No. 19-8587

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA) makes the United States liable for certain torts "to the same extent as a private individual under like circumstances" under applicable state law. 28 U.S.C. 2674; see 28 U.S.C. 1346(b)(1). The Illinois Healing Art Malpractice Act, 735 Ill. Comp. Stat. Ann. 5/2-622 (West 2015), requires a plaintiff or his attorney in an Illinois medical malpractice suit to file an affidavit stating that a medical professional has determined "there is a reasonable and meritorious cause" for the litigation. Id. 5/2-622(a)(1).

The question presented is whether the government is entitled to summary judgment if the plaintiff fails to submit a qualifying affidavit in an FTCA action asserting medical malpractice claims arising in Illinois.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Ill.):

Young v. United States, No. 17-cv-946 (Sept. 5, 2018)

United States Court of Appeals (7th Cir.):

Young v. United States, No. 18-3415 (Dec. 30, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 942 F.3d 349. The order of the district court (Pet. App. 14a-18a) and the report and recommendation of the magistrate judge (Pet. App. 7a-13a) are not published in the Federal Supplement but are available at 2018 WL 4217068 and 2018 WL 5904459.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2019. A petition for rehearing was denied on December 30, 2019 (Pet. App. 19a.). The petition for a writ of certiorari

was filed on May 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA) contains a limited waiver of the United States' sovereign immunity and creates a cause of action in tort against the United States for a wrongful act or omission "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Under that cause of action, "[t]he United States shall be liable * * * in the same manner and to the same extent as a private individual," subject to certain exceptions not applicable here. 28 U.S.C. 2674.

2. The Illinois Healing Art Malpractice Act, 735 Ill. Comp. Stat. Ann. 5/2-622 (West 2015), provides that in any action for medical malpractice under Illinois law, a plaintiff or his attorney must file an affidavit declaring that a qualified health professional has reviewed the claim and made a written report that "there is a reasonable and meritorious cause" for filing the action. Id. 5/2-622(a)(1).[1]

Ordinarily, the required affidavit -- which the statute refers to as a "certificate" -- must be filed with the complaint. 735 Ill. Comp. Stat. Ann. 5/2-622(a)(1)-(2). However, if the

[1] All references to Illinois Compiled Statutes are to the West 2015 edition.

plaintiff is unable to consult with a health professional before expiration of an applicable statute of limitations, the affidavit and written report may "be filed within 90 days after the filing of the complaint." Id. 6/2-622(a)(2). Likewise, where the plaintiff has requested records to substantiate his claim and the health care provider has not provided them within 60 days, the certificate and written report may "be filed within 90 days following receipt of the requested records." Id. 6/2-622(a) (3) (discussing "Part 20 of Article VIII" of the Illinois code, which governs receipt of medical records).

"The defendant [is] excused from answering or otherwise pleading until 30 days after being served" with the required affidavit, 735 Ill. Comp. Stat. Ann. 5/2-622(a)(2), unless the defendant's failure to produce requested records is the cause of the plaintiff's inability to provide an affidavit, id. 5/2-622(a)(3). The statute provides that "failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619," id. 5/2-622(g), which governs, among other things, "affirmative" defenses "avoiding the legal effect of or defeating [a] claim," id. 5/2-619(a)(9).

3. Petitioner is a federal prisoner incarcerated at Federal Correctional Institution Greenville (FCI Greenville) in Greenville, Illinois. Pet. App. 7a. Petitioner was diagnosed with cataracts in both eyes and underwent cataract surgery on

his right eye in 2009. Compl. 2. The cataract in his left eye has not been surgically corrected. Compl. 2-3.

Petitioner filed an FTCA suit against the United States in the United States District Court for the Southern District of Illinois, alleging that Bureau of Prisons physicians committed malpractice by failing to authorize or perform surgery to correct the cataract in his left eye. Pet. App. 2a. Petitioner sought to have the cataract surgery performed and requested damages of $62,000. Compl. 7.

In his pro se complaint, petitioner asserted that he had complied with the Illinois certificate requirement, 735 Ill. Comp. Stat. Ann. 5/2-622, because he had consulted with qualified medical professionals. Compl. 5-6. Petitioner also stated that he was waiting on additional medical documentation requested from FCI Greenville Health Services. Ibid. Petitioner subsequently filed three additional documents related to the certificate requirement: the record of his April 4, 2011 examination with Dr. Jeffery Maher; the record from a July 19, 2011 examination with Dr. Maher, in which Dr. Maher recommended cataract surgery; and a November 3, 2008 letter from Dr. Bart Brine recommending cataract removal. Pet. App. 11a-12a.

