DIGERONIMO V. FUCHS;[1] JUDGE DISMISSES MALPRACTICE SUIT COMPLAINING ABOUT LIFE

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I. INTRODUCTION

Jurists throughout the United States have commented that medical malpractice suits initiated as a result of religious objections to provided blood transfusions, "present some of the most difficult questions [courts have] been asked to address."[3] The primary legal dispute in these cases arises over how to adjudge the appropriate legal standard, the accepted standards of care, and the degree to which the religious beliefs of the patient affect, if at all, the prevailing standard in medical malpractice suits.[4] In the context of religious objections to blood transfusions, pleading sufficient facts evidencing compensable injury or harm poses the greatest obstacle to establishing a prima facie case for medical malpractice.[5]

This article will provide an analysis of *DiGeronimo v. Fuchs,*[6] dismissed by New York's trial court, the Supreme Court of New York, Richmond County.[7] Plaintiff, thirty-four year old Nancy DiGeronimo sought prenatal care from Defendants, Allen Fuchs and Staten Island University Hospital, after becoming pregnant in early September 2003.[8] Due to Plaintiff's religious beliefs, she

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1. DiGeronimo v. Fuchs, 927 N.Y.S.2d 904 (N.Y. Sup. Ct. Aug. 4, 2011).

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3. Rozewicz v. N.Y. Health and Hosps. Corp., 172 Misc. 2d 43, 44 (N.Y. Sup. Ct. Feb. 18, 1997) (citing Munn v. S. Health Plan, 719 F. Supp. 525, 526 (D. Miss. 1989)).

4. *See, e.g.*, Deutsch v. Chaglassian, 71 A.D.3d 718, 719 (N.Y. App. Div. 2010) (citing Geffner v. North Shore Univ. Hosp., 57 A.D.3d 839, 842 (N.Y. App. Div. 2008)); Bazakos v. Lewis, 12 N.Y.3d 631, 634 (N.Y. 2009).

5. *See DiGeronimo*, 927 N.Y.S.2d at 905.

6. *Id*.

7. In the unified court system of New York State, the Supreme Court of New York is the trial level court. *See* New York State Unified Court System, Civil Court Structure, *available at* http://www.courts.state.ny.us/courts/structure.shtml (last visited Mar. 18, 2012). To maintain consistency with the naming convention for the jurisdiction of New York State, this note will refer to the court in *DiGeronimo* as the Supreme Court of New York or Trial court.

8. *See DiGeronimo*, 927 N.Y.S.2d at 905.

firmly opposed receiving "allogenic" blood products or transfusions.[9] As a result, she sought medical treatment and hospitalization from facilities, which advertised bloodless technologies.[10]

Defendants actively advertised their implementation of a cell salvage technology that would collect blood cells, otherwise lost during an operation from a patient, process the cells, and re-infuse the blood into the same patient.[11] Thus, Defendants provided the services sought by Plaintiff, and she utilized Defendants for prenatal care and delivery.[12] Nancy expressly memorialized her intention to receive only bloodless transfusions in an advanced medical directive, or health proxy, signed in 1995.[13] Plaintiff alleged that she advised Dr. Fuchs of her religious convictions, and believed "he would create a treatment plan that would use, when necessary and possible, autologous blood transfusions . . . concordant with her beliefs as a Jehovah's Witnes[s]."[14] The record indicates, however, that Dr. Fuchs never advised her to store any of her own blood, and complications during pregnancy precluded the viability of a late stage donation.[15]

On April 3, 2004, Staten Island University Hospital admitted Nancy due to vaginal bleeding, irregular contractions, and cervical dilation, all indicia of early onset labor.[16] Nancy received two doses of antibiotics to stabilize an infection, and Pitocin to enhance cervical contractions in order to assist her in giving birth.[17] She delivered a healthy male infant at 11:40 AM, but bleeding continued despite further treatment with Pitocin and uterine massage.[18] Because of blood loss, Plaintiff was advised that she would die without an allogenic blood transfusion, a transfusion ultimately pro-

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9. Id. An allogenic blood product refers to a transfusion with the blood of another individual. See generally, G. Duffy, Differences in post-operative infection rates between patients receiving autologous and allogeneic blood transfusion: a meta-analysis of published randomized and nonrandomized studies, 6 TRANSFUSION MED. 299, 325-328 (2008) (generally discussing the differences between various types of transfusions). By contrast, autologous transfusions utilize the previously donated blood of the individual, which is stored in anticipation for the operation. Id.

10. *DiGeronimo*, 927 N.Y.S.2d at 905.

11. *Id*.

12. *Id*.

13. *Id*.

14. *Id*. at 905-06.

15. *Id*. at 906.

16. *DiGeronimo*, 927 N.Y.S.2d at 906

17. *Id*.

18. *Id*.

vided by Defendants.[19] At the summary judgment hearing, Dr. Fuchs asserted that Plaintiff indicated that her husband should decide whether or not she should be transfused.[20] Defendants proffered an alleged nod by Plaintiff while in the hospital as indicia of her consent, but Plaintiff contested the factual validity of the proffer.[21] Plaintiff's husband had authority as a health care proxy for his wife, and he signed forms indicating consent to his wife receiving allogenic blood transfusions.[22] Plaintiff stated she had no recollection of these events, and thus disputed any tacit consent on her part, but did not contest the validity of her husband's signature.[23] Interestingly, the record is silent on whether Plaintiff's husband was present at trial.

Plaintiff initiated a medical malpractice suit alleging the Defendant's administration of an allogenic blood transfusion, against Plaintiff's religious convictions, caused her emotional distress. Logically extended, and as noted by the court, Plaintiff essentially alleged that the doctor should have allowed her to die rather than provide her with a blood transfusion, in discord with her religious convictions.[24] The *DiGeronimo* court emphasized the absence of any precedent for finding medical malpractice when a blood transfusion was the proximate cause of saving a life.[25] The court granted summary judgment in favor of the physician and hospital, holding that Plaintiff had not alleged a prima facie claim for medical malpractice, having failed to proffer a deviation from accepted standards of practice that caused her harm, injury, or loss.[26]

First, this article will discuss Plaintiff's argument, effectively alleging a "right to die" or "wrongful life" with respect to her religious beliefs, and the factual context in which the argument arose. Second, this article will detail the basis for the court's dismissal, and the assertion that no precedent existed in the jurisdiction to support the argument asserted by Plaintiff. Third, this article will compare the dismissal in *DiGeronimo* with similar "right to die" cases based upon religious objections.[27] Lastly, this article pro-

19. *Id*.
20. *Id*.
21. *Id*.
22. *DiGeronimo*, 927 N.Y.S.2d at 906.
23. *Id*.
24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*.

poses a remedy to address objections to blood transfusions, and other life-saving procedures, due to religious beliefs.

Additionally, this article will suggest that plaintiffs engaging in medical malpractice litigation under a similar theory face significant legal barriers. Primarily, and as evident by *DiGeronimo*, many courts are reluctant to wade into the murky waters of religious interpretation and teachings, a necessary inquiry where plaintiffs allege injury or harm predicated upon their religious beliefs.[28] As will be discussed in greater detail, such an inquiry poses potential difficulty for courts, and may provide some explanation for certain judicial outcomes.

