No. _____

In the
Supreme Court of the United States

THOMAS GILEWICZ,
Petitioner,
v.

BRYLIN HOSPITAL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the State of New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

MICHAEL CONFUSIONE
Counsel of Record
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550
mc@heggelaw.com

Counsel for Petitioner

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Did the state court procedure in petitioner's case violate his right to due process of law under the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner was the plaintiff in the New York Supreme Court, the appellant in the New York Supreme Court, Appellate Division, and the movant-petitioner in the New York Court of Appeals. Respondents were the defendants in the New York Supreme Court, the respondents in the New York Supreme Court, Appellate Division, and the respondents in the New York Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Thomas Gilewicz petitions this Court for a writ of certiorari to review the decisions of the New York state courts entered in this action.

OPINIONS BELOW

The Order of the State of New York Court of Appeals entered on June 11, 2020 is attached at Appendix A (App. 1). The Order of the State of New York Court of Appeals entered on December 19, 2019 is attached at Appendix B (App. 2). The Memorandum and Order of the Supreme Court of the State of New York Appellate Division, Fourth Judicial Department entered on June 8, 2018 is attached at Appendix C (App. 3). The Order of the State of New York Supreme Court: County of Erie entered on August 7, 2017 is attached at Appendix D (App. 6). The Order of the State of New York Supreme Court: County of Erie entered on May 5, 2017 is attached at Appendix E (App. 9).

JURISDICTION

The decision of the New York Court of Appeals denying reargument of petitioner's motion for leave to appeal was entered on June 11, 2020. App.1. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part, "nor shall any

State deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

In 2012, Thomas Gilewicz filed a *pro se* Complaint in the New York Supreme Court against BryLin Hospital and Dr. Balvinder Kang alleging medical malpractice, emotional distress, assault and memory loss, arising from a traumatic involuntary hospitalization in a psychiatric ward. The state court denied defendants' motion to dismiss the Complaint in 2013. In August 2013, plaintiff, now via counsel (James Davis), filed a second action against defendants BryLin and Dr. Kang alleging medical malpractice, false imprisonment, and negligent supervision, and alleging false imprisonment against additional defendants Buffalo General Hospital Psychiatric and Buffalo General Hospital. Defendants denied the claims. The separately filed actions were consolidated into a single action.

Following discovery and settlement offers from defendants, defendants moved for summary judgment in 2017. Here, the problems for Mr. Gilewicz began.

The relationship between petitioner and his counsel had deteriorated so much that his counsel (Mr. Davis) told the state court judge, during oral argument on defendants' summary judgment motions, that he had been fired by petitioner or would be "withdrawing" from representation. Meanwhile, Mr. Davis – who remained petitioner's counsel of record – failed to file *any* opposition to defendants' summary judgment motions, or request an extension of time to do so on his

client's behalf. Mr. Davis never moved to withdraw as petitioner's counsel, in fact, and never requested time for Mr. Gilewicz to obtain substitute counsel who could file opposition to the summary judgment motions that defendants had filed.

The state court, rather than protect Mr. Gilewicz's rights to a fair determination process of his claims, cemented the unfair prejudice. Mr. Gilewicz had filed his own *pro se* application for an extension of time to respond to defendants' summary judgment motions once he realized that Mr. Davis was abandoning him. Attorney Davis also asked, during oral argument before the trial judge, that plaintiff be given "an opportunity to get another attorney and hold [the] summary judgment motions in abeyance." But the judge summarily denied the requests for extension of time, then granted as "unopposed" defendants' motions for summary judgment (*see* May 5, 2017 Order, App. 9).

Following the trial judge's dismissal of his claims, plaintiff sought redress for the unfair determination procedure ending in dismissal of his claims. Petitioner obtained new counsel and moved for leave to reargue the summary judgment motions so that he could have a chance to oppose the motions that his prior lawyer, Mr. Davis, had failed to oppose. Petitioner requested relief so that he "may retain a new attorney and oppose defendants' motions for summary judgment, on the grounds that the communication and representation between plaintiff and his prior counsel appears to have broken down but remained in effect, leading to a confusing scenario in which plaintiff's prior counsel did not submit opposition papers in response to defendants' summary judgment motions, request a continuance on

the motion, or file a motion to withdraw, and plaintiff was not granted a continuance to have the opportunity to submit papers to the motions for summary judgment." App. 13-32. Petitioner's new counsel stressed the fundamental unfairness that had been visited upon Mr. Gilewicz in his case:

