

No. 19-5477

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IN THE  
**Supreme Court of the United States**

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BRIAN KEITH WAUGH  
Petitioner,

v.

MEDSTAR GEORGETOWN UNIVERSITY HOSPITAL  
Respondent.

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**On Petition for Writ of Certiorari to the  
District of Columbia Court of Appeals**

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**BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

Whether Petitioner's obligation to provide pre-suit notice pursuant to D.C. Code § 16-2802 was excused under § 16-2804 and D.C. Superior Court Rule 15(c).

Whether D.C. Code § 16-2804(b), which permits a court to waive the pre-suit notice requirement in the interests of justice, applies to toll the statute of limitations.

## CORPORATE DISCLOSURE STATEMENT

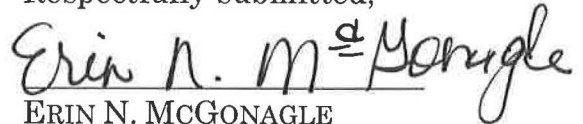
Pursuant to Supreme Court Rule 29.6, Respondent provides the following disclosures;

1. There is no publicly held company that owns 10% or more of the stock of MedStar Georgetown University Hospital. MedStar Georgetown University Hospital is a District of Columbia corporation.

2. MedStar Georgetown University Hospital is a District of Columbia corporation. The parent corporation of MedStar Georgetown University Hospital, formerly known as Medlantic Healthcare Group, Inc., is MedStar Health, Inc., a not for profit, non-stock membership corporation, and a 501(c)(3) charitable organization.

Dated: September 5, 2019.

Respectfully submitted,



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## STATEMENT OF THE CASE

This is a medical malpractice action arising out of care provided to Petitioner Brian Waugh (“Mr. Waugh”) at MedStar Georgetown University Hospital (“MGUH”). On November 22, 2017, Mr. Waugh filed a Complaint in the Superior Court of the District of Columbia for care he received on September 7-8, 2014, over three years before he filed suit. See District of Columbia Superior Court Public Docket, Case No. 2017 CA 007831, Appendix A. He alleged a nurse inserted a needle into his arm resulting in a tingling sensation. See First Complaint, Appendix B. He attempted to state six causes of action: (1) discrimination by disparagement of healthcare; (2) unnecessary pain, suffering, and bodily injury; (3) negligent infliction of emotional distress; (4) intentional infliction of emotional distress; (5) loss of the sense of freedom in seeking healthcare; and (6) sense of loss of safety and wellbeing in seeking healthcare. See id.

On December 27, 2017, MGUH filed its Motion to Dismiss. See Motion to Dismiss, Appendix C. MGUH argued Mr. Waugh’s claims were time barred because he filed suit more than three years after the alleged hospital visit. See id. MGUH also argued that the court lacked subject matter jurisdiction because Mr. Waugh did not provide pre-suit notice pursuant to D.C. Code § 16-2802(a). See id. Finally, MGUH analyzed each of the six counts in Mr. Waugh’s Complaint and argued how they failed to state legally recognized causes of actions and/or were not sufficiently pled. See id.

Mr. Waugh filed an Amended Complaint and a Consent Motion to Extend Time to File an Opposition to MGUH’s Motion to Dismiss on January 16, 2018. See

Amended Complaint, Appendix D. MGUH filed a Motion to Dismiss the Amended Complaint on February 6, 2018, again arguing Mr. Waugh's claim was time barred and that he had failed to provide pre-suit notice. See Motion to Dismiss Amended Complaint, Appendix E. Mr. Waugh opposed MGUH's Motion to Dismiss the Amended Complaint on February 20, 2018. See Opposition to MGUH's Motion to Dismiss Amended Complaint, Appendix F. MGUH filed its Reply on February 21, 2018. On February 23, 2018, Judge Rigsby issued an Order dismissing Mr. Waugh's Amended Complaint. See Omnibus Order, Appendix G. Judge Rigsby held Mr. Waugh had failed to file his Complaint within the three-year statute of limitations, established by D.C. Code § 12-301(8), and that Mr. Waugh failed to provide MGUH with pre-suit notice as required by D.C. Code § 16-2802. See id.

Mr. Waugh filed a notice of appeal to the D.C. Court of Appeals on March 23, 2018. MGUH filed a Motion for Summary Affirmance on April 24, 2018. In response, Mr. Waugh filed a Motion for Summary Reversal on April 30, which the court treated as a cross-motion. See Motion for Summary Reversal, Appendix H. On June 14, 2018, the appeals court denied MGUH's Motion for Summary Affirmance and Mr. Waugh's Motion for Summary Reversal. The appeals court granted Mr. Waugh's request to treat his Motion for Reversal as his appeal brief. MGUH filed a responsive Brief and Appendix on July 16, 2018. See Appellee Brief, Appendix I. Mr. Waugh never filed a reply brief.

