

No. 25-6673

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IN THE  
**Supreme Court of the United States**

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JAMES R. CAPUTO,

*Petitioner,*

*v.*

RICHARD S. TUBIOLO, *et al.*,

*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION,  
SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT

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**BRIEF IN OPPOSITION**

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February 17, 2026

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## **COUNTERSTATEMENT OF QUESTION PRESENTED**

1. Did the New York State Court of Appeals correctly deny the Petitioner's motion seeking leave to appeal from the Memorandum and Order of the Appellate Division, Fourth Department entered on March 14, 2025, which unanimously affirmed the Decision, Order and Judgment of the Monroe County Supreme Court filed July 21, 2022, granting the Respondents' motion for summary judgment seeking dismissal of the Petitioner's Complaint sounding in legal malpractice?
2. Did the Appellate Division, Fourth Department correctly affirm the Decision, Order and Judgment of the Monroe County Supreme Court granting Respondents' motion for summary judgment, applying well-established principles of New York State case law and in accordance with the procedural framework as provided in the New York State Civil Practice Law and Rules?

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Sup. Ct. R. 24.1 (b), Respondent Hirsch & Tubiolo, P.C. states as follows:

Hirsch & Tubiolo, P.C. is a New York Professional Service Corporation, and it is not a publicly held corporation. It has no subsidiaries or affiliates that are publicly traded.

## RELATED PROCEEDINGS

- *James R. Caputo v. Richard S. Tubiolo, Esq., et al.*, Index No. I2017005512 (N.Y. Sup. Ct. Monroe Cnty., [July 21, 2023]).
- *James R. Caputo, M.D. v. Richard S. Tubiolo, Esq., et al.*, Docket No. CA 23-01338 (N.Y. App. Div. 4th Dep't, [March 14, 2025]).
- *James R. Caputo, M.D. v. Richard S. Tubiolo, et al.*, Motion No.: 2025-302 (N.Y. Ct. App., Oct. 21, 2025).

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## INTRODUCTION

Petitioner's petition for writ of certiorari does not present any issue worthy of this Court's review or anything of general importance. Instead, it simply reflects the Petitioner's long-standing discontent with both the results of litigation that he has pursued for years and the rules of judicial process. Both the Monroe County Supreme Court and the Appellate Division, Fourth Department, in affirming the lower court's decision, correctly applied settled principles of New York State law to dismiss the Petitioner's complaint sounding in legal malpractice against the Respondents. The nearly decade long history of this case reflects the Petitioner's pursuit of meritless litigation and exemplifies his contempt for the judicial process, which is evident and in line with his history of blaming the court system and administrative bodies where the outcome was not rendered in his favor. Moreover, the New York State Court of Appeals did not even entertain the merits of the case but rather denied the Petitioner's motion seeking leave to appeal, awarding one hundred dollars costs and necessary reproduction disbursements to the Respondents. Petitioner raises no legal question of general importance, only a case-specific dispute, involving settled principles of New York State law that has already been exhaustively litigated and repeatedly rejected.

## STATEMENT OF THE CASE

### **I. The Monroe County Supreme Court Granted The Respondents' Motion for Summary Judgment Dismissing The Complaint Based upon Well-Settled Principles of New York State Law Regarding Legal Malpractice**

On May 26, 2017, the Petitioner commenced the underlying state court action (Index No.: I2017005512) by filing a Summons and Complaint against the Respondents with the Monroe County Clerk, State of New York. *See*, Index No.: I2017005512, Dkt. 5.

The Complaint alleged legal malpractice in connection with the Respondents' representation of Petitioner relative to charges asserted against him by the New York State Office of Professional Medical Conduct ("OPMC") dated April 24, 2014, for which the OPMC was seeking, among other things a revocation of the Petitioner's medical license.<sup>1</sup> *Id.* The Complaint focused on the allegation that Respondents advised Petitioner that the only course of action available to him to preserve his medical license was a surrender of his license; and therefore, Respondents failed to conduct adequate research, failed to file appropriate motions, failed to advise Petitioner of other courses of action and failed to zealously advocate for Petitioner.

Following the completion of discovery and the filing of the note of issue, Respondents timely filed a motion for summary judgment pursuant to New York Civil Practice Law and Rules ("CPLR") §3212 seeking dismissal of the Petitioner's

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<sup>1</sup> It is noteworthy that Petitioner was a board-certified obstetrician gynecologist with a lengthy history of discipline both with respect to loss of hospital privileges as well as with the OPMC. Prior to ever contacting the Respondents, Petitioner lost all hospital privileges. *See*, Docket No.: CA 23-01338, Dkt. 61 at 13.