The government filed a motion seeking dismissal or, in the alternative, summary judgment, on the ground that petitioner's submissions did not satisfy the requirements of Section 5/2-622. D. Ct. Doc. 11 (Jan. 2, 2018). The magistrate judge recommended

that the district court grant the motion, because petitioner's submissions -- while providing evidence of the treatment recommended by two physicians -- did not "reflect a determination on behalf of the providers that this lawsuit is meritorious and reasonable" or "any opinion on the care and treatment [petitioner] received at FCI Greenville." Pet. App. 12a. Because petitioner had "had ample time and opportunity to provide the appropriate documentation pursuant to [Section] 2-622," the magistrate judge recommended dismissal with prejudice. Ibid.

The district court granted the government's motion and dismissed petitioner's FTCA claims with prejudice. Pet. App. 14a-18a. The court explained that the medical records provided by petitioner "do not comply with the letter or spirit of 735 ILCS § 5/2-622(a)" because none of the records indicates "that there was 'reasonable and meritorious cause' for filing a medical malpractice action." Id. at 17a. The court observed that while the authors of the medical records had recommended a different course of treatment than petitioner received, "a doctor's recommending one course does not necessarily imply that a doctor who cho[o]ses another commits malpractice." Ibid.

4. The court of appeals affirmed. Pet. App. 1a-6a. It held that the requirement of Section 5/2-622(a) that a plaintiff support his claim with a report from a health professional "applies to malpractice litigation in federal court because §5/2-622 is a substantive condition of liability." Id. at 2a.

In doing so, the court of appeals recognized that not every aspect of Section 5/2-622(a) applies in federal court. It explained that under this Court's decision in Shady Grove Orthopedic Associates, P. A. v. Allstate Insurance Co., 559 U.S. 393 (2010), among others, it is well established that "federal, not state, rules apply to procedural matters * * * in all federal suits." Pet. App. 4a (citation omitted). Accordingly, Section 5/2-622 "applies in federal court to the extent that it is a rule of substance; but to the extent that it is a rule of procedure it gives way to Rule 8 [of the Federal Rules of Civil Procedure] and other doctrines that determine how litigation proceeds in a federal tribunal." Ibid. (emphases omitted). The court of appeals noted, for example, that because Rule 8 "specifies what a complaint must contain" and "does not require attachments," a complaint in federal court could not properly be dismissed for failure to attach a certificate or report called for by Section 5/2-622. Ibid. Likewise, because Rule 12(a)(1) governs when an answer is due in federal court, the court concluded that the provisions of Section 5/2-622 purporting to excuse a defendant from answering a complaint until a certificate and report have been filed would not apply in federal litigation. Id. at 5a.

The court of appeals acknowledged that in a prior decision addressing the application of Section 5/2-622 in federal court, the litigants had assumed that the certificate and report would

need to be filed with the federal complaint, and the court of appeals in that case had not suggested otherwise. Pet. App. 3a-4a (discussing Hahn v. Walsh, 762 F.3d 617 (7th Cir. 2014), cert. denied, 135 S. Ct. 1419 (2015)). But the court in this case emphasized that the earlier decision "did not produce a holding on that topic," and concluded -- "having [now] given the matter some thought" -- "that a complaint in federal court cannot properly be dismissed because it lacks an affidavit and report under §5/2-622." Ibid. Instead, the court held that the appropriate mechanism by which to give effect to the substantive component of Section 5/2-622(a) is a motion for summary judgment. Id. at 5a.

Construing the district court's order as a grant of the government's alternative request for summary judgment, the court of appeals concluded that the district court had correctly determined that petitioner did not satisfy the certificate requirement because the records he submitted did not indicate that petitioner's doctors had determined that there was a "reasonable and meritorious" basis for filing suit. Pet. App. 5a-6a (citation omitted).

Petitioner filed a petition for rehearing and rehearing en banc, arguing for the first time that he should not have been required to comply with Section 5/2-622 when he filed his FTCA complaint. Pet. C.A. Reh'g Pet. 7-11. The court of appeals

denied the petition, with no judge calling for a vote. Pet. App. 19a.

ARGUMENT

The court of appeals held that the United States was entitled to summary judgment because petitioner failed to satisfy the substantive requirements of Section 5/2-622. That decision was correct, and does not conflict with the decision of any other court of appeals. No further review is warranted.

