No. 20-668

In the
Supreme Court of the United States

NINA ALLISON
Petitioner,
v.
DR. ROBERT DAR-THE LIOU, DR. TUAN T. LAM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I.

INTRODUCTION

The multiple inconsistencies, deviations and diversions from the underlying issues here by petitioner NINA ALLISON's ("Petitioner") counsel are disturbing but understandable.[1] The reality underlying the entire appellate process pursued here by Petitioner is a "CYA" (***not*** referring to the California Youth Authority) effort by Petitioner's counsel, not so much an attempt by Petitioner herself to seek relief from the nonsuit appropriately entered in favor of respondents ROBERT DAR-THE LIOU, M.D. and TUAN T. LAM, M.D. (collectively "Respondents") after Petitioner's counsel's opening statement at trial.

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[1] For reasons that become evident, the entire appellate process herein is driven by Petitioner's counsel, not so much by Petitioner herself.

In a straightforward medical malpractice action, Petitioner's counsel made the calculated decision to ***not*** retain a medical expert for trial, a decision that flies in the face of all pertinent decisional authority. Petitioner's "Hail Mary" attempt here to fashion a federal issue or question is completely lacking in traction, both factually and procedurally.

The case presented no substantive issues of statewide importance or conflict in California decisional law, nor were there any other grounds for review as enumerated in *California Rules of Court*, Rule 8.500 (b). For that reason, the California Supreme Court denied review.

Likewise, no basis enumerated in *Rules of the Supreme Court of the United States*, Rule 10 (or otherwise) exists in this case compelling this Honorable Court to exercise its judicial discretion and expend its limited resources here. The Court should not spend its precious time on such a case – especially where, as here, the courts below all ruled correctly.

II.

BACKGROUND AND PROCEDURAL HISTORY

The underlying action here is a lawsuit for wrongful death based on alleged medical malpractice. The corresponding elements "are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the pecuniary loss suffered by the heirs." (*Moxon v. County of Kern* (1965) 233 Cal. App. 2d 393, 398-399.)

When medical negligence is alleged, a plaintiff must additionally prove:

> "(1) [T]he *duty* of the professional to use such skill, prudence and diligence as other members of his profession commonly possess and exercise; (2) *breach of that duty*; (3) *a proximate causal connection* between the negligent conduct and the resulting injury; and (4) actual loss or *damage* resulting from the professional negligence."

Banerian v. O'Malley (1974) 42 Cal.App.3d 604, 611-612; emphasis in original.

"When these elements coexist, they constitute actionable negligence. On the other hand, absence of, or failure to prove, any of them is fatal to recovery." (*Id.*, at 611-612.)

Thus, in order to prevail at trial, a plaintiff must establish through competent admissible evidence:

(1) The standard of care governing the medical professional.

(2) Whether that standard of care was breached; and

(3) Whether a breach of that standard of care caused, to a reasonable medical probability, a compensable injury, as opposed to medical complications unrelated to any provision of substandard care.

"Ordinarily, proof of the prevailing standard of skill and learning in the locality and proof on the question of the propriety of particular conduct by the practitioner in particular instances is <u>not a matter of general knowledge and can only be supplied by expert testimony.</u>" *Stephenson v. Kaiser Found. Hosps.* (1962) 203 Cal. App. 2d 631, 635; emphasis added. (See also, *Avivi v. Centro Medico Urgente*

Med. Ctr. (2008) 159 Cal. App. 4th 463, 467 - "Both the standard of care and defendants' breach must normally be established by expert testimony in a medical malpractice case.")

In addition, "[t]he law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based [on] competent expert testimony." *Jennings v. Palomar Pomerado Health Sys., Inc.* (2003) 114 Cal. App. 4th 1108, 1118. (See also, *Salasguevara v. Wyeth Labs., Inc.* (1990) 222 Cal. App. 3d 379, 385 – "[M]edical causation can only be determined by expert medical testimony.")

On November 13, 2018, following jury selection and the opening statement by counsel for Petitioner and former plaintiff and appellant Marion Lee, Jr. (collectively "Plaintiffs"), whose appeal was also dismissed due to similar inexcusable failings by counsel, Respondents moved the trial court for a judgment of nonsuit pursuant to *Code of Civil Procedure* §581c.

After careful consideration of the opening statement of Plaintiffs' counsel, the moving papers, the oral arguments of counsel, and those other pleadings and papers on file therein, the trial court granted the Respondents' motion for judgment of nonsuit, holding that after giving Plaintiffs' evidence all the value to which it was legally entitled and indulging in every legitimate inference which could be drawn from that evidence, there was no evidence of sufficient substantiality to support a verdict in favor of Plaintiffs. The judgment of nonsuit was entered on January 4, 2019.

Plaintiffs' March 5, 2019 Notice of Appeal was not served on anyone at all. Consequently, the trial court's July 25, 2019 Notice of Filing of Notice of Appeal was not served on Respondents' counsel.

On or about August 15, 2019, Petitioner served her Court of Appeal Civil Case Information Sheet, the first document relating to the appeal where service on Respondents or their known counsel of record was even attempted. Although Respondents' counsel filed and served Petitioner's then counsel of record with a Notice of Change of Address (Suite Number) on or about September 26, 2017, almost one year later, the Civil Case Information Sheet was served on an incorrect address (Suite Number).

