No. 19-5437

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In The
Supreme Court of the United States

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EKATERINI ALEXOPOULOS
Petitioner,
vs.
STEVEN GOLDSMITH P.A.,
and STEVEN M. GOLDSMITH,
Respondents.

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

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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and STEVEN M. GOLDSMITH

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QUESTIONS PRESENTED

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).

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INTRODUCTION

This case presents a purely factual series of complaints by the Petitioner, none of which implicate a Federal question, constitutional provision, United States Code provision or other Federal law. The Florida trial court did not pass on or rule on any Federal question or matter of law, and the Petitioner, proceeding *pro se* did not pose any such questions, or assert any Federal legal issues.

Similarly, Petitioner did not frame any Federal questions, argue any United States Constitutional provisions or violation of such rights in the proceedings below. The same is true of Petitioner's arguments advanced in the intermediate appellate court. Petitioner can not now attempt to create a basis for the Court's exercise of its certiorari jurisdiction by simply quoting Amendments V and XIV to the United States Constitution. None of the rulings in the underlying legal malpractice trial court proceedings, nor the proceedings in the intermediate court of appeal involved Supreme Court Rule 10 considerations.

The Petition for issuance of a writ of certiorari does not comply with Supreme Court Rule 14(g)(i) in that it does not state when the federal question(s) sought to be reviewed were raised; the method or manner of raising them; pertinent quotations of portions of the record where the federal issue or matter appears. The reason that the Petition does not comply with this requirement is that no such issues involving Federal questions ever occurred or were passed upon in the Florida state trial and intermediate appellate court proceedings below. Hence, with no Federal question timely and properly raised below, this Court has no jurisdiction to review the judgment on a writ of certiorari. U.S.Sup.Ct.Rule 10, 14.

Respondents herewith point out to the Court that they object to Question 1 presented by Petitioner as the Florida Fourth District Court Of Appeal is not an evidentiary court, but an intermediate appellate court. It did not exercise discretion to exclude trial testimony regarding The Florida Rules Of Professional Conduct; rather, the trial court made that evidentiary ruling during the trial proceedings. Petitioner never argued or mentioned Federal Rule of Evidence 702, nor does that rule appear in her submissions to the Florida appellate court. The underlying legal malpractice action was a state court proceeding, tried before a jury in the Seventeenth Judicial Circuit Court in and for Broward County, Florida. Those proceedings were governed by the Florida Rules of Evidence found in Florida Statutes Chapter 90, and pursuant to the Florida Rules Of Civil Procedure, and Florida general law. There were no Federal questions, rules or statutes passed upon by the trial court or the intermediate appellate court. To the extent that Petitioner explicitly or implicitly states that she put forth any federal question issues for determination by the trial court and intermediate state appellate court, the same constitutes a misstatement of fact and law in the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner filed her legal malpractice suit in 2010 (A155-65). While briefly represented by counsel in 2015, Petitioner filed her Amended Complaint asserting claims against the Respondents of legal malpractice, breach of fiduciary duty and breach of contract (A163-73). Thereafter, Petitioner proceeded *pro se.*

The case was set for jury trial in October 2017 (A65-102). The Respondents filed their motion in limine to strike testimony and exhibits related to emotional damages (*Id*.). That motion came on to be heard on October 16, 2017 (A71-72). Petitioner explained that her husband was so angry with her over the loss of their restaurant business and the settlement of their landlord tenant

dispute with Target Corporation, that "he marched into the office where I was and he beat the craps out of me, and he did that for five (5) months continuously." (A71-73). The trial court granted the motion in limine and excluded evidence regarding Mr. Alexopoulos physically beating and abusing his wife, the Petitioner, and any related emotional damages related thereto (A73). The trial court excluded any such evidence and testimony based on the "impact rule," the absence of causation and the fact that there was no claim for emotional distress (*Id*.).

The Respondents filed their proposed verdict form and their proposed jury instructions (A72). There was a joint pre-trial stipulation filed, but it was not signed by Petitioner (A72). The explanation set forth the facts and issues to be resolved at trial according to the Respondents (A72-73):

a. This is an alleged malpractice action brought by the Plaintiff against the Goldsmith Defendants after she settled an underlying commercial eviction lawsuit, wherein Target Corporation sought to evict its tenant, Homori, Inc., a company in which Plaintiff was a shareholder ("Target Lawsuit"). After the Plaintiff's first four law firms either withdrew or declined to represent her and another lawyer was ready and willing to represent Plaintiff in the Target Lawsuit, who Plaintiff declined to hire, on March 17, 2008, the Plaintiff hired the Goldsmith Defendants for the limited purpose of preparing a Writ of Certiorari ("Writ") to seek review of the trial court order denying Plaintiff's repeat Motion for Continuance in the Target Lawsuit. While the Goldsmith Defendants were working on the Writ, the Plaintiff, by and through her other lawyer, Salome Zikakis, Esq. negotiated and settled the

> Target Lawsuit, with Target's attorney, Marc Gottlieb, Esq. Plaintiff alleges the Goldsmith Defendants did not timely file the Writ of Certiorari and that caused her to settle the Target Lawsuit and incur damages. The Goldsmith Defendants deny that they acted improperly and allege the Plaintiff had other counsel, Salome Zikakis, Esq., who represented her when she decided to settle the Target Lawsuit prior to the deadline for the Writ of Certiorari to be filed. The settlement of the underlying landlord tenant eviction proceeding, mooted the appeal on which Mr. Goldsmith was working. This dispute is what you will be asked to resolve.

