No. 24-440

IN THE

# Supreme Court of the United States

HAROLD R. BERK,

*Petitioner*,

v.

WILSON C. CHOY, M.D., ET AL.,

*Respondents*.

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

## BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONER


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## INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including medical-malpractice litigation. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ members have significant practical experience with affidavits of merit in Delaware and in other states with substantially similar requirements. In some states, AAJ members have successfully challenged the constitutionality of these laws on grounds that include separation of powers and access to the courts. The requirement significantly adds to the cost of medical malpractice litigation, an area of law that is extraordinarily expensive to bring. The plaintiffs in these cases often have catastrophic injuries or have had a loved one die due to negligent medical care. The affidavit requirement adds yet another hurdle to the many that already exist and cannot be reconciled with

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

the civil rules' promise of "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Rules of Civil Procedure seek to assure the just, speedy, and inexpensive resolution of controversies filed in federal court by establishing a uniform set of requirements for the commencement, conduct, and determination of legal controversies. Decisions of this Court make clear that the uniformity these rules establish must take priority over state substantive and procedural law. Nowhere should that be even more true than when plainly procedural state law conflicts with the mandates of the Federal Rules.

Affidavit or certificate of merit requirements—which vary widely among the states and among the types of claims to which they apply—are plainly procedural aspects of state litigation. They do not define the claim or its elements but rather are a piece of the mechanics of commencing a cause of action. These requirements cannot be reconciled with Federal Rule of Civil Procedure 11's disclaimer that pleadings generally "need not be verified or accompanied by an affidavit" because they require an affidavit, often by a health-care expert, about the legitimacy of the claim. Fed. R. Civ. P. 11(a).

Furthermore, state affidavit requirements impel experts to make what can only be tentative evaluations based on limited information. Because the attestation occurs before discovery, an expert is asked to

opine on the validity of a lawsuit without the type of information the expert normally requires.

The requirements also work against the Federal Rules' priority for just, speedy, and inexpensive resolution of controversies because they add tremendous expense and time to litigation, particularly because the requirements provide significant fodder for satellite litigation that forestalls proceeding to the merits.

For example, the qualifications of the applicant are a frequent basis for dispute. State laws' rigorous qualifications criteria often become the source of granular examinations of the affiant's background and credentials even when different experts will submit the expert reports and testify at trial, as well as frequent interlocutory appeals. Separately, and rather regularly, the substance of the affidavit becomes grounds for dispute over its sufficiency with appeals following trial court rulings. Moreover, the areas affected often stretch well beyond medical malpractice claims to those against the full panoply of licensed professions.

Along with the affidavit requirement, many of these state laws add further procedural mandates to accommodate or render practical the specifics of each state statute. These additional procedural requirements increase their inconsistency with the Federal Rules. For example, New Jersey's affidavit requirement exists alongside a mandate (deemed reversible error if not followed) for a case management conference within ninety days of an answer.

The affidavit requirements, involving as they do the employ of expensive experts, create satellite arenas of dispute that add needless expense to already costly medical-malpractice cases. These battles over expert qualifications also affect expert reputational interests and, concomitantly, their willingness to provide the affidavits in future litigation.

Their palpable variance from the Federal Rules and their significant distortion of the federal litigation process, separately and together, render any attempt to crossbreed state affidavit of merit requirements with federal procedural rules erroneous.

## ARGUMENT

### I. AFFIDAVIT OF MERIT REQUIREMENTS VARY FROM STATE TO STATE AND WOULD PRODUCE NEW BURDENS ON DISTRICT COURTS.

#### A. Incorporation of an Affidavit of Merit Requirement Undercuts the Way in Which the Federal Rules Operate.

One of the great achievements of the Federal Rules of Civil Procedure was to "bring about uniformity in the federal courts." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (quoting *Lumbermen's Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)). In service of that goal, this Court has observed:

> A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate

> a state substantive law (or a state procedural law enacted for substantive purposes).

*Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 409 (2010).

The Rules establish "the normal course for beginning, conducting, and determining controversies." *N.H. Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 406 (1960). The very first rule requires that the entire body of rules be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Those words are not mere aspirations but provide meaningful guidance and were designed to further the due process of law that the Constitution guarantees." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000).

The Rules also declare that there is but a single form of action, Fed. R. Civ. P. 2, and purposefully adopt a "simplified notice pleading standard." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513 (2002). Under this notice-pleading regime, the Rules "invest the deposition-discovery process with a vital role in the preparation for trial," *Hickman v. Taylor*, 329 U.S. 495, 501 (1947), and acknowledge that certain essential facts may only be obtained from one's adversary through compulsory process.

