No. 23-563

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 a Writ of Certiorari to the Massachusetts Supreme Judicial Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether there are "compelling reasons" justifying review of the Massachusetts Appeals Court's decision reversing the denial of summary judgment on Petitioners'[1] state law legal malpractice claims, brought as the "parents and next friends" of their then-minor son Anthony, against Lubin & Meyer where Petitioners lack standing given that Anthony had reached the age of majority under Massachusetts law before Petitioners filed their petition for a writ of certiorari?

2. Whether there are "compelling reasons" justifying review of the Massachusetts Appeals Court's decision reversing the denial of summary judgment on Petitioners' state law legal malpractice claims where Petitioners raise for the first time before this Court a purported due process violation under the Fourteenth Amendment of the U.S. Constitution that they never asserted in their application for further appellate review before the Massachusetts Supreme Judicial Court?

3. Whether there are "compelling reasons" justifying review of the Massachusetts Appeals Court's decision reversing the denial of summary judgment on Petitioners' state law legal malpractice claims where Petitioners were not prevented from

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[1] Obaida Abdulky and Ward Abdulky, parents and next friends of Anthony Abdulky, are referred to herein as "Petitioners" or "Abdulkys." The Respondents, Lubin & Meyer, P.C., Andrew C. Meyer, Jr., and Krysia Syska, are referred to herein as "Lubin & Meyer."

offering evidence under some "new legal standard" governing damages in legal malpractice actions, but where the Appeals Court applied well-established Massachusetts state law governing the inadmissibility of speculative and conclusory expert opinion on damages that Petitioners chose to rely on in opposing summary judgment?

4. Whether there are "compelling reasons" justifying review of the Massachusetts Appeals Court's decision reversing the denial of summary judgment on Petitioners' state law legal malpractice claims where the asserted error consists of purported erroneous factual findings that Petitioners lacked admissible evidence of damages sufficient to defeat summary judgment?

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Lubin & Meyer, P.C. states that it has no parent corporation and no publicly-held corporation owns more than 10% of its stock.

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JURISDICTION

In stark contrast to Petitioners' assertion, this Court lacks jurisdiction over this matter pursuant to 28 U.S.C. § 1257 for two separate and independent bases.

First, Obaida and Ward Abdulky filed this Petition in their capacities as "parents and next friends" of their son Anthony Abdulky arising from a $6 million medical malpractice settlement obtained by Respondents for Anthony and that was then judicially-approved by the Massachusetts Superior Court when Anthony was a minor. However, Anthony, whose date of birth is November 5, 2005, turned 18 years old on November 5, 2023, before the instant Petition was filed and when he had full legal capacity under Massachusetts law. *See* MASS. GEN. LAWS ch. 231, § 85P ("[A]ny person domiciled in the commonwealth who has reached the age of eighteen shall for all purposes . . . be deemed of full legal capacity . . . ."); R.A.II 9-10. As a result, Anthony's parents, as the named Petitioners, lack standing to pursue this Petition on behalf of their adult son, who is the real party at interest. *See, e.g.*, *Whitmore v. Arkansas,* 495 U.S. 149, 163-66 (1990) (dismissing writ of certiorari brought by "next friend" for want of jurisdiction); *Stephenson v. McClelland*, 632 Fed. App'x. 177, 181 (5th Cir. 2015) (holding that the Court of Appeals lacked jurisdiction to review claims filed by parents on behalf of son where son had reached the age of majority prior to the appeal); *Vandiver v. Hardin Cnty. Bd. of Educ.*, 925 F.2d 927, 930 (6th Cir. 1991) (parents lacked standing to pursue claims to enforce

son's rights when son turned eighteen, the age of legal majority under state law).

Second, this matter relates solely to the Massachusetts Appeals Court's application of well-established Massachusetts state law governing the essential element of actual loss/damages in a legal malpractice action where the Abdulkys' only evidence of damages rested on a speculative and inadmissible expert opinion. Indeed, Petitioners never raised any alleged due process violation under the Fourteenth Amendment when they sought further appellate review before the Massachusetts Supreme Judicial Court (the "SJC"). As a result, jurisdiction is lacking. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("[W]e will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."); *TXO Prod. Corp. v. All. Res. Corp.,* 509 U.S. 443, 464 (1993) ("Because TXO's constitutional attack on the jury instructions was not properly presented to the highest court of the State, we do not pass on it.") (citation omitted); *Webb v. Webb*, 451 U.S. 493, 495, 501 (1981) ("Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. . . . [T]here should be no doubt from the record that a claim under a *federal statute* or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.") (emphasis added).

SUMMARY OF RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, Lubin & Meyer opposes the Petition for a Writ of Certiorari filed by the Abdulkys, as parents and next friends of Anthony Abdulky, seeking review of the decision of the Massachusetts Appeals Court in *Abdulky v. Lubin & Meyer, P.C.*, 102 Mass. App. Ct. 441 (2023) (the "Decision") (Appendix of Respondent, herein after "L&M App." at 2-22). The Appeals Court reversed the Massachusetts Superior Court's denial of Lubin & Meyer's motion for summary judgment and directed that the Abdulkys' claims of legal malpractice and breach of fiduciary duty be dismissed because the Abdulkys failed to offer admissible evidence of actual loss/damages, which was an essential element of their claims.

The Abdulkys' claims arose from a $6 million medical malpractice settlement (the "Settlement") that Lubin & Meyer obtained for Anthony and that was subsequently judicially-approved in 2015 by the Massachusetts Superior Court as "excellent," "huge," and in the best interests of Anthony. Approximately three years after receiving the benefit of that judicially-approved settlement, which will ultimately net $7.8 million, the Abdulkys brought claims for legal malpractice and breach of fiduciary duty in Massachusetts Superior Court, asserting that Lubin & Meyer failed to adequately calculate the lifetime costs of Anthony's prosthetics in advising them to accept the Settlement.

In the underlying legal malpractice lawsuit, Lubin & Meyer moved for summary judgment asserting, among other things, that the Abdulkys' claims failed due to the lack of admissible evidence of actual loss/damages, which was an essential element of their claims. The Abdulkys' sole evidence of damages, as offered through their expert, David Oliveira, was inadmissible under *Commonwealth v. Lanigan*, 419 Mass. 15 (1994) ("*Lanigan*"), which requires Massachusetts courts to exercise a "gatekeeper" function to ensure that inadmissible expert testimony does not reach a jury. However, as the Appeals Court properly concluded, the Superior Court failed to exercise its mandatory gatekeeping analysis and denied summary judgment in a 4-sentence endorsement, stating, without analysis, that "issues of causation and damages remain in dispute." R.A.II 461.

