No. 21-1234

In The

Supreme Court of the United States

Jose Dominguez,

Petitioner,

v.

American Express National Bank
(Formerly American Express Bank, FSB)

Respondent.

On Petition For A Writ Of Certiorari to the
Supreme Court of Texas

PETITION FOR REHEARING

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Pursuant to Rule 44.2, Jose Dominguez respectfully petitions for rehearing of the Court's May 16, 2022 order denying certiorari in this case.

GROUNDS FOR REHEARING

The original certiorari petition in this case presented the vital question of when a person is liable for the debts of a third person corporation– a question that has been already answered: a person can't be held liable for the debts of a third person without a written personal guaranty, as established by the Statute of Frauds, over 400 years of common law, and this Court. However, American Express misrepresented the facts to the jury and the trial court was complicit, such as in allowing American Express the use of peremptory challenges to violate petitioner's constitutional rights to a fair and impartial jury, as guaranteed by the Constitution of the United States. Petitioner hereby presents the following substantial grounds not previously presented:

1. American Express uses unconscionable collection practices, including putative death threats. After the verdict by the jury in favor of American Express was read on February 2, 2017, petitioner asked the attorney for American Express, what was next step and he answered:

> "I'm going to send the Constable to execute you."

Needless to say, this caused great anxiety at the time. When Petitioner reported the incident to the police, he was somewhat relieved

to be told by the Constable that they were not going to execute anyone for the plaintiff. Petitioner remembered a line in the movie Wall Street, when Bud Fox tells his friend "I'm tapped out Marv, American Express' got a hitman lookin' for me." Well, fortunately, for everyone concerned, that was just a line in a movie. Petitioner did document the unconscionable collection practices on the Final Judgment that was signed by the judge. Even recently, from the period November 4, 2021 to February 1, 2022, American Express called to harass the petitioner every week, even after requesting them in writing to stop. It is these actions by American Express that are expressly prohibited by 15 U.S.C §§ 1601 to 1667f) and Subchapter V – Debt Collection Practices (§§ 1692 to 1692p).

2. The Respondent is not entitled to judgment as a matter of law. To begin with, quoting Atticus Finch, "this case should never have come to [a jury] trial." In fact, this case had already been decided at the bench trial held on August 10, 2015 where a directed verdict was granted in favor of Petitioner due to a lack of evidence and since Utah law had not been plead or proven. 2CR491. In a case in which the party with the burden of proof has failed to present a prima facie case for jury consideration, the trial judge may order the entry of a verdict without allowing the jury to consider it, because, as a matter of law, there can be only one such verdict.

3. The trial court abused its discretion in granting the plaintiff's motion for a new trial. An issue of whether the trial or appellate court abused its discretion presents a question of law, not fact, and this is within the Supreme Court's appellate jurisdiction. Mann v. Mann, 607 S.W.2d 243 (Tex. 1980); Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1982); Banales v.

Jackson, 610 S.W.2d 732 (Tex. 1980); McKnight v. McKnight, 543 S.W.2d 863 (Tex. 1976).

A motion for new trial is addressed to the trial court's discretion and the court's ruling on such will not be disturbed on appeal in the absence of a showing of an abuse of that discretion. Howard Gault & Son, Inc. v. Metcalf, 529 S.W.2d 317, 321 (Tex.Civ.App.Amarillo 1975, no writ); Neunhoffer v. State, 440 S.W.2d 395, 397 (Tex.Civ.App.San Antonio 1969, writ ref'd n.re.); Wright v. Swayne, 104 Tex. 440, 140 S.W. 221 (1911).

In reviewing the judgment of the trial court where there are no findings of fact and no conclusions of law requested or filed, the judgment must be upheld on any legal theory that finds support in the evidence. Lassiter v. Bliss, 559 S.W.2d 353, 358 (Tex.1977). However, as stated in Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (1939),

> "[w]hile trial courts have some measure of discretion in the matter, as, in truth, they have in all cases governed by equitable principles, it is not an unbridled discretion to decide cases as they might deem proper, without reference to any guiding rule or principle."

The Craddock court then set forth the guiding rule or principle which trial courts are to follow in determining whether to grant a motion for new trial:

A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or accident; provided the motion for a new trial

sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff. Id. at 126.

Let's consider the first requirement, intentional disregard or conscious indifference by the defendant's failure to answer before judgment. This case distinguishes itself from Craddock in that it is not as a result of a default judgment (due to defendant's failure to answer before judgment) due to intentional disregard or conscious indifference by the defendant. In this case the defendant obtained legal representation and had to procede pro se when his attorney abandoned him after the rendering of the directed verdict in favor of petitioner and with the motion for new trial pending. The respondent's motion for new trial was due to a mistake on the judgment that was entered after the completion of the trial in which the court had rendered a directed verdict in favor of defendant.

