No. 24-440

IN THE

Supreme Court of the United States

HAROLD R. BERK,

Petitioner,

v.

WILSON C. CHOY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

The question presented is: Must the affidavit of merit requirement in Del. Code Ann. tit. 18, § 6853(a) be applied in a medical negligence action pending in federal court when subject matter jurisdiction is based on diversity of citizenship under 28 U.S.C. § 1332(a)?

The Third Circuit correctly applied the Delaware affidavit of merit (AOM) statute in this diversity jurisdiction medical negligence action. The Delaware AOM law does not collide with the Federal Rules of Civil Procedure, and resolution was consistent with the *Erie* doctrine as the Delaware statute is outcome determinative and applying it would discourage forum shopping and avoid inequitable administration of the law.

The circuit split alleged by Petitioner is illusory as the outcome among the circuits on the AOM issue is uniform when the cases are grouped according to the basis of their federal court jurisdiction. Those circuits (Third and Tenth) which have addressed state AOM requirements in diversity cases have consistently found them to be applicable. The "opposing" cases cited by Petitioner are federal question actions, which are primarily Federal Tort Claims Act (FTCA) cases and/or are factbound, treated AOMs as pleadings or involved materially different requirements. The Third Circuit did not "acknowledge" a circuit split but explained why the analysis is different based on jurisdiction.

The issue presented is insignificant and not worthy of this Court's attention. This nonprecedential case, which involves no conflict with federal procedure or a circuit split, is an inappropriate vehicle for consideration.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Beebe Medical Center, Inc. discloses the following. There is no parent or publicly held company owning 10% or more of Respondent Beebe Medical Center, Inc.'s stock.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

STATEMENT OF THE CASE 1

I. NATURE OF THE CASE 1

II. LEGAL BACKGROUND 3

III. PROCEEDINGS BELOW 9

REASONS FOR DENYING THE WRIT OF CERTIORARI 13

I. THE THIRD CIRCUIT'S UNPUBLISHED OPINION REFLECTS THE FACTBOUND APPLICATION OF SETTLED LAW 13

II. THERE IS NO CIRCUIT SPLIT WARRANTING THIS COURT'S REVIEW 15

Table of Contents

Page

A. The alleged circuit split is illusory because the outcome of the cases is the same when grouped according to the basis of federal-court jurisdiction 15

B. The circuit split claimed by Petitioner is also illusory because the specific terms of the various state statutes being applied differ in outcome-determinative ways 18

III. THE THIRD CIRCUIT'S RULING IS CORRECT. 21

IV. THIS CASE IS THE WRONG VEHICLE FOR REVIEW. 27

CONCLUSION 28

TABLE OF CITED AUTHORITIES

Page

Cases

Ashcroft v. Iqbal,
556 U.S. 662 (2009). 25

Bell Atl. Corp v. Twombly,
550 U.S. 544 (2007) 25

Burlington N. R.R. Co. v. Woods,
480 U.S. 1 (1987). 10, 14, 22

Byrd v. Blue Ridge Rural Elec. Coop., Inc.,
356 U.S. 525 (1958). 14

Chamberlain v. Giampapa,
210 F.3d 154 (3d Cir. 2000) 9, 10, 13, 15, 24

CoreCivic, Inc. v. Candide Group, LLC,
46 F.4th 1136 (9th Cir. 2022). 22

Corley v. United States,
11 F.4th 79 (2d Cir. 2021). 16, 17, 20

Dishmon v. Fucci,
32 A.3d 338 (Del. 2011) 8, 19, 24

Enhaili v. Patterson,
2018 WL 5877282 (Del. Nov. 7, 2018). 12

Fletcher v. Univ. Hosps. of Cleveland,
897 N.E.2d 147 (Ohio 2008). 19

Page

Gallivan v. United States,
943 F.3d 291 (6th Cir. 2019). 16, 17, 19

Hanna v. Plumer,
380 U.S. 460 (1965). 14, 22

Liggon-Redding v. Estate of Sugarman,
659 F.3d 258 (3d Cir. 2011) 9-11, 13, 15-17, 24-26

Mammarella v. Evantash,
93 A.3d 629 (Del. 2014) 25

Martin v. Pierce Cnty.,
24 F.4th (9th Cir. 2022). 16

Nationwide Ins. Co. of Columbus, Oh. v. Patterson,
953 F.2d 44 (3d Cir. 1991) 13

Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.,
692 F.3d 282 (3d Cir. 2012) 10, 13

