Index No. 2020-6564

In the
New Scotland Court of Appeals

AMELIA AND JOSEPH BAKER,

Petitioner-Appellant,

- against –

NEW SCOTLAND MEDICAL CENTER,

Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE
NEW SCOTLAND COURT OF APPEALS

BRIEF FOR PETITIONER-APPELLANT

COUNSEL FOR PETITIONER-APPELLANT
TEAM 15
DATED JANUARY 15, 2022

QUESTIONS PRESENTED

I. Whether the Third Appellate Division erred in reversing the Supreme Court's ruling that the New Scotland Medical Center violated New Scotland Family Court Act § 1964 when it unlawfully resuscitated Petitioners' infant daughter without first obtaining a court order finding of medical neglect, despite Petitioners' explicit decision against resuscitation.

II. Whether the Third Appellate Division erred in reversing the Supreme Court's ruling that the New Scotland Medical Center violated New Scotland Public Health Law § 3807 when it administered experimental medications to the Petitioners' infant daughter without first obtaining the required informed consent from the Petitioners in the absence of a medical emergency.

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STATEMENT OF THE CASE

On January 12, 2017, the lives of Mrs. Amelia Baker and Mr. Joseph Baker ("Petitioners") changed forever when they arrived at New Scotland Medical Center ("Respondents"). R. at 7. At the Medical Center, Mrs. Baker, who was 22 weeks pregnant, was diagnosed with a life-endangering infection that caused her premature labor after experiencing severe contractions and abdominal pain. R. at 7-8.

Eight hours later, the Bakers met with their obstetrician, Dr. McGregor, and a neonatologist from New Scotland Medical Center, Dr. Maddock, for antenatal counseling. R. at 8. During this antenatal counseling, the physicians informed the Bakers that if they induced labor, their 22-week-old infant would have a 5.1% chance of survival, and if the infant survived it would likely suffer from serious mental and physical disabilities. R. at 12-13, 8. Dr. McGregor further explained that if the Bakers decided to resuscitate the infant at 22-weeks' gestation, the first hour of its life (known as the "Golden Hour") would be the most important period to provide medical care to the infant. R. at 9. However, the physicians did not discuss specific medications or treatments that may be used to prevent complications or otherwise treat micro preemies. R. at. 9. The physicians then recommended that the Bakers not resuscitate their infant if it was born alive because there was an extremely high chance that it would have little to no quality of life. R. at 8. Importantly, the physicians emphasized to the Bakers that while non-resuscitation would be the recommendation of most obstetricians and neonatologists due to the gestational age, the Bakers had the ultimate and final say on whether they wanted their child to be resuscitated. R. at 8.

The Bakers were then left with the painful decision of whether the Medical Center should resuscitate their infant in the unlikely chance that it was born alive. R. at 9. The Bakers then spent nearly an hour carefully considering their circumstances, their child's future, their personal values,

and their financial resources to determine the best course of action for their infant daughter, Claire. R. at 9. Ultimately, with their physicians' recommendations, the Bakers informed Dr. McGregor that they did not want their child to be resuscitated, nor did they want any "heroic measures" performed on her. R. at 9. The physicians agreed with the Baker's decision and subsequently informed the medical staff that no resuscitative measures were to be performed on the infant after birth. R. at 9.

A nurse at the Medical Center overheard the Bakers' decision to not resuscitate their daughter and called for an Ethics Committee meeting, which was subsequently held on January 13, 2017. R. at 9. During this meeting, the Medical Center physicians, along with advocacy from Dr. McGregor and Dr. Maddock, discussed potential ethical concerns with not resuscitating the Bakers' infant. R. at 9-10. Ultimately, the group decided to violate the Bakers' express decision and have a neonatologist in the delivery room to evaluate the infant's condition at birth, and then decide whether it should be resuscitated. R. at 10. Neither the Ethics Committee nor the physicians ever considered seeking court approval for the resuscitation, as required by §1964 of New Scotland's Family Court Act. R. at 10. Mr. Baker was informed of the Hospital's decision and explicitly refused to sign a consent form allowing resuscitation. R. at 10.

The following day, on January 14, 2017, Mrs. Bakers' condition worsened, and labor was induced for her safety and health. R. at 10. When their daughter, Claire Baker, was born alive, Dr. Wingert (the neonatologist present in the delivery room) proceeded to place her on ventilation to resuscitate her, as Claire would not have survived without resuscitation. R. at 10. Although both parents were present during the procedure, neither Mrs. nor Mr. Baker consented to the resuscitation. R. at 10.

In the hour following Claire's birth, Dr. Wingert administered various medications, including a non-FDA approved drug called indomethacin and an experimental drug called phenobarbital. R. at 14. These experimental medications, though not FDA approved, were routinely administered to micro premature infants at the New Scotland Medical Center. R. at 11. Claire subsequently suffered from seizures, intraventricular hemorrhaging (IVH), gastrointestinal bleeding, and experienced painful interventions from the Hospital staff to keep her alive. R. at 11. Unfortunately, the interventions performed on Claire did not prevent her from suffering from severe physical and mental disabilities. R. at 11. Until the time of her death at age 3, Claire experienced several physical and mental disabilities that required 24/7 care. R. at 11. She enjoyed little, if any, quality of life, and could not speak, see, walk, or perform any daily activities without substantial assistance. R. at 11.

