

No. 25-6673

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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James R. Caputo, M.D.

**PETITIONER**

VS.

Richard S. Tubiolo, Esq.

Bryan S. Kornfield, Esq.

Hirsch and Tubiolo, PC

**RESPONDENTS**

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On Petition for a Writ of Certiorari to  
The New York State Supreme Court,  
Appellate Division: Fourth Department.

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**PETITIONER'S BRIEF IN REPLY**

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**QUESTIONS PRESENTED**  
**LIST OF PARTIES**  
**RELATED CASES**  
**JURISDICTION**  
**CONSTITUTIONAL AND STUTORY PROVISIONS**

This Brief in Reply is being filed pursuant to Supreme Court Rule 15(6). Pursuant to Supreme Court Rule 24(2), Petitioner acknowledges Respondents' Questions Presented in their Brief in Opposition, along with the list of parties, related cases, overall jurisdiction and Constitutional/Statutory provisions detailed in his Petition for Writ of Certiorari.

**TABLE OF CONTENTS**

**JURISDICTIONAL STATEMENT REGARDNG**

**QUESTION(S) PRESENTED**

**LIST OF PARTIES**

**RELATED CASES**

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....i**

**TABLE OF CONTENTS..... ii**

**APPENDICES.....iv**

**TABLE OF AUTHORITIES.....v**

**INTRODUCTION.....1**

**STATEMENT OF THE CASE .....1**

- I. The Monroe County Supreme Court Granted The Respondents’ Motion for Summary Judgment Dismissing The Complaint Based Upon *Mis-Application* of New York State Laws Regarding Legal Malpractice, Summary Judgment and Form of Decisions.....1**
  - A. *OPMC Has Never Had Anything On Petitioner* .....2**
  - B. *Any Opportunity to Thwart Justice*.....2**
  - C. *The Court Undermines The Facts And Shields Liability*.....3**
  
- II. The Appellate Division, Fourth Department, Unanimously Affirmed The Decision of The Monroe County Supreme Court Based Upon Mis-Application of the Well-Settled Principles of New York State Law Regarding Legal Malpractice and Summary Affirmances (without Opinion).....4**
  - D. *Ghost Evidenced*.....4**
  
- III. The New York State Court of Appeals Refused to Entertain Clear Legal Error With Constitutional Application, Enumerated in Petitioner’s Appeal, Issuing A Denial of Petition’s Motion Seeking Leave to Appeal.....4**
  - E. *Blatant Disregard Of Facts And Law*.....4**

TABLE OF CONTENTS – cont.

REASONS FOR ACCEPTING CERTIORARI.....5

I. THE FACTS OF THIS CASE MOST DEFINITELY REPRESENT THE ISSUES RAISED BY PETITIONER AND THEREFORE THERE IS FEDERAL QUESTION WARRANTING REVIEW BY THIS COURT.....5

    A. *Enabling Statutes, Federal Supremacy, Failure to Comply*.....5

    B. *Respondents Hoping for a Lazy Court*.....7

    C. *More Misleading Claims*.....8

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.....9

    D. *Respondents Playing With The Rules*.....9

    E. *Ample Proof From Who?*.....10

    F. *Slanted And Misleading Expert Affidavits*.....10

III. PETITIONER’S CASE DOES PRESENT A QUESTION OF GENERAL IMPORTANCE REQUIRING THIS COURT’S ATTENTION.....12

    G. *The Second Witness*.....12

    H. *Issues General Importance Confirmed*.....13

CONCLUSION: THE ORDERS BELOW ARE INCORRECT.....14

CERTIFICATE OF COMPLIANCE.....16

**APPENDICES**

**Appendix: Volume 1**

MOTION W/ AFFIRMATION FOR REARGUMENT to the  
New York State Appellate Division: Fourth Department (37 pages)  
Re: Originating Court No. E2024000703  
Appellate Division Docket #: CA 24-01298 – 3/2/2026.....1a

Appellate Division: Fourth Department – ORDER  
w/ (2/27/2026) Notice of Entry (4 pages)  
Re: Originating Court No. E2024000703  
Appellate Division Docket #: CA 24-01298 – 2/11/2026.....38a

Monroe County Supreme Court  
DECISION AND ORDER (10 pages)  
Re: Originating Court No. E2024000703 – 7/26/2024.....42a

