No.

In the

Supreme Court of the United States

OBAIDA ABDULKY AND WARD ABDULKY, PARENTS AND NEXT FRIENDS OF ANTHONY ABDULKY,

Petitioners,

v.

LUBIN & MEYER, P.C., ANDREW C. MEYER, JR. AND KRYSIA SYSKA,

Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether by failing to allow the Petitioners an opportunity to present evidence under the new legal standards created at the appellate level, the Appeals Court of Massachusetts violated the due process rights of the Petitioners warranting this Honorable Court's intervention.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *Obaida Abdulky and Ward Abdulky, Parents and Next Friends of Anthony Abdulky v. Lubin & Meyer, P.C., Andrew C. Meyer, Jr. and Krysia Syska*, Civil Action No. 1185CV01247, Massachusetts Trial Court, Superior Court Department, Worcester County (rendering an order denying Defendants' motion for summary judgment on December 20, 2021).

2. *Obaida Abdulky and Ward Abdulky, Parents and Next Friends of Anthony Abdulky v. Lubin & Meyer, P.C., Andrew C. Meyer, Jr. and Krysia Syska*, Appeals Court of Massachusetts, Civil Action No. 22-J-0020 (granting Defendants' Petition for Interlocutory Review and directing Defendants to file a Notice of Appeal on February 23, 2022).

3. *Obaida Abdulky and Ward Abdulky, Parents and Next Friends of Anthony Abdulky v. Lubin & Meyer, P.C., Andrew C. Meyer, Jr. and Krysia Syska*, Appeals Court of Massachusetts, Appeals Court No. 22-P-498 (rendered a published decision which affirmed the decision of the trial court on summary judgment as to the claims of collateral estoppel and judicial estoppel but reversed on the arguments as to evidence of damages on March 28, 2023).

4. *Obaida Abdulky and Ward Abdulky, Parents and Next Friends of Anthony Abdulky v. Lubin & Meyer, P.C., Andrew C. Meyer, Jr. and Krysia Syska*, Supreme Judicial Court of Massachusetts,

Docket No. FAR-29293 (denying Petitioners' Application for Further Appellate Review on June 29, 2023).

5. *Obaida Abdulky and Ward Abdulky, Parents and Next Friends of Anthony Abdulky v. Lubin & Meyer, P.C., Andrew C. Meyer, Jr. and Krysia Syska*, Supreme Court of the United States, Application No. 23A251 (extension of time to file a petition for a writ of certiorari granted on September 20, 2023 extending time to file to and including November 21, 2023).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Obaida Abdulky and Ward Abdulky, Parents and Next Friends of Anthony Abdulky, respectfully petition for a writ of certiorari to review the decision of the Appeals Court of Massachusetts in this case, or in the alternative, Petitioners respectfully request that this Honorable Court summarily reverse the decision of the Appeals Court of Massachusetts pursuant to Supreme Court Rule 16.

OPINIONS BELOW

The Appeals Court of Massachusetts issued its published opinion on March 28, 2023, and is reproduced at App.2-23. The opinion of the Appeals Court of Massachusetts is available at *Abdulky v. Lubin & Meyer, P.C.*, 102 Mass. App. Ct. 441, 205 N.E.3d 381 (2023). The Supreme Judicial Court summarily denied an Application for Further Appellate Review without rendering an opinion on June 29, 2023. App.1. The Superior Court of Massachusetts, Worcester County issued an order denying summary judgment on December 20, 2021, and it is reproduced at App.24-25.

