

No. 17-1541

In The
Supreme Court of the United States

EITAN SOBEL,

Petitioner,

v.

CITY OF RUTLAND, VERMONT,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Vermont**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court has jurisdiction under 28 U.S.C. § 1257(a) to review this matter, as the Petitioner during the course of the state court proceedings failed to properly present his claim pursuant to the United States Constitution.

Whether an appeal from a state small claims decision, that the Vermont Supreme Court declined to review, where the intermediate appellate court found that after having been given a full and fair opportunity to present and argue evidence, the Petitioner completely and totally failed to prove his case, involves an important question of federal law that this Court should review pursuant to the Rules of the Supreme Court of the United States 10(c).

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the Vermont Superior Court, Rutland Unit, Small Claims Division (Pet. App. 1-5), Docket No. 159-6-17, dated September 28, 2017. The Decision on Appeal of the Vermont Superior Court, Rutland Unit, Civil Division (Pet. App. 6-7), Docket No. 527-10-17 Rdcv, dated March 15, 2018. The Entry Regarding Motion to Reconsider of the Vermont Superior Court, Rutland Unit, Civil Division (Pet. App. 8), Docket No. 527-10-17 Rdcv, dated March 21, 2018. The Entry Order of the Vermont Supreme Court (Pet. App. 9), Docket No. 2018-114, dated April 18, 2018.

JURISDICTION

The Petitioner claims jurisdiction pursuant to 28 U.S.C. § 1257(a) (Pet. 1). For the reasons set forth below, the Respondent disagrees that the Court has jurisdiction to review this matter pursuant to 28 U.S.C. § 1257(a), and the Petitioner's writ of certiorari should be dismissed for want of jurisdiction.

INTRODUCTION

The Petitioner has not set forth a compelling reason, or even a remotely viable reason, as to why this

Court should grant certiorari from the decision of the Vermont Small Claims Division and appeal to the Vermont Civil Division and Vermont Supreme Court below.

The instant case arises from a complaint filed by the Petitioner in the Vermont Small Claims Division on June 14, 2017. The Petitioner voluntarily chose the forum to file suit, even though he later alleged during the course of the small claims proceedings that his damages exceeded the jurisdictional amount of \$5,000.00 that the Small Claims Division could award. Petitioner specifically stated at the small claims hearing that he did not want to spend the time and energy to pursue his claim in a different forum and he had trouble finding legal representation to assist with his claim. Without specifically delineating a claim of negligence, the Petitioner argued that the City of Rutland was responsible for the damage caused to his rental property as the result of the City's sewer main becoming clogged and backing up into the basement of the Petitioner's property.

At the small claims hearing, the Petitioner was provided with a full and fair opportunity to present the evidence related to his case. He testified on his own behalf but called no other witnesses, nor did he inform the small claims court that he had any other witnesses he intended to call as part of his presentation. At the conclusion of the Petitioner's case, the Respondent moved to dismiss the complaint and renewed this motion to dismiss after the Petitioner had a chance to present oral argument to the court. The Small Claims

Division ended up dismissing the matter before the direct testimony of the Respondent's witness was finished and before the Petitioner had an opportunity to cross-examine the Respondent's witness. At no point in the proceedings before the Small Claims Division did the Petitioner invoke the United States Constitution or any part thereof, nor did he argue that he was being deprived of any right to cross-examine the Respondent's expert witness.

In his initial appeal filed on or about November 23, 2017 with the Vermont Superior Court, Civil Division, the Petitioner did not invoke the United States Constitution or any part thereof.¹ In Petitioner's reply brief to the Respondent's response dated on or about December 8, 2017, the Petitioner did not invoke the United States Constitution or any part thereof. The first time the Petitioner invoked the United States Constitution was in his Motion to Reconsider filed with the Vermont Superior Court, Civil Division on or about March 20, 2018. The Petitioner's Motion to Reconsider did not refer to any specific provision or section of the United States Constitution or precedent that would support his position that he was unjustly denied the

¹ The entirety of the Petitioner's Appeal stated: "While I was sitting as the plaintiff in this case, I could not avoid the feeling that this was not a fair hearing and that the Court had made its decision prior to the hearing. It was most disturbing to hear the court announcing its final judgment while the defendant was still questioning the expert witness, Mr. Wennberg, and before the plaintiff had an opportunity to cross examine [sic] the expert witness."

right to cross-examine the Respondent's witness at the small claims proceeding.

