No. 20-8050

IN THE SUPREME COURT OF THE UNITED STATES

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JENNIFER VAN BERGEN
a/k/a Gwendolyn Stone -- Petitioner

vs.

SCOTT KOPPEL, DPM, -- Respondent

---/

PETITION FOR WRIT
OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO
FLORIDA FIRST DISTRICT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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In Florida, where the presuit medical malpractice provisions require that a plaintiff show a "reasonable belief" that malpractice occurred, but where a medical expert affidavit is required to corroborate this belief as a procedural condition precedent to filing a medical malpractice claim, and no common knowledge exception is allowed:

QUESTIONS PRESENTED

1. Does the Florida Medical Malpractice Act's presuit medical expert affidavit requirement violate the 14th Amendment equal protection clause and the 5th and 14th Amendment due process clauses of the U.S. Constitution for an indigent pro se litigant where she can show a reasonable belief and make a prima facie case that negligence occurred on common knowledge, without medical expert opinion or with medical testimony from other treating doctors?

2. Does the Florida medical expert affidavit requirement conflict with court rules regarding the procedures for filing lawsuits and therefore violate the separation of powers?

3. Does the finding that the "so-called [medical insurance] 'crisis' is nothing more than the underwriting cycle of the insurance industry, and driven by the same factors that caused the 'crises' in the 1970s and 1980s," *Estate of McCall v. U.S.*, 134 So.3d 894, 907 (Fla. 2014)(citing 2000 Florida Legislative Task Force findings), eviscerate the legislative basis for the medical expert affidavit requirement, enacted in 1988 in response to the alleged medical malpractice crisis then, and suggest similar disconnects for medical malpractice expert affidavit requirements in other states, warranting this Court's intervention and guidance?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES
(Relevant Orders)

8th Judicial Circuit Court of Florida, 2017-CA-3433, Jennifer Van Bergen v. Scott Koppel, DPM, Order Granting Summary Judgment to Defendant, May 1, 2018.

First District Court of Appeals, Florida, 1D19-4566, Jennifer Van Bergen a/k/a Gwendolyn Stone v. Scott Koppel, DPM, (Per Curiam) Affirmed (Denial of Relief from Judgment), February 9, 2021 and Denial of Motion for Written Opinion, March 18, 2021.

(Other related cases, not relevant here)

8th Judicial Circuit Court of Florida, 2017-CA-0441, Jennifer Van Bergen v. Scott Koppel, DPM, Petition for Automatic Extension, February 7, 2017.

First District Court of Appeals, Florida, Van Bergen v. Koppel, 1D19-2991 (Dismissal, Nonfinal Appeal of Motion for Reconsideration), September 18, 2018.

First District Court of Appeals, Florida, Van Bergen v. Koppel, 1D19-4817 (Per Curiam, Reversed and Remanded for Evidentiary Hearing on Excusable Neglect for Filing Late Appeal) August 30, 2019.

First District Court of Appeals, Florida, Van Bergen a/k/a Stone v. Koppel, 1D19-4450 (Dismissed, Nonfinal Appeal) March 5, 2020. (Consolidated to 1D19-4566.)

First District Court of Appeals, Florida, Van Bergen a/k/a Stone v. Koppel, 1D19-4565 (Dismissed, Nonfinal Appeal) March 5, 2020. (Consolidated to 1D19-4566.)

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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

[ ] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix to the petition and is

[ ] reported at ; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished. The opinion of the United States district court appears at Appendix to the petition and is

[ ] reported at ; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[X] For cases from **state courts**:

The date on which the highest state court (First District Court of Appeals) decided my case was February 9, 2021 (an Affirmance without Opinion).

A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____ , and a copy of the order denying rehearing appears at Appendix .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. ____A ____.