For these reasons, Rule 8 requires only a "short and plain statement of the claim showing that the pleader is entitled to relief" and rejects the need for technical forms. Fed. R. Civ. P. 8(a)(2), 8(d)(1). The "plain statement" requirement is not without some

teeth. Although the Rules do not require "detailed factual allegations," they require "more than labels and conclusions [or] a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). The end result is that federal complaints must contain enough factual matter, taken as true, to show a "plausible entitlement to relief." *Id.* at 556, 559. Moreover, the Rules eschew any requirement that, absent congressional action, complaints be verified or accompanied by an affidavit. Fed. R. Civ. P. 11(a). The required attorney's signature on the pleading "certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that, *inter alia*, the "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." *Id.* at 11(b)(3). A violation of that requirement authorizes the court to levy appropriate sanctions on the attorney. *Id.* at 11(c)(1).

Layering on the affidavit requirements of various States would, to some extent, revive the Conformity Act of 1792, 1 Stat. 278 (1792), which required federal district courts sitting in diversity to utilize state procedural rules. 19 Fed. Prac. & Proc. Juris. § 4508 (3d ed.). The Rules Enabling Act of 1934, 28 U.S.C. §§ 2071-2077, revolutionized the federal rulemaking process, authorizing the establishment of procedural uniformity among the federal courts, even when jurisdiction existed only through diversity. *Id.*

This Court's ruling in *Hanna* made that mandate clear, precluding states from altering the procedural rules that govern federal cases:

> To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

380 U.S. at 473–74.

*Hanna* refined the substantive/procedural dichotomy to determine when the federal rules apply and when state law is paramount. This Court subsequently held that *Hanna* requires a court to determine if there is a "direct collision" between the applicable rule and state law and then, so long as the rule represents a valid exercise of rulemaking authority, to apply the federal rule. *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 5 (1987); *see also Shady Grove*, 559 U.S. at 410 ("[I]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule.").

Despite the frequent fluidity of the substantive/procedural dichotomy, "[r]ules regulating matters indisputably procedural are *a priori* constitutional." *Burlington*, 480 U.S. at 5. There can be no dispute that Rules 8 and 11 fit the "indisputably procedural" criterion and collide with affidavit requirements like that of Delaware.

At the same time, although it is not necessary to the analysis, the Delaware requirement is indisputably procedural. It is a key to the courthouse that is not otherwise utilized in assessing liability. Delaware law requires the affidavit of merit to be filed with the complaint or following a motion to extend the time to file in order for the court clerk to accept and docket the filing. 18 Del. Code Ann. § 6853(a)(1). Once it serves its purpose—unless its validity becomes the subject of satellite litigation—the affidavit has no further application to the litigation because it remains "sealed and confidential," and thus not be deemed a public record. Therefore, it has no substantive purpose; it is simply an aspect of pleading in a medical-malpractice case.

The procedural nature of these state requirements is further exemplified by an analysis by the Washington Supreme Court that invalidated that state's certificate of merit requirement. The State of Washington's Rule 11 "was modeled after the Federal Rule of Civil Procedure (Rule 11), and federal decisions interpreting Rule 11 often provide guidance in interpreting [Washington's] rule." *Biggs v. Vail*, 876 P.2d 448, 451 (Wash. 1994) (citing Wash. Super. Ct. Civ. R. 11). Washington's Rule 8, like its federal counterpart, also requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Wash. Super. Ct. Civ. R. 8.

In 2006, Washington adopted a certificate of merit requirement that applied to medical malpractice cases and required "a statement from an expert that, 'based on the information known at the time of executing the

certificate of merit, . . . there is a reasonable probability that the defendant's conduct did not follow the accepted standard of care.'" *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 216 P.3d 374, 378 (Wash. 2009) (quoting the former Rev. Code of Wash. 7.70.150(3) (2006), *repealed by*, Laws 2023, ch. 102, § 10, eff. July 23, 2023)).

Three years later, a plaintiff who filed a lawsuit over an alleged failure to diagnose ovarian cancer challenged the requirement's constitutionality after her complaint was dismissed for failure to comply.[2] Part of the challenge called upon the state supreme court to determine whether the certificate requirement "can be harmonized with [that] court's rules." *Id.* at 377.

In Washington, court rulemaking is within the exclusive authority of the state supreme court. *Id.* When a rule and statute conflict and "cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Id.* The court could not harmonize the two and held that the certificate requirement directly conflicted with Rules 8 and 11. It conflicted with Rule 8 because it "essentially requires plaintiffs to submit evidence supporting their claims before they even have an opportunity to conduct discovery and obtain such evidence." *Id.* at 379. It also conflicted with Rule 11 because it

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[2] The plaintiff challenged the certificate requirement for violating both the state constitutional guarantee of access to courts and its separation-of-powers provision. *Putman*, 216 P.3d at 376.

