No. 22-1212

ORIGINAL

In The

Supreme Court of the United States

BARBARA LINDSEY,

Petitioner,

v.

MAX F. ADLER, M.D., P.A. F/K/A PARK CITIES DERMATOLOGY CENTER A/K/A COPPELL DERMATOLOGY; MAX F. ADLER; LINDA L. WHITE; AND JOHN DOES,

Respondents.

On Petition For A Writ Of Certiorari To The Fifth District Court Of Appeals For The State Of Texas

PETITION FOR WRIT OF CERTIORARI

BARBARA LINDSEY
Petitioner Pro Se
[redacted]

QUESTIONS PRESENTED

This appeal presents an important and novel question concerning the claim splitting branch of res judicata or claim preclusion. In this case, Petitioner brought a prior action predicated upon the improper placement of a foreign object in her body, which was dismissed. Subsequently, another foreign object was discovered, which was not related to the prior object. The Texas Courts dismissed the claim under the rule against claim splitting.

The following issues are thus raised:

1. Does it violate the Due Process Clause to give preclusive effect to judgments rendered in proceedings against a party against who did not have a "full and fair opportunity" to litigate the claim?

2. Does it violate the Due Process Clause to bar a plaintiff from bringing an action who did not know or could not reasonably have known of her injuries at the time of the first action?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Lindsay v. Adler, No. 05-12-00010-CV, 2013 WL 1456633 (Tex. App. – Dallas Apr. 9, 2013, no pet.) (mem. op.).

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Lindsey v. Adler*, 2022 Tex. App. LEXIS 6446, *1, 2022 WL 3699608 (Tex. App. Dallas August 26, 2022).

JURISDICTION

The Court of Appeals issued its decision on August 26, 2022. The Supreme Court of Texas denied a petition for review on January 27, 2023. *Lindsey v. Adler*, 2023 Tex. LEXIS 98 (Tex. January 27, 2023). Rehearing was denied on March 17, 2023. *Lindsey v. Adler*, 2023 Tex. LEXIS 274 (Tex. March 17, 2023). These documents are in the Appendix at App. 1-14.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS CIVIL PRACTICE AND REMEDIES CODE Sec. 74.351. EXPERT REPORT. (a) In a health care liability claim, a claimant shall, not later than the 120th day after the date each defendant's original answer is filed or a later date required under Section 74.353, serve on that party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the later of the 21st day after the date the report is served or the 21st day after the date the defendant's answer is filed, failing which all objections are waived.

(b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care

provider, shall, subject to Subsection (c), enter an order that:

(1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and

(2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

(c) If an expert report has not been served within the period specified by Subsection (a) because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency. If the claimant does not receive notice of the court's ruling granting the extension until after the applicable deadline has passed, then the 30-day extension shall run from the date the Petitioner first received the notice.

STATEMENT OF THE CASE

In 2009, Petitioner went to Respondents for laser scar removal. (1CR271.) During treatment she was offered an injection for "stinging." The exact site of that injection became swollen, protruded, infected, and discolored (1CR212-214).

Petitioner sought treatment almost immediately for problems with the injection site. Within a short time, a foreign body (microchip or chip) was recovered

from the site of the injection. (1CR214). That finding prompted a lawsuit in 2011. Unfortunately, Petitioner couldn't get an attorney, and the 2011 lawsuit was dismissed for want of an Expert Report under 74.351(b). (1CR357)

Problems arose again when a hardened lump appeared at the same site almost 7 years later. On May 26, 2017, a surgeon located and removed another foreign body from the injection site. (CR212). Until it was removed on May 26, 2017, Petitioner was completely unaware of this Second Foreign Body. (1CR214)

The item removed from Petitioner has zero connection with laser scar removal. Lab analysis revealed "parts of wireless sensor body network." (1CR227). Medical and lab records were also reviewed by a Board-Certified Anatomical Pathologist MD, licensed in seven states including Texas, who concluded: "in fact a crystalloid foreign object. In other words, it is not tissue naturally produced or derived from her body." (1SUPPCR8).