When is a judgment rendered?

> "A judgment is in fact rendered when the trial court officially either orally announces its decision in open court or provides written memorandum of the decision to the clerk." Jeremy C. Wicker, 2 Texas Civil Trial and Appellate Procedure, § 9-6 (2020). State of Tex. v. Naylor, 466 S.W.3d 783 (Tex. 2015); S & A Restaurant Corp. v. Leal, 892 S.W.2d 855 (Tex. 1995); Samples Exterminators v. Samples, 640 S.W.2d 873 (Tex. 1982); Reese v. Piperi, 534 S.W.2d 329 (Tex. 1976).

In this case, the trial court rendered judgment that respondent take nothing from petitioner on the trial held on August 10, 2015 when it orally announced its decision in open court:

> "MS. VILANDOS [Attorney for Dominguez]: And I move for a directed verdict based on this amount that the plaintiffs are asking an individual to pay for when it's in a company's name.
>
> THE COURT: Granted as to Mr. Dominguez individually." 1RR25-FLD 091318.

A couple of months later, on October 24, 2015, the Honorable James H. Shoemake signed the Final Judgment, 1CR191-FLD 042417, apparently unaware that it did not conform to the previously rendered "take nothing" judgment due to Dominguez's error in requesting damages of $89,500 from American Express. There are no indications or notations on the eight-page final judgment; the only thing the judge apparently did was sign the judgment. Regardless if the judge read the judgment, the entry (as opposed to rendition) of a judgment involves no judicial or discretionary powers, rather it is simply a ministerial act performed by the clerk:

> "The judgment of a court is what the court pronounces. Its rendition is the judicial act by which the court settles and declares the decision of the law upon matters at issue. Its entry is the ministerial act by which an enduring evidence of the judicial act is afforded. The failure of the minute entry to correctly or fully recite what the court judicially determined does not annul the act of the court, which remains the judgment of the court not withstanding its imperfect record." Coleman v. Zapp, 105 Tex.491, 151 S.W. 1040 (1912).

In this case the signed judgment did not conform to the rendered judgment since it did not include the rendered judgment that American

Express "take nothing" from Dominguez but it included that Dominguez be awarded damages of $89,500; practically, the exact reverse of what American Express was seeking.

At the hearing on the respondent's motion for new trial on November 16, 2015, it appears that the judge first became aware of the error in the judgment that the judge had signed:

> THE COURT: Well, now, as I recall, they were suing you for –
>
> MR. DOMINGUEZ: -- yes, sir.
>
> THE COURT: -- for the balance on the card.
> 1RR6-FLD 091318

Once a clerical error in the judgment has been discovered, the trial court has the inherent power to correct the judgment so that it accurately reflects the judgment actually rendered. Knox v. Long, 152 Tex. 291, 257 S.W.2d 289 (1953). Coleman v. Zapp, 105 Tex. 491, 151 S.W. 1040 (1912); Pet. Equip. Fin. Corp. v. First Nat'l Bank of Fort Worth, 622 S.W.2d 152 (Tex.Civ.App. Fort Worth 1981, writ ref'd n.r.e.).

In fact, during the hearing Dominguez asked the judge to correct the judgment to a "take nothing" judgment and the judge refused:

> THE COURT: -- Yeah, but that doesn't give you a judgment against them; that just doesn't give them a judgment against you.
>
> MR. DOMINGUEZ: Well, excellent. That's wonderful, Judge. I -- that's -- if that's what it is, that's what it is.

THE COURT: Well, I hate to tell you, but by not doing it right the first time, they're going to get another chance at it.

MR. DOMINGUEZ: Well, Your Honor –

THE COURT: -- I gave you the best that you could get under the law. They had a case against you. The problem was they didn't plead or prove Utah law –

MR. DOMINGUEZ: -- exactly and –

THE COURT: -- and you didn't do what I said. And you did not give them a take nothing judgment, which would have inured to your benefit in the amount that you -- I think -- how much were you all suing for?

MS. DAVLIN (Attorney for American Express): It was 80 -- 80 some –

THE COURT: 89,000 or something like that.

MS. DAVLIN: (Nods)

THE COURT: And instead you gave yourself a judgment for 89,000.

MR. DOMINGUEZ: Well, Your Honor, you --you could now -- you can now easily take care of this right now.

THE COURT: I just did –

MR. DOMINGUEZ: -- you can withdraw the judgment –

MS. DAVLIN: -- I don't know if --

MR. DOMINGUEZ: -- you can withdraw the judgment and -- and continue with the verdict, and that's the end of that. There's no reason why – you know, I'm doing my best as a pro se litigant to a number of reasons.