TABLE OF AUTHORITIES

Page

I. STATUTES

Federal Circuit Rule 36 .....	6, 14, 15
Federal Rule of Civil Procedure – (FRCP) Rule 56(a).....	5
Federal Rule of Civil Procedure – (FRCP) Rule 52(a).....	5, 14
Federal Rule of Civil Procedure – (FRCP) Rule 61.....	ii, 32
<u>NY CPLR § 3212(b)</u> .....	3, 5, 14, 15
NY CPLR § 4213(b).....	5, 14, 15
NY CPLR § 5712(b) and (c).....	5, 6, 7, 12, 14, 15
Supreme Court Rule 10.....	9, 10
Supreme Court Rule Rule 15.....	1
United States Constitution – 6th Amendment.....	6

## PETITIONER'S BRIEF IN REPLY

### INTRODUCTION

This *Brief in Reply* will be a pointed rebuttal of Respondents' *Brief in Opposition*, which attempts to rehash already defeated issues as a distraction rather than "presenting other arguments for denying the petition", and addressing "any perceived misstatement of fact or law in the petition..." as they are admonished to do pursuant to Supreme Court Rule 15(2). And since Respondents made no objection in their Brief to consideration of Petitioner's specific questions before this Court regarding the Constitutionality and abusability of the statutes presented and discussed herein, based on what occurred in the proceedings below, they are deemed by this Rule to have waived any further objection.

When deliberated alongside the *Petition for Writ of Certiorari*, the questions and concerns clarified in this Reply are certainly worthy to be heard by The Supreme Court of The United States on (both) the merits of the legal malpractice case [at the heart of the matter], as well as the dereliction of duty by all three New York Courts to outright deny justice and infringe upon the Constitutional rights of a litigant through unmistakable misuse and misapplication of numerous State laws.

### STATEMENT OF THE CASE

- I. **The Monroe County Supreme Court Granted The Respondents' Motion for Summary Judgment Dismissing The Complaint Based Upon Mis-Application of New York State Laws Regarding Legal Malpractice, Summary Judgment and Form of Decisions.**

**A. *OPMC Has Never Had Anything On Petitioner***

Respondents are quick to point out Petitioner's past travails and consequences from OPMC's prosecution of his license (prior to 2014) when the record proves it all to have been illegitimate. In fact, the whole OPMC arm of this matter is further and decisive confirmation of the very Constitutional issues and abuses being presented in this paper. OPMC intentionally chose to violate every possible professional ethical code and Constitutional protection when breaking myriad rules of their own proceedings (PHL 230), over the course of twelve unrelenting years of malicious prosecution of Petitioner, (despite his unyielding and sincerely unassailable defense), leading to five separate precedential events and/or changes to the law [because of OPMC's unbridled cheating]. (see 2015 Petition for Vacatur to OPMC in the Complete Record on Appeal - A1266-A1410 and the full account to the Court - A1986-A2045)

Because of inconceivable malfeasance by an official agency of New York State who operates with impunity, Petitioner lost a massively successful medical career, his medical license, his entire livelihood, his family and fatherhood to his five children, while living near or below the poverty level because of the extended (unwritten) fallout from it all. Respondents had an opportunity to help rectify the damage but chose to commit malpractice, adding substantially to Petitioner's hurt.

**B. *Any Opportunity to Thwart Justice***

Respondents made a previously repudiated point about the lower court disregarding Petitioner's cross-motion for summary judgment for being untimely. This whole "timeliness" issue of Petitioner's cross-motion came about only after

Petitioner brought it up in his cross-motion memorandum of law because filing guidelines specific to *cross-motions* couldn't be found. Petitioner put Respondents' inaccurate response to rest in his Reply. (A2766-A2767)

Nevertheless, the trial court equally jumped on this topic by making a new law that the non-moving party in a summary judgment motion can only file a *cross-motion* if it falls within 120 days of the Note of Issue. Without citing a single statute or controlling case law answering the *cross-motion* question, the trial court rejected Petitioner's entire submission, which also contained his intertwined *Answer* to Respondents' motion for summary judgment, which they seemingly rejected as well. This cross-motion timeliness issue was again addressed and thoroughly defeated on page 39 of the *Appellant's Brief*, (and also on pages 12-13 of *Appellant's Reply Brief*).