The Court of Appeals affirmed the trial court's dismissal on March 14, 2019. See Opinion, Appendix J. In so doing, the appellate court rejected Mr. Waugh's



argument that a complaint filed after limitations expired, but within 90 days of such expiration, was eligible for the limitations extension provided by D.C. Code § 16-2803. See id. The court reasoned that Mr. Waugh's construction of D.C. Code §§ 12-301(8) and § 16-2803 impermissibly invalidated the limitations period set forth in § 12-301(8). See id.

The court also affirmed dismissal on the basis of Mr. Waugh's failure to provide pre-suit notice. See id. The court flatly rejected Mr. Waugh's argument that the Complaint itself constituted pre-suit notice. See id. The court also held that Mr. Waugh had not provided notice to MGUH by faxing his complaints to the D.C. Department of Health. See id. This communication failed to inform the defendant, MGUH, of any potential suit. See id. Mr. Waugh's Petition for Rehearing En Banc was denied on May 6, 2019. See Order Denying Rehearing *en banc*, Appendix K.

Mr. Waugh filed a Petition for a Writ of Certiorari in this Court on August 6, 2019 asking this Court to address the state law claims at issue herein.<sup>1</sup> See Petition, Appendix L. This Court should deny the Petition.

## REASONS TO DENY THE PETITION

### I. THE DISTRICT OF COLUMBIA'S STATUTE OF LIMITATIONS AND STATUTE REQUIRING PRE-SUIT NOTICE FOR MEDICAL MALPRACTICE ACTIONS DO NOT MERIT REVIEW BY THIS COURT.

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<sup>1</sup> Mr. Waugh is no stranger to this Court. He filed three other Petitions which this Court denied. See Waugh v. Anheuser-Busch InBev, 135 U.S. 26, petition for cert. denied (Aug. 11, 2014) (No. 13-9528); Waugh v. Anheuser-Busch InBev, 132 U.S. 794, petition for rehearing denied (Nov. 28, 2011) (No. 11M45); Waugh v. Southeastern Gun Co., 133 U.S. 136, petition for cert. denied (Oct. 1, 2012) (No. 11-1026).

The issues raised in Mr. Waugh's Petition for Writ of Certiorari do not invoke federal question jurisdiction. Mr. Waugh's first issue is grounded in the District of Columbia's Medical Malpractice Act, codified at D.C. Code §§ 16-2801 – 2804 (the "Act"). The Act has never been addressed – or even cited – by a federal circuit court. As such, there is no circuit split regarding this local statute.

Rather, the U.S. District Court for the District of Columbia is the only federal court to have addressed issues arising from the Act. The Act has been cited by only ten reported cases in the U.S. District Court for the District of Columbia. See, e.g., Bradley v. NCAA, 249 F. Supp. 3d 149 (D.D.C. 2017) (denying the NCAA was a healthcare provider under the Act); Smith v. Hendricks, 140 F. Supp. 3d 66 (D.D.C. 2015) (opining that the Act's pre-suit notice requirement could be either jurisdictional or an element of a medical malpractice claim); Brashear v. United States, 847 F. Supp. 2d 41 (D.D.C. 2012) (requiring plaintiffs bringing federal medical malpractice claims against under the FTCA in the District of Columbia to abide by the Act's notice requirement); Carmichael v. West, 880 F. Supp. 2d 28 (D.D.C. 2012) (applying the Act's pre-suit notice requirement to diversity actions in federal courts); Ghee v. Howard Univ. Hosp., Inc., 879 F. Supp. 2d 96 (D.D.C. 2012) (deeming the Act's notice requirement a substantive rule of law); Coleman v. Washington Hosp. Center Corp., 734 F. Supp. 2d 58 (D.D.C. 2010) (holding that plaintiff's failure to provide pre-suit notice defeated subject matter jurisdiction); Hartley v. Dombrowski, 744 F. Supp. 2d 328 (D.D.C. 2010) (applying Maryland rather than District of Columbia law); Smith v. Corrections Corp. of America, Inc., 674 F. Supp. 2d 201 (D.D.C. 2009) (holding the

Act inapplicable to wrongful death claims); Diffenderfer v. United States, 656 F. Supp. 2d 137 (D.D.C. 2009) (barring medical malpractice claim where pre-suit notice was not provided); and Davis v. Grant Park Nursing Home LP, 639 F. Supp. 2d 60 (D.D.C. 2009) (finding the Act's notice requirement was substantive law). None of these cases have raised a federal question about the Act.

Mr. Waugh's second issue is grounded in the District of Columbia's statute of limitations for medical malpractice actions, D.C. Code § 12-301(8). The Supreme Court of the United States has not accepted a petition for writ of certiorari for a case regarding the validity of a state's statute of limitations since 1988. See Clark v. Jeter, 486 U.S. 456 (1988) (finding Pennsylvania's six-year statute of limitations for paternity actions to be an unconstitutional violation of the Equal Protection Clause). There is no federal question implicated by Mr. Waugh's assessment of the District's statute of limitations.

