

19-5437

ORIGINAL

No. 19-

**In The
Supreme Court of the United States**

EKATERINI ALEXOPOULOS
Petitioner,

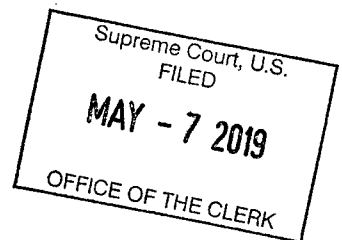
vs.

STEVEN GOLDSMITH P.A.,
and STEVEN M. GOLDSMITH,
Respondents.

**Petition For Writ Of Certiorari
To The District Court Of Appeal
Fourth District, Florida**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. The issue presented by Petitioner's Writ of Certiorari in this legal malpractice case is not whether a properly instructed jury could have ruled in favor of plaintiff but whether the court's decision to disallow plaintiff's expert witness on the standard of care to explain to the jury in plain language the ethics violation by a lawyer and its irrelevance to this case affected the jury's verdict. See *Ike J. White III v. Dait A. Beeks, M.D.* (TN Supreme Court, 2015), Case No. E2012-02443-SR-R11-CV.

QUESTION 1:

Whether the District Court erred in disallowing plaintiff's expert witness testimony regarding ethics violations and its irrelevance to this case which contributed to the verdict, and violated Rule 702 of the Federal Rules of Evidence.

QUESTION 2:

Whether the District Court erred in affirming "there is no duty to control the conduct of a 3rd person (client) as to prevent him from causing physical harm to another, when a special relation exists between the attorney and the other which gives the other a right to protection" in violation of Restatement (Second) of Torts § 315 (1965).

PARTIES INVOLVED

The parties involved are identified in the style of the case.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, EKATERINI ALEXOPOULOS, requests that the Court issue its writ of certiorari review the Decision of the Florida Fourth District Court of Appeals entered in this case on February 14, 2019 (A p. 141) and the Order denying Motion for Written Opinion entered on March 6, 2019. (A p. 153).¹

CITATION TO DECISION(S) BELOW

Ekaterini Alexopoulos v. Steven M. Goldsmith and Steven Goldsmith P.A. (Fla. 4th DCA 2019).

BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the decision of the Florida Fourth District Court of Appeals (the highest court of the State of Florida in this case) entered on February 14, 2019. A timely motion for an issuance of a written opinion was filed on February 19, 2019. The motion for an issuance of a written opinion was denied on March 6, 2019.

CONSTITUTIONAL PROVISIONS AND LEGAL PRINCIPLES INVOLVED

Rule 702 of the Federal Rules of Evidence and Rule 90.702 of Florida's Rules of Evidence permit expert witnesses to offer opinion testimony when the proposed testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue."

¹ References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

The Fifth and the Fourteenth Amendment to the Constitution of the United States, provide:

Amendment V

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE

A. Introduction

This legal malpractice case was filed ten (10) years ago and it is based on three causes of action: Negligence, Breach of Contract and Breach of Fiduciary Duty. Twelve (12) years ago, Petitioner retained Respondent and his law firm to petition the Fourth District Court of Appeals by filing a Writ of Certiorari for an extension of trial date. Respondents agreed to represent Petitioner, her husband and her businesses, and were paid for their services in advance. Respondents (attorneys) did not file the Writ of Certiorari on time. With the trial date approaching and without an extension of trial date, Petitioners (clients) were compelled to accept a settlement of \$177,806.60 to cover the outstanding legal fees in defending the underlying eviction case. Petitioners did not benefit from the forced settlement. The legal fees at the time of the forced settlement were \$240,000. The secured business debt at the time of the forced settlement (which petitioners pay to this date) was over \$250,000. Petitioner's (clients')

franchise business was in that location for thirteen (13) years. Two other businesses were under the same lease: an arcade with games for adults, and an arcade with video games for children. Petitioner's (clients') negotiations with Target Corporation to buy the standalone building/property also ended as result of Respondent's (attorneys) failure to file the writ of certiorari to get an extension of trial date.