1. State law is "the source of substantive liability under the FTCA." Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 478 (1994). Procedural requirements in FTCA suits, by contrast, are governed by the Federal Rules of Civil Procedure or, with regard to some requirements, by the FTCA itself. See Pet. App. 4a; see also, e.g., Gallivan v. United States, 943 F.3d 291, 294 (6th Cir. 2019) ("Rule 1 states that the Federal Rules apply in basically all civil actions in federal court (the few exceptions are not relevant here). A FTCA action is a civil action in federal court. So the Federal Rules apply.").

As the court of appeals correctly recognized, therefore, "Section 5/2-622 applies in federal court to the extent that it is a rule of substance, but to the extent that it is a rule of procedure it gives way to * * * doctrines that determine how litigation proceeds in a federal tribunal." Pet. App. 4a (emphases omitted). For example, Section 5/2-622(a)(1) requires

litigants to "attach[]" an "affidavit and report to [a] complaint unless an exception applies." Id. at 3a. That requirement is procedural, and is accordingly inapplicable in federal court, where "Rule 8 of the Federal Rules" instead "specifies what a complaint must contain" -- and "does not require attachments." Id. at 4a.

The court of appeals correctly determined, however, that Section 5/2-622 also contains a substantive component that applies in suits under the FTCA. Pet. App. 2a. The core requirement of Section 5/2-622 is that a plaintiff seeking to prove medical malpractice must support his claim with a "written report" from a "health professional" attesting that "a reasonable and meritorious cause for the filing of [a malpractice] action exists." 735 Ill. Comp. Stat. Ann. 5/2-622(a)(1); see Pet. App. 1a-2a. That underlying "substantive condition of liability" does not disappear when a plaintiff sues in federal rather than state court. Pet. App. 2a. Instead, federal courts give it effect through the appropriate federal procedures -- specifically, as the court of appeals recognized, the summary judgment procedures established by Rule 56. See id. at 5a-6a.

Here, in moving for summary judgment, the United States put petitioner "on notice of the need for an affidavit and report." Pet App. 5a. Petitioner never suggested that he could obtain the necessary support for his claim if given additional time,

however; instead, he "argued that two physicians' recommendations in favor of surgery sufficed." Ibid. But as the district court concluded and petitioner no longer disputes, those submissions did not meet the requirements of Section 5/2-622 in "letter or spirit." Id. at 17a. Accordingly, because petitioner failed to present sufficient evidence in support of his claim, the United States was entitled to summary judgment. Id. at 5a-6a.

2. Petitioner argues that the court of appeals erred in construing Illinois law and failing to consider certain asserted conflicts with the Federal Rules. None of these alleged errors merits further review.

a. Petitioner principally contends (Pet. 6, 10) that Illinois courts have characterized Section 5/2-622 as "'a pleading requirement * * * not a substantive defense,'" and that the imposition of "a heightened pleading standard" in medical-negligence claims conflicts with Federal Rules 8 and 9. Pet. 6 (quoting Schroeder v. Northwest Cmty. Hosp., 862 N.E.2d 1011, 1021 (Ill. App. Ct. 2006)).

The correctness of a federal court's interpretation of state law ordinarily is not a subject warranting this Court's review. See Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 & n.3 (2019); Sup. Ct. R. 10. That is particularly true here, given that petitioner described Section 5/2-622 as the "Substantive Law of the State" in his complaint, Compl. 5

(emphasis omitted), and argued in his panel-stage briefing before the court of appeals that he had complied with Section 5/2-622 -- not, as he now contends, that compliance with Section 5/2-622 was unnecessary because it is a rule of pleading rather than of substance. See Pet. C.A. Br. 8. Even at the rehearing stage, represented by current counsel, petitioner did not clearly argue that the panel erred in treating Section 5/2-622's requirement of a report from a health professional as a substantive requirement rather than a pleading standard. Cf. Pet. C.A. Reh'g Pet. 10.