Thereafter, the case proceeded to jury trial, with voir dire and the jury being sworn on October 24, 2017 (A73). The trial continued on October 25, 26 and 27, and then into the following week on October 31, with a resulting complete defense verdict in favor of the Respondents on November 1, 2017 (A73).

Petitioner filed her motion for new trial (A73) and an amended one (A73). The trial court denied Petitioner's Amended Motion For New Trial (*Id*.). The trial court entered Final Judgment for the Respondents, from which Petitioner filed the instant appeal (*Id*.).

Absent from this record on appeal below was the entire transcript of trial proceedings relating to the Rule 1.470 charge conference, jury instructions, the verdict form and any record of Petitioners' objections (assuming there were any) and agreements to the jury instructions and verdict form as discussed during the charge conference, and then created, read and given to the jury, and various witnesses' (fact and expert) testimony (A73).

Petitioner appealed the complete defense verdict to the Florida Fourth District Court Of Appeal (A1-6). The Respondents argued that the Petitioner's failure to bring a complete record on appeal of the trial proceedings precluded meaningful appellate review. (A74-75) There is no

transcript of the trial proceedings relating to the Florida Rule of Civil Procedure 1.470 charge conference, the jury instructions, the verdict form and of Petitioner's objections (assuming there were any) and agreements to the jury instructions and verdict form as discussed during the charge conference, and then created, read and given to the jury (A74-75).

Thus, Petitioner failed to demonstrate reversible error on any of the bases she argued in Points I, II, III, IV and V in the appeal below, as they complain of erroneous jury instructions and verdict form, and inconsistent positions allegedly taken by Respondent. Petitioner offered only portions of the trial testimony of some witnesses, but not all the various witnesses and none of Respondents' experts' testimony (*Id*.). Without the factual content of the other witnesses' testimony and the related evidence, it was impossible to determine the sufficiency and propriety of the jury instructions and verdict form (*Id*.). Accordingly, the affirmative was correct.

Respondents are not responsible for the beatings and emotional distress visited on Petitioner, by the hand of her abusive husband, Konstantinos (A74-75). While certainly sad and reprehensible, those facts do not support imposition of liability on Respondents, who had no duty to prevent the misconduct of a third person from harming another (A74-75). Florida courts have long been loathe to impose liability based on a defendant's failure to control the conduct of a third party (A74-75). In determining the duty of care concerning misconduct of third persons, the courts have carved out limited exceptions where such a duty might arise: i.e., where the defendant is in actual or constructive control of: (1) the instrumentality; (2) the premises on which the tort was committed; or (3) the tortfeasor (74-75; 87-93). None of those limited exceptions apply to the case at bar, in the context of the rendition of legal services involving a writ of certiorari, where the necessity of filing the writ of certiorari was mooted by Petitioner's settlement of the underlying landlord tenant litigation with Target Corporation (A87-93).

Respondents had no "special relationship" with either Petitioner nor her husband Konstantinos Alexopoulos, so as to become legally responsible for the beatings the husband administered to his wife (A87-93).

In the context of the rendition of legal services, the only circumstance in which emotional distress damages may be awarded to the client, as an exception to the "impact rule" is where the client is left incarcerated due to the malfeasance of the attorney (*Id.*) That exception does not apply on these facts, and Petitioner has demonstrated no overriding public policy concern to expand this area of tort liability to include physical and emotional damages caused by domestic abuse (*Id*.). After briefing (A7-64, 65-102, 123-140), the appellate court issued its per curium affirmance of the lower tribunal proceedings (A141), refused to issue a written opinion, and denied rehearing (A153).

Unable to invoke the discretionary jurisdiction of the Florida Supreme Court, Petitioner has filed the instant petition for writ of certiorari in this Court.

REASONS TO DENY THE PETITION

I. There Is No Federal Question Of Law Or Constitutional Issue Implicated By The Per Curium Affirmance Of The Lower Court Proceedings.

At a minimum, it is essential that there be Supreme Court Rule 10 considerations to support the Court's exercise of certiorari jurisdiction, and there are none presented in the Petition, nor in the proceedings below. Therefore, there is no basis for the Court to exercise jurisdiction over this matter under 28 U.S.C.A. §1257.

