

No. 23-223

IN THE
Supreme Court of the United States

CHARLES J. JENKINS,

Petitioner,

v.

TRIWEST HEALTHCARE ALLIANCE ET AL.,

Respondents.

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

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

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QUESTIONS PRESENTED

1. Did the Fifth Circuit properly affirm the District Court's decision to dismiss Jenkins' suit for lack of subject matter jurisdiction when Jenkins failed to plead facts sufficient to establish either federal question jurisdiction or diversity jurisdiction?

2. Was the Fifth Circuit's order affirming the District Court proper when the Fifth Circuit issued its opinion and analysis separately from its Order?

PARTIES TO THE PROCEEDING

Respondents-Appellee and Defendants

- TriWest Healthcare Alliance Corp.
- TriWest Alliance, Inc.
- VA Medical Center
- Tulane Medical Center

Petitioner-Appellant

- Charles Jenkins, *pro se*

CORPORATE DISCLOSURE STATEMENT

TriWest Healthcare Alliance Corp states that it is a wholly owned subsidiary of parent company TriWest Alliance, Inc. TriWest Alliance, Inc. is owned by 14 non-profit health plans and university hospital systems. No parent company, subsidiary, or affiliate holds any shares issued to the public.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States Court of Appeals for the Fifth Circuit and the District Court for the Eastern District of Louisiana:

- *Charles Jenkins v. TriWest Healthcare Alliance*, No. 22-30429 (5th Cir. Feb. 8, 2023);
- *Charles Jenkins v. VA Medical Center, et al.*, No. 22-37 (E.D. La. June 21, 2022);
- *Charles Jenkins v. VA Medical Center, et al.*, No. 22-37 (E.D. La. May 12, 2022); and
- *Charles Jenkins v. VA Medical Center, et al.*, No. 22-37 (E.D. La. Apr. 28, 2022) (North, Mag. J.).

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of Rule 14.1(b)(iii).

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JURISDICTION

The Fifth Circuit issued its decision on February 8, 2023, affirming the District Court's May 12, 2022 and June 21, 2022 dismissals for lack of subject matter jurisdiction. Jenkins petitioned this Court to review that decision on September 5, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution are Article III, Section 1 and Article III, Section 2 relating to the Judicial Branch of the United States.

STATEMENT OF THE CASE

Petitioner Charles Jenkins (“Jenkins” or “Petitioner”) sued TriWest Healthcare Alliance Corp., TriWest Alliance Inc., the VA Medical Center, and the Tulane Medical Center (collectively, “Respondents”) alleging medical malpractice. The District Court dismissed Jenkins’ suit because he failed to plead facts establishing either subject matter or diversity jurisdiction. The Fifth Circuit affirmed the District Court. Jenkins’ petition for writ asks this Court to review the Fifth Circuit’s affirmation, asserting that the Fifth Circuit’s decision and order were somehow improperly brief.

1. Factual Background.

Jenkins brought suit on January 9, 2022, asserting that he had a cause of action under the Federal Tort Claims Act (“FTCA”). He brought his lawsuit more than five years after he received the medical care that allegedly injured him. Compl. at 5. Jenkins brought his claim in federal court under his theory that his medical malpractice claim constituted a federal question establishing subject matter jurisdiction.

Jenkins did not and has never named the United States as a party in his suits. Respondent TriWest Healthcare Alliance Corp. is a private entity. The treating physicians who Jenkins alleges committed the tortious conduct are not federal employees. Jenkins did not obtain any certification from any federal agency confirming that the treating physicians were federal employees under the FTCA. The United States has not waived its immunity from claims

asserting the negligence of non-VA doctors. Jenkins did not assert that he exhausted administrative remedies prior to filing suit.

Jenkins alleges he is a Louisiana resident and that all tortious conduct occurred in the state of Louisiana, asserting \$12 million in damages. Defendants Tulane Medical Center and the VA Medical Center are also residents of the state of Louisiana. Defendants TriWest Healthcare Alliance Corp. (“TriWest”) and TriWest Alliance Inc. are residents of Arizona as their sole principle place of business and state of incorporation.

2. Procedural History

Jenkins initiated his malpractice action in the District Court for the Eastern District of Louisiana. On April 28, 2022, the presiding magistrate judge issued a Report and Recommendation (“R&R”) finding that Jenkins alleged no facts to establish federal question jurisdiction under the FTCA because (a) no defendant was a federal employee, and (b) he did not first exhaust administrative remedies, which was fatal to his claim. The R&R concluded with the recommendation that a motion to dismiss be granted.