The Petitioner invoked the United States Constitution in both his docketing statement of March 27, 2018 and in his brief to the Vermont Supreme Court submitted on or about March 27, 2018, but again failed to delineate any specific provisions of the Constitution or precedent that supported his position regarding the cross-examination of defense witnesses in a small claims proceeding.

On appeal to the Vermont Supreme Court, the Respondent argued that the Petitioner failed to request permission to appeal the decision of the Vermont Superior Court, Civil Division as required for small claims appeals by Vermont Rule of Appellate Procedure (V.R.A.P.) 6(b) and Vermont Rules of Small Claims Procedure (V.R.S.C.P.) 10(e)(1). The Vermont Supreme Court's Entry Order stated "Plaintiff's motion for permission to appeal the above-captioned small claims action is denied. *See* 12 V.S.A. § 5538 (providing that '[n]o appeal as of right exists to the Supreme Court' in small claims action); V.R.S.C.P. 10(e)." (Pet. App. 9).

The Petitioner claims in his Petition that he "appealed to the Superior Court of Rutland based on his constitutional right to cross-examine and confront a witness." (Pet. 4). This is a misstatement of fact. As a result of the Petitioner's failure to either timely or adequately raise his claims pursuant to the United States Constitution, the Court is without jurisdiction. Even if the Petitioner were able to establish

jurisdiction, the decision of the Vermont Small Claims Division judge to end the proceedings before granting the Petitioner the opportunity to cross-examine the Respondent's witness is not an important question of federal law. The Petitioner's invocation of the United States Constitution, only upon a request to reconsider the Civil Division's decision on appeal, does not transform the issue raised into an important question of federal law.

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STATEMENT

The Vermont Small Claims Court proceedings are a creation of Vermont Statute and the corresponding Vermont Rules of Small Claims Procedure (V.R.S.C.P). The V.R.S.C.P. are "construed to secure the simple, informal, and inexpensive disposition of every action subject to them." V.R.S.C.P. 1(a). Motion practice in small claims proceedings is mostly prohibited except for matters related to default, jurisdiction and extending timeframes. V.R.S.C.P. 4. Plaintiffs waive the ability to have a trial by jury when they bring a small claims action. V.R.S.C.P. 5(a). Vermont small claims trials are held in a "summary manner" and when a trial is held before a judge, the Vermont Rules of Evidence are inapplicable, except for those regarding privilege. V.R.S.C.P. 6(a), (b). The Petitioner specifically chose to file his action in the Small Claims Division, precisely because of the informality of the proceedings.

The Petitioner is a physician employed by the Rutland Regional Medical Center. (Pet. App. 1). The basement of Petitioner's rental property was flooded as the result of one of the City of Rutland's sewer mains becoming blocked and backing up. (Pet. App. 2). The Respondent's witness established at the trial that the City had no prior notice of a problem in the sewer main where the blockage occurred in this instance. (Pet. App. 3). The Small Claims Division held that the Petitioner's claim failed because he failed to prove his claim of negligence against the City because he did not prove that the City breached any duty owed to him.

Appeals from small claims proceedings go to the Civil Division of the court where the small claims proceeding was held. V.R.S.C.P. 10(a)(1). This appeal is an appeal as of right. *See* V.R.S.C.P. 10(a)(1) (“[a]ny party to a small claims action may appeal the judgment to the civil division.”). On appeal, the Civil Division affirmed the decision of the Small Claims Division, finding that “Plaintiff’s evidence fell far short of what was required to establish a duty on the part of Defendant.” (Pet. App. 6). The Civil Division, in upholding the decision of the Small Claims Division, albeit for slightly different reasons, relied on the Vermont Supreme Court holdings in *In re Handy*, 764 A.2d 1226, 1234; 171 Vt. 336, 343 (2000) and *Buttolph v. Eriksson*, 648 A.2d 824, 826; 160 Vt. 618, 619-20 (1993) for the proposition that “[o]n appeal, the court may affirm the trial court on any ground that fairly appears in the record below.” (Pet. App. 7). The Civil Division also held that while it may have been error for the Small Claims

Division to conclude the proceedings before allowing the Petitioner the chance to cross-examine the City's witness, any error was "not reversible error" since the Small Claims Division could just as easily have granted judgment to the Respondent pursuant to V.R.C.P. 52(c) based on the Petitioner's failure to meet his burden of proof. (Pet. App. 7). The Civil Division reiterated this decision on the Petitioner's Motion to Reconsider, holding that "Plaintiff had ample opportunity to present his evidence. . . . notwithstanding the trial court's error, its judgment is amply supported on alternate grounds that appear on the face of the record below." (Pet. App. 8).

