SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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ELAINE GREENBERG, as Executor of the Estate of GERALD GREENBERG, Deceased,

Plaintiff-Appellant,

- against -

MONTEFIORE NEW ROCHELLE HOSPITAL, DIEGO ESCOBAR, M.D., and MONTEFIORE HEALTH SYSTEM, INC.,

Defendants- Respondents.

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**NOTICE OF MOTION**

Bronx Cty. Index No. 20340/2019E

First Dept. Docket No. 2021-01438

PLEASE TAKE NOTICE, that upon the annexed affirmation of Elliott J. Zucker, Esq., dated May 2, 2022, and upon all the pleadings, proceedings and exhibits heretofore had herein, the undersigned will move this Court at the courthouse located at 27 Madison Avenue, New York, New York, on the 23rd day of May, 2022, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order: (1) granting the defendants-respondents reargument under CPLR 2221 and 22 NYCRR 1250.16(d) with regard to the portion of this Court's order of March 31, 2022, and upon reargument, affirming the decision of the court below and dismissing the plaintiff's claims; or, alternatively (2) granting the defendants-respondents leave to appeal to the Court of Appeals from that same order, pursuant to CPLR Articles 56 and 57 and 22 NYCRR 1250.16(d); and (3) granting such other and different relief as may be just and proper.

PLEASE TAKE FURTHER NOTICE, that answering papers, in any, are required to be served not later than seven (7) days prior to the return date of this motion in accordance with CPLR 2214(b).

Dated: New York, NY
May 2, 2022

Elliott J. Zucker, Esq.
AARONSON RAPPAPORT FEINSTEIN & DEUTSCH, LLP
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To:

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT
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ELAINE GREENBERG, as Executor of the Estate of GERALD GREENBERG, Deceased,

Plaintiff-Appellant,

- against -

MONTEFIORE NEW ROCHELLE HOSPITAL, DIEGO ESCOBAR, M.D., and MONTEFIORE HEALTH SYSTEM, INC.,

Defendants-Appellants.

**AFFIRMATION IN SUPPORT OF MOTION TO REARGUE OR FOR LEAVE TO APPEAL**

Bronx Cty. Index No. 20340/2019E

First Dept. Docket No. 2021-01438

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ELLIOTT J. ZUCKER, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following under penalties of perjury and upon information and belief:

1. I am a member of the firm of AARONSON RAPPAPORT FEINSTEIN & DEUTSCH, LLP, attorneys for the defendants-respondents in the above-captioned matter. As such, I am familiar with the facts and circumstances stated herein, based upon my review of the file maintained by this office.

2. This affirmation is made in support of the within motion, which initially seeks an order granting reargument, under CLPR 2221 and 22 NYCRR 1250.16(d), with regard to this Court's order dated and entered March 31, 2022. A copy of the Court's order is annexed hereto as **Exhibit "A."** Alternatively, this motion seeks leave to appeal to the Court of Appeals, pursuant to Articles 56 and 57 of the CPLR and 22 NYCRR 1250.16(d) from the same aforementioned

order. As we will show below, this Court's March 31, 2022 for the first time in New York State allowed a "wrongful life" lawsuit to proceed, and in doing so based its decision on distinctions between this and earlier wrongful life cases that simply do not stand up to any scrutiny. Further, the Court's decision created a very real conflict with the decision of the Second Department on the same issue. As we will explain, the factors should result in the granting of reargument and the reinstatement of the lower court's decision dismissing the case, or failing that, should result in leave to appeal to the Court of Appeals for resolution of this important legal issue.

## BACKGROUND

3. Based on the recent vintage of this Court's decision, we assume full familiarity with the underlying facts and issues presented on appeal. We will thus only provide a brief review of the background of this case in these papers.

4. Essentially, the allegations in this case are that the defendants committed malpractice by not following advance care directives that were in place at the time Gerald Greenberg entered Montefiore New Rochelle Hospital on November 3, 2016. The defendants are accused primarily of administering a single dose of antibiotics to the patient, in contravention of those advance care directives. It is the plaintiff's contention that this "unwanted" treatment caused the patient to live for approximately a month longer than he would have otherwise, and that during this extra month, he experienced pain and suffering, for which legal recovery should be allowed.

