No. 19-790

In the Supreme Court of the United States

JUAN A. MARTÍN-DE-NICOLÁS

v.

AAA TEXAS COUNTY MUTUAL INSURANCE CO.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF APPEALS
THIRD DISTRICT, AT AUSTIN

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do automobile liability insurers have a duty *not-to-settle* third-party claims, when it becomes reasonably clear that the peril insured against—policyholder negligence—has not occurred, and therefore, it is reasonably clear that the policyholder is not "legally liable"?

PARTIES TO PROCEEDINGS AND CASES

Parties to Proceedings

- Petitioner is Juan A. Martín-de-Nicolás (Appellant/Plaintiff in the courts below).
- Respondent is AAA Texas County Mutual Insurance Co. (hearafter "AAA"). (Appellee/Defendant in the courts below).

List of All Proceedings

- No. 64557, Justice of the Peace Court, Precinct Two, Travis County Texas. Summary judgment order entered on February 23, 2016.
- No. C-1-CV-16-003312, County Court at Law No. 2, Travis County Texas. Summary judgment order entered on October 26, 2016.
- No. 03-17-00054-CV, 2018 Tex. App. LEXIS 2747 (Tex. App.–Austin Apr. 19, 2018, no pet. h.) (mem. op.). Time extensions granted. Memorandum opinion and judgment entered on April 19, 2018. Motion for rehearing denied on May 15, 2018. Motion for en banc reconsideration denied on June 20, 2018. Reprinted in Appendix (App. 2a - 27a, 28a).
- No. 18-0713, Supreme Court of Texas. Time extensions granted. Petition for review denied on January 25, 2019. Reprinted in Appendix (App. 29a). Motion for rehearing denied on May 3, 2019. Reprinted in Appendix (App. 30a).

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JURISDICTION

This Court has Jurisdiction to grant the writ of certiorari for the following reasons:

1. This petition is timely filed:
   a. Third District: Time extensions granted. Opinion issued 4/19/2018. Final motion for en banc reconsideration timely filed 5/30/2018; overruled 6/20/2018.
   b. Supreme Court of Texas: Time extensions granted. Petition for review timely filed 11/21/2018; denied 1/25/2019. Motion for rehearing denied 5/3/2019.
   c. This petition for writ of certiorari timely filed 9/30/2019 after 60-day extension granted by Fifth Circ. Justice Samuel Alito. Rule 14.5 corrections requested on 10/9/2019, and corrected petition refilled on or before 12/9/2019 deadline.
2. 28 U.S.C. § 1257 confers this honorable Court jurisdiction to review final decisions from State courts of last resort.

STATEMENT OF THE CASE

The federal question presented here for review (page i) was repeatedly raised in the courts below as a contract construction issue; it evolved—almost verbatim—to the one raise in the Supreme Court of Texas.[1]

The compelling federal reason for this court to issue a writ of certiorari,[2] namely the denial of equal protection of the laws,[3] is raised here for the first time.

1. The facts are incontrovertible, the third-party was negligent per se—thus Petitioner was not legally-liable.

A third-party (Rex Jones) illegally parked his vehicle against the flow of traffic—at night—a manner that defeated the purpose[4] of the vehicle's—federally mandated—red rear reflectors.[5] The illegally parked vehicle caused an accident.[6]

Nevertheless, the third-party insurer (Farmers) denied Petitioner's claim, and Petitioner's insurer—AAA—volunteered payment to the legally-liable third-party.[7]

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[1] *See*, Petition for Review (Supreme Court of Texas), filed 11/21/21018, p. ix, 7.

[2] SUP. CT. R. 10.

[3] U.S. Const. amend. XIV. § 1, (equal protection of the laws).

[4] Described by Federal Code as "Reflex Reflectors" and defined as: "devices used on vehicles to give an indication to approaching drivers using reflected light from the lamps of the approaching vehicle." 49 CFR § 571.108, ¶ S4—Definitions.

[5] 49 CFR § 571.108, ¶ S8.1—Reflex reflectors.

[6] *See*, Plaintiff's Original Petition, §V, pp. 2-3.