In reversing the Superior Court and directing that judgment enter in Lubin & Meyer's favor, the Appeals Court applied black-letter state law under Massachusetts Rule of Civil Procedure 56(e), which requires parties opposing summary judgment to set forth admissible evidence establishing that there is a genuine issue of material fact for trial. Relying on well-established Massachusetts law, the Appeals Court held that admissible evidence of damages was an essential element of the Abdulkys' claims, which the Abdulkys sought to satisfy by relying on a speculative, inadmissible expert opinion that conclusorily asserted that the Abdulkys would have somehow secured a "$10 million settlement or verdict" in their favor in the underlying medical malpractice

case notwithstanding the undisputed evidence that the insurance adjuster for the medical malpractice defendants in the underlying case never valued the case at more than $6 million.

The SJC has mandated that trial judges and appellate courts have a fundamental "gatekeeping" role in ensuring that inadmissible and speculative expert testimony of all types does not reach a jury. *See Case of Canavan*, 432 Mass. 304, 314-15 (2000) (reversing finding that expert's *ipse dixit* opinion was admissible under *Lanigan*); *Santos v. Chrysler Corp.*, 430 Mass. 198, 206 (1999) (expert's opinion properly excluded where proponent did not establish that data underlying the opinion "matched the circumstances of the plaintiff's accident"); *Lanigan*, 419 Mass. at 25; Mass. G. Evid. § 702(d) (2022). This requirement of ensuring the admissibility of expert evidence extends to expert evidence offered at summary judgment. *See Commonwealth v. AmCan Enter., Inc.*, 47 Mass. App. Ct. 330, 337 (1999) (affirming summary judgment where trial court properly disregarded expert affidavit that proffered inadmissible evidence); *Ramey v. Zoning Bd. of Appeals of Methuen,* No. 06–P–0196, 2007 WL 517722, at *1 (Mass. App. Ct. Feb. 20, 2007) (affirming summary judgment where trial court struck inadmissible expert opinion because "[w]here an expert opinion would not be admissible at trial, there is no error in refusing to consider it at the summary judgment stage").

In performing its mandatory "gatekeeping" function, the Appeals Court held that the Abdulkys' proffered expert opinion "failed to meet the basic

standard for admissibility under the case law, because they did not set forth how [the expert] had applied a reliable methodology to the facts of this case." (L&M App. 18-19). For example, the Appeals Court noted that the Abdulkys' expert opinion failed to: (1) identify which verdicts and settlements he reviewed, (2) disclose the amounts of those verdicts and settlements, and (3) explain why those verdicts and settlements upon which he based his opinion were apt comparators. (L&M App. 19).

The Appeals Court's decision was entirely consistent with controlling Massachusetts precedent applying a *Lanigan* analysis to expert evidence proffered at summary judgment. *See, e.g.*, *Grassi Design Grp., Inc. v. Bank of Am., N.A.*, 74 Mass. App. Ct. 456, 462-63 (2009) (affirming summary judgment to defendants where plaintiff's reports did "not qualify as expert opinions under [Lanigan], and . . . [we]re insufficient to create a genuine issue of material fact"); *Molly A. v. Comm'r of the Dep't of Mental Retardation*, 69 Mass. App. Ct. 267, 284 n.24 (2007) (noting that, if made, a *Lanigan* challenge to expert evidence at summary judgment "might have succeeded . . . because [the expert evidence] largely failed to satisfy the requirements of" rule 56(e)); *Baptiste v. Sheriff of Bristol Cnty.*, 35 Mass. App. Ct. 119, 126 (1993) (holding that there is no error in "disregard[ing] the affidavit from the plaintiff's expert" in granting defendants' motion for summary judgment where "many of the expert's statements [we]re based upon assumptions proved faulty by the undisputed facts" and "would not be admissible at any trial"). It was also entirely consistent with Rule 56(e) of the

Massachusetts Rules of Civil Procedure, which requires a party opposing summary judgment to dispute issues of fact with *admissible* evidence.

Under Supreme Court Rule 10, review on a writ of certiorari is a matter of judicial discretion that will only be granted for "compelling reasons." Those compelling reasons focus on conflicts among courts regarding important federal questions or the adjudication of important issues of federal law. Sup. Ct. R. 10. Here, there are no federal questions at issue, much less any that have been properly preserved. No compelling reasons exist warranting review, and the Abdulkys' Petition should be denied for five (5) separate reasons.

First, Petitioners lack standing. Petitioners brought this action in their capacities as parents and next friends of their son Anthony; however, Anthony turned 18 years old prior to his parents filing this Petition on November 21, 2023. R.A.II 9-10. Anthony has full legal capacity under Massachusetts law and is the real party at interest; therefore, his parents lack standing to file this Petition on their adult son's behalf. *See* MASS. GEN. LAWS ch. 231, § 85P ("[A]ny person domiciled in the commonwealth who has reached the age of eighteen shall for all purposes . . . be deemed of full legal capacity . . . ."); *Stephenson*, 632 Fed. App'x. at 181 (holding that the Court of Appeals lacked jurisdiction to review claims filed by parents on behalf of son where son had reached the age of majority prior to the appeal of the final judgment); *Vandiver*, 925 F.2d at 930 (parents lost standing to

pursue claims to enforce son's rights when son turned eighteen, the age of legal majority under state law).

Second, Petitioners have attempted to manufacture a federal issue by claiming, for the first time before this Court, a supposed "egregious" due process violation under the Fourteenth Amendment of the U.S. Constitution by falsely contending that the Appeals Court abruptly changed Massachusetts law by "demand[ing] that the Abdulkys prove their damages with a legal expert." (Pet'r's Br. 14-15). Contrary to Petitioners' representations, they never raised at any stage in the state court proceedings—before the Superior Court, Appeals Court, or SJC—that their due process rights under the Fourteenth Amendment of the U.S. Constitution had been violated in any way. Tellingly, the Abdulkys do not even provide this Court with a copy of their Application for Further Appellate Review ("FAR Petition") to the SJC.[2] This is because nowhere in their FAR Petition did the Abdulkys contend that the Appeals Court's decision somehow implicated, much less violated, any protections or rights under the U.S. Constitution. Indeed, the words "constitution," "unconstitutional," "due process," or "Fourteenth Amendment" are glaringly absent from the FAR Petition. (L&M App. 23-42). This alone mandates the denial of their petition. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 729 n.30 (2010) ("[P]etitioner attempts to raise a challenge to the Act as a deprivation of

[2] Lubin & Meyer has included a copy of the Abdulkys' FAR Petition (without exhibits) in its Appendix. *See* (L&M App. at 23-42).

property without due process. Petitioner did not raise this challenge before the Florida Supreme Court . . . . We therefore do not reach it."); *Adams*, 520 U.S. at 86 ("[W]e will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."); *TXO Prod. Corp.*, 509 U.S. at 464 (ruling that because constitutional arguments were not properly presented to the highest court of the State, they were waived); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) ("A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon."); *Webb*, 451 U.S. at 495 (dismissing review because "the federal question was not raised below and that we are without jurisdiction in this case"); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.").