Passmore v. Baylor Health Care Sys.,
823 F.3d 292 (5th Cir. 2016). 16, 21

Pledger v. Lynch,
5 F.4th 511 (4th Cir. 2021) 16, 17, 20

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010). 9, 10, 14, 22, 24

Page

Sibbach v. Wilson & Co.,
312 U.S. 1 (1941) 14

Trierweiler v. Croxton & Trench Holding Corp.,
90 F.3d 1523 (10th Cir. 1996). 16

Walker v. Armco Steel Corp.,
446 U.S. 740 (1980) 14, 22, 25, 26

Wilson v. United States,
79 F.4th 312 (3d Cir. 2023). 2, 16-18

Young v. United States,
942 F.3d 349 (7th Cir. 2019). 16, 19, 20

Statutes and Other Authorities

18 Del. C. § 6853 . . . . . .8, 11

18 Del. C. § 6853(a) 1, 7-15, 26

18 Del. C. § 6853(a)(1) 8, 11, 24, 25

18 Del. C. § 6853(a)(2) 8, 11

18 Del. C. § 6853(a)(4) 11

18 Del. C. § 6853(b) 8, 11

18 Del. C. § 6853(c) 11

Cited Authorities

Page

18 Del. C. § 6853(d) 11, 25

18 Del. C. § 6853(e) 8, 11

28 U.S.C. § 1332(a). 1

735 ILCS § 5/2-622 20

735 Ill. Comp. Stat. Ann. 5/2-622(a)(1)–(3). 6

Ariz. Rev. Stat. Ann. § 12-2603(A)–(B) 5

C.G.S.A. § 52-190(a). 20

Colo. Rev. Stat. Ann. § 13-20-602(1)(a) 5

Colo. Rev. Stat. Ann. § 13-20-602(3)(a)(I)–(II) 5

Conn. Gen. Stat. Ann. § 52-190a(a) 6

Del. Code Ann. tit. 18, § 6853(2) 3

Del. Code Ann. tit. 18, § 6853(a)(1) 3

Fed. R. Civ. P. 7(a) 23

Fed. R. Civ. P. 8 . . . . . .1, 10, 11, 14, 23, 24

Fed. R. Civ. P. 8(a)(2). 23

Fed. R. Civ. P. 9 . . . . . .1, 10, 11, 14, 23, 24

Page

Fed. R. Civ. P. 10 14

Fed. R. Civ. P. 11 . . . . . 2, 10, 11, 14, 23, 25

Fed. R. Civ. P. 11(a) 25

Fed. R. Civ. P. 12 . . . . . 2, 10, 11, 23, 25

Fed. R. Civ. P. 12(b)(6). 25

Fed. R. Civ. P. 26 21

Fed. R. Civ. P. 37 21

Fla. Stat. Ann. § 766.104(1) 6

Fla. Stat. Ann. § 766.106(2) 7

Fla. Stat. Ann. § 766.203(1) 7

Fla. Stat. Ann. § 766.203(2) 7

Ga. Code Ann. § 9-11-9.1(a). 3, 4

Ga. Code Ann. § 9-11-9.1(b) 3

H.R.S. § 671-12. 7

H.R.S. § 671-12.5 7

Iowa Code Ann. § 147.140(1)(a). 4

Page

Ky. Rev. Stat. Ann. § 411.167(1) 6

Ky. Rev. Stat. Ann. § 411.167(2)(a)–(c). 6

Md. Code Ann., Cts. & Jud. Proc. § 3-2A-03(a). 7

Md. Code Ann., Cts. & Jud. Proc. § 3-2A-04(a)(1)(i) 7

Md. Code Ann., Cts. & Jud. Proc. § 3-2A-04(b)(1)(i). . . .7

Md. Code Ann., Cts. & Jud. Proc. § 3-2A-06A(a) 7

Mich. Comp. Laws Ann. § 600.2912d(1)(a)–(d). 4

Mich. Comp. Laws Ann. § 600.2912d(1) 4

Mich. Comp. Laws Ann. § 600.2912d(2) 4

Minn. Stat. Ann. § 145.682 Subd. 2, Subd. 3(1)–(2) 5

Miss. Code Ann. § 11-1-58(1)(a)–(c) 5

Miss. Code Ann. § 11-1-58(6) 5

Mo. Rev. Stat. § 538.225(1). 6

N.C. R. Civ. P. 9(j) 5

N.D. Cent. Code Ann. §28-01-46 4

Page

N.J. Stat. Ann. § 2A:53A-27 4

N.Y. C.P.L.R. § 3012-a(a)(1)–(3) 5

N.Y. C.P.L.R. § 3012-a(f). 5

Nev. Rev. Stat. Ann. § 41A.071 4

Ohio Civ. R. 10(D)(2) 19

Ohio R. Civ. P. 10(D)(2)(a) 4

Ohio R. Civ. P. 10(D)(2)(b). 4

Pa. R. Civ. P. 1042.3(a)(1)–(3) 6

Pa.R.Civ.P. 1042.3 . . . . . .16, 17

S.C. Code Ann. § 15-36-100(B)–(C)(1). 4

Tenn. Code Ann. § 29-26-122(a)(1)–(2) 6

Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). 7, 21

Utah Code Ann. § 78B-3-412(1)(a)–(b) 7

Utah Code Ann. § 78B-3-416(1)(a)–(b) 7

Utah Code Ann. § 78B-3-423(1)(a) 7

Page

Va. Code Ann. § 8.01-20.1 6

Vt. Stat. Ann. tit. 12, § 1042(a) 6

W. Va. Code § 55-7B-1 20

W. Va. Code § 55-7B-6 7

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Petitioner filed this medical negligence action in diversity under 28 U.S.C. § 1332(a) in the District of Delaware against his treating physician Wilson C. Choy, MD, his primary-care hospital Beebe Medical Center, Inc. and his rehabilitation-care hospital Encompass Health Rehabilitation Hospital of Middletown, LLC. Pet. App. 12a, 33a-34a. The Petitioner's underlying liability claims relate to the care he received following injuries to his ankle and foot, and their merits are disputed. *Id.* at 34a-40a. Defendants denied the descriptions of the allegedly negligent conduct in the pleadings. The district court dismissed this case for Petitioner's failure to file an AOM as required by 18 Del. C. § 6853(a).

The Third Circuit correctly decided this case by applying the Delaware AOM statute, which it found to be a substantive law provision applicable in medical negligence diversity actions. The decision conforms with well-established law and the Third Circuit's own prior determinations involving Pennsylvania and New Jersey AOM requirements, and with the Tenth Circuit, the only other circuit to have addressed state AOM rules in a diversity action versus a federal question case. This matter lacks any genuine controversy, and the issue does not warrant further consideration.

The Third Circuit properly applied the *Erie* doctrine, and there is no collision with federal procedure as the Delaware law and Federal Rules can exist side by side. The AOM statute does not conflict with Rule 8 or 9, as

it does not concern pleadings or their content. There is no conflict with Rule 11 which governs experts, not the conduct of attorneys, or with Rule 12, as the statute's means of addressing noncompliance differs from a Rule 12 motion to dismiss and serves an entirely different purpose. Broadly expanding the concept of when a conflict occurs, as Petitioner and Amicus urge, would impede and undermine *Erie*'s purpose by promoting federal court forum shopping by medical negligence plaintiffs and would result in inequitable treatment of defendants sued in federal courts and force defendants to defend non-meritorious lawsuits.

The circuit split alleged by Petitioner is illusory and overstated. When the decisions by various circuits are properly grouped according to the basis of their federal court jurisdiction, the outcome is the same. Those circuits which have addressed state AOM requirements in *diversity* cases like this one, the Third and Tenth circuits, have consistently found such rules to be applicable. The Third Circuit did not "acknowledge" a circuit split but rather properly distinguished the "opposing" cases Petitioner cited, as federal question actions which primarily involve the FTCA (where state tort law is not applicable), and/or are factbound, treat AOMs as pleadings or involve materially different requirements. The Third Circuit referred to its own *Wilson* decision where it rejected application of a state AOM rule in a federal question jurisdiction FTCA case based upon the very same cases cited by Petitioner, and found no inconsistency with this present matter which involves diversity jurisdiction. *Wilson v. United States*, 79 F.4th 312 (3d Cir. 2023).

This case is not worthy of this Court's consideration and is an inappropriate vehicle to review the issues Petitioner purports to raise. The Third Circuit decision is nonprecedential, and one panel member concurred in the judgment only, and Petitioner chose not to request an *en banc* review of that decision. Should this issue somehow be of interest, this Court should wait for a case that might pose an actual conflict such as a diversity jurisdiction action involving analogous AOM requirements where a different outcome is reached.