5. In the court below, the defendants had moved to dismiss under 3211(a)(7), arguing that this was a wrongful life case, that wrongful life cases are not recognized in New York State, and pointed out that the Second Department had already held as much in an analogous case, Cronin v. Jamaica Hospital Medical Center, 60 A.D.3d 803, 875 N.Y.S.2d 222 (2d Dept. 2009), *leave to appeal granted*, 12 N.Y.3d 715, 912 N.E.2d 1072, 884 N.Y.S.2d 691 (2009), *appeal to Court of*

*Appeals withdrawn*, 13 N.Y.3d 857, 920 N.E.2d 96, 891 N.Y.S.2d 691 (2009). The court below granted that motion, which this Court's decision now reverses.

**REARGUMENT**

6. A motion to reargue is, of course, meant to afford a party the opportunity to establish that a court overlooked or misapprehended relevant facts or misapplied controlling principles of law. See, e.g., Pro Brokerage, Inc. v. Home Insurance Company, 99 A.D.2d 971, 472 N.Y.S.2d 661 (1st Dept. 1984); Siegel v. Glassman, 157 A.D.3d 836, 69 N.Y.S.3d 673 (2d Dept. 2018) (reargument appropriate where movant demonstrates that court previously misapprehended the facts and applicable law). Here, it is respectfully submitted that an examination of the record on appeal conclusively shows that the Court misunderstood controlling facts and law as applied to the questions at hand.

7. We do not believe that at any time in this litigation, including during the appeal, has it truly been argued that New York State, in traditional circumstances, simply does not recognize causes of action premised on "wrongful life." The briefs of the parties pointed to a trove of cases standing for this principle, beginning with Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) and continuing on, uncontradicted, through the subsequent years.

8. These traditional wrongful life lawsuits generally involve an infant, and involve situations in which, for example, a health care provider commits malpractice by failing to inform an expectant parent that the child she is carrying has some detectable "defect," a defect that will result in the child experiencing prolonged pain and suffering once born, when that pain and suffering might have been avoided by a properly-informed mother exercising her right to terminate the pregnancy. We do not believe that, under such circumstances, anyone would now argue that a wrongful life lawsuit would be permitted. Indeed, our law is clear that the only lawsuit that might

survive under these circumstances would be one by the parents to recover "extraordinary expenses" associated with raising the "compromised" child, and even then only to the age of majority. No lawsuit, however, is permitted because of the pain and suffering of being "allowed" to live, with the "living" having only occurred because of the malpractice.

9. The question before this Court is simply whether this prohibition on wrongful life claims applies to end-of-life scenarios as well as beginning-of-life scenarios, i.e., if a doctor commits malpractice (for example, by failing to follow an advance care directive), and this malpractice results in life, is recovery allowed even when that continuing life is painful.

10. This Court has now essentially ruled that wrongful life prohibitions do not apply to these end-of-life scenarios, but we respectfully submit that the rationales stated for this conclusion were mistaken, and that a more rigorous analysis will show that the reasons for the beginning-of-life bar on wrongful life claims are no different than what occurs at the end of life.

11. Perhaps not surprisingly, the substantive part of this Court's decision begins with an attempt to distinguish this case from the Second Department decision in Cronin. We recognize, of course, that this Court had no obligation whatsoever to follow that ruling. Yet this Court's decision distinguished the two cases in ways that do not necessarily logically make sense. This Court suggests that the difference between the two cases begins with the idea that Cronin was a "wrongful life" case, whereas the instant matter involves an "ordinary claim" of "medical malpractice." In reality, however, this is not an either/or choice. A case can be both a malpractice case and a wrongful life case. What the Court seems not to understand is that a case can be both a medical malpractice case *and* a wrongful life case. It doesn't have to be one or the other, and in point of fact, the published decision in the Cronin case begins its recitation by noting that it is, in fact, a malpractice case. Both Cronin and the current matter involve identical claims of malpractice

(failing to follow advance care directives), and both resulted in the same damages, a situation in which both parties were allowed to live longer than they desired (wrongful life) in which that life was painful.

12. The Court decision here seems to suggest that Cronin did not involve pain and suffering from an extended life, as does the current matter here. And while the Cronin case did not detail the consequences of that patient's prolonged life, we would suggest that it strains credulity to take away from this the idea that the earlier case did not also involve claims for pain and suffering. The fact is that no one is brings wrongful life claims solely because they are living; they bring them because their life is so bad that they think nonexistence is a better state of being. Indeed, this is true of all wrongful life lawsuits, and is not unique to end-of-life situations. After all, wrongful life cases involving infants are not being brought because a healthy child was born; they are brought because the child has pain and suffering, and yet the universally-accepted holding is that however terrible this may be, it is simply not compensable because the pain comes from the fact of being alive rather than dead.