Without specifically requesting permission to appeal as required by V.R.S.C.P. 10(e)(1) and V.R.A.P. 6(b), the Petitioner appealed to the Vermont Supreme Court and filed a merits brief. Nevertheless, the Vermont Supreme Court, without reaching the substance of any of the Petitioner's claims, denied what it termed his "motion for permission to appeal." (Pet. App. 9). This appeal followed.

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ARGUMENT

1. The Court lacks jurisdiction to hear this matter pursuant to its holdings interpreting 28 U.S.C. § 1257(a) that allows for final judgments or decrees to be reviewed by the Court when "rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is

specially set up or claimed under the Constitution . . . or any commission held or authority exercised under, the United States.”

In the present instance, the Petitioner failed to properly raise any claim under the United States Constitution as part of the state court proceedings. “This Court has frequently stated that when ‘the highest state court has failed to pass upon a federal question, it will be assumed that that omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.’” *Webb v. Webb*, 451 U.S. 493, 495 (1981) (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)) (remaining citations omitted). “It is a long settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.” *Id.* at 496-97 (citations omitted).

The Court has expounded on this basis holding “under 28 U.S.C. § 1257 that we will not consider a petitioner’s federal claim, unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.” *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (citations omitted). “When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had ‘a fair

opportunity to address the federal question that is sought to be presented here.’” *Id.* at 86-7 (quoting *Webb*, at 501) (citations omitted).

Past decisions demonstrate that the Court has “focused on the need for petitioners either to establish that the [federal question] claim was raised ‘at the time and manner required by the state law,’ or to persuade us that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court’s judgment. . . . In other cases, we have described a petitioner’s burden as involving the need to demonstrate that it presented the particular claim at issue here with ‘fair precision and in due time.’” *Adams*, at 87 (quotations and citations omitted).

Where the highest court of a state denies a “motion for leave to appeal without stating any ground for its decision. . . . [This Court] must ascertain whether that court’s decision ‘might’ have rested on a nonfederal ground, for if it did we must decline to take jurisdiction.” *Ellis v. Dixon*, 349 U.S. 458, 459 (1955) (citations omitted). The Court approaches this issue “first by considering what the petitioner has alleged as a basis for the constitutional issues which he asks us to review on the merits.” *Id.*

The Vermont Supreme Court has made clear that when a party fails to raise an issue related to the United States Constitution at the trial court stage, they “will not consider it on appeal.” *State v. Lee*, 2007 VT 7, ¶14, 181 Vt. 605, 608, 924 A.2d 81, 86 (2007)

(citing *State v. Ovitt*, 2005 VT 74, ¶13, 178 Vt. 605, 878 A.2d 314 (2005) (mem.)). “An issue is not preserved for appeal unless a party raises it with specificity and clarity below, thereby ensuring that the trial court will have an opportunity to fully develop the relevant facts and to reach considered legal conclusions.” *State v. Ovitt*, 2005 VT 74, ¶13, 178 Vt. 605, 878 A.2d 314 (2005) (mem.).

It is clear from the record of the Small Claims Division hearing that the Petitioner did not once mention the United States Constitution or his ability to cross-examine the Respondent’s witness after the Petitioner had presented his case. The Petitioner did not once mention the United States Constitution in his appeal to the Vermont Superior Court, Civil Division or in his reply to the Respondent’s brief. The trial court in this instance never had the opportunity to fully explore, or explore at all, any concerns that the Petitioner had pursuant to the United States Constitution. There was no record developed at the trial court in respect to the Petitioner’s concerns or his ability to cross-examine the Respondent’s witnesses. The Petitioner failed to properly present any issue to the trial court regarding the United States Constitution.

