No. 17-1684

In The
Supreme Court of the United States

JANICE FRANCE,

Petitioner,

v.

SHARON PATRICK,

Respondent.

On Petition For Writ Of Certiorari
To The Court of Appeals Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner's position is essentially that she was denied access to Georgia courts to pursue a professional negligence claim because she was unable to afford the cost of an expert witness. Petitioner claims that the requirements under Georgia law, specifically O.C.G.A. § 9-11-9.1's requirement to file an expert affidavit with a claim for professional negligence, violate her Due Process and Equal Protection rights under the Fourteenth Amendment. However, the requirements of the statute impose no costs or fees upon the Petitioner which would deny her meaningful access to the courts. Therefore, there is no state action upon which a finding of a Due Process violation can be made.

With regard to Petitioner's claim that her rights under Equal Protection have been violated, she has failed to show that she is entitled to an analysis other than the rational relationship test. Specifically, Petitioner has not demonstrated a suspect classification nor a fundamental right is at stake. As the subject statute's recognized and stated purpose is to reduce the number of frivolous lawsuits against professionals in Georgia, the requirement to have an expert attest to an act of negligence at the time of filing the complaint furthers the stated purpose. The statute is rationally related to a legitimate purpose and does not violate Petitioner's rights to Equal Protection.

Petitioner's process began in the Magistrate Court of Thomas County, Georgia on July 25, 2016 with the filing of her Statement of Claim alleging claims of professional negligence against Respondent, dentist Sharon Patrick, DMD. Petitioner did not file the affidavit of an expert to support her claims and a motion to dismiss was filed contemporaneously with the answer which denied liability.

Under Georgia Statute, O.C.G.A. § 9-11-9.1, in a case alleging professional negligence, a plaintiff must file the affidavit of a competent expert witness, in most cases concurrently with the filing of the complaint,[1] alleging at least one negligent act or omission of the defendant. O.C.G.A. § 9-11-9.1; *Walker v. Cromartie*, 696 S.E.2d 654, 657 (Ga. 2010). The failure to file the required affidavit in such an action is addressed through a motion to dismiss for failure to state a claim under O.C.G.A. § 9-11-12(b)(6). *Hewett v. Kalish*, 442 S.E.2d 233, 235 (Ga. 1994). The basis for the motion to dismiss was the Petitioner's failure to meet the requirements of the Georgia statute.

The magistrate courts of Georgia are not subject to the requirements of the Georgia Civil Practice Act, where O.C.G.A. § 9-11-9.1 is found. O.C.G.A. § 15-10-42; *Howe v. Roberts*, 385 S.E.2d 276, 278 (Ga. 1989). However, the magistrate courts of Georgia may follow the provisions of the Civil Practice Act where doing so would "administer justice." *Howe*, 385 S.E.2d at 278. The details and citations to this authority were pointed out in the Respondent's motion to dismiss filed with

[1] Additional time may be allowed under certain time constraints which are inapplicable to the facts of this case. *See, e.g.*, O.C.G.A. § 9-11-9.1(b).

the magistrate court. After a hearing that granted Petitioner an additional 30 days to obtain the required affidavit,[2] the matter was dismissed for the continued failure to present a qualified expert.

Petitioner appealed the magistrate court's ruling to the State Court of Thomas County for a *de novo* review, which was her right under O.C.G.A. § 15-10-41 and *Handler v. Hulsey*, 406 S.E.2d 225, 226 (Ga. 1991). The State Court of Thomas County provided Petitioner the opportunity for a *de novo* trial on July 10, 2017. At the trial, Petitioner attempted to advance several arguments, including the professional negligence claims.[3] The State Court of Thomas County dismissed all of Petitioner's claims, including professional negligence claims citing the lack of the expert affidavit required by O.C.G.A. § 9-11-9.1.

Georgia law does not permit Petitioner a right of further appeal under the circumstances; rather, the code allows for the application for leave to appeal to be filed. O.C.G.A. § 5-6-35(a)(1) and (b); *Dean's Catering v. Sturm & Assocs.*, 498 S.E.2d 786, 786 (Ga. App. 1998). Petitioner filed the application for leave to appeal, (Exhibit "H"), and the application was denied as was the request for reconsideration which was filed

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[2] The additional time allotted by the court was through judicial discretion rather than any recognized statutory provision allowing the same.

[3] Petitioner also advanced claims for false advertising under the Georgia Fair Business Practices Act. These claims were also dismissed for lack of supporting evidence. The dismissal of these claims was never the subject of any subsequent appeal.

immediately thereafter. Petitioner inappropriately attempted a direct appeal to the Georgia Court of Appeals which was deemed barred by the doctrine of res judicata and the appeal was dismissed.

Petitioner next filed an application for discretionary appeal (petition for writ of certiorari) with the Georgia Supreme Court alleging that she was inappropriately held to a higher standard of pleading in spite of having "protected status" as a pro se litigant. The application was denied and the subsequent request for reconsideration was also denied. This Petition followed with the enumeration of error that Petitioner was denied meaningful access to the courts and that she was unable to afford the required expert affidavit to continue her initial claims which constitute a violation of her Fourteenth Amendment rights under Due Process and Equal Protection.

