

ORIGINAL

Supreme Court, U.S.
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No. **21-7155**

IN THE SUPREME COURT OF THE UNITED STATES

BINBING XIE

Petitioner

v.

YAN FENG CHEN, PHYSICIAN, P.C.

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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Pro se Petitioner

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QUESTIONS PRESENTED

Whether the trial court abused its discretion by violating the Due Process and Equal Protection of United States Constitution, Amendment XIV to proceed the above-entitled case?

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

I, Petitioner, Binbing Xie, the plaintiff in the trial court, respectfully ask that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeal, filed on October 7, 2021.

OPINIONS BELOW

The opinion of the New York Court of Appeal, was issued on October 7, 2021, and is attached as Appendix A. The New York Kings County Supreme Court's Decision and Order is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The decision of the New York Court of Appeal for which petitioner seeks review was issued on October 7, 2021. This petition for a writ of certiorari is filed within 90 days of the New York Court of Appeal's decision.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 7, 2016, I brought this action to the New York Kings County Supreme Court. The nature of this action is fraud and medical malpractice.

On May 5, 2014, I started to have fever. The fever subsided a little on May 6, 2014, and returned on May 7, 2014. Because I believed that I was pregnant according to my signs and knowledge at that time, therefore, my ex-husband and I went to see Dr. Wei Yuan Shieh, MD (hereinafter "Dr. Shieh"), a F.A.C.O.G doctor on 05/09/2014 at noon to make sure whether or not my pregnancy causes the fever and what kind of fever reducer wouldn't hurt the unborn baby. Dr. Shieh believed that if I became pregnant, it was probably one or two days, and fever had nothing to do with pregnancy. Dr. Shieh told me that taking Tylenol Cold is safe and would not cause harm to the unborn baby.

During the visit, Dr. Shieh did ultrasound exam for me. He told me and my ex-husband that my ultrasound showed my uterus was in a very good position and shape to carry a baby. Dr. Shieh told me that as for fever, I should see a family doctor and have a blood test to figure out what caused the fever. Dr. Shieh also told me that my heart rate is indeed a bit high, so I should see a family doctor for a checkup as well. Both my ex-husband and I didn't have a family doctor at that time, therefore, my ex-husband took me to Defendant's clinic, a walk-in clinic on May 9, 2014 around 2pm.

In the defendant's clinic, the receptionist told me to see "Dr. Lina Wu". Lina Wu also presented herself as a doctor during my visit. I told Lina Wu that I experienced fever, shortness of breath, bleeding gums, weakness, tiredness, and heartbeats fast since May 5, 2014. I asked Lina Wu to give me a blood test. Lina Wu insisted that it was not necessary

to have a blood test and I would be fine after taking the medications she prescribed. Lina Wu diagnosed me with a cold/Flu and prescribed three medications: Amoxicillin/Clavulan TAB 875-125mg, Q-PAP TAB 325mg, and Metoclopramide TAB 10mg to take for ten days. After I took the medicines that Lina Wu prescribed, I suffered a miscarriage with heavy and long lasting vaginal bleeding on May 10, 2014.

I entered the emergency room of Bellevue Hospital Center on May 14, 2014. At that time, I had 98% leukemic blast cells and only 2% normal blood cells left in my blood. I was diagnosed with Acute Myeloid Leukemia (AML). A diagnosis of AML only requires having above 20% leukemic blasts. My hematology doctor, MaryLynn R Nierodzik MD, in the Bellevue Hospital Center, told me that if I came to hospital one night late, I would have died, her team couldn't save me.

As a matter of fact, I was misdiagnosed by Lina Wu. Lina Wu wasn't a medical doctor, but a nurse. The Defendant and Lina Wu recklessly and fraudulently practice medical service. The Defendant kept opening a new clinic branch office with only one M.D. doctor and three nurses who fraudulently practice the profession as doctors, as set forth Appendix C: *Defendant's business cards*. They sacrifice patients' health and lives to make money.

Because of the extremely high rate of leukemic blast cells, the induction chemotherapy didn't get me into remission. I had undergone high-dose re-induction chemotherapy and more treatments with high-dose consolidation chemotherapy to prevent a relapse. Because of too many high-dose chemotherapy treatments, even though the dose of each cycle of consolidation chemotherapies was continually reduced, my

body cannot tolerate any more. The only chance that I could survive is to have an Allogeneic Stem Cell Transplant, also called Bone Marrow Transplant (BMT).