[7] *Id.*

2. AAA used fraudulent summary judgment evidence to get the case dismissed.

Petitioner filed two separate and distinct lawsuits. In the first, he sued the third-party (Rex Jones) for negligence per se.[8] In the second, he sued his insurer (AAA) for [essentially] breach of contract,[9] Insurance Code violations, and fraud.[10] Plaintiff cited specific policy language he understood as a guarantee from AAA that they would defend him "even if the allegations were groundless, false, or fraudulent." Given the clear facts of the accident, Plaintiff reasoned, any claim made by the third-party against his insurance policy surely seemed to be "groundless, false, or fraudulent" and Plaintiff had the expectation that AAA would defend him by denying any such illegitimate claim.[11]

AAA moved Justice Court three times for summary judgment (SJ).[12] They used essentially the same motion each time. AAA argued that: (i) Plaintiff had failed to state a cause of action upon which he could recover, (ii) they had the right to "choose to settle" a claim as they considered or think[ed] appro-

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[8] *Martin-de-Nicolas v. Jones*; No. 64556; Justice of the Peace Court, Precinct Two, Travis County Texas. Judgment for Defendant on 7/11/2012 (Plaintiff take nothing).

[9] Plaintiff described the causes of action in his own words, and did not use the "breach of contract" terminology, but it was understood as such by the court. See Plaintiff's Original Petition, pp. 2-3. AAA did not file special exceptions to challenge the pleadings. *See,* Plaintiff's Response, filed (4/30/2013), §5(A), pp. 4-6.

[10] *See,* Plaintiff's Original Petition, filed in Justice Court on 2/1/2012.

[11] *Id.*

[12] In the record below: *see* Defendant's motions for summary judgment (MSJ) filed/served on 4/18/2012, 2/19/2013, and 11/24/2015.

priate, and (iii) Plaintiff had no proof that AAA committed fraud or Insurance Code violations. AAA used as SJ evidence a copy of the insurance policy which did not contain the language paraphrased by Plaintiff in his original pleading—presumably proving the inappropriateness of plaintiff's suit.[13]

Plaintiff filed a response to all of AAA's motions for summary judgment (MSJ).[14] Justice Court denied AAA's first MSJ.[15] Plaintiff attempted to conduct discovery and AAA filed a second MSJ.[16] Plaintiff then noticed that AAA was using as their summary judgment evidence an *old version* of the insurance policy—not the new current version that was in effect the night of the accident. Plaintiff also noticed that the old policy did not contain the language he paraphrased in his original petition.[17]

In his response to AAA's second MSJ, Plaintiff introduced a copy of the "authentic" insurance policy as certified by the Texas Department of Insurance.[18] The court denied AAA's second MSJ,[19] and then abated the case until plaintiff's separate suit against the negligent third-party reached finality.[20]

The separate lawsuit against the third-party (Rex Jones) went to trial. The evidence of illegal parking *at night* by the defendant was introduced, and the law and the purpose of the red rear reflectors was

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[13] Attached to AAA's MSJ as Appendix—A.

[14] In the record, see Plaintiff's responses to AAA's MSJ filed on 5/9/2012, 4/30/2013, and 12/28/2015.

[15] Judge verbally denied AAA's MSJ at hearing on 5/17/2012.

[16] AAA's second MSJ filed on 2/19/2013.

[17] *See* the relevant language of the old and current insurance policies as reproduced in the App. 32a.

[18] Plaintiff's second response, Exhibit—A.

[19] AAA's second MSJ denied on 6/27/2013.

[20] Court sua sponte abated case on 10/24/2013.

explained. The court erred by submitting the question of negligence to the jury.[21] Inexplicably, the jury disregarded the evidence and the law, and came up with a verdict that Plaintiff was 100% at fault for the accident and Defendant was 0% at fault. The judge failed to *sua sponte* issue judgment notwithstanding the verdict (JNOV). Plaintiff's filed a JNOV motion and a motion for new trial;[22] both were overruled by operation of law.

After plaintiff lost said case against the third-party (Rex Jones) in the County Court, AAA again filed a MSJ (its third) in Justice Court.[23] It is important to note that AAA again used the *old* version of the insurance policy as SJ evidence *even though* Plaintiff put them "*on notice*" after their second MSJ that the policy they were using as SJ evidence was the old one (i.e. not the one in effect the night of the accident).[24] In his response to AAA's third MSJ, Plaintiff reminded the court that AAA's SJ evidence was fraudulent (an old version of policy), and argued that SJ could not be granted with such fraudulent basis.[25] Plaintiff also argued that (i) the insurance policy contract did not grant AAA the right to "choose to settle" as AAA claimed, that (ii) the policy holder had to be legally liable in order for them to contemplate settling. The court dismissed plaintiff's arguments and evidence of fraud, and a visiting judge granted AAA's third MSJ.[26]

Plaintiff took his *de novo* appeal from Justice

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[21] In Texas, the question of negligence per se is a question of law for the court to decide.

