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COURT OF APPEALS

STATE OF NEW YORK

KRISTIN KAHKONEN DUPREE,

Respondent-Appellant,

-against-

No. 204

JAMES E. GIUGLIANO,

Appellant-Respondent.

20 Eagle Street
Albany, New York 12207
October 17, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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1 CHIEF JUDGE LIPPMAN: 204, Dupree.
2 Counselor.

3 MR. DACHS: May it please the Court. My
4 name is Norman Dachs. I'm arguing on behalf of the
5 defendant in this case.

6 Before I begin, I would just like to assure
7 the Court that my remarks on behalf of the defendant
8 is not intended in any way to condone his ethical
9 violation in this case but simply to discuss whether
10 what he did in this case constitutes anything more
11 than an ethical violation for which - - -

12 CHIEF JUDGE LIPPMAN: Counselor, do you
13 want any rebuttal time?

14 MR. DACHS: Pardon?

15 CHIEF JUDGE LIPPMAN: Rebuttal time? Would
16 you like any rebuttal time?

17 MR. DACHS: Oh, yes, please. Two minutes,
18 please.

19 CHIEF JUDGE LIPPMAN: Two minutes. Sure.
20 Go ahead.

21 JUDGE READ: So what is the standard - - -

22 MR. DACHS: The question is whether - - -

23 JUDGE READ: What is the standard - - -

24 MR. DACHS: - - - his breach of - - -

25 CHIEF JUDGE LIPPMAN: Judge Read has a

1 question.

2 JUDGE READ: What is the standard you're
3 promoting for med-mal? What should the standard be
4 here?

5 MR. DACHS: The - - - in my opinion, it
6 should be either simply a breach of an ethical
7 violation for which the courts do not provide a
8 remedy in tort but disciplinary proceedings. Or if
9 that's not the case, then the question is whether or
10 not this constitutes medical malpractice where the
11 act was engaged in wholly - - -

12 CHIEF JUDGE LIPPMAN: Why is this found in
13 malpractice? Why isn't it a violation of a
14 professional obligation? In this particular case,
15 isn't your client acting as a psychiatrist?

16 MR. DACHS: No. He - - -

17 CHIEF JUDGE LIPPMAN: No, he's not?

18 MR. DACHS: No, he's not. He was an
19 osteopath - - -

20 JUDGE GRAFFEO: As a therapist at least?

21 JUDGE CIPARICK: Well, he was giving her -
22 - -

23 JUDGE GRAFFEO: He was providing some kind
24 of therapy.

25 MR. DACHS: Well - - -

1 JUDGE CIPARICK: And medication also.

2 MR. DACHS: - - - it was described as "talk
3 therapy", but hardly an osteopath who was treating
4 his patient for stomach conditions who tells his
5 patient to relax or to go and exercise - - -

6 CHIEF JUDGE LIPPMAN: No, no, but who
7 provides medication that - - -

8 JUDGE CIPARICK: Right.

9 CHIEF JUDGE LIPPMAN: - - - seems to go to
10 a psychological condition.

11 JUDGE CIPARICK: Condition.

12 MR. DACHS: It goes to conditions involving
13 GI - - -

14 CHIEF JUDGE LIPPMAN: Paxil - - -

15 JUDGE CIPARICK: Paxil - - - Paxil - - -

16 CHIEF JUDGE LIPPMAN: - - - and those kind
17 of things go to GI?

18 MR. DACHS: Yeah.

19 CHIEF JUDGE LIPPMAN: Yes? How so?

20 JUDGE CIPARICK: They're not
21 antidepressants?

22 MR. DACHS: Pardon?

23 JUDGE CIPARICK: Paxil isn't an
24 antidepressant?

25 MR. DACHS: Yeah - - - well, it's an

1 antidepressant too but - - -

2 CHIEF JUDGE LIPPMAN: So that's - - - but -
3 - -

4 MR. DACHS: - - - to calm - - - to calm the
5 system.

6 JUDGE SMITH: Couldn't - - -

7 MR. DACHS: But he's not giving psychiatric
8 treatment but - - -

9 JUDGE SMITH: Couldn't the jury find on
10 this record that he was giving her some sort of
11 mental health treatment?

12 MR. DACHS: Some sort, but the - - -

13 JUDGE SMITH: And you agree with the
14 principle that when - - - that at least when a
15 patient's being treated for her mental health, that a
16 consensual sexual relationship between the patient
17 and the therapist can be malpractice, can support a
18 claim for malpractice?

