No. 18-246

In The
Supreme Court of the United States

MARY LOU DOHERTY, JAMES DOHERTY
and JOHN DOHERTY,

Petitioners,

v.

ALLSTATE INDEMNITY COMPANY,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petitioners have presented any argument or evidence sufficient to warrant United States Supreme Court review of the Rule 56 Summary Judgment decision of the District Court where the Petition presents nothing other than a factbound dispute which has been reviewed twice and has no importance to anyone beyond the immediate parties.

ALLSTATE INDEMNITY COMPANY
CORPORATE DISCLOSURE STATEMENT

Allstate Indemnity Company is a wholly-owned subsidiary of Allstate Insurance Holdings, LLC, which is a Delaware limited liability company. Allstate Insurance Holdings, LLC is a wholly-owned subsidiary of The Allstate Corporation, which is a Delaware corporation. The stock of The Allstate Corporation is publicly traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF IN OPPOSITION

Allstate Indemnity Company respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Mary Lou Doherty, James Doherty and John Doherty.

OPINIONS BELOW

The Third Circuit's opinion is located at 2018 WL 2382799 (3d Cir. May 25, 2018). The Eastern District of Pennsylvania order and opinion granting Respondent's Summary Judgment can be found at 2017 WL 1283942 (E.D. Pa. April 6, 2017).

JURISDICTION

The Third Circuit filed its opinion on May 25, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

INTRODUCTION

The Petition for Certiorari should be denied because it fails to present any conflict among the circuits, does not involve an important federal question and the opinions of the lower courts in no way conflict with relevant decisions of this Court. Furthermore, the holdings of the district court and the Third Circuit Court of Appeals were correct.

Petitioners own rental properties in Radnor, Pennsylvania. Over a span of many years, the properties at 949 and 951 Glenbrook Avenue were rented to students enrolled at nearby Villanova University. Respondent issued a Landlords Package Policy to Petitioners offering certain coverages on those properties. For reasons explored thoroughly in the district court and Third Circuit opinions and detailed in this brief, there is no coverage for the alleged damages claimed by Petitioners.

Petitioners contend that their Fifth and Seventh Amendment rights were violated because the district court granted Respondent's Motion for Summary Judgment. This appeal to the Constitution is a thinly veiled attempt to inject some semblance of import to a purely factbound insurance coverage dispute. The Petitioners failed to meet their burden as a matter of law and suffered summary judgment as a result.

Petitioners' discussion of the "Mend the Hold" Doctrine is largely incoherent. At any rate, Respondent never had an opportunity to evaluate the claim prior to litigation and the "Mend the Hold" Doctrine is not indicated. Even if this doctrine was relevant, Respondent has consistently maintained that there is no coverage in this matter because the damages were not "sudden and accidental" as required by the coverage grant in the policy.

Petitioners next claim that the lower courts erred in applying the "Sham Affidavit" Doctrine. In fact, the Petitioners' attempt to convert the Second Amended

Complaint into a verified pleading was a bald, naked attempt to combat the previously filed Motion for Summary Judgment. The district court and Third Circuit addressed this transparent, shameless subterfuge and found that the allegations were not substantiated in any respect.

Petitioners complain that the lower courts disregarded the Petitioners' expert reports and somehow this creates an intra and inter circuit conflict. Their argument is ridiculous. The lower courts found that the conclusions of the "experts" simply were not supported by the facts of the case.

Finally, Petitioners argue that the lower courts misapprehend the nature of the policy issued by Respondent and claim that they are entitled to "All-Risk" coverage. Petitioners persist with a position that is patently and palpably preposterous. They ignore the plain, unambiguous language of the coverage grant in the policy requiring "sudden and accidental direct physical loss" to the property as a prerequisite to coverage. Petitioners' confused recipe for legal alchemy has no basis in fact or law, does not present circuit conflict and certainly has no broader implications outside of this litigation.