The Petitioners brought a claim in the New Scotland Supreme Court, alleging that New Scotland Medical Center (1) violated New Scotland Family Court Act § 1964 when it resuscitated their infant daughter despite their express refusal to consent to the procedure; and (2) violated New Scotland Public Health Law § 3087 by administering experimental medications to their infant daughter without first obtaining informed consent from the Petitioners. R. at 6. On October 2, 2020, the Supreme Court granted the relief sought and found that (1) Respondents unlawfully authorized Claire's resuscitation despite the Petitioners' objections, and (2) Respondents did not obtain informed consent from the Petitioners for the experimental treatments performed on Claire R. at 22. The On January 19, 2021, the Third Appellate Division reversed the determinations from the Supreme Court. R. at 23. Petitioners now appeal to the New Scotland Court of Appeals. R. at 23.

SUMMARY OF THE ARGUMENT

New Scotland Medical Center unlawfully performed medical treatments on the Plaintiffs' infant daughter Claire and should thus be held liable for willfully breaching New Scotland Law. This Court should reverse the New Scotland Third Appellate Division's decision and instead find that the New Scotland Medical Center's physicians (1) violated the New Scotland Family Court § 1964 when it resuscitated Claire without a court order; and (2) violated New Scotland Public Health Law § 3087 when it administered experimental treatments to Claire without informed consent.

First, the New Scotland Third Appellate Division improperly determined that the Respondents properly exercised their authority to resuscitate Claire when they failed to first obtain a court order showing medical neglect before resuscitating the Bakers' daughter against their express consent. Pursuant to New Scotland Family Court Act § 1964, a hospital may override a parent's medical decision for their child only when there first has been a finding of medical neglect by a court. Thus, if a court does not make a finding of medical neglect, the hospital must comply with the parent's decision. Here, the New Scotland Medical Center breached § 1964 when it overrode the Bakers' decision and resuscitated Claire without first obtaining a court order showing of medical neglect.

Moreover, § 1964 does not allow for an emergent circumstance exception to bypass a court order showing of medical neglect. However, even if this Court were to read in a court-created emergent circumstance exception to § 1964, this exception does not apply to the birth of Claire because Respondents had ample time to seek a court intervention of medical neglect. Subsequently, a court would likely find that the Bakers' decision to not resuscitate Claire did not

constitute medical neglect because the Bakers exercised beyond a minimum degree of care in their decision and reasonably refused a treatment with a low success rate.

Furthermore, the New Scotland Third Appellate Division incorrectly held that the Respondents were not required to obtain informed consent from the Bakers prior to administering experimental treatments to Claire. Unless there is a medical emergency, the New Scotland Public Health Law § 3087 requires a physician to obtain the informed consent from its patient before administering medical treatments. As medical physicians, the Respondents had a legal duty to obtain informed consent from the Bakers before it administered experimental drugs to Claire. This duty of informed consent required that the Respondents provided the Bakers with the expected treatments for Claire and material risks associated with each treatment. Since the Respondents did not attempt to inform nor obtain consent from the Bakers, this Court should find that the Respondents breached § 3087.

Finally, Claire's birth was not a medical emergency thus the exception to the informed consent requirement of § 3087 does not apply. A medical emergency is an unexpected event that requires immediate medical action. Here, the Respondents reasonably anticipated the micro premature birth of Claire. The Respondents also anticipated the exact experimental drugs it would administer Claire if she was born alive. Thus, given the anticipatory nature of Claire's birth, this Court should find that her birth was not a medical emergency exception to § 3087. Accordingly, this Court should reverse the findings of the New Scotland Third Appellate Division and find in favor of the Petitioners and grant the relief sought.

STANDARD OF REVIEW

The issue of this case arises from a question of law which is subject to de novo review; therefore, this Court owes no deference to the conclusions reached by the Third Appellate Division. *South Park Indep. Sch. Dist. v. United States*, 453 U.S. 1301, 1304-05 (1981).

ARGUMENT

I. THE SUPREME COURT CORRECTLY HELD THAT NEW SCOTLAND MEDICAL CENTER VIOLATED THE NEW SCOTLAND FAMILY COURT ACT § 1964 WHEN IT UNLAWFULLY AUTHORIZED THE RESUSCITATION OF CLAIRE BAKER DESPITE THE PETITIONERS' EXPRESS DECISION AGAINST RESUSCITATION.

Parents have a well-established, fundamental right to raise their children and make decisions related to the care of their children in the manner they see fit; this includes the right to make decisions related to their children's medical care. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *see also Parham v. J.R.*, 442 U.S. 584, 602 (1979) (holding that parents have a natural right, coupled with a "'high duty' to recognize symptoms of illness and to seek and follow medical advice" on the child's behalf). Because parents have a fundamental right to the care and custody of their child, the Due Process Clause of the Fourteenth Amendment requires that parents are given due process before this right is taken away. *Troxel v. Granville*, 530 U.S. 57, 66 (2000). While this parental right is not absolute, the State may intervene only when a parent has failed to provide the minimum degree of care to their child. *Mueller v. Auker*, 576 F.3d 979, 1000 (9th Cir. 2009). Here, there has been no court finding – or any evidence – indicating that the Bakers provided anything but the utmost care and concern for their daughter Claire. Nonetheless, Respondents, New Scotland Medical Center, stripped the Bakers of their

fundamental right to make a decision related to the medical care of Claire when it unlawfully resuscitated her. R. at 10.

