

No. 21-228

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IN THE  
**Supreme Court of the United States**

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**MICHAEL MURPHY,**  
*Petitioner,*  
v.

**RICHARD SARTA, ET AL.,**  
*Respondents.*

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On Petition for Writ of Certiorari  
to the Tennessee Supreme Court

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**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether the dismissal of the Petitioner's appeal by the Tennessee Court of Appeals for failing to timely file a notice of appeal as required by the Tennessee Rules of Appellate Procedure violated an alleged federal constitutional right to a jury trial when this matter was tried by a 12 person that returned a verdict finding the Respondents not at fault for the Petitioner's alleged injuries.

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## **OPINIONS BELOW**

The is no reported opinion below, in that upon the Petitioner filing his notice of appeal, the Tennessee Court of Appeals issued an Order on September 15, 2020 that the Petitioner show cause as to why his appeal should not be dismissed, in part, due to being untimely filed. The Tennessee Court of Appeals then issued an Order on October 14, 2020 dismissing the Petitioner's appeal, in part, upon determining that it was in fact untimely filed. The Order, setting forth the Tennessee Court of Appeals rationale, is included as part of the Petitioner's Appendix. The Tennessee Supreme Court then denied the Petitioner's application for permission to appeal on March 17, 2021.

## **JURISDICTION**

The Petitioner asserts that this Court possesses jurisdiction in this matter pursuant to 28 U.S.C. § 1257(a).

## **STATEMENT OF THE CASE**

This lawsuit arises out of events alleged to have occurred on June 22, 2012. Pet. App. B, Complaint. The petitioner, Michael Murphy, claims that on that date he suffered injuries to his hand from an automatic door at the entrance to a store and art gallery operated by the respondent, Rebecca Keck, d/b/a Ingenuity 101, located at 101 East Main Street, Morristown, Tennessee. *Id.* On June 6, 2019, the parties appeared for a jury trial in this matter, where

after the close of proof, the 12-person jury found that the Respondents were not at fault in this matter. Pet. App. B, Jury Verdict Form. The trial court entered judgment upon the jury's verdict on June 20, 2019. Pet. App. A, Order.

On July 18, 2019, the Petitioner filed in the trial court a Motion for New Trial pursuant to Rule 59 of the Tennessee Rules of Civil Procedure, listing 10 different reasons why he contended he was entitled to a new trial. Pet. App. B, Motion for New Trial. On October 3, 2019, the Petitioner filed an Amended Motion for New Trial adding an additional reason why he contended he was entitled to a new trial in this matter. Pet. App. B, Amended Motion for New Trial.

After trial, the Respondents also filed their own motion seeking discretionary costs as the prevailing parties at trial. Pet. App. B, Order.

On October 11, 2019, the parties appeared for hearing before trial court on all post-trial motions. Pet. App. B, Order. At the hearing, the trial court denied the Petitioner's Motion for New Trial/Amended Motion for New Trial, and granted, in part, the Respondents' Motion for Discretionary Costs. *Id.* The trial court entered an Order regarding the Post-Trial Motions on November 8, 2019. *Id.*

On December 5, 2019, the Petitioner filed a Motion with the trial court, asking the court, pursuant to Rule 59.04 of the Tennessee Rules of Civil

Procedure, to alter or amend the November 8, 2019 Order “to specify and identify which particular court reporter expenses are being awarded to Defendant of \$2,500.00 and to correct the amount in the third paragraph of the Order on page 2 which states \$3,587.81, as well as to indicate whether the award is pursuant to TRCP 54.04(2).” Pet. App. A, Motion. On February 7, 2020, the trial court conducted a hearing on the motion and altered the amount of discretionary costs awarded. Pet. App. B, Order on Plaintiff Motion Related to Discretionary Costs.

