No. 20-217

In the

Supreme Court of the United States

RICHARD BALTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the *Virginia Medical Malpractice Act's* requirement that a plaintiff possess a written opinion signed by an expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed apply to a medical malpractice claim brought under the *Federal Tort Claims Act?*

PARTIES TO THE PROCEEDING

Petitioner Richard Balter and the United States of America are parties to the proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Balter respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Fourth Circuit, so that this Court may review the judgment below.

OPINIONS BELOW

This matter seeks discretionary review of the grant of summary judgment to the defendant by the United States District Court for the Eastern District of Virginia, and the United States Court of Appeals for the Fourth Circuit opinion affirming the District Court's summary judgment grant. The District Court ruled that Plaintiff's medical malpractice claim was subject to dismissal because the *Virginia Medical Malpractice Act* ("*VMMA*") requires that by the time he or she effects service of process on a defendant, a plaintiff possess a written opinion signed by an expert witness that – based upon a reasonable understanding of the facts – the defendant for whom service of process has been requested deviated from the applicable standard of care, and that the deviation was a proximate cause of the injuries claimed apply to a medical malpractice claim brought under the *Federal Tort Claims Act* ("*FTCA*"). Plaintiff did not possess such an opinion, but he maintains that the *VMMA's*

requirement is inapplicable to a claim brought pursuant to the *Federal Tort Claims Act.*

The *Memorandum Order* of the U.S. District Court for the Eastern District of Virginia appears at *Balter v. United States,* Case No. 1:17cv1188 (E.D.Va., March 27, 2019), 2019 U.S. Dist. LEXIS 52544, 2019 WL 1394368, and at **Appendix A** to this *Petition.* The *Opinion* of the U.S. Court of Appeals for the Fourth Circuit appears at *Balter v. United States,* 788 Fed.Appx. 245 (4th Cir., Dec. 23, 2019), and at **Appendix B** to this *Petition.* The *Order* of the United States Court of Appeals for the Fourth Circuit denying rehearing appears at *Balter v. United States,* 2020 U.S. App. LEXIS 9922 (4th Cir., Mar. 23, 2020), and at **Appendix C** to this *Petition.*

JURISDICTION

This Court has jurisdiction to hear this *Petition* pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Federal Tort Claims Act,* 28 U.S.C. Pt.VI Ch.171; *Federal Rules of Civil Procedure* 8, 9, 11 and 12; and the *Virginia Medical Malpractice Act, Va. Code Ann.* § 8.01-20.1 (2013) are the principal statutory and rules provisions involved in this *Petition.* All are set out in **Appendix D.**

STATEMENT OF THE CASE

Petitioner is a federal inmate held in in the custody of the Federal Bureau of Prisons ("BOP") at the federal prison complex at Petersburg, Virginia. On March 24, 2015, he fell in the shower on a piece of soap dropped by another inmate. Petitioner, who is blind, was unable to see and avoid the hazard.

In June and July of 2015, Petitioner saw the FCC Petersburg medical staff daily regarding severe pain in his lower back and right leg, and numbness in his right foot. BOP healthcare employee prescribed Petitioner a series of drugs while misdiagnosing his malady. Finally, in August, a physician employed by BOP noted that Plaintiff-Appellant's pain and numbness "raise[] the question of spinal cord/lumbosacral compromise" and ordered a magnetic resonance imaging (MRI) examination of the lumbar and sacral areas on "an urgent basis if not emergent basis." However, the BOP medical employees did not schedule an MRI.

BOP healthcare employees increased Petitioner's daily dosage of morphine to 40 milligrams, but Petitioner remained in substantial pain. On August 9, 2015, Petitioner was suffering severe pain, was vomiting, incontinent, confused, and unresponsive to verbal stimuli. The BOP medical staff, suspecting that Petitioner had overdosed on drugs, ordered that he be taken to an outside hospital, where physicians ordered an immediate MRI. That imaging showed Petitioner was suffering from a herniated disc and compression fracture of the spine, and was in acute renal failure. *Id.*

On August 14, 2015, while still in the hospital, Plaintiff-Appellant underwent spinal surgery. That surgery left his right leg and foot numb. Although BOP healthcare employees ordered an additional MRI in December 2015, that diagnostic imaging was not performed for another thirteen months. At that time, it revealed that Petitioner was suffering from a pinched nerve, which was responsible for the numbness.