[X] The Florida Supreme Court does not have jurisdiction to review a state District Court of Appeals ("DCA") Affirmance without Opinion. (Florida Rules of Appellate Procedure, Rule 9.030.) The First DCA denied Petitioner's Motion for a Written Opinion (filed February 19, 2021) on March 18, 2021 (a copy of that decision appears at Appendix B), denied her Motion for a Stay (filed February 23, 2019) on March 1, 2021, and denied her Motion to Amend her Motion for Written Opinion (filed February 23, 2021) on March 1, 2021.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(See Appendix E)

United States Constitution

5th Amendment, Due Process Clause
14th Amendment, Due Process and Equal Protection Clauses

Florida Statutes

Florida Stat. § 766.102 (3)(b)

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Florida Stat.§766.206

STATEMENT OF THE CASE

Petitioner timely sued the Respondent doctor in May 2017 for failure to advise her of the risks and alternatives to surgery, performing unnecessary surgery, falsely informing her of an incorrect recovery period in order to induce her to have surgery (fraudulent inducment), failure to obtain her consent, negligent administration of meds, negligent post-op care, and failure to investigate and to supply all medical records.

Petitioner, who has been at all times during the litigation of this case indigent (as determined under statute) and pro se, claims that the medical expert affidavit requirement of the Florida Medical Malpractice Act, as applied to her and those similarly situated, violates her federal and state rights to due process, equal protection, and access to courts, where this requirement is a condition precedent to filing suit and no common knowledge exception is permitted. She also argues that the medical expert affidavit requirement conflicts with court procedures for filing lawsuits and therefore violates the separation of powers.

LEGAL FRAMEWORK

The Florida Medical Malpractice Act (hereafter "MMA") requires that any action involving a health care provider be filed under the MMA. Fla. Stat. §766.201(2). Medical negligence claimants must file suit within two years, must engage in presuit investigation prior to filing a claim, and must provide a medical expert affidavit that corroborates their "reasonable belief" that medical negligence has occurred. Fla. Stat. §766.203.

The expert affidavit requirement is a condition precedent not waivable by the trial court, except where the defendant fails to provide complete medical records. Fla. Stat. §§766.106, 766.204(2); *Ingersoll v. Hoffman*, 589 So. 2d 223, 224 (Fla. 1991); *Florida Hosp. Waterman v. Stoll*, 855 So. 2d 271, 276 (Fla. 5th DCA, 2003). There are no common knowledge or indigency exceptions.

Section 766.102(9)(b)(2)(10) stipulates that in any action alleging medical negligence, an expert witness may not testify on a contingency fee basis.

PROCEDURAL HISTORY

This case does not provide an example of the early settlement intended by the presuit requirements. The procedural history of this case, which has not yet been heard on the merits, spans almost four years.

However, of sole relevance here, Petitioner complied with all presuit statutory requirements except the medical expert affidavit. Respondent was granted summary judgment in April 2018.

After four years of Petitioner's motions for relief, reconsideration, written clarifications, and more, the Florida First District Court of Appeals issued a Per Curiam Affirmance on February 9, 2021 of the trial court's denial of Plaintiff's Motion for Relief from Judgment.

REASONS FOR GRANTING THE PETITION

This case raises a question of great public importance: whether a state's presuit medical expert affidavit requirement, which excludes the common knowledge exception, as applied to a vulnerable class of litigants, unduly discriminates in violation

of their federal rights of due process, equal protection, and right of access to courts, and violates the separation of powers.

The vulnerable class members are those who file a malpractice claim with expected damages too low to attract contingent-based legal representation, who can, without a medical affidavit, establish reasonable belief and a prima facie case on common knowledge, or common knowledge with minimal testimony from subsequent treating physicians, that negligence occurred, and who are unable to afford an attorney or medical expert. In other words: a pro se indigent litigant with a demonstrably legitimate but small case.

It conflicts with long-standing tenets of summary judgment jurisprudence. (*See Saunders v. Lischkoff*, 137 Fla. 826, 188 So. 815, 820 (Fla. 1939), a malpractice case: "If the evidence is conflicting or will permit of different reasonable inferences, or if there is evidence tending to prove the issues, it should be submitted to a jury as a question of fact to be determined by it, and not taken from the jury and passed upon by the Court as a question of law.") (quoted in *Atkins v. Humes*, 110 So. 2d 663, 668 (Fla. 1959) (discussing cases).) *See also Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966) ("the burden of proving the absence of a genuine issue of material fact is upon the moving party").[1]

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[1] The Florida Supreme Court recently adopted the federal standard as "better comport[ing] with the text and purpose of [the Florida summary judgment] rule 1.510," in which a party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts" and "[where] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *In re: Amendments to Florida Rule of Civil Procedure 1.510*, Case No. SC20-1490, December 31, 2020. Internal citations omitted.