II. RELIGIOUS CONTEXT FOR PLAINTIFF'S OBJECTIONS

Originally known as the "Russellites," the Jehovah's Witnesses adopted their present name in 1931.[29] Jehovah's Witnesses believe that the present world is wholly under the dominion and control of an evil spirit, Satan, whose rule will soon end after a fierce struggle, called the Battle of Armageddon, between the forces of good and evil.[30] Jehovah's Witnesses reject allegiance to any earthly government, considering themselves citizens of Heaven, and only accountable to Christ.[31] As such, members of the Church neither vote nor hold office, and refuse military service.[32] Their "witnessing" consists primarily of house-to-house canvassing, soliciting subscriptions to their religious pamphlets, distributing literature and denouncing orthodox Christianity as an affront to true religion.[33] In light of these beliefs and practices, much litigation has resulted concerning their activities, but the incorporation of the First Amendment through the Due Process Clause of the Fourteenth Amendment has provided the Church sanctuary, and has foreclosed many actions against the group.[34]

The historical background of the First Amendment indicates the framers' intent to prevent the judiciary from becoming the ar-

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28. *DiGeronimo*, 927 N.Y.S.2d at 905-10.

29. Watchtower Bible & Tract Soc'y v. Metro. Life Ins. Co., 69 N.Y.S.2d 385, 387 (N.Y. Sup. Ct. 1947).

30. Edward F. Waite, *The Debt of Constitutional Law to Jehovah's Witnesses*, 28 MINN. L. REV. 212, 224 (1944).

31. Nathan T. Elliff, *Jehovah's Witnesses and the Selective Service Act*, 31 VA. L. REV. 811, 812-14 (1945).

32. Waite, *supra* note 30, at 213.

33. Douglas v. City of Jeannette, 319 U.S. 157, 170 (1943).

34. Jamison v. Texas, 318 U.S. 413, 414 (1943).

biter of religious disputes, for fear such arbitrations would inevitably make the arbiters' own beliefs the standard of judgment.[35] Thomas Jefferson acknowledged the untenable nature of complete freedom in the exercise of religion, and thus believed such rights could only be restricted if the individual's religious acts proved injurious to others.[36] As such, courts have intervened when religious objections to blood transfusions have threatened the lives of minor children, but generally conclude that authorization of a blood transfusion for an adult Jehovah's Witness unconstitutionally interferes with the patient's right to the free exercise of religion.[37]

Based upon the Old Testament teachings that people of Christ were forbidden from eating the blood of animals, Jehovah's Witnesses extrapolate those verses to work a complete ban on blood transfusions, whether medically required or not.[38] Jehovah's Witnesses believe that accepting a blood transfusion forecloses entrance to heaven. The belief that blood transfusions are a violation of the law of God is derived from a literal reading of such biblical passages as Genesis 9: 3-4: "Only flesh with its soul – its blood – you must not eat," and Leviticus 17: 13-14: "You must not eat the blood of any sort of flesh, because the soul of every sort of flesh is in its blood."

Individuals in the Jehovah's Witness faith proclaim a determination "not to violate God's standard, which [those in the Jehovah's Witness Church allege] has been consistent: Those who re-

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35. Reynolds v. United States, 98 U.S. 145, 163 (1878); SAUL KUSSIEL PADOVER, THE COMPLETE MADISON 300 (1953).

36. CALEB PERRY PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 182 (1953).

37. *See, e.g.*, In re Sampson, 65 Misc. 2d 658, 669 (N.Y. Fam. Ct. 1970).

> The child is a citizen of the state. When he 'belongs' to his parents, he belongs also to his state. Their rights in him entail many duties. Chief among them is the duty to protect his right to live and to grow up with sound mind a sound body, and to brook no interference with that right by any person or organization. 'When a religious doctrine espoused by the parents threatens to defeat or curtail such a right of their child, the state's duty to step in and preserve the child's right is immediately operative.' To put it another way, when a child's right to live and his parents' religious belief collide, the former is paramount, and the religious doctrine must give way. … Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves. *Id*. (emphasis omitted) (quoting Prince v. Mass., 321 U.S. 158, 170 (1944)).

38. *Acts* 17:25-28.

spect life as a gift from the Creator do not try to sustain life by taking in blood."[39] Accordingly, devout Jehovah's Witnesses repel blood transfusions of an allogenic nature, and encourage medical facilities to adopt bloodless transfusion technologies, which better align with their religious beliefs, and allegedly present a variety of health-related benefits.[40]

III. PRE-*DIGERONIMO* CASE LAW REGARDING A PATIENT'S RIGHT TO EXERCISE TREATMENT CONCORDANT WITH RELIGIOUS BELIEFS

As stated by the Supreme Court of the United States in *West Virginia Board of Education v. Barnette*, the constitutional right to religious belief and the free exercise thereof has a dual nature.[41] The United States Constitution grants the absolute right to hold any religious belief, but qualifies the right to practice that belief in any manner that does not violate the rights of others.[42] This dichotomy has traditionally provided the basis for court intervention in cases where religious objections to life-saving procedures pose legitimate risks to a patient. In most cases, administering life saving procedures that are inconsistent with express religious convictions requires judicial intervention especially where, as here, failure to provide such care would result in the death of the patient, and potentially give rise to a negligence claim against the administering physician.[43] By contrast, if the physician is able to obtain

39. *Blood, Vital for Life*, WATCHTOWER.ORG, http://www.watchtower.org/e/hb/article_01.htm

40. Kevin Jess, *Evidence in favor of bloodless surgery mounts*, DIGITAL JOURNAL (October 28, 2009), http://digitaljournal.com/article/281102 (noting that blood transfusions increased the risk of death, renal failure and sepsis or infection; while, bloodless medicine during surgery diminished the potential for post-operative infections, cost twenty-five per cent less than blood technologies, and resulted in a fifty percent increase in recovery times).

41. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. *Id.*

42. *Id*.

43. *Id*.

express authorization for the blood transfusion, such consent vitiates the need for judicial intervention.[44] However, New York case law in this arena provides patients with a claim for medical malpractice predicated upon a physician's failure to obtain informed consent from the patient.[45]

New York courts have articulated an interest pursuit to the intersection between religious beliefs and patient rights, announcing, "[a] patient has an important and protected interest in the exercise of [his or her] religious beliefs."[46] The New York Court of Appeals in *Fosmire v. Nicoleau* noted that, "the policy of New York, as reflected in the existing law, is to permit all competent adults to make their own personal health care decisions without interference from the State."[47] This precedent appears to extend near complete autonomy to adults of sound mind and empirically, lower courts in New York resist intervention where a patient's medical choices only affect that individual's life.[48] *DiGeronimo* presents a slightly different question than previous cases because Defendants did not seek a court order to provide Plaintiff with a blood transfusion, but instead argue they administered a transfusion by consent.[49] The question thus becomes whether providing a blood transfusion against the express religious wishes of a patient, and in the presence of potential alternatives, constitutes a deviation from the standard of care.