JURISDICTION

The Appeals Court of Massachusetts issued its opinion on March 28, 2023. App.2-23. Petitioners filed a timely Application for Further Appellate Review with the Supreme Judicial Court of Massachusetts, and the Supreme Judicial Court of Massachusetts denied an application for further

appellate review on June 29, 2023. App.1. On September 20, 2023, Justice Jackson extended the time for filing a Petition for Writ of Certiorari up to and including November 21, 2023, Supreme Court of the United States, Application No. 23A251. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution provides in relevant 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.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

1. Factual and Procedural History

Petitioners Obaida Abdulky and Ward Abdulky, Parents and Next Friends of Anthony Abdulky, brought a legal malpractice action against Respondents Lubin & Meyer, P.C., Andrew C. Meyer, Jr. and Krysia Syska. App.3. Obaida Abdulky and Ward Abdulky are the parents of Anthony Abdulky, a child whose arm was amputated below the elbow at the age of five due to egregious medical malpractice. App.3. Respondents are the attorneys who represented the Abdulkys in the underlying medical malpractice case. App.3.

The Abdulkys brought a civil action against their former lawyers (Respondents Lubin & Meyer, P.C., Andrew C. Meyer, Jr. and Krysia Syska) for attorney malpractice based upon the failure of the Respondents to competently develop evidence of damages in a medical malpractice action where their five-year-old child had his arm amputated. App.3. This resulted in a lower recovery than should have been obtained. App.3. Respondents moved for summary judgment arguing collateral estoppel, judicial estoppel, and the sufficiency of the expert testimony as to damages. App.3-4. The trial court denied Respondents' motion for summary judgment finding that there were material issues of fact as to "whether the defendants exercised the reasonable degree of care and skill…[i]n addition, there are issues as to causation and damages that remain in dispute" that required a trial. App.24-25. The Respondents

sought immediate appellate review. App.4. On an interlocutory appeal, the Appeals Court of Massachusetts rendered a decision which affirmed the decision of the trial court as to the claims of collateral estoppel and judicial estoppel but reversed on the arguments as to evidence of damages. App.4. Petitioners timely filed an Application for Further Appellate Review with the Supreme Judicial Court of Massachusetts, and the Supreme Judicial Court of Massachusetts denied the application for further appellate review on June 29, 2023. App.1.

The Abdulkys brought this legal malpractice action based upon claims that Respondents improperly advised the Abdulkys to enter into a settlement agreement in the underlying medical malpractice action. App.3. The Abdulkys argued that the Respondents "failed to competently develop evidence of damages — in particular, the lifetime costs of the child's medical treatments and prosthetics — and that this failure resulted in a lower recovery than should have been obtained." App.3. "More specifically, [Respondents] failed to obtain in the [medical malpractice action] on behalf of their clients *any* expert opinion estimating arguably the single largest element of the Abdulkys' damages, namely the lifetime prostheses costs for five-year-old Anthony - *before* that case was settled." R.A.I/221; R.A.II/219-225.[1]

[1] Citations in the form "R.A._/_" are to the Record Appendix designating the Volume followed by the Page Number (R.A.[Volume/Page Number]) filed in the Appeals Court of Massachusetts.

Anthony Abdulky was a healthy, five-year-old boy when he fractured his wrist in 2011. R.A.I/222. While being treated at UMass Memorial Medical Center ("UMMHC") for the fracture, Anthony developed compartment syndrome. R.A.I/222. After two months of treatments, Anthony finally returned home after his dominant, right arm had been amputated just below the elbow. R.A.I/222. Thereafter, the Abdulkys received an anonymous letter from "a healthcare practitioner" at UMMHC who knew of Anthony's case "very well", who stated that Anthony "did not receive the appropriate care that he should have..." detailing the events leading up to Anthony's amputation and encouraged the Abdulkys to bring claims for medical malpractice. R.A.I/223; R.A.II/124.

The Abdulkys hired the Respondents to pursue medical malpractice claims against Anthony's providers and a medical malpractice action was filed in early 2012.[2] R.A.I/222. The medical malpractice action named a total of ten (10) defendants - UMMHC as well as nine (9) physicians were named defendants. R.A.I/222. In September 2014, a Medical Malpractice Tribunal found in favor of the Abdulkys as to every one of the named defendants in the medical malpractice action. R.A.I/224. A few months later, in

[2] The Respondents also sent letters to the District Attorney's office and to the Massachusetts Attorney General's Criminal Bureau with regard to possible criminal conduct incurred during Anthony's treatment by the medical malpractice defendants and the Attorney General's Office requested in a letter to UMMHC's director of claims management an investigation of the Abdulkys' claims. R.A.I/223; R.A.II/126-131.