Where the common knowledge rule is prohibited in the presuit period, a plaintiff with a case resting on common knowledge is prevented from offering probative nonexpert evidence and cannot withstand summary judgment, even where (as here) the defendant's medical expert affidavit is deficient.

This strict presuit prohibition conflicts with both long-standing medical negligence law in Florida (*see Atkins, supra, passim* (discussing cases)) and the current rule which permits "hybrid" testimony from treating physicians at trial. (See, *Gutierrez v. Vargas*, 239 So. 3d 615 (Fla. 2018).) The presuit medical expert requirement thus sets a higher standard of proof before trial than that required at trial on the merits.[2]

The common knowledge rule ("CKR") remains intact in Florida *at trial.* ("When facts are within the ordinary experience of jurors, conclusions to be drawn therefrom are left to the jury." *Johnson v. State*, 393 So.2d 1069, 1072 (Fla. 1980), *quoting Nelson v. State*, 362 So.2d 1017, 1021 (Fla. 3d DCA 1978); *see also, Gutierrez*, 239. So. 3d at 622 (*citing Johnson*).) However, the CKR is disallowed by the MMA at presuit, creating a higher standard presuit than on the merits, conflicting with civil rules regarding notice pleading, one of the primary components of our justice system, and violating the power of the court to promulgate rules for its practice.

The Florida Supreme Court in 2014, in striking down the noneconomic damages cap, eviscerated the alleged legislative purpose for the presuit medical expert requirement, when it concluded that the legislative finding "that Florida was in the midst of a bona fide medical malpractice crisis, threatening the access of Floridians to

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[2] Medical experts must submit to prior disclosure and must review patient records and treatments, but in Florida, where a litigant must merely establish reasonable belief of negligence or a prima facie case sufficient to pass summary judgment, full proof of negligence is not yet required. A prima facie showing of negligence can be established where, as here, a subsequent treating physician provided information to the claimant during treatment which corroborates surgeon negligence. Similarly, to show that the doctor lied to a patient about recovery time, as here, statements made by subsequent treating doctors can establish standard of care. Breach, harm, and causation are jury questions.

health care," was "dubious and questionable at the very best" *Estate of McCall v. U.S.*, 134 So.3d 894, 909 (2014).

There are wide differences between the states regarding the CKR and indigency on the presuit medical expert affidavit requirement. While indigency and the CKR are widely accepted across the United States for court costs and proof at trial, respectively, these considerations are unevenly and disparately applied across the states with respect to presuit medical affidavit requirements.

There are, in addition, strong policy reasons for this Court to review Florida's medical expert provisions and determine the minimum constitutional standards. Small cases should not be excluded from judicial determination or taken away from jury fact-finding, not only because doing so excludes low-income litigants. Such cases mark the minimum legal and constitutional standards, alerting both doctors and patients to their rights and responsibilities. Without such minimum standards, doctors are encouraged, as here, to engage in under-the-radar fraud, deception, and malpractice, taking advantage of the uneducated, the disabled, seniors, and low-income individuals, who have no remedy unless they lose life or limb.

DISCUSSION

U.S. Supreme Court Review of State Decision

Petitioner raised equal protection and right of access to court constitutional questions at the outset in both her Notice of Intent and Complaint. She raised due process in her subsequent early papers.[3]

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[3] Petitioner added due process in her first Motion for Reconsideration (Case No. 2017-CA-3433, May 15, 2018, pp. 19, 23). She initially addressed the constitutional claims as state questions. In subsequent papers, she stated them more broadly as constitutional questions and later specified them as both federal and state questions. (Plaintiff's Motion for Reconsideration, Case No. 2017-CA-3433, October 4, 2019, fn.

While Petitioner did not identify "separation of powers" in any of her pleadings or appeals, she stated in her Complaint that the presuit requirements of the MMA "took away from our courts in medical malpractice matters a significant power to do what courts are supposed to do: decide on the basis of logic and reason what is a matter of factual determination and what is a matter of authority (expert witness or law)." (Complaint, 2017-A-3433, October 13, 2017, fn. 5.)