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44. *Id*.

45. *See, e.g*., Orphan v. Pilnik, 15 N.Y.3d 907, 908 (N.Y. 2010) (noting that to succeed in a medical malpractice action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed, and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment, and further requiring expert medical testimony to prove the insufficiency of the information disclosed by the plaintiff).

46. In re Jamaica Hospital, 491 N.Y.S.2d 898, 899 (N.Y. Sup. Ct. 1985).

47. Fosmire v. Nicoleau, 75 N.Y.2d 218, 231 (N.Y. 1990).

48. *See generally*, Matter of Melideo, 88 Misc. 2d 974, 975 (N.Y. Sup. Ct. 1976) (denying a hospital's application for an order authorizing a physician to perform a blood transfusion or surgical procedure, if necessary).

49. DiGeronimo v. Fuchs, 927 N.Y.S.2d 904, 906 (N.Y. Sup. Ct. Aug. 4, 2011).

IV. CONFLICT WITHOUT RESOLUTION: A PATIENT'S INDIVIDUAL AUTONOMY AND THE ETHICAL INTEGRITY OF THE MEDICAL PROFESSION

In the context of medical malpractice litigation, recognition of an individual's autonomy in medical decisions is limited by the corresponding recognition of the ethical integrity of the medical profession.[50] Courts across the United States attempt to reconcile the various, conflicting positions in an effort to recognize the necessary autonomy of physicians and patients, without chilling either party.[51] Overprotection of individuals could discourage medical professionals from pursuing aggressive and effective treatments; while, subjecting individuals to unwanted therapy could prompt an unwanted flight from medicine.[52] Of greatest concern to medical professionals, treating a patient against his or her express religious objections exposes a medical professional to civil or criminal liability for myriad of sanctions, including assault.[53] Contrarily, if a physician allows a patient to die consistent with his or her express medical wishes, such conduct could give rise to a malpractice claim.[54] Unsurprisingly, varied efforts at balancing the competing interests have given rise to an array of judicial and legislative responses.[55]

In *United States v. George*, the United States District Court for the District of Connecticut granted a physician authority to pro-

50. United States v. George, 239 F. Supp. 752, 755 (D. Conn. 1965).

51. Terry Baynes, *More U.S. Doctors facing charges over drug abuse.* REUTERS (Sept. 14, 2011), http://www.reuters.com/article/2011/09/14/us-jackson-malpractice-idUSTRE78D3P620110914 (noting that the recent trend of criminalizing malpractice is, or could, have a chilling effect on the medical profession as doctors change treatment plans out of fear of facing time in prison, or exposing themselves, or their practice, to civil liability).

52. *Id*.

53. *See, e.g*., Brian C. Kalt, *Death, Ethics, and the State*, 23 HARV. J. L. & PUB. POL'Y 487, 503 (Spring 2000)(considering cases which have found that doctors performing their professional obligations adequately should not be exposed to liability)

54. *See, e.g*., Cregan v. Sachs, 879 N.Y.S.2d 440, 447 (N.Y. App. Div. 2009) (reversing a lower court's grant of summary judgment where potentially questionable post-operative care resulted in a patient's death).

55. *See, e.g*., Fanning v. Danion Sys, Inc., No. 05-1899, 2006 U.S. Dist. LEXIS 61498, at *11 (D. Co. Aug. 16, 2006) (noting that Colorado balances the competing interests of fairly compensating plaintiffs with assuring access to health care in setting damage caps on malpractice awards; while, Connecticut chooses to set no limits to recovery despite any threat to the availability of affordable health care).

vide a blood transfusion, which a patient had refused on religious grounds.[56] The *George* court recognized the importance of respecting a doctor's conscience and oath, and found that patients receiving medical care submit themselves to the doctor's authority and cannot dictate the limits of the treatment provided.[57] Even more, the judge noted that a patient is able to refuse treatment, but "not demand mistreatment," as such demands might infringe upon the autonomy and ethical obligations imposed on medical professionals.[58] The unstated corollary to this position is the corresponding autonomy afforded to an individual in seeking and selecting medical treatment. From this, a patient with specific preferences regarding treatment would likely benefit from prospective consultation regarding the potential for after-arising conflicts in treatment.

An examination of New York's jurisprudence reveals a unique position among refusal of treatment cases. In *Crouse-Irving Memorial Hospital v. Paddock*, a New York trial court concluded that "[a] hospital is not the patient's servant, subject to his orders . . . the hospital shares the physician's independence of judgment and responsibility for action, and to let a patient die runs counter to the reason for the hospital's existence."[59] Thus, *Crouse* recognized the autonomy necessarily imparted upon both the physician and the hospital, but also recognized the primary purpose of both is to ensure the lives of patients.[60] From this vantage, the outcome in *DiGeronimo* appears less anomalous, especially where a treating physician indicates that loss of life will occur absent a specific, noninvasive treatment.[61]

However, courts' recognition of the need to maintain the ethical integrity of the medical profession has waned, to some degree, given the current trend toward palliative care, within the medical profession. Historically, the medical profession has focused predominantly on curative care.[62] However, in recent times, the du-

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56. United States v. George, 239 F. Supp. 752, 755 (D. Conn. 1965).

57. *Id*.

58. *Id*. at 758.

59. Crouse-Irving Mem'l Hosp. v. Paddock, 485 N.Y.S.2d 443, 445 (N.Y. Super. Ct. 1985).

60. *Id*.

61. DiGeronimo v. Fuchs, 927 N.Y.S.2d 904, 906 (N.Y. Sup. Ct. Aug. 4, 2011).

62. Penelope Schofield 'Would you like to take about your future treatment options?' discussing the transition from curative treatment to palliative care. 20 PALLIATIVE MEDICINE 397-406 (2006) (discussing the transition from curative to

ties and responsibilities of medical professionals have enveloped both curative[63] and palliative[64] care, which has called into question, to some degree, previous case law that stringently espoused the need to maintain ethical integrity within the medical profession.[65] This relaxation in medical standards recognizes the prevailing ethical practice that the dying are more often in need of comfort than treatment, and no longer demands that medical professionals take all efforts toward prolonging life.[66] Notably, the duties of doctors now include those, which are not curative, but have the purpose of merely comforting those near the late stages of life.[67] Thus, New York recognizes that the integrity of the medical profession can remain intact where medical professionals help ease the passage of life without providing every life-sustaining treatment regime available.

The *DiGeronimo* court faced the different and novel question of whether properly giving a life-saving blood transfusion may result in a claim for medical malpractice.[68] More clearly articulated, can a patient assert a medical malpractice claim against a physician for allowing a patient to live?

V. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff sought damages for the emotional distress she allegedly sustained as a result of Defendants' administration of an al-

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palliative care in the treatment of cancer and the dual roles of physicians in such transitions).

63. Curative care focuses on aggressive treatments calculated to cure a patient of a given ailment. *Id*.

64. "Palliative care focuses on improving quality of life for patients with [a] life threatening illness [.]"*Id*.