"requires the attorney to submit additional verification of the pleadings," which Rule 11 indicates is not needed. *Id.*

The court then turned to the question of whether the requirement was procedural or substantive. It concluded that the law was "procedural because it addresses how to file a claim to enforce a right provided by law." *Id.* It noted that courts in three other States had ruled that a state certificate of merit requirement was procedural and invalid because it conflicted with court-promulgated rules.[3] *Id.* (first citing *Summerville v. Thrower*, 253 S.W.3d 415 (Ark. 2007); then citing *Wimley v. Reid*, 991 So. 2d 135, 138 (Miss. 2008); and then citing *Hiatt v. S. Health Facilities, Inc.*, 626 N.E.2d 71 (Ohio 1994)). Since the *Putman* decision, the Utah Supreme Court also concluded that the state certificate requirement violated separation of powers by exercising a core judicial function by requiring the certificate to be filed with the state Division of Occupational and Professional Licensing, whose assessment of the certificate as inadequate requires courts to dismiss the case without any right of appeal. *Vega v. Jordan Valley Med. Ctr., LP*, 449 P.3d 31, 36–39 (Utah 2019).

The same conclusion should obtain here. A certificate of merit requirement plainly addresses the mechanics of initiating a lawsuit. It is pre-discovery, so

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[3] Oklahoma's certificate of merit requirement was invalidated for violating the state constitutional bar on special laws and infringing the guarantee of open courts. *Zeier v. Zimmer, Inc.*, 152 P.3d 861, 862 (Okla. 2006).

that it does not reflect the information that a testifying expert would review for the factfinder at trial. It does not address the elements of the cause of action, but is a prerequisite to filing an action that will not be dismissed as inadequate.

### B. States Vary in What Is Required of an Affidavit or Certificate of Merit, But the Contents Often Become Disputes Between the Parties.

Twenty-nine states require an affidavit or certificate of merit to proceed with a medical-malpractice case. *See, e.g.*, D. Chanslor Gallenstein, *Whose Law Is It Anyway? The Erie Doctrine, State Law Affidavits of Merit, and the Federal Tort Claims Act*, 60 U. Louisville L. Rev. 19, 30–31 (2021); *Katherine Hubbard*, Comment, *Breaking the Myths: Pain and Suffering Damage Caps*, 64 St. Louis L.J. 289, 305 n.170 (2020).

Although they take disparate approaches, the statutes Respondents would apply in federal courts share a common thread: They require an attestation from a health-care professional who meets the state's expert qualifications criteria and who finds reasonable grounds to believe the defendant or defendants committed medical negligence. *E.g.*, 18 Del. Code Ann. § 6853.

Despite the procedural nature of the affidavit requirement, disputes about compliance are frequent and at odds with Rule 1's promise of "just, speedy, and inexpensive determination of every action and proceeding." They also contain traps for the unwary more

associated with the strictures of code pleading than modern notice pleading.

*1. Satellite litigation occurs over the expert's qualifications.*

States with affidavit requirements generally impose expert witness criteria on the affiant. In some cases, the rigorous qualifications criteria become the source of granular satellite litigation and interlocutory appeals, with some courts authorizing immediate review under the "collateral order" doctrine. *See, e.g.*, *Keith v. Lawrence*, No. 15-0223, 2015 WL 7628691, at *2 (W. Va. Nov. 20, 2015) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). Other states have accommodated appeals of rulings on the affidavit requirement by amending their appellate rules. *See Univ. of Fla. Bd. of Trs. v. Carmody*, 372 So. 3d 246, 248 (Fla. 2023), *reh'g denied*, 372 So. 3d 256 (Fla. 2023) (announcing that it was amending Fla. R. App. P. 9.130(a)(3) in a concurrent opinion to permit the current appeal and future appeals).

The litigation over qualifications not only adversely affects getting to the merits and adds expense to the litigation, but also can tremendously narrow the field of experts available to perform the task. For example, as is common, Michigan requires affidavits of merit to be signed by a health professional who meets state expert-witness requirements. Mich. Comp. Laws § 600.2912d(1). Its expert-witness statute specifies that if the defendant is board-certified in a particular specialty, the affiant must also be board-certified in that specialty. Mich. Comp. Laws § 600.2169(a). Applying that requirement, the Michigan Supreme Court

entertained an interlocutory appeal challenging an expert who was board-certified in anesthesiology and held a certificate in critical care medicine. *Halloran v. Bhan*, 683 N.W.2d 129, 130 (Mich. 2004). The defendant-doctor was board-certified in internal medicine and shared the same subspecialty with the same type of certificate in critical care as the affiant did. *Id*. The court nevertheless ruled the affiant unqualified because he was not board-certified in internal medicine as the defendant was, even while acknowledging the expert and defendant shared the same non-board-certified certificate in critical care medicine, which was the issue in the case. *Id.* at 132.

New Jersey reached an identical result in finding that an expert affiant's board certification in hematology did not qualify her because the two defendants, only one of which was board-certified, specialized in internal medicine. *Pfannenstein v. Surrey*, 291 A.3d 302, 306 (N.J. Super. Ct. App. Div. 2023), *cert. denied*, 298 A.3d 358, and *cert. denied*, 298 A.3d 361 (N.J. 2023).

