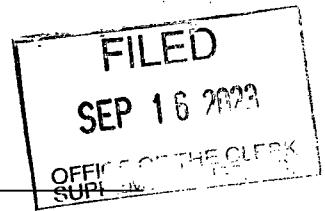


No. 23-5614

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES



ELLISON O. JORDAN,

Petitioner

vs.

THE PENNSYLVANIA STATE UNIVERSITY, et, al,

Respondents

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania,
Middle District

PETITION FOR WRIT OF CERTIORARI

Ellison O. Jordan
P.O. Box 4704
Upper Marlboro, MD 20775
(301) 875-8773

PRO SE

i.

QUESTIONS PRESENTED

The questions presented to this court are as follows:

1. Was the Petitioner's constitutional right to jury trial by demand denied and/or violated by the lower court when it did not conduct a jury trial as demanded nor obtain a jury trial waiver from the Petitioner and Respondents?
2. Was the Petitioner's constitutional right to jury trial based on status of "special relationship" denied and/or violated?
3. Was the Petitioner's constitutional right to jury trial denied and/or violated when the lower court ruled the following and dismissed the Petitioner's complaint without a jury trial:
 - a. "University Defendants had a duty to exercise reasonable care to protect Plaintiff against unreasonable risk of harm. This included a duty to provide duly licensed athletic trainers for the purpose of rendering treatment to its student athletes participating in athletic events."?;
 - b. "...the Court finds University Defendants owed a duty to Plaintiff by virtue of his status as a student-athlete who was recruited by Penn State University and participated in intercollegiate athletic events on behalf of Penn State University..."?;
 - c. "Plaintiff has failed to aver facts evidencing a breach of the duty owed by University Defendants..."?;

ii.

- d. "Here, University Defendants exercised reasonable care in ensuring Plaintiff received proper medical treatment..."?;
- e. "...University Defendants did not fail to have qualified medical personnel available, deny Plaintiff medical care or interfere with his treatment..."?;
- f. "There is no special relationship in this case which would impose a duty greater than reasonable care..."?;
- g. "University Defendants did not breach their duty to ensure qualified medical personnel were available to render medical assistance and Plaintiff failed to aver facts showing University Defendants failed to exercise reasonable care."?; and
- h. "...Plaintiff's pleadings fail to establish a breach of the duty University Defendants owed to Plaintiff, and, therefore, Plaintiff's negligence claim against University Defendants is insufficient as a matter of law."

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

THE PENNSYLVANIA STATE UNIVERSITY

SANDY BARBOUR

CHARMELLE GREEN

JAMES FRANKLIN

ANDY MUTNAN

RENEE MESSINA

SCOTT A. LYNCH, M.D.

PETER H. SEIDENBERG, M.D.

JOHN S. REID, M.D.

BRENDAN M. CARR

TIM BREAM

WES SOHNS

PENN STATE HEALTH

MILTON S. HERSHEY MEDICAL CENTER

PENN STATE HERSHEY MEDICAL GROUP

MOUNT NITTANY HEALTH

RELATED CASES

The following proceedings are directly related to this case:

Ellison O. Jordan v. The Pennsylvania State University et.al., (Pa. 2020-28)

Ellison O. Jordan v. The Pennsylvania State University et.al., (Pa.Super. 76 MDA 2021)

Ellison O. Jordan v. The Pennsylvania State University et.al. (Pa.Supreme 410 MDA 2022)

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OTHER

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

Petitioner respectfully prays that a writ of certiorari is issued to review the judgment of the Pennsylvania Court of Appeals.

OPINIONS BELOW

The Superior Court of Pennsylvania, Middle District, is the highest court to review the merits of Appendix A. The OPINION was filed by the Superior Court on May 9, 2022, and Filed for Record by the Court of Common Pleas Centre County on July 10, 2023. The Court ORDER at Appendix B dated 28th April 2022 directed the issuance of the new opinion and withdrew the April 12, 2022, MEMORANDUM (Non-Precedential Decision – Superior Court I.O.P. 65-37). The Court ORDER at Appendix C dated April 28, 2022, denied as moot Petitioner's Application for Panel Reconsideration. The Petitioner's Application for Reconsideration was denied on 17th of August 2022, under ORDER at Appendix D.

