

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANDREW C. NAJDA, ET AL.,

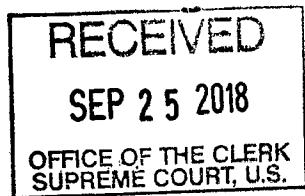
Petitioners,

v.

NIKOLAOS J. PATERAKIS,

Respondent.

**APPLICATION FOR EXTENSION OF TIME TO FILE PETITION
FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT**



**To the Honorable Stephen G. Breyer, Justice of the United States and
Circuit Justice for the First Circuit:**

Pursuant to Rule 13.5 of the Rules of this Court, Andrew and Charles Najda (collectively, the “Najdas” and “Petitioners”) respectfully request a sixty (60) day extension of time, to and including November 26, 2018, within which to file a petition for a writ of certiorari to review the order of the Massachusetts Supreme Judicial Court (“SJC”) in Paterakis v Najda (FAR-26024) denying further appellate review (“FAR”). A copy of the SJC’s order denying further appellate review is attached. The Court has jurisdiction under 28 U.S.C. § 1257(a).

The SJC denied the Najdas’ application for further appellate review on June 29, 2018. The SJC then denied their petition to reconsider the application for further appellate review on July 30, 2018. On July 11, 2018, judgment was entered. Unless extended, the time for filing a petition for a writ of certiorari will expire on September 27, 2018. The Najdas respectfully request an extension of time because the SJC’s order presents the following important constitutional question:

Does denial of further appellate review to parties who raise an error of law that is a demonstrable mistake in SJC precedent, caused by the SJC making an incorrect citation, violate the parties’ due process rights under the constitution and result in the inconsistent application of the law, which establishes a right to appeal?

Although this Court has yet to find that there is a constitutional right to appeal; some state legislatures, including Massachusetts, have codified a right to appeal. The legislative purpose of providing a right to appeal is to give “a party aggrieved by a final judgment” the opportunity to argue before an appellate court

with the power to correct errors of law made in a lower court. Massachusetts General Laws Ch. 231, § 113 (Appeal from final judgment of superior court, land court and housing courts). Massachusetts provides parties litigating a civil matter in a superior court the right to appellate review. Id. Within this right, there is no disclaimer that parties raising a certain class of errors of law are barred from an appearance before an appellate court with the power to correct that certain class of errors. More specifically, there is no carve out declaring that parties who raise an error of law that is a demonstrable mistake in SJC precedent, caused by the SJC making an incorrect citation (such as misreading a cited case to have a holding that it does not have), should be denied meaningful appellate review before a court with the requisite power to correct such an error.

For this class of appellants, appellate review before the Massachusetts Appeals Court does not satisfy due process and equal protection because the Appeals Court does not have the power to correct a demonstrable mistake in SJC precedent caused by an incorrect citation. The Appeals Court applies SJC precedent even if it contains a substantive mistake. Parties raising a demonstrable mistake in SJC precedent are treated as an inferior litigant class when they are only allowed to appear before the Appeals Court.

Indeed, denial of further appellate review to parties who raise an error of law that is a demonstrable mistake in SJC precedent, caused by the SJC making an incorrect citation, violates the parties' due process rights under the constitution and results in the inconsistent application of the law, which establishes a right to appeal.

The class of litigant that raises an error of law that is a demonstrable mistake in SJC precedent is not treated equally as the class of litigant raising more common errors addressable by the Appeals Court until the party's appeal is before the SJC.

Every appellant eligible under M.G.L. Ch. 231, § 113 to appeal must be treated equally under this law (that provides for the right to appellate review before a court with the power to correct the errors raised). Since there is no carve out by the legislature, there cannot be two classes of appellants: (1) those who raise common errors of law (addressable by the Appeals Court) are guaranteed to be heard before an appellate court with the power to correct the errors they raise and benefit from M.G.L. Ch. 231, § 113; while (2) those who raise a demonstrable mistake in the SJC's own precedent, caused by an incorrect citation, are not guaranteed to be heard before an appellate court with the power to correct the errors they raise and when they are denied SJC review they do not benefit from M.G.L. Ch. 231, § 113 (in effect they are a second class appellant).