After considering Jenkins’ objection to the R&R, the District Court affirmed the recommendation to dismiss the suit for lack of subject matter jurisdiction. After reviewing a second objection, the District Court reaffirmed its decision to dismiss the case for lack of subject matter jurisdiction because Jenkins had failed to plead the facts required by the FTCA.

Thereafter, Jenkins appealed to the Fifth Circuit. The Fifth Circuit issued its judgment on February 8, 2023, affirming the District Court's decision. On the same day, the Fifth Circuit issued an opinion providing the legal analysis supporting its judgment.

In its opinion, the Fifth Circuit explained that it would not consider arguments not presented to the District Court and held that Jenkins failed to establish subject matter jurisdiction. The Fifth Circuit found that even viewing the evidence with deference to Jenkins as a *pro se* plaintiff, the allegations put forth were insufficient to establish jurisdiction.

Jenkins petitioned for writ of certiorari on September 5, 2023.

REASONS FOR DISMISSAL

I. Jenkins Failed to State Any Viable Claim and the Lower Courts Properly Dismissed for Lack of Subject Matter Jurisdiction.

In order to state a viable claim, Jenkins was required to plead allegations showing his entitlement—beyond mere speculation. F.R.C.P. 12(b)(6); *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 662 (2009). Even a *pro se* plaintiff must plead facts to show a right to relief. *Coleman v. United States*, 912 F.3d 824, 828 (5th Cir. 2019) (“*pro se* plaintiffs must still plead factual allegations that raise the right to relief above the speculative level.”). The District Court and Fifth Circuit determined that Jenkins failed to establish subject matter jurisdiction because (a) he did not allege facts required for a FTCA claim to establish federal question jurisdiction and (b) his claim did not involve complete diversity of citizenship to justify diversity jurisdiction.

Unless a petitioner alleges sufficient facts to assert a federal question or diversity jurisdiction, there is no subject matter jurisdiction and this Court should dismiss the petition. F.R.C.P. 12(b)(1); U.S. Const. art. III, § 2. Where the FTCA is the basis of federal question jurisdiction, a petitioner must allege sufficient facts on the face of a well-pled complaint to establish that the United States, waiving its sovereign immunity, is liable for the tortious conduct of a federal employee acting within the course and scope of his employment. 28 U.S.C. 2671, *et. seq.* Where diversity

of citizenship is the basis for jurisdiction, there must be (a) complete diversity of citizenship between the petitioner and all listed defendants and (b) an amount-in-controversy of over \$75,000. 28 U.S.C. § 1332. Where there is no federal question or diversity jurisdiction, a federal court is operating appropriately when it dismisses such a claim. *See* F.R.C.P. 12(b)(1).

A. Jenkins failed to plead facts sufficient to establish federal question jurisdiction under the Federal Tort Claims Act.

Though the United States generally has sovereign immunity from suit, a properly filed claim brought under the FTCA constitutes a “limited waiver of sovereign immunity,” permitting individuals to bring a claim against the United States for the tortious conduct of federal employees acting within the course and scope of their employment. *United States v. Orleans*, 425 U.S. 807, 813 (1976); 28 U.S.C. §§ 1346(b), 2674. The FTCA is the exclusive remedy for an injury caused by “the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office.” *Id.* A proper FTCA claim is brought only against the United States and not a private entity.¹ 28 U.S.C. § 2679(d)(1).

¹ Even if the FTCA claim against TriWest were proper, TriWest has derivative sovereign immunity as a private contractor administering the Veteran Community Partnership as required by the Veterans Access, Choice, and Accountability Act on behalf of the federal government. *See Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 20-21 (1940). “Under the concept of derivative sovereign immunity, stemming from the Supreme Court’s

Furthermore, the proper process for filing an FTCA claim requires (1) all administrative remedies to be exhausted prior to suit; and (2) certification by a U.S. attorney that the alleged tortious conduct involved (a) a federal employee (b) acting within the course and scope of employment. *See Coleman*, 912 F.3d at 834 (holding that exhaustion is “a jurisdictional prerequisite for FTCA claims that cannot be waived.” (citing *McNeil v. United States*, 508 U.S. 106, 109–13 (1993) (affirming a dismissal for lack of jurisdiction where the FTCA complainant had not satisfied administrative exhaustion requirements before filing the complaint)); *see also Life Partners Inc. v. United States*, 650 F.3d 1026, 1029 (5th Cir. 2011) (citing 28 U.S.C. § 2675(a)); 28 U.S.C. §§ 2679(d)(1) & 2675(a).² The FTCA’s requirements are stringent because it is a limited waiver of immunity so pleading facts regarding the exhaustion of administrative remedies prior to suit is necessary. *See* 28 U.S.C. § 2675(a).