Third, in stark contrast to Petitioners' representations, this case does not involve any federal or Constitutional issue of any kind. Indeed, in order to now manufacture a "due process" claim, Petitioners disingenuously assert that the Appeals Court "egregiously violated the Due Process Clause" by "changing black letter law" by requiring them, without advance notice, to "prove their damages through a legal expert." (Pet'r's Br. 14-15). Separate and apart from the Abdulkys' failure to raise this claim with the SJC, Petitioners' assertion is a complete fiction. The

Appeals Court did not change Massachusetts law, abruptly or otherwise, nor did it require the Abdulkys at the appellate level to all of a sudden support their claims with expert evidence.

Rather, the Appeals Court appropriately recognized that: "[p]roof of damages, of course, is an essential element of the plaintiffs' malpractice claim. Here, the only evidence of damages the plaintiffs produced was the purported expert disclosure of David Oliveira." (L&M App. 16) (emphasis added). In stark contrast to "demand[ing] that the Abdulkys prove their damages with a legal expert," that is, in fact, how Petitioners affirmatively chose to prove the essential element of their legal malpractice claim in opposing summary judgment before the Superior Court. (L&M App. 126-123). Having chosen to prove their damages only through expert testimony, the Appeals Court, applying well-established Massachusetts law, simply examined the Abdulkys' proffered expert evidence before the Superior Court to determine whether it was, in fact, admissible and thus could create a genuine issue of material fact as to the essential element of actual loss/damages.

Fourth, to the extent that Petitioners now appear to be arguing that under Massachusetts law, they had the right to prove their damages *either* through a lay witness or an expert, this argument is fundamentally flawed and provides no support for their Petition. Among other reasons, Petitioners raise this argument for the first time in this Petition and therefore have waived it. Indeed, Petitioners took the exact opposite position in the Massachusetts courts,

asserting that they did, in fact, need expert testimony given the nature of the case and that causation and damages were not within the ken of the ordinary juror, which is precisely why they were relying on an expert to establish damages. *See Fishman v. Brooks*, 396 Mass. 643, 647 (1986) ("On this approach to the trial of a legal malpractice action, *except as to reasonable settlement values*, no expert testimony from an attorney is required to establish the cause and the extent of the plaintiff's damages.") (emphasis added).[3]

Moreover, Petitioners did not point (and still cannot point) to any admissible evidence in the record within the ken of the ordinary juror that could have created a genuine issue of material fact as to whether, with allegedly proper advice, they would have obtained a settlement or verdict better than the Settlement, which will net them $7.8 million. Indeed, during oral argument before the Appeals Court, counsel for Petitioners were asked point blank what admissible evidence there was in the record

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[3] In their Petition, the Abdulkys selectively quote *Fishman*, claiming that case states that "no expert testimony from an attorney is required to establish the cause and the extent of the plaintiff's damages." (Pet'r's Br. 15). However, Petitioners intentionally omit the key language of that sentence. The full sentence reads: "On this approach to the trial of a legal malpractice action, *except as to reasonable settlement values*, no expert testimony from an attorney is required to establish the cause and the extent of the plaintiff's damages." *Id.* at 647. *Fishman* clearly requires expert testimony for legal malpractice cases that involve the question of whether a settlement was reasonable, which was precisely the issue in the Petitioners' legal malpractice case against Lubin & Meyer arising from the Settlement.

establishing that the underlying medical malpractice case was worth more than the $6 million settlement reached. The only evidence that Petitioners' counsel could point to was their inadmissible expert disclosure. Petitioners did not identify any alternative evidence within the ken of the ordinary juror to establish a genuine issue of material fact as to whether they had any damages. Likewise, in their FAR Petition to the SJC, Petitioners did not identify any such alternative non-expert evidence.

Fifth, this case is not appropriate for review by this Court because, at its core, it concerns purported erroneous factual findings of the Abdulkys' lack of evidence of actual loss/damages. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . ."); *Kennedy v. Bremont Sch. Dist.*, 139 S. Ct. 634, 636 (2019) (denying petition for certiorari; "we generally do not grant such review to decide highly fact-specific questions"); *Nat'l Lab. Relations Bd. v. Henricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (certiorari deemed improvidently granted where issue presented "primarily . . . a question of fact, which does not merit Court review").

Put simply, Petitioners have failed to demonstrate any compelling reason warranting this Court's review of the Massachusetts Appeals Court's decision, which was based on the Abdulkys' fundamental failure to introduce admissible evidence of actual loss/damages at summary judgment, as required by well-established Massachusetts law.

PETITIONERS' MISSTATEMENTS

Pursuant to Supreme Court Rule 15.2, Lubin & Meyer sets forth the following misstatements in the Abdulkys' Petition.

First, Petitioners represent to this Court that they "raised constitutional issues created by the Appeals Court of Massachusetts in their application for further appellate review to the Supreme Judicial Court of Massachusetts . . . ." (Pet'r's Br. 12-13). They did not. Tellingly, Petitioners fail to include their FAR Petition in their record appendix. This is because nowhere in their FAR Petition did the Abdulkys contend that the Massachusetts Appeals Court's decision somehow implicated, much less violated, any protections or rights under the U.S. Constitution. (L&M App. 23-42).

Second, Petitioners represent to this Court that "the Appeals Court demanded that the Abdulkys prove their damages through a legal expert." (Pet'r's Br. 14-15). The Appeals Court did no such thing, as made clear by its decision, which states quite clearly:

> Proof of damages, of course, is an essential element of the plaintiffs' malpractice claim. . . . Here, the only evidence of damages the plaintiffs produced was the purported expert disclosure of David Oliveira, an experienced medical malpractice attorney. . . . Notably, [Mr. Oliveira's] supplemental affidavit did not identify any specific settlements or verdicts, nor

> provide a methodology for how those settlements and verdicts supported his $10 million opinion.
>
> The defendants are correct that the plaintiffs' damages submissions were insufficient to survive summary judgment.