On March 16, 2020, the Petitioner filed a Notice of Appeal in the Tennessee Court of Appeals. Pet. App. A, Order. On September 15, 2020, the Tennessee Court of Appeals issued an Order asking the Petitioner to show cause why his appeal should not be dismissed as having been untimely filed. *Id.* The Tennessee Court of Appeals specifically found that “a review of the record on appeal reveals that the appellant did not timely appeal the November 8, 2019 order, thus depriving this Court of jurisdiction to consider any issues with regard to his motion for new trial,” as the November 8, 2019 order denied the Petitioner’s motion for new trial and thereby constituted a final judgment for purposes of filing an appeal. *Id.* The Tennessee Court of Appeals noted that it was “unable to determine from the notice of appeal whether the appellant [was] attempting to appeal issues with regard to his motion for new trial or whether he [was] attempting to appeal the award of discretionary costs contained in the February 13, 2020 order.” *Id.* The Tennessee Court of Appeals

provided the Petitioner until September 30, 2020 to “show cause why this appeal should not be dismissed as having been untimely filed.” *Id.*

On October 14, 2020, the Tennessee Court of Appeals found that the November 8, 2019 order denied the Petitioner’s motion for new trial, and therefore the appellant failed to timely appeal the issues raised in the motion for new trial. Pet. App. A, Order. The Tennessee Court of Appeals reasoned that “the thirty-day time limit for filing a notice of appeal may be extended by the timely filing of one of four allowed motions pursuant to Tenn. R. Civ. P. 59.01.” *Id.* It further reasoned that “Rule 59.01 clearly and unambiguously provides that these four motions ‘are the only motions contemplated by the rules’ which will extend the time for filing an appeal,” and that “[f]urthermore, Rule 59.01 provides: “[m]otions to reconsider any of these motions are not authorized and will not operate to extend the time for appellate proceedings.” *Id.* As a “motion for discretionary costs is not among the motions that toll the time for taking an appeal,” it “logically follows that a motion seeking to amend an order for discretionary costs likewise would not toll the time for filing a notice of appeal.” *Id.*

The Tennessee Court of Appeals further found that the February 13, 2020 order amended the November 8, 2019 order only as to the amount of the discretionary costs, and the judgment was not altered in respect to the appellant’s motion for a new trial. *Id.* Therefore, “if [the Tennessee Court of Appeals] were

to consider appellant's [December 5, 2019] motion regarding the November 8, 2019 order as one filed pursuant to Rule 59, the motion would be an impermissible motion to reconsider." *Id.* Finding that "the thirty-day time period for filing a notice of appeal of the judgment began to run when the Trial Court entered its November 8, 2019 order denying plaintiff's motion for a new trial, ...] the Court of Appeals concluded the notice of appeal was untimely filed as to any issues regarding the motion for new trial or the underlying judgment[,] and therefore it did not have jurisdiction to consider those issues. *Id.* The Tennessee Court of Appeals therefore found that the Petitioner's appeal was timely only as to the February 13, 2020 order regarding discretionary costs, and therefore the appeal could proceed in his appeal as to the issues regarding discretionary costs only. *Id.* It then dismissed the appeal, in part, as to the raised in the Petitioner's motion for a new trial.

On December 14, 2020, the Petitioner filed an Application for Permission to Appeal with the Tennessee Supreme Court seeking their review as to whether the Tennessee Court of Appeals properly dismissed his appeal, in part, for being untimely filed pursuant to the Tennessee Rules of Appellate Procedure. Pet. App. C. The Tennessee Supreme Court entered an Order on March 17, 2021 denying the Petitioner's Application for Permission to Appeal and thereby refusing to consider this matter. Pet. App. C., Order.

## ARGUMENT

This Court should deny the Petition for Writ of Certiorari filed in this matter for two reasons. First, the Petitioner failed to timely file his Petition within the time limits set forth in Rule 13 of the Rules of the Supreme Court of the United States in that he filed his Petition more than 90 days after the Tennessee Supreme Court, the highest state court, refused to exercise its discretion and accept his application for permission to appeal. Second, the Petition fails to set forth any rationale pursuant to Rule 10 of the Rules of the Supreme Court of the United States as to why this Court should exercise its discretionary authority in this matter. However, a complete consideration of the filings by the Petitioner shows that the requested relief does not meet any of the character of reasons found within Rule 10 of the Rules of the Supreme Court of the United States.