Petitioner further asserted in her amended brief on appeal from the trial court's denial of relief from judgment that "the vortex created by the [medical affidavit requirement of the] Medical Malpractice Act itself, which denies pro se indigent litigants due process, equal protection, or access to court" ... "prevents courts from considering such claims, because it prevents affected litigants from being heard at all." (Amended Brief Of The Plaintiff-Appellant On Appeal From Denial Of Motions For Relief From Judgment Under Rule 1.540(B), 1D19-4566, April 25, 2020, p. 29 and fn. 7.)

Although these constitutional questions *in this context* are ones of first impression, the First DCA's Per Curiam Affirmance without opinion ("PCA") reaffirms Florida courts' inability or unwillingness to address these questions.

The Florida Supreme Court does not have jurisdiction to review an affirmance without opinion. (Florida Rules of Appellate Procedure, Rule 9.030; *Whipple v. State*, 431 So. 2d 1011, 1015 (Fla. 1st DCA 1983) (per curiam): "We recognize that if we decide a case without writing an opinion, the losing party will be unable to obtain

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2.) At the summary judgment hearing on April 23, 2018, she requested permission to more fully brief the constitutional questions and was denied. The state courts at both trial and appellate levels were well-advised of these challenges. Petitioner's brief to the First DCA on a trial court denial of relief from judgment again raised the constitutional questions. (Amended Initial Brief, April 25, 2020, 1D19-4566, pp. 13-14, 22.)

further review in the supreme court.") "[I]t is fundamental black letter law" that a PCA "disposition affirming a trial court order without a written opinion, occurs when the points of law raised are so well settled that a further writing would serve no useful purpose." *Elliott v. Elliott*, 648 So. 2d 137, 138 (Fla. 4th DCA 1994).

The First DCA's PCA in the present case thus indicates that that court considers the matter of the presuit medical expert affidavit well settled, even in the present context. In other words, the First DCA declines to reconsider the constitutional validity of the affidavit requirement or to permit it to be submitted to the Florida Supreme Court.

Where a litigant's federal rights have been determined against her by the highest possible state court, whether expressly or implicitly, the only course available is to petition the U.S. Supreme Court. (See *England v. Medical Examiners*, 375 U.S. 411 (1964).) If the Florida First DCA wished to avoid the presumption that it had decided the federal constitutional questions raised by Petitioner, it could have made that clear by a plain statement in its opinion that federal law did not compel the result and state law was dispositive. (See *Michigan v. Long*, 463 U.S. 1032 (1983); *Harris v. Reed*, 489 U.S. 255, 261 n.7 (1989) (collecting cases); *Florida V. Powell*, 130 S.Ct. 1195, 1201, 449 U.S. 50, [ ] (2010) ("[W]hen ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and the adequacy and independence of any possible state-law ground is not clear from the face of its opinion, this Court presumes that federal law controlled the state court's decision.")(*Quoting Michigan*, 463 U. S. at 1040–1041).

A party seeking to litigate a federal constitutional issue on appeal of a state court judgment must have raised that issue with sufficient precision to have enabled the state court to have considered it.

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

New York ex Rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

Petitioner here raised the state and federal constitutional claims from the outset and reiterated them in briefs before both the state trial and appellate courts sufficiently to bring them to the state courts' attention with fair precision and in due time for the state courts to have properly considered them.

Statutory Purpose Invalid

Health and welfare are traditionally state matters, but where, as here, the state supreme court has found invalid the legislative rationale for a provision of the medical malpractice law that implicates fundamental federal rights, the state can no longer claim a legitimate or compelling state interest.

Across the United States starting in the 1980's, states began enacting medical malpractice "reform" laws, resting on an assumption that a "medical malpractice crisis" existed. (*See* Reed Neil Olsen, *The Reform of Medical Malpractice Law: Historical Perspectives*, Am. J. Econ. & Soc., 55 (No. 3):257 (July 1996).)

In enacting the presuit requirements in 1988, the Florida Legislature found that "[m]edical malpractice liability insurance premiums have increased dramatically in

recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians," and that "[t]he primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims." Florida Stat. §766.201(1) (a) and (b).

The legislature stated that the medical expert affidavit requirement was due to the "high cost of medical claims," which the Legislature determined "can be substantially alleviated by requiring early determination of the merit of claims . . . thereby reducing delay and attorney's fees . . . while preserving the right of either party to have its case heard by a jury." Fla. Stat. §766.201(1)(d).