65. *Compare* Delio v. Westchester Cnty Med. Ctr, 516 N.Y.S.2d 677, 691 (N.Y. App. Div. 1987) (noting the maintenance of the ethical integrity of the medical profession as a compelling state interest in medical treatment) *with* Elbaum v. Grace Plaza of Great Neck, Inc., 544 N.Y.S.2d 840, 847 (N.Y. App. Div. 1989) (indicating that the interest of maintaining the medical profession's ethical integrity has been overcome, at least in part, by prevailing standards which do not require medical intervention at all costs).

66. Joelyn Knopf Levy, *Jehovah's Witnesses, Pregnancy, and Blood Transfusions: A paradigm for the autonomy rights of all women*, 27 J.L. MED. & ETHICS 171 (Summer 1999) (discussing the variety of liberty rights).

67. *Id*.

68. DiGeronimo v. Fuchs, 927 N.Y.S.2d 904, 906 (N.Y. Sup. Ct. Aug. 4, 2011).

logenic blood transfusion, against her express wishes. By initiating suit, Plaintiff effectively alleged that the doctor should have allowed her to die rather than provide her with a transfusion that was inconsistent with her religious convictions.[69] Both Defendants moved for summary judgment on the grounds that neither departed from accepted standards of care.[70]

Under New York law, "medical Malpractice is a breach of a doctor's duty to provide his or her patient with medical care meeting a certain standard."[71] The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage.[72] In this case, Dr. Fuchs moved for summary judgment based upon the expert testimony of a qualified physician, who asserted that there was no departure from accepted standards of care sufficient to sustain a claim of medical malpractice.[73]

In the context of a motion for summary judgment seeking to dismiss a complaint in a medical malpractice lawsuit, a defendant-physician seeking summary judgment must evidence no departure from good and accepted medical practice, or show that the plaintiff was not injured by such a departure, and an absence of any issue of material fact related to the same inquiries.[74] Once a defendant-physician has made such a showing, the burden shifts to the plaintiff "to submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician . . . so as to demonstrate the existence of a triable issue of fact."[75] However, general allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant-physician's motion for sum-

69. *Id*. at 907.
70. *Id*. at 908.
71. Bazakos v. Lewis, 12 N.Y.3d 631, 634 (N.Y. 2009); Deutsch v. Chaglassian, 71 A.D.3d 718, 719 (N.Y. App. Div. 2010); Geffner v. North Shore Univ. Hosp., 57 A.D.3d 839, 842 (N.Y. App. Div. 2008).
72. *Deutsch*, 71 A.D.3d at 719.
73. *DiGeronimo*, 927 N.Y.S.2d at 906.
74. Rebozo v. Wilen, 838 N.Y.S.2d 121, 122 (N.Y. App. Div. 2007); *Deutsch*, 71 A.D.3d at 719.
75. *Deutsch*, 71 A.D.3d at 719.

mary judgment.[76] Where the plaintiff's claim fails to state each essential element of a claim, the claim must be dismissed.[77]

The *DiGeronimo*[78] court surveyed New York cases addressing blood transfusions, and found sufficient factual disputes to sustain a medical malpractice action, and survive summary judgment motions where plaintiffs alleged: disease transmitted by transfusion,[79] failure to give a blood transfusion,[80] delayed transfusion,[81] giving incompatible blood,[82] and failure to complete an interrupted transfusion in a timely manner.[83] Judge Maltese in *DiGeronimo* found a lack of support for a claim of medical malpractice where a blood transfusion was the proximate cause of saving a life, as alleged by Plaintiff.[84] Moreover, the court found that Plaintiff failed to plead sufficient facts evidencing actual injury.[85] Judge Maltese concluded Plaintiff failed to make a prima facie showing by failing to establish a departure from acceptable medical care that proximately caused a legally recognizable injury.[86] Accordingly, the court granted summary judgment in favor of Defendants.[87]

Outside of New York, however, a number of states have enacted "wrongful life" or "wrongful birth" statutes in response to novel legal actions concerning abortions, which preclude plaintiffs from initiating suits under facts similar to those presented in *DiGeronimo*.[88] These statutes explicitly foreclose medical malprac-

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76. Cerny v. Williams, 32 A.D.3d 881, 883 (N.Y. App. Div. 2006).

77. *See generally*, EECP Ctrs. Of Am., Inc. v. Vasomedical, Inc., 696 N.Y.S.2d 837, 837 (N.Y. App. Div. 1999).

78. *DiGeronimo*, 927 N.Y.S.2d at 906.

79. *See* Weiner v. Lenox Hill Hosp., 88 N.Y.2d 784, 786 (N.Y. 1996).

80. *See* Scharlack v. Richmond Mem'l Hosp., 103 A.D.2d 739, 739 (N.Y. App. Div. 1984).

81. *See* Eisen v. John T. Mater Mem'l Hosp., 278 A.D.2d 272, 272-73 (N.Y. App. Div. 2000).

82. *See* Lafferty v. Manhasset Med. Ctr. Hosp., 54 N.Y.2d 277, 280-81 (N.Y. 1981).

83. *See* Pigno v. Bunim, 43 A.D.2d 718, 718-19 (N.Y. App. Div. 1973).

84. *DiGeronimo*, 927 N.Y.S.2d at 907.

85. *Id*.

86. *Id*. at 908.

87. *Id*. at 909.

88. *See, e.g.*, 42 PA. CONST. STAT. § 8305 (1988):

> (a) Wrongful birth. There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a

tice claims arising out of allegations that "but for an act or omission of the defendant, a person once conceived would not or should not have been born," reflecting the compelling state interest in the health and safety of an unborn child.[89] However, no legislature has codified a statutory provision that directly addresses the subject matter of this article; namely, whether a patient may state a claim for medical malpractice when a doctor administered a blood transfusion, against the express wishes of the patient that was the proximate cause of saving the patient's life. As a result, the courts have been slated with the task of crafting the legal contours of this particularly problematic and novel articulation of a medical malpractice action.

The New York Legislature has not promulgated a "wrongful life statute, but in *Alquijay v. St. Luke's-Roosevelt Hospital Center* in 1984 the New York Court of Appeals held "there is no cause of action for wrongful life."[90] That case, as will be discussed below, had unique facts and arose in a dissimilar context, and its precedential value as applied to *DiGeronimo* can undoubtedly be questioned. As will be more fully developed below, allegations of "wrongful life" in the context of allegedly unauthorized, yet lifesaving blood transfusions, poses conceptually distinct policy considerations from the wrongful life statutes in the abortion context. Thus, a similar statute would likely prove less effective within the confines addressed by this article, given the divergence of the state interests between protecting the life of an unborn child and infringing upon the autonomy of an adult citizen. As posed below, a workable solution undoubtedly exists to address the myriad of concerns presented by the conflicting legal and religious interests.

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child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No.261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or any other act regulating the professional practices of health care practitioners. (b) Wrongful life. There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.

89. *Id*.

90. *DiGeronimo*, 927 N.Y.S.2d at 907 (citing Alquijay v. St. Luke's-Roosevelt Hosp. Ctr., 63 N.Y.2d 978, 979 (N.Y. 1984)).