> 23. By the time the Notices of Motion were filed and the Orders to Show Cause were granted, the relationship between plaintiff and his prior counsel, although continuing, appeared to be uncertain.
>
> 24. The uncertain state of plaintiff's professional relationship with his prior counsel, James Davis, Esq., became abundantly clear during oral argument of the defendants' motions for summary judgment on April 11, 2017.
>
> 25. Prior counsel indicated, on the record, … that he had been fired by plaintiff. Counsel also stated that he was going to file a motion to withdraw as counsel. However, despite claims of being "fired" by plaintiff and wanting to withdraw, prior counsel appeared as counsel of record at oral argument for the motions for summary judgment, no motion to withdraw was ever filed by prior counsel Therefore, plaintiff's prior attorney, James Davis, Esq., remained counsel of record and it was incumbent upon him to file papers in opposition to the defenses' summary judgment motions, request an extension of time to respond, or file a motion to withdraw. The granting of a motion to withdraw would have given plaintiff additional time to

secure counsel to oppose defendants' summary judgment motions.

Petitioner's new counsel stressed that petitioner had filed a *pro se* motion for extension of time to respond to the summary judgment motions that his then-counsel (Mr. Davis) had failed to oppose, and Mr. Davis verbally asked for an extension of time during the summary judgment argument. "Given the extremely short period of time between the motions for summary judgment and the return date for the motions, plaintiff's confusion over the status of his counsel and prior counsel's failure to submit any opposition to the summary judgment motions or any formal request for an extension of time to respond, plaintiff submitted a *pro se* 'Motion For Extension of Time to Respond to Motion of Summary Judgment' dated April 14, 2017…" Then, at "oral argument of the motions for summary judgment, plaintiff's prior counsel, James Davis, Esq., appeared and made a verbal request for plaintiff to have 'an opportunity to get another attorney and hold [the] summary judgment motions in abeyance.'" The judge nonetheless denied *any* extension of time while granting as "unopposed" defendants' summary judgment motions dismissing plaintiff's medical malpractice, false imprisonment, and related claims.

Petitioner detailed in his reargument motion how his prior lawyer (Mr. Davis) had compromised his claims and how the state court had permitted this to occur. Rather than opposing the summary judgment motions filed against his client, Mr. Davis compromised his client's claims further by telling the trial judge that the case "was at a point where it would be dismissed

for several reasons," and that he had tried to get the case "settled" in light of its defects. As petitioner and his new counsel subsequently explained to the state court in the motion to reargue, "[t]hen, in open court and on the record, while noting that he had not filed either a motion to withdraw as counsel or a motion for an extension of time to oppose defendants' motions for summary judgment, prior counsel went into detail about the 'holes' in his client's case, including his surprise that plaintiff was ever permitted to file a lawsuit in the first place, given the absence of a certificate of merit, and plaintiff's lack of retained experts due [Mr. Davis said] to his gambling problem…"

Moreover, while Mr. Davis acknowledged that an expert was needed to support the medical malpractice claims he had asserted on Mr. Gilewicz's behalf in the Complaint Mr. Davis had filed, attorney Davis failed to retain the expert. Even when his client provided $14,500 in funds to secure the expert, Mr. Davis told his client, "I can't do anything with it today. What happened to this money three months ago[?]" "Notably, during prior counsel's colloquy before the Court, he did not, at any point, indicate that he was unable to retain an expert because an expert was unwilling to execute an affidavit on plaintiff's behalf. Rather, he blamed plaintiff's inability to pay for an expert three (3) months ago," plaintiff and his new counsel stressed in their motion for re-argument to the state trial court.

Mr. Davis further compromised his client's case, petitioner noted, by relaying to the trial judge, in open court, communications that Mr. Davis claimed to have had with his client that, first, were false, and, second,

breached the lawyer's duty of client confidentiality. Mr. Davis told the trial judge, "I said to [plaintiff], we got to have an expert to defend against summary judgment. Early in the case, [plaintiff], through my help, borrowed $15,000. After a month I called him, I said, [plaintiff], you know, you're supposed to be putting some money into my escrow account for experts. He said, oh, Mr. Davis, I bought a car. And then we learned last Friday at settlement conference … [plaintiff] said, oh, the rest of it, I gambled it away. I almost fell off the chair," Mr. Davis told the state judge in open court. App. 35.

