

No. 20-5452

ORIGINAL

Supreme Court, U.S.
FILED

AUG 17 2020

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IN THE
SUPREME COURT OF THE UNITED STATES

JUDY THORPE,

Plaintiff-Petitioner,

vs.

JUSTIN SWIDLER, ESQ.; KARPF, KARPF & VIRANT, PC; and JOHN DOES 1-100, individually, jointly and severally,

Defendants-Respondents.

On Petition for Certification to the
Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by:

Judy Thorpe
Pro Se Petitioner
102 Harbor Circle
Freehold, New Jersey 07728
Phone: 1.732.303.0585
Email: nursejudymae@gmail.com
August 17th, 2020.

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(i)
QUESTION(S) / ISSUES PRESENTED

- i. Whether it was manifest error and significantly prejudicial for the Supreme Court of New Jersey to Deny Certification and Not Fairly and Equitably Review the Erroneous Decisions of the Appellate Division and the Trial Court.

(ii)

LIST OF PARTIES

Petitioner submits that all parties appear in the caption of the case on the cover page, and are listed below for the Court's reference:

Petitioner: **Judy Thorpe**

Respondents: **Justin Swidler, Esq.**

Karpf, Karpf & Virant, PC

John Does 1-100

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APPENDIX "B" Order Denying Petition for Certification. Supreme Court of New Jersey. Dated September 23, 2019.

APPENDIX "C" Opinion of Affirmance. Superior Court of New Jersey – Appellate Division. Dated May 7, 2019.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is found at *Judy Thorpe v. Justin Swidler, Esq. and Karpf, Karpf & Virant, PC*, No. 083037, dated June 3, 2020. No. 19-3385. Supreme Court of New Jersey.

JURISDICTION

The date on which the highest state court decided the merits of the case was June 3, 2020. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a), which provides: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

CONCISE STATEMENT OF THE CASE

On or about April 6, 2005, Petitioner, a long-standing forensic nurse, transferred to the New Jersey Juvenile Justice Commission as a regional supervisor of nursing services, where she successfully directed nursing services in seven secure environments for a newly developing medical department. In this role, Petitioner coordinated the operations and patient care activities of a multi-site healthcare delivery system, serving approximately 2,000 patients. In 2008, Petitioner was unlawfully and wrongfully terminated from her position.

Disputing her wrongful termination, Petitioner filed an administrative complaint with the Equal Employment Opportunity Commission, which was pending at the time she retained Respondents to represent her. Relying on Respondents' advice and representations that they were going to instead file a federal lawsuit, Petitioner withdrew the administrative complaint. However, Respondents never prepared nor did they ever file a federal complaint.

The Division of Civil Rights set a disciplinary hearing for June 25, 2008. Petitioner advised Respondent Swidler that at the July 25, 2008 disciplinary hearing, the opposing parties emphasized the wrongful claim that Petitioner refused to consent to a psychological fitness-for-duty evaluation. Instead of properly contesting the reasonableness of the psychological fitness-for-duty examination, Respondents advised Petitioner that she should take a psychological evaluation. Relying on Respondents' advice, Petitioner was scheduled for an evaluation with Dr. Felice Massey, M.Ed. The results of the evaluation, submitted directly to Respondents, were favorable to Petitioner. Unfortunately, by the time the favorable results were

submitted to Respondents, the Division had already issued its recommendation(s) based on the disciplinary hearing testimony and as a result, Petitioner was terminated from her position.

Petitioner appealed the decision. On or about May 14, 2009, the Civil Service Commission rendered its final decision in Case No. 06-124. In said decision, the Commission denied Petitioner's appeal. Petitioner immediately notified Respondents of same.

Arbitration was held in the matter on December 10, 2009. Respondents advised Petitioner to proceed with the arbitration since this would show that she had exhausted all of her administrative remedies, which would look favorably on her in the LAD lawsuit. The unfavorable arbitration order and award was communicated to Petitioner by a paralegal working for Respondents. In fact, Respondents never advised Petitioner of her right to appeal the arbitration ruling.

