No. 20-839

In The
Supreme Court of the United States

KENNETH GREENWAY,

Petitioner,

v.

SOUTHERN HEALTH PARTNERS, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF SOUTHERN HEALTH PARTNERS, INC. AND ALYSSA ARMENTI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a jail inmate's suicide render a nurse liable for deliberate indifference to the inmate's medical needs in violation of the Eighth and Fourteenth Amendments' prohibition of cruel and unusual punishment, where the evidence does not show that the nurse was subjectively aware of a strong likelihood that the inmate would harm herself and refused to act on that risk?

2. Does a district court abuse its discretion when it applies state law in deciding a summary judgment motion on a state law claim over which it has supplemental jurisdiction, where the nonmovant does not ask the court to decline jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Respondent Southern Health Partners, Inc. has no parent company, and no publicly held company owns 10% or greater of its stock.

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INTRODUCTION

This Court's Rules admonish that a petition for a writ of certiorari will be granted only for compelling reasons and rarely when the alleged error consists of erroneous factual findings or the misapplication of law. No such reasons exist here. Nonetheless, Kenneth Greenway's petition asks this Court to review the evidence supporting a motion for summary judgment granted by the Northern District of Georgia and affirmed by the Eleventh Circuit Court of Appeals. The petition attempts to dress his evidentiary complaints up as legal disputes by alleging that the Eleventh Circuit is attempting to "reinvent" the deliberate indifference standard, and has violated this Court's articulation of the summary judgment standard. However, the petition misstates the applicable law and omits critical facts underlying both courts' decisions. As a result, Nurse Alyssa Armenti and Southern Health Partners, Inc. ("SHP") submit this brief in opposition of the petition to discuss the relevant legal authority and the omitted facts of the case, showing that the decision of the Eleventh Circuit was correct, and affords no basis for certiorari review.

This case arises out of the suicide of Kenneth Greenway's wife Tammy Sue Greenway at Banks County Jail, a few days after they were both arrested for aggravated assault following a domestic disturbance. Mr. Greenway sued Nurse Armenti and her employer SHP, among others, alleging that Nurse Armenti is liable for Ms. Greenway's death under 42 U.S.C. § 1983 for deliberate indifference to her medical needs in violation of the constitutional prohibition against cruel

and unusual punishment, and that she and SHP are both liable under Georgia law for medical negligence. Plaintiff filed the lawsuit in the Northern District of Georgia, invoking the court's original jurisdiction for the federal claims and supplemental jurisdiction over the state law claim. The Northern District of Georgia held, and the Eleventh Circuit affirmed, that Mr. Greenway failed to present evidence sufficient to create a triable question of fact as to the deliberate indifference claim against Nurse Armenti, or as to the Georgia medical negligence claim against Nurse Armenti and SHP. Because Mr. Greenway did not ask the district court to decline jurisdiction over the state law claim, the Eleventh Circuit held that he waived this claim of error on appeal. The Eleventh Circuit thereafter denied a Petition for Hearing or Rehearing En Banc.

STATEMENT OF THE CASE

I. Factual Background

On the afternoon of Saturday, January 23, 2016, Kenneth Greenway and his wife Tammy Sue Greenway were both arrested for aggravated assault and booked into Banks County Jail following a domestic dispute. (Doc. 64-1, at 5; Doc. 69-1, at 1.) During her initial intake screening, Ms. Greenway reported that she was prescribed several medications, and that she had been diagnosed with thyroid disease, panic attacks,

depression, and "hormones." (Doc. 64-1, at 7.) Ms. Greenway was also given a mental health screening at that time, in which she reported that she was not currently considering, and had never attempted suicide. (Doc. 64-1, at 8.)

Mr. Greenway testified that at some point on Sunday, January 24, Sergeant Jason Muse and a woman he identified as a nurse came to his cell and gave him medication for anxiety. (Doc. 66-1, at 103-06, 165.) During that encounter, Mr. Greenway says he told both of these individuals that Ms. Greenway needed to be put on suicide watch. (Doc. 66-1, at 103-06.) Mr. Greenway did not know the woman's name, had never seen her before, and never saw or spoke to her again after this encounter. (Doc. 66-1, at 104, 154, 157.) Mr. Greenway was released from Banks County Jail on Monday, January 25, and did not encounter any nurse or other medical personnel on that day. (Doc. 66-1, at 123.)