Under New Scotland Law, a hospital must obtain a court finding of medical neglect before overriding parental decisions. New Scotland Family Court Act § 1964(b). It is undisputed that Respondents made no effort at any point to seek a court order before overriding the Bakers' decision; instead, the Respondents assert that emergent circumstances prevented it from doing so. R. at 10. Even if this Court does apply an emergent circumstances exception to this case, the Bakers were not medically neglectful towards their daughter. Therefore, this Court should find that the Respondents unlawfully authorized Claire's resuscitation against the Bakers' explicit decision and subsequently reverse the Third Appellate Division's decision.

A. Respondents Were Required to Obtain a Court Order Showing of Medical Neglect Before It Resuscitated the Bakers' Infant Daughter Claire Against Their Consent.

The Third Appellate Division incorrectly held that New Scotland Medical Center's physicians properly exercised their authority when they resuscitated Claire against her Parents' wishes without first seeking a court order pursuant to New Scotland Family Court Act § 1964. Specifically, New Scotland Family Court Act § 1964(b) states:

> (b) If parents refuse to consent to a medical procedure or treatment for their child, and a hospital believes that not performing the procedure or treatment for their child would constitute medical neglect, the hospital must commence a proceeding in state court to review the allegations of medical neglect.
>
> (1) Upon a finding of medical neglect, the court, by order, may issue directions for medical treatment as the court deems necessary.
>
> (2) If the court does not make a finding of medical neglect, then the hospital must comply with the parents' decision.

New Scotland Family Court Act § 1964(b).

Because a hospital must first obtain a court order finding of medical neglect before overriding parental decisions, Respondents plainly violated the statute and acted outside the scope of their authority. Once Respondents internally decided that the Bakers' decision to not resuscitate their 22-week-old daughter constituted medical neglect, the only lawful thing for the Hospital to do was to commence a proceeding in state court. New Scotland Family Court Act § 1964(b). Here, Respondents attempted to use a single Ethics Committee meeting as a substitute for a court finding of medical neglect. R. at 9-10. By deliberately bypassing this statute and failing to seek a court order, the Respondents acted illegally and failed to afford the Bakers with due process as required by law.

B. <u>Since The Legislature Did Not Create Exceptions to New Scotland Family Court Act § 1964, This Court Cannot Adopt Any Exceptions.</u>

Furthermore, since § 1964 does not outline any exceptions to the requirement that a hospital must obtain a court order before overriding parental consent, this Court should not apply a court-created exception to the statute because an exception would contradict the drafters' intent. The Legislature could have undoubtedly incorporated an exception if it intended for Hospitals to have the authority to make independent decisions concerning medical neglect. For example, New Scotland Public Health Law § 3087(a) states that: "Except in emergencies, a physician owes a duty to a patient to obtain the informed consent of the patient or the patient's authorized representative prior to conducting any medical treatments or procedures…" Thus, New Scotland had the ability to include an exception to § 1964, but specifically declined to do so. Therefore, this Court should also decline to apply an exception to § 1964 and instead find that, pursuant to the statute, the Respondents were required to obtain a court finding of medical neglect before overriding the Bakers' decision.

Further, § 1964 safeguards the fundamental rights of parents to make decisions concerning the care of their child. Having a stringent requirement of a court order before overriding parental decisions is essential to provide a necessary limit on the decision-making power of hospitals. To read in any exceptions would jeopardize the due process rights of parents and would allow hospitals to have a level of authority and decision-making power that the Legislature did not intend for hospitals to have.

Even if this Court allows for an exception to § 1964, an emergent circumstance must be present to override the parents' decision. Respondents assert that because there were emergent circumstances present, it had no option but to act immediately and without the Bakers' consent. R. at 18. Respondents refer to *Miller ex rel. Miller v. HCA* to justify their unauthorized actions. *Miller ex rel. Miller v. HCA*, 118 S.W.3d 758, 772 (Tex. 2003). In *Miller,* the court created an "emergent circumstances" exception to Tex. Fam. Code Ann. § 151.003, holding that "a physician, who is confronted with emergent circumstances and provides life-sustaining treatment to a minor child is not liable for first obtaining consent from the parents." *Id.* at 767-68.

In *Miller*, doctors informed the Petitioners that it was unlikely that their infant would be born alive at 23-weeks' gestation. *Id.* at 762. The Petitioners were given the choice to, and ultimately decided against, providing treatment to the infant after birth. *Id.* The hospital staff met and ultimately decided to override the Petitioners' decision. *Id.* Within approximately seven hours of this decision, the Petitioner gave birth to their infant daughter. *Id.* After this premature birth, the neonatologist began to resuscitate the infant without the Petitioners' consent. *Id.* at 763. The court held that due to the short, eleven-hour window between the Petitioners' arrival at the hospital and birth, the hospital did not have adequate time to obtain a court order to override the Petitioners' decision to not resuscitate the infant. *Id.* at 769. However, the court also emphasized that the

exception is narrowly circumscribed and arises only in emergent circumstances when there is no time to consult the parents or seek court intervention. *Id.* at 769. Thus, due to the emergent circumstance and lack of time to obtain consent or a court order, the court did not hold the hospital liable. *Id.*

