

No. 21-894

In The
Supreme Court of the United States

HELEN GARDNER,

Petitioner,

v.

NEW YORK PRESBYTERIAN BROOKLYN
METHODIST HOSPITAL, ET AL.,

Respondents.

On Petition for A Writ of Certiorari
to the Supreme Court of the State of New York

On PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

I

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of the State of New York, namely, Judge Marsha L. Steinhardt, erred and abused its/her discretion by dismissing Petitioner's Wrongful Death Case for want of a Certificate of Merit which does not apply in New York State.
2. Whether Petitioner's First Amendment right to petition, 42 USC §1981 right to sue, give evidence, to be parties to suits was violated by the actions of the Supreme Court of the State of New York?
3. Whether Petitioner's Fourteenth Amendment right of due process, and access to the courts was violated by actions of Supreme Court of the State of New York?

II

PARTIES TO PROCEEDING AND RELATED CASES

Petitioner, Helen Gardner, an individual person, a citizen of the United States.

Respondents, New York Presbyterian Brooklyn Methodist Hospital, Karina M. Dsouza, M.D., Lien-Khang P. Tran, M.D., Thomas Chen, M.D., Josif Sholomon, M.D., Alana Sholomon, D.O., Dr. Jordan, ET AL.

- Gardner v. New York Presbyterian Brooklyn Methodist Hospital, No. 2021-424, State of New York Court of Appeals. Judgment entered September 15, 2021.
- Gardner v. New York Presbyterian New York Methodist Hospital, No. 2020-930, State of New York Court of Appeals. Judgment entered March 30, 2021.
- Gardner v. New York Presbyterian Brooklyn Methodist Hospital, No. 2019-13202, Supreme Court of the State of New York Appellate Division: 2nd Judicial Department. Judgment entered October 30, 2020.
- Gardner v. New York Presbyterian Brooklyn Methodist Hospital, ET AL, No. 3010/2017, Supreme Court of the State of New York. Judgment entered July 15, 2019.

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DECISIONS BELOW

1. The decisions of the State of New York Court of Appeals appear at Appendices A and B to the petition and are unpublished.
2. The decision of the Supreme Court of the State of New York Appellate Division Second Judicial Department appears at Appendix C to the petition and is unpublished.
3. The decision of the Supreme Court of the State of New York appears at Appendix D to the petition and is unpublished.

JURISDICTION

The dates on which the State of New York Court of Appeals decided my case were March 30, 2021 and September 15, 2021.

Copies of those decisions appear at Appendices A and B.

This Court dismissed case on the ground that it did not have jurisdiction.

The date on which the Supreme Court of the State of New York Appellate Division Second Judicial Department decided my case was October 30, 2020.

Copies of those decisions appear at Appendix C.

The date on which the Supreme Court of the State of New York decided my case was July 15, 2019. A copy of that decision appears at Appendix D.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

CPLR §3012-a (f) provides in regards to a Certificate of Merit:

"The provision of this section shall not be made applicable to a plaintiff who is not represented by an attorney."

Serious violation exists in the application of New York state law regarding affidavits/certificates of merit.

Djeddah v Williams 2009 New York Other Courts Decisions

<https://law.justia.com/cases/new-york/other-courts/2009/2009-51751.html>

The court denied defendant's motion to dismiss on February 19, 2009, and Justice Abdus-Salaam held that "*Plaintiff is pro se and is not required to file a certificate of merit (CPLR 3012-a (f))*". Legal Standard on CPLR §3012-a (f)

Pursuant to CPLR §3012-a (f) which provides that "The provisions of this section shall not be made applicable to a plaintiff who is not represented by an attorney." At the time this motion was brought, plaintiff had been pro se for nearly three years. Justice Abdus-Salaam relied on the express language in subdivision (f) in finding that plaintiff had no duty to file the Certificate. This Court rejects defendant's assertion that Justice Abdus-Salaam erred in her decision. CPLR §3012-a is clear in its language and its intent is made clear in its legislative history. In her opinion denying defendant's motion to dismiss, Justice Abdus-

Salaamcites *Harmon v. Huntington Hospital*, 163 Misc 2d. 150 (Sup.Ct., N.Y.Co. 1994) as support for the ruling that plaintiff's pro se status exempts her from the requirement to file a Certificate of Merit. In *Harmon*, the plaintiff was representing himself, like Ms. Djeddah is representing herself here.