The Supreme Court of Pennsylvania, Middle District, denied Petitioner's Application to Amend and Application for Reconsideration on June 22, 2023. A copy of the ORDER appears at Appendix E. The Court ORDER dated 25th April 2023, at Appendix F, denied the Petition for Allowance of Appeal and Application to Supplement Petition for Allowance of Appeal.

A list of opinions and orders issued by the Court of Common Pleas of Centre County of Pennsylvania appears at Appendix G. Statements of place and issued raised and preserved are included in the appendix as well.

JURISDICTION

The Supreme Court of Pennsylvania, Middle District, denied Petitioner's Petition for Allowance of Appeal and Application to Supplement Petition for Allowance of Appeal on April 25, 2023. A copy of the decision appears at Appendix C. The Supreme Court of Pennsylvania denied Petitioner's Application to Amend and Application for Reconsideration on June 22, 2023. Order denying reconsideration appears at Appendix D.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**Amendment VII**

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Rule 38. Right to a Jury Trial; Demand

- (a) **RIGHT PRESERVED.** The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.
- (b) **DEMAND.** On any issue triable of right by a jury, a party may demand a jury trial by:
 - (1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and
 - (2) filing the demand in accordance with Rule 5(d).
- (c) **SPECIFYING ISSUES.** In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues,

any other party may—within 14 days after being served with the demand or within a shorter time ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) WAIVER; WITHDRAWAL. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) ADMIRALTY AND MARITIME CLAIMS. These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).

231 Pa. Code § 1007.1 - Jury Trial. Demand. Waiver

(a) In any action in which the right to jury trial exists, that right shall be deemed waived unless a party files and serves a written demand for a jury trial not later than twenty days after service of the last permissible pleading. The demand shall be made by endorsement on a pleading or by a separate writing.

(b) Where an appeal is taken from an award in compulsory arbitration and a jury trial has not theretofore been demanded, the right to a jury trial shall be deemed waived unless the appellant endorses a demand for a jury trial on the appeal, or unless the appellee files and serves a written demand for a jury trial not later than ten days after being served with the notice of appeal.

(c)

(1) A demand for trial by jury may not be withdrawn without the consent of all parties who have appeared in the action.

(2) A demand for a trial by jury on behalf of a party shall be deemed withdrawn if at the time a case is called for trial that party, without satisfactory excuse, fails to appear or appears but is not ready. Any other party appearing and ready who has not already demanded a trial by jury shall forthwith demand a trial by jury or shall be deemed to have waived the same.

PA Constitution, Article I, § 6. Trial by jury.

Trial by jury shall be as heretofore, and the right thereof remain inviolate. The General Assembly may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. Furthermore, in criminal cases the Commonwealth shall have the same right to trial by jury as does the accused.

(May 18, 1971, P.L.765, J.R.1; Nov. 3, 1998, P.L.1328, J.R.2)

STATEMENT OF THE CASE

The Petitioner submitted a timely complaint, on January 31, 2020, against the Respondents for medical/professional liability and vicarious liability with demand for jury trial.

The Common Pleas Court, in letter dated May 12, 2020, identified the *case*

“as a medical negligence case, and therefore endeavors to move it forward on an aggressive track with might result in an expedited handling of this matter...Unfortunately, there are no specific local rules for this process, and I apologize if you are seeking information on procedures.”

The Petitioner submitted timely Certificates of Merits which were filed and accepted by the Common Pleas Court specifically the Prothonotary. The Prothonotary Office instructed the Petitioner that any CONFIDENTIAL DOCUMENTATION had to be filed under separate form. Thus, the Petitioner filed the written statements and other medical documentation along with the Certificates of Merits on the CONFIDENTIAL FORM on February 28, 2020. The Common Pleas Court filed and accepted both the Certificates of Merits (for each defendant) as well as the Confidential Form that included the written statements.