An examination of the facts in the case explains the time-consuming difficulty that would be imposed on federal courts long before getting to the merits of the case. Three facts illuminate the obstacle that certificates of merit impose both on parties and the courts. First, the underlying medical malpractice alleged in *Pfannenstein* was the "improper use of heparin, a medication for the treatment of blood disorders." *Id.* at 308. The trial court rejected a challenge to the expert because hematology had a "correlation" to the "active implementation of the heparin." *Id.* Second,

the plaintiff claimed that at least one of the defendants was not practicing internal medicine at the time but was a general practitioner serving as an attending physician at the facility where she was treated. *Id.* Third, "[h]ematology is a subspecialty of internal medicine," which means that it encompasses internal medicine and "requires additional training and assessment." *Id.* at 310 (quoting the Am. Bd. of Med. Specialties, *Guide to Medical Specialties* 27 (2002)).

None of that mattered on appeal. As to whether the specific allegation of malpractice allowed a board-certified hematologist to speak to the standard of care and its breach, as well as whether internal medicine was subsumed within hematology, the court stated that "whether an [affidavit of merit] affiant is permitted by a hospital to treat the same malady, provide the same care, or perform the same procedure that is at issue in a malpractice case is irrelevant if the affiant is not a specialist in the same area as the defendant." *Id.* at 312.

On the challenge to one defendant's claimed specialty and whether it was knowable in advance, the court merely accepted an averment in the answer to the complaint that "unequivocally stated she specialized in internal medicine." *Id.* at 312. The rigidity imposed by New Jersey's requirement contrasts with the Third Circuit's admonition to district courts that expert challenges require full development of the facts and evidence to provide the parties with a proper opportunity to be heard on the issue. *See Padillas v. Stork–Gamco, Inc.*, 186 F.3d 412, 417–18 (3d Cir.

1999); *In re Paoli Railroad Yard PCB Litig.*, 916 F.2d 829, 855 (3d Cir. 1990).

The inflexible precision that the affidavit requirement imposes can create significant additional responsibilities on a court employing it. The New Jersey Supreme Court observed that the "painful experience of our affidavit of merit jurisprudence reveals the compelling need for a [case management] conference at an early stage before problems arise." *Ferreira v. Rancocas Orthopedic Assocs.*, 836 A.2d 779, 785 (N.J. 2003). The court then mandated,

> To ensure that discovery related issues, such as compliance with the Affidavit of Merit statute, do not become sideshows to the primary purpose of the civil justice system—to shepherd legitimate claims expeditiously to trial—we propose that an accelerated case management conference be held within ninety days of the service of an answer in all malpractice actions.

*Id.*

Since *Ferreira* was decided, the New Jersey legislature has amended the affidavit statute. Rather than simplify its requirements, the statute now has additional difficulties, causing the New Jersey Supreme Court to observe that "[g]iven the complexity of the amended statute . . . the need for the conference is even more vital today." *Buck v. Henry*, 25 A.3d 240, 250 (N.J. 2011). Failure to hold a *Ferreira* conference and identify an affidavit's flaw for potential correction creates reversible error. *Id.* at 250–51.

If this Court holds that a federal court must adhere to a State's affidavit of merit requirement, then a federal district court would also necessarily adhere to a requirement to hold a case management conference within ninety days and provide additional time to correct the affidavit where that is also a requirement under state law implementing the statute, as it is in New Jersey. And it would plainly undermine the supremacy of the Federal Rules in establishing uniform governance in matters of procedure in federal court.

Delaware medical-malpractice cases are also not immune from qualification challenges for certificates of merit. Delaware's statute requires the affiant to be board-certified in the same or similar field of medicine if the defendant is board-certified. 18 Del. Code Ann. § 16853(c). Because the affidavit requirement must be "strictly followed," in a case involving faulty foot surgery, the court rejected an affidavit of merit from a podiatrist who "was only board *qualified,* not board *certified*," even though he received his board certification while the case was pending. *Benson v. Mow*, No. CV K13C-03-042 RBY, 2014 WL 7007758, at *3 (Del. Super. Ct. Dec. 4, 2014) (emphasis in original). For that reason, the court granted the defendant's motion to dismiss.

These opinions—exemplars of many more across various states—are particularly relevant to this Court's deliberations here because they foreshadow the types of internecine conflict that will befall district courts should affidavits of merit be added to the requirements for filing a complaint in federal court. And, if the certificate requirement applies to filing a federal

complaint, then comity, the collateral order doctrine, or some other device would likely open the door to similar interlocutory review of decisions on a certificate's validity.

The battles over expert qualifications for affidavits of merit are not limited to medical-malpractice cases, as the New Jersey statute mentioned above demonstrates. For instance, Texas has a certificate of merit requirement for architects[4] and mandates that the expert hold the same state license or registration as the defendant *and* be knowledgeable in the defendant's area of practice. Tex. Civ. Prac. & Rem. Code § 150.002(a)(2), (3).