Complaint upon the grounds that among other things, 1) the Respondents' representation of the Petitioner comported to the applicable standard of care; and 2) the Petitioner otherwise failed to demonstrate the elements of a legal malpractice action: breach of duty, proximate causation and damages.

Petitioner, thereafter, untimely filed a cross-motion seeking, not only summary judgment, but also 1) seeking leave to file a late summary judgment motion; 2) seeking leave to amend the Complaint to change his theory of legal malpractice to assert that Respondents failed to timely answer the charges asserted against the Petitioner and/or otherwise failed to advise him to answer the same; and 3) for punitive damages purportedly based on a violation of New York State Judiciary Law §487 and various sections of the New York State Rules of Professional Conduct.

On July 21, 2023, the Monroe County Supreme Court issued a Decision, Order and Judgment granting the Respondents' motion for summary judgment dismissing the Complaint in its entirety and denying the totality of the Petitioner's cross-motion. The Court found, among other things, that the Respondents met their *prima facie* burden demonstrating entitlement to summary judgment and concluding that 1) Petitioner's failure to timely answer could not serve as a basis for a malpractice claim; 2) Respondents demonstrated the absence of a deviation from the standard of care through the submission of expert proof and Petitioner failed to tender any expert proof in opposition, failing to raise an issue of fact; and 3) the Petitioner failed to demonstrate the purported breach of Respondents' duty proximately caused

Petitioner to sustain actual and ascertainable damages. *See*, Index No.: I2017005512, Dkt. 189.

Notably, with respect to the court's denial of Petitioner's cross-motion for leave to file a late summary judgment motion, the court determined that the Petitioner failed to show good cause for filing his cross-motion 162 days after the filing of the note of issue and 42 days after the statutory deadline of 120 days. *Id.*

**II. The Appellate Division, Fourth Department, Unanimously Affirmed The Decision of The Monroe County Supreme Court Based upon Well-Settled Principles of New York State Law Regarding Legal Malpractice**

On August 4, 2023, Petitioner filed a Notice of Appeal from the Monroe County Supreme Court's Decision, Order and Judgment granting the Respondents' motion for summary judgment dismissing the Complaint in its entirety. *See*, Index No.: I2017005512, Dkt. 192. The Appellate Division, Fourth Department ("Fourth Department"), in a Memorandum and Order dated March 14, 2025, unanimously affirmed the Monroe County Supreme Court's Decision, Order and Judgment. *See*, Docket No.: CA 23-01338, Dkt. 64. In pertinent part, the Fourth Department held:

Here, plaintiff alleges that defendants deviated from the standard of care by failing to timely answer the statement of charges asserted by the OPMC in a professional misconduct proceeding, and the evidence that defendants submitted in support of their motion establishes that defendants did not have an attorney-client relationship with plaintiff at the time of the default (*see Berry v. Utica Natl. Ins. Group*, 66 A.D.3d 1376, 1374 [4th Dep't 2009]). Plaintiff's unilateral belief that he was defendants' client is insufficient to confer that status upon him (*see id.*). We further conclude that defendants established that any negligence on their part was not a proximate cause of plaintiff's alleged damages (*see Dabiri v. Porter*, 227 A.D.3d 860, 861 [2d Dep't 2024]; *Casey v. Exum*, 219 A.D.3d 456, 457 [2d

Dep't 2023]). In opposition to the motion, plaintiff failed to raise an issue of fact (*see generally Zuckerman*, 49 N.Y.2d at 562).

*See Id.*

Furthermore, the Fourth Department rejected Petitioner's contention that the Monroe County Supreme Court abused its discretion denying that part of his cross-motion seeking leave to amend the pleading to conform the evidence pursuant to CPLR §3025 (c). *Id.* at 2. The Court concluded that the Petitioner's proposed amendment claiming the existence of an attorney-client relationship existed prior to the deadline for submitting an answer to the OPMC charges was without merit. *Id.*

### **III. The New York State Court of Appeals Refused to Entertain Petitioner's Appeal, Issuing A Denial of Petition's Motion Seeking Leave to Appeal**

Within 30 days of being served with the Fourth Department's Memorandum and Order, together with a Notice of Entry on March 17, 2025, the Petitioner filed a motion pursuant to CPLR §5602 (a) (1) (a) with the New York State Court of Appeals, seeking leave to appeal.

On October 21, 2025, the New York State Court of Appeals denied the Petitioner's application seeking leave to appeal and awarded one hundred dollars costs and necessary reproduction disbursements to Respondents.