ARGUMENT AND REASONS FOR DENYING THE PETITION

A. Georgia Law requiring an expert affidavit be filed concurrently with the filing of a professional negligence claim is Constitutional and fails to violate any aspect of the Fourteenth Amendment's guarantee of Due Process and Equal Protection.

The Fourteenth Amendment reads, in pertinent part, "[n]o 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; not deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

In support of Petitioner's position, four cases are cited: *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Lewis v. Casey*, 518 U.S. 343 (1996); and *Little v. Streater*, 452 U.S. 1 (1982). Each of the cited cases are distinguishable from the instant case and will be taken in turn.

In *Boddie*, welfare recipients of Connecticut brought an action challenging state procedures requiring the payment of court fees and costs for service of process as it was restricting their access to the courts when seeking a divorce. *Boddie*, 401 U.S. at 372. As welfare recipients, individuals seeking a divorce were not able to pay the fees associated with the court proceedings. *Id.* at 372-73. The Federal District Court found that a state may limit access to its civil courts by requiring fees even if said fees bar persons from their desired relief. *Id.* at 373. On appeal, this Court reversed. *Id.* at 374.

The Court noted the rarity in which access to the courts is reviewed as an element of due process. *Id.* at 376. However, prior cases established that due process required that persons who are forced to seek redress in the courts to settle their claims, in their case divorces, must be given a meaningful opportunity to be heard. *Id.* at 377. "Within the limits of practicability, a state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Id.* at 379 (internal citations omitted).

The *Boddie* Court found that Connecticut's imposition of fees for filing and service were a denial of due process to the individuals that were unable to afford to pay them. *Id.* at 380-81. Because the only avenue to obtain a divorce was through the court system, a set of individuals, those unable to pay, were denied the opportunity to be heard by the State's requirements. *Id.*

In *Griffin*, this Court was required to determine whether Illinois law violated the Due Process or Equal Protection of the Fourteenth Amendment with regard to the appeal process for all criminal cases. *Griffin*, 351 U.S. at 13. Illinois law provided that writs of error in all criminal cases were a matter of right and would be issued of course. *Id.* However, in order to obtain a full direct review of the alleged errors, the defendant was required to provide a bill of exceptions or report of proceedings at the trial certified by the trial judge. *Id.* This was not possible to accomplish in many cases without a transcript which an inmate, indigent or not, was required to purchase. *Id.* at 13-14. The petitioners in *Griffin* sought a free copy of the required transcripts claiming that the failure to provide them with the same was in violation of their Constitutional rights. *Id.* at 14-15.

In analyzing the issue, Justice Black compared the criminally accused's right to defend themselves at trial and their right to an adequate appellate review. *Id.* at

17-18. It was reasoned that if it would be unconstitutional to require a defendant to pay court costs in advance in order to plead not guilty at trial, the same must be true with regard to an appeal that is granted as a matter of right. *Id.* Criminal defendants must be provided the same opportunity to appellate review whether they have the ability to pay for a trial transcript or not. *Id.* at 19.

In *Lewis*, the Arizona Department of Corrections appealed a district court ruling that it was in violation of the requirements of *Bounds v. Smith*, 430 U.S. 817 (1977) which required prison authorities to provide adequate law libraries and assistance from persons trained in the law to inmates. *Lewis*, 518 U.S. at 346. As with the case in *Griffin*, *Lewis* addresses the rights of incarcerated individuals in their meaningful access to the court system. *Id.* The department of corrections sought to have the district court's 25-page injunctive order vacated as exceeding the lawful authority. *Id.* at 347.

The analysis of the case evaluated the meaningful access to the courts for the incarcerated. *Id.* at 350-51. The historical foundation for *Bounds*, which was the basis for the district court's ruling, was the prohibition of state prison officials from actively interfering with an inmate's attempt to prepare and file legal documents. *Id.* at 350. *Lewis* disclaimed any suggestion that *Bounds* expanded the right of access to the courts beyond being given the right to present a grievance to the court. *Id.* at 354. There was no right to an inmate that required the state to assure that the claim was litigated effectively. *Id.*

Ultimately, finding a lack of specific injuries sufficient to warrant the scope and effect of the injunctive order that was issued, Justice Scalia and the Court remanded the case to the Ninth Circuit for further proceedings consistent with their opinion. *Id.* at 364.

In *Little*, the issue did not involve the rights of the incarcerated or the criminally charged directly; rather the issue was whether state imposed costs related to tests for defending paternity actions were in violation of the Fourteenth Amendment when indigent defendants were denied the tests due to inability to pay. *Little*, 452 U.S. at 3. Similar to the issue in *Boddie*, Connecticut had imposed a system in which the only remedy for an "accused" defendant was through the court system. *Id.* at 9. That is, a defendant in a paternity action was required to pay for blood tests to contest the allegations of the mother of a child as his testimony alone was insufficient to meet the shifting burden of proof. *Id.* at 9-12. If the defendant was indigent and unable to pay for such tests, then the state's requirements to pay for such tests was in violation of Due Process. *Id.* at 12.