19 MR. DACHS: No, I do not agree with that.

20 JUDGE SMITH: You mean - - - you say could
21 never on no set of facts?

22 MR. DACHS: Were totally unrelated and has
23 no relationship whatsoever to the treatment.

24 JUDGE SMITH: Okay.

25 MR. DACHS: And everybody in this case

1 agrees - - -

2 JUDGE SMITH: Okay, but there - - -

3 MR. DACHS: - - - it had no relation.

4 JUDGE SMITH: Okay. But let me put the
5 easy one. If it is related to the treatment, it is
6 malpractice.

7 MR. DACHS: If it is related to treatment,
8 yes. If a doctor - - -

9 JUDGE SMITH: And the Heart Balm statute
10 doesn't protect the doctor if he, in fact, is
11 prescribing sex with him for his patient, for
12 example.

13 MR. DACHS: If the doctor says to his
14 patient, look, you're here in my office, you have sex
15 with me and you'll get better, that's a treatment,
16 but this was not the case here. Clearly it was not
17 the case.

18 CHIEF JUDGE LIPPMAN: What if the doctor is
19 examining, which seems to be the case here, talking
20 about treating a psychological condition, aren't we -
21 - - isn't your position a very narrow one in that
22 there may be something that brings the patient in or
23 it may be something that is one of the areas of
24 focus, but when you look at it in a more holistic
25 way, isn't it too narrow to say that in this case the

1 doctor was totally treating a GI condition that had
2 nothing to do with a psychological condition despite
3 the drugs that were - - -

4 MR. DACHS: Yeah, but there was no
5 indication by him or no thought on the part of the
6 patient that this extramarital sexual relationship
7 had anything to do with that treatment. I can
8 compare this - - -

9 CHIEF JUDGE LIPPMAN: But you don't think
10 anyone could come to the conclusion that it had
11 something to do with it?

12 MR. DACHS: Somebody might but not legally.
13 I can compare - - -

14 CHIEF JUDGE LIPPMAN: That if you have a
15 condition that makes you vulnerable, let's say, from
16 a psychological perspective - - -

17 MR. DACHS: Yes.

18 CHIEF JUDGE LIPPMAN: - - - and that if
19 you're a doctor and at least to some degree you're
20 treating this psychological condition and if you take
21 advantage of that vulnerability, doesn't it have
22 something to do with your obligation as a physician
23 and that you're violating your professional
24 obligation?

25 MR. DACHS: Yes, in the same way that the

1 clergyman in the Marmelstein case was violating his
2 ethical - - -

3 CHIEF JUDGE LIPPMAN: But this is very
4 different - - -

5 JUDGE READ: That was - - -

6 CHIEF JUDGE LIPPMAN: - - - than
7 Marmelstein.

8 JUDGE READ: That was - - -

9 JUDGE CIPARICK: Breach of fiduciary
10 relationship in Marmelstein.

11 MR. DACHS: It was held not to be a
12 fiduciary - - -

13 JUDGE READ: We said it was not, yes,
14 exactly.

15 MR. DACHS: Yes. And we also held - - -
16 you also held - - -

17 JUDGE READ: This is a medical malpractice.
18 This is a tort.

19 MR. DACHS: - - - in the Simkovsky (ph.)
20 case that there could be - - -

21 CHIEF JUDGE LIPPMAN: But you acknowledge
22 in terms of what Judge Ciparick has said, that
23 clergyman doesn't have similar obligations, and
24 really that's what the court said.

25 MR. DACHS: No. But the clergyman is in a

1 position to impose - - -

2 JUDGE SMITH: Yeah, but there's a problem
3 with imposing liability on a clergy - - - on a member
4 of the clergy who exploits his parishioner because of
5 the First Amendment. There is no First Amendment
6 problem in this case.

