No. 24-440

In the Supreme Court of the United States

HAROLD R. BERK,
Petitioner,
v.
WILSON C. CHOY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE AMERICAN MEDICAL ASSOCIATION, MEDICAL SOCIETY OF DELAWARE, MEDICAL SOCIETY OF NEW JERSEY, AND PENNSYLVANIA MEDICAL SOCIETY IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici Curiae American Medical Association, Medical Society of Delaware, Medical Society of New Jersey, and Pennsylvania Medical Society[2] file this brief because they strongly support state statutes requiring medical negligence lawsuits to be accompanied by Affidavits of Merit. Such statutes reduce health care costs by foreclosing baseless medical negligence claims. They also protect physicians who have not in any way committed malpractice from incurring the undue expense and reputational harm resulting from meritless cases. Amici believe that both applicable law and considerations of fairness require that the statutes be enforceable, not only in state court, but in federal court as well.

SUMMARY OF THE ARGUMENT

Under Delaware law, plaintiffs bringing medical negligence claims must submit an Affidavit of Merit ("AOM") signed by a medical expert stating

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[1] Pursuant to Supreme Court Rule 37.6, counsel for Amici Curiae state that no party's counsel authored this brief in whole or in part and no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Amici appear on their own behalf and as representatives of the Litigation Center of the American Medical Association (AMA) and the state medical societies. The Litigation Center is a coalition among the AMA and the state medical societies, whose purpose is to advance the interests of physicians and their patients in the courts.

that there are reasonable grounds to believe that each defendant committed medical negligence. 18 Del. C. § 6853. The Delaware General Assembly enacted this law to reduce the incidence of meritless, but nonetheless costly, medical negligence claims and to promote the efficient use of judicial resources.

Delaware's AOM statute should be enforced in diversity actions in federal courts. This statute completely accords with the Federal Rules of Civil Procedure. Thus, Rule 11(a) provides that a pleading need not be accompanied by an affidavit "[u]nless a rule or statute specifically states otherwise." The Delaware AOM requirement does just that: It is a state statute requiring that a pleading be accompanied by an affidavit.

Indeed, the AOM statute furthers the objective of the Federal Rules, as set forth in Rule 1, to promote the "just, speedy, and inexpensive determination of every action" in federal court. It fairly, quickly, and relatively inexpensively results in the determination of malpractice cases that lack sufficient merit even to be accompanied by an AOM – but that, in the absence of the statute, might drag on for months or even years, at considerable expense to the defendants.

Apart from the Federal Rules, enforcement of Delaware's AOM statute in federal court is required by the decision of this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). In accordance with *Erie,* the AOM statute is outcome determinative when a plaintiff fails to comply. Moreover, enforcement of

the statute in federal court promotes *Erie's* twins aims of discouraging forum shopping and the inequitable administration of the law. It would be exceedingly unfair if plaintiffs in malpractice cases would be required to file AOMs in state court but could circumvent that requirement when filing in federal court.

Diversity jurisdiction was enacted to protect non-citizens of a state from being disadvantaged in state courts, not to disadvantage a state's citizens in federal courts. But that would be the result if the Court were to allow plaintiffs in medical negligence cases based on diversity to skirt state AOM requirements by filing in federal court. Consequently, Amici Curiae respectfully request that this Court affirm the judgment of the Third Circuit and uphold the application of Delaware's AOM requirement in diversity actions in federal court.

ARGUMENT

In actions based on diversity jurisdiction, a federal court must apply state substantive law and federal procedural law. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965); *Erie*, 304 U.S. at 78.

Where a Federal Rule is sufficiently broad to cause a "direct collision" with state law or implicitly "control[s] the issue" before the court and leaves no room for the operation of state law, that Rule controls. *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987) (citations omitted). Thus, if a Federal Rule "answers the question in dispute," a court need not

"wade into *Erie's* murky waters." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

However, where no Federal Rule controls, a court must consider whether application of state law would be outcome determinative and consistent with the twin aims of *Erie*—to discourage forum shopping and to avoid the inequitable administration of the laws. *Hanna*, 380 U.S. at 466-68.

Here, the Federal Rules implicitly control the issue before this Court and require affirmance of the decision below. At a minimum, Delaware's AOM statute advances the objectives of the Federal Rules. Thus, this Court does not need to wade into *Erie's* "murky waters". In any event the statute furthers *Erie's* twin aims. Indeed, *Erie* mandates its enforcement in federal court.