II. LEGAL BACKGROUND

In order to control litigation costs related to meritless medical negligence actions, numerous States, including Delaware, have enacted statutes to require some form of early-stage documentation from the plaintiff that a colorable claim exists. But the specifics of how the plaintiff must provide that support vary widely across jurisdictions, thus illustrating the lack of a conflict among the circuits here.

In some States, a plaintiff must submit an affidavit from an expert with the complaint, but the court may in specified circumstances extend the deadline for submission to a certain number of days after the complaint is filed.[1]

1. Del. Code Ann. tit. 18, § 6853(a)(1), (2) (allowing the trial court to grant a 60-day extension for good cause); Ga. Code Ann. § 9-11-9.1(a), (b) (providing an automatic extension for 45 days if the complaint is filed without the affidavit within 10 days before the expiration of the statute of limitations, an affidavit could not be prepared before the expiration of the statute of limitations, and the plaintiff's attorney files an affidavit affirming that the representation did not start more than 90 days prior to the

The contents required of the affidavit are not uniform among these States.[2] Some States require an AOM to be filed within a specified timeframe after the filing of the complaint.[3] In North Carolina, the complaint itself must

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expiration of the statute of limitations); Mich. Comp. Laws Ann. § 600.2912d(1), (2) (allowing the court to grant a 28-day extension for good cause); Ohio R. Civ. P. 10(D)(2)(a), (b) (allowing the court to grant up to a 90-day extension for good cause and an even longer extension if defendant fails to cooperate with discovery or for other circumstances warranting extension); *see also* S.C. Code Ann. § 15-36-100(B)–(C)(1) (requiring affidavit to be filed "as part of the complaint" but (1) providing an automatic extension within the statute for 45 days if the complaint is filed without the affidavit within 10 days of the expiration of the statute of limitations and an affidavit could not have been prepared in time, and (2) also allowing the court to grant extensions for good cause). *But see* Nev. Rev. Stat. Ann. § 41A.071 (filing with complaint required with no time-extension provisions).

2. *Compare* Ga. Code Ann. § 9-11-9.1(a) (requiring the affidavit to "set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim") *with* Mich. Comp. Laws Ann. § 600.2912d(1)(a)–(d) (requiring the expert to include within the affidavit a certification that the expert "reviewed the notice and all medical records supplied to [the expert]…and [to include] a statement" regarding "(a) [t]he applicable standard of practice or care," "(b) [the expert's] opinion that the…standard of…care was breached by [the defendant]," "(c) [t]he actions that should have been taken or omitted by [the defendant] to have complied with the…standard of…care," and "(d) [t]he manner in which the breach of the standard of…care was the proximate cause of the injury").

3. Iowa Code Ann. § 147.140(1)(a) (requiring the affidavit before commencement of discovery and within 60 days of the defendant's answer); N.J. Stat. Ann. § 2A:53A-27 (requiring the affidavit within 60 days after the defendant's answer); N.D. Cent. Code Ann. § 28-01-46 (requiring the affidavit within 3 months

contain an assertion that the claim has been reviewed by an expert willing to testify that the applicable standard has been breached.[4] In other States, the plaintiff's attorney must submit a certification with the complaint or within a certain time after the complaint's filing.[5] Again, the required contents of the certification differ across jurisdictions.[6] Some States require both a certification

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of the commencement of the action); *see also* Ariz. Rev. Stat. Ann. § 12-2603(A)–(B) (requiring the plaintiff, or the plaintiff's attorney, to file a certification with the complaint noting whether an expert is required to prove liability, and if an expert is required, requiring the affidavit to be filed with the initial disclosures).

4. N.C. R. Civ. P. 9(j) (requiring the complaint itself to assert that the claim has been reviewed by an expert willing to testify that the standard was breached).

5. Colo. Rev. Stat. Ann. § 13-20-602(1)(a), (3)(a)(I)–(II) (requiring a certificate by the plaintiff's attorney to be filed within 60 days after the service of the complaint); Miss. Code Ann. § 11-1-58(1)(a)–(c), (6) (requiring a certificate executed by the plaintiff's attorney to be filed with the complaint, unless the plaintiff is unrepresented; N.Y. C.P.L.R. § 3012-a(a)(1)–(3), (f) (mirroring the Mississippi statute with minor variations in substance and wording); *see also* Minn. Stat. Ann. § 145.682 Subd. 2, Subd. 3(1)–(2) (requiring an affidavit by the plaintiff's attorney to be served with the complaint attesting that the facts of the case have been reviewed with an expert).

6. *Compare* Colo. Rev. Stat. Ann. § 13-20-602(3)(a)(I)–(II) (requiring the certificate to state that the attorney consulted with an expert who reviewed the facts and concluded that the claim has substantial justification) *with* Miss. Code Ann. § 11-1-58(1)(a)–(c) (requiring the certificate to state that either the attorney consulted with an expert and believes there is a reasonable basis for the action, the attorney could not consult with an expert before the expiration of the statute of limitations, or the attorney attempted three times to consult with separate experts and all refused consultation).

from the plaintiff or plaintiff's counsel and some form of expert support.[7] Texas requires that the plaintiff serve

7. The States requiring a certification along with some form of expert support differ regarding whether the expert support must be filed with the court or merely retained by the plaintiff, and these States differ regarding whether the certification can only be made by the attorney or also by the plaintiff as well. *See* Conn. Gen. Stat. Ann. § 52-190a(a) (requiring the plaintiff, or the plaintiff's attorney, to file a certificate of good faith stating there are grounds for the action and requiring the party to attach a copy of an expert's written and signed opinion); Fla. Stat. Ann. § 766.104(1) (requiring a certificate of counsel and requiring the claimant to obtain an expert's written opinion as the basis for the certificate); 735 Ill. Comp. Stat. Ann. 5/2-622(a)(1)–(3) (requiring an affidavit by plaintiff, or plaintiff's attorney, certifying that the affiant consulted and reviewed the facts with an expert and requiring a copy of the expert's written report); Ky. Rev. Stat. Ann. § 411.167(1), (2)(a)–(c) (requiring the claimant's certification to be filed with the complaint stating that the claimant either consulted with an expert and believes there is a reasonable basis for the action, the claimant could not consult with an expert before the expiration of the statute of limitations, or the claimant attempted three times to consult with separate experts and all refused consultation); Mo. Rev. Stat. § 538.225(1) (requiring an affidavit by the plaintiff, or the plaintiff's attorney, stating that an expert's written opinion has been obtained); Pa. R. Civ. P. 1042.3(a)(1)–(3) (requiring plaintiff, or plaintiff's attorney, to file a certificate of merit noting that an expert has provided a written statement); Tenn. Code Ann. § 29-26-122(a)(1)–(2) (requiring a certificate of good faith from plaintiff, or plaintiff's counsel, certifying the party consulted with an expert who provided a signed written statement); Va. Code Ann. § 8.01-20.1 (stating that a plaintiff's "motion for judgement" is deemed a certification that the plaintiff has obtained a written and signed expert opinion); Vt. Stat. Ann. tit. 12, § 1042(a) (requiring certification by plaintiff, or plaintiff's attorney, to be filed with the complaint and certifying that the party consulted with an expert who supports the claim).