Justice Stanley Sklar noted in *Harmon* that the Legislature found the intent of CPLR §3012-a was to "deter the commencement of frivolous cases" brought by attorneys on behalf of their clients. 163 Misc 2d. at 151 citing L 1986, ch 266 § 1. He also noted that the Legislature, while not explicitly discussing its reasoning for excluding pro se plaintiffs from the requirement to file a Certificate of Merit, did not appear concerned with pro se plaintiffs bringing frivolous lawsuits. Rather, the statute "was aimed at reducing frivolous suits commenced by attorneys on behalf of their clients." 163 Misc 2d. at 151.

In *Rose v. Zinberg* (2d Dept. 2015), both the liability and damages verdicts have been affirmed. On March 26, 2013, in the ensuing medical malpractice wrongful death case, a Nassau County jury found that the gastroenterologist who performed the three colonoscopies had departed from accepted medical practice by failing to observe the tumor during the colonoscopy on October 11, 2007. The jurors then awarded **damages in the sum of \$700,000** (\$500,000 for decedent's pre-death conscious pain and suffering and \$200,000 for Mr. Rose's wife's loss of services – each for the 15 month period from 4/28/08 to 7/15/09).

In *Mancuso v. Health*, 172 A.D.3d 1931 (2019) 100 N.Y.S.3d 469, 2019 N.Y. Slip Op. 03520 Appeal from a judgment the of Supreme Court, Erie County (Donna M. Siwek, J.), entered 17, 2017. The judgment awarded plaintiff money damages upon a jury verdict. It is hereby ordered that the judgment so appealed from is affirmed without costs. Memorandum: Plaintiff commenced this action alleging that the negligence of defendant caused plaintiffs decedent to suffer serious and permanent injuries, including severe rhabdomyolysis and renal failure, conscious pain and suffering, and death. The case proceeded to trial, and a jury awarded plaintiff \$1,000,000 for decedent's pain and suffering, fear of death and/or pre-death terror. After a judgment was entered on the verdict. Supreme Court denied defendant's motion to, inter alia, set aside verdict. We affirm.

The First Amendment to the United States Constitution provides in pertinent part:

42 U.S.C. §1981:

All persons within the jurisdiction of the United States and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...

The Supreme Court in *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board* (461 U.S. 731

1983) vacated and remanded a decision by the NLRB that had halted the prosecution of a state court libel suit. The NLRB could not make such a decision unless it found that the suit lacked a reasonable basis in fact or law. The decision implicated the First Amendment right of petition and issues involving freedom of the press and libel. In this case, an employer had initiated the suit against an ex-employee for libel and harassment after she and other workers had picketed his restaurant in Phoenix. The NLRB believed the suit was retaliatory. For the reasons set out in *Brown v. Board of Education*, this case will be restored to the docket for reargument on Questions 4 and 5 previously propounded by the Court. 345 U. S. 972. It is so ordered.

The Fourteenth Amendment to the United States provides in pertinent part:

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.

Under 42 USC §1981, Helen Gardner's right to sue and give evidence was violated when her access to court was prohibited.

Bolling v Sharpe 347 U.S. 497 (1954)

This case challenges the validity of segregation in the public schools of the District of Columbia. The petitioners, minors of the Negro race, allege that such segregation deprives them of due process of law under the Fifth Amendment. They were refused admission to a public school attended by white children solely because of their race. They sought the aid of the District Court for the District of Columbia in obtaining admission. That court dismissed their complaint. The Court granted a writ of certiorari before judgment in the Court of Appeals because of the importance of the constitutional question presented. 344 U. S. 873. We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools.^[1] The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has

recognized, discrimination may be so unjustifiable as to be violative of due process. For the reasons set out in *Brown v. Board of Education*, this case will be restored to the docket for reargument on Questions 4 and 5 previously propounded by the Court. 345 U. S. 972. It is so ordered.