In Common Pleas ORDER, dated 29th January 2021 with an entry date of 02/02/2021, the Petitioner was required to submit a statement of errors complained on appeal. In ORDER, dated 22nd February 2021 with no Filed for Record date, the Petitioner's Motion for Time Extension for Statement of Errors was GRANTED. In the Petitioner's Statement of Matters Complained of on Appeal, Filed for Record, 2021 May 12, it includes questioned errors in right to trial by jury, Certificate of Mert, Non-Pros judgement, recusal, special relationship, Pennsylvania Law of Negligent Performance (Torts), and numerous court errors concerning "*correspondences, transcripts, motions, orders, opinions & orders, preliminary objections, praecipe, judgements, etc...*".

In Superior Court OPINION, Filed May 9, 2022, it states on page 5,

"On January 6, 2021, Appellant filed a notice of appeal. Although not ordered to do so, Appellant filed an eight-page Pa.R.A.P. 1925(b) statement on May 21, 2021. The trial court filed its Rule 1925(a) opinion on May 20, 2021, indicating that it was relying on the reasoning set forth in its prior opinion and orders entered December 4 and 23, 2020."

The OPINION restates the issues for review but does not address at all issue #1 – "...a right to jury trial as demanded?" and issue #2 – "...Certificate of Merit of the original Complaint, Amended Complaint and Supplemental Amended Complaint?". The OPINION states on page 7, "Preliminarily, we must address whether Appellant has properly preserved all of his claims on appeal."

Beginning on page 7, the OPINION addresses in great detail the May 12 and 13, 2020 Judgements of Non-Pros, the July 15, 2020, OPINION denying Petitioner's petition for relief as well as the July 30, 2020, Petitioner's petition for reconsideration. On page 9, it states

“...the record reflects that Appellant’s January 6, 2021 notice of appeal makes no mention of the trial court’s July 15, 2020 order denying his petition for relief of Judgement of Non-Pros, nor the July 30, 2020 order denying his petition for reconsideration of relief from Judgment of Non Pros. Although Appellant badly contends in his brief that he is seeking ‘reversal of all the lower court’s opinions and orders...judgements,’ his notice of appeal indicates that he is only appealing from the trial court’s December 4 and December 23, 2020, orders. See Appellant’s brief at 1 (emphasis added); Appellant’s ‘Notice of Appeal,’ 1/6/21”.

The “Notice of Appeal” referenced in OPINION, as seen below, clearly identifies under Item E.2.- ISSUES TO BE RAISED ON APPEAL, the following:

1. Trial by Jury;
2. Judgement of Non-Pros;
3. Default Judgement;
4. Certificate of Merit – original complaint & amended complaint
5. Judge Recusal – bias, impartiality
6. Special Relationship
7. Breach of Contract, Duty
8. 1042.7, 1042.11, 1042.12

SUPERIOR COURT OF PENNSYLVANIA
 Filed 2/8/2021 2:57:00 PM Superior Court Middle District
 Civil Docketing Statement 76 MDA 2021

Pursuant to Pa.R.A.P. 3517, you *must* complete this form in its entirety and return this form and attachments to the Prothonotary of the Superior Court by *2/12/2021*. A completed copy of this form *must* also be provided to each appellee. THIS FORM IS FOR CIVIL APPEALS ONLY, as indicated on the trial court docket and/or order from which you are appealing.

**FAILURE TO COMPLETE THIS DOCKETING STATEMENT IN ITS ENTIRETY IN A TIMELY
 MANNER, WITH ALL REQUESTED DOCUMENTS ATTACHED, WILL RESULT IN DISMISSAL OF
 THE APPEAL.**

A. CASE IDENTIFICATION

1. Case Caption:	Jordan, E. v. PSU
2. Superior Court Docket No:	76 MDA 2021
3. Party or parties filing appeal:	Ellison O. Jordan

* Use the space provided and attach additional pages, if needed.