Petitioner sued under the *FTCA*. Some aspects of his complaint were dismissed on non-exhaustion grounds, but claims that survived alleged medical malpractice by BOP employees by, *inter alia,* misdiagnosing his back condition and failing to perform necessary diagnostic imaging.

The relevant portion of the *VMMA* provides that

> at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert witness... a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed...

Va. Code Ann. § 8.01-20.1 (2013). *Id.*[1] Petitioner did not obtain a necessary certifying expert opinion at the time he requested service of process on a defendant as required by the *VMMA*. Defendant United States argued in the trial court that Petitioner

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[1] If a plaintiff does not obtain a required certifying expert opinion "at the time the plaintiff requested service of process on a defendant... the court shall impose sanctions according to the provisions of § 8.01-271.1 and *may* dismiss the case with prejudice."

failed to comply with the *VMMA*, and because the United States has waived its sovereign immunity under the *FTCA* only to the extent that a private party "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), the district court was without jurisdiction to entertain the medical malpractice issues.

> The district court agreed that "Virginia law governs the manner and extent to which the United States may be liable as a defendant. Accordingly, the Virginia Medical Malpractice Act ("VMMA"), Va. Code §§ 8.01-581.1, et seq., provides the framework upon which to analyze plaintiff's FTCA claims. *See Starns v. United States,* 923 F.2d 34 (4th Cir. 1991) (applying VMMA in FTCA action involving federally operated health care providers in Virginia).
>
> As a threshold matter, the Virginia Medical Malpractice Act ("VMMA"), Va. Code §§ 8.01-581.1, et seq., requires that a party alleging medical malpractice obtain an expert certification of merit prior to serving process upon defendant. Va. Code § 8.01-20.1. Significantly, the failure to comply with this certification requirement is grounds for dismissal... Plaintiff has informed the Court that he is in the process of seeking an expert certification. However, submitting the required certification at this point in this matter would not comply with the requirements of the VMMA. "If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant as required under this section, the court shall impose sanctions ... and may dismiss the case with prejudice." Va. Code § 8.01-20.1. Because plaintiff had not obtained an expert certification at the time this matter was served on defendant, and defendant is only "liable in the same manner and to the same extent as a private individual under like circumstances," this matter will be dismissed.

Balter v. United States, Case No. 1:17cv1188 (E.D. Va. Mar. 27, 2019), 2019 WL 1394368, 2019 U.S. Dist. LEXIS 52544, at *11-15. **Appendix A.**

The Court of Appeals denied Petitioner's appeal without discussion. **Appendix B.** However, after that decision was handed down, the Seventh Circuit issued a precedential decision in *Young v. United States,* 942 F.3d 349 (7th Cir. 2019),

reh'g denied, 2019 U.S. App. LEXIS 38746 (Dec. 30, 2019). Three days after *Young*, the Sixth Circuit handed down a precedential decision of similar import in *Gallivan v. United States*, 943 F.3d 291 (6th Cir., Nov. 7, 2019). The central holding in both of these cases was that the *Federal Rules of Civil Procedure*, not state rules of procedure, govern medical malpractice cases brought under the *Federal Tort Claims Act*. Petitioner timely sought a panel rehearing, calling these contrary decisions to the Court's attention, but rehearing was denied without discussion. **Appendix C**.

REASONS FOR GRANTING THE WRIT

As Mel Brooks famously said, "It's good to be the king."[2] Among the many benefits that sovereignty confers is that the king cannot be sued in his own courts without his consent. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 142 (1984).

The *FTCA* was intended by Congress to grant such consent to sue the United States, subject to limitations, "to render the Government liable in tort as a private individual would be under like circumstances." *Richards* v. *United States*, 369 U.S. 1, 6 (1962); see also 28 U.S.C. § 2674. The *Act* confers jurisdiction on the federal district courts over claims against the United States for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place

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[2] HISTORY OF THE WORLD, PART I (20th Century Fox, 1981).

where the act or omission occurred." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700 (2004); 28 U.S.C. § 1346(b)(1).

The *FTCA* was employed by plaintiffs over 3,000 times last fiscal year to seek damage for torts allegedly committed by employees and agents of the federal government.[3] Medical malpractice claims – over 17,000 of which are filed against public and private healthcare practitioners annually[4] – account for a substantial number of *FTCA* claims.