13.. This Court's decision next tries to draw distinctions between infant cases, and the "well-established" right of an adult to refuse treatment. But again, this analogy does not entirely hold up. Yes, adults have a right to refuse treatment. Yet it is also undeniably true that expectant mothers have an absolute right to be informed of the condition of the child they are carrying as part of their treatment, and to use that information to make a decision as to whether to carry that child to term. Yet if that right is violated, there is still no wrongful life recovery, so it seems reasonable to ask why a violation of a right at the end of a life should yield a different result. Put simply, whether at the beginning of life or at the end of life, we are talking about a situation in which malpractice results in life rather than death, in which the resulting life is filled with pain and

suffering, and in which the pain and suffering derives solely from the prolonged living. So why is there a distinction now, even when both cases involve a violated right?

14. The last part of the Court's current decision deals with the underpinnings of the wrongful life prohibition. It quotes the Court of Appeals rulings to the effect that courts should not be in the position of trying to place values on living vs. dying, but then says this situation is different because "courts can and regularly do determine damages for pain and suffering." Yet that is equally true at the beginning of life, so if that is the rule, why can't infants in wrongful life cases be awarded pain and suffering damages? In either case, courts and juries could determine the value of pain and suffering. Yet in one situation, all agree that this is prohibited, yet in the other situation, this Court now says there is no prohibition.

15. The Court's decision also says that because of advance care directives involving adults, there is no "philosophical guesswork" involved, thus removing the rationale for the wrongful life prohibition. But again, a parent at the beginning of life can also make clear under what conditions she wants to carry a child to term (thus removing any guesswork), but still if a doctor misinforms her of her child's condition and thus deprives her of her choice, there is unquestionably no recovery. In truth, cases like Becker and its progeny were not decided on questions of unclear patient intent. They were decided, quite explicitly, on the idea that courts should not be deciding which is better, existence with pain, or no existence at all. That is the philosophical conundrum our highest court has cited as the basis for its "no wrongful life" recovery rule, and it applies equally to an end-of-life situation as exists in the case at bar.

16. For these reasons, therefore, we respectfully submit that this Court's original decision was erroneous, and should be reversed.

## LEAVE TO APPEAL

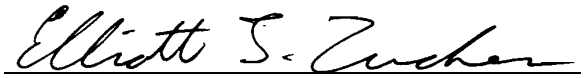
17. Alternatively, the movant requests leave to appeal to the Court of Appeals, and incorporates all of the arguments set forth above. We would note, additionally, that this is an issue of what kind of recovery (if any) is allowed when an advance care directive is violated is of statewide significance. We believe even our adversary would agree with that statement, and with the idea that this kind of fact pattern is one which is very likely to occur in the future. It is a matter in which our State's highest court should be providing guidance.

18. We further note that there is now a conflict between the First and Second Departments. Both this and the Second Department's Cronin decision involve the same question: when a health care provider violates an advance care directive, what kind of action is allowed (if any) for the harm that results? At this point, violations that occur only several miles apart but across county lines will yield vastly different outcomes. We also note that the Court of Appeals itself granted leave to appeal from Cronin, and although that appeal was eventually withdrawn (presumably because of a settlement), this nevertheless is a subject the Court of Appeals feels it should address, and now would seem to be the time.

WHEREFORE, it is respectfully requested that this motion be granted in its entirety, and that this Court grant such other and further relief as may be just and proper.

Dated: New York, New York
May 2, 2022

Yours, etc.



BY: Elliott J. Zucker
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Attorneys for Defendants-Respondents
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# Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

| | |
|---|---|
| ELAINE GREENBERG, as Executor of the Estate of GERALD GREENBERG, Deceased<br><br>Plaintiff,<br><br>-against-<br><br>MONTEFIORE NEW ROCHELLE HOSPITAL, DIEGO ESCOBAR, M.D., and MONTEFIORE HEALTH SYSTEM, INC.,<br><br>Defendants. | Index No.: 20340/2019E<br><br>**NOTICE OF ENTRY** |

Please take notice, that the within is a true and accurate copy of a Decision of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, dated March 31, 2022, and entered on March 31, 2022.

Dated: Brooklyn, NY
March 31, 2022

Lazar Grunsfeld Elnadav LLP

By: Gerald Grunsfeld
Gerald Grunsfeld
Attorneys for Plaintiff
1795 Coney Island Avenue
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# Supreme Court of the State of New York
## Appellate Division, First Judicial Department

Barbara R. Kapnick, J.P.
Troy K. Webber
Ellen Gesmer
Saliann Scarpulla
Martin Shulman, JJ.