B. TIMELINESS OF APPEAL (Check only those which apply and fill in the date(s))

(✓) Date of judgment or order appealed from:	1/4/21; 12/23/20; 12/4/20
(✓) Date of Pa.R.C.P. 236 notice:	3/1/20; 3/9/20; 3/4/20
(✓) Date praecipe for judgment filed:	5/15/20; 5/13/20; 5/12/20
(✓) Date judgment filed:	5/15/20; 5/13/20; 5/12/20
(✓) Date notice of appeal filed:	1/6/21

Was reconsideration requested in the lower court? Yes No (date) _____
 Was it expressly granted? Yes No (date) _____

C. APPEAL FROM THE TRIAL COURT

1. Is the order appealed from a final, appealable order? Yes No

Specify rule and subsection governing finality (e.g. Pa.R.A.P. 301, 313, 341) and, if desired, any applicable case law.

PA 341(c)

2. If the order is not a final order:

a. Is the order appealable as of right under Pa.R.A.P. 311? Yes No

(specify which subsection) _____

b. Was permission to appeal granted pursuant to:

i. Pa.R.A.P. 1311? Yes No Misc. Docket No. _____

ii. Pa.R.A.P. 1501 et seq.? Yes No Misc. Docket No. _____

3. How have issues been preserved? (e.g. pre-trial motions, timely objection, motion to remove non-suit, petition to strike/open)

SUPPLEMENTAL/DETERMINATION OF FINALITY 12/28/20; MOTION TO RESCUE 12/15/20; PETITION FOR RECONSIDERATION OF RELIEF 7/24/20; PRAECIPE FOR DETERMINATION 9/3/20; PRAECIPE FOR DEFAULT JUDGEMENT 9/2/20; MOTION FOR EFILEING 9/3/20; MOTION FOR TIME EXTENSION 12/14/20; SUPPLEMENTAL CERTIFICATE OF MERIT 4/17/20; PLAINTIFF'S RESPONSE TO AFFIDAVIT; PRAECIPE FOR JUDGEMENT 3/9/20; PLAINTIFF'S RESPONSE 6/18/20; LETTER TO PROTHONOTARY 5/29/20; CERTIFICATE OF MERIT 2/28/20

D. RELATED CASES

List all related cases pending in any court (e.g. co-defendants, cross-appeal, cross-claims, counterclaims, bankruptcy proceedings or other appeals):
(Ex: Com v. Smith, 123 EDA 1997, CP-51-CR-1234567-1997).

N/A

Docket No. of cross-appeal: _____

E. DESCRIPTION OF APPEAL (If necessary, attach additional pages for completion of 1 and 2)**1. Brief description of action and result below:**

The court erred in not granting the Motion to Recuse Judge Ruest for bias & impartiality as she is a former partner at the law firm McQuaide Blasko who represent Seidenberg, Reid, Penn State Health, Milton Hershey, & Penn State Hershey Medical Group. The Prothonotary erred in granting Judgement for Non Pros even though a Certificate of Merit was FILED FOR RECORD timely. In addition, the COM was accepted by the court and the court did not deem the COM unacceptable prior to the judgement. The judgement was not granted in accordance with 1042.7(a)(2) & 1042.12(a)(1). The court erred in allowing the defendants to determine how the court would identify the "university defendants". The erred in the applicability of the Supplemental Certificate of Merit and the COM submitted with the Amended Complaint. The court erred in not allowing a jury to determine if a breach of duty by the defendants occurred based on the "special relationship" between Student-Athlete & University.

2. Issues to be raised on appeal:

Judge Recusal-bias, impartiality,
Certificate of Merit - original complaint & amended complaint
Trial by Jury
Judgement of Non Pros
Default Judgement
Special Relationship
Breach of Contract, Duty
1042.7, 1042.11, 1042.12

HAVE YOU ATTACHED (failure to attach any of the following, without explanation, may result in sua sponte action by this Court, including dismissal of the appeal):

(1) trial court's judgment, order or decree from which this appeal is taken? Yes No
(2) notice of appeal? Yes No
(3) up-to-date trial court docket? Yes No
(4) trial court opinion, if available? Yes No