Alyssa Armenti is a licensed practical nurse whom SHP employed to provide medical services at Banks County Jail Mondays through Fridays from 7 a.m. until 11 a.m. during the time period relevant to this case. (Doc. 63-3, at 3-4; Doc. 66-2, at 37, 46.) Therefore, as confirmed by SHP's time records, Nurse Armenti was not present in the jail on Saturday, January 23 or Sunday, January 24. (Doc. 63-3 at pp. 4, 11.) Nurse Armenti has testified unequivocally that she has never met or spoken to Kenneth Greenway or any of their family. (Doc. 63-3, at 3-7; Doc. 66-2, at 61-62.) Her testimony is not only unrebutted—as Mr. Greenway has never

identified Nurse Armenti as the "nurse" he encountered in his cell on January 24—it is corroborated by SHP's employee time records. (Doc. 63-3, at 4, 11; Doc. 66-1, at 104, 154, 157.)[1]

Upon arriving at the jail on the morning of Monday, January 25, Nurse Armenti examined Ms. Greenway. (Doc. 63-3, at 5.) Again Ms. Greenway reported that she had never considered or attempted suicide. (Doc. 64-1, at 2.) Nurse Armenti noted at that time that Ms. Greenway was not exhibiting any signs that suggested the risk of suicide, assault, or abnormal behavior. (Doc. 63-3, at 5.) In fact, Nurse Armenti later remarked to the Georgia Bureau of Investigations that she thought Ms. Greenway was "sweet." (Doc. 63-6, at 13.)

In the course of her examination, Ms. Greenway reported to Nurse Armenti that she had received treatment for "thyroid, depression, bipolar" and that she had been prescribed Levothyroxine 17.5 mg and Paroxetine 20 mg, but that she had not taken her medications in two weeks. (Doc. 63-3, at 5.) Ms. Greenway had been released from jail on December 21, 2015, and she had

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[1] Mr. Greenway has stated that the Eleventh Circuit Court of Appeals conceded that "Mr. Greenway also told Nurse Armenti that Ms. Greenway had attempted suicide in the past and needed to be on suicide watch." While the Eleventh Circuit made this statement, the Northern District found that the claim that Mr. Greenway told Nurse Armenti that his wife was suicidal "finds no support in the record," and this allegation is not conceded here. (App. 64.)

brought her medications with her during that incarceration, but had no medications in her possession when she was booked on January 23, 2016. (Doc. 63-3, at 5-6; Doc. 64-1, at 23.) Therefore, on January 25, 2016, Nurse Armenti administered Ms. Greenway Levothyroxine 17.5 mg, and faxed her pharmacy to request records of current medications. (Doc. 63-3, at 5.) Nurse Armenti did not receive a response from the pharmacy until after Ms. Greenway's death on January 26, 2016. (Doc. 63-3, at 5.)

Nurse Armenti attempted to administer Ms. Greenway her next dose of Levothyroxine at approximately 7:40 a.m. on Tuesday, January 26, 2016. (Doc. 63-3, at 6.) However, Ms. Greenway became angry when she asked Sergeant Jason Muse for a blanket and he responded that he did not have one to give her. (*Id.*) Ms. Greenway threw her medication on the floor in anger, and Nurse Armenti filled out a "Refusal of Medical Treatment and Release of Responsibility" form. (*Id.*) Nurse Armenti did not intervene in the conversation between Sgt. Muse and Ms. Greenway because she understood Sgt. Muse's response to mean that there were no available blankets, and she did not believe there was anything she could do to obtain another one. (*Id.*)

Although Ms. Greenway was obviously upset, nothing in her behavior led Nurse Armenti to believe that she was experiencing a mental crisis, or otherwise presented a danger to herself. (Doc. 63-3, at 6.) Nurse Armenti was not involved in the decision to place Ms.

Greenway on lockdown, as disciplinary decisions are outside the scope of her job duties, and she could not enter a pod or a cell without an officer. (Doc. 63-3, at 7.) Accordingly, after Ms. Greenway returned to her cell, Nurse Armenti could not see or hear her, and had no knowledge of her behavior or mental state. (Doc. 63-3, at 7.)

Three hours later, at approximately 10:45 a.m., Nurse Armenti received a call that "somebody [was] trying to hang themselves." (Doc. 66-2, at 105-06; Doc. 63-6, at 57.) Given her inability to enter the pod independently, Nurse Armenti acted as quickly as possible in gaining access to the cell, assisting Sgt. Muse in cutting the sheet from Ms. Greenway's neck, and in attempting to resuscitate Ms. Greenway to the best of her nursing skills and training. (Doc. 66-2, at 101-08; Doc. 63-3, at 7.) Nurse Armenti's attempts to resuscitate Ms. Greenway continued until the emergency medical team arrived and transported Ms. Greenway to Northridge Hospital, where she was pronounced deceased. (Doc. 63-6, at 14-15.)

II. Expert Testimony of Lawrence Mendel, D.O.

Mr. Greenway retained Dr. Lawrence Mendel, D.O. to offer expert opinion testimony in support of his medical malpractice claim. In his Petition, Mr. Greenway has falsely stated that Dr. Mendel's standard of care testimony was "unrebutted." On the contrary, SHP and

Nurse Armenti have introduced expert testimony that Nurse Armenti's actions were "reasonable, appropriate and well within the acceptable standard of care." (Doc. 58-1, at 12.) Thus, there is conflicting expert testimony on Nurse Armenti's compliance with the applicable standard of care in this case. However, as the Eleventh Circuit observed, none of Dr. Mendel's opinions "provide any testimony that there was a reasonable probability Nurse Armenti's purported failures caused Ms. Greenway's death." *Greenway v. S. Health Partners, Inc.*, 827 F. App'x 952, 963 (11th Cir. 2020). In fact, the Northern District of Georgia and Eleventh Circuit have agreed that "the expert testified in his deposition that Nurse Armenti's actions did not cause Ms. Greenway's suicide." *Id*.

