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COURT OF APPEALS
STATE OF NEW YORK

B.F.,

Respondent,

-against-

NO. 126

REPRODUCTIVE MEDICINE ASSOCIATES OF
NEW YORK, LLP,

Appellant.

DENNEHY,

Respondent,

-against-

NO. 127

COPPERMAN,

Appellant.

20 Eagle Street
Albany, New York
November 15, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON



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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Next case on the calendar
2 is appeal number 126 and appeal number 127. B.F. v.
3 Reproductive Medicine Associates and Dennehy v. Cooperman -
4 - - Copperman, excuse me.

5 Good afternoon, counsel.

6 MS. LEDY-GURREN: Good afternoon. My name is
7 Nancy Ledy-Gurren, counsel for Dr. Alan Copperman. And in
8 conjunction with the court's directive, my colleague, Caryn
9 Lilling and I will split the arguments six minutes - - -
10 six minutes each. We both request one minute in rebuttal,
11 if that's okay with the court. And I'll direct myself
12 towards the accrual issues, if it please the court.

13 CHIEF JUDGE DIFIORE: Very good.

14 MS. LEDY-GURREN: We submit on this appeal that
15 the lower court and our adversaries have achieved a cosmic
16 shift in the application of 214-a, the Medical Malpractice
17 Statute - - -

18 JUDGE RIVERA: But if the parents are - - -

19 MS. LEDY-GURREN: Excuse me?

20 JUDGE RIVERA: Hi.

21 MS. LEDY-GURREN: Hi.

22 JUDGE RIVERA: If the parents are seeking damages
23 for the care of this child, don't you need the birth?
24 Don't you need the live birth?

25 MS. LEDY-GURREN: No. We maintain - - -



1 JUDGE RIVERA: Well, how - - -

2 MS. LEDY-GURREN: - - - we do not need the life
3 birth.

4 JUDGE RIVERA: How could it be? There - - -
5 there is no claim until there is actually a child alive
6 that the parents are now responsible for.

7 MS. LEDY-GURREN: Most respectfully, Your Honor,
8 we believe that if we take a look as we do in all accrual
9 cases, as to the cause of action, the - - - the cause of
10 action in a wrongful life case is a cause of action, it's a
11 medical malpractice cause of action, and when you take a
12 look at the accrual, you look at what is the essence of
13 that cause of action. And the essence of the cause of
14 action in this case is the claim that the failure to test
15 the donor for a particular genetic disease interfered with
16 the parents genetic - - - reproductive choices; the choice
17 to select a donor, the choice whether to go forward with
18 the pregnancy, the choice whether to become pregnant with
19 this donor's - - -

20 JUDGE RIVERA: Okay. But let - - - let's say
21 there had been a miscarriage that's not - - - it can't be
22 tracked back to whatever genetic defect there is.

23 MS. LEDY-GURREN: Correct.

24 JUDGE RIVERA: Miscarriage for some other reason,
25 okay?



1 MS. LEDY-GURREN: Right.

2 JUDGE RIVERA: But they would not have a claim,
3 right?

4 MS. LEDY-GURREN: Yes, they most certainly would
5 have a claim.

6 JUDGE RIVERA: And isn't that because there is
7 not a child born alive with the genetic defect?

8 MS. LEDY-GURREN: What I'm suggesting to you,
9 Your Honor, is if, in fact, there was a malpractice in a
10 failure to diagnose the donor, and if it resulted in a
11 donor that these plaintiffs did not want and in a pregnancy
12 that they did not want, there is a remedy for that in - - -
13 in a cause of action.

14 JUDGE WILSON: And you're saying they could
15 recover damages even if the child had not been born alive?

16 MS. LEDY-GURREN: Yes, and - - -

17 JUDGE WILSON: What are those damages?

18 MS. LEDY-GURREN: Their damages would be for
19 their personal damages in having to go through an IVF cycle
20 and a - - - and a pregnancy, or a pregnancy termination
21 that they didn't - - - that was performed incorrectly.

22 JUDGE STEIN: Have those damages - - -

23 MS. LEDY-GURREN: Just like in sterilization
24 cases, Your Honor.

25 JUDGE STEIN: Have those damages ever been



1 recognized by our courts?

2 MS. LEDY-GURREN: Take a look at O'Toole v.
3 Greenberg where they sustained the two causes of action by
4 the plaintiffs in a sterilization case where there was a
5 failure. And they say - - -

6 JUDGE FAHEY: So - - - so in this case, because
7 there's twins, right?

8 MS. LEDY-GURREN: Excuse me?

9 JUDGE FAHEY: There's two births - - - there's
10 two births that were involved here, right?

11 MS. LEDY-GURREN: In one of the cases that - - -

12 JUDGE FAHEY: In one of the cases, twins.

13 MS. LEDY-GURREN: Yes.

14 JUDGE FAHEY: And - - - and if I understand
15 correctly, one of the - - - one of the twins had the
16 fragile X syndrome, the other didn't.

17 MS. LEDY-GURREN: Correct.

18 JUDGE FAHEY: Under your theory, would in the
19 twin case, there be damages - - - would the accrual date be
20 the same for both children?

21 MS. LEDY-GURREN: Absolute - - - the accrual is
22 to the parent.

23 JUDGE FAHEY: The accrual date wouldn't exist.
24 You're saying it would make any - - - so it doesn't matter
25 if there born with fragile X or not, you'd have a claim to



1 - - - a claim would begin to accrue on that day, even
2 though you - - - let me finish the thought.

3 MS. LEDY-GURREN: Sure.

4 JUDGE FAHEY: Even though you couldn't possibly
5 have damages for both of them, you could only have damages
6 for one of them. Because only one of them had fragile X.