7 MR. DACHS: No. But the question of
8 whether a doctor should be treated any different than
9 anybody else - - -

10 JUDGE SMITH: Well, clergy - - -

11 MR. DACHS: Well, a doctor - - -

12 JUDGE SMITH: - - - clergy people do get
13 treated different from other people because there's a
14 First Amendment, right?

15 MR. DACHS: But this Court held in
16 Simkovsky that a doctor who fraudulently tells his
17 patient that you're going to get better, all you have
18 to do is get some physical therapy, that doctor has
19 committed a fraud that's - - -

20 CHIEF JUDGE LIPPMAN: Yeah, yeah, but it's
21 different when a doctor takes advantage - - - isn't
22 it different when a doctor - - -

23 MR. DACHS: Yes.

24 CHIEF JUDGE LIPPMAN: - - - takes advantage
25 of a medical condition, a vulnerability that the

1 patient has and uses his superior knowledge about
2 that condition to victimize the patient? Isn't that
3 a violation of your professional obligation?

4 MR. DACHS: It's a violation of his
5 professional obligation, but it's not medical
6 malpractice. It's seduction - - -

7 CHIEF JUDGE LIPPMAN: It's just an ethical
8 flaw? Is that what you're saying?

9 MR. DACHS: He is using his position,
10 assuming that in her mind he became, you know, a
11 higher figure - - -

12 CHIEF JUDGE LIPPMAN: You're making the
13 case so - - -

14 MR. DACHS: No, I'm not, because assuming
15 that some actor - - - renowned actor assumes a high
16 position in some person's mind - - -

17 CHIEF JUDGE LIPPMAN: Yeah, but - - -

18 MR. DACHS: - - - and abuses that position
19 - - -

20 CHIEF JUDGE LIPPMAN: - - - the actor is
21 not being held responsible legally for a personal
22 relationship - - -

23 MR. DACHS: Yes.

24 CHIEF JUDGE LIPPMAN: - - - that had
25 nothing to do with a professional obligation here.

1 MR. DACHS: Because that constitutes - - -

2 CHIEF JUDGE LIPPMAN: The doctor is the
3 same as the actor?

4 MR. DACHS: What the doc - - - what you're
5 suggesting that might have been in the mind of this
6 patient is pure seduction. He is seducing her.

7 JUDGE SMITH: But isn't it an inference the
8 jury was entitled to draw? I mean, they - - - you
9 don't have to draw it, but couldn't the jury think
10 that this woman came to worship her because - - -
11 came to worship him because he was providing relief
12 from these hor - - - this horrible condition and that
13 he exploited that attitude?

14 MR. DACHS: But he was not treating her - -
15 - this is not part of his treatment - - -

16 JUDGE GRAFFEO: Well, she was - - -

17 MR. DACHS: - - - and it has to - - -

18 JUDGE GRAFFEO: She was going to his office
19 what, twice a week? Isn't that what the record
20 shows?

21 MR. DACHS: But she was also receiving
22 counseling - - -

23 JUDGE GRAFFEO: So - - -

24 MR. DACHS: - - - from another - - -

25 JUDGE GRAFFEO: - - - couldn't the jury

1 infer that because of the length of their
2 relationship before their sexual relationship
3 commenced that she developed a dependency on him
4 because of the services he was providing to her which
5 included - - -

6 MR. DACHS: Not a dependency - - -

7 JUDGE GRAFFEO: - - - the prescription of
8 drugs - - -

9 MR. DACHS: - - - but an affection for him
10 - - -

11 JUDGE GRAFFEO: - - - that apparently
12 affected her?

13 MR. DACHS: I would say - - - I would say
14 that she developed an affection for him, which
15 possibly carried over in his ability to have sex with
16 her. But that's seduction; that is not medical
17 malpractice. Everybody in this case agrees that no
18 one even thought that that was part of the medical
19 treatment.

20 JUDGE SMITH: But isn't - - -

21 MR. DACHS: This was totally unrelated.

22 JUDGE SMITH: I guess, isn't the question
23 that a seduction by the doctor of the patient using
24 the psychological ascendancy that he has gained in
25 the relationship, isn't that malpractice?

1 MR. DACHS: No, I - - - no, it's seduction.
2 Malpractice would be if he says, look, I'm treating
3 you, but you will get better treatment if you sleep
4 with me. That's malpractice. But he didn't do that.