Because *Miller* emphasizes that the emergent circumstance exception should be narrowly circumscribed and applied only when there is no time to seek court intervention, this Court should decline to apply this exception here. *Id.* at 769. In *Miller,* approximately eleven hours passed between hospital staff meeting and the induced labor of the Petitioner. *Id.* Conversely, the New Scotland Medical Center had substantially more time than the Respondents in *Miller* to seek a court order to possibly override the Bakers' decision to not resuscitate their daughter. Nearly a full day passed between the end of the Ethics Committee Meeting on January 13, 2017 and the birth of Claire Baker on January 14, 2017. R. at 10. The Respondents made no effort to seek a court order before overriding the Bakers' decision despite having adequate time to do so. R. at 10. Here, any emergent circumstance was a direct result of the Respondent's own delay in not seeking a court order rather than an uncontrolled emergency. R. at 19. Therefore, this Court should find that because the Respondents had enough time to seek a court order, the emergent circumstances exception does not apply here.

Moreover, Respondents unlawfully seeks to avert the court order requirement by asserting that resuscitating Claire was her only chance at survival. R. at 24. However, the necessity of a procedure is not a statutorily cognizable reason to excuse the Respondents' failure to seek a court order. On its face, § 1964 does not recognize what procedures are necessary to save a child's life. Instead, § 1964 clearly states that a court showing of medical neglect must be made before a

hospital overrides a parent's decision. Respondents cannot unilaterally decide that because there is a chance of survival, it can administer any medical procedures without the consent of the parents.

In sum, since the Respondents failed to seek a court order finding of medical neglect, § 1964(c) states that the hospital's only remaining option was to comply with the Bakers' decision and not resuscitate Claire. Thus, since the Respondents did not obtain a court order showing medical neglect, nor was there an emergent circumstance that prevented it from doing so, this Court should find that the Respondents violated New Scotland Family Court Act § 1964 when it resuscitated Claire against the Bakers' consent.

C. The Bakers' Decision to Not Resuscitate Claire at 22-Weeks' Gestation Did Not Constitute Medical Neglect.

Even if the Respondents attempted to seek a court order, the Bakers' decision to not resuscitate their daughter after learning that she would be born at 22-weeks' gestation and would likely enjoy zero to no quality of life as a result did constitute medical neglect. R. at 8. To justify medical treatment for a child against the parents' wishes, there must be a showing of medical neglect. *Matter of Shawndel M.*, 33 A.D.3d 1006, 1007 (N.Y. App. Div. 2006). Under the New Scotland Family Court Act § 1964, a medically neglected child is defined as: "a child … whose physical condition has been impaired or is in imminent danger of being impaired as a result of the failure of his parent to exercise a minimum degree of care in supplying the child with adequate medical care…." New Scotland Family Court Act § 1964(a).

The Bakers did not fail to exercise a minimum degree of care in supplying their daughter with adequate medical care. In determining whether a parent has provided a child with adequate medical care, courts consider (1) whether the parent was made aware of the possibility of a cure if certain treatment is pursued, (2) sought accredited medical assistance; and (3) whether the

alternative treatment is recommended by their physician and not totally rejected by all responsible medical authority. *Matter of Hofbauer*, 47 N.Y.2d 648, 656 (1979) (holding that the parents' decision to seek alternate treatment which was supported by multiple physicians in the community did not constitute medical neglect).

This Court should consider these same factors and subsequently find that the Bakers did not medically neglect their daughter. First, Dr. McGregor and Dr. Maddock informed the Bakers that the possibility of a cure for their daughter was extremely low. R. at 8. Second, the Bakers' decision to not resuscitate Claire was strongly recommended by both their obstetrician and neonatologist. R. at 8. Lastly, Dr. McGregor and Dr. Maddock informed the Bakers that many, if not most, obstetricians and neonatologists would make a similar recommendation to not resuscitate the infant at 22-weeks' gestation. R. at 8. In applying these factors, this Court should find that the Bakers' decision to not resuscitate Claire was based on strongly supported medical research and thorough consideration for her possible quality of life. Accordingly, this Court should find that the Bakers were not medically neglectful in their decision.

Further, a court will not find medical neglect when parents refuse radical medical treatment that has a low success rate. *See Newmark v. Williams*, 588 A.2d 1108, 1109-10 (Del. 1991) (holding that a three-year-old-child with an aggressive form of cancer was not medically neglected when his parents refused chemotherapy that had a unacceptably low success rate of only 40%). Respondents informed the Bakers that Claire would only a 5.1% chance of survival. R. at 12-13. (citing Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 NEW ENG. J. MED. 1801 (2015)). Further, the survival rate of 22-week-old infants that receive active treatment after birth is 23.1%. R. at 13. Based on this information of unreasonably low success rates of survival and treatment at 22-weeks' gestation,

the Bakers reasonably declined resuscitation for their daughter. Thus, due to the low success rate, this Court should find that the Bakers' decision to not resuscitate Claire did not constitute medical neglect.