On January 20, 2026, Petitioner filed the instant petition for writ of certiorari seeking review of the totality of the decisions issued by the various New York courts discussed herein, dismissing the Complaint against the Respondents and denying the relief sought by the Petitioner.

## REASONS FOR DENYING CERTIORARI

### I. THE FACTS OF THIS CASE DO NOT PRESENT THE ISSUES RAISED BY PETITIONER AND THEREFORE THERE IS NO FEDERAL QUESTION WARRANTING REVIEW BY THIS COURT

Petitioner identifies 4 questions presented for review, though styled constitutional or statutory issues, they bear no meaningful connection to the actual posture of the facts of this case.

Petitioner's "Questions Presented" can only be characterized as incoherent, incomprehensible, or based upon events that never took place in the courts below, which makes their intended legal basis difficult to discern. Nonetheless, in an effort to provide the Court with some clarity, Respondents assert that the Petitioner's apparent legal themes involve (1) statutory/procedural challenges that Petitioner contends are inconsistent with the Constitution and therefore violate due process and equal protection; and (2) New York State court decisions that Petitioner contends are inconsistent with the Constitution and violative of both federal and New York State statutes.

Question Presented No. 1 concerns whether New York CPLR §5712 (b) and (c), which addresses the content of an order determining an appeal, both an order of affirmance and an order of reversal or modification, is inconsistent with the Constitution, and where misapplied violative of due process and equal protection rights. This issue was neither before the Monroe County Supreme Court nor was it presented to the Fourth Department. Rather, Petitioner first raised the constitutionality of CPLR §5712 (b) and (c) in his motion seeking leave to appeal to

the Court of Appeals. This was nothing more than Petitioner's baseless attempt at fabricating a constitutional question where none existed.

Dissatisfied with the Fourth Department's unanimous affirmance of the Monroe County Supreme Court's Decision, Order and Judgment, which succinctly articulated the Court's rationale based upon settled principles of New York State law concerning legal malpractice, the Petitioner concocted this baseless argument that CPLR §5712 (b) and (c) are violative of due process and now equal protection. However, none of the courts below addressed or had the occasion to address the constitutionality of CPLR §5712 (b) and (c). Accordingly, the constitutionality of CPLR §5712 (b) and (c) is not properly before this Court for review.

Question Presented Nos. 2 and 3 can be examined together. In this regard, Question Presented No. 2 concerns whether CPLR §3212 (b), which identifies the supporting proof necessary for a motion for summary judgment, and CPLR §4213 (b), which addresses the form of decisions of the court, are inconsistent with the Constitution and violative of due process consistent with the Federal Rules of Civil Procedure. Question Presented No. 3 concerns whether the decisions of the Monroe County Supreme Court, Fourth Department and New York State Court of Appeals are inconsistent with the Constitution. Not only were these issues never presented in the courts below, but also, they present no cognizable due process claims based on the actual record and the facts of this case.

In the first instance, Petitioner apparently misunderstands the procedural framework of this case. Petitioner references the Federal Rules of Civil Procedure,

including but not limited to §§ 52 (a) and 56 (a). However, Petitioner's legal malpractice action is a state court proceeding whereby the New York State Civil Practice Law and Rules dictates the procedural posture of the case. Petitioner only offers his self-serving conclusions as to why he believes CPLR §3212 (b) is unconstitutional. However, the statutory language is clear as to the proof required on a motion for summary judgment; and since there was no misapplication of CPLR §3212 (b) in Petitioner's lawsuit, involving only state law, Petitioner's contention that CPLR §3212 (b) is unconstitutional is simply without merit.

Furthermore, Petitioner's criticism of CPLR §3212 (b) and § 4213 (b) stems from his discontent with both the Monroe County Supreme Court and the Fourth Department for rendering decisions that were not favorable to him. Petitioner flatly ignores the fact that these courts acted within their discretion, applying well established standards. At the trial level, relative to the motions for summary judgment, the Monroe County Supreme Court issued a 16 page Decision, Order and Judgment, carefully identifying all documents, including the opinions of multiple experts, and exhibits considered by the court and providing a well-reasoned, thorough analysis of the facts as applied to well-established, applicable state law concerning legal malpractice. *See*, Index No.: I2017005512, Dkt. 189. Similarly, on appeal, the Fourth Department, having before it a ten volume Record on Appeal, issued a clear, concise Memorandum and Order providing the basis for its affirmance, also premised upon settled principles of New York State law concerning legal malpractice. *See*, Docket No.: CA 23-01338, Dkt. 48-57, 64.

