

In the
Supreme Court of the United States

NAHED ABDULNABI,

Petitioner,

v.

FATMA ADEL SEKIK,

Respondent.

**On Petition for a Writ of Certiorari to the
Supreme Court of Tennessee**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court's orders as affirmed by the Tennessee Court of Appeals consolidating a tort case (claims of the divorce plaintiff against this defendant for fraudulent dissipation of marital assets) into a divorce action wherein the petitioner was denied his right to trial by jury pursuant to Tennessee's statutory scheme regarding divorce actions violated his substantive or procedural rights to due process of law as applied against him by the trial court.
2. Whether the trial court's orders as affirmed by the Tennessee Court of Appeals consolidating a tort case (claims of the divorce plaintiff against this defendant for fraudulent dissipation of marital assets) into a divorce action wherein the petitioner was denied his right to contest the valuation of property as testified to by wife and husband pursuant to Tennessee's statutory scheme regarding divorce actions violated his substantive or procedural rights to due process of law as applied against him by the trial court.
3. Whether the trial court's award to the respondent of more money than she sought in her *ad damnum* or asked for at trial violated the petitioner's right to due process of law.

LIST OF PARTIES

PETITIONER, APPELLANT, AND THIRD-PARTY DEFENDANT/CROSS-PLAINTIFF BELOW

- Nahed Abdulnabi

RESPONDENT, APPELLEE, AND PLAINTIFF BELOW

- Fatma Adel Sekik

RESPONDENT, APPELLANT, AND DEFENDANT/CROSS-DEFENDANT BELOW

- Nehad Abdehnabi

LIST OF PROCEEDINGS

Fourth Circuit Court for Knox County Tennessee

Trial held on February 25, 26 and 27, 2019

*Fatma Adel Sekik v. Nehad AbdeInabi;
Nahed Abdulnabi and Rewa Gharbawe,
(Third-Party Defendants and Cross-Complainants)*

Case No. 126002

Final Judgment: June 25, 2019

Tennessee Court of Appeals

Fatma Adel Sekik v. Nehad AbdeInabi, et al.

Case No. E2019-01302-COA-R3-CV

Opinion: November 18, 2020

Corrected Opinion: January 13, 2021

Tennessee Supreme Court

Fatma Adel Sekik v. Nehad AbdeInabi, et al.

Case No. E2019-01302-SC-R11-CV

Order Denying Rule 11 Application: August 4, 2021

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Nahed Abdulnabi, files this Petition for Certiorari seeking this Court to grant said Petition and issue an Order to the Tennessee Supreme Court, requiring it to send to this Court the record below from the judgment of the said court denying the application for permission to appeal which it issued by way of Order on August 4, 2021.



OPINIONS BELOW

The Final Judgment of the Trial Court date Jun. 25, 2019 is contained in the Appendix at App.50a. The Corrected Opinion of the Tennessee Court of Appeals, in *Sekik v. AbdeInabi*, E2019-01302-COA-R3-CV (dated Jan. 13, 2021), is included at App.2a. The Order of the Tennessee Supreme Court denying the Rule 11 Application of Nahed Abdulnabi, *Sekik v. Abdulnabi*, E2019-01302-SC-R11-CV (Tenn. Aug. 4, 2021) is included at App.1a. These opinions were not designated for publication.



JURISDICTION

The Tennessee Supreme Court issued its Order denying the Petitioner's Rule 11 Application on (Aug. 4, 2021). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).



CONSTITUTIONAL PROVISIONS AND JUDICIAL RULE INVOLVED

A. Constitutional Provisions

U.S. Const amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Tenn. Const. art. I, § 6

That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

B. Judicial Rule

Tenn. R. Civ. P. 15.02

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of

the trial of these issues. Provided, however, amendment after verdict so as to increase the amount sued for in the action shall not be permitted. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.