January 2015, the medical malpractice defendants informed the Respondents that they wished to mediate the case. R.A.I/224. In August 2015, the medical malpractice defendants offered to settle the case for $6,000,000.00. R.A.I/225. On the advice of Respondents, the Abdulkys accepted the offer, but immediately questioned whether the sum was sufficient. App.5.

The Abdulkys allege that the Respondents' actions caused them to enter into a $6,000,000.00 settlement which was wholly inadequate because it did not consider the lifetime costs of prosthetics for the Abdulkys' child (Anthony). R.A.I/443. The Abdulkys noted that during the pendency of the medical malpractice action, the Respondents waited a year after filing suit to serve written discovery and then waited another year to receive any responses. R.A.I/223. Respondents did not file any motions to compel, only two of the ten medical malpractice defendants provided answers to interrogatories, and the Respondents only deposed two doctors. R.A.I/223. Remarkably, "only one of the doctors ever responded to the document requests, and that came on the very day the [medical malpractice action] was settled." R.A.I/223.

The Respondents never obtained any expert's estimate to determine any of the family's damages, especially Anthony's lifetime prosthetics costs. R.A.I/226-227. An email from Respondents clearly shows that the $6,000,000.00 settlement did not take into account Anthony's lifetime prosthetics costs. The Respondents email stated "you would need to have the

jury find at least two defendants responsible in order to collect over five million….there are no lost earnings for Anthony and no future medical costs which we can predict today. Any discussion of compensation would come in oral form during closings but in reality the decision is based on the jury's collective wisdom and experience – nothing more." R.A.II/184 (emphasis added).

In another email exchange, the Respondents told the Abdulkys "[a]lthough there may be some jobs which Anthony may not be able to do there is no reduction in his earning capacity as there are many he can do at very high wages … would be happy to hire an economist to tell you that but I … believe that would be an unwarranted waste of money …" R.A.II/201 (emphasis added). Respondent Meyer continued to advise the Abdulkys against engaging any experts, not because the case was settled, but "because after many years of doing this, I know what they are going to say." R.A.II/203.

It was not until after the medical malpractice action was mediated and eventually settled (August 27, 2015) that the Respondents obtained any estimate regarding the projected lifetime costs of Anthony's prosthetics. R.A.I/434. Neither of the Respondents' estimates was from a prosthetist; each estimated Anthony's lifetime costs of prosthetics at approximately $450,000 to $583,500. R.A.I/434; R.A.II/30,33. Meanwhile, on September 11, 2015, the Abdulkys obtained a "rough estimate" from a certified prosthetist (Robert Emerson) that Anthony's lifetime costs of prosthetics alone would "exceed three million

dollars." R.A.II/35-37. That estimate caused the Abdulkys' ever-greater concerns and questions about the sufficiency of the settlement. R.A.II/119-122.

The Abdulkys attempted to withdraw the settlement and those attempts failed. App.5. Following the substandard legal representation provided by Respondents in the medical malpractice action, the Abdulkys timely filed this action. In their Amended Complaint, the Abdulkys include claims against Respondents for negligence/legal malpractice, breach of fiduciary duty, negligent misrepresentations and respondeat superior. R.A.I/443-452. The Respondents filed a motion for summary judgment claiming that collateral estoppel and judicial estoppel barred the Abdulkys' claims and further argued that the Abdulkys could not prove damages because expert testimony was necessary as to damages. App.3-4. The Respondents never filed a motion to strike, in *limine* or similar, regarding the expert testimony. R.A.I/11-32.