As is clearly reflected in the Appellate Court docket, on August 15, 2019, Petitioner's counsel was notified that Petitioner was in default. No steps were taken by her counsel to address that issue and on September 16, 2019, Petitioner's appeal was dismissed. Only after the dismissal was entered did Petitioner's counsel seek and obtain relief from the default and dismissal.

Similar blunders and the ignoring of them resulted in the October 16, 2019 dismissal of the appeal of former plaintiff and appellant Marion Lee, Jr. Then, it was not until after the Remittitur issued on December 17, 2019 that counsel unsuccessfully sought recall of the Remittitur.

The Court of Appeal dismissed Petitioner's appeal for the first time on September 16, 2019 for Petitioner's counsel's failure to comply with *California Rules of Court*, Rule 8.100 (g) by failing to timely file the required Civil Case Information

Statement. The Court of Appeal vacated that Order of Dismissal and reinstated the appeal on October 3, 2019. Further procedural *faux pas* resulted in the subject dismissal of Petitioner's appeal yet again on April 27, 2020, for Petitioner's counsel's failure to comply with *California Rules of Court*, Rule 8.140 (b) by failing to procure the record on appeal.

As set forth in Petitioner's March 19, 2020 Motion for Relief from Default and Any Dismissal (inexplicably not filed until April 27, 2020), Petitioner moved for relief under *California Rules of Court*, Rule 8.60 (d) and under the ***discretionary*** provision of *Code of Civil Procedure* §473 (b). Respondents promptly opposed the Motion.

Petitioner's May 7, 2020 Reply to Respondents' Opposition to Petitioner's Motion for Relief from Default and Any Dismissal again traverses the same path, only addressing the ***discretionary*** provision of *Code of Civil Procedure* §473 (b). On May 26, 2020, the Administrative Presiding Justice of the Court of Appeal for the Second Appellate District denied Petitioner's requested relief, allowing the April 27, 2020 dismissal of Petitioner's appeal, the second such procedural dismissal, to stand.

Petitioner's Petition for Review to the California Supreme Court was filed on or about June 29, 2020. There, Petitioner raised the novel issue of the court's failure to comply with the Americans with Disabilities Act ("ADA") with respect to "an

unknown and undiagnosed mental disability"[2] and the separate mandatory relief provision of *Code of Civil Procedure* §473 ***for the first time***. Respondents' Answer to Petitioner's Petition for Review was filed on or about July 8, 2020. Petitioner's Reply Brief in response to Respondents' Answer was filed on or about July 18, 2020.

On August 12, 2020, the California Supreme Court denied Petitioner's Petition for Review. Petitioner's Petition to this Honorable Court followed on or about November 10, 2020.[3]

III.

ARGUMENT

A. Supreme Court Review Is Unnecessary Because The Circumstances Of This Case Do Not Present A "Cert-Worthy" Issue

Rules of the Supreme Court of the United States, Rule 10 sets forth the non-exclusive considerations governing review on Writ of Certiorari, stating in pertinent part:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the

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[2] Respondents have yet to determine how one can address an unknown and undiagnosed medical condition.

[3] Despite the fact that Respondents' counsel has been counsel of record throughout this entire action, Petitioner did not serve Respondents' counsel, opting instead to serve only one of the two Respondents herein.

Court considers:

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"(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

"(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

None of the factors of "cert-worthiness" are present here. As is so often the case, Petitioner here has failed to show that the questions presented arise out of a conflict in the courts of appeals or state supreme courts; have previously been settled by this Court in a way that is contrary to the decision below; or involve issues of general importance that are ripe for Supreme Court review.

B. <u>Petitioner Failed To Show Good Cause For The Relief Sought</u>

Whether it was the singular failure addressed in Petitioner's unsuccessful motion or the disconcerting totality of the circumstances here, the conduct is

inexcusable. Time and time again in the instant case, Petitioner failed to comply with the clear obligations set forth in the applicable statutes and court rules. Be it the acts of Petitioner or her chosen counsel, the fact remains that Petitioner has failed to use reasonable diligence to perfect and prosecute her appeal.

Petitioner has been represented by the same law firm for several years. Since replacing her prior counsel in 2018, and well prior to trial, Petitioner has been and continues to be represented by the Law Offices of Zulu Ali, a Professional Corporation, consisting, according to its web site, of a "***team***" of five attorneys and a 14-person support staff.[4]

In *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, the court made it clear that ***the law firm***, not an individual attorney employed thereby, ***represented the client***, stating:

> "Unless there is an agreement to the contrary, the retention of an attorney in a law firm constitutes the retention of the entire firm. (*Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 445 ['by retaining a single attorney, a client establishes an attorney-client relationship with any attorney who is a partner of or is employed by the retained attorney']; see Rest.3d Law

[4] Petitioner's counsel's web site (https://zulualilaw.com) refers to Zulu Ali as the "Principal Attorney." His biography thereon highlights his experience as an "Appellate Lawyer" and reflects his admission to, in addition to all California State Courts, the U.S. Courts of Appeals for the Fifth, Ninth, Tenth and Eleventh Circuits, and the United States Supreme Court. He is the only one of the five attorneys on the "team" who has a biography on the web site. None of the attorneys previously assigned to this matter appear any longer on the website.