VI. THE BASIS FOR THE DISMISSAL IN *DIGERONIMO*

In an effort to establish the requisite elements of medical malpractice, Plaintiff submitted the expert affidavit of Dr. Soffer, who alleged a deviation from the acceptable standards of care, and proffered the availability of alternative procedures that would have obviated the need for an allogenic blood transfusion.[91] Judge Maltese appears to have hinged his holding on the inability of Plaintiff or her expert, to articulate a cognizable injury that resulted from the administration of the blood transfusion.[92] Plaintiff survived, and may well not have in the absence of the transfusion. The court concluded that emotional distress concerning the blood transfusion fails to rise to the level of an injury, and that Plaintiff thus was arguing wrongful life against Defendant.[93] The court, however, pronounced, "there is no cause of action for 'wrongful life' in the State of New York" and "there is no precedent for finding medical malpractice when a blood transfusion was the proximate cause of saving a life."[94]

Interestingly, the court based its foreclosure of Plaintiff's theory on *Alquijay v. St. Luke's-Roosevelt Hospital Center*, a factually dissimilar 1984 decision of the New York Court of Appeals. Despite the court's reliance upon *Alquijay*, the unique facts and vintage of the opinion render the opinion readily distinguishable from *DiGeronimo*.[95] *Alquijay's* pronouncement that wrongful life is not legally cognizable arose in the context of a plaintiff seeking to recover expenses incurred for the special care and services required for an infant born with Down syndrome.[96] The plaintiff in *Alquijay* predicated the claim for medical malpractice on the hospital's al-

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91. *DiGeronimo*, 927 N.Y.S.2d at 908. "The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage." Deutsch v. Chaglassian, 71 A.D.3d 718, 719 (N.Y. App. Div. 2010).

92. *DiGeronimo*, 927 N.Y.S.2d at 908.

93. *Id*.

94. *Id*.

95. *Id*.

96. *See* Alquijay v. St. Luke's-Roosevelt Hosp. Ctr., 63 N.Y.2d 978, 979 (N.Y. 1984) (holding that the State of New York does not recognize a cause of action for wrongful birth, and affirming the judgment granting the motion of the hospital and others to dismiss the parents' compliant for the wrongful birth of the infant).

legedly negligent amniocentesis test,[97] performed on the plaintiff during pregnancy, which erroneously reported a healthy fetus, free of genetic defects.[98] The plaintiff allegedly relied upon the results of the genetic testing, and carried the child to term instead of aborting the fetus.[99] At birth, doctors discovered the newborn possessed a condition that would require a lifetime of special treatment.[100] The parents argued that but for the positive results of the amniocentesis test, they would not have carried the fetus to term, and sought damages.[101] The *Alquijay* court noted that the cause of action "'demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence,' which the law is not equipped to make."[102] The court deemed this inquiry more appropriately addressed by the legislature than a court of law, and affirmed the dismissal of the parents' complaint.[103] Unlike a number of other jurisdictions, New York has yet to adopt a wrongful life or wrongful birth statute, legislatively foreclosing a wrongful birth action.[104]

In *DiGeronimo*, Judge Maltese extended this precedent to apply to a claim for medical malpractice by an adult patient, who received a blood transfusion in discord with her express religious beliefs.[105] One can readily question reliance upon *Alquijay* due to the distinct difference between state interests. New York courts consistently recognize the state's compelling interest in ensuring and safeguarding a baby's life and health.[106] The same compelling interest is not present where, as here, the individual at issue has

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97. A test used to detect fetal abnormalities in pregnancy by assessing various protein levels in the blood. *See* M. Lawrence, *Diagnostic Amniocentesis in Early Pregnancy*, 2 BRITISH MED. J. 143, 190-91 (1977).

98. *Alquijay*, 63 N.Y.2d at 979.

99. *Id*.

100. *Id*.

101. *Id*.

102. *Id*. (citing *Becker v. Schwartz*, 47 N.Y.2d 401, 412 (N.Y. 1978) (holding that there is no precedent for recognition of the fundamental right of a child to be born as a whole, functional human being, and dismissing the cause of action brought on behalf of an infant seeking recovery for wrongful life)).

103. *Id*.

104. *See, e.g*., 42 PA. CONST. STAT. § 8305 (1988), *supra* note 88.

105. DiGeronimo v. Fuchs, 927 N.Y.S.2d 904, 907 (N.Y. Sup. Ct. Aug. 4, 2011).

106. *See, e.g*., Fosmire v. Nicoleau, 75 N.Y.2d 218, 222 (N.Y. 1990) (New York recognizes the state's interest in preserving life and protection children from neglect); *Byrn v. N.Y.C. Health & Hosp. Corp*., 38 A.D.2d 316, 333-34 (N.Y. App. Div. 1972)(same).

reached the age of majority. After Judge Maltese rejected the wrongful life cause of action, he likewise concluded that Plaintiff failed to plead a prima facie case for medical malpractice.[107] Based upon Judge Maltese's interpretation of prior case law, his opinion concluded, without regard to Plaintiff's religious convictions, that Plaintiff's claim failed to allege a deviation from the standard of care or a legally recognizable injury.[108] However, as explained below, prior case law provides greater flexibility to litigants than applied by Judge Maltese in *DiGeronimo*.[109]

VII. JUDICIAL RELUCTANCE TO RECOGNIZE RELIGIOUSLY BASED EMOTIONAL DISTRESS AS A LEGALLY COGNIZABLE INJURY

A review of New York case law highlights a myriad of facts evidencing legally compensable injuries.[110] On the broadest level, the body of law in New York appears to favor tangible injuries, both physical and emotional.[111] In the more typical medical malpractice cases, where a plaintiff alleges a tangible injury, the evidentiary proofs necessary to assess damages are more readily calculable and quantifiable than in other kinds of malpractice lawsuits. Such quantifiable proofs arise where a plaintiff brings a medical malpractice action when a treating physician mismatched blood, or where a patient contracts a disease from a contaminated blood transfusion, both causing distinct and treatable medical is-

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107. *Id*.
108. *Id*.
109. *Id*.
110. *See, e.g*., Lang v. Newman, 12 N.Y.3d 868, 869-70 (N.Y. 2009) (failure to admit a patient despite meeting admission criteria constitutes a compensable injury for a medical malpractice action); Broadnax v. Gonzalez, 2 N.Y.3d 148, 155 (N.Y. 2004) (emotional distress experience from a miscarriage or stillbirth is legally cognizable if proximately caused my malpractice); Weintraub v. Brown, 98 A.D.2d 339, 348-49 (N.Y. App. Div. 1983) (wrongful conception against doctor who performed vasectomy).
111. *See, e.g*., Weiner v. Lenox Hill Hosp., 88 N.Y.2d 784, 788-9 (N.Y. 1996) (Plaintiff's medical malpractice action survived summary judgment as she alleged a compensable injury by having contracted a disease transmitted by blood transfusion); Lafferty v. Manhasset Medical Center Hosp., 54 N.Y.2d 277, 280-81 (N.Y. 1981) (recognizing the giving of incompatible blood as a compensable injury in a medical malpractice action); Pigno v. Bunim, 43 A.D.2d 718, 718-19 (N.Y. App. Div. 1973) (sufficient evidence for a reasonable jury to conclude that physician's delay in transfusion caused jaundice).

sues.[112] However, in the religious context, where the basis for the litigation regarding the blood transfusion is not due to the medical effects in the strictest sense, but in the more amorphous realm of emotional distress, such divergence complicates the calculation.