Here, Jenkins’ failed to allege facts sufficient to plead an FTCA claim, and his suit should therefore be dismissed for lack of federal question jurisdiction. As

decision in *Yearsley*, . . . agents of the sovereign are also sometimes protected from liability for carrying out the sovereign’s will.” *Cunningham v. Gen. Dynamics Info. Tech. Inc.*, 888 F.3d 640, 643 (4th Cir. 2018).

² “An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing.” 28 U.S.C. § 2675(a).

an initial matter, Jenkins' suit under a theory of FTCA is brought against the improper entity: a true FTCA claim is made against the United States and not a private entity like TriWest.

But, even with this threshold matter aside, Jenkins failed to adequately exhaust all administrative remedies prior to filing his suit. In fact, Jenkins made no such argument alleging that he exhausted his administrative remedies. As the R&R explained, failing to exhaust administrative remedies alone is fatal to his claim. Even if he had exhausted administrative remedies—which he did not argue nor present facts alleging—Jenkins failed to obtain certification that the tortious conduct involved any federal medical personnel acting within the scope of their employment. In fact, no treating doctors were federal employees, so Jenkins would not have obtained such certification.

Any of the aforementioned failures *alone* invalidates his FTCA claim: (1) suing the improper party, (2) failing to exhaust administrative remedies prior to suit, (3) failing to obtain certification that the alleged tortfeasor is a federal employee, (4) failing to obtain certification that the alleged tortfeasor committing the tortious conduct in the scope of his employment, and (5) alleging that the tortious conduct was committed by non-federal employees. Therefore, Jenkins' allegations are insufficient to establish federal question jurisdiction under the FTCA and dismissal is appropriate. Accordingly, the District Court properly concluded that it lacked subject matter jurisdiction over Jenkins' claim.

B. The District Court lacked diversity jurisdiction because there was not complete diversity of citizenship of Defendants.

Where even one defendant is not diverse from the petitioner, a petitioner cannot establish federal diversity jurisdiction and the suit should be dismissed. To establish federal diversity jurisdiction, the petitioner must be diverse from *all* defendants; lack of diversity from even one defendant destroys diversity. *Mas v. Perry*, 489 F.2d 1396, 1398 (5th Cir. 1974).

Here, because both Petitioner Jenkins and Defendant-Appellee Tulane Medical Center are citizens of Louisiana, there is no complete diversity of citizenship and the case must be dismissed for lack of subject matter jurisdiction. Jenkins alleges that he is a resident of Louisiana; Defendant Tulane Medical Center is also a resident of Louisiana. Though Jenkins refers to the inclusion of multiple defendants as a mistake of the District Court, he himself filed suit against multiple non-diverse defendants and the District Court rightfully dismissed the matter for lack of subject matter jurisdiction for failure to state a federal question or properly assert diversity.

II. The Fifth Circuit Appropriately Affirmed the District Court's Dismissal.

Despite Petitioner's concerns, the judicial process is operating properly and there is no risk to the District Court's—or any involved court's—authority. Courts have the constitutional authority to engage in the appellate process. U.S. Const. art. III, § 1. That is, a Circuit Court may affirm, deny, or further qualify the decision of a District Court's decision within its jurisdiction. *Id.* Though courts adhere to the doctrine of *stare decisis*, a Circuit Court does not consider the lower court's decision *in the same litigation* as precedent on review; to do so would nullify appellate review. *Stare decisis* involves consideration of precedents set in *other* litigations with similar issues. See *In re Grant*, 635 F.3d 1227, 1232 (C.A.D.C., 2011).

Secondly, Jenkins' concern that the Fifth Circuit affirmed the lower court's decision too "briefly" is overcome by simply reviewing the opinion filed on the same day as the Order. In this lengthier analysis, the Fifth Circuit explained its affirmation of the dismissal of his suit, i.e., Jenkins failed to establish subject matter jurisdiction.

Because the Fifth Circuit had valid authority to review and affirm the District Court's decision, there is no overstep of authority and no violation of *stare decisis*. Notably, Jenkins himself filed all objections and appeals, so the subsequent critique of the appellate process does not advance his case. Furthermore, the Fifth Circuit *affirmed* the District Court, so there was no overturn of its decision. Indeed, every decision in this case—the magistrate judge's

Report and Recommendation (April 28, 2022), the District Court's First Order (May 12, 2022), the District Court's Second Order (June 21, 2022), and the Fifth Circuit's Opinion (February 8, 2023)—are all in agreement that Jenkins' suit should be dismissed for lack of subject matter jurisdiction.

CONCLUSION

The petition for writ of certiorari should be denied because the Fifth Circuit properly affirmed the District Court's dismissal of Jenkins' lawsuit. Jenkins did not and cannot establish subject matter jurisdiction in the federal courts.

Respectfully submitted,

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