Appeal No. 15299
Index No. 20340/19E
Case No. 2021-01438
2021-01446

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ELAINE GREENBERG, as Executor of the
Estate of GERALD GREENBERG, Deceased,
Plaintiff-Appellant,

-against-

MONTEFIORE NEW ROCHELLE HOSPITAL, et al.,
Defendants-Respondents.

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COMPASSION & CHOICE, JENNIFER
FRIEDLIN AND STACY GIBSON,
Amici Curiae.

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Plaintiff appeals from the judgment of the Supreme Court, Bronx County (John R. Higgitt, J.), entered February 16, 2021, dismissing the complaint, and bringing up for review an order, same court and Justice, entered on or about February 9, 2021, which granted defendants Montefiore New Rochelle Hospital and Diego Escobar, M.D.'s CPLR 3211(a)(7) motion to dismiss the complaint.

Lazar Grunsfeld Elnadav, LLP, Brooklyn (Gerald Grunsfeld of counsel), for appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for respondents.

Rickner PLLC, New York (Rob Rickner of counsel), for amici curiae.

GESMER, J.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), courts treat the allegations in the complaint as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The relevant facts alleged in the complaint are as follows. On December 21, 2011, plaintiff's husband (decedent) executed a health care proxy and a living will (Public Health Law § 2981; 10 NYCRR 400.21). The living will provides that, if decedent has an "incurable or irreversible mental or physical condition with no reasonable expectation of recovery" or is "a) in a terminal condition; b) permanently unconscious; or c) if . . . conscious but ha[s] irreversible brain damage and will never regain the ability to make decisions and express [his] wishes," then he directed that his treatment be limited to measures to keep him comfortable and relieve pain, and specified that he did not consent to cardiac resuscitation, mechanical respiration, tube feeding, or antibiotics. The health care proxy and living will both identify plaintiff as decedent's health care agent to act in accordance with decedent's wishes in the event that he was unable to make his own health care decisions, with their two adult sons designated to act as substitute health care agents. Both documents were properly witnessed and comply with the applicable statutory requirements.

In 2016, decedent was 63 years old, suffering from advanced Alzheimer's disease, residing in a residential treatment facility, and unable to recognize his wife and children or communicate in any meaningful manner. On November 3, 2016, he was admitted to defendant Montefiore New Rochelle Hospital after being found lying on the floor at his residential facility. Hospital staff had copies of decedent's living will and health care proxy. Hospital staff also provided decedent's son, the only health care agent present at the hospital, with a Medical Order for Life-Sustaining Treatment (MOLST) form, which

he completed and executed. The MOLST provided that decedent was to receive comfort measures only, and that decedent was not to receive intravenous fluids or antibiotics.

The physician who first evaluated decedent at the hospital determined that he was suffering from sepsis. She noted in decedent's chart under "Advance directives," "DNR; DNI; No tube feeds; No antibiotics; No IV fluids . . . (refer to MOLST form)." The examining physician contacted plaintiff by telephone, who confirmed that these directives were correct and also verbally directed that decedent was not to receive interventional medical treatment, including antibiotics, and that he was only to be provided with measures to alleviate pain, so that his suffering would end as quickly as possible.

Shortly after the first physician completed her examination, the attending physician, defendant Dr. Escobar, examined decedent. Dr. Escobar noted that decedent's hospital record indicated that he was not to receive antibiotics or intravenous fluids, and that there was a MOLST in place, executed just the day before. Nevertheless, on November 4, 2016, Dr. Escobar directed that decedent be treated with intravenous antibiotics and ordered a brain CT, chest X ray, ECG, blood tests, and the administration of other medications that were not necessary to alleviate pain.

Plaintiff has retained an expert who opines that, had decedent not received treatment contrary to decedent's wishes and his health care agents' instructions, he likely would have died from sepsis within a few days. Instead, decedent endured pain and suffering over a period of approximately 30 days, until he died on December 5, 2016.

Plaintiff filed this medical malpractice action on January 9, 2019. The complaint alleges that defendants departed from the standard of care by failing to abide by

decedent's wishes expressed in his advance directives, the directives of his health care agents, and the MOLST, and, as a result, decedent endured pain and suffering for over a month.

