

NY Hospital Can't Dodge Claims It Kept Man Alive Against Will

By [Jonathan Capriel](#)

Law360 (April 4, 2022, 6:15 PM EDT) -- A New Rochelle hospital can't escape a malpractice suit accusing its doctor of keeping a man alive against his wishes and causing him a month of suffering until he died, after a New York appeals court ruled that the right to reject medical treatment and choose death is entrenched in precedent.

The five-judge panel said on Thursday that "no philosophical guesswork is required" in this case. Gerald Greenberg declined life-sustaining treatment in his living will, which was his right. Contrary to arguments put forward by Montefiore New Rochelle Hospital and its physician, Dr. Diego Escobar, this action is not a "wrongful life" claim, said Judge Ellen Gesmer, who wrote [the opinion](#) for the panel.

"A competent adult's right to refuse medical treatment, even where refusal may result in death, is well established by case law."

The published unanimous opinion overturned a Bronx County trial court's order dismissing a lawsuit by Elaine Greenberg, the wife of the 62-year-old patient who was suffering from an advanced form of Alzheimer's disease and later died at Montefiore New Rochelle Hospital.

Her lawsuit, filed January 2019, accused the hospital and Escobar of malpractice because they failed to follow Gerald Greenberg's 2011 advance directives regarding what medical providers should do if he were ever in an "incurable or irreversible mental or physical condition with no reasonable expectation of recovery."

This was the exact situation Gerald Greenberg was in when he was admitted to Montefiore New Rochelle Hospital on November 3, 2016, according to the lawsuit.

His living will told medical staff to alleviate pain but provide no medical care that would prolong his life. One of his adult sons, acting as his medical agent, reiterated this point by signing a Medical Order for Life-Sustaining Treatment form for comfort measures only, according to court records.

But on November 4, 2016, Escobar ordered a round of intravenous antibiotics for the patient and a number of blood tests, a brain CT, chest X-ray and an electrocardiogram, the court record says.

This prolonged Gerald Greenberg's life for roughly 30 days, according to an expert witness brought in by Elaine Greenberg. She claims that her husband, who should have died quickly of sepsis, suffered a painful existence until December 5, 2016.

The hospital argued that Elaine Greenberg and her husband's estate are barred from making these kinds of claims. Specifically, it pointed to a 2009 New York appeals court's decision in *Cronin v Jamaica Hosp. Med. Ctr.* which said that "the status of being alive does not constitute an injury in New York."

But Judge Gesmer noted that the First Judicial Department isn't bound by *Cronin*, which is a Second Department ruling. That case also involved a do-not-resuscitate order, while the Greenbergs' claims involved prolonging life.

Finally, the *Cronin* decision relied on two cases — *Alquijay v. St. Luke's-Roosevelt Hosp. Ctr.* from 1984 and *Becker v. Schwartz* from 1978 — regarding infants born with birth defects with parents suing to obtain damages for "wrongful life," Judge Gesmer said.

Those courts had determined that they couldn't take on such cases.

"Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians," the decision in *Becker* reads.

In contrast, Gerald Greenberg was a grown man who knew what he wanted, Judge Gesmer said.

"When a competent adult has executed advance directives specifying the conditions under which they refuse certain life-sustaining treatments, and there has been a medical determination that those conditions are present, no philosophical guesswork is required as to what is best for such a patient," Judge Gesmer said.

Judges Barbara R. Kapnick, Troy K. Webber, Ellen Gesmer, Saliann Scarpulla and Martin Shulman sat on the panel for the Supreme Court of the State of New York, Appellate Division, First Judicial Department.

Elaine Greensberg and her late husband's estate are represented by Gerald Grunsfeld of [Lazar Grunsfeld Elnadav LLP](#).

The hospital and doctor are represented by Elliott J. Zucker of [Aaronson Rappaport Feinstein & Deutsch LLP](#).

The case is *Elaine Greenberg as executor of the estate of Gerald Greenberg, deceased v. Montefiore New Rochelle Hospital et al.*, index number 20340/19E, case numbers 2021-01438 and 2021-01446, in the Supreme Court of the State of New York's Appellate Division, First Judicial Department.

--Editing by Dave Trumbore.