The petition omits these critical portions of testimony, wherein Dr. Mendel expressly refused to reach the conclusions that Mr. Greenway now suggests a jury could reach independently. For example, Mr. Greenway represents that, since Dr. Mendel testified that Nurse Armenti's "actions caused Ms. Greenway to run out of her prescribed antidepressant, putting her at risk of withdrawal and decompensation of her serious mental illness," jurors can infer that this alleged inaction "caused Mrs. Greenway to have a worse outcome." However, such an inference would directly contradict Dr. Mendel's testimony that if Ms. Greenway experienced withdrawal from her medications, it would have lasted "three to five days" beginning in December, and therefore she would not have been experiencing withdrawal

symptoms during her January incarceration. (Doc. 66-3, at 119.)

Nor is there any expert testimony to suggest that restarting Ms. Greenway's antidepressants when Nurse Armenti arrived at the jail on January 25 would have prevented her death. While Dr. Mendel criticized Nurse Armenti's failure to seek physician advice on resuming antidepressants, he testified that he did *not* think that one more dose of Paxil "would have made any difference" in the outcome, given how long Ms. Greenway had gone without taking her medications by that time. (Doc. 66-3, at 73.) In fact, even if Nurse Armenti could have administered the medication on the Saturday that Ms. Greenway was booked, Dr. Mendel did not think that three more doses of Paxil would been enough to help her either. (Doc. 66-3, at 73.) When asked directly whether the antidepressants would have prevented Ms. Greenway's suicide, Dr. Mendel responded bluntly, "no." (Doc. 66-3, at 72-73.)

Mr. Greenway also cites Dr. Mendel's testimony that Nurse Armenti should have notified Sgt. Muse about "Greenway's serious and untreated mental illness," and that doing so "would have helped the custody staff assure her placement into a cell that could be observed." However, the petition has omitted Dr. Mendel's specific testimony that Ms. Greenway's bipolar disorder and single suicide attempt four years earlier were not sufficient to place her on suicide watch. (Doc. 66-3, at 74.) Moreover, there has been no testimony indicating that the jail staff would have placed Ms. Greenway in a different cell if Nurse Armenti had

informed Sgt. Muse of her mental health diagnoses, or that being in a different cell would have prevented her suicide. Dr. Mendel did not address Mr. Greenway's testimony that he had already told Sgt. Muse that Ms. Greenway was suicidal two days earlier. (Doc. 66-3, at 91-93; 101-06.) If that testimony is true, then Sgt. Muse had more information about Ms. Greenway's risk of suicide than Nurse Armenti did, and there is no testimony to support Mr. Greenway's assertion that hearing this information again would have prompted Sgt. Muse to place Ms. Greenway in a different cell.

Finally, Mr. Greenway cites Dr. Mendel's testimony that, "a more rapid and coordinated response" after Ms. Greenway was found hanging in her cell "could have resulted in a different outcome." (Doc. 56-1, at 7; Doc. 66-3, at 89.) Mr. Greenway argues that this evidence is sufficient to permit a jury to reach "an inference of causation." Once again, Mr. Greenway has declined to cite his own expert's testimony directly contradicting that inference. When asked under oath whether he believed that the outcome would have been different if Nurse Armenti had acted more quickly, Dr. Mendel testified, "I don't know that I can say it's more likely than not just because there's so much information lacking." (Doc. 66-3, at 89-90.) He then reiterated: "I don't know—I can't really testify that it was more likely than not." (*Id.*) There is no expert testimony to support the conclusion that Nurse Armenti's response to Ms. Greenway's suicide attempt caused or contributed to her death.

III. Procedural Background

After a thorough review of the evidence, the Northern District of Georgia granted summary judgment on all claims. As to the deliberate indifference claim against Nurse Armenti, the district court held that she was entitled to summary judgment "because no reasonable jury could find she deliberately disregarded a significant risk that Mrs. Greenway would kill herself." (App. 64.) The district court further held that Dr. Mendel "at best, raises the 'possibility' that Defendant Armenti's conduct proximately caused Mrs. Greenway's death," and that his failure to establish the required causal link to a reasonable degree of medical probability "is fatal to Plaintiff's negligence claim against Defendant Armenti, which in turn dooms Plaintiff's respondeat superior claim against Defendant Southern Health." (App. 69.) The Eleventh Circuit affirmed, and thereafter denied Mr. Greenway's request for Hearing or Rehearing En Banc.

REASONS FOR DENYING THE PETITION

1. The Northern District of Georgia & Eleventh Circuit Court of Appeals Correctly Held that Tammy Greenway's Suicide Cannot Render Nurse Alyssa Armenti Liable for Deliberate Indifference to Her Medical Needs, as There is No Evidence that Nurse Armenti Was Subjectively Aware of a Strong Likelihood that Ms. Greenway Would Harm Herself.