In an interlocutory appeal from a lower-court decision finding a certificate adequate, the Texas Supreme Court held the two requirements were distinct and that the "knowledge requirement is not synonymous with the expert's licensure or active engagement in the practice." *Levinson Alcoser Assocs., L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487, 494 (Tex. 2017). Based on that principle, the court held that the licensed architect's certificate in that case did not qualify because it lacked an explicit statement that expert had familiarity or experience with the specific architectural practice area at issue in the litigation. *Id.* at 494. For that reason, it ordered the case dismissed. *Id.*

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[4] A large number of states impose affidavit or certificate of merit requirements on all licensed professionals that, should the Respondent prevail, would be equally applicable to cases filed in federal court. *See* pp. 23–24 *infra*.

at 495. This decision demonstrates how thorny the issues are and would embroil federal litigation with issues that slow litigation and drain resources.

*2. Satellite litigation occurs over the substance of the certificate.*

Affidavit requirements that apply to medical-malpractice cases generally require that a health-care expert who is qualified to testify under the state's expert witness criteria must signify familiarity with the applicable standard of care, set forth grounds to believe that standard of care was breached, and conclude that the breach was the proximate cause of the injury. *See, e.g.*, 18 Del. Code Ann. § 6853(c); 12 Vt. Stat. Ann. § 1042(a)(3).

Some states enhance that requirement by mandating a more detailed expert report, either in lieu of the affidavit or in addition to it. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 74.351. Maryland's requirement that a certificate of merit be accompanied by an expert report from the attesting physician is typical. *See* Md. Cts. & Jud. Pro. Art. § 3-2A-04(b)(1)(i)1. The certifying expert's attached report must "explain how or why the physician failed . . . to meet the standard of care and include some details supporting the certificate of qualified expert." *Walzer v. Osborne*, 911 A.2d 427, 438 (Md. 2006). It must be a "detailed account" that supplements what is contained in the certificate. *Id.*

In addition to this detailed report (which that must be composed without the benefit of discovery), Maryland law requires that the defendant disputing liability respond to the report with a countervailing

expert certificate that "attest[s] to compliance with standards of care, or that the departure from standards of care is not the proximate cause of the alleged injury." Md. Cts. & Jud. Proc. § 3-2A-04(b)(2)(i). Presumably, if this Court decides that a plaintiff must comply with a state affidavit of merit requirement, a plaintiff in federal court in Maryland will need to go to the expense of a preliminary expert report and later a more comprehensive expert report after discovery. And, once that is filed, the defendant will need to produce a certificate of merit rebutting the plaintiff's version of events.

These reports become high-stakes collateral disputes between the parties and create a trial within a trial, along with appeals, before the merits can be tried. In *Powell v. Wurm*, 108 A.3d 552 (Md. Spec. App. 2015), *cert. denied*, 114 A.3d 711 (Md. 2015), for example, the plaintiff-estate appealed the dismissal of its case where a perforation of a vein near the atrium of the decedent's heart necessitated subsequent surgeries to remove an errantly placed filter and repair the laceration. In defense of the report, the plaintiff argued that there was no dispute that the defendant perforated the vein and that "discovery would be necessary to determine precisely which of [the defendant's] actions or inactions had led to that perforation." *Id.* at 554. The trial court nonetheless dismissed the case ruling that the report lacked sufficient detail about how or why the standard of care was breached. *Id.*

On appeal, that ruling was reversed. The Court of Special Appeals concluded that the report stated the

"precise nature of the medical procedure" and explained that the "misplacement of the filter caused the injury. *Id*. at 556. It was therefore deemed "legally sufficient." *Id*.

One notable aspect of the case for purposes of understanding how the affidavit requirement can unnecessarily extend litigation is that the alleged malpractice incident took place in 2009. *Id*. at 553. The case was filed in 2012, three years after the filter placement procedure in question and two years after the patient's death. *Id*. The decision reinstating the case on appeal was made in 2015, with Maryland's highest court denying certiorari that same year. That chronology indicates a three-year period of litigation at every level of the Maryland courts took place before the defendant even had to file an answer. The process certainly cannot be described as just, speedy, and inexpensive.

The events in *Powell* are not a one-off, as other cases already detailed demonstrate. To be sure, some states do not have much satellite litigation over the contents of reports. For example, in some states, counsel may serve as the affiant, attesting to having consulted and reviewed the case with a qualified health professional who concluded that the claim is "reasonable and meritorious." *See, e.g.*, 735 Ill. Comp. Stat. § 5/2-622(a)(1); Fla. Stat. § 766.104(1); Miss. Code Ann. § 11-1-58(1).

Even so, Florida has a hybrid model that requires not only counsel's certification about the good-faith ba-

sis for the claim, but also a contemporaneous "[c]orroboration of reasonable grounds to initiate medical negligence litigation" in the nature of a "verified written medical expert opinion from a [qualified] medical expert." Fla. Stat. § 766.203(2)(b). The disputes over these reports, as described earlier, caused the Florida Supreme Court to amend its appellate rules two years ago to permit interlocutory review when the defendant's challenge is denied. *Carmody*, 372 So. 3d at 248. Tennessee similarly requires attestations from both counsel and from a medical expert. *See* Tenn. Code Ann. § 29-26-122(a)–(b).