These cases are all distinguishable from the instant action as, unlike *Boddie*, *Griffin*, *Lewis*, and *Little*, nothing in O.C.G.A. § 9-11-9.1 prevents meaningful access to the courts for plaintiffs pursuing a professional negligence claim in the state. *See Walker v. Cromartie*, 696 S.E.2d 654, 656 (Ga. 2010). The constitutionality of O.C.G.A. § 9-11-9.1 has been challenged in the Georgia Supreme Court on the very basis upon which Petitioner now makes her claims. *Id.* In *Walker*, appellants argued that their Due Process and Equal Protection Rights were violated because they were unable to afford the costs of procuring an expert affidavit in their professional negligence claims which caused the claim to be dismissed. *Id.*

In reviewing the claims, the Georgia Supreme Court noted that nothing in the statute imposed any cost or fee on a plaintiff in obtaining an expert affidavit. *Id.* Any costs that may be associated with the obtaining of an expert affidavit is created by private actors, not the state. *Id.* Since the state was not acting to cause any harm on the plaintiffs, the statute could not violate the rights of due process. *Id.* Similarly, the Georgia Supreme Court found that the statute did not violate any right to equal protection as the statute does not distinguish between any classes of citizen as required for such a claim. *Id.* at 657 (finding poverty to not be a suspect class for the purpose of equal protection analysis citing *Harris v. McRae*, 448 U.S. 297, 323 (1980)).

In further evaluation of the equal protection claim, it was held that the rational relationship test to a legitimate legislative purpose was the appropriate analysis since there was no suspect class or fundamental right at stake. *Id.* The recognized and stated purpose of O.C.G.A. § 9-11-9.1 was to "reduce the number of frivolous malpractice lawsuits being filed against professionals." *Id.* The Georgia Supreme Court found that the requirement of the expert affidavit served the stated purpose and was rationally related to a legitimate legislative purpose. *Id.*

In this case, Petitioner is making the same claims to this Court that were made in *Walker* to the Georgia Supreme Court. Respondent urges this Court to adopt the same rationale and reasoning as described in the opinion of the State's high court. The expert affidavit requirement under O.C.G.A. § 9-11-9.1 imposes no fees or costs on Petitioner. In fact, Petitioner never actually attempted to obtain expert services herself. Instead, she appears to have relied upon the opinion of others that an expert witness would cost "at least $50,000" and she would not be able to afford such costs. To the extent that an expert will charge for his/her services, such costs and fees would be as described in *Walker*, a transaction between private parties. Any costs and fees associated with expert services are merely theoretical at this point. To the extent that they exist at all, there is no state action that is depriving Petitioner meaningful access to the courts. Therefore, there can be no violation of Petitioner's Constitutional Due Process rights.

Similarly, Petitioner's Equal Protection rights have not been violated. The statute at issue makes no distinction between any classes of persons that seek to bring an action for professional negligence. As recognized in *Walker* through citing to this Court's prior opinions, Petitioner's claim of inability to pay does not place her in a suspect classification for the purposes of an equal protection analysis. Even if Petitioner were poverty stricken, and she makes no claim in this regard, poverty alone is not a suspect classification. Here, Petitioner claims that if an expert witness were to charge for their services, and if the charge were to be in the range of $50,000, she would not be able to pay. Speculation cannot be the basis for a claim that one's rights to equal protection under the law have been violated.

As reasoned in *Walker*, without a protected classification or a fundamental right at stake, Petitioner's claim that O.C.G.A. § 9-11-9.1 is in violation of her rights to Equal Protection is analyzed under the rational relationship test. *Walker*, 696 S.E.2d at 657; *see also, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). The question is whether the statute bears some rational relationship to a legitimate state purpose. *Id.* It has been well recognized that the purpose of O.C.G.A. § 9-11-9.1 was the reduction of frivolous lawsuits against professionals. *Walker*, 696 S.E.2d at 657. As found in *Walker*, "[t]he requirement of filing an expert affidavit at the time the complaint is filed serves this stated purpose because it requires plaintiffs to find an expert who will attest that at least one act of professional negligence has occurred, thereby reducing the number of frivolous claims filed." *Id.* Petitioner's claim for violation of her rights to Equal Protection under the Fourteenth Amendment must fail.

CONCLUSION

Respondent seeks to have the Court deny the Petition for Writ of Certiorari in the instant case. Petitioner has failed to demonstrate that her rights to Due Process or Equal Protection were in any way violated by O.C.G.A. § 9-11-9.1 and its requirements to obtain an expert affidavit to support a claim for professional negligence.

Respectfully submitted this 19th day of July, 2018.

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