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 Writ of Certiorari to the Supreme Judicial Court of Massachusetts

REPLY BRIEF OF PETITIONERS

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Respondents spend the entirety of their opposition trying to detract from the due process issues raised in the Petition. In essence, the Respondents argue that the appellate court's violation of an individual's due process rights is not a compelling interest warranting this Honorable Court's intervention. In fact, that is exactly the type of constitutional harm this Court should address. If appellate courts are permitted to change black letter law without giving a party the right to conform their proofs to the new law, Americans would no longer actually be afforded due process, but rather only the illusion of due process.

I. Respondents' arguments that this Court lacks jurisdiction simply ignores the precedent of this Court.

In their opposition, Respondents simply ignore this Court's established precedent that "[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). Indeed, the Respondents cite numerous inapplicable cases to detract from the legal precedent established by this Honorable Court that "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." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980)(citations omitted).

Respondents make no attempt to distinguish *Saunders* or *Pruneyard Shopping Ctr*. and instead cite a plethora of inapplicable cases – none of which involve an appellate court unexpectedly changing law at the appellate level. Respondents' Brief, pp. 2, 8-9, 28. Each case cited by Respondents simply reiterates established law regarding garden variety waiver of claims that were known and not raised at the appellate level – an issue that is simply not relevant to this instant action because the Petitioners raised their due process claims at the first available opportunity. Instead, in an effort to detract from the due process issues raised, the Respondents provide a lengthy Appendix to purportedly show the Petitioners did not raise a constitutional violation in the trial court and Appeals Court of Massachusetts. Again, the due process issues raised in the Petition were created by the Appeals Court of Massachusetts by unexpectedly changing the law.

Respondents then inexplicably assert that Petitioners' claims are "complete fiction" because the Abdulkys purportedly failed to raise their due process claims with the Supreme Judicial Court of Massachusetts claiming the Petitioners never asserted any claim that the Appeals Court of Massachusetts "'chang[ed] black letter law' by requiring them, without advance notice, to 'prove their damages through a legal expert.'" Respondents' Brief, p. 9. Respondents' Appendix contains the Application for Further Appellate Review which clearly shows that Petitioners raised this issue with the Supreme Judicial Court arguing 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 in this case, if left to stand, will forever deprive the Abdulkys of any opportunity to present any expert damages testimony to the factfinder." Resp.App. 41[1]. Respondents' argument that these due process issues are purportedly "fabricated" is belied by the documents provided in their own Appendix. This Honorable Court's precedent provides that "'[n]o particular form of words or phrases is essential' for satisfying the presentation requirement, so long as the claim is 'brought to the attention of the state court with fair precision and in due time.'" *Hemphill v. New York*, 595 U.S. 140, 142 S. Ct. 681, 689 (2022)(citations omitted),

Notably, the Respondents' Brief completely fails to address the Petitioners' arguments regarding the Appeals Court of Massachusetts's escalation of the summary judgment standard and thus, concede that point.

II. Petitioners have standing to bring this Petition and Respondents citation to inapplicable cases has no legal weight.

Respondents erroneously claim that Petitioners lack standing to bring the instant Petition by cobbling together a hodgepodge of inapplicable federal cases. Respondents' Brief, pp. 1, 26-27. This action stems out of a state court proceeding and thus standing is

[1] For clarity, citations in the form Resp.App._ are to the Respondents' Appendix and citations in the form Pet.App._ are to the Petitioners' Appendix.

governed by the laws of the state. "[S]tate law determines whether the plaintiff is the proper party to maintain the action." *Estate of Garcia-Vasquez v. Cty. of San Diego*, No. 06CV1322-LAB (LSP), 2008 U.S. Dist. LEXIS 69525, at *15 (S.D. Cal. Sep. 8, 2008). Furthermore, despite Respondents' claims to the contrary, "[t]he real party in interest and capacity rules are not jurisdictional, unlike the Article III 'case or controversy' standing requirement, but rather exist to ensure the plaintiff, rather than some third party, is entitled to make the claim." *Id*.

Petitioners are Anthony's parents, who hired the Respondents as their attorneys and were represented by the Respondents in the underlying medical malpractice action. Pet.App.2-23. Petitioners also entered into the Settlement Agreement under the unsound advice of Respondents. Pet.App.2-23. The Abdulkys remain necessary parties to the action as the injuries occurred when Anthony was a minor, Obaida Abdulky and Ward Abdulky remain the trustees of the trust established in that Settlement Agreement, the Abdulkys incurred the necessary medical expenses for Anthony and were part of the fiduciary relationship created when they retained the Respondents. Pet.App.2-23; R.A.II/44. Furthermore, Massachusetts courts have stated that the "'age of majority' is a malleable concept." *Commonwealth v. Robinson*, Nos. 0084CR10975, SJC-09265, 1184CR11291, SJC-11693, 2022 Mass. Super. LEXIS 1337, at *40 (July 20, 2022). Massachusetts courts also explain that the legal rights and duties between a parent and child do not expire on an eighteenth birthday, instead requiring an emancipation analysis stating "'[e]mancipation' is a

legal term of art that relates to the cessation of rights and duties between parent and child. . . . '*Whether* an emancipation has occurred is a question of fact…" *Tatar v. Schuker*, 70 Mass. App. Ct. 436, 442 n.10, 874 N.E.2d 481, 486 (2007)(emphasis in original). Moreover, the Abdulkys remain a necessary party to this action as they entered into the contract for legal services with the Respondents. The law provides

> [a] personal representative, guardian, conservator, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought.