On October 21, 2020, defendants moved to dismiss the complaint for failure to state a cause of action. Their sole argument before the motion court was that plaintiff's claim is one for "wrongful life," and is thus disallowed under *Cronin v Jamaica Hosp. Med. Ctr.* (60 AD3d 803 [2d Dept 2009], *lv granted* 12 NY3d 715 [2009], *appeal withdrawn* 13 NY3d 857 [2009]). As there was no binding precedent from this Department, the motion court found that it was bound to follow *Cronin* (*see D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]) and granted the motion. We now reverse.

At the outset, I note that, in *Cronin*, it appears that plaintiff sought damages based on a claim "that the defendant wrongfully prolonged the decedent's life by resuscitating him against the express instructions of the decedent and his family" (*Cronin*, 60 AD3d at 804). In contrast, here, plaintiff seeks damages for decedent's pain and suffering, which the complaint alleges was the result of medical malpractice in that defendants breached the standard of care by administering treatments without consent and in direct contravention of decedent's wishes expressed in his advance directives as reaffirmed by his health care agents and in the MOLST. Defendants do not address these allegations at all, arguing only that plaintiff asserts a "wrongful life" claim like the one asserted in *Cronin*. Since I find that plaintiff has adequately stated a medical malpractice claim that is not barred by *Cronin*, defendants are not entitled to dismissal of the complaint.

In any event, this Court is not bound by *Cronin* (*see D'Alessandro*, 123 AD3d at

6), and I find that the reasoning in that case, and in the Court of Appeals cases on which it relies, do not apply here. The award of summary judgment to defendant in *Cronin* was based on the Second Department's determination that "the status of being alive does not constitute an injury in New York" (60 AD3d at 804), based on its citation to *Alquijay v St. Luke's-Roosevelt Hosp. Ctr.* (63 NY2d 978, 979 [1984]) and *Becker v Schwartz* (46 NY2d 401, 412 [1978]). In each of those cases, the Court of Appeals dismissed causes of action, made on behalf of infants, which alleged that, "had plaintiffs been properly advised by defendants of the risks of abnormality, their infants would never have been born" (*Becker*, 46 NY2d 401, 410; *see also Alquijay*, 63 NY2d at 979). The holdings in *Becker* and *Alquijay* rely on two premises, neither of which is applicable here.

First, the Court of Appeals stated that there is no precedent recognizing "the fundamental right of a child to be born as a whole, functional human being . . . ." (*Becker*, 46 NY2d at 411 [internal quotation marks omitted]; *see also Alquijay*, 63 NY2d at 979). However, in contrast, a competent adult's right to refuse medical treatment, even where refusal may result in death, is well established by case law (*see Cruzan v Director, Missouri Dept. of Health*, 497 US 261, 281 [1990]; *Myers v Schneiderman*, 30 NY3d 1, 14 [2017]) and statute (*see* Public Health Law article 29-C [health care proxies]; Public Health Law article 29-CCC [non hospital orders not to resuscitate]; 10 NYCRR 400.21 [advance directives]).

Second, the Court found that the type of claim at issue in *Becker* and *Alquijay* is unsuited to judicial determination, since "a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence" (*Becker*, 46 NY2d at 412; *see also Alquijay*, 63 NY2d at 979) and because

"[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians" (*Becker*, 46 NY2d at 411). In contrast, courts can and regularly do determine damages for pain and suffering. Moreover, when a competent adult has executed advance directives specifying the conditions under which they refuse certain life-sustaining treatments, and there has been a medical determination that those conditions are present, no philosophical guesswork is required as to what is best for such a patient. Accordingly, I find that the holdings in *Becker* and *Alquijay* do not bar plaintiff from proceeding with the medical malpractice claim set forth in the complaint on the theory that the failure to follow decedent's directives was a departure from the standard of care.

Accordingly, the judgment of the Supreme Court, Bronx County (John R. Higgitt, J.), entered February 16, 2021, dismissing the complaint, and bringing up for review an order, same court and Justice, entered on or about February 9, 2021, which granted defendants Montefiore New Rochelle Hospital and Diego Escobar, M.D.'s CPLR 3211(a)(7) motion to dismiss the complaint, should be reversed, without costs, the judgment vacated, and the appeal from aforesaid order should be dismissed, without costs, as subsumed in the appeal from the judgment.

Judgment, Supreme Court, Bronx County (John R. Higgitt, J.), entered February 16, 2021, dismissing the complaint vacated, the complaint reinstated and the appeal from the order, same court and Justice, entered on or about February 9, 2021, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Gesmer, J. All concur.

Kapnick, J.P., Webber, Gesmer, Scarpulla, Shulman, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 31, 2022

Susanna Molina Rojas
Clerk of the Court