As a result of Respondents' negligent representation of Petitioner, on December 12, 2016, Petitioner filed her Complaint against Respondents in the Superior Court of New Jersey, Law Division, Mercer County. In said action, Petitioner alleged causes of action for professional negligence, legal malpractice, breach of contract, breach of fiduciary duty, fraud and/or other causes of action allowed by law. Instead of answering the complaint, Respondents immediately filed their motion to dismiss on April 27, 2017. On July 10, 2017, Petitioner filed a cross-motion to extend time to file an amended complaint. On July 12, 2017, Petitioner filed her motion to amend complaint. Oral arguments on both the motion to dismiss and motion to amend complaint were set and had on July 21, 2017. The trial court

issued its oral ruling on July 28, 2017. A formal order followed. *See Appendix D.* Petitioner timely appealed to the Appellate Division, under Docket No. A-0649-17T3, which affirmed the lower court's order of dismissal and denial of leave to amend on May 7, 2019. *See Appendix C.* Petitioner then sought certification from the New Jersey Supreme Court, which was denied on September 26, 2019. *See Appendix B.* Petitioner sought reconsideration and clarification of the denial, which again the New Jersey Supreme Court denied on June 5, 2020. *See Appendix A.*

PETITIONER'S PRO SE STATUS

Indigent and unrepresented litigants have a right to the fair and impartial review of their claims and defenses. An important issue of fairness in our judiciary is raised in this case, in the course of which Petitioner has been a victim of grave injustice and has been forced to represent herself as an indigent, pro se litigant.

Petitioner thus respectfully requests that the statements of her case be given due and equitable consideration, with reasonable lenience, with respect to precedence set by existing case law, to include but not be limited to, the standards of perfection and defense against dismissal. See *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 595, 30 L.Ed.2d 652 (1972) and *Conley v. Gibson*, 355 U.S. 41 at 48 (1957).

Here, as argued below, the Superior Court and Appellate Division applied the wrong law and incorrectly calculated the statute of limitations. Litigants have a right to a fair and impartial review of their claims and defenses. This case raises an important issue of fairness in our judiciary, especially in circumstances such as here, where an aggressive lawyer is actively defending against claims put forth by a pro se

litigant.

REASONS FOR GRANTING THE PETITION

It was manifest error and significantly prejudicial for the Supreme Court of New Jersey to Deny Certification and Not Fairly and Equitably Review the Erroneous Decisions of the Appellate Division and the Trial Court.

The Superior Court's order denying Petitioner leave to amend and of dismissal and the subsequent Appellate Division's affirmance of same constitute manifest error. Further prejudicial to Petitioner is the fact that the Supreme Court of New Jersey denied certification and refused, even after Petitioner proffered sufficient evidence in support of reconsideration, to grant certification upon reconsideration and reargument.

"'Manifest error' is one that 'is plain and indisputable, and that amounts to a complete disregard of the controlling law.'" *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004) (quoting *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 195 (1st Cir. 2004)); See *Black's Law Dictionary* 563 (7th ed.1999). Other authorities have defined manifest error as "an error that is obvious and indisputable, that warrants reversal on appeal. It is an indisputable error of judgment in complete disregard of the facts of the case, the applicable rule or law and credible evidence."

See uslegal.com.

The trial court denied Petitioner's motion for leave of court to file amended complaint, and the Appellate Court affirmed the denial in its May 7, 2019 Opinion. The New Jersey Supreme Court subsequently denied certification.

The appellate courts, in upholding the dismissal and denial of leave to file amended complaint have relied on the trial court's reasoning, particularly based on, in part, as the trial court stated: "Plaintiff could not have prevailed in any of her claims regardless of defendants' actions." Further, the trial court concluded that Petitioner's "...late allegations and numerous new facts would prejudice the defense." Petitioner submits that this finding was clearly erroneous and prejudicial

In affirming the denial of leave to amend, the Appellate Division relied on *Young v. Schering Corp.*, 645 A.2d 1238, 1243 (App. Div. 1994) aff'd, 141 N.J. 16, 660 A.2d 1153 (1995). In *Young*, the Court found that "the allegations in a proposed amended complaint constituted an entirely different cause of action and therefore could not relate back to the original file date because the proposed amended complaint pled entirely new facts to support the claim." Here however, Petitioner's proposed amended complaint, though varied in format than the original complaint, did not bring forth new causes of action which were unknown or prejudicial to Respondents. Petitioner's proposed amended complaint dealt with the same facts, parties and circumstances supporting her claims for legal malpractice/negligence. Thus, *Young* was clearly distinguishable, and it was an abuse of discretion to rely heavily on it in denying leave to amend and granting a dismissal with prejudice.

It was also reasoned that affirmance was warranted because of the statute of limitations. However, a clear review of the record reveals that the statute of limitations was not expired at the time Petitioner filed her proposed amended complaint. In the filed transcripts, the Court stated that Petitioner indeed had not exceeded the statute of limitations to proceed with her legal malpractice claims.

However, in doing so, the lower court's references to the timing of Petitioner's actions were vague and inaccurate.