the defendant with an expert report within 120 days after the defendant's answer.[8]

Other States opt for a different approach and require a plaintiff to undertake certain pre-suit requirements.[9] In Hawaii, for example, the plaintiff must make a pre-suit submission to a medical inquiry and conciliation panel, including a certificate from the plaintiff that he has consulted with a health care provider who believes there is a reasonable and meritorious basis for filing the inquiry. *See* H.R.S. §§ 671-12; 671-12.5. In West Virginia, the plaintiff must provide pre-suit notice to the potential defendants, and the notice must include a screening certificate of merit executed under oath by a health care provider who qualifies as a medical expert under state law. *See* W. Va. Code § 55-7B-6.

The statutory provision at issue here is the Delaware AOM requirement in 18 Del. C. § 6853(a). Pet. App. 16a.

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8. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a).

9. *See, e.g.,* Fla. Stat. Ann. §§ 766.106(2), 766.203(1), (2) (requiring the plaintiff to conduct a pre-suit investigation of the claim and to send a notification of intent to initiate medical negligence litigation to the defendant along with the submission of a verified written medical expert opinion corroborating the claim); Md. Code Ann., Cts. & Jud. Proc. §§ 3-2A-03(a), 3-2A-04(a)(1)(i), (b)(1)(i)1, 3-2A-06A(a) (requiring the claim to first be filed with the "Director" of an alternative dispute resolution panel before filing with the court and requiring an expert's certificate to be filed with the panel); Utah Code Ann. §§ 78B-3-412(1)(a)–(b), 78B-3-416(1)(a)–(b), 78B-3-423(1)(a) (requiring the plaintiff to first file the claim with a prelitigation panel along with an AOM and to receive a certificate of compliance from the panel before filing the claim in court).

Under that statute, a medical-negligence plaintiff must file an affidavit from an expert witness stating merely "that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant." *Id.* § 6853(a)(1).[10] The affidavit is sealed and confidential and may only be viewed by a judge. *Id.* The affidavit must be filed with the complaint, but the court can grant a single 60-day extension for the affidavit's filing for good cause shown. *Id.* § 6853(a)(2). The affidavit need not be filed in cases where the complaint alleges a rebuttable inference of negligence, the grounds for which are statutorily enumerated. *Id.* §§ 6853(b) & (e).

The Delaware Supreme Court recognizes that the legislature enacted Section 6853 to "reduce the filing of meritless medical negligence claims," and that court has held that the AOM requirement "obliges a plaintiff to make a prima facie showing that there are reasonable grounds to believe that negligence occurred and caused injury." *Dishmon v. Fucci*, 32 A.3d 338, 342–43 (Del. 2011). The required affidavit is "in addition to the typical filing requirements." *Id.* at 342.

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10. The amicus brief incorrectly suggests that "the professional who submits the required affidavit in Delaware must say more than 'I think that the plaintiff has a good (reasonable) claim.'" Amicus Br. 10. Rather, the Delaware Supreme Court has held that the expert's affidavit need not contain any more than a statement that substantively tracks Section 6853(a)'s language that "there are reasonable grounds to believe that there has been health-care negligence committed by each defendant." *Dishmon v. Fucci*, 32 A.3d 338, 342-43 & n.3 (Del. 2011) (quoting 18 Del. C. § 6853(a)).

III. PROCEEDINGS BELOW

Contemporaneously with filing his Complaint, Petitioner here moved for an extension of time "for filing a medical expert opinion" pursuant to the statute. Although the extension to file was granted, *he never filed the AOM* as required by Section 6853(a). Rather, he filed documents under seal that did not comply with the statute and he failed to show cause as to whether compliant AOMs were filed. After Petitioner failed to submit an affidavit as required by Section 6853(a), the district court dismissed the action without prejudice. Pet. App. 12a-15a. Petitioner then appealed to the Third Circuit.

The Third Circuit affirmed by unpublished opinion. Pet. App. 1a-11a. Noting that "a federal court sitting in diversity must apply substantive state law and federal procedural law," the court first considered whether Section 6853(a) conflicts with the Federal Rules of Civil Procedure. *Id.* at 3a (citations omitted). This was not unfamiliar legal territory for the court because it had previously found that comparable state-law AOM provisions from Pennsylvania and New Jersey did not conflict with the Federal Rules and thus applied in medical-negligence cases pending in federal court based on diversity jurisdiction. *See id.* at 5a (citing *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 262-64 (3d Cir. 2011) (Pennsylvania AOM statute); *Chamberlain v. Giampapa*, 210 F.3d 154, 159-61 (3d Cir. 2000) (New Jersey AOM statute)).

Although Petitioner contended that these prior Third Circuit decisions were no longer good law based on this Court's decision in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), the Third Circuit

rejected that argument. First, the court explained that *Shady Grove* had not altered "the analytical framework for determining whether there is a conflict between a Federal Rule and state law," but instead had endorsed the test from *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1 (1987). *See* Pet. App. 4a-5a & nn. 5-6. The *Burlington* test asks whether "the scope of [the] Federal Rule [] is sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving no room for the operation of the [state] law." *Id.* at 4a-5a (quoting *Burlington*, 480 U.S. at 4-5; alteration in original). Second, the Third Circuit explained that it had reaffirmed its conclusion in *Chamberlain* about the applicability of the Pennsylvania AOM requirement in federal court after concluding that *Shady Grove* and other intervening precedent had not rendered invalid its collision-of-law analysis in *Chamberlain*. *See id.* at 5a (citing *Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 282, 303-04 (3d Cir. 2012)).

Consistent with its rulings in *Liggon-Redding*, *Chamberlain*, and *Nuveen*, the Third Circuit concluded that Section 6853(a) does not conflict with any Federal Rule, including Rules 8, 9, 11, and 12. *Id.* at 6a-8a. As for Rules 8 and 9, the court noted that Section 6853(a) does not conflict with those rules because (a) it does not require the plaintiff to set forth any factual averments in the complaint; (b) it does not have any effect on what is included in the pleadings or the specificity of those pleadings; and (c) the affidavit it requires is a not a pleading and need not be filed until well after the complaint is filed. *Id.* at 6a-7a. "Because the AOM is not a pleading and serves a different purpose than pleadings do, there is no conflict between the Delaware statute and Rules 8 or 9." *Id.* at 7a.