B. Factual Background

Petitioner, her husband and corporation were subtenants/tenants of a commercial property located in Deerfield Beach, Florida where they operated a Miami Subs franchise restaurant and two arcades for thirteen years. The new owner of the property and landlord was Target Corporation. On or about January 2005, Target Corporation purchased the 200,000 sq. f. shopping center where petitioner's 5700 sq. f. standalone building was located with plans to demolish and redevelop by building a new Super Target Store. Target Corporation successfully evicted over forty (40) accounts from the shopping center prior to demolition. On or about October 31, 2006, Target filed suit against the Petitioner and other standalone accounts in front of the shopping center for possession of the property alleging back maintenance fees as past due

² The Fourth District Court of Appeals summarily affirmed the non final order and the final judgment order. Appellant, the losing party has no right to seek review of the summary dispositions by the Supreme Court of Florida. The case ends with the appellate court being the court of last resort.

Petitioner appealed to Florida's Fourth District Court of Appeals the jury's verdict, final judgment and the trial court's order denying Emotional Distress Damages based on Florida's Impact Rule, Case(s) 18-1008 and 17-3581. The appellate court denied oral argument. The appellate court affirmed without a written opinion on February 14, 2019. Petitioner's motion for a written opinion was also denied by the appellate court on March 6, 2019. Without oral argument or an opinion, petitioner did not have a meaningful participation with the court. Petitioner alleges that her constitutional right to due process and a fair trial have been violated. Florida's Supreme Court does not have jurisdiction to hear appeals without a written opinion. The case ends with the appellate court being the court of last resort.

rent: *Target Corporation v. Homori, Inc., et al.*, Broward County, Florida Circuit Court, Case No. 06-19958 COCE (53) and *Homori Inc. v. Target Corporation*, Case No. 06-17639 CACE.

Petitioners had several attorneys represent them (and their corporation) in the *Target* litigation Case No. 06-19958 COCE and Case No. 06-17639 CACE prior to retaining the Respondent and his law firm. The last attorney withdrew on March 3, 2008, three weeks prior to trial, claiming “political reasons”. With a trial date approaching, petitioner searched for another attorney for trial and the same day that the last attorney withdrew petitioner filed for an extension of trial date. On March 17, 2008, one week prior to trial, the trial court denied petitioner’s request for an extension of trial date. On March 17, 2008, that same day, petitioner retained and paid respondents. Attorney Goldsmith promised to timely file a Writ of Certiorari with the Fourth District Court of Appeals requesting an extension of trial date. He failed to keep his promise and blamed petitioner (Mrs. Alexopoulos) for his failure. Attorney Goldsmith alleged that petitioner did not give him all the necessary pleadings in order to prepare and file timely; the pleadings were not available at the Clerk’s office since the file was transferred to the Judge’s chambers for the upcoming trial only two days away. Respondent then advised his clients that there were no other legal remedies available. He advised and urged his clients to accept a last minute settlement offered by Target Corporation. Respondent advised his clients that even if he had timely filed the writ of certiorari, their case was weak and they could lose at trial. His assessment of the case was based on opposing counsel’s views of the case.

With no other legal remedies available, petitioner was compelled to settle the case for a minimal amount of monies, which did not benefit petitioners. The settlement agreement was finalized by the trial court on the morning of March 25, 2008, the same date that the trial was set to begin. Under the terms of the settlement agreement, Target Corporation agreed to pay the

Alexopoulos family \$177,806.60, comprised of rent money that the Alexopoulos had previously deposited into the Court Registry for accruing rent. The Alexopoulos family lost their livelihood of thirty three (33) years, their past and their future. Further, attorney Goldsmith's actions dictated how the Alexopoulos would live their lives in the future when at the same time attorney Goldsmith went on living his life without being held accountable for his negligent conduct and actions.