> Governing Lawyers, ¶14, com. h, p. 132 ['Many lawyers practice as partners, members, or associates of law firms [citation]. When a client retains a lawyer with such an affiliation, the lawyer's firm assumes the authority and responsibility of representing that client, unless the circumstances indicate otherwise']; 1 Mallen & Smith, Legal Malpractice, *supra*, Vicarious Liability, ¶5.3 at p. 546 ['Unless there is a specific agreement to the contrary, the retention of one partner of a law firm is a retention of the entire firm, so that any attorney in the firm may perform services']; 1 Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2006) ¶¶3:19, pp. 3-5 to 3-6 ['Where a client retains a law firm . . . the client's relationship extends to all members of the firm or organization']....)"

Id. at 392.

Petitioner claims that because of an alleged August 2019 multiple vehicle accident and injuries allegedly sustained by William Geoffrey Sorkin ("Mr. Sorkin") an associate formerly employed by counsel of record[5], the Law Offices of Zulu Ali, a Professional Corporation lacked the ability to perform its services competently, thus

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[5] According to the State Bar of California website, Mr. Sorkin is currently employed by the insurance defense law firm of Yee and Associates in Pasadena, California, seemingly unimpaired by any purported medical conditions.

providing an excuse for the April 27, 2020 dismissal of Petitioner's appeal. This claim fails for several reasons.

The purported inability of Mr. Sorkin to properly function because of an August 27, 2019 accident did not render him unable to quickly submit a Motion for Recall of Remittitur on December 17, 2019 (the same day the Remittitur issued). Nor did it render Mr. Sorkin unable to quickly submit a Reply to Respondents' Opposition to Petitioner's Motion for Recall of Remittitur on December 19, 2019 (the same day the Opposition was filed). The purported inability of Mr. Sorkin to properly function because of an August 27, 2019 accident did not render him unable to quickly submit an April 27, 2020 Motion for Relief from Default and Any Dismissal (the same day the Court of Appeal dismissed the appeal).

No mention of the August 27, 2019 accident, or its impact on Mr. Sorkin's ability to practice law effectively, is made in any of the above-mentioned motions or applications, nor in their supporting declarations by Mr. Sorkin. Indeed, it is not until a ***May 11, 2020*** declaration by Mr. Sorkin that he himself raises the issue. Even then, without admissible medical evidence, Mr. Sorkin is in no position to express a medical opinion regarding or provide a diagnosis of PTSD.

The Law Offices of Zulu Ali, a Professional Corporation, as counsel of record, bears the ultimate responsibility for the action or inaction of all of its attorneys. Although certainly any accident or resulting injury, whether temporary or permanent, is truly unfortunate, Mr. Sorkin's auto accident does not absolve the Law Offices of Zulu Ali, a Professional Corporation and its numerous other attorneys from

the professional obligations it owes to Petitioner herein.

It is a fundamental rule of appellate procedure that the burden rests upon an appellant to use ***reasonable diligence*** to perfect and prosecute an appeal. *Jeffers v. Screen Extras Guild, Inc.* (1956) 140 Cal.App.2d 604, 607. And while there is a strong public policy favoring hearing appeals on their merits and not depriving a party of his or her right of appeal because of technical noncompliance, a respondent is nevertheless entitled to consideration. If an appellant fails to proceed expeditiously and in good faith, a respondent is entitled to have the appeal dismissed. *Amoruso v. Carley* (1948) 89 Cal.App.2d 119, 121.

IV.

CONCLUSION

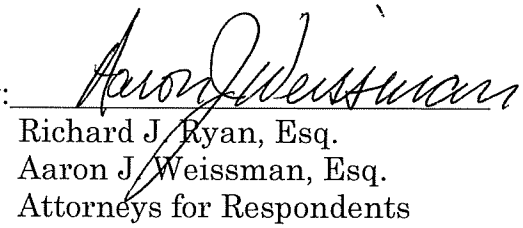
Petitioner was not denied her day in any court. Her counsel chose not to retain a necessary medical expert at trial. Her counsel failed on numerous occasions to comply with time sensitive requirements for the submission of matters in the Court of Appeal. Her counsel strategically pursued relief from default in the Court of Appeal in the fashion he saw fit. As such, Petitioner herself is not without a remedy for any damages resulting from her counsel's actions.

This case, like most, is generally important to the litigating parties, but *only* to them. While that may or may not be entirely the case here due to Petitioner's counsel's personal liability concerns, the underlying applicable law is well settled. More importantly here, no basis exists that should compel this Honorable Court to exercise its judicial discretion and expend its limited resources on this matter.

Respondents should no longer be forced to bear the significant legal expense associated with the choices made by and/or on behalf of Petitioner. Petitioner's Petition for Writ of Certiorari should be denied.

Dated: December 10, 2020

R.J. RYAN LAW, APC

By: 

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