The New York Court of Appeals in *Salandy v. Bryk* recognized that emotional distress damages are compensable in medical malpractice actions, despite lower courts' rulings to the contrary.[113] In *Salandy*, the patient, a Jehovah's Witness, signed a form refusing to consent to a blood transfusion. However, the patient also signed a authorization for operation, which contained a provision permitting the hospital to administer a blood transfusion as may be considered medically necessary.[114] *Salandy* held that "with respect to a claim for emotional distress, all there need be to recover for emotional injury is breach of a duty owing from the defendant to the plaintiff that results in emotional harm, and evidence sufficient to guarantee the genuineness of the claim."[115] Thus, where the plaintiff had "alleged from the outset that receiving a transfusion would violate her religious beliefs as a Jehovah's Witness, the record contain[ed] a sufficient guarantee that her claim of having suffered emotional distress as a result of the transfusion [was] genuine."[116] The majority further concluded that compensable emotional distress damages do not require that the actions of a physician endangered the plaintiff's physical safety or caused her to fear for her physical safety.[117] "All there need be to recover for emotional injury [] is breach of a duty owed by a physician to a plaintiff that results directly in emotional harm, and evidence sufficient to guarantee the genuineness of the claim."[118] Significantly, the physician in *Salandy* testified that, before any transfusion was given, the plaintiff cited her religion in connection with her refusal to consent to transfusions.[119] Thus, the *Salandy* court held that inasmuch as the plaintiff alleged from the outset that receiving a transfusion would violate her religious beliefs as a Jehovah's Wit-

112. Lafferty v. Manhasset Medical Center Hosp., 54 N.Y.2d 277, 280-81 (N.Y. 1981) (deceased patient receives a transfusion of mismatched blood).
113. Salandy v. Bryk, 864 N.Y.S.2d 46, 47-8 (N.Y. App. Div. 2008).
114. *Id.* at 47-50.
115. *Id.*
116. *Id.* at 51.
117. *Id.*
118. *Id.; see also* Garcia v. Lawrence Hosp., 5 A.D.3d 226, 228 (N.Y. 2004); Ornstein v. New York City Health & Hosps. Corp., 10 N.Y.3d 1, 6 (N.Y. 2008).
119. *Salandy*, 864 N.Y.S.2d at 51.

ness, the record contained a sufficient guarantee that her claim of having suffered emotional distress as a result of the transfusion was genuine.[120]

The *DiGeronimo* court did not detail Plaintiff's specific allegations of emotional distress, but merely noted that, "[P]laintiff's emotional distress concerning the blood transfusion does not rise to the level of an injury, as that term is used as an element of a medical malpractice action."[121] Judge Maltese provided no further explanation, nor defined injury pursuant to his understanding of medical malpractice actions. However, as in *Salandy*, Nancy indicated her religious objections from the outset of the physician-patient relationship, which would suffice under a *Salandy* analysis.[122] Provided Plaintiff alleged emotional harm reasonably similar to the distress deemed sufficiently genuine in *Salandy*, the allegations should have presented sufficient factual grounds to deny summary judgment.[123] As such, *DiGeronimo* arguably conflicts with a central holding in *Salandy*, and would appear ripe for appeal.

The *DiGeronimo* court's unwillingness to address Plaintiff's claim of religious injury proves illustrative of the overall judicial reticence on legal issues implicating religion. Harm based upon the infringement of religious beliefs may prove particularly difficult to affirmatively ascertain or quantify. Even more, such evidence might require speculative and conclusory expert testimony, which is generally disfavored by courts.[124] More specifically, such an inquiry would arguably entail an appraisal of the actual merits of a religious objection to blood transfusions, as negligence-based suits often require an assessment of the reasonable nature of each party's action.[125] As a result, courts may take issue with engaging in factual determinations regarding the level of religious conflict,

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120. *Id.*

121. DiGeronimo v. Fuchs, 927 N.Y.S.2d 904, 908 (N.Y. Sup. Ct. Aug. 4, 2011).

122. *See Salandy*, 864 N.Y.S.2d at 51 (discussing emotional distress damages in the medical malpractice context).

123. *DiGeronimo*, 927 N.Y.S.2d at 908.

124. Cappolla v. N.Y.C, 744 N.Y.S.2d 100, 103 (N.Y. App. Div. 2003) (quoting Quinn v. Artcraft Constr., 610 N.Y.S.2d 598, 599 (N.Y. App. Div. 1994)). "'An expert may not guess or speculate in drawing a conclusion.'" *Id.*

125. *See, e.g.*, Maki v. Bassett Healthcare, 85 A.D.3d 1366, 1369 (N.Y. 2011) (affirming the trial court's grant of summary judgment for defendant where the plaintiff failed to demonstrate deficiencies in diagnosis or treatment); Gargiulo v. Geiss, 40 A.D.3d 811, 812 (N.Y. App. Div. 2007)(same).

anxiety, distress, or anger a given practicing member of the Jehovah's Witness Church may derive from a blood transfusion.[126] Even more challenging would be the question of whether the alleged harm was reasonable under the circumstances. This could prove particularly challenging where the religiously based objection derives from spiritual foundation without a concomitant medical rationale.[127]

The *DiGeronimo* court indicated a strong reluctance to assess claims of emotional distress within the context of an action for medical malpractice.[128] Conceivably, Judge Maltese in *DiGeronimo* would have preferred Plaintiff plead emotional distress as an element of an intentional tort because of his own discomfort with an emotional distress claim predicated upon religious beliefs, or because of concerns regarding the legitimacy of Plaintiff's claim.[129] However, his ruling in *DiGeronimo* inherently considered the merits of the religious convictions, even if only to a minor degree.[130] In the Jehovah's Witness Church, faith transcends reason, and faith need not be conflated with fanaticism.[131] Unfortunately, fanaticism and faith often become conflated in pubic perception, leading even reasonable individuals to deem certain faith-based decisions as fanatical, and patently unreasonable. However, The lack of any significant discussion in Judge Maltese's opinion could also suggest a failure of Plaintiff's pleadings to concretely allege the extent of her emotional suffering.

Irrespective of Judge Maltese's reluctance to acknowledge such harm, historic actions of the Jehovah's Witness community underscore the legitimacy of Plaintiff's injury, even if only in the eyes of

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126. J. Maltese's analysis in *DiGeronimo* typifies this reluctance, as he suggested that "administering a blood transfusion without informed consent is best characterized as a batter rather than medical malpractice," but noted that "neither battery, nor intentional infliction of emotional distress were pled." 927 N.Y.S.2d at 908. As such, the court implicitly acknowledged an unwillingness to allow emotional distress claims, as alleged in *DiGeronimo*, as support for a claim of medical malpractice. *Id*.