By law, the six-year statute starts from the time discovery is made. During the July 21, 2017 oral argument, the lower court referred to "early 2011" as the time when Petitioner read the summary judgment transcript. The lower court's approximation disadvantaged Petitioner; official documentation on the record clarifies that "early 2011" was actually September 22, 2011, at the earliest, when the summary judgment transcript was ordered. It was then sent to the Court and Petitioner's then attorney, Mr. Michael Nelson, on October 20, 2011, and stamped as received by the Court on October 25, 2011. Petitioner maintains that it was not until the document(s) was transferred to her subsequent attorney, Mr. Mark Fury, that Petitioner was privy to its entire contents, leading to her discovery of the detrimental actions on the part of Respondents. In fact, Petitioner has acted within the time allotted by the statute of limitations and must not be time-barred from pursuing her case to its fullest extent. The lower court's finding that Petitioner's claims were somehow time-barred is completely erroneous and warrants this Court's review.

Further, Petitioner submits that the Appellate Division and the Supreme Court of New Jersey failed to require the trial court to properly apply the standards set under Rule 4:9-1.

Rule 4:9-1 provides: A party may amend any pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served. Thereafter a party may amend

a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice.

The New Jersey Supreme Court has "made clear that 'Rule 4:9-1 requires that motions for leave to amend be granted liberally' and that 'the granting of a motion to file an amended complaint always rests in the court's sound discretion.'" *Notte v. Merchs. Mut. Ins. Co.*, 185 N.J. 490, 501 (2006) (quoting *Kernan v. One Washington Park Urban Renewal Assocs.*, 154 N.J. 437, 456-57 (1998)). Although motions to amend "are ordinarily afforded liberal treatment, the factual situation in each case must guide the court's discretion, particularly where the motion is to add new claims or new parties late in the litigation." *Bonczek v. Carter-Wallace, Inc.*, 304 N.J. Super. 593, 602 (App. Div. 1997). Here, the trial court made no findings as to how it came to the conclusion that Petitioner's claims and factual allegations were "late." Nor did the trial court offer any explanation as to how the Respondents would be prejudiced by the filing of the first amended complaint. Discovery had not yet even started. It is further undisputed that a trial date had not been set. Thus, the underlying case was still in the early stages of litigation. The trial court only had pending a motion to dismiss, filed by Respondents, and Petitioner's motion for leave to amend. Additionally, this was Petitioner's first request for leave to amend. Thus, it was clear error to deny Petitioner leave to amend.

The Appellate Division and the trial court made much of the finding that the proposed amended complaint was, according to the trial court, "entirely unlike the previous complaint in style and content." A review of the amended complaint indicates that the style of the complaint is in fact different. Petitioner testified at

oral argument on July 21, 2017 that she had hired a paralegal service to type up the complaint. The paralegal service drafted the complaint in compliance with the rules of procedure. Petitioner provided the paralegal service with the factual allegations, all of which were included in the amended complaint. No new claims were asserted in the amended complaint, contrary to the Court's findings. Though the formatting and structure of the amended complaint was different than Petitioner's original complaint, the amended version in no way was significantly different as to give rise to making new claims against Respondents. Respondents were put on due notice, even with the additional factual allegations that supported Petitioner's legal malpractice claim.

Petitioner's proposed Amended Complaint, accompanied by exhibits, when given a generous reading, clearly suggest a cause of action for legal malpractice. Respondents failed to assert expert testimony and reports as crucial material evidence related to the psychological fitness evaluation performed on Petitioner in or around August of 2008; failed to secure depositions of key expert witnesses in support of Petitioner's claims and defenses; and failed to properly investigate expert testimony key to Petitioner's claims and defenses. Additionally, Petitioner proffered sufficient allegations in the complaint and proposed amended complaint that supported the fact that several different individuals, working under the care and control of Respondents handing Petitioner's LAD case, mismanaged the effective prosecution of Petitioner's claims. Regardless of whether or not the trial court "believed" that Petitioner would have likely lost her LAD case, the trial court was under an obligation to follow the standard of review on a motion to dismiss. This was

not done, and it was manifestly erroneous and unjustly prejudicial to Petitioner for the New Jersey Supreme Court to deny certification and further review of this case.

Respondents could, and should, have fought Petitioner's employers' distortion of Dr. Russell Holstein's recommendations for her therapy. His professional advice was misrepresented to allege that Petitioner was the one psychologically unfit, but this was untrue; Dr. Holstein's recommendations were because of Petitioner's hostile workplace and had nothing to do with any lack in Petitioner's own psychological fitness. Dr. Holstein even recently himself affirmed that, had he been deposed, he would have contested the misrepresentation of his professional advice and maintained that Petitioner was psychologically fit. This would have all gone to disprove her employers' claims, exposing their lack of credibility, and strengthened, even won, Petitioner's case. However, Respondents neglected to depose Dr. Holstein for his expert witness testimony, and the Court's decision unfairly assumed that the Respondents' addressing of this matter in their own words, "without the weight and credentials of a medical professional in person," was adequate. Rather, this proves that Respondents did not thoroughly pursue a credible and critical lead in support of Petitioner's claims and defenses in the underlying LAD case. The true flaw now is in the Court's assumption that Respondents could not have done any better to win the case. To the contrary, had Respondents upheld their ethical and professional duty with due diligence, the truth of Petitioner's employers' deceit and the unlawfulness surrounding Petitioner's termination could have been proven, and thus Petitioner would most likely have prevailed.