The evidence in this case is legally insufficient to prove that Nurse Armenti violated Ms. Greenway's Eighth and Fourteenth Amendment protections against cruel and unusual punishment by exhibiting "deliberate indifference" to her serious medical needs. *See Campbell v. Sikes*, 169 F.3d 1353, 1362 (11th Cir. 1999) (*citing Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970 (1994)); *Goebert v. Lee Cty.*, 510 F.3d 1312, 1326 (11th Cir. 2007) (the Fourteenth Amendment Due Process Clause governs pretrial detainees, but "the standards under the Fourteenth Amendment are identical to those under the Eighth"). Since the undisputed evidence establishes that Nurse Armenti did not know that Ms. Greenway was at risk of suicide, there is no question of fact as to whether Nurse Armenti intentionally disregarded that risk.

To overcome summary judgment, Mr. Greenway had the burden of producing evidence sufficient to establish all three prongs of the deliberate indifference claim: (1) an "objective component by showing that [Ms. Greenway] had a serious medical need"; (2) a "subjective component by showing that [Nurse Armenti]

acted with deliberate indifference to her serious medical need"; and (3) "that [Ms. Greenway's suicide] was caused by [Nurse Armenti's] wrongful conduct." *Goebert*, 510 F.3d at 1326. Establishing the "subjective component" requires evidence of "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than [gross] negligence." *Id.* at 1327. Without reaching the second and third prongs of the subjective component, the Eleventh Circuit held that Mr. Greenway failed to meet his evidentiary burden of proving the first prong, since Dr. Mendel's "report offers nothing to show that Nurse Armenti had subjective knowledge of the risk that Ms. Greenway would harm herself." *Greenway*, 827 F. App'x at 961.

Nonetheless, Mr. Greenway argues that a jury should be permitted to *infer* that Nurse Armenti was deliberately indifferent to Ms. Greenway's needs based solely on Dr. Mendel's testimony that the medical care she provided fell below the standard of care. This is plainly not the standard for a deliberate indifference claim. *See Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285 (1976). Even if it were, the record is devoid of any evidence that Nurse Armenti was subjectively aware of and deliberately disregarded Ms. Greenway's risk of suicide, or that she engaged in conduct that was more than gross negligence. Thus, the Eleventh Circuit correctly held that Dr. Mendel's criticisms of her medical care are insufficient to create a question of fact as to the deliberate indifference claim.

A. Nurse Armenti Did Not Have Actual, Subjective Knowledge of Ms. Greenway's Risk of Suicide.

The evidence is undisputed that Nurse Armenti was not present at the jail on the day that Mr. Greenway claims to have reported the suicide risk to an unidentified nurse. Thus, Mr. Greenway has presented no evidence that Nurse Armenti had actual, subjective knowledge of Ms. Greenway's risk of suicide, and Nurse Armenti has affirmatively stated that she did not. (Doc. 63-3, at 7.) To survive summary judgment, Mr. Greenway had the burden of producing evidence that Nurse Armenti had personal knowledge of "a strong likelihood rather than a mere possibility" that Ms. Greenway would inflict harm on herself, and that she *knowingly* disregarded that risk. *Salter for Estate of Salter v. Mitchell*, 711 F. App'x 530, 537 (11th Cir. 2017). Because Nurse Armenti had no such knowledge, summary judgment was appropriately granted.

Subjective culpability is an essential element of a deliberate indifference claim, and to prove that element, "[i]t is not enough merely to find that a reasonable person would have known, or that the defendant should have known." *Farmer*, 511 U.S. at 843 n. 8. "Actual knowledge of the substantial risk is required for one to deliberately disregard it; constructive knowledge of the risk is insufficient to establish deliberate indifference under the Eighth Amendment." *Estate of Owens v. GEO Grp., Inc.*, 660 F. App'x 763, 767–68 (11th Cir. 2016). Thus, a deliberate indifference claim "will fail as a matter of law in the absence of actual knowledge of the

substantial risk, because to hold otherwise would impermissibly vitiate the subjective component of the analysis." *Id.*, *citing Farmer*, 511 U.S. at 837–38. *See also Burnette v. Taylor*, 533 F.3d 1325, 1331 (11th Cir. 2008) ("[I]mputed or collective knowledge cannot serve as the basis for a claim of deliberate indifference.").

The facts pertinent to Nurse Armenti's subjective knowledge are not in dispute. Nurse Armenti testified that she did not know that Ms. Greenway was contemplating suicide, and that she never spoke to Mr. Greenway or any of his family. (Doc. 63-3, at 4, 7; Doc. 66-2, at 62.) Ms. Greenway reported that she was *not* suicidal both times she was asked. (Doc. 64-2, at 2, 7.) Although Mr. Greenway testified that he informed a nurse that his wife was suicidal while in a holding cell on Sunday, January 24, he did not know her name, had never seen her before, and he never saw or spoke to her again after this encounter. (Doc. 66-1, at 103-06, 154, 157, 165.) It is uncontroverted that Nurse Armenti was not at the jail on that day, since she did not work on weekends. (Doc. 63-3, at 3, 11; Doc. 69, at 37, 46.) Thus, Mr. Greenway's testimony that he told an unidentified nurse that his wife was suicidal on Sunday, January 24 does not create a dispute of material fact as to Nurse Armenti's subjective knowledge. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007) (when one party's version of the facts is "blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment").