(L&M App. 16-17) (emphasis added). In stark contrast to "demand[ing] that the Abdulkys prove their damages with a legal expert," that is, in fact, how Petitioners affirmatively sought to prove the essential element of their legal malpractice claim.

STATEMENT OF THE CASE[4]

This case arises out of Petitioners' legal malpractice lawsuit brought in Massachusetts Superior Court against Lubin & Meyer, a law firm that represented the Abdulkys' then-minor son Anthony in a medical malpractice case after he suffered a below-the-elbow amputation following an accident in 2011 when he was 5 years old. R.A.II 10.

In the legal malpractice lawsuit, filed on August 14, 2018, Petitioners claimed that Lubin & Meyer "improperly" advised them to enter into a $6 million

[4] Supporting citations are to the two-volume record appendix filed with the Massachusetts Appeals Court and are cited herein as "R.A.I__," and "R.A.II__."

Court-approved settlement for Anthony.[5] Specifically, Petitioners claimed that the Settlement was inadequate because it supposedly did not account for the future cost of Anthony's prosthetics despite Anthony's own prosthetist admitting that the Settlement was adequate and the trial judge (Judge Lemire) in the underlying medical malpractice case approving the Settlement, over the Abdulkys' objections, as "huge," "tremendous," and in the best interests of Anthony. R.A.I 202, 206, 212, 216, ¶¶40, 56, 74-76, 85-87.

In the underlying medical malpractice action, Judge Lemire of the Superior Court approved the Settlement over the course of three separate hearings pursuant to MASS. GEN. LAWS ch. 231, § 140C½, which provides a judicial review and approval mechanism to protect minors from conflicts and financial pressures that can create the "potential for parental action contrary to the child's ultimate best interests." *Sharon v. Newton*, 437 Mass. 99, 109 n.10 (2002). That policy was particularly applicable in the medical malpractice case where Judge Lemire expressly found that the Abdulkys were raising "issues not based in reason but on emotion," and were detrimentally impacting Anthony's financial interests. R.A.I 118-119, 127-128,131, 134, 146.

Specifically, at the 2015 settlement approval hearings, the Abdulkys first represented to Judge Lemire that they had voluntarily settled their son's

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[5] The Settlement was structured such that it will actually net close to $7.8 million. R.A.I 208, ¶¶61-62; R.A.I 213, ¶76.

medical malpractice action, they were not under any pressure in doing so, and were settling for $6 million, despite knowing that a prosthetist had offered a self-described "rough estimate" that the lifetime costs of Anthony's prosthetics could purportedly exceed $3 million. R.A.I 202-203, ¶¶39, 42-49. The Abdulkys then reversed their position, moving to vacate the Settlement by contending that (1) they were under "duress" when they agreed to the Settlement, and (2) the Settlement was purportedly "inadequate" because it allegedly did not take into account the future cost of their son's prosthetics. R.A.I 205-215, ¶¶50-81.

Judge Lemire (who had personally spent time with the Abdulkys, met with Anthony, and given them his candid view of the settlement offer) considered and rejected those arguments, expressly finding that the Abdulkys were not under duress when they agreed to the Settlement, and that the $6 million Settlement took into account future medical costs and was not merely adequate, but "huge," tremendous," and higher than settlements for children with life-altering brain injuries. R.A.I 206-216, ¶¶55-56, 65-75, 86-87.

Despite being advised of their option to appeal Judge Lemire's rulings approving the Settlement, the Abdulkys, on October 26, 2015, signed releases on behalf of Anthony and accepted the Settlement in accordance with the Court's rulings. The Abdulkys retained the proceeds from the Settlement and never offered to return them. R.A.I 215, ¶¶82-84.

Close to three years later, on or about August 14, 2018, the Abdulkys, in their capacities as parents

and next friends of their son Anthony, brought a legal malpractice lawsuit against Lubin & Meyer arising out of the Court-approved Settlement. The Abdulkys admitted that the bases for their legal malpractice action were the two exact same issues that Judge Lemire considered and rejected; namely, whether: (1) the Abdulkys were under "duress" when they entered into the Settlement because Lubin & Meyer accurately conveyed the potential risk that the medical malpractice defendants had indicated that they would be moving to appoint a guardian ad litem ("GAL") to evaluate the reasonableness of the settlement if the Abdulkys did not accept the Settlement, and (2) Lubin & Meyer supposedly did not adequately determine the future costs of Anthony's prosthetics in advising them to accept the $6 million Settlement. R.A.I 216, ¶¶85-87. In sworn interrogatory answers, Petitioners belatedly disclosed David Oliveira as their purported legal expert on damages who conclusorily opined, without any analysis whatsoever, that: "[I]n the presence of appropriate and timely advice on the issue of settlement, [Petitioners] would have received in excess of $10 million either by way of settlement, or a jury verdict, the latter of which would have had statutory interest added to it." R.A.I 187.

On December 7, 2021, Lubin & Meyer moved for summary judgment on all counts of the complaint, asserting, in part, that Oliveira's damages opinion was inadmissible under Massachusetts controlling law due to its conclusory and speculative nature, and therefore that the Abdulkys could not prove an essential element of their claim, actual loss/damages, with admissible evidence. R.A.I 35-36, 44, 58-61, 265-

266. Oliveira's opinion was particularly speculative given the undisputed evidence that that the insurance adjuster for the medical malpractice defendants in the underlying case never valued the case at more than $6 million.[6] Lubin & Meyer made it clear that, given that the Abdulkys had offered expert evidence to support their claim, Massachusetts law required the trial court undertake a "gatekeeping analysis" to determine if the proffered opinion was admissible. *See Lanigan*, 419 Mass. at 25-26 ("If the process or theory underlying a[n] [ ] expert's opinion lacks reliability, that opinion should not reach the trier of fact"); R.A.I 58-61.

Petitioners opposed summary judgment by providing a supplemental affidavit from Oliveira, which stated that since issuing his expert disclosure, he had conducted unidentified "research into verdicts and settlements in the Commonwealth" on a "variety of cases" including "medical malpractice cases involving amputations" which "confirm[ed]" his *prior* conclusion that Plaintiffs would have received in excess of $10 million through settlement or jury verdict. Even with his nebulous reference to "research," Oliveira provided no identification or analysis of what verdicts/settlements he had reviewed

[6] Indeed, in the medical malpractice action, Judge Lemire told the Abdulkys that they would be "foolish" to reject the settlement and go to trial and that the medical defendants were "never coming back to the table to talk to you guys. They're fed up from a business perspective." R.A.I 131 (emphasis added).

or how they were similar/applicable to the Abdulkys' case, and no discussion of his purported methodology.