In any event, the court of appeals did not misconstrue Illinois law. Under Illinois law, a "section 2-622 affidavit" is not "part of [a] complaint." Garrison v. Choh, 719 N.E.2d 237, 238 (Ill. Ct. App. 1999). A plaintiff must file a complaint to commence a lawsuit, but need not submit an affidavit and report until 90 days after filing a complaint if the circumstances fall within one of the various exceptions in Section 5/2-622. See 735 Ill. Comp. Stat. Ann. 5/2-622(a)(2)-(3). Because the affidavit and report requirement established by Section 5/2-622 is independent of a complaint, answer, or other pleading, it does not speak directly to the "manner of pleading." Palmer v. Hoffman, 318 U.S. 109, 117 (1943). Moreover, when a defendant in Illinois court seeks to assert a plaintiff's failure to submit the required affidavit and report as a bar to liability, the defendant does not do so by filing

"objections to pleadings" under 735 Ill. Comp. Stat. Ann. 5/2-615(a), Illinois's equivalent to Federal Rule 12(b)(6). Instead, the defense is asserted under 735 Ill. Comp. Stat. Ann. 5/2-619, which governs, inter alia, affirmative defenses and defenses based on lack of subject-matter jurisdiction, statutes of limitations, or res judicata. See id. 5/2-622(g); id. 5/2-619(a). Thus, while portions of Section 5/2-622 interact with Illinois pleading requirements, Illinois law treats its core requirement of an affidavit and report as substantive, not as a "pleading rule" in the sense that that term is used in federal litigation.

b. Petitioner briefly raises three additional arguments to advance his characterization of the Illinois requirement as procedural: that Section 5/2-622 conflicts with Rule 11; that judgment based on failure to comply with Section 5/2-622 is not a judgment on a "claim or defense" for the purposes of Rule 56; and that, contrary to Rule 56, a Section 5/2-622 affidavit need not be signed under penalty of perjury. Petitioner did not make these arguments in his briefs below or on rehearing, and in any event the arguments lack merit.

First, petitioner argues (Pet. 6-7) that Section 5/2-622 conflicts with Rule 11, which provides that "a pleading need not be verified or accompanied by an affidavit" unless "a rule or statute specifically states otherwise." Fed. R. Civ. P. 11(a). But under the court of appeals' approach, application of Section

5/2-622 in federal court does not require any "pleading" to be "accompanied by an affidavit." Pet. App. 3a. Rather, a plaintiff may make his affidavit a part of the record at any time before a court rules on a motion for summary judgment. See id. at 5a.

Second, petitioner argues that "[t]he rule fashioned by the Seventh Circuit does not comply with Rule 56(a) of the Federal Rules of Civil Procedure," because Rule 56(a) permits summary judgment "on any 'claim or defense'" and "[a]n 'affidavit of merit' is not an element of a claim of medical negligence." Pet. 10 (citation omitted). But courts assess summary judgment motions using "the substantive evidentiary standards that apply to the case." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Thus, in Anderson, the Court held a court should take into account the applicable clear-and-convincing standard of proof in ruling on a summary judgment motion even though that standard is not an "element" of a "claim." Ibid. Similarly here, federal courts appropriately look to whether a plaintiff has submitted the affidavit and report required to support his medical malpractice claim in determining whether the plaintiff can satisfy "the substantive evidentiary standards that apply to the case." Ibid.

Third, petitioner argues (Pet. 11) that Section 5/2-622 conflicts with Rule 56 because it "does not require the physician's report to be signed under oath or under penalties

of perjury and permits the plaintiff to redact the name and address of the physician who signed the certificate." But Rule 56 requires only that a party "cit[e] to particular parts of materials in the record, including * * * documents * * * or other materials," to support or oppose a summary judgment motion. Fed. R. Civ. P. 56(c)(1)(A). Nothing in that rule or any other rule requires that every document or material cited in a summary judgment motion or opposition be produced under oath, under penalty of perjury, or with an un-redacted name or address.

c. Finally, Petitioner contends that "the Seventh Circuit's approach contradicts" this Court's decision in Shady Grove Orthopedics Assoc., P. A. v. Allstate Ins. Co., 559 U.S. 393 (2010) (plurality opinion), because "'the relevant inquiry isn't whether the federal and state rules can coexist but whether the Federal Rules "answer[] the question in dispute."'" Pet. 11 (quoting Gallivan, 943 F.3d at 296) (brackets in original). That contention does not accurately reflect the court of appeals' decision here.

The court of appeals did not hold that state procedural requirements apply in federal court so long as they can "coexist" with the Federal Rules of Civil Procedure. Pet. 11 (citation omitted). To the contrary, the court recognized that "federal, not state, rules apply to procedural matters * * * in all federal suits, whether they arise under federal or state law." Pet. App. 4a (citation omitted). The court of appeals thus

framed its analysis in the terms advocated by petitioner, explaining that to the extent that Section 5/2-622 imposes procedural requirements, those requirements are not incorporated by the FTCA. Petitioner's quarrel is with the court of appeals' determination that Section 5/2-622 also contains a substantive requirement, but that determination was correct for the reasons discussed above, see pp. 10-12, supra.