THE COURT: I have a lot of respect for pro se litigants. They -- but in this instance, you're wrong and what you did is wrong –

MR. DOMINGUEZ: -- Well, a final judgment –

THE COURT: -- Wait, wait, wait. This is -- I'm not here to debate this. Okay?

MR. DOMINGUEZ: Sure.

THE COURT: I made my decision. I'm going to grant a new trial. You didn't do what I said. You didn't do a judgment. You should have gone to a lawyer and gotten them to draw up a take nothing judgment.

MR. DOMINGUEZ: I asked my attorney; she wouldn't do it, Your Honor.

THE COURT: Well, he withdraw –

MR. DOMINGUEZ: -- Well, She withdraw.

THE COURT: -- Well, she withdrew. Pardon me. Certainly no aspersion on her."
1RR8-FLD 091318.

It is important that this court take notice that the error in the final judgment was not a judicial error, such as from a mistake of law or mistake of fact. It was simply a clerical error. Dominguez had personally delivered a copy of the judgment to the judge's clerk and told her to please review it since his attorney had abandoned him and he was not sure he was entitled to the $89,500. Unfortunately, it appears that neither the clerk nor the judge took notice of the error and the judge signed the judgment on October 24, 2015.

If this court follows the guidance provided by Craddock, this court has to agree with the following:

> A rendered judgment should NOT be set aside and a new trial SHOULD NOT be ordered in any case in which failure of the defendant to enter a judgment that conformed to the rendered judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or accident.

Full stop. Simply, the trial court abused its discretion by not following the first requirement of Craddock and it compounded its error by not exercising its inherent power to correct the judgment it signed. Furthermore, the effect of granting a new trial would bury the question

regarding whether the judge signed the judgment without reading it. This court should void the judgment of the jury trial and/or reverse the decision of the appellate court since it was based on an abuse of discretion by the trial court in giving the plaintiff another bite at the apple.

In a nutshell, this case is about a judge who was embarrassed in front of his court for having signed a judgment without reading it. Being embarrassed is one thing, but then taking a retaliatory action against the indigent pro se defendant-petitioner by granting a new trial on a case that did not have prima facie evidence to proceed to a jury trial is a clear abuse of discretion.

4. This issue is of national importance since it affects all revolving credit, such as credit card debt, reported to be at an all time high of $1.1 trillion in April. In this age of boilerplate agreements, the terms of the agreements must be clear and inconspicuous. The agreements presented by American Express on this case include a "business purpose" clause, which is inconspicuous, in order to deny small business owners the consumer protections provided under the Truth in Lending Act. American Express does not recognize the legal protections afforded to owners of corporations with less than 100 employees. The witness for American Express stated that businesses with more than 100 employees are issued the "Corporate Card" and those with less than 100 employees are issued the "Business Card." Small corporations are relegated to the kiddie table, along with partnerships and unincorporated business, such as DBA businesses. American Express proceeds to deny small business owners the protections afforded under the Truth in Lending Act, while at the same time holding owners of small corporations liable for the debt

of the corporation. As clearly stated by this Court, "You cannot have your cake and eat it too." American Express v. Koerner, 452 U.S. 233, 237,101 S.Ct. 2281, 2284, 68 L.Ed.2d 803 (1981),

5. Congress is not going to act. There have been at least four bills introduced in the House of Representatives to extend to small businesses the credit card credit protections currently provided to consumers. The latest bill, H.R. 5660 (115th), Small Business Credit Card Act of 2018 did not get a vote. In addition, in this case, American Express also avoids compliance with the Statute of Frauds in order to deny an owner of a corporation the statutory protections that have been established in over 400 years of common law.

THIS COURT SHOULD GRANT REHEARING TO ADDRESS THE ABOVE ISSUES IN LIGHT OF RECENT EVENTS NOT PREVIOUSLY PRESENTED.

Petitions for rehearing of an order denying certiorari are granted: (1) if a petition can demonstrate "intervening circumstances of a substantial or controlling effect"; or (2) if a petitioner raises "other substantial grounds not previously presented." R. 44.2. Dominguez's petition shows both.

CONCLUSION

The requirement by the Statute of Frauds for a signed document to hold an owner of a corporation liable for the debts of a third person remains the law of the land. This case clearly falls within the purview of the Statute of Frauds. Events during and since the original judgment in favor of petitioner, including the robo-signing of the Final Judgment, which contained a clerical error that the court had the power to correct, but instead chose to abuse it's discretion, and the subsequent unfair collection practices of the plaintiff, including death threats, prove a substantial need for this Court's intervention. Petitioner's petition for rehearing should be granted.

Respectfully submitted,

/s/ Jose Dominguez

Jose Dominguez, Pro se

June 8, 2022