

No. _____

In The
Supreme Court of the United States

ALBERT VON WEINGARTEN,

Petitioner,

v.

LONNIE CHESTER,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Title 14 Vermont Statutes Annotated Section 1208 provide for an independent cause of action for maladministration of an estate, which can be brought in the United States District Court of Vermont based on diversity jurisdiction?
2. If there was any doubt about Vermont's Supreme Court recognizing the statute as creating an independent action, should the trial and/or appellate court have certified the questions to the Vermont Supreme Court?

LIST OF PARTIES

The full name of the Petitioner and Plaintiff
in this case is

Albert Von Weingarten

The full name of the Respondent and Defendant
in this case is

Lonnie Chester

RELATED CASES

*Albert Von Weingarten and Mary Von Weingarten v.
Lonnie Chester*, No. 2:17-cv-00211-cr, U.S. District
Court for the District of Vermont. Judgment
Entered August 28, 2019

*Albert Von Weingarten and Mary Von Weingarten v.
Lonnie Chester*, No. 19-2932, U.S. Court of Appeals
for the Second Circuit. Judgment
Entered August 28, 2020

ROSEMARY S. POOLER, PETER W. HALL,
DENNY CHIN, Circuit Judges.

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PETITION FOR WRIT OF CERTIORARI

Albert Von Weingarten petitions the United States Supreme Court for a Writ of Certiorari to review the decision of the Second Circuit Court of Appeals dated August 28, 2020 affirming the United States District Court of Vermont decision dated August 28, 2019.

**OPINIONS BELOW**

The opinions below are not officially reported, but are reported as *Albert Von Weingarten, et al. v. Lonnie Chester*, Docket No. 19-2032, 818 Fed. Appx 110 (Mem.) 2020 WL 5083333 and *Weingarten v. Chester*, Case No. 2:17-cv-0211, 2019 WL 4059839. They are printed in the Appendix.

**STATEMENT OF JURISDICTION**

The Supreme Court of the United States has jurisdiction to entertain petitions for writs of certiorari from the United States Second Circuit Court of Appeals based on diversity jurisdiction. Rule 10, Rules of the Supreme Court of the United States. This Court has jurisdiction under 28 U.S.C. § 1254(1).



**CONSTITUTIONAL AND STATUTORY
PROVISION INCLUDED**

1. 14 V.S.A. § 1208 provides as follows:

§ 1208. Individual liability of executor or administrator

(a) Unless otherwise provided in the contract, an executor or administrator is not individually liable on a contract properly entered into in his or her fiduciary capacity in the course of administration of the estate unless he or she fails to reveal his or her representative capacity and identify the estate in the contract.

(b) An executor or administrator is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he or she is personally at fault.

(c) Claims based on contracts entered into by an executor or administrator in his or her fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the executor or administrator in his or her fiduciary capacity, whether or not the executor or administrator is individually liable therefor.

(d) Issues of liability as between the estate and the executor or administrator individually may be determined in a proceeding for

that purpose in this court or a proceeding in a court of competent jurisdiction. (Added 1975, No. 240 (Adj. Sess.), § 7; amended 1985, No. 144 (Adj. Sess.), § 62.)

2. The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that “. . . nor shall any state deprive any person of due process of law. . . .”

◆

STATEMENT OF THE CASE

In this case, Albert Von Weingarten (“Albert”), beneficiary of the estate of his mother, Philomena Weingarten, claims his nephew, Lonnie Chester (“Chester”), as administrator of the Estate of Philomena Weingarten (“Estate”), was negligent in bringing a court proceeding against him to collect estate funds, which he did not have. Negligence is a tort in administering the estate. The action by Chester against Albert is different from a standard abuse of process or malicious prosecution action. Chester owed Albert a fiduciary duty of fairness as the personal representative of the Estate, since Albert was a beneficiary of the Estate. 14 V.S.A. § 3322.

The administrator or executor of an estate has the duties of collecting the assets of the estate, paying its debts, and distributing the residue to the beneficiaries of the estate. *Baldwin v. Taplin*, 113 Vt. 291, 295, 34 A.2d 117 (1943). He is held to the utmost frankness and fair dealing in his relations with the beneficiaries of the estate. *In Re Walker’s Estate*, 100 Vt. 366, 370,

137 A. 321 (1927). The Uniform Probate Code adopted by Vermont applies to all claims, including tort claims. *Martel v. Stafford*, 157 Vt. 604, 603 A.2d 345 (1991).