7 MS. LEDY-GURREN: First of all, the people who
8 have the damage are the parents.

9 JUDGE FAHEY: Okay. I understand - - -

10 MS. LEDY-GURREN: And the issue is - - -

11 JUDGE FAHEY: No, I understand it, but - - -

12 MS. LEDY-GURREN: - - - what is the measure - - -

13 JUDGE FAHEY: - - - but - - -

14 MS. LEDY-GURREN: - - - of those damages.

15 JUDGE FAHEY: Right. And how do you measure
16 damages in a situation like that where - - - where one of
17 the children is born with fragile X and what isn't; so the
18 parents cleanly can't be damaged on both, even though a
19 claim - - - in other words, a conception would have
20 occurred at the same time, let's say.

21 MS. LEDY-GURREN: Correct.

22 JUDGE FAHEY: And you're arguing that the date of
23 conception is that date, and that's why - - - that's the
24 flaw I see in in the argument that that disturbs me only
25 because we're not talking about negligence here. We're



1 talking about the tort in its entirety, and the tort in its
2 entirety demands measurable damages.

3 MS. LEDY-GURREN: The injury that occurs is the
4 interference with their reproductive choice. The measure
5 of their damages, whether they are going to - - - whether
6 they are going to incur costs for a child that's impaired,
7 whether they're going to incur costs for their own physical
8 damages, is going to have to be sorted out, I agree with
9 you, Your Honor. But - - -

10 JUDGE FAHEY: The only - - - the only - - - the
11 only reason I raise the point is because the A.D.'s
12 analysis relied on - - - on - - - on the damages as an
13 element of the tort in their underlying logic and since one
14 child would have damage - - - would create damages for the
15 parents and the other child clearly wouldn't, the date of
16 conception for accrual doesn't seem logical to me.

17 MS. LEDY-GURREN: Well, it doesn't, but except
18 that if the - - - I ask you this.

19 JUDGE FAHEY: Um-hum.

20 MS. LEDY-GURREN: There is nothing about the date
21 of birth that informs - - -

22 JUDGE FAHEY: Sure it is.

23 MS. LEDY-GURREN: - - - that there is - - -

24 JUDGE FAHEY: That's - - - that's the date when
25 you know - - -



1 MS. LEDY-GURREN: - - - that there is - - -

2 JUDGE FAHEY: Let me just finish. That's the
3 date you know who - - - what - - - what unfortunately, one
4 of - - - one of the children has fragile X and one doesn't.
5 That's the date you know that.

6 MS. LEDY-GURREN: No, sir. Most respectfully,
7 you don't.

8 JUDGE FAHEY: Well, you're saying earlier on in
9 testing.

10 MS. LEDY-GURREN: You don't. The fact of the
11 matter it is in this very - - -

12 JUDGE FAHEY: Okay.

13 MS. LEDY-GURREN: - - - case, these - - -

14 JUDGE FAHEY: Yeah, it took - - - it took - - - I
15 don't know, four months. I'm not sure of the time frame.
16 It took a few months.

17 MS. LEDY-GURREN: They - - - this - - - this took
18 the children were over a year old.

19 JUDGE FAHEY: Two years, yeah.

20 MS. LEDY-GURREN: And in other cases, other
21 genetic cases, since were making a rule that's not going to
22 apply justified till then - - -

23 JUDGE RIVERA: But they - - - but - - - but they
24 - - - could they not have known if the child was tested at
25 birth?

1 MS. LEDY-GURREN: The - - - could they have known
2 if the child - - -

3 JUDGE RIVERA: I mean, isn't the delay you're
4 talking about because of the time when the company knows
5 and notifies them, as opposed to when they could have
6 actually found out, which is at birth?

7 MS. LEDY-GURREN: Could they have test - - - if
8 they had - - - if their obstetrician had chosen to do a
9 test - - -

10 JUDGE RIVERA: Well, they could have requested
11 it?

12 MS. LEDY-GURREN: Or they had - - -

13 JUDGE RIVERA: Right? They could have requested?

14 MS. LEDY-GURREN: - - - requested it - - -

15 JUDGE RIVERA: Correct.

16 MS. LEDY-GURREN: - - - they might have found
17 out, yes.

18 JUDGE RIVERA: Yeah.

19 CHIEF JUDGE DIFIORE: Okay.

20 MS. LEDY-GURREN: Correct. But the point is that
21 the - - - the notion that the date of birth, per se, will
22 establish in any one of these cases a damage is a fantasy.
23 The fact of the matter is not only for this case, but for
24 the cases across the line that you want - - - that the
25 plaintiffs - - - that the court wants us to apply it to.



1 The fact of the matter is there's been - - -
2 there's no evidence that genetic defects appear on the date
3 of birth and there picking a date of birth as the date of
4 accrual.

5 JUDGE STEIN: So assuming that's true, I just
6 want to clarify one thing. So - - - so the damage - - -
7 you don't agree that the damages or the cost of raising
8 this, a disabled child, you think the damages are what
9 happened before the birth - - -

10 MS. LEDY-GURREN: I'm saying - - -

11 JUDGE STEIN: - - - or both?

12 MS. LEDY-GURREN: - - - that's the measure of
13 damages.

14 JUDGE STEIN: Well then - - -

15 MS. LEDY-GURREN: I'm saying the injury is to the
16 parent.

17 JUDGE STEIN: Well, okay. If we accept that - -
18 -

19 MS. LEDY-GURREN: Okay.

20 JUDGE STEIN: - - - which, I mean, certainly - -
21 -

22 MS. LEDY-GURREN: The injury is to the parent - -
23 -

24 JUDGE STEIN: - - - we have cases that say for
25 wrongful birth, the injury is to the parent. The injury is



1 the cost of having the additional costs and expenses of
2 raising a disabled child. So my - - - you - - - but you
3 were referring to other kinds of costs. The cost of the
4 pregnancy, the costs of the in vitro fertilization. So are
5 you saying that that they're both part of the damages, or
6 are you saying only the pre-birth costs are - - - are the
7 measure of damages?