127. Though some scholars have posited the medical benefits of bloodless technologies, the text of the Old Testament provides the primary basis for the Church's belief. *See Elliff, supra* note 31. Thus, the Church emphasizes the spiritual over the medical. *Id*.

128. *Id*.

129. *Id*.

130. *Id*.

131. David Malyon, Transfusion-free treatment of Jehovah's Witnesses: respecting the autonomous patient's rights. 24 J. OF MED. ETHICS 291, 302-07 (1998).

the community itself. Since the Church's creation, members have gone to great lengths to preserve their adherence to the strictures of the Church.[132] Certain members of the Church even suggest that "[h]uman life is a gift from a sovereign God who has ultimate authority over its beginning and end."[133] These believers assert "[W]itnesses will not abandon 'love of God' and 'love of neighbor' even at the risk of their own lives."[134] As such, many within the Church contend that life is not the supreme consideration, and even suggest that Jehovah's Witnesses are willing to risk their lives in furtherance of Church beliefs.[135] Historians within the Church point to well-documented instances such as resistance to Hitler[136] and to the idolatrous Roman emperors, as evidence of Church members' willingness to sacrifice their lives in furtherance of their religious beliefs.[137] Based upon these historical examples, a claim of religious anguish derived from participation in acts which violate religious law is patently reasonable due to the strict adherence to the Church's tenets exhibited by many followers, despite Judge Maltese's reluctance to acknowledge the distress in *DiGeronimo*.[138]

VIII. SHOULD RELIGIOUS BELIEFS FACTOR INTO A STANDARD OF CARE ANALYSIS IN A MALPRACTICE ACTION?

No simple answer adequately resolves this issue. However, ascertaining the standard of care requires an assessment of where the physician departed from the accepted standard of care in the medical community.[139] This inquiry is inherently objective and thus leaves no basis for religious consideration.[140]

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132. *Id*. at 305.

133. Orr RD, Genesen LB. Requests for "inappropriate" treatment based on religious beliefs. 24 J. OF MED. ETHICS 282-4 (1997).

134. *Id*.

135. *Id*.

136. *See* Malyon, *supra* note 131, at 305. Jehovah's Witnesses imprisoned in Ravensbruck during World War II refused to make saddles, believing such work would infringe upon the Church's prohibition against military participation, without regard for retaliation by the Nazis. *Id.*

137. *Id*.

138. DiGeronimo v. Fuchs, 927 N.Y.S.2d 904, 907-8 (N.Y. Sup. Ct. Aug. 4, 2011).

139. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 325 (N.Y. 1986)(granting defendant-physician's motion for summary judgment)

140. *Id*.

Ostensibly, Judge Maltese decided such beliefs have no place in a malpractice action.[141] In assessing whether a triable issue of fact existed as to the standard of care, the court in *DiGeronimo* appeared to provide greatest deference to the defense experts.[142] Dr. Vincent D'Amico and Dr. Howard G. Nathanson blankly stated that there was no deviation from the proper standard of care in Defendants' treatment of Plaintiff.[143] These experts testified to the appropriateness of vaginal delivery based upon the condition of Plaintiff upon arrival at the hospital.[144] These experts further emphasized the unexpected nature of the post-partum hemorrhage, and asserted that cell salvage technology could not have been utilized because of the contaminated nature of the hemorrhagic blood.[145] In response, Plaintiff's expert suggested that the presented condition of Plaintiff upon admission for vaginal bleeding indicated vaginal delivery should not have been attempted. Plaintiff's expert further opined that an earlier caesarean section performed at the onset of labor would have prevented the uncontrolled hemorrhage, and left Plaintiff without the subsequent need for a transfusion.[146]

Plaintiff's experts' testimony delved into the highly speculative and conclusory, which could explain, to some degree, Judge Maltese's reluctance to find any deviation from the standard of care.[147] Curiously, the focus of the expert witness testimony centered upon the necessity of a blood transfusion and the possibility of alternate procedures that may not have resulted in such significant blood loss. However, neither party's expert addressed whether providing a service, procedure, or operation that conflicted with a patient's express wishes, but saved the patient, constituted a deviation from

141. *Id*.
142. *Id*.
143. *Id*.
144. *Id*.
145. *Id*.
146. DiGeronimo v. Fuchs, 927 N.Y.S.2d 904, 907-8 (N.Y. Sup. Ct. Aug. 4, 2011).
147. *See, e.g*., Wiands v. Albany Med. Ctr., 816 N.Y.S.2d 162, 163-64 (N.Y. App. Div. 2006) (denying Defendants' summary judgment motion where Plaintiff's expert affidavit was neither conclusory nor speculative regarding a deviation from the standard of care, and thus raised a triable issue of fact); *See also* Clark v. Perry, 114 N.C. App. 297, 317 (N.Y. App. Ct. 1994) (dismissing claims for medical malpractice against a doctor and a hospital after Plaintiff's experts failed to prove the applicable standards of care through expert testimony).

the acceptable standards of care.[148] Nor did Plaintiff propound any testimony regarding the importance of bloodless technologies to Church members.[149]

Dr. Fuchs asserted that a reasonable person would accept a blood transfusion to save her life.[150] Based upon the opinion, the court hinged its assessment of the standard of care on the statement of the defendant-doctor at trial, coupled with Plaintiff's alleged nod, without regard to the innocent interpretation of such gesture, or the vigorous factual dispute regarding the gesture.[151] Thus, the court in *DiGeronimo* ostensibly gave little to no consideration to the religious beliefs of Plaintiff.[152]

Under New York Law, "a physician 'stands in a relationship of confidence and trust to his patient' and a 'special relationship akin to a fiduciary bond' exists between the physician and the patient."[153] As such, failure to adhere to the express instructions of a patient arguably constitutes a breach of the fiduciary relationship between a doctor and his or her patient.[154] Public policy concerns likely require providing significant leeway to physicians, and deferring to their medical expertise, especially in times of emergency. However where, as here, medical uncertainty exists as to the availability of alternative treatments, a physician's affirmative choice to engage in conduct outside of that approved by the patient surely poses a circumstance warranting discussion because there may be a potential deviation from acceptable practices. Moreover, such uncertainty should present a genuine issue of material fact sufficient to overcome a summary judgment motion.