STATEMENT OF THE CASE

A. Glenbrook Properties and the Applicable Allstate Insurance Policies

Mary Lou, John and James Doherty ("Petitioners") own real property located at 949 and 951 Glenbrook Avenue in Bryn Mawr, Radnor Township, Pennsylvania. The property is a side-by-side "twin" property. John and James Doherty are the sons of Mary Lou Doherty, who is an attorney. For more than a decade, the property was leased to Villanova University students.

Petitioners insured the twin-home property with a "Landlords Package Policy" form AS84 issued by Allstate Indemnity Company. The Allstate agent was the McKeon Agency, of Morton, PA. Thomas McKeon is the owner of that agency. Allstate Policy No. 9 08 879295 12/21 covered the property for the period of 12/21/13 to 12/21/14. (A975.) Allstate Policy No. 9 08 879295 12/21 covered the property for 12/21/14 to 12/21/15. (A1035.) The policies will collectively be referred to as "the Policy."

B. History of Property (and Related Properties) Prior to Petitioners' Claimed Loss

There is a lengthy history between Petitioners and the authorities in Radnor Township concerning Glenbrook and other properties owned by Petitioners. It is imperative to review this history to contextualize the action against Respondent.

Radnor Township is in Delaware County, Pennsylvania and includes affluent Philadelphia suburban neighborhoods such as Wayne, Villanova, and Bryn Mawr. Radnor Township has a Rental Housing Code that applies to rental units. Section 226-7.H of the Code requires that all rental units shall be licensed with the township, have an annual term, and be subject to a minimum of at least one inspection every three years by code officials. The Code also imposes certain standards requiring that rental housing units be maintained in a habitable condition.

In the course of discovery, numerous documents were obtained by subpoena from Radnor Township and Villanova University. Complaints by Villanova students concerning Doherty owned rental properties date to at least 2006. These issues were brought to the attention of Radnor Police as well as its Code Enforcement Office, and would on occasion reach the attention of Villanova administrators, including Kathy Byrnes, Associate Vice President for Student Life at Villanova.

C. Relevant Records from Villanova University and Radnor Township

A Radnor Township Police Incident Report dated 4/13/06 details a complaint from Jerry Anders. He complained that his son, Doug, a senior at Villanova, was receiving phone calls from Petitioners. (A862.) Anders stated that "nothing is getting repaired at the

apartment" and that the Dohertys were falsely claiming they were owed money.[1] *Id.*

The Villanova file includes a complaint dated 8/27/08 made by the grandfather of a female student. The report details Petitioners' conduct related to another rental property they owned, 256 West Montgomery Avenue in Haverford. (A858.) The complaint asserted that the Petitioners had wrongly "refused to return all or a significant portion of the security deposits to the young women, most of whom have graduated and are now living out of town." *Id.*

The Villanova file includes e-mails from 11/14/08 regarding 951 Glenbrook Avenue. (A856.) This particular student complained about unfair conduct of the Petitioners. The student had signed a lease, but then the Petitioners had rented the apartment to someone else. According to Ms. Byrnes of Villanova, "last year a few Villanova students had serious concerns about this landlord as well, so they were already on my radar screen, and your story re-enforces the concern." *Id.* In a 5/26/10 e-mail, Villanova's Byrnes indicated that she has received "complaints about this landlord in the past . . . more than any other property in fact" and

[1] While statements contained in the Villanova University subpoena response could be considered hearsay, they are included here as these records were relevant to Allstate's decision to deny the Petitioners' claim. Therefore, these documents are also relevant in determining the reasonableness of Allstate's decision in the context of Appellant's Bad Faith Count in the Second Amended Complaint.

wanted to entertain the possibility of removing the Petitioners from the approved township list. (A855.)