5 JUDGE SMITH: But couldn't it have been - -
6 -

7 MR. DACHS: He simply fell in love with
8 her.

9 JUDGE SMITH: - - - couldn't it be
10 reasonably thought that his sleeping with her
11 interfered with the treatment, that maybe - - - if
12 you're giving someone psychotherapy and you're trying
13 to get her over her hang-ups, that maybe going to bed
14 with her isn't such a great - - - isn't such a great
15 idea from the medical point of view?

16 MR. DACHS: Well, that's why it's - - - and
17 that's why he is subject to disciplinary proceedings.

18 JUDGE SMITH: But isn't - -- but isn't it
19 also a breach of the standard of professional care?
20 It isn't something that a doctor is not supposed to
21 do because the patient doesn't get the treatment
22 she's supposed to get.

23 MR. DACHS: But the patient doesn't think
24 she's being treated that way, and he didn't represent
25 that that's part of his treatment, and that's why

1 is if it's medical malpractice how can there be
2 comparative negligence.

3 MR. DACHS: Well, a patient - - -

4 JUDGE PIGOTT: Yeah. I can't picture one.

5 MR. DACHS: A patient can - - - assuming it
6 is malpractice, which I don't agree with, but
7 assuming it is, a patient can be contributory
8 negligence in failing to file - - - follow doctor's
9 advice or in some other way contributing to her own
10 injury. But in this case - - -

11 JUDGE READ: That's not this case.

12 MR. DACHS: In this case, this was purely
13 consensual, outside of the relationship of a
14 physician-patient. And the cases hold and the jury
15 was charged that if you find that it is not part of
16 the treatment or intimately connected with the
17 treatment, then you must - - - then it's not medical
18 malpractice, and the law is to that effect.

19 CHIEF JUDGE LIPPMAN: Okay, counsel - - -

20 MR. DACHS: The pattern jury instruction
21 clearly so states.

22 CHIEF JUDGE LIPPMAN: Okay. You'll have
23 rebuttal. Thank you, counselor.

24 MR. DACHS: Thank you.

25 CHIEF JUDGE LIPPMAN: Counselor.

1 MR. COOPERSTEIN: Good afternoon. May it
2 please the Court. My name is Kenneth Cooperstein,
3 and I'm the attorney for Kristin Dupree. I
4 respectfully reserve two minutes for rebuttal on my
5 cross appeal.

6 CHIEF JUDGE LIPPMAN: Oh, on the cross-
7 claim?

8 JUDGE CIPARICK: Oh, they have a cross-
9 claim, yeah.

10 CHIEF JUDGE LIPPMAN: Okay.

11 JUDGE CIPARICK: All right. So the jury
12 found here that defendant's conduct departed from
13 good and accepted medical practice and was the
14 proximate cause of plaintiff's injuries, correct, her
15 emotional distress and economic loss?

16 MR. COOPERSTEIN: That's correct.

17 JUDGE CIPARICK: And also attributed some
18 comparative negligence to her.

19 MR. COOPERSTEIN: That's correct also.

20 JUDGE CIPARICK: And that's the basis of
21 your cross-claim, right, the comparative negligence -
22 - -

23 MR. COOPERSTEIN: That's correct.

24 JUDGE CIPARICK: - - - piece of it?

25 MR. COOPERSTEIN: We objected to any charge

1 of comparative fault on the ground that she was
2 inherently compelled under the Padula doctrine, that
3 the testimony of the only expert in the case and the
4 only - - - good reason there was only one expert,
5 because no expert would testify that this was not
6 malpractice, that the relationship crossed the line
7 from ordinary transference, which arises over a
8 period of time between a doctor and a - - - providing
9 counseling in a patient and erotized transference,
10 which is a totally different thing, an uncommon
11 phenomenon not within the expertise or knowledge of a
12 layman. And the testimony of the plaintiff and of
13 the expert was that this is a condition where there
14 is no volition, the boundaries dissolve. The witness
15 testified that - - - plaintiff testified that it went
16 through her like a bolt of lightning when the doctor
17 first kissed her and - - -

18 JUDGE SMITH: Aren't you really saying that
19 anyone who falls in love with her doctor, or at least
20 with her therapist, can later sue when the
21 relationship ends badly?