C. Procedural History

Petitioner filed their Complaint against Respondents on March 23, 2010 in the Broward County, Florida Circuit Court. Respondents first filed a Motion to Dismiss on October 21, 2010. The trial court denied the motion. Respondents then filed their Answer and Affirmative Defenses on April 10, 2012. Respondents then moved for First Summary Judgment on January 29, 2013 contending, among other things, that Petitioner abandoned or waived their claim for malpractice by settling the underlying *Target* litigation and by not allowing Respondent to seek any appellate relief. Petitioner filed their Response in Opposition to that Motion. The trial court entered an Order denying Respondents' Motion for First Summary Judgment on July 29, 2013. Respondents then moved for a Second Summary Final Judgment on March 31, 2014, a Third Summary Judgment on April 2, 2014, and a Fourth Summary Judgment on November 11, 2015 contending, among other things, that Petitioner abandoned or waived their claim for malpractice by settling the underlying *Target* litigation and by not allowing Respondent to seek any appellate relief and the statute of limitations defense. Petitioner filed their Response in Opposition to each summary judgment motion and the trial court entered Orders denying Respondents' second, third and fourth motions for summary judgment. The case was then set for trial. On November 1, 2017, the jury ruled in favor of Respondents. A Final Judgment was entered on March 1, 2018.

Petitioner then filed a Notice of Appeal of the trial court's order on the impact rule emotional distress / non-economic damages issued on October 16, 2017, which was based on the attorney-client relations and physical injuries/emotional harm, and of the jury's verdict and Final Judgment on March 1, 2018, ("*Alexopoulos v. Goldsmith*, Case No's. 18-1008 and 17-3581) which was limited only to errors on jury instructions, missing jury instructions and the question on ethics because the petitioner could not afford to buy the entire trial transcript.

The appeal was briefed by the parties. The Fourth District Court of Appeals denied oral argument and as a result there was no meaningful participation by Petitioners, an opportunity to explain to the court. On February 14, 2019, the Fourth District Court of Appeal issued its summarily affirmance without Opinion. On February 19, 2019, Petitioner filed a motion petitioning the appellate court for the issuance of a written opinion. Without a written opinion Petitioner could not appeal to Florida's Supreme Court. The motion was denied on March 6, 2019. The case ended with the Fourth District Court of Appeals being the court of last resort in this case. These proceedings ensued.

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REASONS FOR GRANTING THE PETITION

I. THE LAW IS CLEARLY ESTABLISHED THAT THERE IS DUTY TO CONTROL THE CONDUCT OF A THIRD PERSON WHEN A SPECIAL RELATION EXISTS.

Petitioner's Petition for Writ of Certiorari should be granted as the defendants owed a legal duty to the plaintiff, to her husband (the other client) and their corporation and the direct impact to the plaintiff was proximately caused by the defendants' breach of duty; the impact rule applies to this case.

Restatement (Second) of Torts § 315 (1965) provides:

There is no duty so to control the conduct of a third person as to prevent him [or her] from causing physical harm to another **unless**

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Under Florida law, there is no duty to control the conduct of a third person to prevent him or her from causing physical harm to another. *Nova Southeastern University, Inc., v. Gross*, 737 So. 2d 551 (Fla. Supreme Court 1999) Case No. SC94079. *Carney v. Gambel*, 751 So. 2d 653, 654 (Fla. 4th DCA 1999). *Gross v. Family Services Agency, Inc.*, 716 So. 2d 337, 338 (Fla. 4th DCA 1998).

There is however an exception to this rule where a special relation exists, as here, between the attorney and the third person, a client in the underlying case which gives to the other a right to protection. Restatement (Second) of Torts § 315 (1965); See *Garrison Retirement Home Corp. V. Hancock*, 484 so. 2d 1257, 1261 (Fla. 4th DCA 1985) (holding that retirement home that assumed and undertook care and supervision of retirement home resident owed duty to third party to exercise reasonable care in supervision of resident's activities); See *Kowkabany v. Home Depot, Inc.*, 606 So. 2d 716 (Fla. 1st DCA 1992) Case No. 90-3806 (holding that by undertaking to safely load landscaping timbers into vehicle, defendant owed duty of reasonable care to bicyclist who was struck by timbers protruding from vehicle window); See *Wallace v. Ed Dean, Sheriff of Marion County*, 3 So. 3d 1035 (Fla. Supreme 2009) Case No. SC08-149 the court stated: [i]n every situation where a man *undertakes to act*, or to pursue a particular course, he is under an implied legal obligation or duty to act with *reasonable care*, to the end that the person or property of others may not be injured by any force which he sets in