Eggshell Plaintiff Doctrine

Legal Standard on Proving Eggshell Plaintiff Doctrine

Bartolone v. Jeckovich - 103 A.D.2d 632, 481 N.Y.S.2d 545 (App. Div. 1984) Rule:

A defendant must take a plaintiff as he finds him and hence may be held liable in damages for aggravation of a pre-existing illness. Nor may defendants avail themselves of the argument that plaintiff should be denied recovery because his condition might have occurred even without the accident. Facts: On October 4, 1976, plaintiff was involved in a four-car chain reaction collision in Niagara Falls for which defendants were found liable. Plaintiff sustained relatively minor injuries consisting of whiplash and cervical and lower back strain for which he was treated with muscle relaxants and physical therapy but was not hospitalized. Subsequently, however, he suffered an acute psychotic breakdown from which he has not recovered. The theory on which plaintiff's case was tried was that the accident aggravated a preexisting paranoid schizophrenic

condition which has totally and permanently disabled him. The trial court granted the liable parties' motion to set aside the jury verdict and to order a new trial unless the injured party would stipulate to a reduced verdict. The injured party refused to so stipulate and appealed. Issue: Are defendants liable for the aggravation of the pre-existing illness of the plaintiff? Answer: Yes.

Conclusion: The court reversed the order and reinstated the verdict. The court found that the trial court record presented ample evidence that the plaintiff suffered from a psychotic illness but that he had been able to function in a relatively normal manner until the time of the accident. The court held that the liable parties were obligated to take the injured party as they found him and that they were, thus, liable for damages for the aggravation of a preexisting illness. The eggshell plaintiff doctrine essentially means that a defendant tortfeasor (i.e. the person at fault for the accident or negligent conduct) "takes the victim as he finds him." Put another way, the eggshell plaintiff doctrine requires that a defendant who proximately (legally) caused injury to another person is responsible for new injuries, of course, but also for exacerbations or worsening

of any pre-existing or prior health conditions that the victim was suffering from prior to the time they were newly injured. <https://www.ncbi.nlm.nih.gov>

Sharae Gardner had many pre-existing conditions so the expeditious diagnosis of Septic Shock was crucial to her life.

STATEMENT OF THE CASE

FACTUAL BACKGROUND

It is undisputed that on November 15, 2015, Sharae Gardner passed away in the Intensive Care Unit while under the care of the Defendants at New York Methodist Hospital (NY Presbyterian Brooklyn Methodist Hospital). Sharae had been admitted and discharged 7 times before her death, between the dates of April 7, 2015 and her tragic demise on November 15, 2015, complaining of the same symptoms. As a direct cause in fact, as certified by Dr. Michelle Ogues, Sharae Gardner's death was caused by Septic Shock. Between the dates of April 7, 2015 through October 20, 2015, the hospital repeatedly sent her home while she was still ill. She had been seen by different doctors and nurses and none of them recognized the symptoms of Sepsis, until it was too late. On her final admission, Sharae went undiagnosed for Sepsis/Septic Shock on November 12, November 13, November 14, up until the day of her passing on November 15. Sharae begged and pleaded with nurses and doctors for pain medication because of the excruciating torture she was feeling but she was refused. Her blood pressure

was dangerously low, which is a sign of the still undiagnosed Septic Shock, she was refused any pain medicine and had to suffer excruciating pain until her last few hours on Earth.

In the ICU, my Daughter was placed behind a curtained bed with a Black female doctor with a short Afro hairstyle, and a heavyset white male x-ray technician. There were two female nurses standing outside the curtain, watching me: a tall, light-skinned Black nurse and an Asian nurse.

My Daughter's last words to me from behind the curtain were "MOMMY HELP ME!"

When I was allowed to see my Daughter, her eyes were taped down, she had dried blood on her chin, she was not intubated, and she was tightly tucked under a sheet. When I untucked the sheet, I found the defendants had put hand restraints on my Daughter, which they had no consent to do. My 120 lb Daughter had, literally, been fighting for her life against 4 adults: a doctor, 2 nurses, and an x-ray technician. I had given the defendants specific, clear instructions that if any problems arose, notify me so I could make a decision about my Daughter's medical care. I was in the ICU, the entire time, approximately 7 feet from my Daughter and not once was I advised that there were any problems.

