Case No. 20-8050

In The
Supreme Court of the United States

JENNIFER VAN BERGEN, AKA,
GWENDOLYN STONE
Petitioner,

v.

SCOTT KOPPEL, DPM
Respondent.

On Petition for Writ of Certiorari Review
to the First District Court of Appeals
State of Florida

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Petitioner has alleged that her case raises questions of great public importance related to the medical expert affidavit requirement of the Florida Malpractice Act. However, there is no issue on appeal regarding the constitutionality of any part of the Florida Medical Malpractice Act. On the contrary, the question presented is whether the trial court erred in denying Petitioner's Motion for Relief from Judgment when she failed to timely file her Notice of Appeal of the trial court's Order on Motion for Summary Judgment.

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INTRODUCTION

Petitioner's list of the questions presented does not capture the issues posed, argued, or decided in the proceedings in the courts below. Specifically, the ruling from the trial court, and affirmed by the Florida Court of Appeals, was that Petitioner was not entitled to Relief from Judgment when she failed to file a timely notice of appeal in the underlying case. The evidence nor arguments presented pertaining to the Motion for Summary Judgment from the trial court are part of the record on appeal.

According to Petitioner's jurisdictional statement, jurisdiction is being invoked under 28 U.S.C. § 1257(a) which allows the Supreme Court to review "final judgments or decrees rendered by the highest court of a State…where the validity of a statute of any State is drawn in question." No judgment or decree was rendered by any lower state court in this case regarding the constitutionality of §766.102(1), Florida Statutes. The only state statute or rule briefed and argued on appeal was Florida Rule of Civil Procedure 1.540(b)(1) regarding Motions for Relief from Judgment.

Even so, Petitioner requests this Court to review the Florida Medical Malpractice Act's requirement in Fla. Stat. §766.102(1) that says a medical expert review is a prerequisite that must be satisfied before a medical negligence claim can be brought against a medical provider. Because these questions, arguments, and attendant evidence have never been part of the record on appeal, Petitioner's request for review should be denied.

STATEMENT OF THE CASE

1. STONE filed a lawsuit against KOPPEL alleging she sustained damages arising out of KOPPEL's rendering of podiatry care associated with the operative and post-operative care of STONE's right foot.

2. KOPPEL filed a Motion for Final Summary Judgment in this case and argued that STONE failed to comply with the presuit requirements of §766.102(1) when she did not provide expert testimony or an affidavit from an expert to indicate that KOPPEL fell below the standard of care provided by other podiatrists in the community.

3. A hearing was had on KOPPEL's Motion for Final Summary Judgment on April 23, 2018.

4. Final Summary Judgment was entered by the trial court on May 1, 2018.

5. STONE filed a Motion for Reconsideration on May 15, 2018.

6. The Court entered an Order on June 12, 2018 denying the Motion for Reconsideration.

7. STONE then filed a Notice of Appeal on July 31, 2018 attempting to appeal the Order for Final Summary Judgment and the Order Denying Plaintiff's Motion for Reconsideration among other things.

8. STONE's Notice of Appeal was not filed within thirty days of the entry of either of the above Orders and was therefore untimely.

9. STONE then filed a Motion for Relief from Judgment on September 20, 2018 and requested that a new Order be entered so her right of appeal would be preserved. She claimed that the basis for this was due to not receiving timely notice of the entry of the Order Denying her Motion for Reconsideration under Florida Rule of Procedure 1.540(b)(1).

10. Initially, when STONE filed a Motion for Relief from Judgment, the order denying relief from judgment was entered by Judge Keim at the trial court level without an evidentiary hearing. STONE first filed an appeal with the Florida Court of Appeals regarding said nonfinal order and KOPPEL conceded error so that an evidentiary hearing could be had. Then the case was remanded back to Judge Keim for the evidentiary hearing on the Motion for Relief from Judgment ***only***.

11. Before the evidentiary hearing was held, Judge Keim recused herself after STONE filed a Motion for Disqualification and Judge Brasington was assigned the case. The evidentiary hearing was ultimately held on November 19, 2019 in front of newly assigned Judge Brasington solely on the issue of the timeliness of STONE's notice of appeal of the Court's Order Granting Summary Judgment.

The summary judgment ruling itself was not at issue.

12. During that evidentiary hearing, STONE presented no additional evidence for the court's consideration beyond her own arguments. No sworn testimony was presented and no additional documentary evidence was placed into the record. Following the evidentiary hearing, the underlying trial court upheld the ruling of the circuit court denying relief from judgment. The order denying STONE's Motion for Relief from Judgment likewise did not address in any way the constitutionality of the Florida Medical Malpractice Act. (Pet. App. C) An Appeal to the Florida Court of Appeals followed.