Without subjective knowledge of the risk of Ms. Greenway's suicide, Nurse Armenti cannot be held liable for violating the Constitution's prohibition of cruel and unusual punishment. "No liability arises under the Constitution for 'an official's failure to alleviate a significant risk that he should have perceived but did not, and we must judge Nurse [Armenti's] conduct in the light of the information available to her." *Jones v. Dr. Steve Anderson Behavioral Med., LLC*, 767 F. App'x 701 (11th Cir. 2019) (citation omitted) (holding that a jail nurse did not act with deliberate indifference by failing to order an inmate's medical and pharmaceutical records, where the plaintiff "never established that [the nurse] was aware that [the inmate] had a serious medical need that warranted further investigation and declined to pursue the matter further").

Because nothing in the record supports the conclusion that Nurse Armenti had actual knowledge of "a strong likelihood" that Ms. Greenway would inflict harm on herself, there is no basis for concluding that Nurse Armenti was deliberately indifferent to Ms. Greenway's serious medical needs. *See Salter*, 711 F. App'x at 537.

B. No Act or Omission of Nurse Armenti Could Constitute Cruel and Unusual Punishment.

Mr. Greenway argues that, since there is conflicting expert testimony as to whether Nurse Armenti violated the standard of care, there must also be a

factual dispute as to whether her medical care was so deficient that it violated the Eighth and Fourteenth Amendments. This is simply not the legal standard for a deliberate indifference claim, and despite Mr. Greenway's accusation that the Eleventh Circuit is either confused or "consciously moving the goalposts," it has never been the standard. This Court's seminal case on this issue is *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285 (1976), which cautioned that not every claim of inadequate medical treatment states a violation of the Eighth Amendment, since an "inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'" *Id*., at 105-06 (observing that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner").

Nonetheless, Mr. Greenway erroneously contends that the deliberate indifference standard's requirement that the defendant's conduct include "conduct that is more than gross negligence" is a mere redundancy, referring only to the defendant's actual knowledge of the risk and failure reasonably to act on it, as opposed to the negligence standard's reference to a risk that *should be* recognized. Mr. Greenway claims that requiring *deliberate* inaction, as opposed to a simple failure to react reasonably to a known risk, imposes "a level of culpability tantamount to criminal." However, Mr. Greenway's claim arises under 42 U.S.C. § 1983, which creates "'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or

immunities secured' to them by the Constitution." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305–06, 106 S. Ct. 2537, 2542 (1986). Thus, a deliberate indifference claim applies the Eighth Amendment's prohibition of cruel and unusual *punishment* to the context of medical care in jails and prisons; it is not, as Mr. Greenway urges, an independent tort that allows inmates to recover for general "unreasonable" behavior of jail officials.

Because Mr. Greenway seeks to hold Nurse Armenti liable under § 1983 for cruel and unusual punishment, rather than for simple negligence, the "culpability" requirement is essential to proving the specific constitutional violation that underlies a deliberate indifference claim. *See Farmer*, 511 U.S. at 834 ("To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' "). The Eleventh Circuit has clarified this very misconception regarding the subjective component in a deliberate indifference claim in *Howell v. Evans*:

> The distinction between deliberate indifference and negligence is conceptually vague because "indifference" generally implies a lack of attention by the actor similar to what the law often calls negligence. The modifier "deliberate," however, requires that the actor recklessly ignore the medical situation in the face of information that a reasonable person would know requires action.

Howell v. Evans, 922 F.2d 712, 720 n.7 (11th Cir.), *vacated pursuant to settlement*, 931 F.2d 711 (11th Cir.

1991), and *opinion reinstated sub nom. Howell v. Burden*, 12 F.3d 190 (11th Cir. 1994). This sort of *deliberate* inaction is manifest by a "refusal to act" rather than simply a "failure to act," and requires "not merely the knowledge of a condition, but the knowledge of necessary treatment coupled with a refusal to treat properly or a delay in such treatment." *Id.* at 720-21. The record reveals no evidence that Nurse Armenti had actual knowledge of Ms. Greenway's suicide risk and "recklessly ignored" or "refused to act" on it. Without such knowledge, neither her failure to recognize the risk nor the failure to act on it could constitute "cruel and unusual punishment." *See Farmer*, 511 U.S. at 826 (the failure to alleviate a risk that an official did not perceive cannot be condemned as the infliction of punishment).