Subsection (2)(a) of this provision states "Presuit investigation *shall* include: 1. Verifiable requirements that reasonable investigation precede both malpractice claims and defenses in order to eliminate frivolous claims and defenses. 2. Medical corroboration procedures." Fla. Stat. §766.201(2)(a). (Emphasis added.)

The Florida Supreme Court stated that "the prevailing policy of this state relative to medical malpractice actions is to encourage the early settlement of meritorious claims and to screen out frivolous claims." *Cohen v. Dauphinee*, 739 So. 2d 68, 71 (Fla. 1999). The legislative purpose of the MMA was to "promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding." *Williams v. Campagnulo*, 588 So. 2d 982, 983 (Fla. 1991); *see also Kukral v. Mekras*, 679 So. 2d 278, 281 (Fla.1996) (quoting *Williams*, 588 So.2d at 983).

In 2014, however, the Florida Supreme Court decided that legislative findings "that Florida was in the midst of a bona fide medical malpractice crisis, threatening the access of Floridians to health care," were "dubious and questionable at the very best." The Court struck down the noneconomic damages cap. *Estate of McCall v. U.S.*, 134 So.3d 894, 909 (2014). The Court further found that "the conclusions reached by the Florida Legislature as to the existence of a medical malpractice crisis are not fully supported by available data," and noted that the legislative Task Force itself had stated that "this so-called 'crisis' is nothing more than the underwriting cycle of the insurance industry, and **driven by the same factors that caused the 'crises' in the 1970s and 1980s.**" *McCall,* 134 So.3d at 907. (Emphasis added.)

The *McCall* decision, although it was directed to the alleged medical malpractice crisis of the early 2000's and addressed the issue of discrimination on noneconomic damages, also undid the legislative rationale for the 1988 presuit medical expert requirement, which rested on the identical rationale -- an alleged medical malpractice crisis -- and about which the court also raised doubts when it quoted the Task Force's finding that "this so-called 'crisis' is nothing more than the underwriting cycle of the insurance industry … driven by the same factors that caused the 'crises' in the 1970s and 1980s." *Id.*

According to the Petitioner in that case:

> [T]he two most recent medical liability insurance crises [mid-1980s and early 2000s] did not result from sudden or dramatic increases in medical malpractice settlements or jury verdicts. Instead . . . the crises resulted from dramatic increases in the amount of money that the insurance industry put in reserve for claims. Those reserves increases were so big because the insurance industry systematically under reserved in the years leading up to the crisis.

Estate of McCall v. U.S., Case No. SC11-1148, Initial Brief for Plaintiffs - Appellants, On Discretionary Review from the United States Court of Appeals for the Eleventh Circuit Case No. 09-16375J, pp. 26-27, *quoting* Tom Baker, *The Medical Malpractice Myth* 53-54 (2005) and providing additional references in accord.

Where there existed no actual medical insurance crisis and the legislative grounds are found to be fallacious, where it was "nothing more than the underwriting cycle of the insurance industry," and where this nonexistent crisis was the rationale for the presuit medical expert affidavit requirement, there can be no compelling or legitimate state interest involved in the requirement and the provision must fail where it invades the fundamental rights of a vulnerable class of persons.

Other States

As of 2014, twenty-eight states required some form of medical expert affidavit attesting to the alleged malpractice prior to claimant filing a complaint. (*See* Heather Morton, *Medical Liability/Malpractice Merit Affidavits and Expert Witnesses,* National Conference of State Legislatures, June 24, 2014 (chart listing statutes), https://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-merit-affidavits-and-expert-witnesses.aspx; Joseph H. King, *The Common Knowledge Exception To The Expert Testimony Requirement For Establishing The Standard Of Care In Medical Malpractice,* Ala. L.R. Vol. 59:1:51 (November 2007).)

By a cursory review, at least six states permit the common knowledge exception during presuit investigation. (*See* footnotes 4 and 5, *infra.*) In Florida, *at trial,* where common knowledge is sufficient to determine a factual issue, medical expert testimony is prohibited. *Gutierrez,* 239 So. 3d at 622 ("[W]e have held that expert testimony

should be excluded when the facts testified to 'were within the ordinary experience of the jurors and did not require any expertise beyond the common knowledge of the jurors' to form a reasoned judgment of the facts." *Quoting Johnson*, 393 So.2d at 1072.