Further, state affidavit of merit statutes differ with respect to the effect of noncompliance. In Delaware, the affidavit requirement is a key requirement in medical-malpractice cases; a case may not be filed unless the complaint is accompanied by an affidavit of merit for each defendant signed by an expert witness. 18 Del. Code Ann. § 6853(a)(1). Vermont's statute contains the same bar on filing. 12 Vt. Stat. Ann. § 1042(a). Even so, some complaints are filed and then subject to a motion to dismiss. Vermont requires that the certificate of merit be an attestation from counsel that "he or she has consulted with a [qualified] health care provider" who described the applicable standard of care, found a reasonable likelihood that the defendant failed to meet that standard of care, and that the breach of the standard of care caused the plaintiff's injury. *Id.*

In *McClellan v. Haddock*, 166 A.3d 579 (Vt. 2017), the Vermont Supreme Court rejected a substantial

compliance argument where plaintiffs' counsel included all the elements of the certificate requirement in the signed complaint and had moved to amend the complaint to attach a separate certificate of merit. *Id.* at 583. Instead, it upheld dismissal with prejudice. *Id.* at 589. As the court subsequently explained, "mak[ing] explicit what [it] implicitly held in *McClellan*," even substantial compliance is insufficient because "strict compliance" is necessary. *Quinlan v. Five-Town Health All., Inc.*, 192 A.3d 390, 395 (Vt. 2018). *Cf. Miller v. Cath. Health Initiatives-Iowa, Corp.*, 7 N.W.3d 367, 374 (Iowa 2024) (holding qualifying expert's signed but unsworn certificate of merit was not substantial compliance nor was the issue cured by the subsequent report signed under penalty of perjury).

Still, other states permit the case to be filed and do not rely on the court clerk as Delaware does to screen out complaints without affidavits. In some of those instances, "the action [is] subject to dismissal with prejudice. *See, e.g.*, Tenn. Code Ann. § 29-26-122(c).[5]

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[5] Tennessee also obligates a defendant to file a certificate of good faith if the defendant contends fault on the part of a non-party. Tenn. Code Ann. § 29-26-122(c). A failure by the defendant to do so prohibits the defendant from asserting, and prohibits a judge or jury from considering, the fault of others. *Id.*

*3. Incorporation of state affidavit of merit requirements would extend beyond medical malpractice cases.*

State affidavit requirements do not apply only in medical-malpractice cases. States have adopted them in a number of other instances that presumably would be affected by this Court's ruling.

Twelve state statutes require affidavits or certificates of merit outside of medical malpractice actions for lawsuits against licensed professionals, either generally or in specific categories.[6] States with similar laws include:

- **Arizona:** Ariz. Rev. Stat. § 12-2602 (covering any licensed professional);
- **California:** Cal. Civ. Pro. § 411.35 (covering architects, engineers, and land surveyors);
- **Colorado:** Colo. Rev. Stat. § 13-20-602 (covering acupuncturists and any other licensed professional);
- **Georgia:** Ga. Code § 9-11-9.1(g) (covering twenty-six listed licensed professionals, such as physical therapists, as well as businesses vicariously liable for harm caused by a licensed professional);

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[6] In at least three states, the requirement of a certificate of merit is not statutory but incorporated in the state civil rules. *See* Pa. R. Civ. P. 1042.3 (applying to licensed professionals); N.C. R. Civ. P. 9(j) (applying to medical professionals); Ohio Civ. R. 10(D)(2).

- **Hawaii:** Haw. Rev. Stat. § 672B-6 (covering design professionals);
- **Maryland:** Md. Cts. & Jud. Proc. § 3-2C-01 (covering architects, interior designers, landscape architects, engineers, and land surveyors);
- **Minnesota:** Minn. Stat. § 544.42 (covering attorneys, architects, accountants, engineers, land surveyors, and landscape architects);
- **Nevada:** Nev. Stat. § 40.6884 (covering design professionals, engineers, land surveyors, and architects);
- **New Jersey:** N.J. Rev. Stat. § 2A:53A-27 (covering "licensed persons");[7]
- **Oregon:** Ore. Rev. Stat. §§ 31.300, 31.350 (covering design professionals and real estate licensees);
- **South Carolina:** S.C. Code § 15-36-100(G) (covering twenty-two listed licensed professionals); and
- **Texas:** Tex. Civ. Prac. & Rem. Code § 150.002 (covering licensed architects, licensed professional engineers, registered landscape architects, and registered professional land surveyors).

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[7] New Jersey's affidavit requirement applies to claims against every "licensed person," which includes accountants, architects, attorneys, dentists, engineers, physicians, podiatrists, chiropractors, registered professional nurses, health care facilities, physical therapists, land surveyors, registered pharmacists, veterinarians, and insurance producers. N.J. Rev. Stat. § 2A:53A–26.