STATEMENT OF THE CASE

A. Procedural Posture

On September 7, 2012, Respondent filed suit for divorce against her husband, Nehad AbdeInabi, for divorce. *Sekik v. AbdeInabi*, 2021 WL 120940 at *1 (Tenn. Ct. App. Jan. 13, 2021). Eventually, the Plaintiff filed an amended complaint in which she alleged a claim of conspiracy to dissipate marital assets against Nahed Abdulnabi (the brother of Nehad AbdeInabi) and his wife, Rewa Gharbawe. *Id.* at *3. Prior to trial, the newly-joined Defendant Abdulnabi objected to the Court's jurisdiction and objected to being joined to a divorce case as third-party tort defendants. *Id.* at *4. Abdulnabi objected to the lay opinion testimony of husband and wife as to the valuation of a piece of

real property located in the Gaza Strip because he was not allowed to give his own lay opinion testimony as to the value of the property because he was not a party to the divorce case; therefore, the only way for him to challenge the value of the property would have required him to produce a live witness at trial who could have qualified as an expert witness pursuant to the requirements of the Tennessee Rules of Evidence. (T.T.¹ 54:4-11, 104:16-20, 109:21-23, 110:14-16, 137:9-138:7, 138:15-13:6); *see also* Tenn. R. Evid. 701-704. The trial was held on January 25-27, 2019 and no jury was empaneled as there is no constitutional right to jury trial for divorce actions in Tennessee. *Sekik*, 2021 WL 120940 at *5. On June 25, 2019, the trial court entered the final order and judgment in the case. *Id.* at *5. A timely notice of appeal was filed, and the Tennessee Court of Appeals initially issued its opinion on November 18, 2020, and, thereafter, issued a corrected opinion on January 13, 2021. *See Sekik*, 2021 WL 120940, at *1. A timely Rule 11 application for permission to appeal was filed and, on August 4, 2021, Tennessee Supreme Court denied the application. *See* (Tenn. Ct. Order Denying Pet. For Application for Permission to App., Tenn. Ct. App. Aug. 4, 2021). This Petition for Writ of Certiorari follows.

B. Statement of Facts

The Petitioner believes the Tennessee Court of Appeals recitation of facts is accurate and would incorporate the same by way of reference as if fully set forth herein. However, there are a few facts germane to this Petition, which were either not addressed or not fully addressed by the Tennessee Court of

¹ “T.T.” is abbreviated for Trial Transcript.

Appeals. First, the Petitioner is not a citizen of Tennessee, and he was not served with a copy of the Amended Complaint and injunction until after he had traveled to the Gaza Strip and sold a portion of the property. The amount received by Petitioner from the sale was \$451,500.00, and from that amount, he paid \$184,613.25 to satisfy marital debts. Second, in wife's amended complaint, she set forth a specific request for damages where she simply sought disgorgement of the funds realized from the sale of the real property or alternatively, a judgment against Petitioner for money damages for the same amount. (T.R.,² Vol. I, at 85) (amended complaint). Third, wife testified at trial the real property in question was "at all times" solely in the name of husband. (T.T., Vol. V, at 220-221). Wife also testified that although she had seen the property once in person, she viewed it before numerous improvements to the property had occurred. *Id.* at 221. Notwithstanding the fact that Respondent only sought in her *ad damnum* the amount of money Petitioner received from the sale (as was reduced by the Trial Court based on Petitioner's satisfaction of marital debts), the Trial Court *sua sponte* after the trial in its Final Judgment awarded the Plaintiff \$529,475.37 in damages against the Petitioner.

² "T.R." is abbreviated for Trial Record.



REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should exercise its discretion and grant this Petition for Certiorari because the Petitioner was not given sufficient notice that he would not be entitled to a jury trial for a tort claim and because he was not given sufficient notice that the trial court could use lay opinion testimony of husband and wife to the divorce action as to the value of a piece of real property located in the Gaza Strip, which is controlled by the terrorist organization, Hamas.

I. TENNESSEE'S STATUTORY SCHEME AS INTERPRETED BY THE TENNESSEE COURT OF APPEALS AND THE TRIAL COURT VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT BECAUSE HE WAS NOT PROVIDED SUFFICIENT NOTICE THAT HIS RIGHT TO TRIAL BY JURY WOULD BE VITIATED BY THE TRIAL COURT.

The right to due process of law, enshrined in the 14th Amendment's Due Process Clause, guarantees a citizen of any of the several states a right to fair notice and fear hearing. As noted by the 2d Circuit, the originating test for a Due Process violation claim requires the following proof from the plaintiff: "1) whether plaintiffs possess a liberty or property interest protected by the Due Process Clause; and, if so, 2) whether existing state procedures are constitutionally adequate." *Kapps v. Wing*, 404 F.3d 105, 112 (2d Cir. 2005).

The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV § 1; *Jahn v. Farnsworth*, 617 F. App’x 453, 459 (6th Cir. 2015).

“Procedural due process requires that a person be afforded notice and a right to be heard before the state deprives him of a property or liberty interest.” *Jahn*, 617 F. App’x at 459 (citing *Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005)).