The Abdulkys filed an opposition to the Respondents' motion for summary judgment, attaching the Second Supplemental Answers to the Defendants' First Set of Interrogatories ("the Second Supplemental Answers") as well as the Supplemental Affidavit of David J. Oliveira, Esq. ("the Oliveira Affidavit"). R.A.I/182-187; R.A.II/215-218. The Second Supplemental Answers identified evidence reviewed by Oliveira and upon which he would base his expert testimony, including, inter alia, the deposition transcripts of Defendant Krysia Syska, Plaintiff Obaida Abdulky, Plaintiff Ward Abdulky,

and their child, Anthony (R.A.I/183); the deposition transcript of prosthetist Robert Emerson (R.A.I/183); the transcripts of Medical Malpractice Action hearings dated September 17, 2015, October 2, 2015, and October 22, 2015 (R.A.I/183,309-426); the Report of prosthetist John Schulte dated February 9, 2021 ("the Schulte Report") (R.A.I/183; R.A.II/221); the Report of economist Stan Smith dated March 2, 2021 ("the Smith Report") (R.A.I/183; R.A.II/221-222); and various communications between the Defendants and the Abdulkys (R.A.I/183).

The Schulte Report estimates Anthony's lifetime costs of prosthetics alone at a range of $5,418,385 to $6,438,684 depending upon his lifespan. R.A.II/221. The Smith Report calculates the present value of the prosthetics costs (assuming Anthony lives to be 78.4 years old) at $5,927,738. R.A.II/221-222. The Record clearly shows that Oliveira expected to testify, based upon the evidence that he reviewed and particularly with respect to damages, that the Defendants "never examined the issue of damages at the critical times in their representation of the Abdulkys" and that, as a result, "the Abdulkys accepted the sum of $6 million to settle [the Medical Malpractice Action] which was wholly inadequate in the circumstances." R.A.I/183. Further, the Second Supplemental Answers stated,

> Once [the Defendants] received an offer of $5 million at the mediation, … Oliveira will testify that it was incumbent upon them to have a full assessment of damages to demonstrate to the defense

why they could not recommend the settlement amount to the Abdulkys. [and that] this also would have served the critical purpose of enlightening the defense to the nature of the damages evidence that [the Defendants] would introduce at trial … This would also have been important to managing the issue of insurance company reserves… Oliveira will testify that, if the carrier had performed its own due diligence and set realistic reserves, this would not be an issue… Oliveira will also testify [that] … [a] proper approach to case valuation would have included the preparation of a life care plan … the future losses must be understood before entering into any settlement discussions… Anthony's on-going need for prosthetics over the course of his life was a critical factor to consider as anyone would recognize that would be a large number. [i]t is … Oliveira's opinion that the failures [of the Defendants] caused the Abdulkys to accept an inadequate settlement … The realistic case value for this matter is in excess of $10 million. This would have included future equipment and medical costs, loss of consortium and, of equal importance, Anthony's pain and suffering over many years (past and future). The pain and suffering alone could have been worth $3 - $4 million given that the higher number is merely

> $1000/week for an 80-year life expectancy… In conclusion, it is … Oliveira's opinion that, in the presence of appropriate and timely advice on the issue of settlement, the Abdulkys would have received in excess of $10 million either by way of settlement, or a jury verdict…

R.A.I/184-186.

Mr. Oliveira also submitted a supplemental affidavit further detailing his experience, his analysis of the underlying case and verifying the information contained in his expert disclosure provided in the Plaintiffs' Supplemental Answers to Interrogatories. R.A.II/215-218. At no point during the medical malpractice action were any of the ten defendants dismissed, and each and every one of them remained a defendant in the case up until the settlement was finalized. R.A.I/523-529. No dispositive motions were ever filed in the medical malpractice action. R.A.I/523-529. Each of the nine individual defendants in the medical malpractice action was insured for malpractice liability up to $5 million. R.A.II/418.