Albert now petitions the Supreme Court of the United States for a writ of certiorari, concerning whether Title 14 Vermont Statutes Annotated § 1208 (“Statute”) provides for an independent cause of action for maladministration of an estate, which can be brought in the United States District Court based on diversity jurisdiction, as a court of general jurisdiction. Despite the fact that the statute provides for the cause of action, both the trial judge and the appellate justices found that it did not provide a cause of action in this case, and could not be brought in a court of general jurisdiction. The Courts reasoned in the August 28, 2020 Summary Order that Vermont only recognizes causes of action as found in the *Restatement of the Law* and that only the Probate Division has jurisdiction over the maladministration claim. The Courts have overlooked the plain wording of the statute and case law concerning maladministration, which allows for the claim to be made “in a court of competent jurisdiction.” 14 V.S.A. § 1208(d).



ARGUMENT

1. The Court Erred in Concluding Plaintiff Did Not Have an Independent Cause of Action for Maladministration.

Title 14 V.S.A. § 1208 provides for the individual liability of executor or administrator for torts, stating that:

(b) An executor or administrator is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administrator of the estate only if he or she is personally at fault.

* * *

(d) Issues of liability as between the estate and the executor or administrator individually may be determined in a proceeding for that purpose in this [probate] court or a proceeding *in a court of competent jurisdiction*. (Emphasis added).

The Vermont Supreme Court construes a statute according to the ordinary meaning of the words the legislature has chosen. *In re Villeneuve*, 1678 Vt. 450, 458, 709 A.2d 1067, 1072 (1998). South Dakota has a similar statute to 14 V.S.A. § 1208. The South Dakota statute 29A-3-808 provision concerning individual liability of personal representative is as follows:

(b) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed

in the court of administrator of the estate only if personally negligent.

* * *

(d) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding.

In the case of *In Re Weekly v. Prostrollo*, S.D. 13, ¶ 12, 778 N.W. 2d 823, 827 (2010), both the trial and appellate courts found that a personal representative may be held liable for negligent administration of a decedent's estate. These were both courts of general jurisdiction, as opposed to the probate court. Personal representatives act in a fiduciary capacity on behalf of those having an interest in the estate. Therefore, "[i]f the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from the breach of fiduciary duty." *In Re Weekly, supra*.

2. The Courts Should Have Certified the Issue of Jurisdiction to the Vermont Supreme Court.

If there was any doubt about Vermont's Supreme Court recognizing the statute as creating an independent action in a court of general jurisdiction, the Courts should have certified the question to the Vermont Supreme Court.

As explained in 32A Am. Jur. 2d Federal Courts § 1073:

Certification of a question by a federal district court to a state's highest court is a mechanism to prevent a federal court from having to make a so-called "Erie guess", where a particularly unclear area of state law would be outcome determinative and where no controlling state precedent exists. Certification procedure allows a federal court faced with a novel state law question to put the question directly to the state's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.

Rule 14 of Vermont's Rules of Appellate Procedure provides in part as follows:

(a) Answers to Certified Questions. The Vermont Supreme Court may answer a question of Vermont law certified to it by a federal court if the answer might determine an issue in pending litigation and there is no clear and controlling Vermont precedent. The Supreme Court may decline to answer any question certified to it without providing any reasons for its decision.

* * *

(h) Opinion. The Supreme Court will issue a written opinion answering the certified question. The clerk will send a copy of the opinion to the certifying court and serve it on the parties.

(i) Costs. Parties must divide costs equally in a proceeding under this rule unless the certifying court orders otherwise.

In not certifying the question to the Vermont Supreme Court, the United States Federal Courts have denied plaintiff due process.



CONCLUSION

Petitioner requests a reversal or remand, or for the Second Circuit Court to certify the question to the Vermont Supreme Court, to allow re-argument once the Vermont Supreme Court issues an opinion.

Dated at Stowe, Vermont this 24th day of November 2020.

Respectfully submitted,
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