8 MS. LEDY-GURREN: I'm trying - - - I'm trying to
9 distinguish to the court the difference between injury and
10 the measure of damages.

11 JUDGE STEIN: I - - - I understand that. So
12 you're talking about measure of damages. Does the measure
13 of damages include both pre-birth and post birth?

14 MS. LEDY-GURREN: Yeah.

15 JUDGE STEIN: Or just pre-birth?

16 MS. LEDY-GURREN: A measure of damages will - - -
17 will include all.

18 JUDGE STEIN: Thank you.

19 MS. LEDY-GURREN: But the injury occurs and is
20 complete at the time the malpractice occurs.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.
22 Counsel?

23 MS. LILLING: Good afternoon, Your Honors. May
24 it please the court? My name is Caryn Lilling on behalf of
25 defendant-appellant, RMA.



1 I'm listening very intently to the court's questions and I
2 want to try to answer them in perhaps a little differently.

3 CPLR 214-a doesn't consider, doesn't regard, doesn't care
4 when the injury occurs or when the measure of damages can be
5 effectuated.

6 CHIEF JUDGE DIFIORE: So CPLR 214-a was enacted
7 in 1975 - - -

8 MS. LILLING: Yes.

9 CHIEF JUDGE DIFIORE: - - - and then Becker was
10 decided a couple of years later.

11 MS. LILLING: And then Becker - - - yes. And it
12 was, in fact - - -

13 CHIEF JUDGE DIFIORE: So - - - so my question to
14 you is - - -

15 MS. LILLING: Oh, I'm sorry.

16 CHIEF JUDGE DIFIORE: - - - do you think that the
17 legislature intend - - - can - - - envisioned this cause of
18 action at the time that they set where I think you're going
19 with this?

20 MS. LILLING: I'll say yes, Your Honor, because
21 in - - - in the Becker decision, this cause of action was
22 addressed, but it wasn't called wrongful birth. In fact,
23 it was called wrongful diagnosis, which actually highlights
24 and underscores, I think, Ms. Gurren's point for the
25 moment, that the injury that we're talking about is a



1 deprivation of choice for an improper diagnosis.

2 But let me, for this purpose, beyond - - - beyond
3 my statement that CPLR 214-a is statutory; it does not
4 consider the date of injury, it does not consider measure
5 of damages. Now yes, the First Department deviated from
6 that and looked to birth stating that we can't know what
7 the injuries are - - - they call them the injuries, the
8 measure of damages - - - whatever you like to call it - - -
9 until the child is born.

10 However, I will assume for the sake of argument
11 that the measure - - - that the injury is the increased
12 financial obligation. Let's even assume that for this
13 purpose. What the First Department overlooked was your
14 decision in Goldsmith v. Howmedica. This case is critical
15 to this analysis. Goldsmith v. Howmedica makes it crystal
16 clear the statute of limitations in medical malpractice
17 actions runs from the time of the act even in the absence
18 of any injury, until and unless the legislature declares
19 otherwise, and - - -

20 JUDGE GARCIA: And in Goldsmith, didn't we, in
21 fact, cite 214-a, although it wasn't applicable in
22 Goldsmith to say it doesn't change the calculation. So if
23 that's the case, if Goldsmith applies, then distinguish
24 LaBello.

25 MS. LILLING: Yes, Your Honor. LaBello is very



1 distinguishable from the case at bar. And, in fact, the
2 Appellate Division even recognized that it was not
3 controlling in its decision because the plaintiff was not
4 in existence in LaBello. And what the court in LaBello
5 said is that 214-a never contemplated that the plaintiff
6 would not be in existence.

7 In this case, the plaintiffs are the parents, and
8 they - - -

9 JUDGE GARCIA: And I believe LaBello also cites
10 the infant toll, right - - -

11 MS. LILLING: Yes, Your Honor.

12 JUDGE GARCIA: - - - in support of the position?

13 MS. LILLING: And the in - - - the plaintiff - -
14 -

15 JUDGE FAHEY: You - - - you're - - - you were
16 relying on Becker; is that correct?

17 MS. LILLING: That's partly - - - relying on
18 Becker to the extent that Becker, it was a case where this
19 court determined that there was no cause of action for
20 wrongful life - - -

21 JUDGE FAHEY: For wrongful conception. Wrongful
22 conception, right?

23 MS. LILLING: Wrong, or - - - or yes, Your Honor.

24 JUDGE FAHEY: Yeah.

25 MS. LILLING: Or wrongful life.



1 JUDGE FAHEY: I had thought the timing of that
2 rule arose prior to any in vitro fertilization at all. In
3 other words - - - is that correct?

4 MS. LILLING: Yes, Your Honor. Well, if that is
5 correct - - -

6 JUDGE FAHEY: Does that affect your analysis at
7 all?

8 MS. LILLING: No, it doesn't, Your Honor. And -
9 - - and despite what might be perceived as the inherent
10 unfairness, case after case in this court, when a statute
11 the medical malpractice statute, has been looked at, it has
12 been adhered to strictly no matter the outcome.

13 JUDGE RIVERA: So can I just clarify the sort of
14 the analysis you are proposing here? Is it your position
15 that even if the parent gave birth to a child that doesn't
16 have the mutation, they could sue?