After BMT, I am infertile and will never be able to give birth myself. I also develop acute and chronic Graft-Versus-Host Disease (GVHD). I had to have immunosuppressive therapy for 4 years. Because of immunosuppressive therapy, low blood counts, and lack of immunizations, I am at high risk for injury, bleeding and vulnerable to all kinds of infections. I require a mask and gloves when in the community to reduce the risks of infections. In these years, I am unable to work and suffer so much pain. I wish that no one has to go through what I have been through.

Statute of limitation for medical malpractice cases is three and half years. Because I was still under immunosuppressive therapy and monthly phlebotomy treatments in 2017, I was very weak. But in order to seek justice, I had to go to the Defendant's clinic to ask for my medical record on October 7, 2017. The receptionist told me that I can print the medical record from www.MDLAND.com. The receptionist also told me my medical record account name and password. Because there was only one month left to bring this action to the court, I cannot find a lawyer to represent me. These lawyers that I contacted told me that they need to have at least 6 months in advance to review medical records. Therefore, I brought this action to the New York Kings County Supreme Court on November 7, 2016, as a pro se plaintiff, as set forth Appendix D: *WebCivil Supreme - Case Detail*, (<https://iapps.courts.state.ny.us/webcivil/FCASSearch>).

I filed the note of issue on January 30, 2020 with a jury trial request. The defendant filed the defendant's motion for summary judgment through e-file on August 5,

2020. The trial court requested me to submit my response before the conference meeting on August 20, 2020. Because the court house was closed and I didn't have an e-file account, I sent my opposition to Defendant's summary judgment to the trial court and the defendant through email on August 20, 2020, as set forth Appendix E: *Email with attached Plaintiff opposition to summary judgment and exhibits*. The trial court made the Decision and Order on September 18, 2020. I received the Decision and Order of the trial court with notice of entry in mail on November 23, 2020. Notice of appeal was filed with the New York Kings County Supreme Court on December 22, 2020. The New York Appellate Division, 2nd Judicial Department made Decision & Order on Motion on June 7, 2021, as set forth Appendix F: *Decision & Order on Motion of Appellate Division*. I filed the notice of appeal with the New York Court of Appeal on June 30, 2021.

The New York Court of Appeal dismissed the appeal on October 7, 2021, upon the ground that no substantial constitutional question is directly involved. Petitioner seeks a writ of certiorari to review that decision.

REASONS FOR GRANTING THE WRIT

- I. The trial court violated due process and equal protection to proceed the defendant's motion for summary judgment, at the time that the court house was closed during pandemic and the plaintiff's resident place lacked privacy or internet access for vital conference meetings.**

I lived in a room of a shared house. The house lacked privacy. My roommates and I can hear each other talking in our own rooms. My computer got a computer virus on June 17, 2020. Because computer stores are closed at that time, I cannot have my computer fixed in person. I tried to get IT technique support through phone calls to solve

the problem, but the problem cannot be fixed.

Under the above circumstances, when the trial court contacted me for a vital conference meeting in July 2020, I told the trial court my situations and respectfully requested the trial court to hold the court meetings in the court after the courthouse was reopened. However, the trial court denied my request and still forced the vital conference meeting for the defendant's motion for summary judgment, meanwhile, directed me to move the paper filing to e-file, as set forth Appendix G: *Emails regarding e-file and privacy*. Therefore, I had to attend the meeting by telephone call. I cannot see the judge face to face, however, the other party of this case can see the judge face to face. This is not equal. Without an e-file account, I was unable to file the documents to the court at the time the courthouse was closed due to the pandemic. This is not due process. My right of fair trial was denied and not equally protected.

Because I complained that the landlord illegally converted the house, the landlord prohibited me to access the shared internet cable or install internet cable myself since August, 2020, as set forth Appendix H: *Landlord's notice*. Even though my computer was fixed in the beginning of September, because I didn't have internet at my resident place. In order to attend the vital conference meeting to see the judge on September 15, 2020, I had to go to the ferry terminal in the public place to get an internet connection. The background noise of the public made me hard to hear clearly in the meeting. My right of privacy and fair trial were not equally protected. My right of equal protection was denied.

II. The trial court violated due process and equal protection to proceed the defendant's motion of summary judgment, by repeatedly denying the plaintiff's requests for a Mandarin interpreter.