In 2008, Radnor Township filed an enforcement action against James A. Doherty concerning the inspection of the 949, 951 and 961 Glenbrook Avenue properties, entitled, *Commonwealth of Pennsylvania (Radnor Township) v. James A. Doherty*, No. 08-0888. Delaware County Common Pleas Judge Edward J. Zetusky issued an Order against James Doherty on 11/16/09. (A400.) The Order required Petitioners to immediately provide Radnor Township copies of the leases for 951 Glenbrook Avenue and 961 Glenbrook Avenue and, further, to advise Radnor Township when the rental units became vacant and open the properties for inspection by Township officials. *Id.*

The Villanova materials include a notation from July 2010 entitled "bad recommendations of local landlord," pertaining to a property owned by the Petitioners (which appears to be the subject property), stating: "Glenbrook, Duplex, water in basement, leaky faucets, pealing [sic] paint on bathroom ceiling/fear of mildew = LL [Landlord] not responsive." (A860.)

After the 2009 Order, the Township continued to have problems arranging inspections of various properties owned by Petitioners, including the subject properties. (A403-A420.)

In February 2013, the Township sent a letter to the Dohertys seeking to schedule an inspection of the subject properties. Petitioners failed to arrange a time for the inspection and challenged the Township's right

to require the inspections. Continued efforts were made to inspect the property in May, June, July and August 2013. (A407-A409.) On 11/18/13, the Township Solicitor sent a letter to Mary Lou Doherty. The letter referenced the lack of inspections to date. It reported a notification of a sewage overflow at 961 Glenbrook Avenue. The letter also noted tenants at 961 Glenbrook Avenue, in violation of Judge Zetusky's order. (A409.) On 1/7/14, Radnor Township contacted the Petitioners to schedule an inspection of the subject properties. (A409.)

D. Radnor Police and Radnor Code Enforcement Involvement on August 22, 2014

On 8/22/14, prospective student tenants attempted to move into the subject properties and found them uninhabitable. One of those tenants, Scott DiSciullo, submitted a complaint to the Radnor Police. (A464-A468.) When he attempted to move into the property at 949 Glenbrook, he experienced "deplorable" conditions. He was greeted by mouse droppings in the kitchen, on the stove/around the sink; problems with smoke detectors; extremely dirty floors and surfaces; broken glass; windows that did not lock; unusable dishwasher; and a moldy basement at 951 Glenbrook Avenue (the adjacent property where he was storing belongings). When he attempted to contact Petitioners, he stated, "I've been hung up on, mocked and treated rudely by Mary." (A467.)

Patrick O'Brien, another prospective tenant, intended to move into the property at 951 Glenbrook Avenue. In his complaint to the Radnor Township Police (also dated 8/22/14), he complained that there was "garbage and clutter everywhere; the kitchens were covered in dust and mouse droppings; a moldy basement; the door to the basement could not be locked; water damage; and most of the fire detectors were pulled from the walls and not working; certain rooms lacked electrical power." He also found the landlords to be "very rude and short." (A470-A474.)

According to a follow-up e-mail from DiSciullo dated 8/31/14, the Dohertys did not return approximately $13,000 of security deposit/advance rent, even though the tenants were unable to move in to 949-951 Glenbrook Avenue. In fact, these students never moved in. (A700-A701.) The Villanova file contains August 2014 records from DiSciullo corroborating that the subject premises were uninhabitable, including urine in bottles, mouse droppings in the kitchen, damp spots throughout the basement, mold, etc.

The Villanova materials include an 8/22/14 e-mail from Judy Landry of Pittsford, NY to Radnor Township reporting the "negligence of a landlord" regarding the property at 961 Glenbrook Avenue, also owned by Petitioners. (A844.) She reported, "Our son and two other Villanova seniors have had the terrible misfortune of dealing with the Dohertys. We as parents are also under distress because of these landlords." She further stated, "The Dohertys have not removed debris left from previous tenants, will not remove broken

appliances, will not clean the house from tenant to tenant, they have not repaired a leaky pipe in the kitchen." According to Ms. Landry:

> There is limited, affordable housing for the students who are pushed off campus due to the lack of housing at Villanova University. We need protection from landlords such as James and Mary Lou Doherty.
>
> I beg for your help.

Id.