Under NY CPLR 3212(b), the lower court had to *duty* to Petitioner as the nonmoving party to not only fully consider Petitioner's answer and cross-motion but also grant to him a summary judgment of his own, if warranted, even if one was not submitted at all. This case is a complete court failure.

### ***C. The Court Undermines The Facts And Shields Liability***

Respondents' assertion the lower court's dismissal was based upon well-settled principles of NY State Law, which flies in the face of the eight-million-pound gorilla that has been standing in these courtrooms from the beginning of this case. The Court shielded the Respondents' liability regarding the OPMC Answer default by declaring the attorney-client relationship not established on the day in question and

therefore dismissed the case. This was after Petitioner's answer and cross-motion papers negated the Court's authority to have made this ruling. (A2060-A2061)

**II. The Appellate Division, Fourth Department, Unanimously Affirmed The Decision of The Monroe County Supreme Court Based Upon Mis-Application of the Well-Settled Principles of New York State Law Regarding Legal Malpractice and Summary Affirmances (without Opinion).**

***D. Ghost Evidence***

Respondents cite the Appellate Division's *Decision and Order* where the Court states, "*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.*" This statement by the Court itself was proven to be a complete fabrication on pages 11-15 in Petitioner's *Petition to Appeal to the NY State Court of Appeals*, and on pages 43-48 of the *Appellant's Brief*. Five independent proofs indisputably establishing the presence of an attorney-client relationship on the day in question were way too much for the Appellate Division to even touch it, let alone the Respondents, particularly the inescapable "prospective client" obligations.

**III. The New York State Court of Appeals Refused to Entertain Clear Legal Error With Constitutional Application, Enumerated in Petitioner's Appeal, Issuing A Denial of Petition's Motion Seeking Leave to Appeal**

***E. Blatant Disregard Of Facts And Law***

On pages 9-15 in his *Petition to the NY Court of Appeals*, Petitioner addressed the blatant disregard of numerous crucial material facts and applicable law by the two courts below (as if these substantial elements did not exist) and expressed the

constitutional implications of such a dubious practice. The lower court first abuses NY CPLR 3212(b) and NY CPLR § 4312(b), followed by the Appellate Division's misuse of CPLR 5712(b) and (c) to rubberstamp it all without a word.

## **REASONS FOR ACCEPTING CERTIORARI**

### **I. THE FACTS OF THIS CASE MOST DEFINITELY REPRESENT THE ISSUES RAISED BY PETITIONER AND THEREFORE THERE IS FEDERAL QUESTION WARRANTING REVIEW BY THIS COURT**

#### **A. *Enabling Statutes, Federal Supremacy, Failure to Comply***

As pointed out on pages 13-14, 29-31 of the *Petition for Writ of Certiorari*, NY CPLR § 4312(b), [the law directing the form of a NY Court's decision, where the court can essentially cherry-pick whatever facts it "deems essential" while having zero obligation to state the conclusions of law], is out of alignment with the Federal standard found in the Federal Rules of Civil Procedure, FRCP 52(a). When a court can exploit the vagueness of the very statute directing how it states its findings and conclusions, this navigates right into summary judgment abuse. And when such blurriness found in CPLR 4312(b) is combined with CPLR 3212(b), whose statutory language is just as unclear as to the proof required or to the court's duty to state it, (particularly when compared to its Federal Equivalent in FRCP2), you have a terrible recipe for judges and courts to manifestly deny due process of law and illicitly decide who gets justice and who doesn't, while having a mechanism to make it all look legit when far, far from it. This dereliction of duty by the trial court is precisely what has occurred here, with the Appellate Division thereafter ratifying it.

CPLR § 5712(b) is the statute then abused by the Appellate Division *after* the lower court's specious *Decision, Order and Judgment*. Respondents' criticism of Petitioner for not having raised the constitutionality of this statute with the lower court is putting the cart before the horse. The Court of Appeals is the first and only court where this statutory concern could have been raised, as was done by Petitioner.

When examining NY CPLR § 5712(b) and (c) the language is vague, ill-defined and imprecise as to any guidelines and/or safeguards involved with a wordless affirmance, thereby making this statute hostile to the parallel Federal Statute, (Federal Circuit Rule 36), as the supreme legal standard of the land for the practice of *Judgment of Affirmance Without Opinion*.