These statements by Mr. Davis violated his duty of confidentiality, and were false. As petitioner stated in his motion for reargument, petitioner "had supplied money for experts earlier in the case" to his counsel. Mr. Davis instead pressured his client into accepting a settlement. When petitioner resisted and called Mr. Davis' office, "he was told counsel was no longer on the case and would not speak to him…" Mr. Gilewicz explained the prejudice he had suffered to the trial judge:

> On April 8, I spoke to Mr. Davis, informed me that I needed money for the experts. It is also my understanding that I have paid some money for an expert a few years back.
>
> I was in Massachusetts for my birthday, which was on the 5th of April … I was nearly 30 minutes away from Buffalo, I turned around and [drove] an additional 12 hours to grab the check I needed for the experts. A new trial was in May. I wasn't aware of any proceedings in April.

> I would not have gone to Massachusetts for my birthday if I knew I had court the next day.
>
> I met with Mr. Davis on Monday, April 10th. Mr. Davis explained to me two times that he decided to settle the case.
>
> On Tuesday, April 11th, Mr. Davis and I met with Amy Ziegler, I believe, and felt I was being forced and pressured to take the settlement. I was then told if I didn't take the settlement, Mr. Davis would no longer be my lawyer, and once I walked out the door, there would be a conflict and it would have consequences.
>
> On the 14th of April, I called Mr, Davis' office, and was told that he no longer was on the case and that he could no longer speak to me. These attempts -- these attempts happened as early as Tuesday, April 11th. When I felt I was on my own at certain times, I didn't know if I still had a lawyer and was confused, so I decided to file my own motion letting the courts know there may have been a conflict. I felt I was prejudiced in hav[ing] the appropriate time to respond and oppose summary judgment because I didn't know if I had a lawyer or not. [App. 35-42]

As Mr. Gilewicz's new attorney stressed again in seeking reargument, "[p]rior counsel's failure to either properly withdraw from representation, submit any opposition to defendants' motions for summary judgment, or a move for an extension of time to respond

to defendants' summary judgment motions on plaintiff's behalf, irrevocably harmed plaintiff and denied him the opportunity to oppose defendants' summary judgment motions on the merits." "This breakdown in communication and representation between prior counsel and plaintiff led to a situation where plaintiff required to attempt to file a *pro se* motion at the last minute for an extension of time in which to respond to the defendants' motions for summary judgment, which left plaintiff without a defense to the defendants' motions…" Plaintiff was not aware "until it was too late, that prior counsel was simply not going to submit any opposition papers, and not move for an extension of time to respond" – resulting directly in the granting of defendants' summary judgment motions as "unopposed" and the dismissal of the important medical malpractice, false imprisonment, and related claims for which Mr. Gilewicz was seeking redress in the state court litigation.

Despite those affirmations, the New York courts below all denied relief to Mr. Gilewicz from the unfair determination process visited upon him. The Supreme (trial) Court denied petitioner's motion for re-argument and re-affirmed dismissal of his claims as a matter of law. Mr. Gilewicz appealed the unfair decision to New York's Appellate Division, but the Appellate Division affirmed, ruling that the trial judge "properly denied that part of the motion seeking leave to renew," never addressing the fundamental unfairness of the determination procedure employed in plaintiff's case. Gilewicz v. BryLin Hosp., 162 A.D.3d 1585, 1585–86, 74 N.Y.S.3d 913 (2018), leave to appeal dismissed, 34

N.Y.3d 1037, 138 N.E.3d 1105 (2019), reargument denied, 35 N.Y.3d 985, 148 N.E.3d 538 (2020). Mr. Gilewicz sought relief from New York's Court of Appeals too, but the state high court declined to address whether the procedure in Mr. Gilewicz's case was proper and consistent with the fundamental right to due process of law.

Mr. Gilewicz now seeks review from this Court and respectfully asks the Court to grant his Petition.

REASON FOR GRANTING THE PETITION

The Court should grant this Petition to address whether the state court procedure in Mr. Gilewicz's case violated his right to due process of law under the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1-Citizens; Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989).

A fundamental component of due process is the party's right to be heard with adequate opportunity to object. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." Mathews v. Eldridge, 424 U.S. 319, 344, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); Carey v. Piphus, 435 U.S. 247, 259, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978). "[S]ome form of hearing is

required before an individual is finally deprived of a property [or liberty] interest." The notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Fuentes v. Shevin, 407 U.S. 67, 80–81, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

Mr. Gilewicz received no such process in the state court procedure in his case. The state courts affirmed a procedure where Mr. Gilewicz's counsel of record completely abandoned his ethical duties to represent his client, resulting in the granting of defendants' summary judgment motions as "unopposed" and the dismissal of Mr. Gilewicz's medical malpractice and other important claims without the opportunity to be heard "granted at a meaningful time and in a meaningful manner" to him. Fuentes, 407 U.S. at 80–81.