## **II. D.C. CODE § 16-2804(b) APPLIES ONLY TO PRE-SUIT NOTICE AND DOES NOT TOLL THE STATUTE OF LIMITATIONS.**

Mr. Waugh filed his original Complaint over two months after the limitations period expired, which he concedes. See Appendix D at ¶ 4; Appendix H at pages 6-7 ¶ 4. Mr. Waugh asks this Court to find that the "interests of justice waiver" found in D.C. Code § 16-2804(b) of the Medical Malpractice Act, tolls the three-year statute of limitations in D.C. Code § 12-301.<sup>2</sup>

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<sup>2</sup> Mr. Waugh raises this argument here for the first time. In the D.C. Court of Appeals, Mr. Waugh argued that D.C. Code § 16-2802 permitted him to file notice within 90 days after of limitations expired. See Appendix H.

Pursuant to D.C. Code § 16-2804(b), pre-suit notice may be waived “upon a showing of good faith effort to comply *or if the interests of justice dictate.*” D.C. Code § 16-2804(b) (emphasis added). This provision can be used to excuse the failure to provide a defendant with pre-suit notice. No court has ever applied this section to toll the statute of limitations. There is no basis for this Court’s review of this meritless legal theory.

**III. MR. WAUGH’S FAILURE TO PROVIDE PRE-SUIT NOTICE IS NOT EXCUSED UNDER D.C. CODE § 16-2804(a) OR D.C. SUPERIOR COURT RULE 15(C).<sup>3</sup>**

**A. D.C. Code § 16-2804(a) is inapplicable as Mr. Waugh never provided pre-suit notice.**

Mr. Waugh argues pre-suit notice was not required because he filed a new claim in his Opposition to MGUH’s Motion to Dismiss Plaintiff’s Amended Complaint. See Petition at page 3. This theory has no merit.

D.C. Code § 16-2802(a) requires “any person who intends to file an action in the court alleging medical malpractice against a healthcare provider [to] notify the intended defendant of his or her action not less than 90 days prior to filing the action.” No suit shall commence unless this requirement is met. D.C. Code § 16-2802(c). The plain language in the statute creates a condition precedent to filing suit. Tucci v. District of Columbia, 956 A.2d 684, 694 (D.C. 2008) (finding dismissal proper when Plaintiff fails to satisfy condition precedent and provide notice of suit); East River

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<sup>3</sup> Mr. Waugh also raises these arguments for the first time in this Court. In the D.C. Court of Appeals, Mr. Waugh argued that either his Complaint or his fax to the D.C. Department of Health constituted pre-suit notice. See Appendix H.

Const. Corp. v. District of Columbia, 183 F. Supp. 684, 685-86 (D.D.C. 1960) (finding dismissal was appropriate where condition precedent is not pled).

Mr. Waugh's failure to satisfy the statutorily mandated condition precedent to filing suit was a fatal flaw to his right to sue. Mr. Waugh argues that pre-suit notice was not required under D.C. Code § 16-2804(a)(2). He asserts that because he raised a "new claim" of extravasation in his Opposition to MGUH's Motion to Dismiss Plaintiff's Amended Complaint, § 16-2804(a)(2) excuses his pre-suit notice obligation.

Mr. Waugh misapplies the statute. Section 16-2804(a)(2) states the pre-suit notice requirement shall not apply to a "claim that is unknown to the person at the time of filing his or her notice." See D.C. Code §§ 16-2804(a)(2). Presupposing notice was given, the section simply excuses any additional or revisional notice. In the instant case, Mr. Waugh provided no pre-suit notice. See Appendix D at ¶¶ 4-6 (discussing limitations and notice without alleging MGUH was ever given pre-suit notice).

Mr. Waugh was aware of his claim when it developed. Extravasation is the leakage of intravenously (i.e., IV) infused medications. Mr. Waugh's Complaint alleged improper placement of his IV. See Appendix D. The trial court's dismissal Order found as fact that Mr. Waugh knew of his injury when it occurred, referring generally to the facts alleged in Mr. Waugh's Complaint. See Appendix G at page 4. In considering all of Mr. Waugh's allegations, both the trial and appellate courts concluded his failure to file pre-suit notice warranted dismissal of his claim. See Appendix G and J.

**B. The relation back principle does not excuse Mr. Waugh's pre-suit notice obligations.**

Mr. Waugh alternatively argues that he met the pre-suit notice requirement through his Amended Complaint. He relies on D.C. Superior Court Rule 15(c)(C)(i) which "permits a Pleading to serve as Notice." See Petition at page 3.

D.C. Superior Court Rule 15(c) allows amended pleadings to relate back to the original filing so new claims related to the same transaction and occurrence will not be barred in a lawsuit that was otherwise timely filed. See generally, Wagner v. Georgetown Univ. Med. Ctr., 768 A.2d 546, 555 (D.C. 2001). Mr. Waugh filed his Complaint on November 22, 2017, after limitation had expired. Even allowing Mr. Waugh to state a new cause of action for extravasation, and relating it back to his original filing, does not save his lawsuit because the first lawsuit was not timely.

Finally, nothing about the interplay of local rules regarding relation back, limitations, or pre-suit notice implicate any federal question so as to invoke jurisdiction in this court.

**CONCLUSION**

The Petition for Writ of Certiorari should be denied because there is no federal issue for this Court's consideration.

Respectfully submitted

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Dated: September 5, 2019