Likewise, Respondents could have disproven the legitimacy of the nine

complaints that Petitioner's employers alleged among their reasons to terminate. Respondents in fact never prepared with Petitioner to dispute these complaints in detail (thereby rendering them, to this date, hearsay). Yet, Respondents claimed to have addressed this issue in court in Petitioner's defense. It is then hypocritical, and ethically questionable, for their attorney to now stipulate on their behalf in oral argument that those complaints were valid support for Petitioner's opponents' case to terminate.

In addition, the stipulations that Petitioner's Union attorney made during her employment case must not be deemed indisputable, authentic, or factual, as they are currently being contested, along with the findings in that case's summary judgment. This includes, but is not limited to, the summary judgment's upholding that the sick leave policy which was referenced in support of Petitioner's termination was valid. Again, Respondents claim to have acted in the best interest of Petitioner, but now, through the duration of this case, they are presenting those very issues to attack Petitioner and her case, and the Court has unfairly accepted it. If Respondents had believed even then, that Petitioner's case was fundamentally flawed by these matters, they were deceitful in their professional agreement to act in her best interest, and then failing to do so in full faith throughout the entire course of the case. This deceit and fraud certainly would speak to legal malpractice, as properly alleged in Petitioner's proposed amended complaint.

Also speaking to legal malpractice was the Respondents' lack of competence, which the Court's decision never allowed Petitioner to fully call into question and scrutiny. Be it noted that the current Respondents at Karpf & Karpf, P.C. filed a

complaint to the Attorney Ethics Grievance Committee against Adam Virant, Esq., then a partner, for his mishandling of clients' information and money beginning in 2009. Petitioner further became aware that he was not licensed to practice in New Jersey and was removed from the firm sometime between 2010 and 2012. The existing record shows how Mr. Virant had possessed and handled material evidence in Petitioner's case, including her favorable psychological fitness-for-duty evaluation, which the firm had then appeared unable to present in a timely manner. As the timing of Petitioner's case coincided with this period of internal conflict within the Respondents' firm, the mishandling of crucial materials for Petitioner's case is at the very least questionable in regards to the ethical, diligent, and competent conduct of the defendants, providing more support for why Petitioner should have been granted leave to amend.

Lastly, simply because one believes that Petitioner "would not have prevailed" and that "Respondents' actions, right or wrong could not change the deficiencies in plaintiff's claims" that does not give the lower courts license to misapply well established law and standards of review, which clearly allow the liberal granting of leave to file amended pleadings. As officers of the Court, Respondents had an affirmative duty in the LAD case to actively prosecute and defend Petitioner's claims. They failed to do so. Respondents had an affirmative duty to advise Petitioner of all possible legal options. They failed to do so. Respondents had an affirmative duty to represent Petitioner's best interests in the course of litigation. They failed to do so. It is only when Officers of the Court are held to the professional standards which govern the practice of law will litigants truly believe in the notion of a fair and

impartial judiciary dedicated to justice and the pursuit of truth.

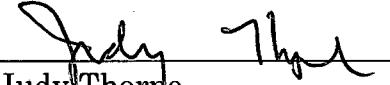
Accordingly, the petition for Writ of Certiorari should be granted.

CONCLUSION

For the reasons herein, the petition for writ of certiorari should be granted.

Dated: August 17th, 2020.

Respectfully submitted,

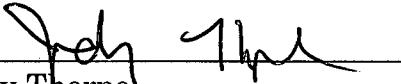


Judy Thorpe
Pro Se Petitioner
102 Harbor Circle
Freehold, New Jersey 07728
Phone: 1.732.303.0585
Email: nursejudymae@gmail.com

CERTIFICATE OF COMPLIANCE

I, Judy Thorpe, Pro Se Petitioner, hereby certify that, according to the word-count tool in Microsoft Word, the foregoing Petition for Writ of Certiorari consists of 3,664 words, including footnotes and excluding the sections enumerated by Rule 33.1(d).

The Petition therefore complies with Rule 33.1(g).



Judy Thorpe
Pro Se Petitioner
102 Harbor Circle
Freehold, New Jersey 07728
Phone: 1.732.303.0585
Email: nursejudymae@gmail.com