I am not native English speaker. I cannot understand all the vocabulary and legal terms. Therefore, I requested a Mandarin interpreter from the court for court appearance meetings every time. If the court cannot provide the interpreter, the court will always adjourn the meeting, as set forth Appendix I: *Final Pre-Note Order*.

I requested a Mandarin interpreter for the conference meetings of the defendant's motion for summary judgment as well, as set forth Appendix J: *Emails with the trial court regarding the vital meeting and interpreter*. However, the trial court repeatedly denied my requests and proceeded the conference meetings in July and August of 2020 without an interpreter. This is not due process. My right of fair trial was not equally protected. My right of equal protection was denied.

III. The trial court abused its discretion by cutting down the plaintiff's time to respond to the defendant's motion for summary judgment.

On August 4, 2020, the judge of the trial court asked me to submit my response to the defendant's motion for summary judgment before the next conference meeting held on August 20, 2020. Because of my medical conditions, I requested more time to submit my response. However, the trial court denied my request.

The defendant filed the defendant's motion for summary judgment through e-file on August 5, 2020. The return day generated by the e-file system was on September 17, 2020, as set forth Appendix K: *WebCivil Supreme - Motion Detail*. Even though the trial court was noticed the huge amount of documents of the defendant's motion, as set forth

Appendix L: *WebCivil Supreme - eFiled Documents Detail*, and the return day generated by the e-file system, as set forth Appendix M: *Emails regarding e-file return day*, but the trial court still asked for the return day on August 20, 2020.

I received the delivery of 6 box documents of Defendant's motion for summary judgment on August 7, 2020, as set forth Appendix N: *Photo of 6 boxes of documents*. From August 7, 2020 to August 20, 2020, I only had less than 2 weeks to respond to those huge amounts of documents. It is irrational. It caused me tremendous emotional stress. The trial court abused its discretion to cut down the reasonable time. This is not due process. My right of fair trial was not equally protected. My right of equal protection was denied.

IV. The trial court abused its discretion by denying the plaintiff's request to obtain the key evidence and facts of this case from the third party, but gave the defendant additional time to make false and fraudulent statements about the altered and forged medical records.

After I received the documents of the defendant's motion for summary judgment, I realized that the medical records that the defendant's submitted with the motion were altered and forged. The first line on page 3, "Chen, Yan Feng, MD page" of the Client Records shows the "Date of Service: 05/28/2017", as set forth Appendix O: *Defendant's motion for summary judgment-Exhibit-N-Client-Records*. I brought this action on November 7, 2016. I definitely didn't visit the defendant's clinic on 05/28/2017. It shouldn't have the service record on 05/28/2017.

Meanwhile, the page 2, "Wu, Lina, NP page" of the Client Records is different from what I printed through MDLAND.com website on 10/7/2016, as set forth Appendix

P: *Medical records printed on 10/7/2016.* The contents of Reason for Visit and History of Present Illness on “Wu, Lina, NP page” provided by the defendant were absolutely false and fraudulent statements. I never complained about those symptoms. However, the reason for my visit and symptoms I complained about, such as, fever, shortness of breath, bleeding gums, weakness, tiredness and heartbeats fast weren’t there. It caused reasonable doubt that the “Wu, Lina, NP” page was altered and forged after I brought this action into the court.

The client medical records are the key facts and evidence of this case. The affirmation of Mark Fialk, MD and affirmation of Alexa Schneider, RN in support of the defendant’s motion for summary judgment were based on the medical records provided by the defendant. Therefore, it is absolutely important and critical for the trial court to figure out whether the client records provided by the defendant were altered and forged.

Because the court house was closed in 2020, I cannot subpoena the third party MDLAND.com to provide my medical records and transaction information of my medical record account which was maintained by MDLAND.com. Therefore, I respectfully requested the trial court to obtain those evidences from the third party, MDLAND.com. However, the trial court denied my request on August 20, 2020, but adjourned the conference meeting to September 15, 2020, as set forth Appendix Q: *WebCivil Supreme - Appearance Detail*, in order to give the defendant additional time to submit an explain regarding the client medical record provided by the defendant. The defendant submitted Reply Affirmation and the Affirmation of Yan Fang Chen, M.D. on September 14, 2020, as set forth Appendix L: *WebCivil Supreme - eFiled Documents*

Detail.

The trial court abused its power and discretion to deny the plaintiff's request to obtain the key evidence and facts of this case from the third party, and gave the defendant additional time to make false and fraudulent statements about the altered and forged medical records. It is extremely unfair and unjust. This is not due process. My right of fair trial was infringed. My right of equal protection was denied.