E. Notice of Violation Issued by Radnor Code Enforcement Official Ray Daly

In response to the complaints from the prospective tenants, Radnor Township Code Enforcement Officer Raymond Daly conducted an inspection of the properties at 949, 951 and 961 Glenbrook Avenue on 8/22/14. Daly found 18 violations of the Township's Property Maintenance Code at both 949 and 951 Glenbrook. (A476-A572; A574-A679.) Numerous photographs were taken to document the violations. Daly personally took photographs of the conditions observed in the property. As a result of these inspections, Daly found the subject properties to be "unfit for human habitation" and issued violation letters on 8/27/14. *Id.*

F. Rental License Revoked on September 5, 2014

On 9/5/14, as a result of the inspections and Code violations, the Township Solicitor forwarded a letter to Petitioners stating that their rental licenses for the properties for the 2014-2015 year had been revoked. (A459.) The letter stated:

> This letter is to advise you that the student rental licenses for the above two properties are revoked. The licenses are being revoked based on recently received information by the Township which reveals that both properties are uninhabitable under the Township's Building & Property Maintenance Codes. As you may recall, the Township has repeatedly attempted to schedule inspections and you have failed and refused to provide access over the past year.

Id.

G. Radnor Township's Enforcement Action – September 18, 2014

On 9/18/14, Radnor Township instituted a civil action against Petitioners in the Court of Common Pleas of Delaware County, *Radnor Twp. v. Mary Lou Doherty*, *et al*., Civil Action – Equity No. 14-84-84. (A403-A420.) The action relates to the code violations and remains pending.

H. Doherty Rental Licenses Not Renewed on July 2, 2015

On 7/2/15, Kevin W. Kochanski, the Director of Community Development, authored a letter to Doherty. (A461.) Radnor Township refused to renew the rental licenses for the subject properties, as well as 961 Glenbrook Avenue. According to the non-renewal letter:

> Upon reviewing our system's files, it does not appear that any of the above listed properties have passed the required rental housing inspection. Further, over the past several years, you have refused to acknowledge our repeated attempts to schedule the required inspections.

Id.

The letter indicated that the properties were placed in "non-renewal" status and that "all units shall be vacated immediately." *Id.* The non-renewal status would be effective until such time as the properties passed the required inspection. *Id.*

I. Issues with Prospective 2015-2016 Tenant Devon Good

Despite the fact that the rental license for the Glenbrook properties was revoked on 9/5/14 and not renewed on 7/2/15, Petitioners attempted to rent the property. In July 2015, another prospective tenant, Dennis Good, attempted to move into 951 Glenbrook Avenue. He found the premises in deplorable conditions. The septic pipe in the basement was actively

leaking, black mold throughout, exposed wiring, overflowed and non-functioning toilet, missing smoke detectors, etc. Good reported these issues to Radnor Police. The Petitioners refused to return deposit monies. Good filed a lawsuit. (A2989.)

J. Joanne Chester Matter Related to 301 Grayling Avenue in Narberth, Pennsylvania

Prior to the issues at Glenbrook, Petitioners were involved with a third-party liability claim brought by Joanne Chester. (A2993-A3065.) Chester resides at 301 Grayling Avenue in Narberth, PA, adjacent to another rental property owned by Petitioners. Chester contacted the Narberth Police Department to report issues relating to the Petitioners' property. Narberth Police issued a citation to Petitioners. In response, Doherty sued Chester for "false light", "interference with contract" and "intrusion upon seclusion."

Chester, at her personal expense, retained the firm of Powell, Trachtman, Logan, Carrle & Lombardo to defend the action brought by Petitioners. On 3/19/13, the Montgomery County Court of Common Pleas dismissed Petitioners' action. (SA12.)

Chester then filed a *Dragonetti* lawsuit against the Petitioners, alleging that the action initiated by Petitioners was a SLAPP suit (Strategic Lawsuit Against Public Participation) designed to punish Chester. Chester asserted a count for Wrongful Use of Civil Proceedings and Abuse of Process and sought $29,443.03 in legal fees and expenses that Chester had incurred

in defending the meritless action brought by Petitioners. (SA13-30.)