22 MR. COOPERSTEIN: No. I think anyone who
23 is experiencing erotized transference can and is
24 entitled to - - -

25 JUDGE SMITH: Well, if you're - - - any

1 female patient, I suppose, any straight female
2 patient of a straight male doctor can at least - - -
3 a jury could find that that patient is experiencing
4 an eroticized transference, so it's going to happen
5 in every case, isn't it?

6 MR. COOPERSTEIN: No, I don't believe so.
7 I think most people are not as vulnerable as this
8 particular person was. Most people don't come into a
9 physician suffering debilitating panic attacks that
10 leave them completely bedridden.

11 JUDGE SMITH: A lot of people come to
12 therapists with mental problems.

13 MR. COOPERSTEIN: Yes, but not as severe as
14 - - -

15 JUDGE CIPARICK: Are you claiming she had
16 some sort of diminished capacity? You're not
17 claiming she had diminished capacity, are you?

18 MR. COOPERSTEIN: We requested that she be
19 charged as - - - under the PJI as being particularly
20 vulnerable and that be taken into account, and the
21 judge refused - - -

22 JUDGE GRAFFEO: She did - - -

23 JUDGE CIPARICK: And the judge refused to
24 charge that.

25 JUDGE GRAFFEO: She did - - -

1 MR. COOPERSTEIN: Beg your pardon?

2 JUDGE CIPARICK: The judge didn't charge
3 that. He refused to charge that.

4 MR. COOPERSTEIN: He refused to charge
5 that, correct.

6 JUDGE GRAFFEO: She did advance the
7 relationship though outside, say, the medical office.

8 MR. COOPERSTEIN: Yes. Well, once she was
9 on that slip - - -

10 JUDGE GRAFFEO: I mean, she joined his
11 health club.

12 MR. COOPERSTEIN: Yes.

13 JUDGE GRAFFEO: She seemed to - - -

14 MR. COOPERSTEIN: Yeah, she couldn't get
15 enough of him. There's no - - -

16 JUDGE GRAFFEO: - - - put herself in
17 positions where she was going to see this gentleman -
18 - -

19 MR. COOPERSTEIN: Couldn't help herself.

20 JUDGE GRAFFEO: - - - on a fairly regular
21 basis. I mean - - -

22 MR. COOPERSTEIN: All true.

23 JUDGE GRAFFEO: - - - that's a little bit
24 outside the scope of - - -

25 MR. COOPERSTEIN: I think once that - - -

1 JUDGE GRAFFEO: - - - patient-doctor
2 relationship, isn't it?

3 MR. COOPERSTEIN: There's no question that
4 the sex was not happening inside the patient-doctor
5 relationship.

6 JUDGE SMITH: It started at the health
7 club, right?

8 MR. COOPERSTEIN: It start - - - no, it
9 started in the office during examinations. After he
10 switched her from Paxil to Wellbutrin and her sex
11 drive came back - - -

12 JUDGE SMITH: Well, the - - - some of the
13 chemistry may have started in the office; the first
14 sexual act was at the health club, right?

15 MR. COOPERSTEIN: Well, I don't know, maybe
16 flirting is not a sexual act. Yes, there was no
17 touching of sex organs, so it's not a sexual act,
18 correct. The first sexual act occurred after he
19 kissed her and they went to a private room, and he
20 indicated that he wanted oral sex, that - - - and she
21 gave it to him, and that was the first sex act.

22 JUDGE READ: What about some of the
23 damages, like the damages for the divorce and loss of
24 support? Those are the kind of damages you can get -
25 - - those sound like the kind of damages you can get

1 that would be prohibited by the Heart Balm statute,
2 aren't they?

3 MR. COOPERSTEIN: Well, once we're - - -
4 once the causation is not a cause for alienation of
5 affections or seduction, which this is not, and there
6 are no cases to the contrary - - -

7 JUDGE SMITH: But in common - - - in plain
8 English, seduction is exactly what you're suing for
9 here, right? You're saying he took advantage of her.