Signature /s/ Ellison O. Jordan E-Mail Address _____
Print Name Ellison O. Jordan Atty. I.D. No. _____
Address PO Box 4704 Date 2/7/2021
Upper Marlboro, MD 20775

REASONS FOR GRANTING THE PETITION

The Supreme Court has indicated that, in cases involving a claim of a denial of constitutional rights, it is free to examine and review the evidence upon which the lower court based its conclusions, a position that under some circumstances could conflict with the principle of jury autonomy. In *Dairy Queen v. Wood*, the Supreme Court reversed a district court's order striking a plaintiff's demand for jury trial. There, the plaintiff-trademark owner sought several types of relief against the defendant-licensee for the licensee's alleged breach of a licensing contract, including an injunction and an accounting for money damages. The Court held that, even though the claim for legal relief was characterized by the district court as incidental to the equitable relief sought, the *Seventh Amendment* required that the factual issues pertaining to whether there had been a breach of contract to be tried before a jury. Thus, the rule emerged that legal claims must be tried before equitable ones, and before a jury if the litigant so wished.

Parties to a civil action have a constitutional and statutory right to a jury trial. In *Chilutti v. Uber Techs, Inc.* 2022 Pa Superior 172 (Oct. 12, 2022) states in *Taylor v. Extendicare Health Facilities, Inc.* 147 A. 3d 49 (Pa 2016) "...The Superior Court noted the Commonwealth of Pennsylvania guarantees its citizens a constitutional right to a jury trial." A demand for a jury trial was written in the Petitioner's complaint FILED FOR RECORD on January 31, 2020. The Petitioner's endorsement of "JURY TRIAL DEMANDED" complies with Pa. R. Civ. P. 1007.1(a).

In a letter dated May 12, 2020, President Judge Pamela A. Ruest, identified the case as medical negligence to be expedited on an aggressive track whereby no local rules for the stated process were available to the Plaintiff. In Pennsylvania, medical malpractice is not limited to physicians.¹ Malpractice actions extend to many professions, including healthcare providers, accountants, bookkeepers, tax preparers and engineers.² Professional malpractice arises when a professional who presents himself or herself as having specific skills and knowledge fails to meet the reasonable standards to that industry, resulting in harm. Also, in Pennsylvania, claims against doctors based on lack of informed consent are not considered medical malpractice but are treated as medical battery torts.³ Pa. Rule 212.3(d), Pre-Trial Conference states

“The court may make an order reciting the action taken at conference and the agreements made by the parties as to any of the matters considered; and limiting the issues for trial to those not disposed of by admissions or agreements of the attorneys. Such order when entered shall control the subsequent course of action unless modified the trial to prevent manifest injustice.”

In addition, Pa. Rule 1042.51(b)(1)(2) states

At the pretrial conference, the court shall (1) set a date for another pre-trial conference or for trial or furnish the parties with a tentative trial date, and (2) inquire of the parties whether they are willing to participate in mediation.

¹ Ditch v. Waynesboro Hosp. 917 A.2d 317 (Pa. Super. 2007)

² W. Page Keeton, et al, *Prosser and Keeton on Torts* 32, pp. 185-86 (5th Ed. 1984)

³ Cooper v. Lankenau Hospital, 51 A.3d. 183 (Pa. 2012)

Thus, it was the Petitioner's understanding as of June 23, 2020, that a jury trial was going to be conducted as evidenced by information stated in the June 23, 2020 FILED FOR RECORD, Case Management Conference Memorandum, in which the Appellate stated the following in response to Item 2(8)

"Possible unknown serious injuries which may be disclosed during Discovery given the Defendants' have failed to provide the Plaintiff with a complete copy of his medical records from June 2016-June 2020.;" Item 8- "To Be Determined (Discovery required)"; Item 9- "To Be Determined (Discovery required)"; Item 10- "Several unpaid medical bills by PSU Athletics. Unpaid charges being billed to Plaintiff. (Discovery required)"; Item 11- "Plaintiff's Father had to take off work to provide medical support to the Plaintiff. In addition, parents had to use retirement funds to cover expenses for medical and medical related expenses which the Plaintiff is required to repay his parents. (Discovery required)"; and Item 12- "Plaintiff's father had to use accrued leave and no longer has access to the leave. (Discovery required)". The Plaintiff did not withdraw nor consent to a withdrawal of his demand for trial by jury. The Judge's decision to dismiss the case with prejudice did not allow Mr. Jordan the opportunity for discovery, other pertinent pretrial events as well as trial by jury as demand.