Under the *FTCA*, "the extent of the United States' liability... is generally determined by reference to state law." *Molzof v. United States*, 502 U.S. 301, 305 (1992); *accord, Massey v. United States*, 312 F.3d 272, 280 (7th Cir. 2002), *Hannah v. United States*, 523 F.3d 597, 601 (5th Cir. 2008), and *Liebsack v. United States*, 731 F.3d 850, 855 (9th Cir. 2013). This makes a development in state malpractice law over the past 20 years very relevant to *FTCA* plaintiffs around the nation.

Currently, 29 states have adopted a requirement that a plaintiff possess or file some form of an affidavit of merit, sometimes referred to as a certificate of merit.[5] In

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[3] United States Attorneys Annual Statistical Report – Fiscal Year 2019 (Dept. of Justice), Table 5, found at https://www.justice.gov/usao/page/file/1285951/download (last visited August 17, 2020).

[4] Nicholas Bazemore, *Does Your Doctor Have Malpractice Claims? How To Find Out* (FORBES, April 19, 2016), found at https://www.forbes.com/sites/amino/2016/04/19/does-your-doctor-have-malpractice-claims-how-to-find-out/#a5a4b7855a64 (last visited August 17, 2020).

[5] Those statutes include *Ariz. Rev. Stat. Ann. §12-2603; Colo. Rev. Stat. §13-20-602; Conn. Gen. Stat. §52-190a; Del. Code Ann. tit. 18, §6853; Fla. Stat. §766.104; Ga. Code §9-11-9.1; Hawaii Rev. Stat. §671-12.5; Ill. Rev. Stat. ch. 735, §5/2-622; Md. Courts & Judicial Proceedings Code Ann. §3-2A-04; Mich. Comp. Laws §600.2912d; Minn. Stat. §145.682; Miss. Code Ann. §11-1-58; Mo. Rev. Stat. §538.225; Nev. Rev. Stat. §41A.071; N.J. Rev. Stat. §2A:53A-27; N.Y. Civil Practice & Rules*

general terms, "affidavits of merit are affidavits signed by an expert in the field, attesting to the merit or merits of a claim. Depending on the state, affidavits of merit may be required in medical malpractice claims, legal malpractice claims, and other claims involving some sort of professional negligence. This may include cases against architects, accountants, engineers, land surveyors, real estate agents, as well as design professionals."[6]

One such statutes is the *VMMA*, which requires that the plaintiff possess such an affidavit of merit at the time his or her complaint is served on defendants, and that the affidavit be provided to the defendants upon their request. *Va. Code Ann.* § 8.01-20.1 (2013). *Id.*[7] In Petitioner's case, the lack of such an affidavit caused dismissal with prejudice of his complaint.[8]

Recently, two circuits held that similar requirements that medical malpractice plaintiffs obtain affidavits of merit in *FTCA* actions were in conflict with the *Federal Rules of Civil Procedure*, and thus, did not apply in *FTCA* actions. *Young, supra; Gallivan, supra.* These decisions conflict with the 4th Circuit's decision in this action

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Law §3012-a; N.D. Cent. Code §28-01-46; Ohio R. Civ. P. 10; Okla. Stat. tit. 12, §19.1; Pa. R. Civ. P. 1042.3; S.C. Code Ann. §15-36-100; Tenn. Code Ann. §29-26-122; Tex. Civil Practices & Remedies Code Ann. §74.351; Utah Code Ann. §78B-3-423; Vt. Stat. Ann. tit. 12, §1042; Va. Code §8.01-20.1; Wash. Rev. Code §7.70.150; W. Va. Code §55-7B-6; Wyo. Stat. §9-2-151.

[6] Christine Funk, *Affidavits of Merit in Medical Malpractice Cases* (EXPERT INSTITUTE, June 23, 2020), found at https://www.expertinstitute.com/resources/insights/affidavits-merit-medical-malpractice-cases/#_ftn1 (last visited August 17, 2020).

[7] If a plaintiff does not obtain a required certifying expert opinion "at the time the plaintiff requested service of process on a defendant... the court shall impose sanctions according to the provisions of § 8.01-271.1 and *may* dismiss the case with prejudice."

[8] As noted *supra,* other counts of Petitioner's complaint were dismissed for non-exhaustion reasons. Those are not relevant to the matter being raised in this *Petition for Writ of Certiorari.*

that Petitioner's complaint should be dismissed for lack of jurisdiction because he lacked the affidavit of merit required by the *VMMA*. Both decisions join a Ninth Circuit decision, which describes the Nevada "affidavit of merit" requirement as a procedural rule that does not apply in FTCA cases because "[t]he FTCA contains no affidavit requirement." *Kornberg v. United States,* 692 Fed.Appx 468, 469 (9th Cir. 2017).