17 MS. LILLING: No, Your Honor.

18 JUDGE RIVERA: Why not?

19 MS. LILLING: My interpret - - - well, they could
20 sue who does not have the mutation - - -

21 JUDGE RIVERA: Right.

22 MS. LILLING: - - - that it would go back to Ms.
23 Gurren's argument which perhaps there were injuries that
24 they sustained separate and apart from the increase
25 financial obligations of having - - -



1 JUDGE RIVERA: I thought you said it was not
2 related to the injury?

3 MS. LILLING: I'm sorry, Your Honor?

4 JUDGE RIVERA: I thought you said there was a
5 claim even if you have no injury.

6 MS. LILLING: Were you talking about different
7 types of injuries?

8 JUDGE RIVERA: No, no, but I thought - - - I may
9 have misunderstood you.

10 MS. LILLING: Oh, I'm sorry.

11 JUDGE RIVERA: I thought you were arguing that
12 you have a claim even without the injury. The clock starts
13 running even if you've suffered no injury at the moment in
14 time the malpractice occurs.

15 MS. LILLING: Well, if I may, Your Honor - - -

16 JUDGE RIVERA: Yes, please.

17 MS. LILLING: - - - I see that my time, but I
18 think that's an important distinction. I say yes to that
19 in light of the Howmedica case. You see, and I think it's
20 worth exploring that in Howmedica, the malpractice occurred
21 in 1973, but the injury didn't arise until eight years
22 later. There was no injury. There was no measure of
23 damages. The plaintiff could not have known.

24 And then the plaintiff brought a medical
25 malpractice action in 1983, ten years after. And this



1 court, even though Goldsmith v. Howmedica, the statute of
2 limitations was three years, because it predated the
3 enactment of 214-a, this court considered and cited and
4 reflected on 214-a when it refused to extend the statute of
5 limitations in the Howmedica case past three years.

6 And I think the language of this court's decision
7 is very compelling and controlling in this case.

8 "Plaintiffs also claim that to require the bringing of an
9 action within three years of the commission of the
10 malpractice effectively forecloses an action against the
11 doctor before any injury has been suffered." Much like
12 this case, it was an implementation of a device that didn't
13 malfunction until many years later. "The argument is not
14 new. We have carefully considered it on numerous
15 occasions. In each, we weighed the detriments of such a
16 result against the effect of potentially open-ended claims
17 upon the repose of defendants in society and held the
18 statute of limitations must run from the time of the act
19 until the legislature decrees otherwise."

20 And that, Your Honor, is a case that I feel is
21 controlling in this case. And the reason why the Appellate
22 Division's decision should be reversed.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 Counsel?

25 MS. FLEISHMAN: Yes. Thank you, Your Honors. My



1 name is Wendy Fleischman, and I'm here on behalf of the
2 Farber plaintiffs. And I wanted to address the accrual
3 issue first.

4 I don't think that this court should reverse the
5 First Department's decision on accrual. It doesn't make
6 sense.

7 JUDGE STEIN: Would you address Goldsmith?

8 JUDGE GARCIA: If you could just - - - yeah.

9 MS. FLEISHMAN: Yes. I think that's the easiest
10 place to start.

11 JUDGE STEIN: Good.

12 MS. FLEISHMAN: Goldsmith is like a failure to
13 diagnose cancer case. When the conduct occurs, the injury
14 - - - for the doctor - - - the injury actually occurs. So
15 when - - - in Goldsmith, the doctor had actually placed the
16 - - - the device improperly into the hip, and that's why
17 seven years later that hip component failed. And so - - -
18 but it wasn't until the failure that the - - - that the
19 injured person came forward and said, oh my gosh, this
20 really hurts and then all the rest occurs. But the
21 incident - - - the incident of the malpractice did occur
22 when the doctor didn't place it properly. In the same way
23 as this court has historically determined - - -

24 JUDGE STEIN: So when did the incident of
25 malpractice occur here?



1 MS. FLEISHMAN: The incident of malpractice
2 doesn't occur here because it's absurd. The - - - at the
3 time that the two children are in utero, there's no way to
4 know one way or the other that - - -

5 JUDGE GARCIA: The knowledge, it's the same thing
6 as the hip. I mean, you're arguing kind of two different
7 things here. The malpractice has occurred in your case,
8 you just don't know it. It's the same way - - - because
9 it's a failure to screen, so it's the same way that a hip
10 implant malpractice has occurred, but you just don't know
11 it. So what they considered to mean in Goldsmith was you
12 don't know it. You can't bring a claim. You don't even
13 have any damages yet. But that's not for us. That's for
14 the legislature. And - - -

15 MS. FLEISHMAN: But - - -

16 JUDGE GARCIA: - - - I don't understand how your
17 claimed malpractice is different than the Goldsmith
18 malpractice.

19 MS. FLEISHMAN: The Goldsmith malpractice is
20 different because if you think of it in a failure to
21 diagnose cancer case, which is an - - -

22 JUDGE GARCIA: But I don't want to think of it
23 that way.

24 MS. FLEISHMAN: Okay.

25 JUDGE GARCIA: I want to think of it in your



1 case.

2 MS. FLEISHMAN: But it - - - in every - - - well,
3 in my case, in the Farber's case, there's the fail - - -
4 the failure to diagnose the donor as having fragile X, as
5 being carrier fragile X, is not the injury. The injury in
6 a wrongful birth case is the - - - the parents having to
7 pay the money to take care of an injured child.