The Vermont Supreme Court in this instance failed to pass upon the federal question regarding the United States Constitution that the Petitioner only raised after both the Small Claims Division and Civil Division had issued their decisions. The Vermont Supreme Court did not address the Petitioner’s claim pursuant to the United States Constitution. Precedent

dictates that the Vermont Supreme Court will not take up issues related to the United States Constitution, unless the issue was raised in the trial court. The Petitioner failed to invoke the United States Constitution in the Small Claims Division. The Court should assume that the omission of the Vermont Supreme Court to pass on the Petitioner's later invocation of the United States Constitution is due to want of proper presentation. The Petitioner's petition is devoid of any claim that he raised his concerns pursuant to the United States Constitution with the trial court and he will be unable to affirmatively demonstrate the contrary to the Court.

In the alternative, it may be the case that, even though the Petitioner's filing was referred to by the Vermont Supreme Court as a "motion for permission to appeal" (Pet. App. 9) the Vermont Supreme Court did not consider the Petitioner's appeal a proper request for permission to appeal as required by the V.R.A.P. and V.R.S.C.P, as he did not ask for permission to appeal, but instead filed a merits brief.

Petitioner's claim pursuant to the United States Constitution was not submitted to the Vermont Supreme Court with fair precision and in due time, or in the time and manner required by Vermont law, nor will Petitioner be able to demonstrate that the Vermont Supreme Court's procedural requirements are not an adequate and independent state-law ground for the Vermont Supreme Court's judgment. Based on the state of the record, the Court should conclude that at a minimum, the Vermont Supreme Court's denial of the

Petitioner's appeal might have rested on a nonfederal ground based on the fact that the Petitioner did not raise the United States Constitution in the trial court, nor did he follow the appropriate procedure necessary to request permission to appeal a decision of the Vermont Civil Division's review of the Small Claim's Division.

As the decision of the Vermont Supreme Court might have rested on a nonfederal ground and because the Petitioner will be unable to demonstrate to the contrary, the Court must decline to take jurisdiction and dismiss the appeal for want of jurisdiction.

2. Even if the Court finds that there is sufficient jurisdiction to entertain the Petitioner's claims, the Petitioner fails to demonstrate how the decision of the Vermont Small Claims Division; the subsequent affirmation by the Vermont Civil Division; and the Vermont Supreme Court's refusal to review the small claims decision is "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." Supreme Court Rule 10(c). The Petitioner does not cite or refer to even a single decision of this Court or of any other court in his petition. Without citation to a single case of this Court or any other, the Petitioner has utterly failed to demonstrate that there is either a conflict among the Federal Courts of Appeals on any issue presented, nor is he able to demonstrate that the decision of any Vermont court in the record below conflicts with a decision of this Court.

The Petitioner attempts to characterize the Small Claims Division decision below as one of national importance by inserting a claim that the maintenance of Rutland’s sewer system is governed by the “recommendations of the EPA.” (Pet. 6). Petitioner’s misplaced attempt to recast his small claims action as a federal question of national importance does not pass muster or the prior jurisprudence of the Court. The question before the Court is whether Petitioner should have been allowed to cross-examine a defense witness after Petitioner concluded his case in a small claims trial, where the Vermont Civil Division found on appeal that “so complete was the failure of proof that it would have been reversible error for the trial court to have found that the Plaintiff had established a duty.” (Pet. App. 8). “There is no conflict among the state or federal courts regarding [this issue] Cf. this Court’s Rules 10(a)-(b). . . . [It] does not implicate an open ‘important question of federal law.’ Cf. Rule 10(c). Nor do the procedures below clearly conflict with any precedent from this Court. Cf. *ibid.*” *Hollingsworth v. Perry*, 558 U.S. 183, 203 (2010) (Breyer, J., dissenting).

“Even where a state court has wrongly decided an ‘important question of federal law,’ Sup. Ct. Rule 10, we often decline to grant certiorari, instead reserving such grants for instances where the benefits of hearing a case outweigh the costs of so doing.” *Kansas v. Carr*, 577 U.S. ___, 136 S.Ct. 633, 647 (2016) (Sotomayor, J., dissenting). As set forth above, the state courts did not decide any question of federal law because it was not properly presented. The Petitioner has not outlined

how the issue presented constitutes an important question of federal law. Even if the Petitioner had successfully navigated these two hurdles (and he has not) it is clear that the benefits of hearing this case do not outweigh the costs of so doing.