While the *VMMA* applies to Petitioner's claim, it does so only to the extent that it does not conflict with the *Federal Rules of Civil Procedure.* Some of the VMMA establishes Virginia substantive law, which undoubtedly applies to the instant suit. But where the *VMMA* mandates the application of *procedural* rules, and those rules conflict with the *Federal Rules of Civil Procedure*, the *Federal Rules* will govern.

In *Young, supra,* the 7th Circuit held that Illinois statute 735 ILCS § 5/2-622(a) – which requires a physician's affidavit and report to be attached to a malpractice complaint unless an exception applies – may not be relied upon to cause dismissal of a malpractice complaint filed pursuant to the *FTCA* that lacks such an affidavit of merit. The 7th Circuit observed that "[m]any cases hold that federal, not state, rules apply to procedural matters — such as what ought to be attached to pleadings — in all federal suits, whether they arise under federal or state law." *Young, supra* at 942 F.3d 351, quoting *Cooke v. Jackson National Life Ins. Co.*, 919 F.3d 1024, 1027 (7th Cir. 2019) and citing *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.,* 559 U.S. 393, 398 (2010)*; Burlington Northern R.R. Co. v. Woods,* 480 U.S. 1 (1987);

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) and *Mayer v. Gary Partners & Co.*, 29 F.3d 330 (7th Cir. 1994).

Young quite properly held that Rule 8 of the *Federal Rules of Civil Procedure* specifies what a complaint must contain. The Rule

> does not require attachments. One can initiate a contract case in federal court without attaching the contract, an insurance case without attaching the policy, a securities case without attaching the registration statement, and a tort case without attaching an expert's report. Supporting documents come later. 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 and other doctrines that determine how litigation proceeds in a federal tribunal.

Young, supra.[9]

Three days after the 7th Circuit ruled in *Young*, the 6th Circuit held in *Gallivan* that under *F.R.Civ.P.* Rule 8(a), a complaint need include no more than (1) a short and plain jurisdictional statement, (2) a short and plain statement of the claim, and (3) an explanation of the relief sought. *Gallivan, supra* at 943 F.3d 293. "By listing these elements," the Court ruled, "Rule 8 implicitly 'excludes other requirements that must be satisfied for a complaint to state a claim for relief'." *Id.*, citing *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1352 (11th Cir. 2018).

The inmate plaintiff in *Gallivan* brought suit for medical malpractice under the *FTCA*. Ohio *Civ.R.* 10(D)(2) requires that

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[9] The *Young* court, however, did hold that a plaintiff's lack of an affidavit of merit could be addressed by the defendant later in a motion for summary decision. *Id.* at 942 F.3d 351-52. The petitioner in that case has filed a petition for writ of *certiorari* in this case, which is pending. Case No. 19-8587.

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in section 2305.113 of the Revised Code, shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. Affidavits of merit shall include all of the following:

(i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

(ii) A statement that the affiant is familiar with the applicable standard of care;

(iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

Because the *Gallivan* plaintiff's complaint lacked the *Civ.R.* 10(D)(2) affidavit of merit, the district court dismissed the case on 28 U.S.C. § 1915 review.

The 6th Circuit reversed:

> The first question we must ask is whether the Federal Rules of Civil Procedure answer the question in dispute: does someone need an affidavit of merit to state a claim for medical negligence? *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.* [*supra*]. In other words, do the Federal Rules answer "the same question" as the state rule? If the Federal Rules answer that question, we then must ask whether the Federal Rules are valid under the Constitution and the Rules Enabling Act. If the answers to both those questions are yes, then our work is done. We apply the Federal Rules, not Ohio Rule 10(D)(2).
>
> For the first question, the Federal Rules provide a clear answer: no affidavit is required to state a claim for medical negligence. Under Rule 8(a), which provides the general rules of pleadings, a complaint must include (1) a short and plain jurisdictional statement, (2) a short and plain statement of the claim, and (3) an explanation of the relief sought. Fed. R. Civ. P. 8(a). That's it. By listing these elements, Rule 8 implicitly "excludes other requirements that must be satisfied for a complaint to state a claim for relief." *Carbone v. Cable News Network, Inc.*, [supra] (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 10, at 107 (2012)); *cf. Shady Grove*, 559 U.S. at 401 ("Rule 23 permits all class actions that meet its requirements, and a State cannot limit that

> permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements"). Rule 8 does not require litigants to file any affidavits.
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> Nor does Rule 12. A complaint survives a motion to dismiss under Rule 12(b)(6) by simply alleging facts "sufficient to state a claim to relief that is plausible on its face." *Majestic Bldg. Maint., Inc. v. Huntington Bancshares Inc.*, 864 F.3d 455, 458 (6th Cir. 2017) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 [] (2007)). Rule 12 does not demand "evidentiary support" — in an affidavit or any other form — for a claim to be plausible. *Klocke v. Watson*, 936 F.3d 240, 246 (5th Cir. 2019). Even without an affidavit, a complaint can move beyond the pleading stage and into discovery.
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> And Rule 9 confirms the point by specifying the few situations when heightened pleading *is* required — for instance, when a party alleges fraud or mistake. *Fed. R. Civ. P.* 9(b). Since none of those heightened requirements apply here, Rule 8's more liberal pleading standards govern. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 [] (1993). To impose a heightened pleading standard in Gallivan's case would upset the careful balance struck by the Federal Rules.
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> In short, the *Federal Rules* answer the question in dispute: Gallivan did not have to file an affidavit with his complaint to state a claim.

Gallivan, supra at 943 F.3d 293-94.

The Third, Fourth, Eighth, and Tenth Circuits are at odds with *Gallivan*, and apply state "affidavit of merit" statutes to *FTCA* medical negligence claims governed by state substantive law.

In *Chamberlain v. Giampapa,* 210 F.3d 154 (3d Cir. 2000), the Third Circuit applied a state "affidavit of merit" rule to an *FTCA* action because the state and federal rules "can exist side by side." *Id.* at 210 F.3d at 160. *See also Liggon-Redding v. Estate of Sugarman,* 659 F.3d 258, 264-65 (3d Cir. 2011) (applied *Chamberlain*). *Gallivan* rejected this reasoning as inconsistent with *Shady Grove,* observing that "the relevant inquiry isn't whether the federal and state rules can co- exist but

whether the Federal Rules "answer[ ] the question in dispute." *Gallivan, supra* at 943 F.3d 296, quoting *Shady Grove, supra* at 559 U.S. 398. The Fourth Circuit in *Littlepaige v. United States*, 528 Fed.Appx. 289, 292-93 (4th Cir. 2013) held without discussion that compliance with state law "is required to sustain a medical malpractice action under the *FTCA* in North Carolina."

The Eighth Circuit held in *Keating v. Smith*, 492 Fed.Appx 707, 708 (8th Cir. 2012) that an *FTCA* malpractice action had to comply with a state law "affidavit of merit" requirement, relying on *Mackovich v. United States,* 630 F.3d 1134, 1135 (8th Cir. 2011) (*per curiam*). The Tenth Circuit in *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523 (10th Cir. 1996) employed the same "outcome determinative" test that did not survive *Shady Grove,* applying the state certificate requirement so that it did not "create a rule of law likely to produce substantially different results in state and federal court." *Id.* at 90 F.3d 1540.

Section 8.01-581.20(a) of the *VMMA* – which dictates what a plaintiff in a malpractice action must have in hand at the time the complaint is filed – is indistinguishable from the state procedural requirements which *Gallivan* and *Young* have held must yield to the *Federal Rules of Civil Procedure.* At the same time,

In Petitioner's case, the District Court ruled that because Petitioner "had not obtained an expert certification at the time this matter was served on defendant, and defendant is only 'liable in the same manner and to the same extent as a private individual under like circumstances,' this matter will be dismissed." *Balter v. United States, supra* at 2019 U.S. Dist. LEXIS 52544, *14-15. The 4th Circuit "affirm[ed] for

the reasons stated by the district court." *Balter v. United States, supra* at 2019 U.S. App. LEXIS 38261, *1. That decision improperly conflates procedural rules and substantive liability in a manner properly separated in *Young* and *Gallivan.*

While the *FTCA* borrows state law to provide the rules of decision in tort actions against the United States. 28 U.S.C. § 1346(b)(1), the statute "expressly makes the *Federal Rules of Civil Procedure* applicable"' in those suits. *United States v. Yellow Cab Co.,* 340 U.S. 543, 553 & n.9 (1951). The 4th Circuit's approach effectively displaces Congress's power "to prescribe housekeeping rules for federal courts." *Hanna v. Plumer*, 380 U.S. 460, 473 (1965). As *Gallivan* noted *supra* at 943 F.3d 295: "That some of those federal rules may conflict with their state counterparts matters little. Our judicial systems are not meant to be identical. *Id.* Besides, it doesn't make sense for federal courts to have one system of procedural rules in diversity cases and another in FTCA cases – at least absent clear instructions to the contrary."