In this case, the State of Tennessee provided no notice whatsoever to the Petitioner that his right to trial by jury, which is afforded to him under the Tennessee Constitution, Tenn. Const. Art. 1 § 6, would be vitiated by the Trial Court’s decision to consolidate his case into a divorce action where the State of Tennessee does not afford the right to trial by jury.

The consolidation of such claims is highly problematic, especially where the claim is for dissipation of real property. First, a party to a divorce does not enjoy a right to trial by jury whereas a civil litigant does in most all other cases.

As this Court has noted,

The Tennessee Constitution provides that the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors. Tenn. Const. art. I, § 6. Although this language is broad, article I, section 6 does not guarantee the right to a jury trial in every case. *Helms v. Tenn. Dep’t of Safety*, 987 S.W.2d 545, 547 (Tenn. 1999). Rather, it guarantees the right

to trial by jury as it existed at common law . . . under the laws and constitution of North Carolina at the time of the adoption of the Tennessee Constitution of 1796. *Id.* (quoting *Patten v. State*, 221 Tenn. 337, 426 S.W.2d 503, 506 (1968)). The constitutional guarantee of a jury does not apply to cases that could have been tried without a jury prior to 1796. *Newport Hous. Auth. v. Ballard*, 839 S.W.2d 86, 88 (Tenn. 1992). In the classic common law system of courts, matters inherently legal in nature were tried in the law courts by a jury while matters inherently equitable were tried by the Chancellor without a jury. Therefore, there is no constitutional right to a trial by jury in a matter inherently equitable. *Smith Cnty. Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 336 (Tenn. 1984) (emphasis added). Additionally, the constitutional right to trial by jury does not apply to statutory rights and remedies created after the adoption of the 1796 Constitution. *Helms*, 987 S.W.2d at 547. For such statutory rights and remedies, the Legislature is free either to dispense with the right of trial by jury, *id.* (citing *Ballard*, 839 S.W.2d at 88), or provide for it, *Anderson*, 676 S.W.2d at 335–37.

Young v. City of LaFollette, 479 S.W.3d 785, 793–94 (Tenn. 2015).

In this case, the rights and remedies of a divorce proceeding are largely governed by statute, and therefore, the constitutional right to jury trial does not extend to divorce cases. *See Wright v. Quillen*,

909 S.W.2d 804, 813-14 (Tenn. Ct. App. 1995). By contrast, the Petitioner clearly had a right to trial by jury because actions based in fraud and conspiracy claims relating to the same existed at common law. *See Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 67 (Tenn. 2001) (noting “[w]e have very recently discussed the common law action of conspiracy to defraud”). Based on these authorities, the Petitioner clearly had a right to trial by jury for the conspiracy claim which was vitiated by the trial court allowing Petitioner to be joined to the divorce case. The Petitioner’s 14th Amendment right to fair notice and fair hearing was violated by the underlying Trial Court’s rulings and orders.

II. TENNESSEE’S STATUTORY SCHEME AS INTERPRETED BY THE TENNESSEE COURT OF APPEALS AND THE TRIAL COURT VIOLATED THE PETITIONER’S RIGHT TO DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT BECAUSE HE WAS NOT PROVIDED SUFFICIENT NOTICE THAT PLAINTIFF WOULD BE ABLE TO ESTABLISH HER CLAIM TO THE AMOUNT OF DAMAGES AGAINST HIM BY WAY OF LAY OPINION TESTIMONY.

The trial court’s application of Tennessee law allowing a party to a divorce to testify as to the valuation of real property violated the Petitioner’s right to due process of law.

Because this was a divorce case, the parties were allowed to testify as to the value of the property in the Gaza Strip—by lay opinion testimony authorized by the common law for divorce cases as noted by the court of appeals in their opinion below. *See Sekik v. AbdeInabi*, No. E201901302COAR3CV, 2020 WL 6779918, at *18 (Tenn. Ct. App. Nov. 18, 2020), super-

seeded, No. E201901302COAR3CV, 2021 WL 120940 (Tenn. Ct. App. Jan. 13, 2021) (citing *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987); *Melvin v. Johnson-Melvin*, No. M2004-02106-COA-R3-CV, 2006 WL 1132042, at *3 (Tenn. Ct. App. Apr. 27, 2006) and *Ingram v. Ingram*, 721 S.W.2d 262, 264 (Tenn. Ct. App. 1986)).