Federal Circuit Rule 36 is painfully transparent as to how an affirmance without opinion can *only* be invoked after certain conditions have been met and where an opinion would otherwise have no precedential value. When comparing the clarity and frankness of FCR 36 with that of NY CPLR § 5712(b) and (c), the latter is positively unsound in its language, [with zero direction for how the court is to apply this brush-stroke procedure, which erases an appellant's case in one felled swoop], thereby making it repugnant to the Federal standard found in FCR 36, to which NY statute is beholden under Article VI's supremacy clause.

It matters not that Federal Circuit Rule 36 deals primarily with Federal appeals (often involving patent law). When state law *fails* to provide equivalent conditional statutory directives on A) the rightful application of a summary

affirmance without opinion; and B) the precedential impact involved with such an affirmance, *then* C) the Federal equivalent must therefore prevail.

Petitioner raised questions concerning misuse of the summary judgment statute on pages 5 and 6 of his *Petition for Leave to Appeal to the NY Court of Appeals*, and issues of Constitutionality concerning NY CPLR 5712(b) and (c) on pages 15-25 of same. The point by Respondents that “*none of the courts below addressed or had the occasion to address the constitutionality of CPLR §5712 (b) and (c)*”, therefore fails. Petitioner raised questions concerning misuse of the summary judgment statute on pages 29-31 of the *Petition for Writ of Certiorari*, and issues of Constitutionality concerning NY CPLR 5712(b) and (c) on pages 21-29 of same.

#### ***B. Respondents Hoping for a Lazy Court***

Throughout this entire matter, including these papers, the Respondents have operated themselves as licensed attorneys over and against a pro se litigant seemingly incapable of making his case, while flooding the arena with provably false claims as though they were “fact”, (for three separate courts to afterwards hang there derelict decisions on), relying on those in an adjudicatory position to forgo reading deep enough into the case to see the dastardly deeds being obfuscated by all this noise. This approach also employs ad hominem and gaslighting style tactics against Petitioner (relative to some nebulous axe to grind against the courts and his past OPMC travails), in the face of every single assertion made across this entire legal malpractice lawsuit by Petitioner being substantively corroborated.

These repetitive deceptions from Respondents require constant rebuttal, thereby adding undue confusion to a matter that is otherwise quite simple and straightforward but for the noise. Case in point is their newly fabricated claim that Petitioner purposely didn't upload his 103 missing exhibits, (which are referenced 340 times in his answer and cross-motion), because he knew his cross-motion was untimely? This is preposterous. Notwithstanding the fact that Petitioner already invalidated the cross-motion timeliness issue and validly argued the Court's error in excluding these exhibits, he was still able to prove his entire case to the prima facie standard, absent his 103 missing exhibits. (see Appellant's and Reply Briefs).

**C. *More Misleading Claims***

Respondents tried to mislead this Court once again regarding Petitioner's claims of professional misconduct by stating "*Petitioner failed to raise them in the courts below*" and that "*this (claim) was first raised in Petitioner's opposition to the Respondents' motion for summary judgment.*"

This is the second attempt by Respondents to sneak this lie past the Courts. They first tried it in their response paper to Petitioner's cross-motion for summary judgment. (A2218) They stated, in no uncertain terms, "*at no time has plaintiff ever once alleged a specific violation of the New York Rules of Professional Conduct.*" Sound familiar? Petitioner already dispelled this inaccuracy by pointing out distinctive references to professional misconduct in a previously filed *subpoena duces tecum* and in deposition testimony. (A2768-A2769, A2877-A2879)

The Respondents mislead this Court yet again when they state, "*Petitioner alleges without basis that the Respondents colluded with the OPMC so that Petitioner would enter into a surrender agreement.*" On May 20, 2014, Petitioner met with the Respondents for the first time as his new defense attorneys. The record shows immediately following that meeting, Respondent Tubiolo engaged in a telephone conversation with the OPMC prosecutor, without Petitioner's knowledge or consent. The two discussed a proposed application for Petitioner to surrender his medical license, evidenced by a draft being faxed to Respondent Tubiolo the next morning. (A1203) The evidence also shows OPMC prosecutor filing an answer default motion with the ALJ that same day, whereafter Respondents kept it from Petitioner's knowledge until the day prior to the hearing. (A1198-A1199, A1203-A1209, A1233)