operation, *or by any agent for which he is responsible. If he fails to exercise the degree of caution which the law requires in a particular situation, he is held liable for any damage that results to another*, just as if he had bound himself by an obligatory promise to exercise the required degree of care.... [E]ven "where a man interferes *gratuitously*, he is *bound to act in a reasonable and prudent manner according to the circumstances and opportunities of the case*."; See *Union Park Memorial Chapel v. Hutt*, 670 So. 2d 64 (Fla. Supreme 1996), the court stated: "It is clearly established that one who *undertakes to act*, even when under no obligation to do so, thereby becomes obligated to act with reasonable care"; and *Slemp v. City of North Miami*, 545 So. 2d 256 (Fla. Supreme 1989) (holding that even if city had no general duty to protect property owners from flooding due to natural causes, once city has undertaken to provide such protection, it assumes the responsibility to do so with reasonable care)".

The Plaintiff (Goldsmith's client in the underlying case) was violently ³ beaten by her husband (also a client) moments after her husband ended a telephone conversation with the defendant (their attorney). The attorney informed his client that he had missed the deadline to file the petition because his wife did not give him all the pleadings he needed; he could not get the pleadings from the clerk of the court because the file had been transferred to the judge's office for the upcoming trial; he could not get the files before trial; there were no other legal remedies left in court; "it is over" the attorney informed him; take the offer to settle which is open until midnight.

³ In addition to the violent beating, both clients in this case suffered physical and emotional harm..

Mr. Alexopoulos understood what “it is over” meant for him and his case. Mr. Alexopoulos also understood based on the conversation with his attorney that Mrs. Alexopoulos was responsible for his attorney’s failure to file the petition timely. Mr. Alexopoulos did not know that his lawyer had just lied to him. Mrs. Alexopoulos had delivered to their attorney the entire trial record. The defendant attorney intentionally did not file; he wanted his clients to accept the settlement offer. He had been advised by opposing counsel that the case was weak and his clients could lose at trial.

Had defendant not falsely accused Mrs. Alexopoulos there would be no violent beating. Had defendant filed the petition timely there would be no violent beating. Instead of filing, the attorney chose to lie to Mr. Alexopoulos and his lie created the most dangerous situation in the most critical time while waiting for the phone call to tell them if the appellate court had given them an extension of trial date set to begin a few days later. Goldsmith had knowledge that his clients had passed their breaking point. He knew the fragile state both clients were in. His clients were exhausted by the behavior of multiple attorneys. The clients had urged attorney Goldsmith multiple times to file timely. The physical injuries and the emotional harm Mrs. Alexopoulos (and Mr. Alexopoulos) suffered were from Goldsmith’s negligent conduct. Goldsmith’s hands ⁴ violently beat up Mrs. Alexopoulos and not her husband who was in shock.

⁴ Goldsmith had the ability to control his client, to give him an alternative legal remedy, to encourage him with a possible solution; instead he chose to tell him over the phone “it’s over!” and his wife is the one to be blamed for his failure.

There would be no beating incident had Goldsmith filed the petition; the Alexopoulos family would have all of their businesses left intact, their business opportunities, and no secured business loans to pay to this date, all of their investments, their monies, and their retirements and would have been enjoying their lives twelve (12) years later. Instead, the attorney and his law firm through their lies and negligent conduct took everything from the family and attorney Goldsmith forced the Alexopoulos to live below the poverty standards today.

On appeal the defendants argued that: they owed no duty to Konstantinos or Ekaterini Alexopoulos, and the impact rule does not apply because Mr. Alexopoulos was a wife beater and he was beating his wife for five⁵ months. One incident incorrectly was multiplied by (150) times.

The appellate court incorrectly affirmed because defendants had a duty to protect all three plaintiffs-clients, that is: Konstantinos Alexopoulos, Ekaterini Alexopoulos and their corporation Homori Inc. All three (3) were defendants' clients in the underlying eviction case. A direct attorney-client relation existed in this case. See *Bradshaw v. Daniel*, 854 S.W.2d 865 (Tenn.

Supreme 1993) ('certain socially recognized relations exist which constitute the basis for such legal duty). The Goldsmith defendants were retained and paid to protect the rights and the interests of all three clients. Under the attorney-client special relation, the right and/or the ability

⁵ For five months or until the time both clients found out from the Florida Bar that attorney Goldsmith had prepared the petition timely but did not tell them and did not file it with the District Court, Konstantinos was blaming Ekaterini every day, every hour of the day for having destroyed his life and their lives as having caused the loss of their livelihood, based on the attorney's accusation that she had not provided the attorney with all pleadings needed to prepare and file the petition.

to control another's (a client's) conduct is included. Petitioner is seeking reversal of the District Court's affirmance of the non final order on October 16, 2017, based on the impact rule, and not economic damages.