In sum, when considering whether parents have been medically neglectful, the court will only consider whether the parents failed to exercise a minimum degree of care. New Scotland Family Court § 1964(a). A court will not look at factors that the Third Appellate Division considered in its opinion, such as Claire's chance of survival, or the State's "public interest in preserving public life." R. at 25. Rather, a court will only consider whether the parents' actions were medically neglectful as defined in § 1964. Here, there was no court order finding of medical neglect. Even if Respondents attempted to obtain a court order, a court will not find the Bakers were medically neglectful in their decision. Nevertheless, the Respondents failed to obtain a court order to override the Bakers' decision, as required by § 1964. Thus, this Court should reverse the findings of the Third Appellate Division and find that the Respondents unlawfully resuscitated the Bakers' daughter.

II. THE SUPREME COURT CORRECTLY HELD THAT THE NEW SCOTLAND MEDICAL CENTER VIOLATED THE NEW SCOTLAND LAW WHEN IT FAILED TO OBTAIN INFORMED CONSENT FROM THE BAKERS PRIOR TO ADMINISTERING EXPERIMENTAL TREATMENTS TO THEIR INFANT DAUGHTER CLAIRE WHEN THERE WAS NO MEDICAL EMERGENCY PRESENT.

New Scotland Public Health Law § 3087 states that "[E]xcept in emergencies, a physician owes a duty to a patient to obtain the informed consent of the patient or the patient's authorized representative prior to conducting any medical treatments or procedures . . ." To obtain informed consent under New Scotland law, "a physician must disclose all information that the physician possesses, or reasonably should possess, regarding the treatment that would be material to a

reasonable person in deciding whether or not to undergo the treatment." R. at 20 (citing *Harnish v. Child.'s Hosp. Med. Ctr.*, 439 N.E.2d 240, 243 (Mass. 1982)).

Physicians have a legal duty to obtain informed consent from their patients. *Harnish*, 439 N.E.2d at 243. Informed consent requires a physician to adequately inform the patients of the proposed treatment and the material risks associated with each treatment. *Turner v. Child.'s Hosp., Inc.*, 602 N.E.2d 423, 431 (Ohio Ct. App. 1998). Patients have a fundamental right to be informed on any medical treatments and procedures. *Wheeldon v. Madison*, 374 N.W.2d 367, 374 (S.D. 1985). Thus, a physician may not deprive patients of this right by administering treatment without first obtaining informed consent. *Id.* The tort of informed consent arises when (1) a physician fails to disclose risks of the proposed treatment; (2) the unrevealed risks cause the injury; and (3) the patient would have reasonably denied the treatment if properly informed. *Id.* The only exception to a physician's legal duty to obtain informed consent is during a medical emergency where obtaining informed consent is impracticable. R. at 27 (citing *Shine v. Vega*, 429 Mass. 456, 464 (1999)).

This Court should find that the Respondents breached New Scotland Public Health Law § 3087 when it administered experimental medical treatments to the Bakers' daughter without obtaining informed consent. First, the Respondents breached their legal obligation to obtain informed consent from the Bakers before it administered experimental drugs to their infant daughter Claire. Second, the anticipated birth of Claire at 22-weeks' gestation did not constitute a medical emergency exception to the § 3087 requirement of obtaining informed consent.

A. Respondents Had a Legal Obligation to Obtain Informed Consent from the Bakers Before it Administered Experimental Treatments to Claire.

In accordance with New Scotland Public Health Law § 3087, a physician owes a duty to a patient to obtain informed consent prior to conducting any medical treatments. To obtain informed

consent for the treatment of a child, a physician must engage in a substantive discussion with the parents regarding the nature of the treatment and inform them of the risks and alternatives. *See Lucas v. Awaad*, 830 N.W.2d 141, 151 (Mich. Ct. App. 2013) (holding that a parent stands in the place of the child in the patient-physician relationship). Furthermore, a physician has a duty to thoroughly explain and provide sufficient information about a medical procedure for a patient to make an informed judgement and provide consent. *See Harnish v. Child.'s Hosp. Med. Ctr.*, 439 N.E.2d 240, 243 (Mass. 1982) (holding that the physician's failure to inform the patient of the risk of nerve severance in her tongue prior to the procedure constitutes medical malpractice). The duty to obtain informed consent has generally fallen on the treating physician. *Wells v. Storey*, 792 So. 2d 1034, 1038 (Ala. 1999).

Moreover, parents have the right to be involved in the decision-making of medical treatments administered to their children. *Lucas*, 830 N.W.2d at 151. Particularly in cases where parents await the birth of an extremely low gestational age infant, physicians must inform parents of the anticipated medical treatments during the antenatal, or "pre-birth," counseling. James Cummings, *Antenatal Counseling Regarding Resuscitation and Intensive Care Before 25 Weeks of Gestation*, 136 PEDIATRICS 588, 591 (2015). The primary goal of antenatal counseling is to provide parents with the knowledge and support that will allow them to make an informed decision about medical procedures. *Id.*

During the antenatal counseling for expected micro premature births, physicians should provide the parents with possible treatments and the risks associated with each treatment. *Id.* at 589. Antenatal counseling allows parents to have the information necessary to make an informed decision on whether to provide treatments to a micro premature infant following birth. *Id.* 590.

After the patient is adequately informed, physicians must obtain consent from the patient prior to administering any medical treatments. *Miller v. HCA*, 118 S.W.3d 758, 767 (Tex. 2003).