In the instant action, the Respondents' motion for summary judgment was denied in its entirety by the trial court on December 20, 2021. App.24-25. Thereafter, a single justice of the Appeals Court granted the Respondents leave to take an interlocutory appeal of the Summary Judgment Order. R.A.II/467. On March 28, 2023, the Appeals Court reversed the Superior Court agreeing with the

Superior Court that the Abdulkys' claims were not barred by either collateral estoppel or judicial estoppel, but concluding the that the Abdulkys did not adduce evidence of damages "such ... as would be admissible" at trial. App.4. The Abdulkys brought a timely Application for Further Appellate Review which was summarily denied on June 29, 2023. App.1. On September 20, 2023, Justice Jackson extended the time for filing a Petition for Writ of Certiorari up to and including November 21, 2023. Supreme Court of the United States, Application No. 23A251.

2. How the federal question sought to be reviewed was raised.

Petitioners raised constitutional issues created by the Appeals Court of Massachusetts in their application for further appellate review to the Supreme Judicial Court of Massachusetts arguing that the Supreme Judicial Court of Massachusetts "should grant further appellate review to scale back this escalation of the summary judgment standard, lest a procedural scalpel become a chainsaw and an impediment to the right to trial in civil cases" based upon the Appeals Court of Massachusetts creating a new, unanticipated legal precedent with regard to expert testimony and the summary judgment standard applied in Massachusetts. Application for Further Appellate Review, p. 13. Petitioners also argued that the "Appeals Court has imposed upon the Abdulkys a burden of expert damages testimony inconsistent with long-established precedent" and "the Appeals Court decision, if left to stand, will forever deprive the Abdulkys of any opportunity to present

any expert damages testimony to the factfinder." Application for Further Appellate Review, pp. 20-21. The Appeals Court decision changed existing law regarding the necessity for expert testimony to prove damages and created an evidentiary hurdle which would foreclose the ability to prove a cause of action which violated the due process rights of the Petitioners and impeded their constitutional rights to access to the courts. This Honorable Court has held "[t]he denial of rights given by the Fourteenth Amendment need not be by legislation" but can be created by the unanticipated act of a State court. *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). The Supreme Judicial Court of Massachusetts denied the application for further appellate review allowing the constitutional violations to stand. App.1.

REASONS FOR GRANTING THE WRIT

Due process requires that all litigants be afforded notice and the opportunity to be heard when a law is changed by the legislature or the judiciary. Fairness is a deeply rooted principle in our country, and the decision of the Appeals Court of Massachusetts violates the rules of fairness and due process. Indeed, this dangerous holding will allow appellate courts to pluck a case on the eve of trial and change the standards to prove one's case after discovery is completed. Of course, this will make it impossible for a litigant to conform his proofs to the new standard. Litigation is a tough exercise, and it should be. However, litigants cannot become mind readers and conform standards of proofs to law not yet announced in a pending case. We ask that this

Honorable Court provide a cautionary tale to state appellate courts that notice and opportunity to be heard must be honored by each and every court at each and every level.

I. The Appeals Court of Massachusetts egregiously violated the Due Process Clause by changing black letter law at the appellate level without providing a party notice of the new standards and the ability to conform proofs to meet these new standards. This case should be reversed and remanded to afford the Abdulkys an opportunity to conform to these newly announced standards. Due Process requires such a result.

In its decision, the Appeals Court of Massachusetts changed black letter law at the appellate level in violation of this Honorable Court's established precedent and in violation of the Abdulkys' due process rights. In *Saunders v. Shaw*, this Honorable Court made it abundantly clear that "denial of rights given by the Fourteenth Amendment need not be by legislation" but can be created by the unanticipated act of a State court. *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). In creating an unanticipated, new legal requirement for proving damages in a legal malpractice action, the Appeals Court of Massachusetts clearly violated the due process rights of the Abdulkys.