8 JUDGE GARCIA: That's like the hip fails. So
9 that's the injury.

10 MS. FLEISHMAN: The hip - - - the hip - - -

11 JUDGE RIVERA: Well, is - - - is - - - is your -
12 - - is your point that there's no malpractice until the
13 child is born with the genetic - - -

14 MS. FLEISHMAN: Yes.

15 JUDGE RIVERA: - - - defect, because if, of
16 course, the child doesn't have the genetic defect, where -
17 - - where did the doctor go wrong; is that - - -

18 MS. FLEISHMAN: Well, if you - - -

19 JUDGE RIVERA: - - - what you're trying to argue?

20 MS. FLEISHMAN: If the child's not born with the
21 genetic defect as baby B was, there was no malpractice.

22 JUDGE GARCIA: But the child has a genetic defect
23 before it's born.

24 MS. FLEISHMAN: The - - - but the genetic defect
25 doesn't show itself in - - - in baby B, because baby B in



1 this case doesn't - - - has a pre-mutation.

2 JUDGE GARCIA: Okay.

3 MS. FLEISHMAN: He doesn't have a full on
4 mutation for fragile X - - -

5 JUDGE GARCIA: The - - - the problem doesn't
6 itself - - -

7 MS. FLEISHMAN: - - - that's why he's not a
8 plaintiff.

9 JUDGE GARCIA: - - - in a hip replacement either.
10 We're - - - we're talking about the injury, and I think - -
11 - it seems counsel's argument is pretty strong on that.
12 Goldsmith sets this rule. LaBello is different, and
13 LaBello has a certain kind of appeal here because we're
14 talking about a birth, but it seems to me LaBello is
15 talking about something very different, which is, you don't
16 have a plaintiff yet, because you're bringing the claim on
17 behalf of a child who doesn't have capacity, yet isn't even
18 born, and you get into tolling issues. That's LaBello.
19 This is - - - why isn't this Goldsmith?

20 MS. FLEISHMAN: This isn't Goldsmith because
21 there's no actionable injury at the time that the children
22 are in utero. There are for many reasons - - -

23 JUDGE GARCIA: Just put - - - just change in
24 utero to Goldsmith - - -

25 MS. FLEISHMAN: But the children - - -



1 JUDGE GARCIA: - - - the hip doesn't fail yet.
2 It's just that it's in utero. It isn't the same problem as
3 LaBello.

4 MS. FLEISHMAN: There's no certainty that the - -
5 - the children in utero - - -

6 JUDGE FAHEY: Doesn't the fact - - -

7 MS. FLEISHMAN: - - - utero will survive.

8 JUDGE FAHEY: Doesn't - - - excuse me. Same
9 question I asked to counsel before. Doesn't the fact that
10 the twins - - - one had the defect, one didn't - - - show
11 that you don't know - - - and you have nothing to work with
12 until there's a birth?

13 MS. FLEISHMAN: Yes, Your Honor.

14 JUDGE FAHEY: So that would support your theory
15 that the possibility of the tort existing only takes place
16 upon birth?

17 MS. FLEISHMAN: Yes, Your Honor.

18 JUDGE GARCIA: But how is - - - I don't
19 understand - - -

20 MS. FLEISHMAN: There's no actionable - - -

21 JUDGE GARCIA: - - - why it's true.

22 MS. FLEISHMAN: - - - tort. You have - - - you -
23 - - the same way as in LaBello, there was no actionable
24 tort until the baby was born.

25 JUDGE GARCIA: There was no plaintiff in LaBello.



1 MS. FLEISHMAN: There - - -

2 JUDGE GARCIA: There wasn't - - - it wasn't a cl
3 - - - it wasn't that you didn't have all the elements of
4 the claim. What LaBello cites for that is a contract case,
5 which I think is Kronos, but they really don't rely on
6 elements of your claim having come together yet in terms of
7 the act, the injury. What LaBello relies upon is it's
8 unfair and not contemplated by 214-a to make someone bring
9 an action when they don't exist. So the child has no legal
10 capacity to bring an action and it implicates these tolling
11 provisions for an infant until they're born. But LaBello
12 doesn't really rely in any way on the cause of action
13 hasn't come together at the time - - - until the time of
14 birth.

15 And so you're asking us, I think, to apply
16 LaBello in a different way that to me will impact the
17 Goldsmith Rule.

18 MS. FLEISHMAN: Okay. If Your Honor goes back
19 and looks at LaBello, LaBello actually does speak to
20 exactly the fact that this is a tort and that you can't
21 have a tort until - - - and you can't have a cause of
22 action and a tort unless you have an injury.

23 JUDGE GARCIA: They say - - - they talk about
24 that. And again, they said a contract case for that
25 proposition. But really - - -



1 MS. FLEISHMAN: Well, actually they cite a lot of
2 - - - of tort cases throughout.

3 JUDGE GARCIA: - - - the - - - they cite Kronos
4 for the most part. But the basic point of LaBello is what
5 they didn't contemplate in 214-a was not having a plaintiff
6 who could bring an action; not that the cause of action
7 hadn't solidified or come together yet. But that you don't
8 have an actual person who can come into court and bring
9 this claim. And when you read that in conjunction with a
10 tolling provision for infants and the protection we give to
11 them as plaintiffs, this is something different. And
12 you're asking us, I believe - - - and maybe we will do this
13 - - - to expand LaBello because it's in some way, a birth
14 case into this case, which to me, then starts to come into
15 conflict with the Goldsmith ruling.

16 CHIEF JUDGE DIFIORE: Well, isn't the birth
17 important because the mom says had I known and had this
18 information, I would not have carried this pregnancy to
19 term?

20 MS. FLEISHMAN: Yes, Your Honor. She actually
21 would not have even accepted the donor egg and her
22 husband's sperm, the embryo.

23 JUDGE GARCIA: But that's not the damages here.
24 That's a wrongful life claim. Your damages are the excess
25 costs, right?