Indeed, a careful review of the submissions at the Fourth District Court Of Appeal For the State of Florida reveals there was no Federal treaty or statute drawn into question; there was no state statue drawn into question on federal grounds; and there was no title, right, privilege or immunity specially set up or claimed under federal law. *See* 28 U.S.C.A. §1257. It is clear that neither the trial court, nor the Fourth District Court Of Appeals for the State of Florida ever considered any question of Federal law.

Petitioner did not argue in the trial court, nor in her briefs filed in the Florida Fourth District Court Of Appeal the issue of exclusion of her expert's theoretical testimony regarding the Florida Rules of Professional Conduct. Generally, in Florida, the Rules Of Professional Conduct do not set the standard of care and therefore are not probative of legal malpractice. The Preamble of the Florida Rules of Professional Conduct provides:

> **Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached.** In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules 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.**

> **Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons.**

(emphasis added). *See also Beach Higher Power Corp. v. Rekant*, 832 So. 2d 831, 833 (Fla. 3d DCA 2002). Further, the Court in *Greenwald v. Eisinger, Brown, Lewis & Frankel, P.A.*, 118 So. 3d 867, 871 (Fla. 3d DCA 2013) held that the preamble language and caselaw does not mandate the admission of "any rule of professional conduct claimed to have been violated by a defendant." *Id*. "[R]ather, the decision to admit or exclude such evidence remains vested in the broad discretion of the trial court, and will not be disturbed absent an abuse of that discretion." *Id*. (*citing Hendry v. Zelaya*, 841 So. 2d 572, 574 (Fla. 3d DCA 2003). The *Greenwald* court stated: "[t]his discretion may be exercised, generally, to balance the probative value against the danger of unfair prejudice, *see* § 90.403, or, more specifically here, to ensure the Rules of Professional Conduct are not "subverted when they are invoked by opposing parties as procedural weapons." R. Regulating Fla. Bar 4—Preamble." 118 So. 3d at 871.

Not having raised the issue in the proceedings below, Petitioner can not seek certiorari review of this uniquely Florida state issue for the first time in this Court. See generally *Taylor v. Freeland & Kronz*, 112 S.Ct. 1644, 1649 (1992) (Supreme Court would not consider argument raised for first time in opening brief on merits, which had not been raised or resolved in lower courts, absent showing of unusual circumstances.) This Florida evidentiary issue regarding the trial court's exercise of discretion regarding admissibility of expert testimony regarding standard of care in a legal malpractice action is not an important Federal issue which would support this Court's exercise of its certiorari jurisdiction.

II. The Florida Intermediate Appellate Court's Affirmance Does Not Create Any Conflict In Florida or Federal Law Supporting Certiorari Review.

With no written opinion, there can not be a conflict of law on the same issue in the lower level state courts, or elsewhere. There can not be any conflict within the Federal courts either because there is no written opinion to create a conflict. The principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning meaning of provisions of federal law. U.S.Sup.Ct.Rule 10.1, 28 U.S.C.A. §1257. *Braxton v. United States,* 111 S. Ct. 1854 (1991). As there are no conflicts created by the per curium affirmance of the trial court proceedings, there is no basis for this Court to exercise its limited certiorari jurisdiction in this case. Indeed, a per curiam affirmance without written opinion, even one with a written dissent, has no precedential value and should not be relied on for anything other than *res judicata*. The Florida Fourth District court of appeal held in *State v. Swartz,* 734 So.2d 448 (Fla. 4th DCA 1999):

> As has been stated countless times before, a per curiam affirmance decision without written opinion has no precedential value and should not be relied on for anything other than res judicata. Without a written opinion, the trial court could only speculate regarding the rationale underlying this court's per curiam affirmance decision.

Id. at 448. *See also Dep't of Legal Affairs v. Dist. Ct. of Appeal, 5th Dist.,* 434 So.2d 310, 311 (Fla. 1983) ("The issue is whether a per curiam appellate court decision with no written opinion has any precedential value. We hold that it does not."). In *Department of Legal Affairs,* the Florida Supreme Court held that a per curiam affirmed "citation from another court has no relevance for any purpose and is properly excluded from a brief or oral argument." 434 So.2d at 312.

There remains no basis for certiorari review in this Court of the Florida Fourth District Court Of Appeals' per curium affirmance of the complete defense verdict in favor of the Goldsmith Defendants in the proceedings at the trial level. With no effect on Federal statutory or constitutional law, there is no implicit or explicit "conflict" set up for resolution in this matter. There is no issue of nationwide importance, for example, involving a substantial constitutional challenge to a federal statute, or a misapplication of Supreme Court precedent.

CONCLUSION

The Petition should be denied.

Dated: October 18, 2019

Respectfully submitted,

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