Petitioner's District Court was right that the FTCA provides that the United States may be held liable only "in the same manner and to the same extent as a private individual." 28 U.S.C. § 2674. But use of the *Federal Rules of Civil Procedure* does nothing to change the scope of that liability. "With or without the *Federal Rules,* the elements for proving liability remain the same in a *FTCA* action because state law always supplies the rules of decision. If the *Federal Rules* apply, district courts may dismiss fewer complaints as procedurally defective. But that doesn't change the 'manner' or 'extent' of the government's liability." *Gallivan, supra.*

The analysis applied in *Shady Grove, supra,* is properly employed to determine whether a given *Federal Rule of Civil Procedure* governs an issue in an *FTCA* action. In *Shady Grove,* this Court considered whether a federal rule governed an issue in a diversity action in the face of contrary state law. Despite the fractured nature of the decision, the majority in *Shady Grove* agreed that a court must first determine whether the federal rule "answers the question in dispute." *Id.* at 559 U.S. 398 (majority opinion). If it does, the court must next decide whether the rule complies with the *Rules Enabling Act,* 28 U.S.C. § 2072. *Shady Grove, supra* at 559 U.S. 398. A valid federal rule governs in the face of contrary state law. *Id.*

While *Shady Grove* arose in the diversity context, nothing about the two-step framework is specific to diversity actions. The first question in the analysis — whether the federal rule answers the question in dispute — "involves a straightforward exercise in statutory interpretation." *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 26 (1988). The second question – whether the federal rule is valid – involves application of the *Rules Enabling Act,* 28 U.S.C. § 2072. Neither step is peculiar to diversity jurisdiction, suggesting that the identical analysis applies in a case under the *FTCA.*

Thus, Congress has not conditioned waiver of sovereign immunity under the *FTCA* on a plaintiff's compliance with state law affidavit-of-merit requirements such as those set out in the *VMMA.* Indeed, neither the *VMMA* nor any similar state affidavit-of-merit statutes existed at the time Congress passed the *FTCA.* The *VMMA* was introduced simultaneously as HB 2659 and SB 1173 on January 12, 2005, and

signed into law on March 23, 2005. Similar measures in other states were not more than nine or 10 years older than that. Jeffrey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 BYU L. REV. 537, 538-39 (traces origin of such measures to 1996 presidential debates, and legislation that followed in Congress and various states).[10]

The second question under *Shady Grove* is whether the *VMMA* establishes a pleading requirement that collides with the Federal Rules. Clearly, it does. To begin with, this Court "has often rejected the Government's calls to cabin the *FTCA* on the ground that it waives sovereign immunity — even in the years immediately after the Act's passage, even as it was construing other waivers of immunity narrowly:

> As compared to other waivers of immunity (prominently including the *Tucker Act*), the *FTCA* treats the United States more like a commoner than like the Crown. The *FTCA's* jurisdictional provision states that courts may hear suits "under circumstances where the United States, if a private person, would be liable to the claimant." 28 U.S.C. §1346(b). And when defining substantive liability for torts, the Act reiterates that the United States is accountable "in the same manner and to the same extent as a private individual." §2674. In keeping with those provisions, this Court has often rejected the Government's calls to cabin the FTCA on the ground that it waives sovereign immunity — and indeed, the Court did so in the years immediately after the *Act's* passage, even as it was construing other waivers of immunity narrowly.

United States v. Kwai Fun Wong, 575 U.S. 402, 419 (2015), *citing United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383 (1949); and *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955).

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[10] Found at http://commons.lib.niu.edu/bitstream/handle/10843/17216/Parness%201997%20BYU%20L%20Rev%20537%201997-Hein%20PDFA.pdf?sequence=1&isAllowed=y (last visited August 17, 2020).

Rule 8 of the *Federal Rules of Civil Procedure* "governs the pleading standard in 'all civil actions and proceedings in the United States district courts'." *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (*quoting F.R.Civ.P.* 1). It provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *F.R.Civ.P.* 8(a)(2). Under that modest notice-pleading requirement, a plaintiff need only plead "sufficient factual matter, accepted as true, to state a 'claim to relief that is plausible on its face." *Iqbal, supra* at 556 U.S. 678.