Petitioners tendered the Chester Complaint to Allstate and demanded a defense to the *Dragonetti* lawsuit. Allstate assigned the liability claim to Lisa Handlovic. In a letter dated 3/27/14 from Handlovic to Petitioners, Allstate denied liability coverage for the claim. When Petitioners protested the denial of coverage, Allstate retained Curtin & Heefner as coverage counsel. In letters dated 4/23/14 and 5/6/14, Allstate, through Curtin & Heefner, confirmed that there was no coverage for Chester's liability action against Petitioners. (A2993-A3065.)

K. Petitioners' Irregular Submission of Property Loss Claim to Allstate

Petitioners' initial submission of anything resembling a claim was the letter from Mary Lou Doherty dated 9/6/14. The letter was sent to "Allstate Insurance Company" in Northbrook, Illinois, where Allstate's Home Office is located. The letter was also addressed to the Allstate agent, the McKeon Agency. The letter is titled, "Notice of Claim under policies (908 879295) for 949-951 Glenbrook Avenue, Bryn Mawr, PA." The letter states in full:

> Please be advised of a claim being made for property damage which has occurred at the above properties. In addition, the properties have been vacated by the tenants so that there is also a claim being made by your

> insured, James & John Doherty and Mary Lou Doherty for loss of rent.

Petitioners did not telephone their agent, Thomas McKeon, concerning this claim. Petitioners did not utilize Allstate's "800" toll free phone number for submitting a claim. The letter contains no date or cause of loss.

It is not clear from the record what Allstate's Home Office did with the 9/6/14 letter. It was likely misfiled, an outcome made probable given the fact that it included no date of loss, cause of loss or claim number. The letter was acknowledged by McKeon, however. On 9/9/14, it was noted as received by Kathy Wagner of the McKeon Agency. (A2460:62:2-24.)[2]

Upon receipt, Wagner called Mary Lou Doherty and left a message, seeking further information about the perplexing submission. Doherty never responded to the call. (SA163.)[3]

On 10/4/14, Doherty submitted a second letter, also to Allstate in Northbrook, Illinois and to the McKeon Agency. This correspondence references the previous letter and stated:

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[2] Appellant's Appendix contains mini-transcripts. As there are 4 pages of deposition transcript for each Appendix page, Appendix number, page and line are separated by a colon.

[3] SA163 is Supplemental Appendix page 163. Petitioners did include an original copy of the 9/6/14 letter, but omitted the 9/6/14 letter from the McKeon Agency files. This letter included handwriting from Kathy Wagner and was included as an exhibit in various depositions as well as the motion for summary judgment.

> After you were given notice, you should have responded. Inasmuch as you have chosen not to do so, please be advised that remedial action will have to be undertaken in the next ten (10) days.
>
> If you have any particular procedures you wish to have followed, please notify me of such in the next ten (10) days.
>
> Thank you.

(SA164.)

Again, Doherty's letter provided no date of loss, no cause of loss, or claim number. Allstate's Clare Erskine testified that the 10/4/14 letter was misfiled into the preexisting Chester file. (A2441:78-80.) However, the 10/4/14 letter was received by McKeon Agency. (A2460-A2461.) Kathy Wagner of the McKeon Agency spoke with Mary Lou Doherty, as memorialized in a 10/10/14 handwritten note affixed by Wagner to the bottom of the letter:

> Sp. w/Mary Lou – gave her info to call to file a claim – nothing was established. Also e-mailed a copy of policy to her.

Ms. Wagner sent an e-mail to Mary Lou Doherty confirming the conversation and attached a copy of the policy declarations. Petitioners were specifically advised as to the procedures that should be followed for presenting a claim to Allstate: "To establish a claim, call 1-800-Allstate and follow the prompts to file a new claim." (A2108.)