According to one scholar, "there continues to be widespread recognition of the common knowledge exception in principle by the courts" across the states, apparently even where a common knowledge exception is not acknowledged in the statute. (King, *Common Knowledge Exception, supra* at 67-68; fns. 54 and 73.) However, the Florida expert affidavit requirement does not permit courts to consider such an exception.

Twenty-eight states, including Florida, require either a medical expert affidavit or an attorney certification of consultation with a medical expert.[4] Twenty-three states or territories have no medical expert statute.[5] Three states that require an expert affidavit contain statutory exceptions: one for indigency (Oklahoma), two for claims within common knowledge (Arizona, Arkansas).

Indigency

The U.S. Supreme Court has viewed indigency as a suspect class where important underlying rights are implicated, including access to courts (*Boddie v.*

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[4] (Arizona), (Arkansas), Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey,* New York,* North Dakota, Ohio,* (Oklahoma), Pennsylvania, South Carolina*, Tennessee, Texas, Utah,* Vermont, Virginia, (Washington), West Virginia, Wyoming. (Morton, *Medical Liability/Malpractice Merit Affidavits, supra*, chart listing statutes.) (Parentheses indicate a common knowledge exception contained in statute. Asterisk indicates a common knowledge exception applied by courts. *See* King, *Common Knowledge Exception, supra,* fn. 55.)

[5] Alabama, Alaska, California, District of Columbia, Guam, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oregon, Puerto Rico, Rhode Island, South Dakota, Virgin Islands, Wisconsin. (Morton, *Medical Liability/Malpractice Merit Affidavits, supra,* chart.)

Connecticut, 401 U.S. 371 (1971); *Griffin v. Illinois*, 519 U.S. 102 (1996).) Indigency is not a suspect class where "the class of disadvantaged 'poor' cannot be identified or defined … and [without a determination that] the relative -- rather than absolute -- nature of the asserted deprivation is of significant consequence." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19 (1973).

In Florida, indigency for purposes of exemption from court filing fees is clearly defined by parameters set by state statute. Only persons whose annual income "is equal to or below 200 percent of the then-current federal poverty guidelines" are deemed indigent. The clerk has no discretion. Florida Stat. § 57.081 and § 57.082(1) and (2)(a)1. The class is clearly defined.

Where a claimant is found indigent under a state standard that exempts her from paying filing fees to obtain access to court, it is obvious that she cannot afford to pay for legal representation. Where her case is deemed financially infeasible by medical malpractice attorneys -- even where consulting attorneys acknowledge the legal viability of her case -- the litigant must proceed by herself if she is to seek a remedy for the harm she suffered.

But where a medical expert affidavit is mandated and a pro se litigant is indigent as determined by state statute and cannot afford to hire a medical expert to provide such an affidavit, she is deprived of the ability to litigate her claim. She is deprived of access to court, due process, and the equal protection of the laws. The relative nature of her deprivation is clearly of significant consequence.

In 2006, the Oklahoma Supreme Court ruled that the statute requiring plaintiffs in medical malpractice tort suits to consult with, and to obtain a written opinion from, a

qualified expert in support of their claim prior to filing their lawsuits—was an unconstitutional special law and monetary barrier to court access. *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Okla. 2006). Oklahoma law retains the medical expert requirement but provides a statutory exemption for indigent litigants. Okla. Stat. tit. 12, §19.1(D).

Mirroring the concerns in the instant case, the Oklahoma Supreme Court declared:

> The Oklahoma Legislature implemented the Affordable Access to Health Care Act (Health Care Act), 63 O.S. Supp.2003 § 1-1708.1A et seq. for the purpose of implementing reasonable, comprehensive reforms designed to improve the availability of health care services while lowering the cost of medical liability insurance and ensuring that persons with meritorious injury claims receive fair and adequate compensation. Although statutory schemes similar to Oklahoma's Health Care Act do help screen out meritless suits, the additional certification costs have produced a substantial and disproportionate reduction in the number of claims filed by low-income plaintiffs. The affidavit of merit provisions front-load litigation costs and result in the creation of cottage industries of firms offering affidavits from physicians for a price. They also prevent meritorious medical malpractice actions from being filed. The affidavits of merit requirement obligates plaintiffs to engage in extensive pre-trial discovery to obtain the facts necessary for an expert to render an opinion resulting in most medical malpractice causes being settled out of court during discovery. Rather than reducing the problems associated with malpractice litigation, these provisions have resulted in the dismissal of legitimately injured plaintiffs' claims based solely on procedural, rather than substantive, grounds.