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II. THE COURT'S DECISION TO DISALLOW PLAINTIFF'S EXPERT WITNESS TESTIMONY ON ETHICS VIOLATIONS BY A LAWYER AND ITS IRRELEVANCE TO THIS CASE IS A CONSTITUTIONAL ERROR THAT CONTRIBUTED TO THE VERDICT OBTAINED.

Petitioner's Petition for Writ of Certiorari should be granted as this case raises issues identified in Supreme Court Rule 10, which conforms with the Rules of this Court for jurisdiction over this writ and presents a "compelling reason" for this Court to accept discretionary review: The court "has so far departed from the accepted and usual course of judicial proceedings,".

Sup. Ct. R. 10 provides, in pertinent part, that:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

* * *

(a) entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . .

a. The trial court's error to disallow expert testimony at trial might have affected the jury's verdict.

The issue in this legal malpractice case is whether the trial court erred by disallowing the testimony of plaintiff's expert witness at trial regarding the ethics violation that contributed to the verdict. The Fourth District Court of Appeals affirmed without oral argument or a written opinion. Because this error, more probably than not, influenced the jury's verdict, Petitioner is asking for reversal of the final judgment and a new trial.

Attorney Goldsmith and his law firm were retained and paid in 2008 to file a writ of certiorari in the underlying Target v. Homori, Inc., Konstantinos Alexopoulos and Ekaterini Alexopoulos with the Florida's Fourth District Court of Appeal petitioning the appellate court for an extension of trial date. Goldsmith did not file the writ and their clients were damaged and lost their livelihood of thirty-three (33) years. Two years later in 2010 the clients filed a three count legal malpractice lawsuit against their attorney and his law firm for Negligence, Breach of Contract and Breach of Fiduciary Duty. Trial on the malpractice lawsuit was set for October of 2017.

At trial, plaintiff's only expert on the standard of care, Mr. Charles Baron, was not allowed to offer testimony on the ethics violations question when Petitioner attempted to have him testify regarding the ethics violations and its irrelevance to this legal malpractice case. The expert testimony was intended to make it easy for jurors to understand that the ethics³ violations did not apply and were irrelevant to this case. Petitioner had filed a complaint with Florida's Bar Association in 2008. Petitioner was not a party to the complaint she filed. The parties were the Florida Bar and their attorney (s). In its response to the Alexopoulos Complaint

The jury did not hear and did not understand that the Florida Bar's finding of a non ethics violation is independent from a civil lawsuit. The jury's misunderstanding proved to be fatal in this case, when at a later time the jury was faced with Respondents' instruction on ethics.

The jury returned a verdict in favor of the attorneys. Petitioner alleges that the trial court made an error in not allowing the expert to explain in simple language that the ethics question is irrelevant in this case, that the Florida Bar's finding of a non ethics violation is independent from a civil lawsuit. An explanation to the jury was extremely important because the expert's testimony on that issue would have assisted⁷ the jury to understand the evidence and to determine the facts in issue in order to arrive at the proper and just verdict. In *Ribeiro v Rhode Island Eye Institute* (May 2016), Case No's 2013, 297/298/299 (PC 07-4069) the R.I. Supreme Court ruled that it was error to exclude expert testimony "better jury confusion than expert testimony exclusion" and ruled that plaintiff was entitled to a new trial on all issues in its medical malpractice case. The court found that the potential to confuse a jury does not outweigh the probative value of expert witness testimony. In this case, without the expert's testimony on this issue the jury either misunderstood or was confused about the question on ethics and its irrelevance in this case and petitioners were further damaged as a result. The court's decision not to allow expert testimony on ethics violated the rules of evidence on expert witness testimony. Lack of testimony on ethics was prejudicial to plaintiff and affected the jury's verdict. One Motion to Dismiss and four Final Summary Judgment Motions have been filed in this malpractice case. The court has ruled in plaintiff's favor all five times. Petitioner is seeking a new trial.