Application of these diverse state statutes and rules in federal diversity litigation involving certificates of merit in federal court may require the addition of procedures that accommodate the specifics of each state statute, which would be inconsistent with the Federal Rules.

## II. AFFIDAVIT REQUIREMENTS UNNECESSARILY INCREASE THE COSTS OF MEDICAL-MALPRACTICE LITIGATION.

Beyond the incompatibility between the Federal Rules and state procedural requirements that impose affidavits or verification upon the filing of a federal complaint, the realities of medical-malpractice litigation further advise against incorporation of the added expense and extended litigation costs that flow from certification before discovery. Medical malpractice cases do not proceed as do other personal injury cases, but always have significant additional requirements. They require extraordinary investments of time and money while winning percentages are well below those of other personal-injury cases.

An examination of the empirical literature shows that "patients lose twice as many medical malpractice verdicts as they win," Philip G. Peters, Jr., *Doctors & Juries*, 105 Mich. L. Rev. 1453, 1457 (2007), while Justice Department statistics show that tort plaintiffs otherwise prevail in about fifty percent of cases. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Medical Malpractice Trials and Verdicts in Large Counties, 2001*, NCJ 203098, at 1 (Apr. 2004) (finding

that medical-malpractice plaintiffs prevail only twenty-seven percent of the time, which is about half as frequently as plaintiffs in all tort cases). These figures have remained consistent over time. *See* Valerie Hans & Neil Vidmar, *Judging the Jury* (1986) (reviewing the available literature and concluding that the plaintiff win-rate was about thirty percent before juries, while tort plaintiffs prevailed in about fifty percent of jury trials); *but see* Gabriel H. Teninbaum & Benjamin R. Zimmermann, *A Tale of Two Lawsuits*, 8 J. Health & Biomed. L. 443, 443 (2013) (finding the loss rate for patients to be ninety percent in Massachusetts).

Plaintiffs' lawyers typically self-fund these cases and receive compensation on a contingency fee basis. Researchers at the American Bar Foundation found that the high risk forces lawyers to "screen medical malpractice cases quite stringently." Stephen Daniels & Joanne Martin, *Damage Caps and Access to Justice: Lessons from Texas*, 96 Or. L. Rev. 635, 656 (2018). As a result, their survey found that lawyers who regularly practice in that field agree to represent plaintiffs in fewer than eight percent of the cases that come to them. *Id.* A lawyer whose practice focused on brain-injury cases told the researchers that his firm escrows $300,000 per case because of the high cost of litigating the cases. *Id.* at 658. A primary expense center is the cost of medical experts. One company that maintains an expert witness directory for lawyers puts the hourly rate for a physician expert in the range of $500 to $1000 per hour. James J. Mangraviti, Jr., *How Much Can a Physician Expert Witness Charge?*, SEAK, Inc., https://www.testifyingtraining.com/how-much-

can-a-physician-expert-witness-charge/ (last visited June 3, 2025).

Even when conducted by experienced medical-malpractice counsel, preparing a case for filing is an arduous task. Often, "[i]njury in medical malpractice cases can be difficult to detect." *Deen v. Egleston*, 597 F.3d 1223, 1235 (11th Cir. 2010); *see also Owens v. White*, 380 F.2d 310, 316 (9th Cir. 1967) ("[N]ot even the fact of injury can always be clear."). Even when the injury could not have occurred in the absence of malpractice, particularly before discovery commences, the basis of the negligence is not always readily apparent. *See*, *e.g.*, *Truth v. Eskioglu*, 781 F. Supp. 2d 630, 634 (M.D. Tenn. 2011) (involving a certificate of good faith that found the plaintiff had a good-faith basis for suit, but that the precise negligence could not be determined without access to the full medical records only available in discovery).

Because discovery is not available prior to filing the complaint and even the patient's own medical records essential to an evaluation can be difficult to obtain, *see, e.g.*, *T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 964 (8th Cir. 2006), counsel must find experts willing to opine on the likely cause of the injury and the likely departure from the standard of care on the basis of an incomplete record at the pre-filing stage, which is frequently a herculean task. *See* Teninbaum & Zimmermann, *supra*, at 446–47 (indicating that it is an expensive process, generally involving retired doctors or doctors from another region of the country because colleagues generally will not usually agree to testify against each other).

In some states, besides the affidavit requirement, counsel may be required to notify the potential health-care defendants of an intent to sue, along with theories of negligence and damages as much as six months before filing the case, in order to permit the putative defendants to consider settlement or prepare a defense. *See, e.g.*, Fla. Stat. § 766.106(2)(a); Mass. Gen. Laws ch. 231, § 60L(a).