Mass. R. Civ. P. 17(a). Finally, the Massachusetts Supreme Judicial Court has made clear "the person who assumes to act as next friend in instituting the proceedings is not ousted from his position by a challenge of his authority, but only by removal by the court, and until such removal his authority is in force." *Butler v. Winchester Home for Aged Women*, 216 Mass. 567, 569, 104 N.E. 451, 452 (1914).

Additionally, Massachusetts law provides that "[i]f substitution of a party in the appellate court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in Rule 30(a)." Mass. App. P. R. 30(b). Rule 30(a) provides the procedure for substitution when a party dies and states "[i]f a party

entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by the party's personal representative, or, if the party has no personal representative, by the party's attorney of record within the time prescribed by these rules." Mass. App. P. R. 30(a). "After the appeal is docketed, substitution shall be effected in the appellate court in accordance with this subdivision." Mass. App. P. R. 30(a). A Petition for Writ of Certiorari is akin to filing a Notice of Appeal and seeks this Honorable Court's appellate review. It is filed to preserve the right to seek further appellate review. If this Honorable Court grants the Petition, Anthony can be joined as a necessary party. Furthermore, the law provides

> [n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Mass. R. Civ. P. 17(a). Likewise, the Federal Rules also provide that a

> court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been

> allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

Fed. R. Civ. P. 17.

The preceding law illuminates the specious arguments made by Respondents as to standing. For example, Respondents improperly rely on *Whitmore v. Arkansas*, which involves Whitmore (a death row inmate) who sought to intervene and bring a Petition as next friend of Simmons (another death row inmate) despite the fact that Simmons was a competent adult who had expressly waived his right to appeal, Whitmore had no special relationship with Simmons and Whitmore had previously been denied this designation by the State court. *Whitmore v. Arkansas*, 495 U.S. 149, 163-66 (1990). *Vasquez v. United States* involves whether a person who did not own the apartment could object to the warrantless search of an apartment. *Vasquez v. United States*, 454 U.S. 975, 976-77 (1981). Likewise, *Stephenson v. McClelland* is a federal civil action where the child reached the age of majority "before the trial and entry of final judgment in this case" and did not appeal. *Stephenson v. McClelland*, 632 F. App'x 177, 181 (5th Cir. 2015). *Vandiver v. Hardin Cty. Bd. of Educ.* is yet another federal civil action where the parents were suing for academic credit for their son who was already eighteen in his senior year with the court pointing out that the parents "do not contend that any of their

claims arose in the narrow window" in the academic year he was still a minor. *Vandiver v. Hardin Cty. Bd. of Educ.*, 925 F.2d 927, 930 (6th Cir. 1991). Notably, *Vandiver* supports the position that the Abdulkys have standing because all the legal malpractice occurred when Anthony was a minor.

III. Respondents remaining arguments raised in Respondents' Brief Points III-V are simply an attempt to confuse the law and facts.

The remainder of Respondents arguments are simply to complicate the issues raised in the Petition by arguing facts and law that are simply irrelevant. This is a straightforward legal malpractice action. This simple issue is whether 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." Pet.App.3.

Despite all their claims, Respondents admit that this case was dismissed for failure to prove damages. Respondents' Brief, p. 34. Respondents then disingenuously argue that the Abdulkys chose to prove damages through a legal expert. Respondents' Brief, pp. 29-31. Respondents also argue that Petitioners' sole evidence as to damages on summary judgment was the expert report of Oliveira. Respondents own Appendix disproves this argument. Resp.App.45. Respondents append the Abdulkys' Brief in Opposition to Summary Judgment which