In rendering its decision, the Appeals Court demanded that the Abdulkys prove their damages

through a legal expert. App.17-22. Prior to its decision, however, the law in Massachusetts did not require an expert to prove damages in a legal malpractice action. Previously settled black letter Masschusetts law held "while expert testimony on reasonable settlement value is admissible in this type of action, it is not required to establish the cause and extent of the client's damages." *Marston v. Orlando*, 95 Mass. App. Ct. 526, 534, 127 N.E.3d 296, 303 (2019)(emphasis added). The law holds "[a] plaintiff who claims that his attorney was negligent in the prosecution of a tort claim will prevail if he proves that he probably would have obtained a better result had the attorney exercised adequate skill and care." *Fishman v. Brooks*, 396 Mass. 643, 647, 487 N.E.2d 1377, 1380 (1986). Under the traditional approach of litigating a legal malpractice action in Massachusetts, "no expert testimony from an attorney is required to establish the cause and the extent of the plaintiff's damages." *Fishman v. Brooks*, 396 Mass. 643, 647, 487 N.E.2d 1377, 1380 (1986)(explaining that an expert as to damages is only required if a party is not using the traditional approach). Under the first *Fishman* methodology (the traditional approach), there is no requirement that a plaintiff show "'loss/causation' through expert testimony as to reasonable settlement value." *Marston v. Orlando*, 95 Mass. App. Ct. 526, 534, 127 N.E.3d 296, 303 (2019). Indeed, in *Fishman*, the court explains there are two methodologies of pursuing a legal malpractice claim – a traditional approach which involves a trial within a trial and an approach where a plaintiff seeks a more limited recovery by arguing he could have obtained a better settlement. *Fishman v. Brooks*, 396 Mass. 643,

647 n.1, 487 N.E.2d 1377, 1380 (1986)(noting that the traditional approach does not require an expert as to damages). Under the traditional approach, a plaintiff is required to prove that he would have obtained a better result if the case had not settled and "[t]he original or underlying action is presented to the trier of fact as a trial within a trial." *Marston v. Orlando*, 95 Mass. App. Ct. 526, 533, 127 N.E.3d 296, 303 (2019). Indeed, in the Application for Further Appellate Review, the Petitioners argued that the Appeals Court's reversal was improper because the law did not require expert testimony "to establish the cause and extent of their damages." Application for Further Appellate Review, p. 18. Petitioners argued that the "Appeals Court has imposed upon the Abdulkys a burden of expert damages testimony inconsistent with long-established precedent" and "the Appeals Court decision, if left to stand, will forever deprive the Abdulkys of any opportunity to present any expert damages testimony to the factfinder." Application for Further Appellate Review, pp. 20-21.

In unexpectedly changing the law at the appellate level, the Appeals Court of Massachusetts violated the Abdulkys' fundamental due process rights. Causes of action have been established as a property right protected under the constitutional guarantee of due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). This Court has acknowledged "[t]he right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of

citizenship." *Chambers v. Balt. & O. R. Co.*, 207 U.S. 142, 148 (1907). By rendering a decision that changed substantive law regarding what evidence is necessary to prove an element of the case, the Appeals Court eviscerated the Abdulkys' case on a legal requirement which simply did not exist until the Appeals Court rendered its decision. This Court has noted "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265 (1994). Rather than remanding the case to allow the Abdulkys to meet the new evidentiary requirements, the Appeals Court dismissed the action and warned the plaintiff's bar that future litigants should be cautious about the new exacting standards required to bring a legal malpractice claim. App.23. The Constitution and the precedent of this Honorable Court do not allow for such unprecedented, unfair action.

By changing the substantive law at the appellate level, the Appeals Court also denied the Abdulkys their fundamental right of access to the courts. This Honorable Court has held "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). The Abdulkys brought a claim for legal malpractice against the Respondents because the Respondents' actions fell below the standard of care resulting in an inadequate settlement that is

simply insufficient to provide for the needs of their child, Anthony, who suffered a horrific, lifelong injury. By changing the substantive law at the appellate level, the Appeals Court denied the Abdulkys any meaningful access to the courts. The Abdulkys spent years preparing their case and garnering their evidence based upon the law that existed at that time. By upending the law at the appellate level and not remanding the case, the Abdulkys were foreclosed from garnering any evidence to meet this new, unanticipated evidentiary requirement. The appellate court simply ended the Abdulkys' case without giving them any meaningful opportunity to bring their case according to the new law.