Going behind your client's back to set them up for a license surrender after a planned answer default, not telling them about the default and then backing them into a ready and waiting license surrender is not zealous representation by any standard. It's professional misconduct. (*see* Appellant's Brief pgs. 63-69)

**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.**

***D. Respondents Playing With The Rules***

What Respondents did in this unchanged capitalized heading was to mesh together components of reasons (b) and (c) of Rule 10 of The Rules of the Supreme Court into one universal and restricted reason for what they say constitutes

meritorious submissions to the Court. Under *Character of Reason Rule 10(c)*, it says: “a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or...”

***E. Ample Proof From Who?***

Respondents state, “*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.*”

“Ample proof” was what Petitioner submitted to all three courts sustaining beyond any doubt that the attorney-client relationship was for sure in place on the date in question. The Court is asked to take note of the glaring absence of any party, including the courts, rebutting Petitioner’s multiple independent proofs on this issue.

***F. Slanted And Misleading Expert Affidavits***

On the issue of expert witness affidavits, Petitioner offers up what has already been fully established in previous submissions. Every single expert and their testimony produced by Respondents was impeached for reasons commensurate with how Respondents have treated this entire matter. Just like how Respondent Tubiolo was caught deliberately withholding copies of damning emails from discovery, every one of their experts had certain documents deliberately withheld from them that should and would have markedly changed their opinions in the matter, if they were operating from honesty. (*see Appellant’s Reply Brief, pgs. 26-27*)

For example, the expert who was absolutely certain that an attorney-client relationship had *not* been established on the date in question was also *not* provided a

copy of the May 19th emails and Respondents' *Professional Services Invoice* sent to Petitioner's medical malpractice insurance carrier who was funding his defense, which erased any doubt that the relationship positively existed on the date in question because of detailed billing hours that and three days prior. (A2086-A2087)

This same expert is the source of the first quoted example given in Respondents' instant Brief who asserts Petitioner's prosecutorial burden before OPMC was simply too insurmountable to have expected him to prevail at the 2014 hearing. On pages A2127-A2147, A2770-A2788 of the Complete Record, and on pages 53-61 of Appellant's Brief, Petitioner systematically dismantles this contention leaving zero doubt that he would have most definitely retained his medical license, but for the Respondents committing legal malpractice and professional misconduct costing him his opportunity to defend the charges.

As for the second expert's quote regarding "*the alacrity and zeal*" of Respondents' involvement in Petitioner's 2014 defense, this has no basis in truth. (*see* Appellant's Brief, pgs. 63-69)

Respondents lastly point out that Petitioner did not have an expert of his own to establish their negligence. This too was addressed and overcome by Petitioner because of the specific type of neglect committed by these Respondents. Because their negligence involved a Statute that they ought to have been inherently familiar with, they were guilty of "negligence per se", which stands on its own as a matter of law in the absence of an expert. (*see* Appellant's Brief, pgs. 49-51)

### III. PETITIONER'S CASE DOES PRESENT A QUESTION OF GENERAL IMPORTANCE REQUIRING THIS COURT'S ATTENTION

#### G. *The Second Witness*

What's even more disturbing about the dereliction of duty to the facts and law by these Courts in the instant matter is that it's not an isolated event. As referenced on page 37 of the Petition for Writ of Certiorari, the exact same flagrant abuses of the laws directing court decisions and the implementation of summary judgments and summary affirmances have once again been committed by these same two courts.

After another unbelievable snubbing of Petitioner's rights by the trial court in *that* matter, the Appellate Division was specifically asked in writing to *not* hide behind CPLR 5712(b) and (c), but rather specify the reasons behind any would-be decision affirming the lower Court, all while facing appellant papers that left them zero room for affirmation. Nevertheless, they doubled down on their previous deed (from the instant matter now before SCOTUS that they knew had been appealed) and rendered a measly three sentence *per curiam* affirmance without any opinion. This marked the second case in as many years where Petitioner held the veritable *Royal Flush* of facts, law and material evidence against parties who did him wrong, only to see the courts rewrite the rules of poker (and law) in favor of immoral and lawless conduct by defendants, including fellow attorneys, at the expense of a pro se litigant.