The Court should address the due process right by granting Mr. Gilewicz's Petition and holding that the state court procedure violated Mr. Gilewicz's Fourteenth Amendment right. New York law provides substantive causes of action for medical malpractice, false imprisonment, and the related claims Mr. Gilewicz asserted in his Complaint, and New York law provides a forum – the state court -- for Mr. Gilewicz to seek redress for those claims. Yet the state court followed a determination procedure that deprived Mr. Gilewicz of his right to be heard and to object to the summary dismissal of his claims that the defendants sought.

This Court has held that the Due Process Clause protects civil litigants who seek recourse in the courts,

either as defendants seeking to protect their property interests or as plaintiffs seeking to redress grievances as Mr. Gilewicz was seeking in his state court case. The Court has held that it is a violation of due process for a state court to enforce a judgment against a party without having given the party an opportunity to be heard sometime before the final judgment is entered. Postal Tel. Cable Co. v. City of Newport, Ky., 247 U.S. 464, 476, 38 S. Ct. 566, 62 L. Ed. 1215 (1918); Louisville & N.R. Co. v. Schmidt, 177 U.S. 230, 236, 20 S. Ct. 620, 44 L. Ed. 747 (1900). These principles apply here, we submit -- to a process in the state court where Mr. Gilewicz was seeking determination of claims that New York law provides a substantive right to assert and prescribes a forum to assert them in.

In Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958), the plaintiff's claim had been dismissed for failure to comply with a trial court order. The Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Societe Internationale Pour Participations Industrielles Et Commerciales, S. A., 78 S. Ct. at 1094; see also Hammond Packing Co. v. State of Ark., 212 U.S. 322, 349–351, 29 S. Ct. 370, 379–380, 53 L. Ed. 530 (1909) (power to enter default judgment); Hovey v. Elliott, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215 (1897); Windsor v. McVeigh, 93 U.S. 274, 23 L. Ed. 914 (1876).

The Fourteenth Amendment's Due Process Clause has been interpreted as precluding the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]" in the action. Boddie v. Connecticut, 401 U.S. 371, 380, 91 S. Ct. 780, 787, 28 L. Ed. 2d 113 (1971).

In Logan v. Zimmerman Brush Co., 455 U.S. 422, 429–30, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982), the Court stressed that Boddie established that, at least where interests of basic importance are involved, "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard" (citing Boddie, 401 U.S. at 377).

> The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In *Societe Internationale v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958)*, for example—where a plaintiff's claim had been dismissed for failure to comply with a trial court's order—the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id., at 209, 78 S.Ct., at 1094. See also*

> *Hammond Packing Co. v. Arkansas, 212 U.S. 322, 349–351, 29 S.Ct. 370, 379–380, 53 L.Ed. 530 (1909) (power to enter default judgment); Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897) (same); Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914 (1876) (same). Cf. Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974).* Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut, 401 U.S. 371, 380, 91 S.Ct. 780, 787, 28 L.Ed.2d 113 (1971).* [Logan v. Zimmerman Brush Co., supra, 455 U.S. 429–30]

In Saunders v. Shaw, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163 (1917), a final judgment entered for the defendant was violative of the due process clause because the plaintiff was never had an opportunity to introduce evidence in rebuttal to critical testimony on which the defendant relied. Cf. Societe Internationale Pour Participations Industrielles Et Commerciales, S. A., 357 U.S. at 209 ("there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of [Fed. R. Civ. P.] 37 were well aware of these constitutional considerations").

Similar due process violation was imposed on Mr. Gilewicz in his state court case, we submit. New York provided Mr. Gilewicz with substantive causes of action to seek redress for his injuries. New York provided a forum – the state court – to have the claims heard and determined. Yet the state courts affirmed a procedure where Mr. Gilewicz's counsel of record completely abandoned his duty to advocate and oppose the summary judgment dismissal sought by the defendants, and breached his attorney duty of confidentiality to Mr. Gilewicz, while simultaneously denying the litigant any extension of time to obtain substitute counsel and file the required opposition to the summary judgment motions – resulting directly in the dismissal of Mr. Gilewicz's medical malpractice and other important claims as "unopposed." That procedure, followed by the trial judge and which the state appeal courts refused to correct below, violated Mr. Gilewicz's fundamental right to due process of law under the Fourteenth Amendment by depriving him of a meaningful opportunity to be heard and contest the dismissal of his claims for which New York law provided him a forum to have determined.

CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL CONFUSIONE (MC-6855)
Counsel of Record
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
Tel: (800) 790-1550
Fax: (888) 963-8864
mc@heggelaw.com

Counsel for Petitioner,
Thomas Gilewicz

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