1 JUDGE FAHEY: Well, isn't - - - isn't - - -

2 MS. FLEISHMAN: Well, it's a cost, but - - -

3 JUDGE FAHEY: Excuse me. Isn't - - - isn't the
4 analysis in LaBello - - - and - - - and I think it isn't
5 directly on point. I think Judge Garcia is correct about
6 that, but it offers some language that - - - that's
7 compelling to the court and may affect our analysis. It
8 says that the statute of limitations cannot run until there
9 is a legal right to relieve. It doesn't say the statute of
10 limitations runs from conception even though this is a
11 wrongful birth case. It doesn't say that the statute of
12 limitations begins to run when there is an injury to be
13 alleged, but instead, when there is a legal right to
14 relief.

15 And so the question for us, then - - - and I
16 can't say I know the answer to this, but the question for
17 us is that may be an extension of our analysis. My
18 colleagues argue that, and that may be true. The question
19 is whether we should extend it in this instance to that - -
20 - that analysis and that language to this case.

21 MS. FLEISHMAN: Well, that - - - that language
22 follows with two additional pieces that accrual occurs when
23 the claim becomes enforceable. This claim was not
24 enforceable when mom was pregnant with those two babies.
25 And it - - - as the - - - as the - - -



1 JUDGE GARCIA: Then was the hip claim enforceable
2 when it hadn't failed yet?

3 MS. FLEISHMAN: Right.

4 JUDGE GARCIA: No.

5 MS. FLEISHMAN: A tort is enforceable when all
6 its elements can be truthfully alleged in a complaint. We
7 could not have truthfully alleged in the complaint in this
8 case that - - - that there - - - that the failure to
9 diagnose the donor with fragile X would have resulted in
10 the chil - - - the parents having to incur all of these
11 additional expenses.

12 JUDGE RIVERA: So are you saying you're - - - if
13 you had actually filed - - -

14 MS. FLEISHMAN: We would be dismissed.

15 JUDGE RIVERA: - - - and when - - - the - - -
16 when - - - I was going to ask, you would have been open to
17 a challenge that it's premature and you don't have a claim,
18 and you'd be dismissed?

19 MS. FLEISHMAN: Right. Right. So you can't - -
20 - so it would be absurd to put us into that situation. So
21 - - -

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MS. FLEISHMAN: Thank you, Your Honors.

24 CHIEF JUDGE DIFIORE: Counsel?

25 MR. LICALZI: Good afternoon, Your Honors. James



1 LiCalzi. I represent the Dennehy's in the companion action
2 to this.

3 Judge Garcia, I was listening to what you were
4 saying. A claim didn't exist here until this child was
5 delivered live because - - - but what we're seeking here -
6 - -

7 JUDGE GARCIA: But - - - I'm saying, I'd agree
8 with you on that.

9 MR. LICALZI: Yeah.

10 JUDGE GARCIA: But why isn't that Goldsmith? The
11 claim didn't exist until the hip failed?

12 MR. LICALZI: Because it's - - -

13 JUDGE GARCIA: Why is this different?

14 MR. LICALZI: Because the - - - what's seeking to
15 be recovered here cannot be recovered unless there's - - -
16 there's a child that's born.

17 JUDGE GARCIA: But in - - -

18 MR. LICALZI: You can't do it.

19 JUDGE GARCIA: You can't recover in a hip failure
20 case until the device fails.

21 MR. LICALZI: You know - - -

22 JUDGE GARCIA: What's the difference?

23 MR. LICALZI: Your Honor, this is one of those
24 unenvisaged circumstances that LaBello spoke about.

25 JUDGE GARCIA: No, LaBello spoke about an un-



1 envisaged circumstance being you don't have a plaintiff.
2 And you don't have anybody you can come into court and
3 actually assert this claim; not that the claim hadn't come
4 together in terms of you have all of the elements. And I
5 think what Goldsmith speaks to in the language that your
6 adversary quoted is that's unfair sometimes.

7 MR. LICALZI: And that - - -

8 JUDGE GARCIA: But it's a fix for the
9 legislature.

10 MR. LICALZI: And Your Honor, it could be unfair
11 with - - - starting the accrual date of birth and in this
12 case and other cases as well. Because it's a two-and-a-
13 half year bright-line. There's no discovery rule that - -
14 - if we were arguing a discovery rule, it would have been
15 starting in May of - - -

16 JUDGE GARCIA: Understood.

17 MR. LICALZI: - - - 2010, right? When the
18 parents found out or were notified.

19 JUDGE GARCIA: No, I understand.

20 MR. LICALZI: But similar to LaBello, and I think
21 this case is more - - - I disagree with you and I think - -
22 -

23 JUDGE RIVERA: Well, look, is - - - is it - - -

24 MR. LICALZI: - - - that this case is more
25 similar to LaBello than - - -



1 JUDGE RIVERA: Isn't the difference between the
2 hip case, which I think is what counsel was trying to get
3 to - - - that in the hip case, the injury is at the time,
4 right, of that malpractice.

5 MR. LICALZI: Correct, Your Honor.

6 JUDGE RIVERA: You - - - you're going to suffer
7 particular consequences somewhere down the line and that
8 might put you all of a sudden to realize, oops, a long time
9 ago, this doctor messed up.

10 MR. LICALZI: Yeah.

11 JUDGE RIVERA: And now I'm suffering.

12 MR. LICALZI: That's correct, Your Honor.

13 JUDGE RIVERA: But until a child is actually
14 born, you don't know at all whether or not you're going to
15 suffer any consequences.

16 MR. LICALZI: And that - - -

17 JUDGE GARCIA: So would the Goldsmith rule be
18 different, then, if you implanted a device correctly and
19 the device is fine, but it fails at some point? And so
20 until the point it fails for whatever reason, which
21 wouldn't be discoverable, and maybe it isn't even a problem
22 until it does, then would you get from the date of failure,
23 or would you get from the date of implant under Goldsmith?