That amount was ultimately used by the trial court (the wife's opinion as to the property's value) to justify the award of damages against the Petitioner. Had the matter not been a divorce case, the wife, and the husband's, lay opinion testimony as to value would have been excluded and competent and otherwise admissible proof of damages (as to the whole amount of the tract of land) would have been required. *See* Tenn. R. Evid. 701-704.

The trial court's decision to allow the wife to join the Petitioner on a claim of conspiracy to dissipate marital assets and/or defraud was error, and as it affected the substantive and constitutional rights of Petitioner, it was plain error.

These actions by the trial court as affirmed by the Tennessee Court of Appeals violated the Petitioner's right to due process of law.

III. THE FINAL JUDGMENT AS ENTERED BY THE TRIAL COURT AND AFFIRMED BY THE TENNESSEE COURT OF APPEALS, AWARDING THE PLAINTIFF DAMAGES WELL IN EXCESS OF WHAT HER AMENDED COMPLAINT SOUGHT VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

In Tennessee, a Plaintiff is in control of setting forth the damages she is seeking in her Complaint. However, where a Plaintiff seeks a specific remedy,

or a specific amount, she may not, post-judgment, increase the amount sought—the *ad damnum*—in the event the trier of fact returns a verdict in excess of the sought amount. *See Romine v. Fernandez*, 124 S.W.3d 599, 605 (Tenn. Ct. App. 2003) (noting a long line of cases in Tennessee “which stand for the well-settled proposition that a party is limited to the relief prayed for in his complaint” and citing Tenn. R. Civ. P. 8.01; Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 5–4(c) (1999); and *Cross v. City of Morristown*, C.A. No. 03A01–9606–CV–00211, 1996 WL 605248, *3, 1996 Tenn. App. LEXIS 677, *9 (Tenn. Ct. App. Oct. 22, 1996); *accord Lawrence v. E.I. DuPont De Nemours & Co.*, No. 3:04-0115, 2005 WL 6147578, at *2 (M.D. Tenn. Nov. 10, 2005), *aff’d sub nom. Lawrence v. E.I. du Pont de Nemours & Co.*, 226 F. App’x 498 (6th Cir. 2007) (noting the difference between state and federal law on this issue and stating “Rule 15.02 of the Tennessee Rules of Civil Procedure and Tennessee case law make it clear that the plaintiff may not recover a judgment in excess of the request in the *ad damnum*” but further stating “[t]he federal rule, on the other hand, allows the plaintiff to recover more than is requested in the *ad damnum*. Rule 54(c), Fed. R. Civ. P., provides, in part: ‘Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party’s pleadings.’ This rule consistently has been interpreted to allow the plaintiff to recover a judgment in excess of the *ad damnum* in the complaint.”) (some citations omitted) (citing *Scala v. Moore McCormack Lines, Inc.*, 985

F.2d 680, 683-84 (2d Cir. 1993); *Aggarwal v. Ponce School of Medicine*, 745 F.2d 723, 728-29 (1st Cir. 1984).

In this case, the wife sought damages by way of amended complaint against the Petitioner as follows:

That all transfers of property from Nehad Abdelnabi and/or Nahed Abdelnabi and/or Rewa Gharbawe be declared null and void and the property be disgorged and restored to the marital estate and/or that judgment enter against all Defendants jointly and severally for all funds received that relate to the property and losses associated with their actions or inactions. (T.R., Vol. 1, at 85-89) (Am. Compl. at 4).

The Respondent also requested in her amended complaint that Petitioner and Respondent pay her attorneys' fees. *Id.* She did not, however, seek any punitive damages. *Id.*

Although the Respondent's prayer for relief did not contain a specific amount (likely because she did not know the correct amount of the portion of the real property Petitioner had sold), her request clearly seeks a money judgment (which was provided to her by the court) for "all funds received that relate to the property and losses associated with [the sale of a portion of the real property]."

After the trial occurred (wherein the divorce and conspiracy claims were tried together by way of bench trial), the trial court took the matter under advisement and issued a written opinion thereafter. In its memorandum opinion and order, the trial court entered a judgment against Petitioner based on the value of the entire tract of land in Gaza Strip even though the

undisputed testimony and facts were that Petitioner sold only a portion of the land and from that amount (\$451,500.00), satisfied \$184,613.25 in marital debt.

Because the trial court *sua sponte* awarded the Plaintiff approximately \$500,000 more than she asked for, said Order and the Tennessee Court of Appeals' affirmation of said Order constitute a due process violation.



CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's petition for Writ of Certiorari to the Supreme Court of Tennessee.

Respectfully submitted,

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