Finally, Petitioner claims that all three courts disregarded his 103 exhibits. Petitioner seemingly wanted those courts to overlook the fact that he failed to upload his exhibits to New York State Courts Electronic Filing (“NYSCEF”) in support of his untimely filed cross-motion for summary judgment. Having never been uploaded to NYSCEF, the 103 exhibits were never before the Monroe County Supreme Court or the Fourth Department. Thus, neither court had any duty or obligation to review or seek to review evidence not before them. The responsibility to properly and timely file motions and any supporting exhibits with the court falls on the parties. As Petitioner failed to submit legally adequate and sufficient proof in opposition to the Respondents’ motion for summary judgment, the Monroe County Supreme Court properly concluded that he failed to raise a triable issue of fact. *Acheson v. Pelliccia*, 222 A.D.3d 1335, 1337, 201 N.Y.S.3d 814 (App. Div. 4th Dep’t 2023).

Petitioner is now on a quest to castigate the Monroe County Supreme Court, the Fourth Department, and the Court of Appeals for his own oversight in failing to ensure the proper filing of a timely and complete cross-motion for summary judgment. Petitioner himself is responsible for this error and his attempt to assert a claim here is without merit.

Question Presented No. 4 concerns whether New State Judiciary Law (hereinafter “N.Y. Judiciary Law”) §44 (2), which involves the state commission on judicial conduct’s ability to initiate, on its own motion, an investigation of a judge, and N.Y. Judiciary Law §90 (2), which involves the power of the Appellate Division of the Supreme Court to discipline attorneys who violate the rules of professional

conduct, are inconsistent with the Constitution and violative of due process. However, the constitutionality of these statutes are again not properly presented for review because Petitioner failed to raise them in the courts below and this Court is not the appropriate forum for the Petitioner's collateral attack on the judiciary or the processes used to investigate either judicial or attorney misconduct.<sup>2</sup>

Petitioner alleges without basis that the Respondents colluded with the OPMC so that Petitioner would enter into a surrender agreement. Yet, the record below is clear that Respondents vigorously represented Petitioner including the exploration of a consent order, which was reasonable under the circumstances. Petitioner had been on notice since 2011 that the OPMC was seeking a revocation of his medical license. *See*, Docket No.: CA 23-01338, Dkt. 49 at 275. Thus, Respondents' conduct in exploring whether the OPMC Prosecutor would agree to something less than a revocation, an outcome that could preserve some ability to practice, was reasonable, appropriate and in the best interest of the Petitioner. *See*, Docket No.: CA 23-01338, Dkt. 53 at 82.

Consequently, Petitioner is now insinuating that the Monroe County Supreme Court, Fourth Department, and the New York State Court of Appeals did not act with

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<sup>2</sup> As it relates to Petitioner's claim that Respondents violated the Rules of Professional Conduct, this was first raised in Petitioner's opposition to the Respondents' motion for summary judgment and in support of his cross-motion relative to Petitioner's attempt at advancing a new claim seeking relief pursuant to New York State Judiciary Law §487 and the Rules of Professional Conduct. However, as to this issue, the Monroe County Supreme Court denied Petitioner's application for summary judgment and to amend the Complaint. *See*, Index No.: I2017005512, Dkt. 189 at 14-15.

integrity in rendering their decisions. This attack on the New York courts only exemplifies the Petitioner's contempt for the judicial process and is in line with his history of blaming the courts and administrative bodies, like the OPMC, when a decision has been rendered that is adverse to the Petitioner.

Again, whereas none of the courts below addressed or had the occasion to address the constitutionality of N.Y. Judiciary Law §44 (2) or §90 (2), this issue is not properly before this Court for review.

**II. THE FOURTH DEPARTMENT'S MEMORANDUM AND ORDER AFFIRMING THE DECISION DOES NOT CONFLICT WITH ANY RULING OF THIS COURT, NOR HAS PETITIONER IDENTIFIED A CONFLICT WITH ANY OTHER COURT**

Petitioner has failed to identify any decision of this Court or any court that conflicts with the ruling of the Fourth Department. On the contrary, the Fourth Department's unanimous affirmance of the lower court's dismissal of the Petitioner's Complaint was correct and in line with New York State case law addressing a defendant's burden of proof on a summary judgment motion relative to a claim for legal malpractice.