After some time, Dr. Jordan, a white male, advised me that Sharae's liver was failing (organ failure is a clear sign of Septic Shock). He gave the indication that he didn't know what to do about the problem, he was just reporting it to me. A few hours later, while sitting at Sharae's beside, holding her hand, the vital

signs monitor alarm sounded, and the numbers indicating heart rate, blood pressure, etc. started flickering off and on. I looked up for a nurse or doctor, and there was not one of them available. I had no choice but to leave my Daughter's side, and run around the ICU trying to find help. After about a 5 minute search, I found Dr. Jordan and told him My Daughter's in some kind of distress. When we got back to her bedside, the monitor was still going off, and I asked Jordan what's going on with my Child? Why is the monitor going off? He answered, with irritation in his voice: "That's what's going on inside her body". That was not the medical response I was looking for. A short time later, my Child was gone.

The Defendants are guilty of malpractice, being understaffed with unskilled workers, not informing me what procedures they were performing, and the ultimate death of my Child.

Not long after my Daughter's death New York Presbyterian Hospital took over New York Methodist Hospital. "The merger, which was recently approved by the New York State Department of Health, will now give New York-Presbyterian oversight of all hospital areas such as quality, technology, facilities and has been renamed New York-Presbyterian Brooklyn Methodist Hospital (NYM), officials announced December 7." <https://bklynpr.com>

PROCEDURAL BACKGROUND

- a. November 13, 2017 the instant action commenced against the defendants for the Wrongful Death of Sharae Gardner (action No. 3010/2017). The case was dismissed, without being heard, in error,

and with an abuse of power, by Judge Marsha L. Steinhardt, on July 15, 2019.

- b. January 12, 2019- Motion to Vacate Defendant's Motion to Dismiss.
- c. May 9, 2019- Motion to apprise Judge Steinhardt of CPLR §3012-a (f)
MOTION IGNORED.
- d. July 5, 2019- Second Motion to educate Judge Steinhardt of CPLR §3012-a (f).
- e. July 8, 2019- Motion in Opposition of Defendant's Motion to Dismiss.
- f. October 3, 2019- Letter of Complaint to Administrative Judge Lawrence Knipel re: conduct of Judge Steinhardt.
- g. October 3, 2019- Motion of Appeal to Supreme Court of the State of New York.
- h. December 21, 2019- Notice of Appeal to Supreme Court of the State of New York: 2nd Judicial Department.
Case dismissed because Court claimed \$315 Filing Fee was received too late.
- i. December 7, 2020- Appeal to Court of Appeals of New York.
- j. April 23, 2021- Motion to Remand back to Supreme Court of New York.
Dismissed September 15, 2021 by a Clerk: John P. Asiello.

REASONS for GRANTING the WRIT

This Writ should be granted because Judge Marsha L. Steinhardt of the Supreme Court of New York erred in her rulings and a committed flagrant, unscrupulous abuses of power and a complete disregard of the Law by arbitrarily and frivolously

dismissing my Wrongful Death case. Failure to obtain substantial Justice in State Courts lead to suits being filed in higher Courts under Title 42 United States Code standard 1983. This suit asks for Relief of all orders made in violation of the Law, that Due Process of Law be allowed, and further issue relief as the court deems appropriate.

Serious violation exists in the application of New York state law regarding affidavits/certificates of merit.

The first issue presented before this Court is whether the Supreme Court erred in its demand for an Affidavit/Certificate of Merit.

Case law states: When a judge acts as a trespasser of the Law, when a Judge does not follow the Law, he loses subject matter jurisdiction and his/her orders are void, of no legal force or affect.

That failure to follow simple guidelines of their post makes a judge's action no longer a judicial act but an Individual act as the act represents their own prejudices and goals. The biases of any Judge has no place in the judicial system.

CONCLUSION

This case represents an appalling legal acceptance in our civil judicial courts to steal the rights of Citizens, who are non-lawyers from them. It is one of the closest examples of modern day civil slavery and race discrimination in plain view: the denial of core Constitutional Rights of non-white citizens to have

access to our Courts, file lawsuits, and have impartial hearings, trials, and judgments.

My Daughter, SHARAE GARDNER, has the right to have her case heard in a Court of Law, and for those responsible for her death to be held accountable. I, Sharae's Mother, Helen Gardner, respectfully request for the Supreme Court of the United States to grant this Writ of Certiorari.

Respectfully submitted,

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