I. THE FEDERAL RULES REQUIRE ENFORCEMENT OF THE DELAWARE AOM STATUTE IN FEDERAL COURT, AND THE STATUTE PROMOTES THE OBJECTIVES OF THOSE RULES.

As the Third Circuit correctly explained, Delaware's AOM requirement does not conflict with any Federal Rule. *Berk v. Choy*, No. 23-1620, 2024 WL 3534482, at *2-3 (3d Cir. July 25, 2024).

The lack of any conflict between Delaware's AOM requirement and the Federal Rules is evident from Rule 11(a), which provides that "[u]nless a rule or statute specifically states otherwise, a pleading

need not be verified or accompanied by an affidavit." Here, the Delaware AOM statute "specifically states otherwise." This Federal Rule expressly carves out an "intended sphere of coverage" for the AOM requirement to occupy.[3] *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980); *see also Velazquez v. UPMC Bedford Mem. Hosp.*, 328 F. Supp. 2d 549, 558 (W.D. Pa. 2004) (holding Rule 11 and Pennsylvania's AOM requirement can co-exist); *RTC Mortg. Trust 1994 N-1 v. Fidelity Nat'l Title Ins. Co.*, 981 F. Supp. 334, 345 (D.N.J. 1997) (holding Rule 11 does not conflict with New Jersey's AOM requirement because "Rule 11 specifically allows room for the operation of other statutes which may require an affidavit"). Thus, Rule 11(a) controls the issue in this case.

Moreover, the AOM requirement advances the objectives of the Federal Rules, as set forth in Fed. R. Civ. P. 1 (providing that the Federal Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding").

Delaware's legislature enacted the AOM requirement to prevent, or at least reduce, the incidence of meritless medical negligence claims. *Dishmon v. Fucci*, 32 A.3d 338, 342 (Del. 2011). As the Delaware Supreme Court explained, the statute

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[3] To the extent Rule 11 is ambiguous as to the meaning of "rule or statute," it should be read to include state law to avoid substantial variations in outcomes between state and federal litigation. *Shady Grove*, 559 U.S. at 406 n.7.

"operates as a prophylactic measure to ensure the efficient administration of judicial resources." *Id.*

Empirical evidence demonstrates why states have enacted similar laws, as many medical malpractice claims are without any merit whatsoever. A study published in 2019 concluded that 65% of malpractice claims that were resolved between 2016 and 2018 were dropped, dismissed, or withdrawn. Medical Professional Liability Association, *Data Sharing Project MPL Closed Claims 2016-2018 Snapshot* (2019). Moreover, 89% of the cases that were decided after a trial were won by the defendants. *Id.*

Likewise, a 2011 article published in the New England Journal of Medicine reported that, by age 65, 99% of physicians in high-risk specialties have been subjected to at least one malpractice claim. B.J. Anupam, S. Seabury, D. Lakdawalla, et al., *Malpractice Risk According to Physician Specialty*, 365 New England J. Med. 629-636 (2011). Of these claims, only 22% resulted in an indemnity payment. *Id.*

Even meritless malpractice claims take an inordinate time to resolve. A 2013 article in Health Affairs concluded that the average time from filing of such claims to closure is 20 months and that many claims took more than three years to resolve. S. Seabury, A. Chandra, D. Lakdawalla, et al., 32(1) Health Affairs 111-119 (2013). And apart from the needless costs of defending meritless claims, those

claims contribute to the practice of defensive medicine, a practice which serves only to increase the costs of medical care in this country.

For all these reasons, the available data supports application of AOM requirements to secure the just, speedy, and inexpensive adjudication of medical negligence cases.

While some courts have not applied state AOM requirements in federal court, those decisions do not control the outcome here for several reasons.

First, the four Courts of Appeals that held AOM requirements conflict with the Federal Rules did so in the context of Federal Tort Claims Act claims, where no *Erie* concerns exist. *See Corley v. U.S.*, 11 F.4th 79, 82 (2d Cir. 2021); *Pledger v. Lynch*, 5 F.4th 511, 513 (4th Cir. 2021); *Gallivan v. U.S.*, 943 F.3d 291, 293 (6th Cir. 2019); *Young v. U.S.*, 942 F.3d 349, 350 (7th Cir. 2019). As the dissent in *Pledger* aptly noted, "the *Erie* factors identified by the Supreme Court seem meaningless in the face of an FTCA suit." *Pledger*, 5 F.4th at 534.