Moreover, even if Nurse Armenti had been present in the holding cell when Mr. Greenway allegedly warned that Ms. Greenway was suicidal on January 24, the mere failure to act on that assertion would not constitute evidence of "obduracy and wantonness" as necessary to prove a deliberate indifference claim. *See Sumlin v. Lampley-Copeland*, 757 F. App'x 862, 867 (11th Cir. 2018). In *Sumlin*, the Eleventh Circuit found that despite the fact that an inmate declared he was having a stroke, the physician's failure to detect the signs of a stroke "amounts, at most, to negligence or medical malpractice, not deliberate indifference," since "the medical staff was not obligated to act on Sumlin's self-diagnosis." *Id.*, *citing Howell*, 922 F.2d at 719 ("[T]he mere negligent diagnosis or treatment of a patient does not constitute deliberate indifference.")

Likewise, even if Nurse Armenti had heard from Mr. Greenway—who had just been charged with aggravated assault of Ms. Greenway—that Ms. Greenway should be put on suicide watch, she would not have been obligated to act on his word alone, and her failure to subjectively appreciate the risk based on that interaction would not be a constitutional deprivation.

Mr. Greenway had the burden of producing specific evidence creating a genuine dispute of material fact as to whether Nurse Armenti had actual knowledge of a significant likelihood that Ms. Greenway would harm herself and intentionally refused to act to on that knowledge. Dr. Mendel's testimony regarding Nurse Armenti's alleged breach of the standard of care does not identify any conduct that could rise to the level of "offend[ing] 'evolving standards of decency' in violation of the Eighth Amendment." *See Estelle*, 429 U.S. at 106. Thus, Mr. Greenway's deliberate indifference claim is deficient as a matter of law, and the Eleventh Circuit ruled correctly in affirming the trial court's grant of summary judgment.

2. The Northern District of Georgia Did Not Abuse its Discretion When it Properly Applied Georgia Law in Deciding a Summary Judgment Motion on a State Law Claim Over Which it Had Supplemental Jurisdiction, Where Mr. Greenway Did Not Ask the Court to Decline Jurisdiction.

For the first time on appeal, Mr. Greenway argued that the district court should have declined to exercise

supplemental jurisdiction over the state law medical malpractice claim pursuant to 28 U.S.C. § 1367(c), and that the court's decision to grant summary judgment on this claim was therefore an abuse of discretion.

The Eleventh Circuit has held that "with respect to § 1367(c), the only issue which we could address is whether the district court abused its discretion in taking supplemental jurisdiction" of the state law claim. *Lucero v. Trosch*, 121 F.3d 591, 598 (11th Cir. 1997). Where, as here, "the district court was not asked to exercise its discretion [to decline jurisdiction], and thus did not discuss the matter," it is difficult for an appellate court to review that decision for an abuse of discretion. *Id.*, *citing Narey v. Dean*, 32 F.3d 1521, 1526 (11th Cir. 1994) ("[A]ppellate courts generally will not consider an issue or theory that was not raised in the district court."). Noting that the district court is in the best position to weigh the competing interests in deciding whether it is appropriate to exercise supplemental jurisdiction, the Eleventh Circuit declined to consider the argument that failing to exercise its discretion to dismiss the state claims was an abuse of discretion where it was raised for the first time on appeal. *Lucero*, 121 F.3d at 598. Citing *Lucero*, the Eleventh Circuit found that that Mr. Greenway had waived this argument by failing to raise it before the district court. *Greenway*, 827 F. App'x at 962.

Even if the argument had not been waived, the district court's exercise of supplemental jurisdiction was appropriate on its merits. The district court had the power to hear Mr. Greenway's medical malpractice

claim along with his federal claims under 28 U.S.C. § 1367(a), which states that federal courts "*shall* have supplemental jurisdiction" over state law claims when they "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. . . ." 28 U.S.C. § 1367(a) (emphasis supplied). District courts "*may* decline to exercise supplemental jurisdiction over a claim" when (1) the state law claim raises a novel or complex issue of state law, (2) the claim substantially predominates over any claims that the district court has original jurisdiction over, (3) the court has dismissed all the other claims that it has original jurisdiction over, or (4) there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c) (emphasis supplied).

"Any one of the factors listed in § 1367(c) is sufficient to give the district court discretion to dismiss a case's supplemental state law claims," but prior to dismissing a claim under § 1367(c)(4), a court must consider the discretionary factors articulated in *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966), including comity, convenience, fairness, and judicial economy. *Sutherland v. Glob. Equip. Co.*, 789 F. App'x 156, 161–62 (11th Cir. 2019) (the district court was not required to analyze the *Gibbs* factors prior to dismissing a claim under § 1367(c)(3)). *But see Palmer v. Hosp. Auth. of Randolph Cty.*, 22 F.3d 1559, 1569 (11th Cir. 1994) (holding that it was error not to consider the *Gibbs* factors prior to exercising its discretion to dismiss the claims under §1367(c)(4)).