This Court's jurisprudence in respect to small claims proceedings is limited. The two readily discernable instances of an appeal from a small claims court to this Court both ended in certiorari being denied for "want of jurisdiction." See *Cross v. Church*, 446 U.S. 902 (1980); *Theoharous v. Deer Run Shores Property Owners Association, Inc.*, 459 U.S. 899 (1982). The Court has opined on the fact that its own jurisprudence obviated the need for a jury trial in small claims courts. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 784, fn. 30 (2010) ("As a result of *Bombolis [Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916)], cases that would otherwise fall within the Seventh Amendment are now tried without a jury in state small claims courts. See, e.g., *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 124 P.3d 550 (2005) (no right to jury trial in small claims court under Nevada Constitution).").

Since small claims jurisprudence before this Court is nearly non-existent, state court jurisprudence may prove informative. "A litigant may effectively waive certain constitutional and procedural rights by choosing an alternative forum that provides an expeditious and inexpensive means of resolution of a case." *Whitehouse v. Six Corporation*, 40 Cal. App. 4th 527, 536, 48 Cal.Rptr.2d 600, 605 (Cal.Ct.App.1995). An "example is the small claims court where, in exchange for

speedy, inexpensive procedures, a plaintiff waives his or her right to discovery, right to an attorney, damages in excess of \$5,000, trial by jury, and appeal.” *Id.* at 536-37, 606.

It was the Petitioner who in this instance chose the forum of the Small Claims Division. When Petitioner did so he knew or should have known of the limitations to bringing a claim in the Vermont Small Claims Division “the simple, informal, and inexpensive disposition of every action subject to them.” V.R.S.C.P. 1(a) (almost no discovery or motion practice; waiver of jury trial by plaintiff; summary proceedings; inapplicability of rules of evidence). The Petitioner instead has attempted to turn a simple small claims complaint into a matter of national importance. This is not the purpose of small claims courts.

Small claims courts serve an important purpose in acting as a release valve to the pressures exerted on higher courts in any jurisdiction. Small claims courts provide an informal, but structured, forum to determine cases of low monetary value that, while not rising to levels of great importance, are meaningful to the litigants. Subjecting a small claims proceeding to formal review by this Court belies the purpose of a small claims forum. Even if the Petitioner had properly raised an important issue of federal law below, the benefits of reviewing that issue on appeal from a small claims proceeding do not outweigh the costs of that review. The petition for a writ of certiorari should be denied.

3. Petitioner argues that the Vermont Civil Division erred in its decision on appeal when it asserted that the “Plaintiff ‘did not meet the burden of proof’” in the proceedings below, because the decision of the Vermont Civil Division sitting as an appellate court, affirmed the decision of the Small Claims Division on a different ground. (Pet. 7). The Petitioner’s position in respect to appellate court review is without merit. As the Court recently stated, “[a]n appellate court’s function *is* to revisit matters decided in the trial court.” *Musacchio v. U.S.*, ___ U.S. ___, 136 S.Ct. 709, 716 (2016) (emphasis in original). This Court need go no further than its own holdings to confirm that appellate courts routinely affirm decisions below on different grounds or for different reasons. *See, e.g., McNeill v. United States*, 563 U.S. 816 (2011); *Kennedy v. Plan Adm’r for DuPont Sav. and Inv. Plan*, 555 U.S. 285 (2009); *Hudson v. U.S.*, 522 U.S. 93 (1997); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *Board of Airport Com’rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260 (1986); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

The Vermont Civil Division was well within its authority when it affirmed the decision of the Small Claims Division on different grounds. The petition for a writ of certiorari should be denied.



CONCLUSION

The petition for a writ of certiorari should be denied because the Court lacks jurisdiction to hear this matter. Wholly in the alternative, even if there is jurisdiction to review this matter, the petition for a writ of certiorari should be denied because the Petitioner fails to raise an important question of federal law that should be decided by this Court or that conflicts with a prior holding of the Court. The decision of the Vermont Civil Division to uphold the Small Claims Division on different grounds does not raise any question reviewable by this court and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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