10 MR. COOPERSTEIN: I'm saying he failed to
11 treat her at the standard required of persons
12 providing psychiatric care, and that the - - -

13 JUDGE SMITH: But the departure from - - -
14 the departure from the standard of care consisted of
15 seducing her.

16 MR. COOPERSTEIN: Well, that's one way of
17 looking at it. The other side of the coin and which
18 the cases in New York look at it is that he failed to
19 properly manage the transference phenomenon, which
20 brings it all within normal medical malpractice.

21 JUDGE SMITH: Isn't this - - - I mean, I
22 understand what you're saying, but isn't this - - - I
23 mean, here we have a relationship that was very
24 largely outside the office - - - or where she
25 testified that she - - - I mean, she seemed to take

1 her oath seriously. She - - - they said was sex part
2 of the treatment; she said of course not. They said
3 - - - and when the sex began, he refers her to
4 another therapist, and she admits that their so-
5 called medical appointments at that point became
6 essentially just lovers' trysts. Isn't that
7 basically just a story of two people who fell in love
8 and one of them happens to be a doctor?

9 MR. COOPERSTEIN: I don't think there is
10 one chance in a billion that this woman would have
11 fallen in love with this man had he not been treating
12 her for seventeen months and having - - - and had
13 reduced her panic attacks and given her - - - and she
14 testified he gave her her life back. There is no - -
15 - this woman had been faithful to her husband up
16 until this point in their marriage, which I think was
17 nine years at that point. And the entire tort is
18 based on the relationship of trust that developed
19 between a doctor providing psychiatric services and
20 his client. And there's no question that he was
21 providing psychiatric services.

22 JUDGE PIGOTT: I know you've raised this
23 issue in one context. I want to ask it in a
24 different way. How can there be a verdict that finds
25 her twenty-five percent responsible for what happened

1 and yet punitive damages end up as part of the
2 verdict as well? I just don't understand how
3 something could be so - - -

4 MR. COOPERSTEIN: I would think it would be
5 because her conduct, whatever contribution there was,
6 was not reprehensible whereas his was. That's - - -

7 JUDGE SMITH: What is there in - - - I
8 mean, you just made the point that it's related to
9 treatment. But punitive damages is supposed to be
10 for something almost criminal, the sort of thing
11 that's really horrifying. Is this really the sort of
12 thing that the community must punish because it's
13 such a menace?

14 MR. COOPERSTEIN: Well, we know, based on
15 counsel's admission, that it's a very serious ethical
16 violation; it's immoral.

17 JUDGE SMITH: I mean, most - - - there are
18 plenty of medical malpractice cases, a number in
19 which we might be more outraged by what the doctor
20 did than this. What is it that makes this a punitive
21 damages case?

22 MR. COOPERSTEIN: Because this is a breach
23 of trust. This - - -

24 JUDGE SMITH: So any time you've got a
25 breach of trust you're entitled to punitive damages?

1 MR. COOPERSTEIN: Breach of trust of this
2 particular type - - -

3 JUDGE SMITH: If you didn't have a breach
4 of trust, you wouldn't have a cause of action at all.
5 What is there more than the basic cause of action
6 that gives you punitives?

7 MR. COOPERSTEIN: Well, I think it's a
8 disregard of the almost inevitable harm that he was
9 going to cause his patient. In most - - -

10 JUDGE SMITH: Is it possible that the - - -
11 that what the jury was really punishing him for was
12 perjury?

13 MR. COOPERSTEIN: That - - - we argue that
14 as well, because that is a permissible basis.

15 JUDGE SMITH: Is that kosher? I mean, are
16 they allowed to do that?

17 MR. COOPERSTEIN: According to the cases we
18 cite, yes. That is an element in assessing punitive
19 damages.

20 JUDGE SMITH: So you would say that any
21 time a jury finds that the defendant lied it can
22 award punitives?

23 MR. COOPERSTEIN: No. I'm saying on this
24 whole group of facts it was entirely justified.

25 JUDGE PIGOTT: Then how do you get twenty-

1 five percent negligence on the part of the plaintiff?
2 I just don't - - - they don't seem consistent to me.