As hospital physicians, Respondents had the legal duty to obtain informed consent from the Bakers prior to administering experimental treatments to Claire. Although the Bakers received antenatal counseling, the Respondents did not engage in substantive discussion with the Bakers about the experimental medications that would be used on Claire. R. at 11. During the antenatal counseling, Dr. McGregor and Dr. Maddock merely explained the significance of the first hour of a micro premature infant's life (known as the "Golden Hour") and the common complications that may arise. R. at 9. Neither physician explained to the Bakers any specific treatments or medications that would be given to Claire if she was resuscitated. R. at 9. During this antenatal counseling, the Respondents were required to provide sufficient information about the medications expected to be used on Claire. The Third Appellate Division asserts that the Bakers could have asked for more information about any treatments, however, it is the Respondents legal duty as physicians to provide all information necessary to make an informed decision. R. at 27. The burden is not on the Bakers to pry for this information.

Nonetheless, when neonatologist Dr. Wingert, independently decided to resuscitate and administer experimental drugs to Claire, there was no attempt to obtain consent from or provide information to the Bakers about these experimental drugs. R. at 10, 21. Although Dr. Wingert was not their primary physician, she maintained the duty to obtain informed consent from the Bakers because she was the operating physician during the procedure. *See Lenahan v. Univ. of Chi.*, 808 N.E.2d 1078, 1086 (Ill. App. Ct. 2004) (holding that a physician-patient relationship is found when such services provided are sufficient to impose a duty on the physician). While the physicians should have obtained informed consent from the Bakers during the antenatal counseling, Dr.

Wingert had the opportunity and legal duty to obtain consent from the Bakers in the delivery room prior to administering the treatments to Claire. Thus, this Court should find that the Respondents had a legal obligation to obtain informed consent from the Bakers and failed to do so.

B. Respondents Breached its Legal Obligation to Obtain Informed Consent from the Bakers When it Deliberately Withheld Information on the Routine Experimental Treatments Expected to be Administered to Claire.

A doctor who intends to use an experimental course of treatment on the patient must not only tell the patient about the treatment, but must also inform the patient that he is conducting an experimental treatment. R. at 20 (citing *Heinrich v. Sweet*, 308 F.3d 48, 70 (1st Cir. 2002)). Courts have regularly imposed a duty for hospitals to obtain informed consent when experimental procedures pose a foreseeable risk of injury to the patient. *See Buu Nguyen v. IHC Med. Servs., Inc.*, 288 P.3d 1084, 1091-92 (Utah App. 2012) (holding a hospital liable for breaching its legal duty of informed consent when it used experimental test equipment on a child without obtaining the parents' consent).

The tort of lack of informed consent surfaces when: (1) a physician fails to disclose to the patient any material risks and dangers involved with the treatment; (2) the unrevealed risks and dangers that should have been disclosed materialize and are the cause of injury; and (3) a reasonable person would decline the treatment if they were properly informed of the material risks and dangers. *Turner*, 602 N.E.2d at 431. The *Turner* court adopted this informed consent test when it held a physician liable for medical malpractice for failing to communicate the possibility of material risks associated with an adverse drug to the subsequent physician. *Id.* at 434.

In applying the *Turner* test of informed consent, this Court should find that the Respondent breached its legal obligation to obtain informed consent from the Bakers because (1) it failed to disclose with the Bakers the material risks and dangers of experimental treatments administered to

Claire; (2) the unrevealed risks of the experimental treatments materialized and were the proximate cause of Claire's injuries; and (3) the Bakers would have reasonably declined the experimental treatments for Claire if properly informed of the material risks.

1. The Respondents failed to disclose the medical treatments and risks and dangers of each treatment expected to be administered to Claire following her birth.

The risks associated with administering experimental treatments to Claire were foreseeable and anticipated. It is a physician's duty and legal obligation to inform patients of the risks associated with recommended medical procedures. *Turner*, 602 N.E.2d at 431. Physicians' failure to communicate important information to patients generally results in liability in malpractice. *Id* at 431 (citing *Malpractice: Failure of Physician to Notify Patient of Unfavorable Diagnosis of Test* 49 A.L.R.3D 501 (1973)). Extensive case law supports the conclusion that physicians must adequately inform patients of potential risks and dangers associated with each proposed medical treatment. *See Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. Cir. 1972) (holding that physicians must inform patients of the probability of risks involved before procedure); *see also Heinrich v. Sweet*, 308 F.3d 48, 70 (1st Cir. 2002) (holding that a doctor must not only tell the patient the known risks of proposed treatments but must also inform the patient that there may be unknown risks).

The facts of the Record indicate that Respondents were aware of the risks and dangers associated with the experimental treatments given to Claire. As a matter of policy, the New Scotland Medical Center routinely administers various medications to micro premature infants to prevent as many complications as possible. R. at 11. These routine medications include indomethacin, a drug that is not approved by the FDA to reduce the risk of IVH and phenobarbital, an experimental drug. R. at 11. Respondents administered both indomethacin and phenobarbital to Claire approximately 52 minutes following her birth. R. at 11.