Second, although the Fifth and Ninth Circuits adopted similar rationale, their decisions did not address comparable AOM requirements. *See Martin v. Pierce County*, 34 F.4th 1125, 1127 (9th Cir. 2022) (addressing the applicability of Washington statute requiring a plaintiff to elect or decline to submit a claim to arbitration at the time suit is commenced);*Passmore v. Baylor Health Care Sys.*,

823 F.3d 292, 293 (5th Cir. 2016) (addressing the applicability of Texas statute requiring service of expert report within 120 days of answer). These cases have little bearing on the dispute at hand.

Third, none of these decisions grapples with Rule 11(a)'s express allowance of a state law AOM requirement, as discussed above. The only appellate court that has applied Rule 11(a) to an AOM requirement in a context comparable to the one at bar is the Sixth Circuit, which stated in *Albright v. Christensen* that "[o]ur decision is bolstered by Rule 11, which states outright that 'a pleading need not be verified or accompanied by an affidavit.'" *Id.*, 24 F.4th 1039, 1046 (6th Cir. 2022) (citing Fed. R. Civ. P. 11(a)). But the Sixth Circuit omitted the key prefatory clause in Rule 11(a) that dispenses with a verification or affidavit "[u]nless a rule or statute specifically states otherwise."

Fourth, none of these cases considered the relationship between AOM statutes and Rule 1. The fact that these statutes advance the basic objective of the Federal Rules, as set forth in Rule 1, has not adequately been considered by the appellate courts.

Fifth, these cases incorrectly frame the issue. Citing *Shady Grove*, the Sixth Circuit in *Gallivan* casts the question in dispute as whether someone needs an AOM to state a claim for medical negligence, to which question it answers, "no." *Id.*, 943 F.3d at 293. Other circuits have followed that framing. *See Pledger*, 5 F.4th at 519; *Corley*, 11 F.4th at 88-89. But

under *Shady Grove*, the question in dispute is not narrowly confined to whether an AOM is required as a matter of pleading. Rather, *Shady Grove* cites to *Burlington*, which held, consistent with *Hanna*, that the test is whether the scope of a Federal Rule is broad enough to cause a direct collision with state law or to implicitly control the issue. *Shady Grove*, 559 U.S. at 398; *Burlington*, 480 U.S. at 4-5. Here, the AOM requirement peacefully coexists alongside the Federal Rules.

II. *ERIE* REQUIRES FEDERAL COURTS TO APPLY DELAWARE'S AOM REQUIREMENT.

Delaware's AOM requirement is substantive rather than procedural. Failure to apply that requirement in federal court would frustrate the Court's ruling in *Erie*.

The AOM requirement is outcome determinative because "a plaintiff's failure to comply with the AOM requirement can result in the dismissal of his case." *Berk*, 2024 WL 3534482, at *3; *see also* 18 Del. C. § 6853(a)(1) (mandating that, if the AOM is not filed, "then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court").

Failure to uphold AOM requirements would also frustrate *Erie's* twin aims. *Hanna*, 380 U.S. at 468. Specifically, plaintiffs who could not produce an AOM would be incentivized to pursue medical negligence claims in federal court to circumvent the requirement. The result would be an inequitable

administration of the laws because an action that would be barred in state courts would be allowed to proceed in federal court "solely because of the fortuity that there is diversity of citizenship between the litigants." *Walker*, 446 U.S. at 753; *accord Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1541 (10th Cir. 1996) ("If the certificate of review requirement applies in state but not federal court, the inequitable result would be a penalty conferred on state plaintiffs but not those in federal court under diversity jurisdiction.").

Erie reversed *Swift v. Tyson*, 41 U.S. 1 (1842), because it "introduced grave discrimination by noncitizens against citizens" and "prevented uniformity in the administration of the law of the state." *Erie*, 304 U.S. at 74-75. Those same concerns apply here, where a non-Delaware plaintiff has sued Delaware defendants under Delaware law but has not complied with that law. Diversity jurisdiction "was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state," *id.* at 74, not to enable discrimination by federal courts against citizens of a state.

As the Court recognized in *Erie*, "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." *Id.* at 76.

Here, Delaware's AOM requirement is part of

its tort regime. That law imposes an affirmative duty on plaintiffs to provide an AOM to prosecute medical negligence claims. Just as the plaintiffs in *Erie* were bound by the duties imposed by Pennsylvania tort law, so too should the plaintiff in this case be bound by the duties imposed by Delaware tort law.

CONCLUSION

For these reasons, Amici Curiae respectfully request that this Court affirm the judgment of the Third Circuit.

Respectfully submitted,

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