Rule 9, by contrast, requires parties to allege fraud and mistake "with particularity' and to "specifically state[]" items of special damage. *F.R.Civ.P.* 9(b), (g). Because *Rule* 9 imposes a heightened pleading standard in limited situations, courts presume that no such standard applies in other contexts. *Leatherman, supra* at 507 U.S. 168 ("[H]eightened pleading standard[s] are impossible to square with the liberal system of 'notice pleading that *Rule* 8 embodies'").

As for *Rule* 12, a complaint that pleads facts sufficient to satisfy the applicable pleading standard is not subject to dismissal under *Rule* 12(b)(6). *See Bell Atlantic Corp., supra* at 550 U.S. 570 (A pleading need allege "only enough facts to state a claim to relief that is plausible on its face").

Thus, *Rules* 8, 9, and 12 provide an answer to the question raised here: no affidavit of merit is required for an *FTCA* complaint alleging medical malpractice to survive a motion to dismiss, no matter what state law may provide. For that reason, there is no basis for a district court finding that the Government has not waived sovereign immunity to permit suit. Indeed, there is no basis at all for the notion that

waiver of sovereign immunity depends on the plaintiff's compliance with state procedural requirements.

VMMA § 8.01-20.1 imposes a heightened pleading requirement on parties bringing medical claims. By its plain text, the statute requires a plaintiff to possess additional proof of the elements of his or her medical-malpractice claim — in the form of an expert affidavit — and to provide that document upon demand to the defendants. It is not enough that the plaintiff obtain an affidavit when the defendants demand it (which itself would be a pleading requirement rather than substantive law). Rather, the statute requires that plaintiff possess the affidavit prior to service of process, thus making it part of the complaint process divorced from the merits of plaintiff's claim. Thus, § 8.01-20.1.1 conflicts with *F.R.Civ.P.* 8, 9, and 12.

The 11th Circuit's thorough opinion in *Carbone, supra,* supports the notion that § 8.01-20.1.1 imposes a heightened pleading standard at odds with *Rules* 8, 9, and 12. In *Carbone,* the issue was whether a state anti-SLAPP law that imposed a heightened pleading standard could be applied in federal court to strike a civil action. *Id.* at 910 F.3d 1349. Applying *Shady Grove,* the 11th Circuit held that it could not. The court concluded that *Rules* 8 and 12 create "an affirmative entitlement" to avoid dismissal at the pleading stage if the plausibility pleading standard is satisfied. *Id.* at 910 F.3d 1850-52; *accord Abbas v. Foreign Policy Group, LLC,* 783 F.3d 1328, 1383-1386 (D.C.Cir. 2015). Similarly, the heightened pleading standard imposed by § 8.01-20.1.1 conflicts with Rules 8, 9, and 12.

It matters not that § 8.01-20.1.1 does not mandate that the complaint have the affidavit attached to it when filed. The affidavit must exist by the time the complaint is served. This is true regardless of whether plaintiff has pled all of the elements that make out a malpractice case under state law, and regardless of whether in response to a motion for summary judgment on the merits, the plaintiff could marshal expert testimony that supported his cause of action. Thus, compliance with § 8.01-20.1.1 is independent of the plaintiff making a case that establishes the substantive elements of medical malpractice. Section 8.01-20.1.1's affidavit of merit requirement is nothing more than a procedural rule, a heightened pleading standard.

Section 8.01-20.1.1 also conflicts with *F.R.Civ.P.* 11. *Rule* 11(a) states in relevant part that "a pleading need not be verified or accompanied by an affidavit' "[u]nless a rule or statute specifically states otherwise." *F.R.Civ.P.* 11(a). The exception for any "rule or statute" that "specifically states otherwise" refers only to federal law. *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1360 (11th Cir. 2014); *Farzana K. v. Indiana Department of Education*, 473 F.3d 703, 705 (7th Cir. 2007); *Follenfant v. Rogers*, 359 F.2d 30, 32 n.2 (5th Cir. 1966).

Despite the fact that the expert affidavit required by § 8.01-20.1.1 is not filed with the complaint, there can be no doubt that the affidavit constitutes a pleading requirement. Where a plaintiff alleging medical malpractice must possess such an affidavit prior to service of his or her complaint in order to survive a motion to dismiss for failure to state a claim, the fact that the affidavit only need be produced when a defendant demands it rather than being filed with the complaint is a distinction

without a difference. In both cases, the complaint is subject to dismissal upon the defendant's demand that it be dismissed. In both cases, the affidavit must verify the material allegations of the complaint. The affidavit requirements of § 8.01-20.1.1 fly in the face of *F.R.Civ.P.* 11, placing the statute and the rule in conflict.