3 MR. COOPERSTEIN: I don't think - - - I
4 think that that part of the jury verdict should be
5 set aside. I don't think there's any basis in law
6 for it. But I'll tell you theoretically how it - - -

7 JUDGE PIGOTT: Yeah make some - - - yeah.

8 MR. COOPERSTEIN: You know, you talk about
9 comparative negligence, and we - - - I argued to the
10 trial judge that that was not logically correct. If
11 we're talking about comparative fault, then in this
12 case - - - going back to the old cases of last clear
13 chance or should be mitigation, and that's the
14 approach - - -

15 JUDGE PIGOTT: Well, last clear chance is
16 an absolute defense, isn't it?

17 MR. COOPERSTEIN: Well, not anymore. Just
18 like contributory negligence used to be a complete
19 defense, all those are now comparative fault. And
20 logically, I thought that was a better approach, and
21 I thought the most - - -

22 JUDGE GRAFFEO: Could it be because the
23 jury felt that he had told her to go to a different
24 therapist and she declined to do that - - -

25 MR. COOPERSTEIN: Couldn't.

1 JUDGE GRAFFEO: - - - that they felt she
2 somewhat put herself - - -

3 MR. COOPERSTEIN: She couldn't.

4 JUDGE GRAFFEO: - - - in this continuing
5 position?

6 MR. COOPERSTEIN: It was beyond her
7 control. She had no money, and her husband didn't
8 pay for it.

9 CHIEF JUDGE LIPPMAN: But we didn't say - -
10 - but the doctor didn't say she lacked any judgment,
11 right? She still had some judgment. I mean, is that
12 how you get to the twenty-five percent?

13 MR. COOPERSTEIN: He didn't opine on her
14 judgment. He opined in general as to the attributes
15 of erotized transference and how it differed from
16 normal transference.

17 JUDGE SMITH: In common sense, isn't it
18 fair to say that this terribly unfortunate thing that
19 happened was partly her fault?

20 MR. COOPERSTEIN: No, I don't think that's
21 fair at all. I think it's manifestly unfair, and
22 it's a reflection of a mentality, not even a
23 philosophy, that we see unfortunately too many places
24 in the world. And I mentioned the Middle East where
25 a woman who is raped is prosecuted criminally for

1 forced adultery.

2 JUDGE SMITH: Yeah, but this - - - your
3 client, to her credit, didn't testify that she was
4 this helpless slave who couldn't - - - she more - - -
5 I mean, I read her testimony. She more or less says,
6 yeah, I made mistakes. She did make mistakes.

7 MR. COOPERSTEIN: She adm - - -

8 JUDGE SMITH: What's wrong with a twenty-
9 five percent contributory fault for her?

10 MR. COOPERSTEIN: She said she knew it was
11 wrong. She felt guilty about it. She couldn't
12 believe she was doing it, but she couldn't help
13 herself. And that's consistent with erotized
14 transference.

15 JUDGE SMITH: But you're not saying she
16 literally couldn't help herself the way the victim of
17 a rape in the Middle East can't help herself.

18 MR. COOPERSTEIN: No. There was no force,
19 but there was nevertheless emotional and mental
20 compulsion according to mental science.

21 JUDGE PIGOTT: That answers half of the
22 question I wanted to ask you. So let's assume that
23 you can find the twenty-five percent. Does that
24 apply to the punitives?

25 MR. COOPERSTEIN: No, it doesn't.

1 JUDGE PIGOTT: Does that - - - did the
2 verdict break down that way? In other words, did you
3 - - -

4 MR. COOPERSTEIN: No. What we also - - -

5 JUDGE PIGOTT: - - - did you get seventy-
6 five percent of the whole verdict on the damages in
7 the entire punitives?

8 MR. COOPERSTEIN: That's the - - - it was
9 discussed. It was briefed on the dispute over what
10 the judgment should provide, and I don't even
11 remember what I said back five years ago, but there
12 was some authority that it should not be applied to
13 the punitive part because she did not contribute to
14 the immorality and the failure to consider the
15 drastic effect on her health of the particular act.