Although indomethacin is a commonly used drug administered to micro premature infants, it has adverse, well-known effects. R. at 14 (citing Ingrid Pan et al., *Comparison of Neonatal Outcomes With and Without Prophylaxis With Indomethacin in Premature Neonates*, 26 J. PEDIATRIC PHARMACOLOGY & THERAPEUTICS 478 (2021)). Indomethacin frequently results in renal dysfunction, necrotizing enterocolitis (NEC), and gastrointestinal bleeding. *Id.* Phenobarbital is also a common drug used to treat complications in micro premature infants that has serious side effects. R. at 14 (citing Cynthia Sharpe et al., *Levetiracetam Versus Phenobarbital for Neonatal Seizures: A Randomized Controlled Trial*, 145 PEDIATRICS 1, 2 (2020)). Side effects of phenobarbital include hypotension, respiratory suppression, sedation, and decreased cognitive ability from chronic exposure. *Id.* at 1-2.

Because the Respondents routinely use indomethacin and phenobarbital on micro premature infants, they should have known – or been reasonably aware of – the serious and dangerous side effects of each medication. Furthermore, since the Respondents knew that Mrs. Baker could give birth to Claire at 22-weeks' gestation, they should have reasonably anticipated administering indomethacin and phenobarbital to Claire in accordance with the New Scotland Medical Center's policy for micro premature infants. Thus, since Respondents were aware of the expected medications that would be administered to Claire after her birth, Respondents had a duty to disclose these medications and the risks associated therein.

2. The unrevealed risks and dangers of the experimental medications Respondents administered to Claire resulted in her unnecessary suffering and further complications.

Claire suffered from gastrointestinal bleeding and decreased cognitive ability because of the unrevealed risks of the experimental medications. Multiple courts hold that for liability purposes, the cause of injury must materialize from an unrevealed risk that should have been made known by the physician. *Harnish*, 387 Mass. at 157-58. *See Canterbury v. Spence*, 464 F.2d 772,

787 (D.C. Cir. 1972) (holding a physician liable for failing to disclose possible paralysis from an operation); *see also Wilkinson v. Vesey*, 295 A.2d 676, 692 (R.I. 1972) (holding a physician liable for failing to disclose severe risk of radiation burns from treatment).

For instance, in *Harnish*, the court held a surgeon liable for medical malpractice for failure to disclose the serious risks of a surgery to his patient. *Harnish*, 387 Mass. at 159. There, the surgeon performed an operation on the plaintiff to remove a tumor but failed to inform her of the risk of loss of tongue function from the operation. *Id.* at 153. The court found that the risk of loss of tongue function from the surgery was a foreseeable risk, thus it was a required medical practice to inform the plaintiff before the operation of the risks and consequences of the surgery. *Id.* at 158. Moreover, since loss of tongue function materialized following the surgery, the court factored into its decision the unrevealed risks of the surgery to determine liability. *Id.* Therefore, since the surgeon was aware of the risks associated with the surgery, failed to inform the patient of the risks, and the unrevealed risks materialized into injury, the court found the surgeon liable for medical malpractice for performing a surgical procedure without the patient's informed consent. *Id.* at 159.

Throughout Claire's short life, she experienced continuous suffering because of the undisclosed risks of the medical treatment Respondents administered to her. Like the surgeon's medical malpractice in *Harnish*, the Respondents' failure to inform the Bakers of the risks of indomethacin and phenobarbital materialized into Claire's adverse side effects. Immediately following the medications, Claire suffered from gastrointestinal bleeding, a documented side effect of indomethacin. R. at 11. She also suffered from a severe lack of cognitive ability, an adverse side effect of phenobarbital. R. at 11. As a result of these experimental drugs, Claire could not speak, see, walk, use the restroom, perform any daily activities without substantial assistance, and suffered from frequent, painful seizures. R. at 11. Up until her death, Claire had the mental capacity

of an infant and required around-the-clock medical care and treatment. R. at 11. Thus, Claire's sustained complications and continued suffering were a direct result of the unrevealed risks of the experimental medications the Respondents administered to Claire.

3. Had the Respondents properly disclosed the material risks of the medications, the Bakers would have declined the experimental medications for Claire.

A plaintiff must show that if she was informed of the material risk of injury associated with the procedure, she would not have consented to the procedure. *See Wilkinson v. Vesey*, 295 A.2d 676, 690-91 (R.I. 1972) (finding that a patient would have refused to undergo the proposed therapy if she was properly informed of the severe risk of the radiation burns following treatment). A material risk is the severity and likelihood of the risk associated with the treatment that a reasonable person would attach to the disclosed risk in deciding whether to submit to the surgery or treatment. *Id.* at 689.

The Bakers would not have consented to the experimental medications administered to Claire if they were adequately informed of the material risk that she would likely suffer. Claire suffered from extreme side effects from the experimental medications the Respondents administered to her without the Bakers' consent. R. at 11. As licensed physicians, the Respondents were aware that gastrointestinal bleeding and decreased cognitive ability were serious side effects associated with phenobarbital and indomethacin. R. at 14. The Respondents deliberately failed to inform the Bakers of the material risks of adverse side effects from phenobarbital and indomethacin. Instead, during the antenatal counseling, the Bakers were only informed that Claire would likely suffer from severe disabilities with little to no quality of life, if she survived. R. at 8. Based on this information alone, the Bakers decided against any medications or treatments to resuscitate Claire in order to prevent a life of immense suffering. Thus, it is reasonable to assume that if the Respondents informed the Bakers of the adverse side effects that Claire would likely –

and in fact did – experience from the medications, they would have declined the experimental medications. Because the Respondents deliberately withheld this information about the risks associated with the experimental medications, Claire unnecessarily suffered during her entire life.