On 6/12/15, Mary Lou Doherty sent a third letter to Allstate's Home Office and the McKeon Agency. (A3029.) Although this correspondence referenced the previous letters of 9/6/14 and 10/4/14, once again no date of loss, no cause of loss, and no claim number was provided. This letter set forth a specific amount of loss as including property damage in the amount of $32,252.00, replacement of damaged or missing appliances in the amount of $3,140.00; and an amount of claimed loss rent totaling $34,000.00.

Because there was no open property loss claim at the time, but there was an existing liability claim involving the Dohertys (Joanne Chester – claim no. 0312886526), the 6/12/15 letter was again misfiled by Allstate into the preexisting Joanne Chester liability claim. (A2441:77-78.)

On 7/30/15, Mary Lou Doherty sent a fourth letter to Allstate's Home Office and the McKeon Agency. (A1363.) This correspondence referenced the earlier letter of 9/6/14, but now claimed a loss of $376,777.00 in damages under the Dwelling Protection of the Policy and $18,839.00 in damages under the Personal Property portion of the Policy. Doherty also referenced, for the first time, the Code Enforcement Action that Radnor Township filed in September of 2014.

This latest correspondence led to a claim file being set up at Allstate on or about 8/7/15. The file was assigned claim number 0379581976. The claim was assigned to Claims Representative Tiara Myrick. Myrick's involvement in this claim is memorialized in

a computerized "Claim History Report," commonly referred to as the "claim log." (the claim log is found at A1164-A1166 and discussed below.)

On 8/8/15, Claim Representative Myrick telephoned the insured and left a voice mail message regarding the claim. Myrick called again on 8/11/15.

On 8/12/15, Allstate received a letter from Doherty. The letter was dated 8/11/15, and specifically referenced the calls from Myrick. Doherty's letter requested that Allstate contact her.

On 8/12/15, Myrick spoke with "Lynn" from the McKeon Agency. Lynn advised Myrick of previous correspondence with Petitioners and that the Petitioners "will not respond to anyone's phone call." Lynn stated that "she has tried to call the insured and get a feel for what the claim is being filed for, but the insured only responds with numerous legal documents."

On 8/12/15, Myrick again called Petitioners, and left a voice mail message. She explained that she received the documents that had been sent to the agent, and asked for a return call.

On 8/13/15, Myrick sent a letter to Petitioners confirming that she had been assigned to handle the claim and requested that someone representing Petitioners return the call. The letter also confirmed that Myrick had tried to reach the insured via telephone. Having heard nothing from the insured by 8/19/15, Myrick again called and left a message.

On 8/21/15, Myrick sent an e-mail to Petitioners. This email was received by Jim Doherty the same morning it was sent by Myrick. Jim Doherty then forwarded the email to James, John and Mary Lou Doherty.

On 8/26/15, Myrick again telephoned Mary Lou Doherty. This time it appears that she made contact with her. Her log note reads, "Called the insured. Mrs. Insured answered the phone, explained that she could not speak with me because she was in pending litigation and hung up the phone – at this time we'll get a manager involved for the appropriate steps."

The claim was assigned to Allstate litigation adjuster Clare Erskine. Erskine reviewed the file and created a log note dated 8/27/15 stating, "Apparently litigation has been filed against Allstate in this matter as stated by the insured."

Upon becoming involved, Erskine reviewed the Allstate Liability Claim File of Joanne Chester to make sure it had nothing to do with the first-party Glenbrook claim. In the Joanne Chester *Dragonetti* Claim File, she found some documents – letters from Mary Lou Doherty – that pertained to the property claim. (A2432:41-43.)

On 9/1/15, there is reference in the claim file to the receipt by Allstate of suit papers. Petitioners had filed their Complaint in the Court of Common Pleas of Delaware County on 8/18/15.