16 JUDGE PIGOTT: Okay. And that's reflected
17 in the judgment? That's the way it came down?

18 MR. COOPERSTEIN: Yes.

19 JUDGE PIGOTT: Okay.

20 JUDGE CIPARICK: And what about the loss of
21 support?

22 MR. COOPERSTEIN: Yes. Well, I mean, once
23 you say it's malpractice, all damages that naturally
24 flow from it are recoverable. And in this case, had
25 she been employed and lost her job, she would have

1 been compensated. In this case, her husband provided
2 support, and she lost that. And it was a numerical
3 computation, and we provided it. In this case, we
4 showed it was 134,000 up to trial and 237-
5 afterwards. The jury awarded a small fraction of
6 that.

7 And the attorney's fees are another point
8 I'd like to address. The jury awarded nothing for
9 attorney's fees, and we think they were proved
10 sufficiently as a matter of law by her testimony as
11 to the - - -

12 JUDGE SMITH: You didn't put in bills, did
13 you?

14 MR. COOPERSTEIN: Pardon?

15 JUDGE SMITH: Did you put in the lawyer's
16 bills?

17 MR. COOPERSTEIN: No, we didn't put in the
18 bill and - - -

19 JUDGE SMITH: But could - - - why is it
20 irrational for a jury to say if you want me to award
21 lawyers' fees show me a lawyer's bill?

22 MR. COOPERSTEIN: Because no objection was
23 made to her testimony, it went in. And based on the
24 Appellate Division Second Department's ruling in a
25 case on which I was on the losing side, they said you

1 don't have to have a bill; mere testimony as to what
2 the legal fees incurred is sufficient. And I was
3 relying on that.

4 JUDGE SMITH: Yeah, but they didn't say it
5 was sufficient for a directed verdict, that the jury
6 had to award it.

7 MR. COOPERSTEIN: Well, if it's sufficient
8 for a directed verdict, it's something that should
9 have been taken away from the jury in the first
10 place.

11 JUDGE SMITH: But you're saying it has --
12 you're saying it should be taken away from the jury.
13 The jury found against you, and you want judgment - -
14 - essentially, you want judgment notwithstanding that
15 verdict.

16 MR. COOPERSTEIN: And we moved for that as
17 well as judgment as a matter of law before the jury
18 came in with a verdict.

19 Let me see if there are any points - -
20 - I just want to also point out - - -

21 JUDGE CIPARICK: Why wasn't this a
22 contingency? This was a negligence case, medical
23 malpractice case.

24 MR. COOPERSTEIN: Why was what not a
25 contingency? No. The expenses of the divorce - - -

1 divorce is an hourly.

2 JUDGE CIPARICK: Oh, sorry.

3 MR. COOPERSTEIN: This was a contingency.

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 JUDGE CIPARICK: Oh, attorney's fees for
6 the divorce. I'm sorry.

7 CHIEF JUDGE LIPPMAN: You'll have your
8 rebuttal.

9 MR. COOPERSTEIN: Thank you.

10 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

11 MR. DACHS: Just briefly, I just want to
12 say that I - - - in terms of the punitive damage
13 aspect of the case, I'd just rely on the cases cited
14 in my brief. But I just want to point out that there
15 are - - - there was a point made in the brief about
16 the special damages that they eschewed in their bill
17 of particulars that they were claiming special
18 damages when they answered "not applicable", and
19 there should have been no award for special damages
20 of any nature regardless of what they were,
21 especially, as may have been pointed out, the loss of
22 her husband's support clearly is an item of
23 alienation of affection and has nothing to do with
24 medical malpractice.

25 CHIEF JUDGE LIPPMAN: Okay. Thank you,

1 counselor.

2 Any rebuttal?

3 MR. COOPERSTEIN: Yes, very briefly as to
4 that one point. The special damages in the bill of
5 particulars is governed by CPLR 3043, which itemizes
6 which special damages you may request in a bill of
7 particulars, and it does not include any of the items
8 of special damages we requested. Moreover, at the
9 same time we served the bill of particulars, we
10 served discovery and inspection responses that fully
11 identified all those items of special damages.

12 CHIEF JUDGE LIPPMAN: Okay. Thank you
13 both.

14 MR. DACHS: Thank you, Your Honor.

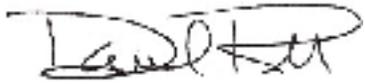
15 (Court is adjourned)

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

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Dupree v. Giugliano, No. 204 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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