With respect to Rule 11, the Third Circuit found no conflict with Section 6853(a) because "Rule 11 governs *attorney* conduct, whereas the Delaware statute governs what an *expert* must do in a particular type of case." *Id.* at 7a (emphasis added). Nor did Rule 12 conflict: "Rule 12 provides litigants a mechanism to test the sufficiency of a complaint's factual allegations and whether they provide a basis for relief." *Id.* at 7a-8a (citations omitted). The court saw no direct conflict or collision between Rule 12 and Section 6853(a) because "a state AOM statute 'serves an entirely different purpose' from a pleading and contemplates a process for addressing noncompliance that differs from a motion to dismiss based on a pleading defect." *Id.* at 8a (citing *Liggon-Redding*, 659 F.3d at 264).

Having concluded that there was no direct collision between Section 6853(a) and any Federal Rule,[11] the Third Circuit then undertook the next step in the *Erie* analysis to determine whether "(1) the state law is outcome determinative; and (2) failure to apply the state law would frustrate the twin aims of *Erie*, namely to (a) discourage forum shopping and (b) avoid inequitable administration

11. The amicus law professors raise arguments in their amicus brief related to three Federal Rules—Rules 7.1, 15, and 20—that were not made to the Third Circuit in either of Petitioner's briefs. *See* C.A. Doc. 39 & 55. In addition, while Petitioner made general arguments to the Third Circuit about the consistency of Delaware's AOM requirement in Section 6853(a) with Rules 8, 9, 11, and 12, the professors make new detailed, granular arguments about various subparts of Section 6853 that were not made by Petitioner to the Third Circuit. *Compare* Amicus Br. 3-4, 12-14 (citing 18 Del. C. §§ 6853(a)(1), (a)(2), (a)(4), (b), (c), (d), (e)) *with* C.A. Doc. 39 & 55. As a result, the Third Circuit never addressed these never-presented arguments. Pet. App. 1a-11a.

of the law." *Id.* at 9a (internal quotations, citations, and alterations omitted). On the question whether Section 6853(a) is outcome determinative, the Third Circuit concluded that it is, because "a plaintiff's failure to comply with the AOM requirement can result in the dismissal of the case." *Id.* (citing *Enhaili v. Patterson*, 2018 WL 5877282, at *1 (Del. Nov. 7, 2018)).

The Third Circuit also determined that "applying [Section 6853(a)] would promote *Erie*'s twin aims." *Id.* at 9a. On the issue of forum shopping, the court noted that "a plaintiff who has been unable to secure expert support for his claims and faces dismissal under an [AOM] statute in state court may, by filing in federal court, be able to survive beyond the pleading stage and secure discovery." *Id.* (internal citations, quotations, and alterations in original omitted). Thus, the court saw the forum shopping potential because such a plaintiff could still proceed in federal court, thereby "provid[ing] him an advantage that he would lack in state court." *Id.* The Third Circuit also determined that failure to apply Section 6853(a) in federal court would be inequitable because "a defendant in federal court would be forced to engage in additional litigation and expense in a non-meritorious malpractice suit simply because the plaintiff was from a different state and filed suit in federal court." *Id.* at 9a-10a (internal quotations and citations omitted). The Third Circuit further noted that Petitioner identified no countervailing federal interests that prevent Section 6853(a) from being applied. *Id.* at 10a n.11.

Based on its multi-step *Erie* analysis, the Third Circuit concluded that Section 6853(a) "is substantive and must be enforced by a federal court sitting in diversity."

Id. at 10a. As Petitioner had failed to comply with the AOM requirement, the court affirmed the dismissal of the action. *Id.* at 11a. Contrary to Petitioner's assertions, the Third Circuit at no time acknowledged or agreed that there was any split between the circuit courts and instead indicated otherwise. *Id.* at 8a n.10.

One judge on the panel concurred in the judgment, believing the Third Circuit's prior decisions such as *Nuveen*, *Liggon-Redding*, and *Chamberlain* to be controlling, but indicating that he "may not arrive at the same conclusion" if he were writing on a clean slate. *Id.* at 11a n.12. Holdings in a precedential Third Circuit opinion must be followed unless overruled *en banc* or undermined by a subsequent Supreme Court case. *See* Third Cir. I.O.P. 9.1; *Nationwide Ins. Co. of Columbus, Oh. v. Patterson*, 953 F.2d 44, 26 (3d Cir. 1991). Petitioner elected not to file a petition for rehearing *en banc* which would have allowed the entire Third Circuit court to consider the issues.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE THIRD CIRCUIT'S UNPUBLISHED OPINION REFLECTS THE FACTBOUND APPLICATION OF SETTLED LAW.

Below, the Third Circuit applied this Court's established *Erie*-doctrine jurisprudence in determining whether the Delaware AOM requirement, 18 Del. C. § 6853(a), applies in this diversity jurisdiction medical-negligence action. That factbound application of this Court's settled precedents does not warrant certiorari review.

The *Erie* doctrine addresses "whether state or federal law should apply on various issues arising in an action based on state law which has been brought in federal court." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 744 (1980). In such cases, federal courts must apply state substantive law. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941). The analysis as to whether a state law should be applied in a diversity case is clear and well-defined. "The initial step is to determine whether, when fairly construed, the scope of [the applicable federal procedural rule] is 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, leaving no room for the operation of that law." *Burlington*, 480 U.S. at 4-5. If so, then the federal procedural rule must be applied "unless it exceeds statutory authorization or Congress's rulemaking power." *Shady Grove*, 559 U.S. at 398. If there is no direct collision between the federal rule and the state law, then the applicable court must determine whether (a) the state statute is outcome determinative; and (b) applying it would frustrate the twin aims of *Erie* to discourage forum shopping and avoid inequitable administration of the law. *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965). The court must also consider whether any countervailing federal interests prevent the state law from being applied in federal court. *See Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958).

The Third Circuit hewed closely to that step-by-step assessment in examining whether the Delaware AOM statute should be applied in this diversity case. *See supra* at 6a. First, after conducting a detailed analysis of the interplay between Section 6853(a) and Rules 8, 9, 10, and 11 of the Federal Rules of Civil Procedure, the court determined that there was no conflict. Pet. App. 6a-8a. The

court then undertook the next steps of the analysis and correctly concluded that application of Section 6853(a) is "outcome determinative" as dismissal of "a claim or case can certainly determine the outcome of the matter.'" *Id.* at 9a (quoting *Liggon-Redding*, 659 F.3d at 264. Failure to apply Delaware's AOM statute would frustrate *Erie* by incentivizing plaintiffs unable to secure expert support to forum shop in federal court, where defendants would suffer inequitable treatment. *Id.* at 91-10a. In doing so, the Third Circuit satisfied the steps in the *Erie* analysis, both of which are uncontested by Petitioner. Lastly, the Third Circuit found that "Berk identifies no "countervailing federal interests [that] prevent the state law from being applied[.]" *Liggon-Redding*, 659 F.3d at 262 (citing *Chamberlain*, 210 at 159-61). Pet. App. 10a.