In response to the court's assertion, one legal scholar questioned the legal standard applied by the trial court in this case. Matt Staver, Dean of Liberty University's School of Law, suggested that "the criteria is not whether it actually hurt her – the criteria is whether she has a religious objection to having a blood transfusion. And the answer clearly, for most Jehovah's Wit-

148. *DiGeronimo*, 927 N.Y.S.2d at 908-9.
149. *Id*.
150. *Id*.
151. *Id*.
152. *Id*.
153. Aufrichtig v. Lowell, 85 N.Y.2d 540, 546 (N.Y. 1995)).
154. Sergeants Benev. Ass'n Annuity Fund v. Renck, 796 N.Y.S.2d 77, 79 (N.Y. App. Div. 2005) "Liability for breach of a fiduciary duty is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation." *Id*.

nesses, is yes – and therefore that's the end the story."[155] Though Dean Staver neglected to reference any case law supporting his proposition, he was so bold as to assert "the judge clearly got it wrong on the constitutional issues involved."[156] New York case law belies Staver's suggestion, and rather decisively indicates that standard malpractice, proximate cause, and assumption of risk charges apply in medical malpractice actions involving rejection of blood transfusions on religious grounds.[157]

Lower courts in New York have preliminarily considered the impact of religious beliefs on medical malpractice actions, but have only definitively delineated a standard with respect to jury charges.[158] Specifically, in *Rozewicz v. N.Y.C Health and Hospital Corporation,* a New York trial court deemed religious beliefs an insufficient predicate to modify the traditional jury charges in medical malpractice actions.[159] Thus, Dean Staver's perspective reflects his own aspirations in the area of medical malpractice, but do not expose any per se legal error in Judge Maltese's opinion in *DiGeronimo*.[160] However, notwithstanding the conflicting New York law, the broad concepts relating to Dean Staver's assertions are reasonably well founded, at least with respect to the Jehovah's Witness Church. As discussed above, the traditional Jehovah's Witness community places adherence to "the law of God" above all else, including life.[161] As such, the Jehovah's Witnesses appear to believe that blind adherence to faith trumps any adherence to common concepts of rationality. Accepting this concept as true, a standard of care that accounts for the faith of the Jehovah's Witnesses may be a fair accommodation, especially where a patient explicitly indicates the strict nature of the belief.

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155. Charlie Butts, *Staver: Judge wrong on malpractice lawsuit*, ONENEWSNOW.COM,August 23, 2011, *available at* http://onenewsnow.com/Legal/Default.aspx?id=1415916.

156. *Id*.

157. *See* Rozewicz v. N.Y.C. Health and Hosp. Corp., 656 N.Y.S.2d 593, 598 (N.Y. Sup. Ct. 1997) (indicating the standard malpractice, proximate cause, and assumption of risk charges apply in a medical malpractice action arising from the death of a plaintiff who refused a blood transfusion on religious grounds).

158. *Id*.

159. *Id*.

160. DiGeronimo v. Fuchs, 927 N.Y.S.2d 904, 908-9 (N.Y. Sup. Ct. Aug. 4, 2011).

161. Malyon, *supra* note 131, at 310.

IX. SUGGESTIONS

Judge Maltese's decision in *DiGeronimo* definitively declared that a life-saving blood transfusion properly given to a patient cannot form the basis for medical malpractice, irrespective of whether the transfusion conflicted with the patient's religious beliefs.[162] Despite the volatility exuded throughout New York case law throughout the 1980s and 1990s, the *DiGeronimo* court took a rigid, binary stance in a manner not clearly consistent with prior cases.[163] This departure opens the issue to future appellate review and leaves several legal questions unaddressed. This case, and the issues and assertions present novel issues, particularly regarding whether a plaintiff can predicate emotional damages on infringement of religious beliefs, that may not be resolvable by mechanical reliance on legal doctrine from other arenas. In addressing whether and to what extent religious beliefs factor into the medical malpractice proof structure, the *DiGeronimo* court's reliance upon a rigid doctrine that applies to abortions is likely inappropriate where, as here, infringement upon the express wishes of a Jehovah's Witness works substantial hardship on her beliefs.[164]

The court left open the question of whether Plaintiff could have sustained a claim of battery, emotional distress, or breach of contract arising out of the blood transfusion. Thus, litigants hoping to prevail in a similar action might be advised to better characterize their injuries in those terms, so as to preclude a finding similar to the holding in this case. More adaptive medical procedures and a preemptive contract might alleviate the need for such extreme judicial remedies, especially where, as in the case of blood transfusions in discord with religious beliefs, the damage is irreparable upon the initiation of the transfusion. Even more, heightened prospective communication between the doctor and patient would provide an even more simplistic, pragmatic remedy. Patients in New York should consider discussing and agreeing to certain procedures in advance, taking into account as many exigent circumstances as possible. The lack of such communication proved fatal to Nancy's suit, but had she proactively discussed her desire to receive bloodless therapies, if necessary, instead of relying upon

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162. Physician's performing blood transfusion on Jehovah's Witness is not malpractice; Digeronimo v. Fuchs. NEW YORK HEALTH LAW UPDATE. October 2011.

163. *DiGeronimo*, 927 N.Y.S.2d at 908.

164. *Id.*

ostensible advertising, her cause of action may have never developed.[165] However, potential plaintiffs should also be weary as some state supreme courts have concluded that a patient assumes the risk of death through refusal to permit a blood transfusion.[166] Should this apply in New York, plaintiffs' most advantageous strategy would be clear delineation of the bloodless alternatives that should be used should the need for blood arise.

Based upon the New York courts' reluctance to opine as to injuries to religious beliefs, a more appropriate solution might involve a more expansive bloodless technology, as sought by the plaintiff in *DiGeronimo*.[167] When Plaintiff's need for blood arose, Defendants had little medical recourse aside from a treatment inapposite to Plaintiff's express religious beliefs.[168] As discussed, this situation places any medical professional in a precarious situation, whereby a physician must decide whether adhere to codes of medical ethics, or fail to provide an unwanted medical service that might result in death of the physician's patient. David Malyon, Chairman of the Jehovah's Witnesses Hospital Liaison Committee, has zealously advocated for increased implementation of bloodless technologies.[169] Medical statistics suggesting the risks involved with blood transfusions, and high rates of disease contraction, have bolstered his efforts.[170] As a result of Malyon's work, Charles H. Baron, a law professor commented that, "The Witnesses have succeeded in showing that blood transfusions, from a purely scientific point of view, are not the completely benign treatment modalities they had been thought to be … The work of Jehovah's Witnesses to promote bloodless surgery … has rebounded to the benefit of all patients."[171] Based upon these advancements, widespread implementation of bloodless technologies would obviate religious objections.

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165. *Id*.
166. *See, e.g*., Shorter v. Drury, 695 P.2d 116, 124 (WA. 1985) (holding that a patient who was a Jehovah's Witness did not assume the risk of negligence in a procedure, but did assume the risk of death by refusal to permit a blood transfusion).
167. *DiGeronimo*, 927 N.Y.S.2d at 909.
168. *Id*.
169. Malyon, *supra* note 131, at 302-04.
170. *Id*.
171. *Id*. at 306.

X. CONCLUSION

In the arena of religious objections to blood transfusions, the body of law in New York has exhibited an inclination towards more liberalized consideration of religious convictions, but has, as of yet, employed a strict standard that largely disposes of religious considerations in the medical practice context. Based upon the vigorous and well-founded nature of religious objections to blood transfusions by those in the Jehovah's Witness Church, legal standards have to evolve to more effectively address religious issues. Summarily dismissing claims alleging emotional harm deemed unreasonable based upon mainstream, non-Jehovah's Witness belief systems works an injustice on the legal system and potentially precludes recovery even where plaintiffs have suffered legitimate, though emotional, injuries.