3. Petitioner contends (Pet. 7-8) that the decision below conflicts with decisions of the Sixth and Ninth Circuits. That contention is incorrect.

a. In Gallivan, the Sixth Circuit held that a federal district court had erred in dismissing a medical malpractice suit under the FTCA on the ground that it failed to comply with Ohio Civil Rule 10(D)(2), which requires a medical malpractice plaintiff to file with his complaint an affidavit from a medical professional stating that his claim has merit. 943 F.3d at 292-293. In doing so, the Sixth Circuit held that Ohio Rule 10(D)(2) established "a pleading requirement," not "an element of the underlying medical-negligence claim." Id. at 296. To construe the Ohio rule as "add[ing] an element to a medical-negligence claim," it explained, would violate a provision of the Ohio constitution under which the Ohio Supreme Court -- which had promulgated the rule in question -- "cannot modify substantive rights through procedural rules." Ibid. Moreover, the Ohio Supreme Court had "also made clear * * * that Rule 10(D)(2)

is a pleading requirement that does not go to the merits of a medical-negligence claim." Ibid. And because the Ohio rule is procedural rather than substantive, the Sixth Circuit held, it does not apply in federal court. See id. at 296-297.

The Sixth Circuit's determination that a rule promulgated by the Ohio Supreme Court establishes only procedural requirements and does not "go to the merits of a medical-negligence claim" under Ohio law, Gallivan, 943 F.3d at 296, does not conflict with the Seventh Circuit's decision here that a statute adopted by the Illinois legislature contains a substantive requirement that goes to the merits of a medical malpractice claim under Illinois law. See Pet. App. 1a-2a. Indeed, the Sixth Circuit expressly noted the difference between the two provisions, explaining that "[u]nder Illinois law, the affidavit of merit is not part of the complaint and 'says nothing about the contents' of the complaint," in contrast to Ohio law. Gallivan, 943 F.3d at 296 (quoting Hahn v. Walsh, 762 F.3d 617, 631 (7th Cir. 2014), cert. denied, 135 S. Ct. 1419 (2015)). Given that difference, the Sixth Circuit explained that a decision about the applicability of one state-law requirement in federal court "carries little persuasive weight" in assessing whether the other applies in federal court. Ibid.[2]

[2] The significant distinctions between the Ohio provision and the Illinois statute are typical: "[s]tate certificate of merit statutes vary widely in their exact provisions." Benjamin Grossberg, Comment, Uniformity, Federalism, and Tort Reform: The

In addition to involving materially different state provisions, Gallivan and this case also arose in materially different procedural postures. Like the Sixth Circuit in Gallivan, the Seventh Circuit here concluded that it would have been inappropriate to dismiss a complaint in federal court for failure to attach an affidavit attesting to a health professional's view that the case has merit. See Pet. App. 3a-5a. The Seventh Circuit held that judgment for the United States was appropriate, however, because the government had moved in the alternative for summary judgment under Rule 56. Id. at 5a-6a. The Sixth Circuit had no occasion in Gallivan to address such a motion, and for that reason, too, petitioner is wrong to contend that Gallivan conflicts with the decision below.

b. Petitioner also suggests (Pet. 8) that the decision below conflicts with the Ninth Circuit's unpublished decision in Kornberg v. United States, 692 Fed. Appx. 467 (2017). In Kornberg, the Ninth Circuit held that a Nevada court would not have applied Nevada's certificate-of-merit requirement to the specific facts of the plaintiff's case. Id. at 468. "In the alternative," however, it suggested that "the affidavit requirement may be viewed as procedural," citing Nevada cases describing the certificate of merit requirement as "'a preliminary procedural rule.'" Id. at 469 (citing Zohar v.

Erie Implications of Medical Malpractice Certificate of Merit Statutes, 159 U. Pa. L. Rev. 217, 222 (2010).

Zbiegien, 334 P.3d 402, 406 (Nev. 2014)). As with the Sixth Circuit's treatment of Ohio law in Gallivan, the Ninth Circuit's treatment of Nevada law in Kornberg does not conflict with the Seventh Circuit's treatment of Illinois law here. In any event, an unpublished decision does not give rise to the sort of circuit conflict that might warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2020