⁷ Assisting the jury: Rule 702 of the Supreme Court Rules of Evidence permits expert witnesses to offer opinion testimony when the proposed testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue."

b. But for the constitutional error, no reasonable jury would have found in favor of defendants.

The trial court ruled in favor of plaintiffs five (5) times prior to the trial. Petitioner asserts that the jury's unfavorable verdict should be vacated because the court's refusal to allow the expert's testimony in this legal malpractice case confused the jury, and violated petitioner's rights and a fair trial. The jury misunderstood the instruction on ethics, was confused by it or was misled by the instruction and treated it as a relevant to this case instruction. The jury speculated that since the attorney was not found to have violated any ethics rule the attorney is not liable for any damages the plaintiffs' had suffered. The jury's speculation resulted in an unfavorable verdict. Petitioner suffered irreparable harm as a result. An explanation by plaintiff's only expert would have produced different results.

The instruction given to the jury by the Defendants stated:

Defendants' Proposed Instruction No. 22
RULES DO NOT PROVIDE BASIS FOR CIVIL LIABILITY

"The Florida Rules of Professional Conduct are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability, which is what you are called upon to decide. Moreover, violation of a Rule does not itself give rise to a civil cause of action and it does not create any presumption that a legal duty has been breached."

Had the jury understood the Florida Bar's Ethics violation rules the outcome of this case would have been different. The jury's misunderstanding to this jury instruction on ethics became obvious in the chain of events that followed:

At the beginning of the jury's deliberation, the jury submitted a question to the court asking the following,

Question: "We need the 1st response letter from the Florida Bar to Kathy A."

Answer: "Check the front sleeve of the defense binder- should be #96."

On October 28, 2008, in the Florida Bar's response to Mrs. Alexopoulos complaint which she had filed against attorney Goldsmith and his law firm the Florida Bar found that the attorney had *not violated any ethics rule* because "... the matter had been settled and the filing of the petition would have been moot..."

Immediately after the response letter (from the Florida Bar to Kathy Alexopoulos) was provided to the jury, the jury returned a verdict in favor of defendants. Without any doubt the jury misunderstood the ethics instruction and the jury's misunderstanding contributed to the verdict in favor of defendants. The jury decided that since the Florida Bar found that the attorney did not violate any ethics rule, the attorney was not liable to his clients and the jury did not have to deliberate further. Petitioner's constitutional right to a fair trial was violated. *Buster v. Newkirk*, 20 Johns (N.Y. Sup. Ct. 1822). Had the court permitted the expert to give his opinion in evidence, then the jury could have decided whether any, and if any what, weight is to be given to the expert's testimony; the results of the trial would have been different. The trial court erred by excluding relevant expert testimony regarding ethics violations and its irrelevance in this case. In *Ike J. White III v. Dait A. Beeks, M.D.*, (TN Supreme Court, 2015), (The trial court granted the doctor's motion to limit the patient's expert witness testimony to only those risks that allegedly materialized and injured the patient. The jury returned a verdict in favor of the doctor. In a divided opinion, the Court of Appeals affirmed the trial court's exclusion of the expert medical testimony. The Supreme Court held that the trial court erred by excluding expert testimony regarding undisclosed medical risks that had not materialized. Because this error, more probably than not, influenced the jury's verdict, the patient is awarded a new trial).

In *Bergstrom v. Associates for Women's Health* 388 P.3d 1241 (OR 2017) the Appellate Court determined that (the exclusion of Dr. Rice's expert testimony was prejudicial. Since Dr. Rice's expert testimony, if admitted, could have changed the verdict, the court ruled that the

exclusion of that testimony substantially affected Lydia's right to a fair trial. Accordingly, the court of appeals reversed the judgment and ordered a new trial). In *Butler v. P'ship* 80 A. 3d 298 (MD 2013), the Supreme Court ruled that (the court abused its discretion in excluding results of exterior lead testing as a discovery sanction and noting that such a test "constitutes a crucial piece of evidence in a lead paint case, capable of making or breaking the plaintiff's case"). In this case, it is difficult to assess the effect of the error, which error, more probably than not, affected the jury's verdict. Petitioner is seeking a new trial, because the jury might have relied on the irrelevant ethics question.