Because under *Shady Grove*, § 8.01-20.1.1 conflicts with *F.R.Civ.P.* 8, 9, 11, and 12, the issue becomes whether those rules are valid under the *Rules Enabling Act*.

In *Shady Grove, supra*, a four-Justice plurality viewed the analysis under the *Rules Enabling Act* as controlled by *Sibbach v. Wilson*, 312 U.S. 1 (1941). *Shady Grove, supra* at 559 U.S. 406-410. Under *Sibbach*, a court asks only whether the rule "really regulate[s] procedure," with the "substantive nature of [the state] law" at issue making no difference. *Shady Grove, supra* at 559 U.S. 407, 409; *see also Hanna, supra* at 380 U.S. 464, *citing Sibbach, supra* at 312 U.S. 14; *Bilenky v. Ryobi Technologies Inc.*, Case No. 2:13-cv-345 (E.D.Va. Jan. 29, 2015), 2015 WL 403979, 2015 U.S.Dist. LEXIS 10455, at *2 , *citing Sibbach, supra.* That is the least doctrinally far-reaching approach because it merely follows established precedent and thus "offers the least change to the law." *United States v. Cundiff*, 559 F.3d 200, 209 (6th Cir. 2009). Justice Stevens's opinion, by contrast, distinguished *Sibbach* on the grounds that it did not involve the question whether the relevant federal rule interfered with a state substantive right. *Shady Grove, supra* at 559 U.S. 427-428. But as the plurality explained, the Court in *Hanna, supra* – which did face that question – "unmistakably expressed the same understanding' as did the Court in *Sibbach. Shady Grove, supra*

at 559 U.S. 409-10; *see also Hanna, supra* at 380 U.S. 469-71. To give Justice Stevens's opinion binding status would thus require this Court to implicitly overrule *Hanna* and *Sibbach.*

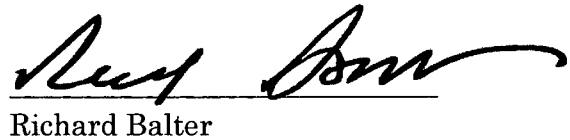
Federal Rules 8, 9, 11, and 12 are valid under the *Sibbach* approach because they "really regulate[] procedure." *Shady Grove, supra* at 559 U.S. 407 (plurality). Indeed, the Supreme Court has "rejected every statutory challenge to a [f]ederal [r]ule that has come before [it]" under that standard. *Id.* The *VMMA* governs matters of pleading, which relate to "the manner and the means by which a right to recover... is enforced. *Mississippi Publ. Co. v. Murphree,* 326 U.S. 438, 446 (1946); *see also Shady Grove, supra* at 559 U.S. 404 (holding that "[p]leading standards [are] addressed to procedure"); *Carbone, supra* at 910 F.3d 1357 (holding that *Rules* 8 and 12 regulate procedure); *Abbas, supra* at 783 F.3d 1337 (same as to *Rule* 12; *Royalty Network, supra* at 756 F.3d 1386 (*Rule* 11).

In Justice Stevens's concurring view, "the bar for finding an *Enabling Act* problem is a high one." *Shady Grove, supra* at 559 U.S. 438. Section 8.01-20.1.1 falls well short of that bar. That statute is procedural, neither expanding nor contracting the showing that must be made to establish medical malpractice. Indeed, the fact that trial court has the option whether to dismiss the action or apply some other lesser sanction strongly lobbies for the notion that, unlike the binary nature of a substantive showing (either the plaintiff makes the showing and prevails, or does not make the showing and fails), the affidavit-of-merit portion is merely a procedural rule that has no bearing on whether the plaintiff can prevail on his or her substantive claim.

Conclusion: The 4th Circuit's engrafting of the *VMMA's* affidavit-of-merit standard onto the *FTCA* is contrary to the law of other circuits, and is contrary to the *FTCA* and this Court's precedent. To resolve the conflict among the circuits and to draw a clear line between procedural requirements governing *FTCA* suits and those which state legislature may elect to impose upon actions in state courts, this Court should grant *certiorari* in this matter, issue the writ to the 4th Circuit, and set this matter for briefing.

WHEREFORE, this *Petition* should be granted. The statements of fact made herein are true, under penalty of perjury.

Executed: August 18, 2020



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