On December 17, 2021, despite its judicially mandated gatekeeping function to analyze the proffered expert opinion, the trial court conducted no analysis and issued a 4-sentence endorsement denying summary judgment, stating that "issues of causation and damages remain in dispute" (the "Order"). R.A.I 31; R.A.I 461.

On January 17, 2022, Lubin & Meyer filed with the Single Justice of the Appeals Court a petition for interlocutory review of the Order. On February 23, 2022, over the Abdulkys' opposition, the Single Justice granted Lubin & Meyer leave to file an appeal of the Order before a full panel of the Appeals Court. R.A.I 467.

On March 28, 2023, the Appeals Court reversed the denial of summary judgment, holding the Abdulkys had failed to put forth competent and admissible evidence of damages. The Appeals Court found that "the only evidence of damages [Petitioners] produced was the purported expert disclosure of David Oliveira" and that Oliveira's opinion was speculative and inadmissible. It correctly concluded that "[s]imply setting forth an expert's experience, and that he did some research, is not sufficient when the expert's application of his methodology to the facts is not disclosed." *Abdulky v. Lubin & Meyer, P.C.*, 102 Mass. App. Ct. 441, 450, 452 (2023) (the "Decision").

The Abdulkys did not file a motion for reconsideration or modification of Decision, as

permitted by Rule 27 of the Massachusetts Rules of Appellate Procedure. *See* Mass. R. App. P. 27. Rather, on May 18, 2023, they filed their FAR Petition with the SJC. The FAR Petition did not: (1) argue that the Decision violated any due process rights under the Fourteenth Amendment; (2) assert any federal or Constitutional issues were implicated; (3) argue that the Abdulkys had admissible non-expert evidence of actual loss/damages sufficient to defeat summary judgment. Rather, they argued that they were entitled to "more leniency" at the summary judgment stage and that the judicially required gatekeeping review of expert testimony should have been deferred until trial. (L&M App. 33-42).

STATEMENT OF FACTS

In 2012, Lubin & Meyer filed a lawsuit on behalf of the Abdulkys in Worcester Superior Court, captioned as *Abdulky et al. v. Kraus MD et al.* (the "Medical Malpractice Action"). It asserted claims for medical malpractice on behalf of the Abdulkys' minor son, Anthony, who suffered a below-the-elbow amputation at the age of five arising from complications from a fractured wrist. The lawsuit brought claims against nine physicians affiliated with UMass Memorial Medical Center (the "Kraus Defendants"). R.A.I 192, ¶¶3-6.

The claims asserted in the Medical Malpractice Action implicated insurance secured by UMass Memorial Health Care Inc. ("UMMHC"), which provided coverage to the Kraus Defendants. On August 12, 2015, UMMHC offered to settle the

Medical Malpractice Action on behalf of the Kraus Defendants in its entirety for $6 million, as its final and best offer, which would be revoked if not accepted. UMMHC's offer took into account, among other things, the potential costs of Anthony's future prosthetics. UMMHC never valued the claims against the Kraus Defendants at more than $6 million and never offered the Abdulkys anything more than $6 million. R.A.I 192-194, ¶¶7, 10-14.

In or around mid-August, 2015, counsel for the Kraus Defendants informed Attorney Syska of their intention to file a motion to appoint a guardian ad litem ("GAL") over Anthony who would advise the Court independently from the Abdulkys of the appropriateness of the acceptance or rejection of the $6 million Settlement Offer. At that time, counsel for the Kraus Defendants informed Attorney Syska that they did not believe that the Abdulkys were acting in the best interests of Anthony and a GAL would provide some objectivity. R.A.I 195-196, ¶¶19-21; R.A.I 636.9.

On August 12, 2015, the Abdulkys met with Judge Lemire, with the consent of all counsel, to get his views on the Settlement Offer. Judge Lemire informed the Abdulkys that the $6 million offer was "very high and very reasonable" and they would be "foolish" not to accept the $6 million offer and risk going to trial. Both Judge Lemire and Lubin & Meyer advised the Abdulkys to accept the $6 million Settlement Offer as being in the best interests of Anthony. R.A.I 194-198, ¶¶15-18, 23-26.

On August 27, 2015, the Abdulkys directed Lubin & Meyer, in writing, to accept the $6 million Settlement Offer. The Court then held three hearings concerning the approval of the Settlement, each of which occurred on September 17, October 2, and October 22, 2015, and were attended by the Abdulkys. R.A.I 199-210, ¶¶30-32, 42- 43, 50-51, 65.

Before the September 17th hearing, the Abdulkys informed Lubin & Meyer that they were contemplating "backing out" of the Settlement, contending that: (1) they were under "duress" due to the fear that either the Kraus Defendants would move to appoint a GAL or that the Court, on its own, could potentially appoint a GAL, and (2) the Settlement purportedly did not contemplate the future cost of Anthony's prosthetics. Pursuant to Mr. Abdulky's request, Lubin & Meyer obtained in early September 2015 estimates from two economic experts who projected the lifetime cost of Anthony's future prosthetics to be approximately $450,000 and $583,500. R.A.I 200-202, ¶¶34-38.

On or about September 11, 2015, Mr. Abdulky obtained a "rough estimate" from a prosthetist, who opined that, "assuming resources not be an issue… a rough estimate of [the] cost [of Anthony's future prosthetics] would exceed three million dollars over Anthony's lifetime based on current technology

available" ("Emerson Letter").[7] R.A.I 202-203, ¶¶38-40; R.A.I 35-37.

At the September 17, 2015 settlement approval hearing, the Abdulkys, even with the benefit of the Emerson Letter, directly represented to the Court that the case was settled for $6 million and further represented that they were not "pressured" or "forced" into the Settlement. Judge Lemire ruled that the case was settled and directed the parties to finalize the details of how the settlement money would be structured. R.A.I 202-204, ¶¶39, 42-49.