C. <u>Because Claire's Expected Premature Birth Did Not Constitute a Medical Emergency Exception to § 3087, Respondents Violated the Statute When It Administered Experimental Medications to Claire Without the Bakers' Consent.</u>

A medical emergency is the only exception to the § 3087 requirement for obtaining informed consent prior to administering medical treatment. To establish a common-law emergency exception to informed consent, there are four essential elements that must be present for informed consent to be legally waived: (1) a medical emergency; (2) the impracticality of obtaining consent from the patient; (3) the physician would have reasonably assumed that the patient would have declined treatment; and (4) the treatment was necessary to prevent significant harm or death. *Childbirth is Not a Medical Emergency: Maternal Right to Informed Consent Throughout Labor and Delivery*. JRNL LEGAL MEDICINE, 38: 329-353.

Oxford dictionary defines medical emergency as "a serious and *unexpected* situation involving illness or injury and requiring immediate action." (emphasis added). *Medical Emergency*, OXFORD DICTIONARY.[1] An emergency exists when immediate action is necessary to preserve a patient's life and it is impracticable to obtain the patient's consent before acting. *Trogun v. Fruchtman*, 207 N.W.2d 297, 311-12 (Wis. 1973). The life of the patient must be in immediate danger, not future danger. *See Cunningham v. Yankton Clinic*, 262 N.W.2d 508, 511 (S.D. 1978) (holding a physician liable for malpractice because the patient's health during surgery was not in immediate danger the emergency exception to informed consent did not apply). Consequently, a medical emergency is one of the very few exceptions to a physician's legal duty to obtain express

[1] https://www.lexico.com/definition/medical_emergency.

informed consent before commencing any medical procedures. *See Shine v. Vega*, 429 Mass. 456, 464 (1999) (holding that a long-established exception to informed consent is a medical emergency where treatment must be given immediately to prevent significant harm or death); *see also Canterbury v. Spence*, 464 F.2d 772, 789 (D.C. Cir. 1972) (holding that when a genuine emergency arises, the impracticality of obtaining consent from the patient diminishes).

First, the medical emergency exception to obtaining informed consent does not apply to Claire's birth because the Respondents expected her micro premature birth. All operating physicians at the New Scotland Medical Center were aware that there was a significant chance that Ms. Baker would give birth at 22-weeks' gestation at least 48 hours before Respondents induced labor. R. at 9-10. Further, immediate action was not necessary to preserve Claire's life because the Respondents reasonably knew what Claire's condition would be at time of birth because infants born at 22-weeks' gestation have a 5% chance of surviving. R. at 21 (citing Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 NEW ENG. J. MED. 1801 (2015)). Thus, the Respondents knew that there was a substantial chance that Claire would not be born alive. Further, because it is Hospital policy to administer medications to micro premature infants, the Respondents knew it would administer medication to Claire if she was born alive. R. at 11. Given the anticipatory nature of Claire's premature birth, the likelihood that she would not survive, and the certainty that it would administer medical treatment if she was born alive, this Court should find that her birth was not a medical emergency.

Second, it was beyond practicable for the Respondents to obtain informed consent prior to administering medications to Claire. The day before her birth, Mr. Baker explicitly refused to sign the consent form to allow the Respondents to perform any treatments on Claire. R. at 10. Although the Bakers were both present during Claire's birth, Dr. Wingert did not obtain consent from either

parent before bagging or intubating Claire. R. at 10. Furthermore, during the hour immediately following Claire's birth, the neonatologists administered various medications to Claire without first informing the Bakers. R. at 11. The Respondents could have obtained consent from the Bakers prior to administering medications to Claire on three separate occasions. R. at 10, 11. At no point before, during, or after Claire's birth was it impracticable for the Hospital to obtain informed consent from the Bakers.

Finally, Respondents were more than aware of the Bakers' decision to decline any resuscitative measures, including medical treatments, for Claire. R. at 10. The Bakers' decision was an explicit refusal of treatment that physicians must abide by. A physician may not legally proceed with refused treatment without a medical emergency. New Scotland Public Health Law § 3087. Although the medications may have prevented some harm to Claire, the Respondents still had a legal duty to obtain informed consent from the Bakers because there was not a medical emergency present.

In sum, Claire's anticipated micro premature birth did not constitute a medical emergency because her medical condition upon birth was expected. There were ample opportunities for Respondents to obtain informed consent from the Bakers prior to administering medications to Claire, and it failed to do. Thus, this Court should find that the Respondents willfully breached the New Scotland Public Health Law because it disregarded its legal duty to obtain informed consent from the Bakers prior to administering experimental treatments to Claire Baker when there was no medical emergency.

CONCLUSION

For the foregoing reasons, Petitioners Amelia and Joseph Baker respectfully requests that this Court reverse the decision of the New Scotland Third Appellate Division and hold that

Respondents (1) violated New Scotland Family Court Act § 1964 when it resuscitated Claire without a court order; and (2) violated New Scotland Public Health Act § 3087 when it administered experimental treatments to Claire without informed consent.