[22] Filed on 7/18/2012.

[23] AAA's third MSJ, filed on 11/24/2015.

[24] *See* AAA's third MSJ, Appendix—A.

[25] *See* Plaintiff response filed on 12/28/2015, §5, pp. 4-10, 11.

[26] Order of dismissal, signed 2/23/2016.

Court to the County Court at Law. There, AAA again filed the same MSJ with the same evidence (old policy).[27] It is also worth noting that at no stage in the trial courts did AAA address plaintiffs charge that their evidence was a fraud. Once again, the court granted AAA SJ[28] even though it was patently obvious by now that AAA was using fraudulent evidence (old policy), and thus did not meet its burden of proof as SJ movant.

The fact that AAA was granted SJ using evidence proven to be a fraud upon the court, is but one example of how Petitioner was denied his Constitutional Right to equal protection of the laws.[29]

3. Memorandum opinion is seriously flawed: (i) misrepresented facts affect-ing narrative & holdings; (ii) erroneous "legal liability" definition, policy lan-guage misconstrued; (iii) misplaced reli-ance on Dear v. Scottsdale (inapposite).

Plaintiff appealed the County Court's dismissal to the Third District court of appeals. The main issues in that appeal were the use of fraudulent evidence to secure a summary judgment and the proper interpretation of the insurance policy.

i. <u>The facts are misrepresented affecting the narrative and holdings</u>.

The Court's opinion is fatally flawed because it misrepresented the facts. The Court's opinion describes the accident facts as: "Martin de-Nicolas's car hit a parked vehicle belonging to Rex Jones ... [and]

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[27] AAA's MSJ at County Court, filed 8/19/2016.

[28] Order of dismissal, signed 10/26/2016.

[29] U.S. Const. amend. XIV. § 1, (equal protection of the laws).

argued that Jones parked his vehicle in a negligent manner by parking the car facing oncoming traffic and that Jones's actions violated relevant governing laws and caused the accident."[30] That's it!

The Court's opinion neglects to include the crux of Appellant's arguments which are that:

- because the accident occurred at night, and
- because he could not see the red rear reflectors (a federal safety standard) of defendant's car due to its illegal parking orientation,
- defendant—the third-party—is negligent per se (reasonable minds can not differ).

When these additional facts are inserted into the narrative, the entire analysis in the memorandum opinion of whether AAA can "choose to settle" falls apart.

ii. "Legal liability" is poorly defined, then insurance policy language is misconstrued.

The court accepted AAA's definition of "legal liability" or "legally liable" as an obligation that [only] arises "after a legal decision by a court or other adjudicative body ... ." [31]

But that definition is not entirely complete as *legal liability*—an obligation imposed by law—can also arise not only pursuant to a judgment, but also out of a settlement, a contract, or statute.[32]

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[30] App. 3a.

[31] App. 17a, [page 14] of original.

[32] *Lennar Corp. v. Great American Ins. Co.*, 200 S.W.3d 651, 680 (Tex. App.—Houston [14th Dist.] 2006), citing *Comsys Information v. Twin City Fire Ins.*, 130 S.W. 3d 181, 189 n.3 (Tex. App. Houston [14th Dist.], 2003) (recognizing a judgment is not the only manner by which an insured can become legally obligated to pay because a legal obligation can also arise out of a contract, such as a settlement).

Following that incorrect definition of "legal liability" the Court interprets the "settlement clause" (i.e. enumerated item no.4 in current policy)[33] as additionally allowing AAA to "choose to settle" claims as they think appropriate.[34] But what is "appropriate?" The only way to give meaning to what's "appropriate" is to tie it to its last-antecedent,[35] namely "legally liable." But the Court's opinion examines that clause in isolation, which goes against well established principles of contract construction.

So, the Court's opinion established new law (i.e. new rights) favoring the insurance industry, something the legislature has not done via statutes.

Petitioner asserts that a proper interpretation of the policy would state that the existence of policyholder liability (i.e. negligence) is a *condition precedent* before an insurer can exercise its right to "settle any claim or suit as [they] think appropriate."[36] The requirement that the policyholder be liable before the insurer can assume and settle that liability is the cornerstone of risk underwriting; else the door is left wide open for fraud and embezzlement.

iii. Misplaced reliance on *Dear v. Scottsdale* (a professional liability case) to support auto liability policy construction.