The law clearly provides that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). This Honorable Court has established that there is a denial of due process where an absence of fairness fatally inflicts a trial because "fundamental fairness [is] essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941). It can never be fair to unexpectedly change the evidentiary proofs required in an action. By changing the law without giving the Abdulkys the opportunity to prove their case under the Appeals Court's newly announced law, the Abdulkys' action was simply barred. In a similar setting, the D.C. Court of Appeals forewarned "[b]ut when, as here, the change is a qualitative one in the nature of the burden of proof so that additional facts of a different kind may now be relevant for the first time, litigants must have a meaningful opportunity to

submit conforming proof." *Hatch v. Fed. Energy Regulatory Com.*, 654 F.2d 825, 835, 210 U.S. App. D.C. 110 (D.C. Cir. 1981).

This Honorable Court has expressly held "[t]he denial of rights given by the Fourteenth Amendment need not be by legislation" but can be created by the unanticipated act of a State court. *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). The law provides "when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). This Court has made it clear that actions taken by the highest court of a state do not preclude a due process analysis by this Honorable Court because a "defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance." *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). In *Pruneyard Shopping Ctr. v. Robins*, this Court reminded us that "this Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." 447 U.S. 74, 85 n.9 (1980)(citing *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-678 (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917)).

This Court has recently reminded us that "[w]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows…" *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 143 S. Ct. 2141, 2176 (2023)(citing *Cummings* v. *Missouri*, 71 U.S. 277, 4 Wall. 277, 325, 18 L. Ed. 356 (1867)). Indeed, this Court has held "[s]tate action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms." *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948). "And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." *Id.* at 20.

The Appeals Court upended the black letter law that governed the Abdulkys' case at the appellate level with no notice and no opportunity to continue their action under the new law. In changing the existing law regarding the necessity for expert testimony to prove damages, the Appeals Court created a new evidentiary hurdle which fatally stopped the Abdulkys from having any ability to prove their cause of action. Pursuant to the black letter law under which the Abdulkys brought their case, no expert testimony was required to prove damages. Under the traditional approach of trying a legal malpractice action in Massachusetts, "no expert testimony from an attorney is required to establish the cause and the extent of the plaintiff's damages." *Fishman v. Brooks*, 396 Mass. 643, 647, 487 N.E.2d 1377, 1380 (1986); *Marston v. Orlando*, 95 Mass. App. Ct. 526, 534, 127 N.E.3d 296, 303 (2019)(stating there is no requirement that a

plaintiff show "'loss/causation' through expert testimony as to reasonable settlement value.") The Abdulkys spent years gathering their evidence under this long-held standard. In fact, the Record on Appeal clearly shows that Mr. Oliveira was retained as a legal expert as to whether the Respondents' actions fell below the "applicable standard of care" for attorneys. R.A.I/185. As to damages, the Record shows that Respondents never obtained any expert's estimate as to any of the family's damages, especially Anthony's lifetime prosthetics costs. R.A.I/226-227. An email from Respondents clearly shows that the $6,000,000.00 settlement did not take into account Anthony's lifetime prosthetics costs. The Respondents email stated "you would need to have the jury find at least two defendants responsible in order to collect over five million….there are no lost earnings for Anthony and no future medical costs which we can predict today. Any discussion of compensation would come in oral form during closings but in reality the decision is based on the jury's collective wisdom and experience – nothing more." R.A.II/184 (emphasis added). In another email exchange, the Respondents told the Abdulkys "[a]lthough there may be some jobs which Anthony may not be able to do there is no reduction in his earning capacity as there are many he can do at very high wages … would be happy to hire an economist to tell you that but I … believe that would be an unwarranted waste of money …" R.A.II/201 (emphasis added). Respondent Meyer continued to advise the Abdulkys against engaging any experts, not because the case was settled, but "because after many years of doing this, I know what they are going to say." R.A.II/203.