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III. THE DISTRICT COURT'S DECISION AFFIRMING BOTH THE NON FINAL AND FINAL JUDGMENT ORDER CREATES CONFLICTS WITHIN THE COURT, OTHER DISTRICT COURTS OF APPEALS AND SUPREME COURTS.

Plaintiff filed a timely notice of appeal from the non final and the final judgment and ordered from the court reporter transcripts of parts of the trial proceedings not already on file that plaintiff considered necessary. Plaintiff paid for transcripts from four different trial dates. Plaintiff asked the defendants to supplement the record with transcripts they had already ordered from the court reporter during trial. The entire trial transcript of all six trial dates would cost plaintiff over \$16,000. Plaintiff could not pay for the entire transcript. Plaintiff shared with defendants she would appeal the non final but appealable emotional distress order and errors in jury instructions from the trial and provided a list of the transcripts she had ordered and paid. Defendants refused to provide any transcripts to supplement the record on appeal. As a result, plaintiff limited the issues she could bring on appeal.

The defendants could but did not designate any additional parts as necessary to be included on appeal, where the plaintiff had designated only certain transcripts. Defendants had

knowledge of what was to be included on appeal and could advise plaintiff more was necessary to be included or could bring it to the attention of the court. Defendants are all very experienced appellate attorneys. Had defendants asked for more, plaintiff could ask the court for permission to supplement the record on appeal with a narrative of other parts of the trial proceedings.

a. By affirming, based on no duty owed or special relation existed with clients, the District Court created conflict:

In *Wallace v. Ed Dean*, Sheriff of Marion County, 3 So. 3d 1035 (Fla. Supreme 2009) the Supreme Court ruled that: [i]n every situation where a man *undertakes to act*, or to pursue a particular course, he is under an implied legal obligation or duty to act with *reasonable care*, to the end that the person or property of others may not be injured by any force which he sets in operation, *or by any agent for which he is responsible. If he fails* to exercise the degree of caution which the law requires in a particular situation, *he is held liable for any damage that results to another*, just as if he had bound himself by an obligatory promise to exercise the required degree of care.... [E]ven "where a man interferes *gratuitously*, he is *bound to act in a reasonable and prudent manner according to the circumstances and opportunities of the case.*".

⁸ Appellant provided adequate transcripts sufficient for appellate review on the emotional distress/impact rule non final order, and the trial errors on final judgment order. The plaintiff included in the record on appeal: 5, 216 pages of records filed with the clerk of the court, 221 trial exhibits, and 269 pages of transcripts. In the appellant's initial brief there were over 133 cross references to the record.

(Goldsmith's clients) the Florida Bar stated that the attorneys did not violate any ethics rules.

Respondents objected to Petitioner's questioning on the ethics⁶ violations. The trial judge sustained the objection. Both Florida State and Federal Rules of Evidence allow experts to testify on all issues with the exception of questions of law. In *Devin v City of Hollywood*, 351 So. 2d 1022 (4DCA, 1976) Case No. 75-570, and in *Consolidated Mutual Insurance Company v. Ramy*, 238, So. 2d 431 (FL App 3 DCA, 1950), CASE No. 70-3, 70-4, the courts rejected the experts testimony as been based on the interpretation of a statute which is a question of law for the courts to decide.

The trial court made an error in disallowing Mr. Baron's expert testimony that was relevant and would have been helpful to the jury. The expert was qualified to testify competently regarding the matters he indented to address, his testimony was reliable and his testimony would have assisted the trier of fact through his specialized expertise to understand the evidence or to determine the facts. What the expert attempted to explain to the jury was relevant and was not prejudicial, because he attempted to explain that the question on ethics violations was irrelevant to this case. Such knowledge would have assisted the jury to understand that the Florida Bar's findings were irrelevant to this case. The Florida Bar's findings did not matter. Disallowing the expert's testimony was an error that decided the entire case and contributed to the verdict. Petitioner was harmed as a result.

⁶ Ethics are moral values and standards that indicate to members of the legal profession how they should act. Laws are rules and regulations that mandate certain behaviors and punish offenders who violate those regulations.

necessity assume that the essential allegations of the Bill of Complaint were proved by competent testimony. The Fourth District's Court of Appeals affirming is in conflict with the McClosky v. Martin opinion of the Florida Supreme Court. The appellant in the Alexopoulos case provided sufficient transcripts, exhibits and the entire record filed with the court over the past ten years to support appellate review.