That barefaced affront to justice was exactly what this Petitioner needed to drive home the entirety of this *Petition for Writ of Certiorari* to be accepted by The Supreme Court of the United States.

As it is written, "*One witness shall not rise up against a man for any iniquity... at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established.*" – Deuteronomy 19:15.

A motion for reargument has been written and submitted to the NY Appellate Division, Fourth Department parallel with these papers before the U.S. Supreme Court. Because both cases deal with the exact same injustices being perpetrated by these two New York Courts involving the exact same laws, a copy of the reargument has been attached to this submission as Appendix A, and copies of both papers before SCOTUS have been submitted as exhibits in the reargument motion going before the Appellate Division and other parties, including the State's Attorney General, pursuant to U.S.C. § 2403(b). As disclosed in that motion, the full register of documents regarding these two matters, can be found at: [https://www.goodlifecentre.com/writ\\_of\\_certiorari-jremd.html](https://www.goodlifecentre.com/writ_of_certiorari-jremd.html).

#### ***H. Issues General Importance Confirmed***

Plaintiff has now presented *two* separate cases to this Court concerning serious issues of general importance where a party's Constitutional right to equal protection of the laws and due process of law were overtly violated by both the trial court and the Appellate Division through their manifest abuse of New York's constricted and ill-defined statutes directing 1) form and content of court decisions; 2) reasons for summary judgments; and 3) summary affirmances without opinion.

When the Federal equivalent of any State law contains a directive of greater duty to the principles of due process and equal protection of the laws, then it reigns

supreme over that of the State. Such is the case with FRCP 52(a) holding sway over NY CPLR § 4312(b). The same goes for Federal Circuit Rule 36 ruling over CPLR 5712(b) and (c). The latter pales in comparison, having zero guidelines for implementation making it way too easy for a court to violate due process by denying a party's right to be heard and right to an impartial tribunal.

Additionally, Petitioner has specifically challenged the Constitutionality of the *per curiam* affirmance itself on the merits of being hostile to due process and equal protection altogether but evermore compounded when the summary affirmance is weaponized to scandalously deny justice, while also endorsing horrendous malfeasance on part of the defendant parties. Both of these cases are near identical applications of this cheating technique and stand as that witness of two which establishes the truth of a matter. If abuse of these laws, (as they are written), indeed happened and with such ease as was done to Petitioner, then they are not only abhorrent to the Constitution and all that is righteous and good about the adversarial system of justice, but also leaves any future litigant wholly unprotected from these very same abusive tactics and to the denial of justice, unless SCOTUS steps in.

*"But as for you, ye thought evil against me; but God meant it unto good, to bring to pass, as it is this day, to save much people alive."* – Genesis 50:20

## **CONCLUSION: THE ORDERS BELOW ARE INCORRECT**


NY CPLR 4312(b), CPLR 3212(b), CPLR 5712(b) and (c), are all New York Statutes completely out of line with their Federal Law counterparts and are highly

susceptible to abuse and/or misuse to the denial of true justice. And because abuses have manifestly infringed on Constitutional protections and denied justice in two individual civil lawsuits, these statutes are therefore repugnant to Federal Law and to the Constitution, along with all rulings in these two matters from their abuse.

For the foregoing reasons, Petitioner has proven his case and the petition for a writ of certiorari should be accepted. Petitioner desires: 1) That NY CPLR 4312(b) and CPLR 3212(b) be amended to align with their Federal equivalents, with clear and direct guidelines that both ensure the true facts and conclusions of law are stated in every instance, while safeguarding against them not. 2) That CPLR 5712(b) and (c) be abolished along with the entire practice of summary affirmances. FCR 36 can readily be transformed into *Judgment of Affirmance With Mandatory Opinion*, where the three conditions required to exist can serve as a template for listing applicable examples of each component from the case being adjudicated to ensure proper affirmance, while also formally declaring the precedential value, present or not. Elevated eminence requires elevated response. Lastly, Petitioner's papers have met the prima facie standard of entitlement to have his original complaint granted, while standing as the textbook example for when punitive damages are justified.

Date: March 2, 2026

Respectfully submitted,

  
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