In sum, the Third Circuit correctly applied this Court's straightforward test in analyzing whether the statute-specific terms of 18 Del. C. § 6853(a) should be applied in this medical-negligence diversity action. The Third Circuit's proper application of the settled *Erie* analysis to this particular state statute—in an unpublished decision—does not warrant review by this Court.

II. THERE IS NO CIRCUIT SPLIT WARRANTING THIS COURT'S REVIEW.

A. The alleged circuit split is illusory because the outcome of the cases is the same when grouped according to the basis of federal-court jurisdiction.

Petitioner has failed to demonstrate a circuit split as to application of state AOM statutes in federal diversity actions. All of the Fourth, Fifth, Sixth and Seventh Circuit

cases on one side of Petitioner's alleged split are federal-question cases, mostly involving the FTCA. *See Gallivan v. United States*, 943 F.3d 291 (6th Cir. 2019) (FTCA case); *Young v. United States*, 942 F.3d 349 (7th Cir. 2019) (FTCA case); *Corley v. United States*, 11 F.4th 79 (2d Cir. 2021) (FTCA case); *Pledger v. Lynch*, 5 F.4th 511 (4th Cir. 2021) (FTCA case); *Passmore v. Baylor Health Care Sys.*, 823 F.3d 292 (5th Cir. 2016) (bankruptcy case).[12] *See also Berk*, Pet. 8a n. 10. By contrast, the decisions from the circuits on the other side of Petitioner's purported split, including the Third Circuit's decision here, emanated from diversity cases. *See* Pet. App. 2a; *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523 (10th Cir. 1996). This explains why the Third Circuit reached a different outcome in this medical negligence diversity case than the result reached in the federal-question cases upon which Petitioner relies.

Petitioner makes no mention of the Third Circuit's key decision in *Wilson*, a prisoner's medical negligence claim under FTCA.[13] *Wilson* involved the question of whether the Pennsylvania AOM requirement in Pa.R.Civ.P. 1042.3 should be applied in an FTCA case. Notwithstanding its prior ruling in *Liggon-Redding* that the Pennsylvania rule should be applied in a diversity jurisdiction case,[14]

12. Petitioner also cites a case from the Ninth Circuit that does not involve a state-law AOM requirement. *See Martin v. Pierce Cnty.*, 24 F.4th 1125 (9th Cir. 2022).

13. Petitioner's failure to mention the decision in *Wilson* is not due to a lack of knowledge of the decision because Petitioner cited the case in both of its Third Circuit briefs. *See* C.A. Doc. 39 & 55.

14. The Third Circuit favorably cited *Liggon-Redding* in its decision below. *See* Pet. App. 5a-8a &10a n.11.

659 F.3d at 264, the Third Circuit held in *Wilson* that it should not be applied in an FTCA case. 79 F.4th at 320. The court explained in *Wilson* that "the FTCA incorporates only state law that governs liability in tort," *id.* at 317, which meant that Pennsylvania Rule 1042.3 should not be applied because it "does not determine the manner or extent of liability under Pennsylvania law." *Id.* at 320. The Third Circuit saw no inconsistency in reaching different results concerning the applicability of the same state rule in federal court in an FTCA case versus a diversity case, because the *Erie* analysis required in a diversity case is "an entirely distinct inquiry from determining which state laws allocate or inform tort liability and are thus incorporated as federal law in an FTCA case." *Id.* at 318.

In *Wilson*, the Third Circuit favorably cited the holdings in the FTCA cases from the Second, Fourth, and Sixth Circuits upon which Petitioner bases his assertion of a circuit split here. 79 F.4th at 319 (citing *Corley*, 11 F.4th at 86; *Pledger*, 5 F.4th at 522-23; *Gallivan*, 943 F.3d at 295). And far from acknowledging a circuit split as Petitioner suggests, the Third Circuit expressly distinguished the FTCA cases cited by Petitioner based upon the difference between the analyses for FTCA cases versus diversity cases as previously explained in *Wilson*. Pet. App. 8a n.10.[15]

15. Petitioner's assertion that the Third Circuit "appeared [in the decision below] to suggest (without explicitly stating) that state AOM statutes may not apply in federal question cases" is misleading. Pet. 10. While the Third Circuit may not have used explicit language sufficient to satisfy Petitioner on that point, the Third Circuit cited its recent *Wilson* decision which contained that very holding. Thus, there is no ambiguity about the Third Circuit's view that diversity cases and federal-question cases require

Given the absence of any actual circuit split on this issue, this Court should deny review. Instead, the Court should wait to see if a circuit decision involving diversity jurisdiction results in a different outcome on the applicability of analogous state-law AOM requirements. Petitioner identifies no conflicting outcomes so far in diversity cases at the circuit level, just as he identifies no differing outcomes in FTCA cases. The fact that the Third Circuit has itself reached differing outcomes on the applicability in federal court of the same Pennsylvania AOM rule in diversity (here) and FTCA cases (*Wilson*) underscores why the circuit split alleged by Petitioner is illusory and does not warrant review. There is no conflict between the circuits, and no issue of significance for this Court to address.

B. The circuit split claimed by Petitioner is also illusory because the specific terms of the various state statutes being applied differ in outcome-determinative ways.

In addition to ignoring the distinction between FTCA cases and diversity cases in claiming a circuit split, Petitioner glosses over critical differences between the requirements imposed by various States to limit the filing of meritless medical-negligence cases and how the respective states have interpreted those provisions. This is not a situation where a uniform law exists that multiple states have adopted with no significant alterations. Rather, there are numerous material differences between the various state laws which can—and should—lead to

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different analyses concerning applicability of AOM statutes in federal court actions.

distinct lines of analysis to determine whether the specific law applies in a federal action. Those differences are manifest in the cases that Petitioner identifies as part of the alleged circuit split and serve as another reason why the purported split is not certworthy.