Petitioner filed a claim for the Second Foreign Body in 2019 – which was as fast as she was able to do it. Petitioner attorneys seemed befuddled by the nature of the foreign body involved, and did not want to take the case. In short, she proceeded pro se and managed to file this case just under 24 months from the May 26, 2017 discovery of the foreign body (1CR15).

On November 9, 2020 Dallas County's 160th District Court dismissed the case. Petitioner appealed to

the Fifth District Court of Appeals, Dallas, which affirmed in a memorandum opinion. The Texas Supreme Court denied a petition for review.

REASONS FOR GRANTING THE WRIT

"Claim splitting draws on and is a subset of the doctrine of res judicata." *Cooper v. Retrieval-Masters Creditors Bureau, Inc.*, 42 F.4th 688, 696 (7th Cir. 2022) (citing *Scholz v. United States*, 18 F.4th 941, 951 (7th Cir. 2021)). It requires a plaintiff to assert all causes of action arising from a common set of facts in one lawsuit. See *Katz v. Gerardi*, 655 F.3d 1212 (10th Cir. 2011); Restatement of Judgments (Second) § 24.

Res judicata, however, does not apply to claims that accrued after the prior suit was filed. *Cooper* at 697 (citing *Smith v. Potter*, 513 F.3d 781, 783 (7th Cir. 2008)); see also *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 529-530 (6th Cir. 2006) ("res judicata does not apply to claims that were not ripe at the time of the first suit") (citing *Katt v. Dykhouse*, 983 F.2d 690, 694 (6th Cir. 1992)); *Manning v. Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992) ("we do not believe that the res judicata preclusion of claims that 'could have been brought' in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation."); *Computer Assocs. Int'l v. Altai, Inc.*, 126 F.3d 365, 369 (2d Cir. 1997).

The Restatement (Second) of Judgments § 26(1)(e) setting forth exceptions to the general rule concerning

claim splitting for cases involving continuing wrongs applies to situations in which a harm cannot be remedied "at one go." See *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.*, 953 F.3d 998 (7th Cir. 2020).

To be sure, these authorities do not speak directly to the Due Process considerations at stake. But given the Due Process concerns in the application of claim preclusion, the analysis flows therefrom. Claim preclusion "is bounded by the Due Process Clause of the Fourteenth Amendment, which overrides the otherwise preclusive effect of a prior judgment if the claimant did not have a 'full and fair opportunity to litigate [the] claim' in the prior action." *Dookeran v. Cnty. of Cook, Ill.*, 719 F.3d 570, 576 (7th Cir. 2013) (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982)); see *Clements v. Airport Auth.*, 69 F.3d 321, 328 (9th Cir. 1995).

The determination of the Texas Courts thus conflict with *Kremer* and decisions of the federal courts of appeals.

Quite aside from Due Process concerns with claim preclusion, there is also the question whether a state may, consistent with Due Process, bar Petitioner's claim without her being aware that she had been injured. This Court has not passed on this issue and it is an open one. See Josephine Herring Hicks, The Constitutionality of Statutes of Repose: Federalism Reigns, 38 Vand. L. Rev. 627, 643 (1985); Christopher J. Trombetta, The Unconstitutionality of Medical Malpractice

Statutes of Repose: Judicial Conscience Versus Legislative Will, 34 Vill. L. Rev. 397, 399 (1989).

It has been the subject of conflicting decisions at the state level. Compare *Landgraff v. Wagner*, 546 P.2d 26, 29 (Ariz. Ct. App.), appeal dismissed, 429 U.S. 806 (1976) (no constitutional infirmity) with *Shessel v. Stroup*, 316 S.E.2d 155, 156 (Ga. 1984), and *Clark v. Singer*, 298 S.E.2d 484, 485 (Ga. 1983); *Gaines v. Preterm-Cleveland, Inc.*, 514 N.E.2d 709 (Ohio 1987) (Medical malpractice statute of repose which cut off right of person injured by malpractice who could not reasonably discover injury within three years after act constituting malpractice to pursue his claim violated due process clause under State Constitution; such plaintiffs were not afforded reasonable time in which to enforce their right.)

CONCLUSION

Certiorari should be granted to resolve the serious issues raised on this petition.

Dated: June 13, 2023

Respectfully submitted,

BARBARA LINDSEY
Petitioner Pro Se
[redacted]