clearly shows that the Abdulkys retained a prosthetist and economist in the legal malpractice action and that "those experts together estimate Anthony's lifetime prosthetics *alone* at approximately $6 million (present value). R.A.II 219-225." Resp.App.45. The citation to R.A.II/219-225 references the Abdulkys' responses to interrogatories, which were an exhibit in the summary judgment papers. Massachusetts law is clear that a nonmoving party can defeat a motion for summary judgment, by going "beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 714, 575 N.E.2d 734 (1991). The evidence submitted in opposition to the motion for summary judgment included email admissions from Respondents that Anthony had no anticipated future medical costs, and the fact that Respondents never obtained a cost estimate from a prosthetist before settlement. Petition, pp. 6-8. The trial court and appellate courts also had before it the medical malpractice Petition for Approval of Settlement for a Minor which reflects the $6 million dollar settlement and outlines the "breakdown of the proceeds on behalf of the plaintiff." R.A.II/43-45. This breakdown of proceeds lists that the settlement figure includes over one and a half million dollars in attorney's fees, monies for legal expenses, over $800,000 for the parents' loss of consortium claims, payment of liens in the amount of $85,000.00 with the remaining $3,483,208.62 placed in a trust for Anthony with the Abdulkys as Trustees. R.A.II/44. Clearly, the Abdulkys presented a prosthetist and economist in the

legal malpractice action and that "those experts together estimate Anthony's lifetime prosthetics alone at approximately $6 million (present value). R.A.II 219-225." Resp.App.45. Even the Appeals Court of Massachusetts agreed with the Abdulkys that any statements made by the trial judge who approved the settlement may have been based on the Respondents inadequate valuation of the case. The evidence shows the $6 million settlement included over $800,000 in loss of consortium to Anthony's parents and clearly considered out of pocket medical expenses. Because the settlement did not include any future medical costs, the Abdulkys clearly met their burden and provided evidence of damages.

Moreover, the Respondents' Appendix also shows that the Petitioners were preparing to try the case under the traditional approach outlined in *Fishman*. Resp.App.88-89, n.3. The Abdulky's Opposition to the Motion for Summary Judgment clearly states as follows:

> L&M engaged Dr.s Becker and Husted to provide expert opinions regarding the standard of care and breaches thereof by the Med Mal Defendants. Both are surgeons; Husted is an orthopedic specialist. (Both doctors have likewise been engaged by the Abdulkys in this action for the same purpose (the "trial within the trial"). Those answers to expert interrogatories can be found at Ex. 36.)…Noticeably absent from L&M's

> list of experts is a prosthetist or anyone in the specialized industry of prostheses.

Resp.App.88-89, n.3(emphasis added).

Despite the Record evidence showing the Petitioners were prepared to try the case under the traditional approach, Respondents then circuitously argue that the Appeals Court of Massachusetts did not change black letter law because *Fishman* does require an expert as to damages. Respondents inappropriately claim that "the Abdulky's selectively quote *Fishman*" arguing that Petitioners intentionally omitted the phrase "except as to reasonable settlement values" stating that this parenthetical phrase was "key language" showing the necessity for expert testimony. Respondents' Brief, p. 11, n. 3. Respondents simply ignore and omit the footnote at the end of the sentence which again explains that only if using the non-traditional approach is an expert required. *Fishman v. Brooks*, 396 Mass. 643, 647 n.1, 487 N.E.2d 1377, 1380 (1986). The Abdulkys were clearly prepared to exercise the traditional approach. Any confusion that the Respondents are attempting to create is clarified by the court in *Marston v. Orlando* which explains "*Fishman* teaches that 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 *Marston* case makes clear that the phrase the Respondents hang their hat is a requirement under the non-traditional approach. "Under the second approach, a client asserts that as a result of his

attorney's negligence, he 'lost a valuable right, the opportunity to settle the case for a reasonable amount without a trial.'" *Marston v. Orlando*, 95 Mass. App. Ct. 526, 533 n.17, 127 N.E.3d 296, 302 (2019). "Unlike the trial within a trial, this approach requires expert testimony as to the reasonable settlement value of the underlying case." *Id.*

Respondents further attempts to cloud the issues is evident by continually reiterating their failed factual arguments regarding collateral and judicial estoppel made to the Appeals Court of Massachusetts. Respondents continually argue that this was a great settlement because of commentaries made by the medical malpractice trial judge and the valuation made by the medical malpractice defendants. Again, the Appeals Court of Massachusetts found that "as this case illustrates, the approval procedure may be relatively informal, in which case the settlement judge is dependent, to some extent, on the presentation of the child's lawyers as to the facts that bear on the strength and value of the child's claim." Pet.App.13.(noting that the judge would have been "under an implicit assumption that the defendant lawyers worked the case to professional standards"). The Court noted that Respondents could not seek shelter under the fact that the settlement of the medical malpractice action was judicially approved because

> we think that approval under the statute at most will have preclusive effect as to the settlement parties it was intended to protect — the child, the parents, and

> perhaps, the original defendants. But there is nothing ... that indicates that the judicial approval process was intended to protect the child's lawyers.

Pet.App.12.

Finally, while spending a large portion of the opposition trying to argue that black letter law was not changed at the appellate level, Respondents then apparently concede the point by arguing that the appellate court may simply have made a mistake. Respondents' Brief, p 37.

CONCLUSION

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

Respectfully submitted,

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