The legislature did not restrict the right to appeal under M.G.L. Ch. 231, § 113 such that the right would not apply to parties raising a demonstrable mistake in SJC precedent on appeal. Therefore, they should be treated equally with those raising other more common errors. Parties raising a demonstrable mistake in SJC precedent, caused by an incorrect citation, should be allowed to appear before the SJC to ensure due process of law and equal justice under the law, which comports with the 14th Amendment.

The inconsistent application of the right to appeal in Massachusetts is related

to an important issue. The role of the appellate courts is to correct errors including errors in higher court precedent. If there is a demonstrably obvious mistake in SJC precedent, then when raised by a party the SJC should correct that mistake in its precedent to prevent further propagation of the error. This judicial duty would compel the SJC to hear the appeal of parties who demonstrate a mistake in SJC precedent, caused by the SJC misreading a decision that it cites.

The Najdas have consistently argued that present intent as to future conduct cannot be negligently misrepresented and that no person can be held liable for statements about their present intent as to future conduct. It was an error of law to find otherwise. This issue is central to their case and appeal. While asserting this position, the Najdas brought to the courts' attention a substantive mistake in SJC precedent, caused by an incorrect citation, which is material to outcome of their case: they pointed out that the SJC had mistakenly held that statements about one's present intent of future conduct can constitute negligent misrepresentation.

false statements of opinion, of conditions to exist in the future ... cannot sustain a claim for negligent misrepresentation ... unless the promisor had no intention to perform the promise at the time it was made. 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).

The SJC made this holding by apparently misreading Brewster and then mistakenly citing Brewster for support even though Brewster does not hold that statements about one's present intent of future conduct can constitute negligent misrepresentation. Rather, Brewster only holds that intentional misrepresentation

can include statements about the future if there is no intent to perform.

In Cumis, the SJC not only misread Brewster and incorrectly used it as a citation, but also came to a conclusion that is indisputably wrong: one 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”).

Logic dictates that a person cannot negligently misrepresent their 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).

Since the Najdas raised the error above, which was material and central to their case, and were denied appellate review before the SJC, they were not treated equally under the law and were denied due process of law. Having raised a substantive mistake in SJC precedent, the SJC erred when it denied the Najdas’ application for further appellate review. In their petition, the Najdas will argue that the SJC should be directed to allow them further appellate review of the issues they raised on appeal, including the mistake in SJC precedent (Cumis). Without such a review, the result is injustice. The Najdas were not treated equally as the class of appellants whose errors of law can be addressed by the intermediate appellate court because the Najdas were not afforded an opportunity to present the error of law they

identified to a court with the power to correct it.

In light of the weighty issues presented above, Petitioners request an extension of time to evaluate and research the issues they intend to raise in this Court, and to prepare a concise, focused petition for certiorari. Additional time may also conserve the Court's resources and support judicial economy because a more concise, focused petition for certiorari would enable the Court to evaluate the petition efficiently. In addition, the Najdas, as petitioners, are pro se and need additional time to research and evaluate the constitutional issues presented above. The Najdas request additional time because they are fulltime caretakers for their 94 year old grandmother, who lives with them and requires 24/7 care and help with the most basic tasks (walking, eating) because of a stroke and late stage dementia. Petitioners have brought this request for an extension of time now because they thought that the ninety (90) day period to file a petition for certiorari ran from the date the SJC denied their petition to reconsider their application. However, Petitioners now understand that the time runs from the date the SJC originally denied further appellate review. No meaningful prejudice would arise from the extension.

Wherefore the Najdas respectfully request that an order be entered extending their time to petition for certiorari sixty (60) days, up to and including November 26, 2018.

Dated: September 22, 2018

Respectfully submitted,

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