Zeier, 152 P.3d at 869.

The Oklahoma indigency exception recognizes that the expert affidavit requirement unfairly burdens low-income litigants.

Right of Access and Separation of Powers

The medical expert affidavit requirement conflicts with the Florida system of notice pleading, which requires a litigant to provide only:

> (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled.

Rule 1.110(b), Florida Rules of Civil Procedure.

"Several other state supreme courts have invalidated certificate and affidavit requirements for medical malpractice litigation, holding that they conflict with court rules regarding the procedures for filing lawsuits and therefore violate the separation of powers." *Putman v. Wenatchee Valley Medical Center*, 216 P.3d 374, 379 (2009)(listing cases).[6]

The Washington Supreme Court in *Putman* struck down the medical expert provision, finding it "jeopardiz[ed] the court's power to set court procedures" and "violat[ed] the doctrine of separation of powers." *Id.* at 380. The *Putman* Court also found that "[r]equiring medical malpractice plaintiffs to submit a certificate prior to discovery hinders their right of access to courts." *Id.* at 377.

Like Florida, Washington is a notice pleading state, which requires only "a short and plain statement of the claim" and a demand for relief in order to file a lawsuit. The Washington Supreme Court found that:

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[6] "*See, e.g., Summerville v. Thrower*, 369 Ark. 231, 239, 253 S.W.3d 415 (2007) (invalidating a statute that required medical malpractice plaintiffs to submit an affidavit of reasonable cause from a medical expert within 30 days of filing); *Wimley v. Reid*, 991 So. 2d 135, 138 (Miss.2008) (invalidating a statute that required the plaintiff's attorney to submit a certificate that he or she has consulted a medical expert prior to filing); *Hiatt v. S. Health Facilities, Inc.*, 68 Ohio St. 3d 236, 237-38, 1994-Ohio-294, 626 N.E.2d 71 (invalidating a statute requiring the plaintiff's attorney in a medical malpractice action to submit an affidavit attesting that he or she had requested a copy of the medical records). *But see McAlister v. Schick*, 147 Ill. 2d 84, 94, 588 N.E.2d 1151, 167 Ill. Dec. 1021 (1992) (upholding an affidavit statute, holding that the statute fell within the legislature's power to enact laws "to determine and effectuate public policy" and did not impede court's ability to control its procedures)." *Putman*, 216 P.3d at 379.

> Under notice pleading, plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims. The certificate of merit requirement essentially requires plaintiffs to submit evidence supporting their claims before they even have an opportunity to conduct discovery and obtain such evidence. For that reason, the certificate of merit requirement fundamentally conflicts with the civil rules regarding notice pleading one of the primary components of our justice system.

Id. at 379. (Internal citations removed.)

The Washington Supreme Court also concluded that the merit requirement "changes the procedures for filing pleadings in a lawsuit, thereby jeopardizing the court's power to set court procedures. When the activity of one branch invades the prerogatives of another, there is a violation of the doctrine of separation of powers." *Id.* at 380.

In *Wilson v. Lee Memorial Hospital*, decided 35 years before the 1988 MMA was enacted, the Florida Supreme Court addressed an issue of failure to state a cause of action in the medical malpractice context and under Florida's constitutional right of access to court clause:

> Complaints seeking to recover damages for tort should be tested by section 4 of the Declaration of Rights, Florida Constitution, F.S.A., which speaks in the imperative and requires that any one injured in his lands, goods, person or reputation, shall have remedy by due course of law, without sale, denial or delay. It is well to require the complaint to state a cause of action, but that done, it should never be overthrown by technical impediments that do not go to the merits of the cause. Whether the technical impediment be a rule or statute is not material. It is certain that the makers of the constitution did not intend that one injured in "lands, goods, person or reputation" be deprived of a right of action.

Wilson v. Lee Memorial Hospital, 65 So. 2d 40, 41 (Fla. 1953).