For instance, Petitioner heavily relies on the Sixth Circuit *Gallivan* decision, an FTCA case where an Ohio procedural rule was at issue. Pet. 13-15. *Gallivan* involved a provision in the Ohio Rules of Civil Procedure requiring a medical-negligence plaintiff to include with the complaint an affidavit stating that the claim has merit. *Gallivan*, 943 F.3d at 293 (citing Ohio Civ. R. 10(D)(2)). In deciding that the Ohio rule did not apply in that FTCA case, the Sixth Circuit relied on the Ohio Supreme Court's holding that described the rule as "placing 'a heightened pleading requirement' on parties bringing medical-negligence claims" that does not go to the merits of a medical-negligence claim. *Id.* at 296 (quoting *Fletcher v. Univ. Hosps. of Cleveland*, 897 N.E.2d 147, 150 (Ohio 2008)). The Sixth Circuit indicated that its result might have been different had Ohio considered the affidavit requirement to be part of the plaintiff's *prima facie* case or if the affidavit was not part of the complaint. *See id.* Critically, Delaware regards the AOM requirement at issue in this petition to be part of the plaintiff's *prima facie* case, *Dishmon*, 32 A.3d at 342, and unlike under the Ohio rule, the affidavit is not part of the complaint in Delaware, *see* Pet. App. 6a. Thus, the Third Circuit's ruling below involved a materially different—and distinguishable—requirement than the one involved in the Sixth Circuit.

Petitioner also relies on the Seventh Circuit's FTCA decision in *Young v. United States*, 942 F.3d 349 (7th

Cir. 2019), and the Second Circuit's FTCA decision in *Corley*. But those cases also involved materially different requirements than the Delaware statute here. The Connecticut statute in *Corley* required the plaintiff's counsel to submit a certificate with the complaint noting that the attorney made reasonable inquiry to reach a good-faith belief that the claim has merit. *See* C.G.S.A. § 52-190(a). Along with the certificate, the attorney must submit a written and signed opinion of a health care provider noting the appearance of medical negligence. *Id.* The Illinois statute in *Young* involved a similar set of requirements to those in *Corley*. *See* 735 ILCS § 5/2-622. Conversely, the Delaware statute imposes no corresponding obligations on the plaintiff's counsel, as the Third Circuit expressly noted in its decision below. *See* Pet. App. 7a.

Petitioner's reliance on the Fourth Circuit's FTCA decision in *Pledger* is also misplaced because it involves yet another type of requirement than what was considered by the Third Circuit below. The West Virginia statute at issue in *Pledger*, enacted to address "the increase in the cost of liability insurance and . . . [the] access to affordable healthcare services for [its] citizens," imposes pre-suit requirements for medical-negligence plaintiffs. W. Va. Code § 55-7B-1. Specifically, at least thirty days before filing suit, a plaintiff must serve on each named medical provider a notice of the claim, a statement of the theory of liability, a list of other providers being notified, and a screening certificate of merit by a qualifying health care provider who has evaluated the claim. *Id.* § 55-7B-6(b). The receipt of the certificate triggers a right by the recipient to demand pre-suit mediation. *Id.* § 55-7B-6(g). By contrast, the Delaware statute involves no pre-suit requirements of any kind.

Even Petitioner admits that the Fifth Circuit decision he cites involves a different type of requirement than the Delaware AOM statute. Pet. 19. In *Passmore*, an FTCA case, the Fifth Circuit considered the applicability of Tex. Civ. Prac. & Rem. Code § 74.351(a) which required the plaintiff to file an expert report within 120 days after the defendant's answer, and whether it conflicted with Federal Rules of Civil Procedure 26 or 37. *Passmore*, 823 F.3d at 296-98. Those rules were never even mentioned by the Third Circuit below because Delaware's AOM requirement has nothing to do with the conduct of discovery.

When it comes to state-law requirements designed to weed out meritless medical-negligence litigation and whether they must be applied in a federal-court action, the devil is in the details. When a court applies the *Erie*-based analysis, outcomes will vary according to the specifics of the law at issue and how the applicable State courts have construed the statute or rule in question.

As a result, this area of law does not demand this Court's guidance. Instead, when confronted with specific statutes or rules, federal courts need simply apply the framework outlined by this Court's past decisions, as the Third Circuit did here.

III. THE THIRD CIRCUIT'S RULING IS CORRECT.

Certiorari review is also unwarranted because the decision below is plainly correct.

The key issue for purposes of the petition is whether the Delaware AOM requirement conflicts with one of the Federal Rules of Civil Procedure. The Third Circuit

accurately identified the meaning of a conflict for these purposes, relying on this Court's precedent. The Third Circuit recognized that "[a] conflict exists when 'the scope of [the] Federal Rule [] is sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving no room for the operation of [the state] law.'" Pet. App. 4a (quoting *Burlington*, 480 U.S. at 4-5). No conflict exists "when a state statute and the Federal Rule 'can exist side by side . . . each controlling its own intended sphere of coverage without conflict.'" Pet. App. 5a (quoting *Walker,* 446 U.S. at 752). If the state law does not conflict with a federal rule, a federal court must assess whether the twin aims of *Erie* are implicated, namely, "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. at 468.

Petitioner's contention that this Court's decision in *Shady Grove* marked a significant change concerning how courts should assess the existence of a conflict between a state law and a Federal Rule was correctly rejected by the Third Circuit. The Third Circuit recognized that the phrase used in *Shady Grove* as the touchstone of the conflict analysis—whether the Federal Rule "answers the [same] question" as the state law—is merely a different way to state the *Burlington* question of whether there is a "direct collision" between the Federal Rule and the state law. Pet. App. 5a n.6 (citing *Shady Grove*, 559 U.S. at 398). Consistent with the Third Circuit's interpretation on this point, the Ninth Circuit also regards *Shady Grove* as "br[eaking] little new ground with respect to the standard for assessing a potential conflict between the federal rules and state law." *CoreCivic, Inc. v. Candide Group, LLC*, 46 F.4th 1136, 1141 (9th Cir. 2022). *Shady Grove* was also

a plurality opinion where no majority was able to come to an agreed standard regarding the second inquiry where a conflict exists.[16]

In applying the conflict analysis to Delaware's AOM requirement, the Third Circuit closely examined the requirements of Rules 8, 9, 11, and 12 and assessed whether there was a direct collision between the Rules and the Delaware statute. The Third Circuit correctly concluded that there was no conflict and that they can exist side by side. For one, the Delaware statute does not pertain to what is in a pleading, thus is not a heightened pleading requirement and serves a different purpose. Rules 8 and 9 were accurately analyzed by the Third Circuit as "dictat[ing] the content of the pleadings and the degree of specificity that is required." Pet. App. 6a. In contrast, an AOM is not a pleading as that term is defined in the federal rules. *See* Fed. R. Civ. P. 7(a) (defining "[p]leadings" as a finite set of submissions that does not include documents attached to a complaint). Rule 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Also, there is no "policy" underlying Rule 8 that would be undermined by application of a state AOM requirement. That argument is at odds with the language and articulated purpose of Rule 8 itself, which concerns "General Rules of Pleading," and governs the content of pleadings, not all of the requirements necessary to initiate a lawsuit. To accept the broad view of Rule 8 asserted by

16. Three opinions were issued and four Justices dissented. Justice Scalia wrote an opinion joined in full by three Justices, and Justice Stevens joined part of Justice Scalia's opinion (making that part a majority opinion) and wrote a separate concurring opinion.

the amicus would frustrate *Erie's* aim to avoid differing outcomes based on the choice of forum.