On October 2, 2015, Lubin & Meyer filed a Petition for Approval of Settlement for a Minor, which sought to have the Court formally approve the $6 million Settlement and its proposed disbursement structure. At this hearing, Mr. Abdulky attempted to retreat from the Settlement, arguing that the Settlement did not contemplate the cost of future prosthetics. Judge Lemire rejected this argument, concluding that the cost of future prosthetics was indeed contemplated in the $6 million settlement

[7] This "rough estimate" was one that the Abdulkys, not Lubin & Meyer, had procured and appeared untethered to Anthony's actual cost history. In 2013, Anthony's prosthetic costs were approximately $30,000, and, as of August 2019 when Anthony was nearly 14 years old (approximately 8 years after Anthony's accident and approximately 5 years after the Settlement was approved), the Abdulkys represented in sworn interrogatory answers that the total costs of Anthony's prosthetics was $38,828.54 — or less than **0.49%** of the total net settlement of $7.8 million. R.A.I 192, ¶3; R.A.I 201, ¶¶35-36; R.A.I 213, ¶76.

figure and that there were not grounds for vacating the Settlement. R.A.I 205-207, ¶¶50-60.

Judge Lemire further ruled that the Abdulkys and their son Anthony, whom Judge Lemire had met and spent some time with, were receiving not only a reasonable settlement, but a "huge" and "tremendous" settlement. In response, Mr. Abdulky acknowledged in open Court during the October 2nd hearing that the Settlement was in the best interest of Anthony: "Yes. We understand and realize that that this . . . is the best thing for the kid." R.A.I 206-207, ¶¶56-58.

At the October 22, 2015 hearing, Judge Lemire was presented with competing motions: (1) the Kraus Defendants' Motion to Enforce the Settlement Agreement and Appoint a GAL over Anthony, and (2) the Abdulkys' Motion to Vacate the Decree NISI and Void the Settlement Agreement filed by Lubin & Meyer at the Abdulkys' instruction. Attached to the Motion to Vacate was the Emerson Letter. R.A.I 208-212, ¶¶61-65, 72; R.A.II 87-91. Judge Lemire heard argument on the Motion to Vacate, which included direct testimony from Mr. Abdulky. After considering the cost of prosthetics issue for a second time, and this time having a copy of the Emerson Letter that gave a "rough estimate" of $3 million for future prosthetics, Judge Lemire denied the motion to vacate. R.A.I 209-213, ¶¶65-75. R.A.I 196-197, ¶22; R.A.I 210-213, ¶¶67-70, 75. *See also* R.A.I 118-120, 136-137.

Judge Lemire then reviewed the financial structure of the $6 million Settlement, which was structured to produce $7,837,573.31 in total net

proceeds to the Abdulkys. In approving the settlement structure, Judge Lemire found that the Settlement was "favorable and a just settlement . . . ." R.A.I 208, ¶¶61-62; 213-214, ¶76.

The Abdulkys elected not to appeal the Court's rulings approving the Settlement. Instead, on October 26, 2015, the Abdulkys signed releases on behalf of themselves and Anthony. Thereafter, the settlement proceeds were disbursed. R.A.I 215, ¶¶82-84.

REASONS FOR DENYING CERTIORARI

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Those compelling reasons focus on conflicts among courts regarding important federal questions or the adjudication of important issues of federal law. *Id.* Here, there is no federal question at issue, much less one that has been preserved, much less one that raises important issues. Indeed, there are no compelling reasons justifying review by this Court and the Petition should be denied for five different reasons.

I. The Petition Should Be Denied Because The Abdulkys Have No Standing To Pursue A Writ Of Certiorari On Behalf Of Anthony In Their Capacity As Parents And Next Friends Given That Their Son Has Reached The Age Of Majority

As a threshold matter, the Abdulkys filed this Petition in their capacity as "parents and next friends" of their son Anthony weeks after he had turned 18 years old, which is the age of majority and full legal capacity under Massachusetts law. *See* MASS. GEN. LAWS ch. 231, § 85P ("any person domiciled in the commonwealth who has reached the age of eighteen shall for all purposes . . . deemed of full legal capacity"). Under Massachusetts law, "[i]n an action prosecuted or defended by a next friend or guardian ad litem, the minor or incompetent person, not the representative, is the proper party plaintiff, and is the real party in interest." *King v. Bradlees, Inc.,* 1991 Mass. App. Div. 140, at *3 (Sept. 30, 1991) (emphasis added). *See also* Mass. R. Civ. P. 17.

With Anthony having reached the age of majority and being the real party in interest, Petitioners lack standing to pursue this Petition on behalf of their adult son. *See, e.g.*, *Vasquez v. United States*, 454 U.S. 975, 977 n.3 (1981) (denying certiorari review because "[i]t is sound practice, however, to deny a petition for certiorari when the facts do not firmly establish that the petitioner has standing to raise the question presented"); *Stephenson*, 632 Fed. App'x. at 181 (holding that the Court of Appeals lacked jurisdiction to review claims filed by parents on behalf

of son where son had reached the age of majority prior to the appeal of the final judgment); *Vandiver*, 925 F.2d at 930 (parents lost standing to pursue claims to enforce son's rights when son turned eighteen, the age of legal majority under state law); *Heard v. Thomas*, No. 2:20-cv-2335-MSN-cgc, 2022 WL 1431083, at *1 (W.D. Tenn. May 5, 2022) ("Once . . . a minor has reached the age of majority under state law, 'the fiduciary loses authority to maintain the suit on behalf of the former infant.'") (citation omitted). As a result, the Court lacks subject matter jurisdiction and, accordingly, the Petition should be denied.

II. The Petition Should Be Denied Because The Abdulkys Attempt To Raise, For The First Time Before This Court, A Manufactured Constitutional "Due Process" Violation That Was Never Presented To The Massachusetts Supreme Judicial Court

As this Court has repeatedly reminded litigants, "we are a court of review, not first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005). Yet, in an attempt to manufacture jurisdiction under 28 U.S.C. § 1257, the Abdulkys disingenuously assert, for the first time, that this case involves an "egregious" violation of the Due Process Clause of the U.S. Constitution caused by the Appeals Court "changing black letter law" and requiring them, without advance notice, to "prove their damages through a legal expert." (Pet'r's Br. 14-15). As discussed in Section III below, the Appeals Court neither "changed black-letter law," nor required the Abdulkys to prove their

damages through a legal expert. Setting that aside for the moment, the Abdulkys, despite claiming an "egregious" violation of due process, never: (1) filed a motion for reconsideration or modification of decision in the Appeals Court, pursuant to Mass. R. App. P. 27; or (2) presented their Constitutional claim of an alleged violation of due process to the SJC. Indeed, the Abdulkys' FAR Petition to the SJC did not even make a passing reference to the U.S. Constitution or any purported "due process" violation. That is fatal to their Petition. *See Webb*, 451 U.S. at 495, 501 ("[T]here should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.") (emphasis added).