The evidence submitted by the Abdulkys contains the Schulte Report which estimates Anthony's lifetime costs of prosthetics alone at a range of $5,418,385 to $6,438,684 depending upon his lifespan. R.A.II/221. Additionally, the Smith Report calculates the present value of the prosthetics costs (assuming Anthony lives to be 78.4 years old) at $5,927,738. R.A.II/221-222. The Record clearly shows that Oliveira expected to testify, based upon the evidence that he reviewed and particularly with respect to damages, that the Defendants "never examined the issue of damages at the critical times in their representation of the Abdulkys" and that, as a result, "the Abdulkys accepted the sum of $6 million to settle [the Medical Malpractice Action] which was wholly inadequate in the circumstances." R.A.I/183.

Clearly, evidence was submitted that the prosthetics alone would cost approximately $6,000,000.00 and coupled with the admissions by the Respondents that this was not a number used in calculating the settlement, a jury would likely render a higher award when given all the evidence. The opposition to the summary judgment established evidence that the Abdulkys damages were in excess of $6,000,000.00. Despite this evidence and the existing law in Massachusetts, the Appeals Court created a new evidentiary burden that the Abdulkys needed their legal expert to provide a detailed methodology to prove damages. The Appeals Court then dismissed the Abdulkys' case without giving the Abdulkys any opportunity to meet this new evidentiary standard. Clearly, the case should have been remanded to comply with the new law as is required by due process.

This Honorable Court has explained "[a]n essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)(quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). This Court has "described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)(quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)(emphasis in original). This bedrock principle was clearly violated in the Abdulkys' case.

In another due process violation, the Appeals Court upended the law regarding summary judgment in Massachusetts. In the concurring opinion, one justice highlighted the unusual procedural posture of the instant action stating, "I write separately merely to highlight my sense that the strictness we apply may be a bit out of step with the somewhat more lenient summary judgment culture prevalent in the trial courts…the plaintiffs' bar, would be wise to view today's opinion as a cautionary tale." App.22-23. Indeed, in their Application for Further Appellate Review, the Abdulkys argued that the Supreme Judicial Court of Massachusetts should grant "further appellate review to scale back this escalation of the summary judgment standard." Application for Further Appellate Review, p. 13. Again, the Appeals Court changed the law governing motions for summary judgment noting it was applying a new

strictness. On appeal, the court must "conduct a de novo examination of the evidence in the summary judgment record… and view the evidence in the light most favorable to the parties opposing summary judgment." *LeBlanc v. Logan Hilton J.V.*, 463 Mass. 316, 318, 974 N.E.2d 34, 37 (2012)(citation omitted). The Record clearly shows that the $6,000,000.00 settlement did not take into account any future medical costs. R.A.II/184. The Record shows that the future medical costs of prosthetics alone would be approximately $6,000,000.00. R.A.II/221. The facts when reviewed in the light most favorable to the Abdulkys clearly show that damages could be proven in the legal malpractice case in excess of $6,000,000.00. Rather than reviewing the Record in the light most favorable to the Abdulkys, the Appeals Court noted that it was taking a "strictness" in this case and forewarned future litigants. While the concurring opinion warns future litigants that they may be subjected to this new strictness, the Abdulkys opposed the motion for summary judgment under the more lenient standard. Again, the Appeals Court applied a new legal standard at the appellate level depriving the Abdulkys of due process.

In rendering its decision, the Appeals Court of Massachusetts created a new, unanticipated legal precedent, with regard to expert testimony and the summary judgment standard in Massachusetts. The Appeals Court changed black letter law in Massachusetts at the appellate level. Despite this unanticipated change in law, the Appeals Court failed to remand the case to allow Petitioners to comport their case under the new law created. By failing to

allow the Petitioners an opportunity to present evidence under the new legal standards created at the appellate level, the Appeals Court violated the due process rights of the Petitioners warranting this Honorable Court's intervention.

CONCLUSION

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

Respectfully submitted,

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November 21, 2023