The Petitioner relies on the REPORT and RECOMMENDATION dated December 28, 2018, from the United States District Court, Middle District of Pennsylvania, *Turner v. Wetzel, 4:18-cv-00361*. The Honorable United States Magistrate Judge states the following:

1. On page 10, it states "...See generally *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244-46 (3d Cir. 2013) (discussing a court's obligation to liberally construe pro se pleadings and other submissions, particularly when dealing with imprisoned pro se litigants)."
2. On page 13, it states "...Ordinarily, dismissal for failure to file a certificate of merit is without prejudice. See *Donelly v. O'Malley & Langan, PC*, 370 Fed. App'x 357, 350 (3d Cir. 2010) (per curiam); *Booker v. United States*, 366 Fed. App'x 425, 427 (3d Cir. 2010)".
3. On page 13, it states "In this case, the Medical Defendants have moved to dismiss on the ground that Turner failed to file an adequate certificate of merit with respect to each of the Medical Defendants".
4. On page 14, it states "A pro se plaintiff's failure to meet the technical requirements of Rule 1042.3 may be excused by the court where the plaintiff has made a substantial effort to comply with the rule or provided a reasonable excuse for failing to do so. See *Booker*, 366 Fed. App'x at 427-29; *Ramos v. Quien*, 631 F. Supp. 2d 601, 611-12 (E.D. {a/ 2008})."
5. On page 17, it states "The only ground upon which the Medical Defendants have moved to dismiss the plaintiff's state-law claims is his failure to file an adequate certificate of merit. Under the facts of this case, this pro se prisoner-plaintiff's written and signed certificate of

merit, timely filed with the state court prior to removal, substantially satisfies the requirements of Rule 1042.3(a)(3)."

The Petitioner relies on *Feleccia v. Lackawanna College* in which the Supreme Court:

1. stated "...*The existence of a duty is a question of law for the court to decide based on the specific facts of the case.*";
2. upheld the Superior Court decision that Lackawanna had a "*duty to care for its intercollegiate student athletes... and to provide adequate treatment in the event that an intercollegiate student athlete suffered a medical emergency.*";
3. stated "*In Kleinknecht and in the present case, the public has a substantial interest in protecting the health and well-being of intercollegiate athletes. As the Superior Court observed, 'colleges are expected to put a priority on the health and safety of their students, especially student athletes engaged in dangerous sports'... Colleges are best positioned to ensure that their athletes receive timely, competent medical attention..."; and*
4. stated "*Whether Lackawanna College breached this duty, and whether this breach caused Feleccia's and Resch's injuries, remain questions for the jury.*"

The Common Pleas Court stated in ORDER dated December 4, 202, on page 19, the following:

1. *“...Although there is no *in loco parentis* duty, that does not mean there is no duty on universities whatsoever, especially in cases involving student athletes recruited by the university to play intercollegiate sports.”;*
and
2. *“...the Defendants had a *duty to exercise care to protect the Plaintiff against unreasonable risk of harm*”.*

CONCLUSION

The petition for a writ of certiorari should be granted. The Petitioner had a constitutional right to demand a jury trial. The Petitioner demanded a jury trial. The Petitioner did not waive the demand for a jury trial. Therefore, the Petitioner had a constitutional right to have a jury decide whether the duty determined by the Court of Common Pleas was breached by the Respondents and whether the Respondents breach caused the Petitioner's injuries. The Court of Common Pleas, Centre County of Pennsylvania denied the Petitioner's constitutional right to a trial by jury.

Respectfully submitted:



Signature

Ellison O. Jordan

P. O. Box 4704

Upper Marlboro, MD. 20775

4jfam2020@gmail.com

September 16, 2023