In *Troutman v. Couture*, 124 So. 443 (Fla. Supreme 1929) Florida's Supreme Court affirmed and stated that: The transcript of the record contains no testimony and the legal assumption is that the evidence supports the findings and decree of the court.

In *South Florida Apartment Association, Inc. v. Dansyear*, 347 So. 2d 710 (3DCA 1977) the court affirmed for failure to include transcript and the court stated: The appellant has failed to include a transcript of this testimony in the record on appeal.

In *Gleim v. Gleim*, 176 So. 2d 610, (3rd DCA 1965) the court affirmed for failure to include transcript and ruled that: The defendant has failed to provide this court with a transcript of the testimony and we are unable to review and determine the sufficiency of the evidence.

In *Belfield v Lochner*, 162 So. 2d 668 (2DCA, 1964) the court affirmed for failure to include a transcript. The court ruled that: ... we have before us no transcript of the testimony considered and utilized by the chancellor, but the record consists only of plaintiffs' complaint, defendants' answer, the pretrial order, the opinion, and the final decree of the court.

In *Pan American Metal Products Co., Inc. v. Healy*, 138 So. 2d 96 (3DCA 1962) Case No. 61-681, the court affirmed for failure to include a transcript. The court stated: Inasmuch as the question sought to be reviewed is necessarily a mixed question of law and fact, failure to include the transcript is fatal. Under such circumstances the chancellor must be affirmed.

In this case, appellant provided the Fourth District Court of Appeals with all necessary parts of the record to support appellate review.

a. **By affirming, based on disallowing testimony from plaintiff's only expert witness, the district court created conflict:**

In *Ribeiro v Rhode Island Eye Institute* (May 2016), the R.I. Supreme Court ruled that: it was error to exclude expert testimony "better jury confusion than expert testimony exclusion" and ruled that plaintiff was entitled to a new trial on all issues in its medical malpractice case. The court found that the potential to confuse a jury does not outweigh the probative value of expert witness testimony.

In *Ike J. White III v. Dait A. Beeks, M.D.* (TN Supreme Court, 2015), the Supreme Court reversed the lower courts' decision to disallow the testimony of plaintiff patient's expert witness. The District Court of Appeals involved a question of whether the trial court properly limited a medical expert's testimony at trial regarding the standard of care in an informed consent health care liability action. The defendant had filed a motion in limine seeking to limit the testimony of the plaintiff's expert at trial regarding risks that should have been disclosed to the plaintiff to only those risks that actually resulted in injury. The trial court granted the motion. A jury trial was held, and the jury found in favor of the defendant. Plaintiff appealed, asserting that the trial court committed reversible error when it restricted the ability of the plaintiff's medical expert to testify about other known risks. The District Court affirmed. The Supreme Court reversed.

In *Santos Wrestling Enterprises v. Perez*, 367 So. 2d 685 (3 DCA 1979) the District Court of Appeals ruled that: the hypothetical question and the medical records formed an adequate predicate for appellants' expert witness to render an opinion ... Therefore, because his opinion was crucial to appellants' case, the trial court erred in excluding his opinion.

In *Pascual v Dozier*, 771 So. 2d 552 (3DCA 2000) the District Court of Appeals ruled that: the trial court improperly excluded the testimony of defendant's expert medical witnesses, thus preventing defendant from presenting any evidence to support his argument that the subject accident was not the cause of plaintiff's injuries.

In *LoBue v. Travelers Ins. Co.*, 388 So. 2d 1349 (Fla. 4th DCA 1980) the District Court ruled that: it was error to exclude expert witness whose testimony was essential to party's case, noting that the right to present evidence and call witnesses is perhaps the most important due process right of a party litigant. In this case, plaintiff's expert witness (Mr. Baron) was the only expert witness who testified for Plaintiff. His testimony was essential to appellant's case.

CONCLUSION

The Petitioner requests that the Court grant the petition for writ of certiorari.

Dated: May 5, 2019

Respectfully Submitted,

“s/”Ekaterini Alexopoulos

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