

Rosa Acuna v. Sheldon C. Turkish, M.D., et als (A-15-06)

Argued February 20, 2007 -- Decided September 12, 2007

ALBIN, J., writing for the Court.

The issue before the Court is whether Dr. Sheldon Turkish failed to provide his patient, Rosa Acuna, with material medical information concerning the nature of the six-to-eight-week-old embryo she was carrying and the consequences of her terminating her pregnancy. Specifically addressed is whether a physician is required to advise a woman, who is in the sixth to eighth week of pregnancy, that an abortion procedure will kill not just a potential life, but an actual existing human being.

On April 6, 1996, twenty-nine-year-old Rosa Acuna consulted with Dr. Sheldon Turkish, her gynecologist for five years. She complained of abdominal pains and headaches. After he examined Acuna and performed an ultrasound, Dr. Turkish informed Acuna that she was between six to eight weeks pregnant. At the time, she was married and the mother of two daughters under the age of three. Acuna has suffered from a kidney disorder since high school and claims that Dr. Turkish advised her that if she did not terminate the pregnancy, she would only have three months to live because of her kidney problems. Dr. Turkish denies making that statement, claiming instead that it was Acuna who brought up the subject of abortion as an option. Acuna further claims that when she asked the doctor if there was a baby inside her, he replied that it was only blood. She claims that what she needed to hear from her doctor on the day of this visit was that she was carrying “an existing living human being.”

Acuna decided to terminate the pregnancy and signed a termination of pregnancy consent form. On the form, Acuna acknowledged that the doctor had explained all the risks and complications to her. A vacuum aspiration was performed to terminate the pregnancy. Acuna suffered complications resulting in her admission to Robert Wood Johnson Hospital with the diagnosis of “incomplete abortion.” A dilatation and curettage was performed. After asking a nurse what had happened, Acuna claims to have finally realized that there had been a baby and not just blood inside her. Acuna researched the subject and eventually concluded that the abortion procedure killed “a human being.” That realization was followed by a decline in her mental health and an eventual diagnosis of post-traumatic stress disorder.

Acuna, individually and as administratrix of the estate of her “deceased infant,” Andres Acuna, filed a malpractice complaint against Dr. Turkish, his medical group, and an unidentified nurse. In the complaint, Acuna asserted wrongful death and survival claims on Andres’ behalf and negligent infliction of emotional distress, negligence, and lack-of-informed-consent claims on her own behalf. Her complaint primarily focused on the theory of a lack of informed consent as well as the argument that had Dr. Turkish provided her with the necessary information surrounding the nature of the abortion and the fact that Andres Acuna was a complete, separate, and unique human being, she would not have agreed to the abortion procedure.

Judge Hague granted Dr. Turkish's motion for partial summary judgment on the wrongful death, survival, and emotional distress claims, finding that a six-to-eight-week-old fetus is not a "person" under the [Fourteenth Amendment](#), or under the laws of New Jersey for purposes of maintaining wrongful death, survival, or negligent infliction of emotional distress causes of action.

On appeal, the Appellate Division affirmed the dismissal of the wrongful death claim but reversed the dismissal of the emotional distress claim. (Acuna I). In reinstating that cause of action, the panel concluded that the facts of this case could not be distinguished from the [Giardina](#) case just because the fetus did not survive to term. [Giardina](#) held that parents whose infant was delivered stillborn could recover damages under a theory of negligent infliction of emotional distress. The matter was remanded to the trial court for the development of a complete factual record on the informed consent issue.

On remand, Judge Chambers granted Dr. Turkish's motion for summary judgment on Acuna's remaining claims, observing that the Appellate Division did not decide whether Acuna had presented facts to support her claim that Dr. Turkish withheld from her material information that a reasonably prudent woman would need to know before consenting to an abortion. Judge Chambers noted that demanding that a physician advise a pregnant woman that her non-viable embryo "is in all material respects equivalent to a person born alive," would require the doctor to convey a value judgment not a medical fact. She further noted that those trained in the medical, religious, and philosophical disciplines had failed to reach consensus on the issue of when life begins. As such, Judge Chambers held that a physician is not required to advise a woman that her non-viable embryo is a human being to obtain informed consent for an abortion.

On appeal, the Appellate Division upheld the dismissal of the wrongful death claim but reversed on the informed consent and emotional distress claims, finding that the motion judge should not have granted summary judgment on those claims because a reasonable patient might not consider the information Dr. Turkish gave to Acuna to be information necessary to make an informed decision (Acuna II). The panel remanded the issue for trial, allowing the parties to present expert testimony to assist the jury on this issue.

The Supreme Court granted Dr. Turkish's petition for certification on the reinstatement of the informed consent claim.

HELD: A physician has a common law duty to provide a woman with material information concerning the medical risks of terminating her pregnancy; however, there is no common law duty requiring a physician to inform a pregnant patient that an embryo is an existing, living human being and that an abortion results in the killing of a family member.

1. A duty is an obligation imposed by law requiring one party to conform to a particular standard of conduct toward another. Courts generally will find a duty where reasonable persons would recognize it and agree that it exists, based on an analysis of public policy and notions of fairness. In weighing such factors, courts must consider

current social realities and should be reluctant to impose a duty that society is unwilling to accept. (Pp. 17-19)

2. Under the doctrine of informed consent, a physician has a legal duty to disclose to the patient all medical information that a reasonably prudent patient would find material before deciding whether to undergo a medical procedure. Thus, Acuna must demonstrate that Dr. Turkish withheld medical information that a reasonably prudent pregnant woman in like circumstances would have considered material before consenting to the abortion. Clearly there is no consensus in the medical community or society supporting Acuna's position that a six-to-eight-week-old embryo, as a matter of biological fact as opposed to moral, theological, or philosophical judgment, is a complete, separate, unique and irreplaceable human being or that terminating an early pregnancy involves the actual killing of an existing human being. (Pp. 19-22)

3. The instructions Acuna would like are not the medical profession's norm within this State and Acuna fails to point to any jurisdiction or court that has found a common law duty requiring doctors to tell their pregnant patients that aborting an embryo is the killing of an existing human being, an instruction that would make physicians and patients complicit in committing the equivalent of murder. Acuna cannot find support for creating such a duty in State or federal law. (Pp. 22-24)

4. The constitutional arguments that it is both an undue burden on a woman's right of self-determination and a violation of a physician's [First Amendment](#) free speech right to compel a physician to advise a pregnant woman that an embryo is an existing human being and that an abortion is tantamount to killing a child need not be reached because the Court cannot find that New Jersey's common law imposes a legal duty on a physician to give the instruction sought by Acuna. The Court will not place a duty on doctors when there is no consensus in the medical community or among the public. The common law doctrine of informed consent requires doctors to provide their pregnant patients seeking an abortion only with material medical information, such as gestational age and medical risks. Because there are no material issues of fact in dispute, Dr Turkish is entitled to judgment as a matter of law. The Appellate Division erred in reversing the motion judge's order granting summary judgment, which should be reinstated. (Pp. 24-28)

Judgment of the Appellate Division is **REVESED** and the order dismissing Rose Acuna's lack-of-informed-consent and emotional distress claims is **REINSTATED**.

JUSTICES LONG, LaVECCHIA, WALLACE and RIVERA-SOTO join in JUSTICE ALBIN'S opinion. JUSTICE HOENS did not participate.