As a result, the Abdulkys did not preserve their Constitutional claim that they seek to raise for the first time before this Court. This mandates the denial of their Petition. *See Adams*, 520 U.S. at 86 ("[W]e will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."); *TXO Prod. Corp.,* 509 U.S. at 464; *Bankers Life & Cas. Co.,* 486 U.S. at 77; *Cardinale*, 394 U.S. at 438 ("Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional

issues raised here for the first time on review of state court decisions.").

III. The Petition Should Be Denied Because, As Established By The Record, There Is No Constitutional Due Process Claim As The Appeals Court Did Not Abruptly Require The Abdulkys To Prove Their Damages Through A Legal Expert, Rather That Is How The Abdulkys Chose To Oppose Summary Judgment Before The Superior Court

In a legal malpractice action under Massachusetts law, "a plaintiff bears the burden of proving that [1] its attorney committed a breach of the duty to use reasonable care, [2] that the plaintiff suffered an actual loss, and [3] that the attorney's negligence proximately caused such loss." *Atlas Tack Corp. v. Donabed*, 47 Mass. App. Ct. 221, 226 (1999) (affirming summary judgment on legal malpractice claim where plaintiff failed to provide expert opinion to demonstrate it otherwise would have prevailed on the underlying claim). Where Lubin & Meyer secured a $6 million settlement, the Abdulkys, in opposing summary judgment, had to offer admissible evidence that they would have secured a better outcome by way of settlement or verdict in order to show an actual loss/damages. *See Poly v. Moylan*, 423 Mass. 141, 145 (1996) (holding that plaintiff must prove that he or she "probably would have obtained a better result had the [defendant] attorney exercised adequate skill and care"); *Fishman v. Brooks*, 396 Mass. 643, 647 n.1 (1986) (finding that damages in a legal malpractice

case based on a settlement is "the difference between . . . the lowest amount at which [the] case probably would have been settled on the advice of competent counsel and . . . the amount of the settlement"); *McElroy v. Robinson & Cole LLP*, No. 03-P-273, 2004 WL 1292042, at *2 (Mass. App. Ct. June 10, 2004) (affirming summary judgment where plaintiff had no reasonable expectation of proving loss or causation where underlying dispute was resolved favorably); *Van Brode Grp., Inc. v. Bowditch & Dewey*, 36 Mass. App. Ct. 509, 517 (1994) (affirming dismissal because there was no loss where expert's opinion was properly struck as speculative as "[i]t is fundamental that a tort action cannot be sustained without proof of damages, whether the action is framed as legal malpractice or breach of fiduciary duty").

Contrary to Petitioners' representations, the Appeals Court did not in any way, shape, or form "demand[] that the Abdulkys prove their damages through a legal expert." (Pet'r's Br. 14-15). Rather, beginning in the Superior Court, the Abdulkys themselves affirmatively chose to prove the essential element of actual loss/damages through the expert testimony of Oliveira. Indeed, neither in the Superior Court, Appeals Court, nor in their FAR Petition to the SJC did the Abdulkys ever assert that they somehow did not need expert testimony on damages and causation or that they were relying on specific non-expert evidence to establish damages. To the contrary, the Abdulkys argued to the Appeals Court, citing Massachusetts case law, that "[w]ithout the aid of expert testimony, a plaintiff is unlikely to demonstrate that it could have obtained a better result

absent [the defendant attorney's] negligence." (L&M App. 80). The Appeals Court properly concluded that, in opposing summary judgment, "the only evidence of damages the [Petitioners] produced was the purported expert disclosure of David Oliveira . . . ." (L&M App. 16).

Having chosen to use expert testimony to show the necessary element of actual loss/damages, the Abdulkys' argument to the Superior Court, Appeals Court, and SJC was not that the law does not require expert evidence on damages or that they had sufficient non-expert evidence of actual loss/damages.[8] *See* (L&M App. 37-42, 78-81, 126-134). Rather, they argued Oliveira's opinion was admissible and therefore created a genuine issue of material fact as to damages, or, alternatively, that the mandatory gatekeeping review of expert testimony imposed by Massachusetts law should not be performed at the summary judgment stage, but deferred until trial. *See* (Abdulky Appellate Brief at L&M App. 78-81); (FAR Petition at L&M App. 34-36 (arguing summary judgment should be decided under a lenient standard)); (*id.* at 37 ("Abdulkys' proffer of expert testimony on damages was sufficient to withstand summary judgment")); (*id.* at 41 ("Even if some of the facts and data upon which Oliveira relied are not apparent on the record, this Court can reasonably

[8] By failing to present to the SJC their current specious argument that the Appeals Court erred by "requiring" to prove their damages, the Abdulkys have waived that argument by failing to properly preserve it.

anticipate that there will be an expanded record at trial")).

Moreover, the Appeals Court did not change Massachusetts law as to the proof required for legal malpractice claims. The SJC has made it clear that when there is a question as to the reasonableness of a settlement, expert testimony *is* required. *See Fishman*, 396 Mass. at 647 ("On this approach to the trial of a legal malpractice action, *except as to reasonable settlement values*, no expert testimony from an attorney is required to establish the cause and the extent of the plaintiff's damages.") (emphasis added); *Frullo v. Landenberger*, 61 Mass. App. Ct. 814, 818 (2004) (affirming summary judgment in legal malpractice action because plaintiff's expert opinion was insufficient to establish a "causal relationship between the attorney's negligence and the outcome of the underlying case"); *Minkina v. Frankl*, No. CV09–01961 C, 2012 WL 3104905, at *3 (Mass. Super. Ct. June 19, 2012) (striking plaintiff's expert opinion on theoretical settlement), *aff'd*, 86 Mass. App. Ct. 282 (2014); *Lavina v. Satin*, No. 13–1012–C, 2016 WL 2846198, at *3-4 (Mass. Super. Ct. May 13, 2016) (striking expert's opinion on theoretical settlement plaintiff "would have" obtained as impermissibly speculative and untethered to evidentiary record). As a result, there is no federal or Constitutional issue warranting review by this Court.

