requirement that the Premises be delivered “completely vacant” in the guaranty. Inclusion of the “completely vacant” requirement in the guaranty becomes meaningful only if the guarantor’s liability can end before the Lease ends, so that even when paragraph 22’s “vacant and broom clean” requirement is not yet in effect (because the Lease has not ended), the “good guy” guaranty requires the premises be completely vacant at the earlier time as a condition of releasing the guarantor (citation omitted).

Id. at *1–2.

Moreover, the Lease contains no requirement that the tenant provide notice to vacate at the end of the lease term. Thus, “the inclusion of the 30-day notice provision in the guaranty makes sense only if the guaranty can terminate before the end of the lease, leaving the tenant, but not the guarantor, liable for post-surrender rent. Indeed, reading ‘surrender’ in the guaranty to include acceptance would render the

30-day notice an impossibility.” *Id.* at *2. The majority did acknowledge that the parties could have done a better job in setting forth their respective rights.

The dissent, written by Judge Singas and joined by Judge Garcia, agreed with the majority’s principles of contract interpretation, but came to a diametrically opposed conclusion. “The text of the instant guaranty and the lease it incorporates require us to hold guarantor to his full obligation. Because tenant failed to obtain landlord’s written acceptance to tenant’s purported surrender of the premises, no valid surrender occurred.” *Id.*

The dissent pointed to paragraph 25 of the Lease which provided that “to validly surrender the premises, tenant must return the keys to landlord’s authorized agent or employee; returning the keys to an unauthorized party ‘shall not operate as a . . . surrender of the premises.’” Here, the tenant returned the keys to someone who lacked the landlord’s authorization to accept the keys (the superintendent). In addition, that same paragraph of the Lease required that, for the surrender to be valid, the Landlord had to accept the surrender in writing, which did not happen here.

A Court Cannot Condition the Making of a Motion on Prior Judicial Approval But a Court Can Prohibit Further Motion Practice Without Leave Where There Has Been a History of Frivolous Motions

In *Reyes v. City of New York*, 239 A.D.3d 491 (1st Dep’t 2025), the Appellate Division held that the trial court improvidently exercised its discretion in denying the plaintiff’s discovery motion based on part rules requiring that the plaintiff first conference the matter with the court. An earlier decision from the First Department explains the fundamental problem:

Even though the practice of conditioning the making of motions on prior judicial approval may, in some instances, discourage the filing of frivolous motions, it may also prevent a party from exercising the option to move for relief to which he or she may be entitled. “A judge shall accord to every person who is legally interested in a matter, or his or her lawyer, full right to be heard according to law” (22 NYCRR 100.3 [a] [4]). Conditioning motion practice on prior approval from the court may also run afoul of certain statutory provisions such as CPLR 3212 (a) which authorizes any party to move for summary judgment in any action, after issue has been joined. Denying a party permission to engage in motion practice hinders the performance of counsel who are encouraged and, in fact, are required to be zealous in their representation of their clients (Code of Professional Responsibility EC 7-1).

Hochberg v. Davis, 171 A.D.2d 192, 195 (1st Dep’t 1991).

However, a court can prohibit further motion practice without leave where the party has previously filed “repetitive, vexatious, and frivolous motions.” *Bey v. City of New York*, 2025 N.Y. Slip Op. 05569 (1st Dep’t Oct. 9, 2025).