

No. 23-5614

**IN THE SUPREME COURT
OF THE UNITED STATES**

ELLISON O. JORDAN,

Petitioner

v.

THE PENNSYLVANIA STATE UNIVERSITY, ET
AL.,

Respondents

On Petition for a Writ of Certiorari to the Supreme
Court of Pennsylvania

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

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QUESTIONS PRESENTED FOR REVIEW

Petitioner presents the following three questions for review:

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 [Respondents] had a duty to exercise reasonable care to protect [Petitioner] 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 [Respondents] owed a duty to [Petitioner] 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. “[Petitioner] has failed to aver facts evidencing a breach of the duty owed by University [Respondents] . . .”?;
- d. “Here, University [Respondents] exercised reasonable care in ensuring [Petitioner] received proper medical treatment . . .”?;
- e. “University [Respondents] did not fail to have qualified medical personnel available, deny [Petitioner] 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 [Respondents] did not breach their duty to ensure

qualified medical personnel were available to render medical assistance and [Petitioner] failed to aver facts showing University [Respondents] failed to exercise reasonable care.”?;

- h. “. . . [Petitioner’s] pleadings fail to establish a breach of the duty University [Respondents] owed to [Petitioner] and, therefore, [Petitioner’s] negligence claim against University [Respondents] is insufficient as a matter of law.”

(Petition at *i -ii*).

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INTRODUCTION

Respondents, The Pennsylvania State University, Sandy Barbour, Charmelle Green, and James Franklin (“University Respondents”), through their counsel, McNees Wallace & Nurick LLC, hereby submit this Brief in Opposition to the Petition for Writ of Certiorari (“Petition”) filed by Petitioner, Ellison O. Jordan. Petitioner, by and through the Petition, requests this Court review the May 9, 2022 order of the Superior Court of Pennsylvania entered at docket number 76 MDA 2021. There are, however, no federal questions for this Court to review. As such, University Respondents request the Petition be denied.

STATEMENT OF THE CASE

The factual and procedural background of this matter is set forth at length in the May 9, 2022 opinion of the Superior Court of Pennsylvania, which is attached to the Petition as Appendix A. Only a short

recitation of the factual and procedural background of this matter is necessary for the purposes of this Court's review of the Petition.

Petitioner was a member of the football team at The Pennsylvania State University between June 2016 and August 2019. In January 2020, Petitioner initiated the underlying action against University Respondents with the filing of a Complaint.¹ The Complaint was twice amended by Petitioner. The Second Amended Complaint brought various causes of action against University Respondents related to the medical treatment and care Petitioner received following a December 27, 2017 surgery performed to repair a knee injury allegedly sustained during football practice.

¹ The Complaint also named Respondents, Andy Mutnan, Renee Messina, Tim Bream, Wes Sohns, Brendan Carr, Scott A. Lynch, M.D., Peter H. Seidenberg, M.D. and John S. Reid, M.D. as defendants.

University Respondents sought the dismissal of the Second Amended Complaint by filing Preliminary Objections pursuant to the Pennsylvania Rules of Civil Procedure. Upon review, the trial court sustained University Respondents' objections and dismissed the Second Amended Complaint with prejudice. Petitioner appealed the trial court's dismissal of the Second Amended Complaint to the Superior Court of Pennsylvania, which affirmed the trial court's dismissal of the action by order and opinion dated May 9, 2022. Thereafter, the Petitioner petitioned the Supreme Court of Pennsylvania to review the Superior Court's decision. The Supreme Court of Pennsylvania declined to exercise discretionary review and the instant Petition to this Court followed.

ARGUMENT

Rule 10 of the Supreme Court of the United States sets forth the “considerations governing review on certiorari.” U.S. Sup. Ct. R. 10. The rule provides that “[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion.” *Id.* Rule 10 further provides that a writ of certiorari “will be granted only for compelling reasons.” *Id.* According to the rule, this Court looks for the following characteristics when considering whether to grant a petition for writ of certiorari:

- (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.

Id. Thus, “the principal purpose” for which this Court uses its certiorari jurisdiction “is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.” *Braxton v. United States*, 500 U.S. 344, 347 (1991).

Petitioner does not cite Rule 10 in his Petition let alone identify an important federal question decided by the Superior Court of Pennsylvania that warrants further review by this Court. The three

questions Petitioner presents for review all generally revolve around the claim that the trial court deprived him of his right to trial by jury by dismissing his Second Amended Complaint prior to trial. Petitioner does not make clear in his questions presented for review whether he is claiming the trial court's action violates the right to trial by jury enshrined in the Seventh Amendment to the United States Constitution² or the right to trial by jury enshrined in Article I, Section 6 of the Pennsylvania Constitution.³

² The Seventh Amendment to the United States Constitution provides that “[i]n 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.” U.S. CONST. amend VII.

³ Article I, Section 6 of the Pennsylvania Constitution provides that “[t]rial 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.” PA. CONST. art. I, § 6.

That being said, Petitioner cites both constitutional provisions in the Petition. (Petition at 3). As such, University Respondents will presume that Petitioner is claiming that the trial court's dismissal of the Second Amended Complaint violates both the federal and state constitutional provisions.

As to Petitioner's claim that the trial court's action violated Petitioner's federal right to trial by jury, that argument is waived. Although the Petitioner has maintained throughout his appeals that the trial court's dismissal of the Second Amended Complaint violated his right to trial by jury, Petitioner cited only the state constitutional provision below. Thus, Petitioner's argument here is being made for the first time. This Court has made clear that it "will not decide federal constitutional issues raised [] for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

Accordingly, Petitioner has not preserved his claim that the trial court's action violates his federal right to a trial by jury for review.

Even if the claim was preserved for review, it is well-settled that the Seventh Amendment's right to trial by jury is not made applicable to the states through the Fourteenth Amendment. *Gasperini v. Ctr. for Humans, Inc.*, 518 U.S. 415 (1996). Therefore, Petitioner has no federal right to trial by jury in the underlying matter filed in Pennsylvania state court. Absent a federal right, there is no federal question for review.

This leaves Petitioner's claim that the trial court's action in dismissing the Second Amended Complaint violates his state right to trial by jury. Federal courts generally do not review questions of state constitutional law. *Moore v. Anderson*, 222 F.3d 280, 286 (7th Cir. 2000). Even if this Court were

inclined to review questions of state constitutional law, it is clear that the trial court did not violate Petitioner's state right to trial by jury. Here, the Second Amended Complaint was dismissed following the filing of Preliminary Objections by University Respondents. Preliminary objections under Pennsylvania law, similar to motions under Rule 12(b) of the Federal Rules of Civil Procedure, challenge legal deficiencies in a complaint. Dismissal of an action in response to preliminary objections or a Rule 12(b) motion is not violative of the right to trial by jury because the right to a trial by jury extends only to cases where there are issues of fact to be determined. *See Borrero-Bejerano v. Dep't of Corr.*, 2019 WL 489835, at *3 (Pa. Cmwlth. 2019); *see also McArdle v. Verizon Commc'ns Inc.*, 567 F. App'x 116, 119 (3d Cir. 2014). Stated differently, a plaintiff has no right to trial by jury where the complaint is deficient as a

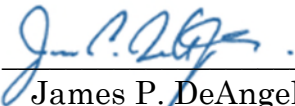
matter of law because there is no issue of fact for a jury to resolve. Therefore, Petitioner's claim that the trial court's action violated his state right to trial by jury is without merit because his Second Amended Complaint was dismissed for legal deficiencies.

CONCLUSION

For the reasons set forth above, University Respondents respectfully request this Court deny the Petition.

Respectfully submitted,

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