IV. The Petition Should Be Denied Because The Appeals Court Properly Applied Well-Established Massachusetts Law Governing The Inadmissibility Of Speculative And Conclusory Expert Opinions Offered At Summary Judgment In Violation Of Massachusetts Rule Of Civil Procedure 56(e)

As a matter of well-established Massachusetts law, a party opposing summary judgment must proffer admissible evidence establishing the material facts in support of its claims. *See* Mass. R. Civ. P. 56(e) (affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence); *Madsen v. Erwin*, 395 Mass. 715, 719-21 (1985) (reversing the denial of summary judgment); *Ramey v. Zoning Bd. of Appeals of Methuen, No. 06–P–0196,* 2007 WL 517722, at *1 (Mass. App. Ct. Feb. 20, 2007) (affirming summary judgment where trial court struck inadmissible expert opinion). As the SJC has long held, the "rationale for requiring admissible evidence . . . is to ensure that 'trial would not be futile on account of lack of competent evidence.'" *Madsen*, 395 Mass. at 721 (citations omitted).

This requirement of admissibility extends to expert evidence offered at summary judgment. *See, e.g.*, *Ramey,* 2007 WL 517722, at *1 ("Where an expert opinion would not be admissible at trial, there is no error in refusing to consider it at the summary judgment stage"); *Commonwealth v. AmCan Enter., Inc.*, 47 Mass. App. Ct. 330, 337 (1999) (affirming summary judgment where trial court properly

disregarded expert affidavit that proffered inadmissible evidence); *Baptiste*, 35 Mass. App. Ct. at 126 (affirming summary judgment where expert affidavit was speculative and would be inadmissible at trial). Moreover, in 1994, the SJC underscored the importance of ensuring the admissibility of expert testimony in its seminal *Lanigan* decision, which affirmatively imposed a "gatekeeper function" on trial courts to ensure that unqualified, unreliable, or speculative opinions are removed from a case. *Lanigan*, 419 Mass. at 25-26 ("If the process or theory underlying a[n] [ ] expert's opinion lacks reliability, that opinion should not reach the trier of fact."). As the Appeals Court aptly concluded, "Rule 56 does not contain an exception for expert evidence, nor should it." (L&M App. 21).

Here, as the Appeals Court accurately recognized that "[p]roof of damages, of course, is an essential element of the plaintiffs' malpractice claim [and] the only evidence of damages the plaintiffs produced was the purported expert disclosure of David Oliveira…" (L&M App. 16). In reversing the denial of summary judgment, the Appeals Court highlighted that well-established Massachusetts law requiring that any expert evidence be admissible in order to defeat summary judgment:

> Admissibility of expert testimony at trial is governed by *Commonwealth v. Lanigan*, 419 Mass. 15 (1994), and its progeny. Under that case law, judges have a "gatekeeping" role in the admission of expert testimony of all

> types. *See Canavan's Case*, 432 Mass. 304, 313 (2000). . . .
>
> In the past, this court has applied the *Lanigan* standard at the summary judgment stage to conclude that a particular expert proffer was, as a matter of law, not admissible. [citing Massachusetts cases]. . . Here Oliveira's expert disclosure and supplemental affidavit failed to meet the basic standard for admissibility under the case law, because they did not set forth how Oliveira had applied a reliable methodology to the facts of this case. . . .

(L&M App. 18).[9]

In opposing summary judgment, the Abdulkys' sole evidence that they could have somehow obtained a better result than the $6 million Settlement was Oliveira's inadmissible expert opinion. Indeed, during

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[9] The inadmissible nature of Oliveira's ipse dixit opinion was also underscored by the undisputed facts that: (1) UMMHC never valued the medical malpractice case at more than $6 million; (2) UMMHC made it clear to Lubin & Meyer and Judge Lemire that the $6 million offer was its final offer and there would be no further offers; and (3) Judge Lemire told the Abdulkys that (a) the $6 million settlement offer was one of the highest that he had heard of for a malpractice case; (b) there would be no further offers; (c) if they went to trial, he felt that the overwhelming likelihood was that a jury would award them a number in the range of $2-3 million; and (d) they would be "foolish" not to accept the $6 million offer given the risks at trial. R.A.I 194-195, ¶¶12-14, 16-18; R.A.I 214, ¶77.

oral argument before the Appeals Court, counsel for Petitioners were asked by the justices what admissible evidence there was in the record establishing that the underlying medical malpractice case was worth more than the $6 million settlement reached. The only evidence that Petitioners' counsel could and did point to was their expert disclosure of Oliveira. Petitioners did not point to any alternative, non-expert evidence to establish a genuine issue of material fact as to whether they had any damages. *See* Massachusetts Appeals Court Oral Arguments, *Abdulky et al. v. Lubin & Meyer, P.C., et al.* (Milkey, Ditkoff, Englander, JJ.), at 3:40:00—3:45:53, YOUTUBE (Dec. 8, 2022), https://www.youtube.com/watch?v=sCj3fPYg0VE. Likewise, in their FAR Petition to the SJC, Petitioners did not point to any such alternative non-expert evidence. (L&M App. 23-42).

Given that the Abdulkys failed to offer admissible evidence of any actual loss/damages in light of their receipt of the $6 million Settlement, summary judgment was mandated under black-letter Massachusetts law. *See, e.g.*, *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 716 (1991) ("[P]laintiff was required to respond by 'set[ting] forth specific facts showing that there is a genuine issue for trial.' Mass. R. Civ. P. 56(e). As a result of the plaintiff's failure in this regard, the grant of summary judgment to the defendants was appropriate."). Indeed, there was nothing remarkable, novel, or improper about the Appeals Court's Decision, which was entirely consistent with well-established Massachusetts law. *See Lahey v. Aiken & Aiken, P.C.*, No. 15-P-1257, 2017

WL 1048118, at *2 n.5 (Mass. App. Ct. Mar. 20, 2017) (affirming summary judgment on a legal malpractice claim, ruling court did not err in excluding expert reports that were based on "speculative assumptions").

V. The Petition Should Be Denied Because The Issue Of Whether The Abdulkys Adduced Sufficient Admissible Evidence Of Actual Loss/Damages To Avoid Summary Judgment Is A Factual Question That Does Not Warrant Review

As this Court makes clear, a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Here, the Appeals Court applied black-letter Massachusetts law to the summary judgment record evidence before the Superior Court. To the extent that the Abdulkys claim that there was a record of admissible evidence of actual loss/damages to avoid summary judgment, that is a factual question that does not warrant review. As such, the petition should be denied on that basis as well. *See Kennedy*, 139 S. Ct. at 636 (denying petition for certiorari as "we generally do not grant such review to decide highly fact-specific questions"); *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., Concurring) ("[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case.").

CONCLUSION

Lubin & Meyer respectfully requests that this Court deny the Abdulkys' Petition for Writ of Certiorari.

Respectfully submitted,

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