AAA's brief, and the Court's opinion, rely on *Dear v. Scottsdale Ins. Co*, 947 S.W.2d 908 (Tex. App.—

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[33] App. 33a.

[34] *Id.*

[35] Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts, §18–Last-Antecedent Canon (2012).

[36] *See*, Petition for Review (Sup. Ct. of Texas), p. 5, 16.

Dallas 1997, pet. denied),[37] as the authority that substantiates their policy interpretation.

However, reliance on *Dear* is misplaced, it is inapposite to the issues at hand.[38] *Dear* is a professional liability insurance case. In the professional liability insurance arena, the policyholder is always the defendant and the insurer is "on the hook" to protect their policyholder against liability no matter what. In other words, the insurer has a *duty-to-settle* or a *duty-to-defend* any claim or suit (i) regardless of whether there is a reasonable determination of legal liability and (ii) regardless of whether the allegations are groundless, false or fraudulent. Therefore, the professional liability insurer has the right to *choose to settle* any mere claim as they *think appropriate.*

Whereas, in the automobile liability insurance arena, both parties have insurance and the question is: who is legally liable, because the legally liable party is the one who pays damages. So, in automobile liability cases, "legal liability" is a *condition precedent* to the insurer's right to settle as they think appropriate.[39]

Following the unfavorable memorandum opinion, Appellant filed a motion for rehearing, but it was denied; and a motion for en banc reconsideration, but it was also denied.

Appellant then filed a petition for review with the Supreme Court of Texas,[40] but it was denied.[41]

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[37] First brief where AAA cites *Dear v. Scottsdale.*
[38] Appellant's Reply Brief, p. 8-12.
[39] Appellant's Reply Brief, p. 4, last ¶.
[40] App. 29a.
[41] App. 30a.

REASONS FOR GRANTING THE PETITION

The question presented is: Do automobile liability insurers have a duty *not-to-settle* third-party claims, when it becomes reasonably clear that the peril insured against—policyholder negligence—has not occurred, and therefore, it is reasonably clear that the policyholder is not "legally liable"?

1. Insurer's duty *not-to-settle* is extremely important for millions of Americans.

a) National in Scope & Millions Affected. This issue is not just limited to Texas, but is of national importance since insurance policies are sold in every state of the union, to millions of people.

b) Fundamental Fairness.

- First, its in keeping with the idea of the *social contract*: I carry insurance to protect you against any future negligence of mine (if any), and you do the same for me.
- Second, deciding legal liability by applying the laws to the facts is what *public policy* has always been. This is the universal expectation of consumers.
- Third, this issue mostly affects *the poor* who are more likely to purchase "liability only" insurance policies due to reduced cost. For many of these "liability only" policyholders, their automobile is one of their most expensive assets. If they were not at fault, they rightfully expect the third-party's insurance to compensate them for their damages. This was the legislative intent of Financial Responsibility Laws.

2. Memorandum opinion is *so wrong*, that it needs correction.

a) The Third District's memorandum opinion is so wrong that it needs to be corrected because:

- It is tantamount to denying Petitioner equal protection of the laws.[42] Perhaps, the best example is the fact that the narrative failed to state that the accident occurred during night time hours, a time when the federally mandated red rear reflectors (a.k.a. reflex reflectors) are meant to warn oncoming traffic of the vehicular hazard ahead.
- It will stands for the defenestration of contract construction principles. It is inexcusable to interpret the "settlement clause" in isolation without recognizing that policyholder legal liability is a condition precedent.
- The door has been left wide open for insurers to defraud consumers of the benefit of the bargain.

b) Unjust Enrichment scheme: The only reasonable explanation for why insurers would volunteer payment to legally liable third-parties is due to collusion, coordination, and conspiracy of industry participants to defraud policyholders of the benefit of the bargain motivated by an unjust enrichment scheme. The scheme consists of determining "liability" for auto accidents, not on the rule of law, but based on internal "rules of thumb" meant to reduce the cost of claims processing. In the long-run, if industry participants adhere to such clandestine agreement, their projected present value of future cash flows is enormous. Perhaps therein lies their definition of "think appropriate."

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[42] U.S. Const. amend. XIV, § 1.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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