24 MR. LICALZI: Well - - -

25 JUDGE RIVERA: Isn't the point - - -



1 MR. LICALZI: - - - there may be - - -

2 JUDGE RIVERA: - - - whether or not - - -

3 MR. LICALZI: - - - to try - - - that may be a
4 different product liability - - -

5 JUDGE RIVERA: Isn't the point - - -

6 MR. LICALZI: - - - case with respect to - - -

7 JUDGE RIVERA: Counsel - - -

8 MR. LICALZI: - - - the date of failure.

9 JUDGE RIVERA: Counsel, isn't the point whether
10 or not the implantation of the device itself was the
11 malpractice? Because if it's not and it fails for
12 something else, maybe you have a product liability case,
13 but - - -

14 MR. LICALZI: That's exactly - - -

15 JUDGE RIVERA: - - - you don't have medical
16 malpractice.

17 MR. LICALZI: - - - what I'm saying, Your Honor.
18 It's not - - - it's not a bad - - - mal case with a two-
19 and-a-half year statute of limitations.

20 What's - - - back to your point, Judge Garcia,
21 about a claim ex - - - that you know, in an infant doesn't
22 exist, so cannot bring a claim. Until an infant exists,
23 the parents here can't bring a claim. So it's - - - it's
24 analogous in that sense that a par - - - the parent just
25 can't bring the claim on the - - - unless this child exists



1 and has this - - -

2 JUDGE GARCIA: So to that point - - -

3 MR. LICALZI: Yes.

4 JUDGE GARCIA: - - - let's say there's a
5 diagnosis before birth and the parents incur costs related
6 to we're going to have this child and there are going to be
7 special needs. But the baby is not - - - is not a live
8 birth for other reasons. Would they be able to recover
9 those costs, or no?

10 MR. LICALZI: I don't know about it in a medical
11 malpractice case. I mean, I don't know if there's a
12 contract issue there or whatnot. But I don't think they -
13 - - I don't know if they'd be able to recover those costs,
14 Your Honor. You know, especially not in a wrongful birth
15 case where you're seeking recovery for the extraordinary
16 costs associated with raising a child with deficits until -
17 - - until their majority.

18 Again, some statute of limitations can have harsh
19 results. If the phone call was never made and these people
20 never found out about it, two-and-a-half years would have
21 passed from the date of birth and we'd be up here arguing
22 that maybe you should have a discovery rule.

23 JUDGE RIVERA: Let - - - let's say we disagree.
24 Let's say we view the case differently. I'm - - - I'm just
25 - - - I'm just curious. Is there an argument that the



1 statute should be tolled given the represent - - -
2 misrepresentation by the company?

3 MR. LICALZI: Well, now you're getting into,
4 like, an equitable estoppel situation.

5 JUDGE RIVERA: Yes, I am asking that question.

6 MR. LICALZI: Yeah.

7 JUDGE RIVERA: Correct.

8 MR. LICALZI: If there was some type of fraud,
9 and some type of concealment, that that's - - -

10 JUDGE RIVERA: Well, those claims got dismissed
11 in an appeal themselves.

12 MR. LICALZI: They did.

13 JUDGE RIVERA: Um-hum.

14 MR. LICALZI: They did. And there is an - - -
15 it's an - - - it's interesting that you bring that up, your
16 - - -

17 JUDGE RIVERA: But you didn't make a tolling
18 argument.

19 MR. LICALZI: No. We did not make a tolling
20 argument. It's a purely bright-line, starts from the time
21 of birth, two-and-a-half years. The equitable estoppel and
22 the fraudulent concealment's interesting because there was
23 a number of months that went by from the doctor finding out
24 to him reaching out to these families to let them know that
25 there was that issue.



1 CHIEF JUDGE DIFIORE: Thank you, counselor.

2 MR. LICALZI: Thank you very much.

3 MS. LEDY-GURREN: I'd just like to make - - -

4 JUDGE RIVERA: Counsel, what about the tolling
5 argument?

6 MS. LEDY-GURREN: The tolling - - -

7 JUDGE RIVERA: They didn't make it. But could
8 there have been a tolling argument?

9 MS. LEDY-GURREN: I'd like to - - - I - - - no,
10 for the following reasons: one thing that has remained
11 unsaid in any of the briefs, certainly by the plaintiffs,
12 is these plaintiffs, as judged by the law, as 214, from the
13 time of the malpractice, discovered their injury, and had a
14 year and a half left to go before the statute expired.
15 These are not plaintiffs who discovered their injury when
16 the time had already lapsed.

17 JUDGE STEIN: But whatever the rule is that we -
18 - - we say it is is going to apply to other people - - -

19 MS. LEDY-GURREN: Yeah, so - - - no, no.

20 JUDGE STEIN: - - - to whom that will be
21 applicable.

22 MS. LEDY-GURREN: But I'm just saying, these are
23 not plaintiffs who woke up one day - - -

24 JUDGE STEIN: I un - - -

25 MS. LEDY-GURREN: - - - with their cases - - -



1 JUDGE STEIN: I understand.

2 MS. LEDY-GURREN: - - - time barred.

3 JUDGE WILSON: So you're saying - - -

4 MS. LEDY-GURREN: They had a year and a half to
5 bring it and so - - -

6 JUDGE WILSON: Do you think that the certified -
7 - -

8 MS. LEDY-GURREN: - - - there's no - - - there's
9 no room - - -

10 JUDGE WILSON: Excuse me a second.

11 MS. LEDY-GURREN: - - - for an equitable estoppel
12 argument on - - - on that fact alone.

13 JUDGE WILSON: You say that we can't reach the
14 dismissal of the other claims here because the certified
15 question hasn't brought that up, right?