- 1. The Petitioner failed to timely file his Petition for Wirt of Certiorari.**

Making the same error he made in attempting to appeal the judgment entered by the trial court in this matter, the Petitioner has failed to timely file his Petition for Wirt of Certiorari with this Court. Pursuant to Rule 13 of the Rules of the Supreme Court of the United States:

Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal,

entered by a state court of last resort [...] is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

As admitted in the Petition, the Petitioner is appealing from a March 17, 2021 Order entered by the Tennessee Supreme Court wherein it denied the Petitioner's application for permission to appeal. Upon the entry of this Order by the Tennessee Supreme Court denying his application for discretionary review, the Petitioner had 90 days to file his Petition for Writ of Certiorari with this Court. Yet, the Petitioner did not file his Petition until almost five months later on August 13, 2021. For this reason alone, this Court should deny the Petition for Writ of Certiorari and refuse to consider this matter.

**2. The Petition for Wirt of Certiorari fails to provide any compelling reasons for why this Court should exercise its discretion and consider this matter.**

Rule 10 the Rules of the Supreme Court of the United States sets forth a list of character of reasons that this Court will consider in determining whether

it should exercise its discretionary authority to grant a Petition for Writ of Certiorari and consider a matter:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a)** a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b)** a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

**(c)** a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Of the above, reason (a) is clearly not applicable to this matter as this Petition is being filed concerning the decision of a state court rather than a decision from the United States Court of Appeals.

That leaves reasons (b) and (c) both of which concern state courts deciding important federal questions that either conflict with the decisions of other state courts of last resort, conflict with relevant decisions of this Court, or decides important questions of federal law that have not been settled by this Court. The Petition, however, fails to address what federal question the Tennessee Court of Appeals raised in making its determination to dismiss, in part, the Petitioner's appeal and why that decision needs to be addressed by this Court.

The Petition focuses primarily on Tennessee law, particularly the application of certain Tennessee Rules of Civil Procedure and Tennessee Rules of Appellate Procedure by Tennessee appellate courts. In fact, the Tennessee Court of Appeals dismissed the Petitioner's appeal, in part, based upon his failure to timely file a notice of appeal as to the issues raised in his motion for new trial in accordance with the Tennessee Rules of Appellate Procedure. Nowhere in the October 14, 2020 Order of the Tennessee Court of Appeals did it interpret, rely upon, or decide any important questions of federal law.

The Petition does allege that these rules of procedure are used to "block the right to a jury trial," yet the Petitioner received a 12-person jury trial in this civil, personal injury matter. As the Petitioner received a jury trial, the Respondents are unsure as to how his perceived constitutional rights were violated given that his Petition nowhere explains the precedent behind his alleged federal constitutional right to a jury trial in a state civil proceeding, what it encompasses, or how it was violated.

Further, assuming, arguendo, that the Petitioner is solely complaining that he has been disenfranchised of some federal constitutional right to an appeal in a civil matter pending in a state court, the Respondents have been unable to locate any decision by this Court that such a right exists under the federal constitution. This Court has already held that there is necessarily no constitutional right to an appeal in criminal proceedings pending in state

courts. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Given that the “Seventh Amendment is one of the few remaining provisions in the Bill of Rights which has not been held to be applicable to the States,” *Colgrove v. Battin*, 413 U.S. 149, 169 n.4, (1973), the Respondents have been unable to locate any precedent from this Court that the federal constitution contains a right to an appeal in a civil matter pending in a state court.

Regardless, this Court under the authority granted by Congress has enacted its own Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure to govern the practice, procedure, and flow of civil matters. The Tennessee Rules of Civil Procedure. The Tennessee Rules of Appellate Procedure, that like their federal counterparts contain time limitations as to certain filings, largely mirror the federal rules enacted by this Court and would have allowed for the Petitioner to file an appeal from the jury trial raising the issues contained within his motion for a new trial had he followed their time requirements. Yet, the Petitioner, who though proceeding pro se in this matter is a licensed Tennessee attorney, failed to adhere to these rules and timely file his notice of appeal. There is therefore no important federal question of law to be settled or decided by this Court due to the Petitioners failure to follow rules of procedure enacted by the Tennessee Supreme Court.

## **CONCLUSION**

For the aforementioned reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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