The medical expert affidavit requirement eviscerates the important and long-standing principles articulated in the *Wilson* case and conflicts with the more recent decisions of high courts in other states about right of access and the court's power to set court procedures for filing lawsuits.

The Medical Expert Affidavit Requirement Conflicts with Florida Caselaw

Under the MMA, to maintain a reasonable belief that medical negligence occurred, a victim need not prove negligence. The presuit investigation process was "intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding." *Kukral,* 679 So. 2d at 280, *quoting Williams,* 588 So. 2d at 983.

Florida courts have clearly stated that "[t]he provisions of sections 766.201 – .212, Florida Statutes [the presuit provisions], are not to be allowed to impinge upon plaintiffs' right of access to the courts and must be construed as imposing upon plaintiffs only a reasonable and limited duty before allowing them to file a suit." *Shands Teaching Hosp. & Clinics, Inc. v. Barber,* 638 So.2d 570, 571 (Fla. 1st DCA 1994) (citations omitted).

"[T]he standard as to whether a reasonable basis has been shown should be similar to the standard that is applied to determine whether a complaint states a cause of action." *Holden v. Bober,* 39 So.3d 396, 400 (Fla. 2d DCA 2010).

The seminal Florida case construing the access guarantee is *Kluger v. White,* 281 So. 2d 1 (Fla. 1973), which held that "the Legislature is without power to abolish [a preexisting common-law] right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show

an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." Id. at 4.

The medical expert requirement plainly does not contain a reasonable alternative for plaintiffs, thus failing the first prong of the Kluger test. After *McCall*, it also cannot satisfy the second prong of the test - an overpowering public necessity. The Kluger test is functionally equivalent to the strict scrutiny test under equal protection.

Reasonable Belief, Prima Facie Case, and Common Knowledge Rule

While a victim of medical malpractice may (and in Florida, must) attempt to reach settlement before going to court, a pro se indigent victim basing her reasonable belief claim or her prima facie case on a factual jury issue under the CKR is unlikely to accomplish pre-trial settlement, which leaves court as her only means of redress -- the one place Florida excludes her absolutely. In this scenario, the defendant doctor knows that if he can keep the case away from a jury, he can avoid all liability for having engaged in negligent practices. This opens the door for doctors to take advantage of those most vulnerable, those whom every doctor knows will be unable to hold him accountable.

To establish issues of material fact, the plaintiff must make a prima facie case of medical negligence, she must show a duty of care, breach, and causation. Here, it is within common knowledge that a doctor has a duty not to lie to a patient to whom he recommends surgery. Not within common knowledge is the length of time of recovery, a matter about which Petitioner here testified to the remarks of two treating doctors. Since a summary judgment hearing is a record hearing, not an evidentiary hearing, Petitioner was merely asserting triable issues of fact. She did not supply affidavits or

testimony from those doctors. In the absence of a CKR, the court was not permitted to consider these material facts and it ordered judgment against Petitioner.

Similarly, a jury could have determined without medical expertise that it is negligent for a foot surgeon to allow a recovering surgical patient to crawl on all fours for days or weeks and fail to provide for appropriate ambulatory assistance. As to this fact, Petitioner supplied her own affidavit and affidavits of witnesses, to no avail.

It is the jury's duty to determine whether these failures constitute negligence and caused harm to the plaintiff.

These facts were sufficient to establish both reasonable belief and a prima facie case that could survive summary judgment, if the trial court had been permitted to consider common knowledge.

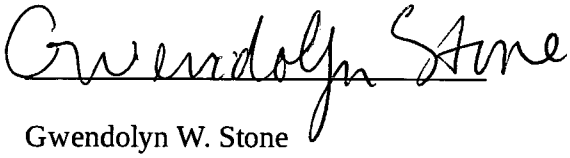
The Respondent's medical expert certification, which stated that Petitioner's X-Rays justified the surgery, was deficient in answering the factual matters Petitioner had raised and did not warrant summary judgment. But again, where the plaintiff is required to supply a medical expert affidavit, the defendant's irrelevant expert certification permits, even requires, that the court grant summary judgment to the defendant.

The doctor might well have felt the surgery was justified by his own judgment without the patient having agreed or consented, but medical procedures are not a merry-go-round justifying a doctor's judgment of what is medically right; they require patient knowledge and consent.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Gwendolyn W. Stone

Date: May 6, 2021