13. The Florida Court of Appeals Per Curiam Affirmed the ruling of the trial court by Order on February 9, 2021. (Pet. App. A) Subsequently, the Florida Court of Appeals denied STONE's Motion for written opinion and certification on March 18, 2021. (Pet. App. B)

14. STONE's Petition for Writ of Certiorari followed and raises issues not resolved or addressed by the lower appellate court.

REASONS FOR DENYING THE PETITION

I. Because no judgment was entered by a lower court as to the constitutionality of §766.102(1) Florida Statutes, Petitioner lacks jurisdiction for this Court's review

Petitioner, JENNIFER VAN BERGEN, aka, GWENDOLYN STONE (STONE) has presented three questions to this Court for consideration in her Petition for Writ of Certiorari. All three questions pertain to the constitutionality of the Florida Medical Malpractice Act's presuit medical expert affidavit requirement. Of significance, none of these three questions were at issue on appeal at the Florida Court of Appeals. Because Petitioner is now asking this Court to answer questions not previously presented on appeal, the Petition fails to satisfy the criteria for certworthiness, particularly given that appellate review is defined by the record below.

Of importance, the absence of prior briefing on these questions would significantly impede the Court's consideration of these issues, for it would not have the benefit of arguments tested and refined in the lower courts. (*Cf. United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998)(declining to entertain an issue on which the courts below did not focus) *United States v. McCall*, 235 F.3d 1211, 1216 (10th Cir. 2000) ("The general rule is that this court will not consider an issue on appeal that was not raised below") "The party seeking to raise the issue [on appeal] must first present it to the [D]istrict Court in a manner that allows the Court an opportunity to

recognize and rule on it." *Flanigan's Enters., Inc. of Georgia v. City of Sandy Springs,* 703 F. App'x 929, 938 (11th Cir. 2017), *cert. denied sub nom. Flanigan's Enters., Inc. of Georgia v. City of Sandy Springs*, 138 S. Ct. 2623 (2018) (internal quotation and citation omitted); *see also Diefenderfer v. Off. of Recovery Servs. for State of Utah*, 185 F.3d 873 (10th Cir. 1999) ("Diefenderfer states that he made at least a passing reference below, but we see nothing in the record sufficient to raise the issue.").

While Petitioner may have initially raised these questions in the underlying circuit court case in Response to Defendant's Motion for Summary Judgment, the Order that was appealed to the Florida Court of Appeal was ***not*** the Order Granting Summary Judgment. Rather, the Order appealed to the Florida Court of Appeals was a circuit court order denying Petitioner's Motion for Relief from Judgment. The underlying circuit court had granted Dr. Scott Koppel's ("KOPPEL") Motion for Summary Judgment, and when STONE failed to file a timely appeal of the final judgment, she then filed the Motion for Relief from Judgment and argued that, because of an error, her Notice of Appeal was not timely filed. Her Motion for Relief from Judgment ***did not*** address the constitutionality of the Florida Medical Malpractice Act. And it was this Order on the Motion for Relief from Judgment that was the subject of the appeal to the Florida Court of Appeals, not the Order on Motion for Summary Judgment.

Whereas Petitioner has included the Order Granting Summary Judgment as one of two

"relevant orders" for purposes of her petition, (Pet. App. D.) said Order was never at issue on appeal. The matters therefore under consideration by the lower courts on appeal have only ever dealt with whether STONE's error in late filing the notice of appeal was excusable. There has been no prior argument, briefing, or consideration as to the soundness of the trial court's decision to grant summary judgment in favor of KOPPEL.

It is clear from the record on appeal that, despite Petitioner's apparent belief that the constitutionality of the Florida Medical Malpractice Act should now be at issue before the United States Supreme Court, such arguments or any of the related evidence, are not appropriate to be presented via a Petition for Writ of Certiorari.

Petitioner's own Petition makes clear that she is requesting that the United States Supreme Court review the judgment identified in her petition. The judgment identified was the Per Curiam Affirmed opinion entered by the Florida Court of Appeals on February 9, 2021 on the trial court's Order denying Motion for Relief from Judgment.

What Petitioner has filed is a 30-page Petition for Writ of Certiorari that does not address the Order on the Motion for Relief from Judgment except to include it in the Appendix. Petitioner's attempt to present new issues related to the constitutionality of the Florida Medical Malpractice Act at this time should be quashed and the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition should be denied.

Respectfully Submitted,

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