Under § 1367(a), it was soundly within the district court's power to decide the state law medical malpractice claim concurrently with the federal claims at summary judgment. Indeed, "supplemental jurisdiction *must be* exercised in the absence of any of the four factors of section 1367(c)." *Palmer*, 22 F.3d at 1569 (emphasis supplied). Contrary to Mr. Greenway's argument, there were no state law claims remaining after dismissal of the federal claims because all of the claims were decided concurrently pursuant to the same dispositive motion. If state law claims had remained after dismissal of the federal claims at summary judgment, the district court would have retained the *power* to consider those claims, but would also have gained the *discretion* to dismiss them without prejudice under § 1367(c)(3), or under §1367(c)(4) if it determined that the *Gibbs* factors weighed in favor of doing so. However, "supplemental state-law claims are not required to be dismissed along with the underlying claim," since the "power to retain jurisdiction after the dismissal of the underlying federal claim has not been altered by section 1367." *Id.* at 1567–68 (remanding for consideration of the *Gibbs* factors because it was unclear whether the district court dismissed the state law claims because it believed that it lacked the power to hear them, or pursuant to the exercise of its discretion under section 1367(c)).

Mr. Greenway's argument reverses this principle. The use of the word "may" in §1367(c) indicates that *declining* to exercise supplemental jurisdiction is discretionary, but since federal courts "shall have"

supplemental jurisdiction over claims arising out of the same case or controversy under §1367(a), the power to exercise its jurisdiction over the state law claim was not contingent on other factors. Because the district court did not decline to exercise supplemental jurisdiction, consideration of the discretionary *Gibbs* factors was unnecessary. Mr. Greenway has cited no cases finding an abuse of discretion under these circumstances.

On the contrary, the Eleventh Circuit has held that a district court did not abuse its discretion by deciding state law claims on the merits and denying a motion to remand the action to state court after disposing of the federal claim, noting that the federal and state law claims involved the same facts and were "so related" that they were "part of the same case or controversy," and thus judicial economy favored the court's consideration of the state law claim in its summary judgment order. *Smith v. City of Tallahassee*, 789 F. App'x 783, 789–90 (11th Cir. 2019). Likewise, Mr. Greenway's medical malpractice and deliberate indifference claims involve the same facts, and deciding both claims concurrently at summary judgment was in the interest of judicial economy.

Mr. Greenway cites dicta in *Owens* for the proposition that "when all of the federal claims have been dismissed pretrial, Supreme Court case law 'strongly encourages or even requires dismissal of the state claims.'" *Estate of Owens v. GEO Grp., Inc.*, 660 F. App'x 763, 775 (11th Cir. 2016). In *Owens*, the Eleventh Circuit affirmed a district court's discretion to decline to

exercise supplemental jurisdiction over state law claims remaining after a grant of summary judgment on the federal claims, noting that Supreme Court precedent encouraged or required it to do so under the particular circumstances. *Id.* Thus, the principle articulated in *Owens*—which cautions district courts against proceeding to trial solely on state law claims after dismissing the claims conferring original jurisdiction—applies specifically to a situation in which only state law claims remain to be tried in federal court.

The case at bar is procedurally distinguishable from the posture contemplated in *Owens* and other cases citing this this line of precedent, since there was no risk of this case proceeding to trial on state law claims alone after all claims were dismissed concurrently. It is only under such circumstances that district courts are "strongly encourage[d] or even require[d]" to dismiss state law claims, since trying such claims alone in federal court undermines objectives of comity and judicial efficiency. *Id*. Because the district court decided both federal and state law claims pursuant to the same motion for summary judgment, consideration of all the claims arising out of the same set of facts was appropriate under § 1367 and favored by principles of judicial economy, convenience, fairness, and comity.

3. The Northern District of Georgia Correctly Applied Georgia Law in Holding That Mr. Greenway's Georgia Medical Malpractice Claim Failed as a Matter of Law, Since the Expert Testimony Did Not Establish Proximate Causation to a Reasonable Degree of Medical Probability.

Finally, Mr. Greenway's argument that the district court abused its discretion in exercising its supplemental state law claims because it incorrectly applied state law is erroneous, and offers no basis for certiorari review. The district court correctly applied Georgia law on the requisite proximate cause evidence in a medical malpractice claim. In order to prove a medical malpractice claim under Georgia law, Mr. Greenway had the burden of proving that Nurse Armenti's "purported violation or deviation is the proximate cause" of Ms. Greenway's suicide, and that her death "proximately resulted from such want of care or skill." *Beasley v. Northside Hosp., Inc.*, 289 Ga. App. 685, 689, 658 S.E.2d 233, 236–37 (2008).

The Eleventh Circuit observed that "Mr. Greenway's expert offers nothing more than the possibility that Nurse Armenti proximately caused Ms. Greenway's death." *Greenway*, 827 F. App'x at 963. Under Georgia law, testimony showing "a bare possibility" of causation is not sufficient to survive summary judgment, since "[t]here can be no recovery where there is no showing to any reasonable degree of medical certainty that the injuries could have been avoided." *Id.* (affirming the grant of summary judgment where the

plaintiff's expert medical testimony established only the "possibility" that any negligence of the hospital caused or contributed to the patient's injuries). *See also Goggin v. Goldman*, 209 Ga. App. 251, 252, 433 S.E.2d 85 (1993) (affirming judgment notwithstanding a mistrial in a medical malpractice case where the plaintiff's expert witness had testified that, if defendant had ordered diagnostic tests, he would have discovered a blood clot and had "some opportunity" to save the plaintiff's kidney); *Anthony v. Chambless*, 231 Ga. App. 657, 659, 500 S.E.2d 402, 404 (1998).