New York State courts will grant a defendant a motion for summary judgment in a legal malpractice action where the defendant tenders proof in admissible form showing plaintiff is "unable to prove at least one necessary element of a legal malpractice action." *Seubert v. Marchioni*, 112 A.D.3d 1370, 1371, 978 N.Y.S.2d 520 (App. Div. 4th Dep't 2013); *Berry v. Utica Nat'l Ins. Group*, 66 A.D.3d 1376, 1376, 886 N.Y.S.2d 784 (App. Div. 4th Dep't 2009) (holding "to recover damages for legal malpractice, plaintiff must prove the existence of an attorney-client relationship");

*see also Aqua-Trol Corp v. Wilentz, Goldman & Spitzer, P.A.*, 197 A.D.3d 544, 545, 152 N.Y.S.3d 504 (App. Div. 2nd Dep't 2021) (holding to recover for damages for legal malpractice, plaintiff must prove an attorney's failure to exercise due care and that the attorney breach of duty proximately caused plaintiff to sustain actual and ascertainable damages).

Here, the Fourth Department considered the ample proof before it that demonstrated the absence of an attorney-client relationship between Petitioner and Respondents at the time the answer to the OPMC charges was due [*See*, Docket No.: CA 23-01338, Dkt. 49 at 152-155; Dkt. 50 at 223-245, 250-415; Dkt. 56 at 262], as well as the absence of a deviation from a standard of care, where Respondents' expert stated:

the extensive, multi-faceted nature of the charges, together with the evidence supporting those charges both as it applies to standard of care, codes of conduct and record keeping, constituted more than sufficient proof for a factfinder in this setting to find the [Petitioner] guilty of the charges against him and for the panel to impose a penalty of revocation of the [Petitioner's] medical license.

*See*, Index No.: I2017005512, Dkt. 189 at 11-12; *see also* Docket No.: CA 23-01338, Dkt. 53 at 81. Respondents' expert further opined:

the management of Dr. Caputo's case, the alacrity and zeal of counsel's involvement on the eve of the hearing, the efforts to remedy [P]laintiff's own default, the preparedness for the hearing, the exploration of settlement, the efforts to preserve some possibilities of future practice, the advocacy to avoid permanent revocation and pursuit of a Surrender Agreement were all reasonable and appropriate and comported with the standard of care by the Defendants in their representation of the [P]laintiff.

*See*, Index No.: I2017005512, Dkt. 189 at 12; *see also* Docket No.: CA 23-01338, Dkt. 53 at 85. Petitioner offered no expert in opposition and simply failed to raise a triable issue of fact. *Id.* at 13.

Petitioner points to no contrary authority from any court that would have compelled a different result. The absence of any genuine legal conflict confirms that this petition raises no issue worthy of this Court's review.

**III. BECAUSE PETITIONER'S CASE INVOLVES ONLY PETITIONER, IT DOES NOT PRESENT A QUESTION OF GENERAL IMPORTANCE REQUIRING THIS COURT'S ATTENTION**

This case presents no question of general importance warranting this Court's attention. The issues raised by Petitioner are wholly case-specific, rooted in his personal dissatisfaction with the outcome of his legal malpractice lawsuit against the Respondents that now dates back nearly nine years. The Monroe County Supreme Court's decision dismissing the Complaint as affirmed by the Fourth Department affects no other litigants and establishes no new legal principle.

This Court's certiorari jurisdiction is reserved for cases that present questions of widespread significance or to settle important questions of federal law. *See* Sup. Ct. R. 10. Petitioner's attempt to litigate his personal grievances relative to the outcome of not only his legal malpractice lawsuit but also his lengthy history of discipline both with respect to loss of hospital privileges as well as with the OPMC does not come close to meeting this standard and raises no issue that extends beyond Petitioner's personal circumstances. *See*, Docket No.: CA 23-01338, Dkt. 48 at 44, 106-107, Dkt. 50 at 222-245, Dkt. 51 at 246-257.

The courts below correctly applied well settled law to facts that are unique to only Petitioner's litigation. No other case would be affected by this Court's review, and no federal law is involved necessitating clarification by this Court. Such a case-specific dispute falls well outside the scope of issues appropriate for this Court's discretionary review.

#### **IV. THE ORDERS BELOW ARE CORRECT**

The Fourth Department's affirmance of the Monroe County Supreme Court's decision dismissing the Complaint was premised upon settled principles of New York State law concerning legal malpractice. Accordingly, the New York State Court of Appeals appropriately denied the Petitioner's motion seeking leave to appeal and awarding one hundred dollars costs and necessary reproduction disbursements.

#### **CONCLUSION**

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

Dated: February 17, 2026

Respectfully submitted,

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