Rule 9 only requires specificity in pleading certain types of claims which does not include malpractice. Fed. R. Civ. P. 9; *see Liggon-Redding*, 659 F.3d at 263. The contents of the AOM have "no effect on what is included in the pleadings of a case or the specificity thereof." *Chamberlain*, 210 F.3d at 160. Unlike Rules 8 and 9, the Delaware statute does "not govern the content of pleadings or the level of specificity contained therein." *See Liggon-Redding*, 659 F.3d at 263. In addition, the purpose of the Delaware statute and Federal Rules 8 and 9 are distinctly different. Rules 8 and 9 "dictate the content of the pleadings and the degree of specificity that is required," whereas the Delaware statute was enacted "to reduce the filing of meritless medical negligence claims." *Chamberlain*, 210 F.3d at 160[17]; *Dishmon*, 32 A.3d at 342. Finally, the Delaware statute does not require that the AOM "contain a statement of the factual basis for the claim." *Chamberlain*, 210 F.3d at 160; *see also Liggon-Reading*, 659 F.3d at 262.

Weighing all of these factors, the Delaware statute does not conflict with or interfere with the pleading standards set forth in Federal Rules 8 or 9. Indeed, the affidavit is also confidential, must be filed under seal and is separate and distinct from the complaint itself. 18 Del. C.

17. Based on a similar five point analysis, the Third Circuit in *Chamberlain* found that New Jersey's AOM requirement did not conflicted with Federal Rules 8 and 9, and affirmed its application in a federal diversity action. 210 F.3d at 160. Nothing in *Shady Grove* overruled this analysis, which has been applied in other cases. *See, e.g., Liggon-Redding*, 659 F.3d at 262.

§ 6853 (a)(1). The affidavit thus does not serve to place the defendant on notice of any aspect of the claim not already contained in the complaint. In fact, Section 6853(d) limits the use of an AOM—barring the defense from discovering the plaintiff's AOM and precluding the use of that affidavit as evidence or as impeachment material. *See Mammarella v. Evantash*, 93 A.3d 629, 637 (Del. 2014).

The Delaware AOM statute also does not conflict with Rule 11 because each rule "controls its own intended area of influence without any conflict." *Liggon-Redding*, 659 F.3d at 263. Rule 11 governs attorney conduct, whereas the Delaware statute governs what an expert must do in a particular type of case, thus they have different "sphere[s] of coverage" and do not conflict. *See Walker*, 446 U.S. at 752. "Rule 11 requires an attorney to sign a pleading, thereby attesting that the complaint is meritorious." *Liggon-Redding*, 659 F.3d at 263; *see also* Fed R. Civ. P. 11(a). In contrast, the Delaware statute requires a statement by "an expert witness" representing that "there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant." Del. C. § 6853(a)(1).

As to Rule 12, it merely sets up grounds for dismissal. Because the Delaware AOM statute is not a heightened pleading requirement it does not conflict with Rule 12(b)(6) which governs motions to dismiss on the pleadings. Fed. R. Civ. P. 12(b)(6). The Third Circuit described Rule 12 as "provid[ing] litigants a mechanism to test the sufficiency of a complaint's factual allegations and whether they provide a basis for relief." Pet. App. 7a (citing *Bell Atl. Corp v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); Fed. R. Civ. P. 12(b)(6)). The

issue of the sufficiency of the complaint, however "has no bearing on a court's decision to dismiss an action for failure to comply with an AOM statute." Pet. App. 7a (quoting *Liggon-Redding*, 659 F.3d at 264).

Petitioner and the amicus law professors seek to expand the concept of when a conflict exists in a way that would significantly impede the concerns underlying the *Erie* doctrine. Accepting the broad view urged by the amicus would frustrate the aim of *Erie* to avoid differing outcomes based on choice of forum. The Federal Rules do not, nor are they intended to occupy and govern the entire field of litigation in federal courts. The amicus is incorrect in arguing that the Third Circuit allegedly failed to recognize that "the Federal Rules of Civil Procedure constitute an interlocking system . . . to bring about the 'just, speedy, and inexpensive' resolution of all civil actions." Amicus Br. 5. This argument is belied by this Court's own acknowledgment that state law and federal procedural rules can co-exist, and the existence of well-established standards for determining whether and where they conflict. *See Walker*, 446 U.S. at 749-750, 752 (stating that "[t]he first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court" and finding that the Federal Rule and state statute "can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict").

The Third Circuit's decision is also correct because there is no serious dispute that the remaining steps in the *Erie* analysis have been satisfied. The Third Circuit correctly found that Delaware's AOM statute is outcome determinative because failure to comply "can result in the

dismissal of [a] case" and failure to apply the statute would frustrate the twin aims of *Erie*. Forum shopping would be a concern because plaintiffs unable to secure an AOM would have an incentive to file in federal court. Permitting diverse plaintiffs to file federal cases without complying with the AOM statute would "force[]" defendants "to engage in additional litigation and expense in a non-meritorious malpractice suit simply because the plaintiff was from a different state." Pet. App. 9a-10a Lastly, Petitioner identified no countervailing federal interests that prevented the Delaware statute from being applied.

This Court's review is unnecessary as the Third Circuit applied the established Erie-doctrine framework and reached the correct result by finding that 18 Del. C. § 6853(a) is applicable to this diversity jurisdiction medical-negligence action.

IV. THIS CASE IS THE WRONG VEHICLE FOR REVIEW.

Not only does no significant issue exist, but this case is an inappropriate vehicle for any such consideration. The Petitioner was afforded the opportunity but failed to file an AOM or to respond to the district court's rule to show cause and he was the architect of his own case's demise. The Third Circuit panel's decision is nonprecedential, with one judge concurring in the result only, and Petitioner did not request rehearing *en banc* so that the whole Court could consider the issues. Instead of reviewing the illusory and artificial conflict argued by Petitioner, it would be far more appropriate to wait for a suitable case where there is an actual conflicting decision, such as a circuit court

decision involving diversity jurisdiction that results in a different outcome on the applicability of analogous AOM requirements.

This matter is not worthy of this Court's consideration.

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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