Some states require submission to a screening panel to evaluate the legitimacy of the case. Often, this pre-filing screening procedure constitutes a jurisdictional prerequisite. *See, e.g.*, *Johnson v. Methodist Hosp.*, 547 F. Supp. 780 (N.D. Ind. 1982); *Schwartz v. Lilly*, 452 A.2d 1302 (Md. 1982); *Perez v. Brubaker*, 660 P.2d 619 (N.M. Ct. App. 1983). And discovery is generally not permitted until after the screening process is complete. *E.g.*, *Gugino v. Harvard Cmty. Health Plan*, 403 N.E.2d 1166, 1168 (Mass. 1980) ("[T]he hearing before the tribunal ordinarily precedes discovery.").

The screening mechanism is intended to determine whether a "legitimate question of liability appropriate for judicial inquiry" exists or "whether the plaintiff's case is merely an unfortunate medical result." *Feinstein v. Mass. Gen. Hosp.*, 643 F.2d 880, 881–82 (1st Cir. 1981). The First Circuit has held that the screening requirement is generally binding on a federal court hearing a medical malpractice case while sitting in diversity. *Id.* at 888.

The extra expenses these requirements impose must be considered against the limitations on recovery that some states have enacted in determining whether

to go forward with a case. Together, the expense and potential recovery create substantial limits on access to justice. Adding additional expert requirements in federal court, such as the affidavit requirement, only narrows the range of cases that can vindicate the negligently injured. After all,

> [t]he reason for not taking low-value cases even though there may be malpractice involved is simple. There must be enough potential for recovery to pay for the costs of screening the case, the costs of preparing the case, the costs of actually litigating the case, the cost of the lawyer's time, and possibly the cost of a referral fee to the lawyer who brought the case to the specialist. On top of this, there must be enough financial recovery to help pay for the costs of screening all of the cases ultimately rejected by the lawyer, as well as other parts of the lawyer's overhead.

Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers, Specialization, and Medical Malpractice*, 59 Vand. L. Rev. 1051, 1063 (2006).

By making it yet more difficult to bring a case, the addition of a certificate requirement that encourages yet more satellite litigation before reaching the merits, does poorly in realizing the promise made in *Marbury v. Madison*, that "[o]ne of the first duties of government" and the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. (1 Cranch) 137, 163 (1803).

## III. AFFIDAVIT REQUIREMENTS HAVE UNDESIRABLE SPILLOVER EFFECTS IN LITIGATING THE MERITS OF A CLAIM.

Trials in areas like medical malpractice, which require expert evidence, often come down to battles over the expert's credibility, an evaluation that is committed to the jury's province. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions."). As this Court recognized in *Daubert*, the "traditional and appropriate means" to attack an expert's credibility is through "[v]igorous cross-examination." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993).

In permitting cross examination, courts afford parties "wide latitude 'to test qualifications, credibility, skill or knowledge, and value and accuracy of [expert] opinion.'" *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 869 (Mo. 1993); *see also Blount Cnty. v. Campbell*, 109 So. 2d 678, 682 (Ala. 1959). Moreover, courts permit the use of materials not otherwise admissible for the "purpose of impeaching, contradicting, or discrediting a witness through cross examination." *Stang-Starr v. Byington*, 532 N.W.2d 26, 30 (Neb. 1995); *see also Buckelew v. Womack*, 913 S.E.2d 789, 801 (Ga. App. 2025) (permitting impeachment on the basis of remarks made on a podcast); *McCaley v. Petrovic*, 253 N.E.3d 1010, 1036 (Ill. App. 2024), *appeal denied*, 246 N.E.3d 1203 (Ill. 2024) (past disciplinary history).

Some states include the affidavit of merit filed prior to discovery within the category of material eligible to impeach experts the affidavit of merit filed prior to discovery. It is not unusual for an expert, upon reviewing material produced in discovery to change or refine an opinion expressed in an affidavit based on allegations and limited medical records. In Michigan, for example, an affidavit of merit inconsistent with trial testimony is proper impeachment evidence. *Barnett v. Hidalgo*, 732 N.W.2d 472, 480 (Mich. 2007).

Although Delaware does not have this problem (because the affidavit is sealed and ineligible for use at trial), where the affidavit is not cordoned off, as in the vast majority of states, the potential exposure for making medical judgments on limited information deters many medical professionals from becoming witnesses or signing affidavits in the first place. *See* Teninbaum & Zimmermann, *supra*, at 446–47 (explaining that the potential for ostracism often means that plaintiffs must rely upon retired doctors or doctors from outside the jurisdiction). Even if a doctor is willing to sign an affidavit at the front end, the physician may later decide that the new information available through discovery—even if strongly indicating malpractice—will cause serious credibility problems to befall him or her as a witness and choose to disassociate from the case, so that a new expert, unencumbered by having expressed a previous opinion in the case, can become the expert witness at trial.

These consequences distance the use of affidavits yet further from the civil rules' goal of the "just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. This Court has long

recognized that the civil rules represent a "new policy" based on the idea that "the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). Adoption of the state procedural obligations inconsistent with Rule 11, in order to entertain a valid federal complaint, cannot be reconciled with that once-new, but now well-established policy.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Third Circuit in this case.

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