Georgia requires expert testimony to establish proximate cause in medical malpractice cases, and "the expert's role is to present a *realistic assessment of the likelihood* that the defendant's alleged negligence caused the plaintiff's injuries." *Beasley*, 289 Ga. App. at 688. Mr. Greenway erroneously argues that a jury could infer causation despite his expert's failure to testify that any of the criticized actions of the nurse caused Ms. Greenway's death. Such an inference would be impermissible under Georgia law, since "if the plaintiff's medical expert cannot form an opinion with sufficient certainty so as to make a medical judgment, there is nothing on the record with which a jury can make a decision with sufficient certainty so as to make a legal judgment." *Id. See also Swint v. Mae*, 340 Ga. App. 480, 485, 798 S.E.2d 23, 27 (2017) ("The trial court need only find the experts' testimony regarding causation to be less than a reasonable medical probability in order to find it insufficient to render the Defendants liable.").

The Georgia Court of Appeals has affirmed summary judgment on a medical malpractice claim where a plaintiff's expert's "bare and conclusory assertion" that a nursing staff's alleged negligence caused a patient's death was insufficient to raise a genuine issue of fact as to proximate causation. *Edokpolor v. Grady Mem'l Hosp. Corp.*, 347 Ga. App. 285, 288, 819 S.E.2d 92, 95 (2018), *cert. denied* (May 20, 2019). In *Edokpolor*, a patient aspirated and subsequently died on the same day that the nursing staff administered a liquid medication by mouth, contrary to a physician's order to administer the medication by feeding tube. *Id.* at 286. The plaintiff's expert witness testified that the failure to administer the medication by feeding tube breached the standard of care, and proximately caused the patient's death. *Id.* Finding this testimony to be "unsupported, conclusory, and insufficient to raise a genuine question of material fact," the trial court granted summary judgment, which the Georgia Court of Appeals affirmed. *Id.* at 287.

The Georgia Court of Appeals reasoned that there was no evidence that the patient had aspirated while ingesting the medication by mouth, and that the expert did not address the possibility that the patient had vomited and aspirated *after* the medication was in her stomach, since vomiting was a known side effect of the medication even when administered by feeding tube. *Id.* The Court thus found that, since the plaintiff's expert did not offer facts linking the patient's death to the defendant's oral administration of the medication, the expert did "not show, to any reasonable

degree of medical certainty, that [the patient's] death could have been avoided," but for the defendant nursing staff's actions. *Id.*

Dr. Mendel's testimony is similarly deficient. Mr. Greenway's medical negligence claim relies on "bare and conclusory" expert testimony that does not link any facts in the record to the conclusion that Ms. Greenway's death could have been avoided, but for Nurse Armenti's actions. *See also Cowart v. Widener*, 287 Ga. 622, 631, 697 S.E.2d 779 (2010) ("a defendant's conduct is not a cause of the event, if the event would have occurred without it"). Instead, Mr. Greenway cites to Dr. Mendel's testimony regarding alleged breaches of the standard of care, and argues that it is the jury's role to connect the dots that his expert witness refused to connect. This argument is irreconcilable with Georgia law that "the question of whether the alleged professional negligence caused the plaintiff's injury is generally one for specialized expert knowledge beyond the ken of the average layperson." *Edokpolor*, 347 Ga. App. at 287. The attempt to create a question of fact by proposing potential causation inferences ignores well-established precedent that "if the plaintiff's medical expert cannot form an opinion with sufficient certainty so as to make a medical judgment, there is nothing on the record with which a jury can make a decision with sufficient certainty so as to make a legal judgment." *Beasley*, 289 Ga. App. at 688.

Dr. Mendel is a physician who has been paid to testify on Mr. Greenway's behalf. If he cannot conclude to a reasonable degree of medical certainty that Nurse

Armenti's actions caused Ms. Greenway's suicide, then as a matter of law, the evidence is insufficient to allow a jury to make that inference. Even if a jury could infer proximate causation without specific expert testimony on the issue—and under Georgia law it cannot—Mr. Greenway elides the fact that Dr. Mendel was specifically asked under oath to testify in support of these causation inferences, and refused to do so. A jury would not be authorized to make inferences that conflict with this testimony.

The lack of expert testimony establishing causation in this case is dispositive. The district court had the power to exercise supplemental jurisdiction over Mr. Greenway's medical malpractice claim under § 1367(a), and correctly applied Georgia law in finding Dr. Mendel's causation testimony legally insufficient. The district court's grant of summary judgment was accordingly correct, and the Eleventh Circuit appropriately affirmed it. Mr. Greenway's argument that the district abused its discretion by misapplying Georgia law must be rejected.

CONCLUSION

For the foregoing reasons, Court should deny Kenneth Greenway's Petition for a Writ of Certiorari.

Respectfully submitted,

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