

**In the
Supreme Court of the United States**

ANDREW NAJDA; and CHARLES NAJDA,

Petitioners,

v.

NIKOLAOS PATERAKIS,

Respondent.

**On Petition for a Writ of Certiorari
to the Massachusetts
Supreme Judicial Court**

PETITION FOR REHEARING

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Pursuant to Rule 44 of this Court, Petitioners Andrew Najda and Charles Najda (collectively, the “Najdas” and “Petitioners”) hereby respectfully petition for rehearing of the April 1, 2019 order denying the petition for a writ of certiorari.

New developments warrant granting this petition for rehearing following the denial of certiorari. The most pertinent reasons here are new Supreme Court rulings that cast doubt on the judgment in the case, which is based on a manifest error in the Massachusetts Supreme Judicial Court’s (“SJC”) own precedent, and cast doubt on the SJC’s denial of further appellate review to the Najdas.

Since, the SJC’s denial of further appellate review and the underlying judgment are tainted by a manifest legal error, which is in conflict with other Circuits and state courts, this case should be remanded for renewed consideration. *Madison v. Alabama*, 139 S. Ct. 718, 721 (2019) (“the state court’s decision was tainted by legal error, this case is remanded”). The SJC’s refusal to correct the manifest error in its precedent, which if corrected would mandate reversal of the judgment in this case, and the Massachusetts Appeals Court’s implicit refusal to acknowledge the manifest error in precedent represent a substantive breakdown in the administration of justice. “In our real case, there is simply no way to shrug off ... [the manifest error in SJC precedent] as harmless error.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1161 (2019). These rulings justify granting this petition.

Although the Appeals Court omits the word “fraud” from its opinion, implicit in a plain reading of the Appeals Court’s thesis “the jury could have found ... [that they] never intended to run a legitimate business” is fraud. App. 4a. A person only reading the Appeals Court’s opinion would be surprised to learn that the jury had rejected the fraud count by voting no on intentional (fraudulent)

misrepresentation. More generally, the Appeals Court does not reference any of the counts that the jury found in favor of the Najdas.

The jury determined that the Najdas did not intentionally misrepresent their intent. To uphold a finding of negligent misrepresentation the Appeals Court cites *Cumis Ins. Soc., Inc. v. BJ's Wholesale Club, Inc.*, 455 Mass. 458, 474 (2009) (citing *Brewster Wallcovering Co. v. Blue Mtn. Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 601 n. 45 (2007)) as precedent for the contention that intent (as to future conduct) can be negligently misrepresented.

Precedent from other Circuits and states, demonstrates that the SJC's holding in *Cumis* is manifestly erroneous. As a matter of law, a person cannot negligently represent his or her own state of mind (intent). Restatement (Second) of Torts § 530 cmt. b (1977); *City of Warrensburg, Mo. v. RCA Corp.*, 571 F. Supp. 743, 754 (W.D. Mo. 1983) ("there can be no cause of action for negligent misrepresentation of a maker's own intention"). So well established is this principle that logic, independent of the law, dictates that a person cannot negligently misrepresent his or her own intent. "Even if one states an intent to act in a certain manner and is merely uncertain if one intends to act in that manner, the statement is not negligent but deceitful because one knows about the uncertainty of one's future intent." *Jacobs Mfg. Co. v. Sam Brown Co.*, 792 F. Supp. 1520, 1528 (W.D. Mo. 1992).

Without the manifest error of law in *Cumis*, the Appeals Court could not have justified its principal holding that intent was misrepresented and would have had to reverse the judgment. The jury rejecting intentional (fraudulent) misrepresentation and the law precluding negligent misrepresentation (of intent) means that there is no possibility that the jury made a finding adverse to the Najdas as to their intent to run the business.

Massachusetts affords “a party aggrieved by a final judgment” the right to appeal. M.G.L. Ch. 231, § 113. “[The Najdas] cannot, consistent with due process and equal protection [under the *Fourteenth Amendment*], be arbitrarily denied the right to a meaningful opportunity to be heard on appeal.” *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 18 (1987). Yet, the Najdas were “denied meaningful access to the appellate system because” they did not receive review of the manifest error in SJC precedent that is at the core of their case before a court that is capable of correcting the error. *Evitts v. Lucey*, 469 U.S. 387, 406 (1985). The Appeals Court had no power to correct the error as to the negligent misrepresentation count, so its review was not meaningful. The Najdas were not given the chance to present their argument before the court with the power to correct the error, the SJC.

To ensure the equal application of state law without discrimination against the class of litigants raising the special class of error that is a manifest error of law in SJC precedent and to ensure a fair opportunity to obtain an adjudication on the merits consistent with due process, the SJC should have granted the Najdas’ application for further appellate review and should have vacated and reversed the judgment as to negligent misrepresentation. Powerless to correct the error the Najdas had identified, the Appeals Court had a duty to vote for further appellate review.

The state courts’ decisions were tainted by clear legal error. The SJC’s and Appeals Court’s decisions conflict with the law in other Circuits and states and conflict with logic: there is no cause of action for negligent misrepresentation of intent. The Najdas should not have been, and no other party in Massachusetts should ever be, held liable for negligent misrepresentation of their intent. This is not a harmless error: the Najdas’ reputation was unjustly

harm; and the Massachusetts Trial Courts have repeatedly applied *Cumis's* manifestly flawed precedent, as to negligent misrepresentation, in multiple cases resulting in unjust judgments:

Rauhaus Freedendfeld & Assocs., LLP, v. Prince, 1684 CV 03686-BLS2, 2017 Mass. Super. LEXIS 89, 4 (2017); *Estate of Tina M. Gefteas v. Pm & Family*, No. MICV2013-00687, 2013 Mass. Super. LEXIS 251, 3 (2013); and *Pyne v. Interface Sys. Grp.*, 2011 Mass. Super. LEXIS 371, 7 (2011).

Given the constitutional safeguards of the *Fourteenth Amendment*, the required relief is for the SJC's order denying further appellate review to be reversed or for the judgment to be vacated and this case remanded.

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

Andrew Najda
pro se

Charles Najda
pro se

May 15, 2019

CERTIFICATE OF COMPLIANCE

I certify that this Petition for Rehearing to the United States Supreme Court is restricted to the grounds specified in Rule 44 and that this petition for rehearing is presented in good faith and not for delay.

/s/ Andrew Najda
Andrew Najda