V. The trial court should give pro se litigant reasonable time to find a medical expert who is able to review the court documents and medical records to write an expert report.

The trial court dismissed the case because I didn't provide an expert report. However, as a matter of fact, the trial court abused its discretion by cutting down my time to respond to the defendant's motion for summary judgment. I received the delivery of 6 box documents of Defendant's motion for summary judgment on August 7, 2020. The trial court forced the return date on August 20, 2020. It is impossible for me to find a medical expert that can review ten thousand pages of medical records and legal documents to write a medical record within two weeks. This is not due process.

VI. The trial court shouldn't prohibit pro se litigants from having fair trial by jury on the medical malpractice case, even though pro se litigants weren't able to provide the medical expert report.

In general, for pro se litigant to obtain a medical expert report, need achieve the following elements:

1. Be able to find a medical expert who has specialized knowledge and experience regarding the case.

2. The medical expert would be able to review the medical records and legal documents to write an expert report within the given period of time.
3. The pro se litigant would afford to pay the costs of the medical expert's work. Usually, it costs \$500 per an hour.

A poor pro se litigant may achieve the first 2 elements, but may not achieve the third element. In practice, as long as the pro se litigant cannot provide a medical expert report, the trial court would dismiss the action during the summary judgment section. The pro se litigant would never get a chance to have a fair trial by jury. Under this circumstance, there is no meaning for a poor pro se litigant to bring the medical malpractice action to the court in the first place, because the poor pro se litigant will never get justice and a fair trial. This is not due process. The poor pro se litigants' rights of seeking justice and having fair trial in medical malpractice cases are denied and not equally protected.

In this case, the defendant took depositions from me three times. However, I was unable to take one deposition from the defendant, not only because I cannot find a recording company who is willing to do the deposition recording for pro se litigant, but I cannot afford the costs as well. Therefore, my chance to get justice is a jury trial. In a jury trial, I am able to subpoena the defendant, Yan Feng Chen, and Lina Wu to testify in the court.

In a jury trial, I am able to let my witness experts, MaryLynn R Nierodzik, MD, my hematology doctor in the Bellevue Hospital Center, and Alla Keyzner, MD, my Bone Marrow Transplant doctor in the Mount Sinai Hospital, to testify on behalf of me in the court, and let the jury decide the case based on the medical facts and the medical

treatments that I had. The medical records speak the truth and facts. In a jury trial, I also can question the experts of the defendant to let the jury decide whether the opinions of the defendant's experts were based on the facts and evidence or not.

I filed the note of issue with a jury trial request. I respectfully requested a jury trial again in my opposition to the defendant's motion for summary judgment, as set forth *Appendix E: Email with attached Plaintiff opposition to summary judgment and exhibits*. However, the trial court abused its discretion by denying my request for a jury trial, but accepting false statements based on the altered and forged medical records. This is not due process. My right to have a fair trial and get justice were denied.

VII. The trial court should give equal protection and extension to all statute of limitations, including the period of time to file the notice of appeal, at the time that the court houses were not fully functional due to Covid-19 pandemic.

In the court house, there is a help center for litigants. As a pro se litigants, I rely on the help center to obtain the procedure instructions and legal forms to proceed this action. Because the court house was closed due to Covid-19 pandemic, I cannot go to the help center to get the assistance that I need. I cannot get instructions regarding how to move the paper filing to e-file and how to obtain the e-file account. Without an e-file account, I was unable to file the documents, such as the motions and response to the defendant's motions, to the court at the time the courthouse was closed due to the pandemic. This is not due process. My right of seeking justice was not equally protected.

After I noticed that the trial court made the Decision and Order on September 18, 2020, I called the courthouse to ask how to file an appeal to the Decision and Order,

however, there is no person answering the phone. I also sent emails to ask the procedure, however, my emails and questions were not replied, as set forth Appendix R: *Emails requesting proceeding guides*. Because the court house was closed and not fully functioning, I struggled with how to submit the notice of appeal to the court in 30 days of statute of limitation.

On the contrary, because of Covid-19 pandemic, the defendant was given a 4 months extension to file the summary judgment and move the paper filing to e-file. Under the same pandemic, as pro se litigant, I was not given any extension of statute of limitation to proceed this action. This is not due process. The right of pro se litigant was denied and not equally protected.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the opinion of the New York Court of Appeals.

Dated: December 31, 2021

Respectfully submitted,



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