16 MS. LEDY-GURREN: Yeah, yes.

17 JUDGE WILSON: Do you agree that after a final
18 judgment, if the court takes it, we can then reach those -
19 - - that question?

20 MS. LEDY-GURREN: Yes.

21 JUDGE WILSON: Okay.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.
23 Counsel.

24 MS. LILLING: Thank you, Your Honors.

25 The principals of law in the Howmedica case, that



1 case was a malpractice case. It was also a products case.
2 But first and foremost, it was a medical malpractice case
3 brought against the physician who implanted a device eight
4 years prior. The basis for the malpractice, the act, was
5 eight years before any damages materialized.

6 JUDGE RIVERA: But counsel argues that they would
7 have been open to - - - they would have been subject to
8 dismissal because it would have been a premature claim.

9 MS. LILLING: But that is true in many cases,
10 Your Honor. It's true - - -

11 JUDGE RIVERA: No, no, no. Would you not have -
12 - - would you not have filed a motion to dismiss as
13 premature?

14 MS. LILLING: Of course, Your Honor. However - -
15 - and there are many other instances - - -

16 JUDGE RIVERA: Okay.

17 MS. LILLING: - - - where the damages or the
18 injury is not manifest of the date of the malpractice.
19 It's true in cancer cases, and I didn't have the
20 opportunity on my direct to talk about Lavern's Law and the
21 impact of Lavern's Law that is currently passed and before
22 the - - - the governor to sign. That is limited to
23 extending the statute of limitations in cancer cases when
24 the injury cannot be known at the time of the malpractice
25 to two-and-a-half years from the date of either knowing or



1 should have known, but not more than seven from the act.
2 There were earlier versions of the bill.

3 JUDGE STEIN: But there - there's - - there's one
4 slight difference here.

5 MS. LILLING: Yes.

6 JUDGE STEIN: As I see it, okay? And - - - and -
7 - - and that is that theoretically, at least, if the - - -
8 you know, if the defective hip was implanted on a certain
9 day, the injury potentially could have been made known
10 sooner, whereas in - - - in this situation, there is no
11 possibility of knowing whether there will ever be a cause
12 of action until the child is born.

13 MS. LILLING: How I would answer that, Your
14 Honor, is this. In the Howmedica case, the implant
15 malfunctioned. So whether or not it could have been - - -
16 it might, yes, Your Honor, you're correct. It perhaps
17 could have been detected - - -

18 JUDGE STEIN: It could have malfunctioned after a
19 week or a month or a year - - -

20 MS. LILLING: But the - - -

21 JUDGE STEIN: I mean, that's potential. Here,
22 there is no possibility that, as I understand it, and
23 scientifically or whatever, that this could have been known
24 until after the birth of the child.

25 MS. LILLING: What I would say to that, Your



1 Honor, and again, perhaps not a perfect answer, is that
2 there is prenatal genetic testing that can be done on a
3 mother to determine whether or not she is a carrier for
4 certain genetic deformities.

5 JUDGE STEIN: Well, whether the mother is a - - -

6 MS. LILLING: I'm sorry, the - - - the - - - the
7 fe - - - the fetus. I apologize. I misspoke, Your Honor.

8 The thing that I'd like to end with, and also was
9 not yet discussed, but certainly is in the briefs, and I
10 recognize my time, Your Honor - - -

11 CHIEF JUDGE DIFIORE: You may. You may.

12 MS. LILLING: Thank you, Your Honor - - - is
13 Jorge. It's the line of cases that precedes this case.
14 And while this Court did not make a formal determination
15 that the statute of limitations in a wrongful birth claims
16 runs from the date of the malpractice, had - - -

17 JUDGE STEIN: It wasn't even raised in that case,
18 was it?

19 MS. LILLING: That - - - well it - - - no, Your
20 Honor, but I - - - I still would like to - - -

21 JUDGE STEIN: It's - - - it's - - - it's not a
22 matter of it being raised and - - - and it was never
23 decided. It was never even - - -

24 MS. LILLING: It was not decided, Your Honor.
25 But however the Appellate Division, interestingly, in the

1 First Department, decided clearly that the date of the
2 malpractice was governing in a wrongful birth claim. And
3 in fact, had it - - - and the continuous treatment doctrine
4 ultimately did not apply.

5 But had it been the date of birth, the action
6 would have been timely. And so the First Department in its
7 decision, marks the date of the act, the date of the
8 malpractice, as marking the beginning of the statute of
9 limitations, and ultimately, this Court made a
10 determination that continuous treatment did not apply, but
11 had it been the date of birth, then this - - - that Jorge
12 would have been timely.

13 And after Jorge, came Scrofini in the Second
14 Department; after Scrofini, came Weed in the Fourth
15 Department. This is not a point of law that has been in
16 dispute; meaning it has been since Becker through O'Toole,
17 through Jorge, through Scrofini, through Weed - - - and it
18 wasn't until Ciceron the Second Department citing LaBello
19 by the way, incorrectly, suddenly, and without explanation,
20 changed the statute of limitations from the date of the
21 malpractice to the date of the birth.

22 And what I would say to Your Honors is that is
23 erroneous, and if the statute of limitations is to be
24 extended, it is only a function of the legislature. And I
25 thank you.



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CHIEF JUDGE DIFIORE: Thank you, counselor.
(Court is adjourned)



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C E R T I F I C A T I O N

I, Gina Gattone, certify that the foregoing transcript of proceedings in the Court of Appeals of B.F. v. Reproductive Medicine Associates of New York, LLP, No. 126, and Dennehy v. Copperman, No. 127 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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