L. Petitioners' Original Complaint

The initial Complaint against Allstate set forth a Breach of Contract count. (A290-A298). The Complaint was vague with respect to the specific allegations of policy breach, but did purport to set forth two dates of loss, 8/27/14 and 7/2/15. With respect to the first alleged date of loss, the Complaint stated:

> 9. On August 27, 2014, while ALLSTATE'S 2013-2014 RENEWAL POLICY was in full force and effect, the OWNERS suffered physical loss and damage to the insured property, believed to be the result of a peril insured against under the policy issued by ALLSTATE resulting in damage to the insured premises GLENBROOK as well as loss of rent totaling in excess of $69,382.

(A290 at ¶9.)

With respect to the 7/2/15 date of loss, the Complaint stated:

> 15. On or before July 2, 2015, while ALLSTATE'S 2014-2015 RENEWAL POLICY was in full force and effect, the OWNERS suffered physical loss and damage to the insured property, believed to be the result of a peril insured against under the policy issued by ALLSTATE resulting in damages to the insured premises GLENBROOK as well as loss of rent totaling in excess of $430,809.

(A290 at ¶15.)

Obviously, these referenced dates are not "dates of loss" involving insurable events such as a pipe burst or wind damage, but instead comport with dates of significance *vis a vis* Radnor Township. On 8/27/14 Radnor Township Code Enforcement Official Ray Daly issued notices of violation finding the Glenbrook properties uninhabitable. (A476; A573.) On 7/2/15 Radnor's Director of Community Property Kevin Kochanski sent a letter to the Petitioners indicating that their rental licenses would not be renewed due to failure to comply with Radnor Housing Code. (A461.)

M. Petitioners' Second Amended Complaint

Petitioners filed an Amended and Second Amended Complaint. These Complaints include counts for Bad Faith and UTPCPL. (A2002; A3325.) Neither Pleading makes a reference to a date of loss or cause of the alleged "damage" to the Glenbrook properties.

SUMMARY OF THE ARGUMENT

The Petition for Certiorari should be denied because it fails to present any conflict among the circuits, does not involve an important federal question and the opinions of the lower courts in no way conflict with relevant decisions of this Court. Furthermore, the holdings of the district court and the Third Circuit Court of Appeals were correct.

Respondent, Allstate Indemnity Company, sought summary judgment in this matter. Summary judgment was granted because Petitioners failed to set forth legally cognizable claims in their Second Amended Complaint and discovery revealed that the claims were not predicated upon a potentially insurable loss, but instead, stemmed from the Petitioners' failure to maintain their rental properties and attendant licensing disputes with Radnor Township.

Petitioners failed to adduce any evidence of "sudden and accidental direct physical loss to the property" as required by the policy. As a result, Petitioners claim for breach of contract failed. Furthermore, even had the Petitioners adduced the requisite evidence of a sudden and accidental direct physical loss to the Glenbrook properties, Plaintiff Mary Lou Doherty and her property damage expert admitted that exclusions to coverage apply.

Petitioners' claim for Bad Faith failed because there is no breach of contract. The Bad Faith Claim also failed because the Appellee's reasonably explained misfiling of Plaintiff Mary Lou Doherty's letter at most constitutes non-actionable negligence and mistake. Furthermore, the McKeon Agency, Petitioners' insurance agency, did respond to the September 6, 2014 and October 4, 2014 letters and provided Mary Lou Doherty with instructions on how to file a claim. Finally, the Petitioners' claim decision was objectively and manifestly reasonable. Therefore, the Petitioners' claim for bad faith failed the first prong of the *Terletsky* test.

Lastly, the Petitioners' claim under the Unfair Trade Practices and Consumer Protection Law likewise failed because the count was inadequately pled. Further, there is no evidence of misrepresentation and there is no evidence of the requisite misfeasance.

REASONS FOR DENYING CERTIORARI

Petitioner, Allstate Indemnity Company, hereby incorporates by reference the facts, exhibits, arguments and supporting case law presented in the motion for summary judgment. (A2706-A3352.) Petitioner further incorporates by the reference the facts, arguments and case law set forth in District Court Judge Gerald J. Pappert's lengthy, detailed and well-reasoned 95-page opinion. Finally, Petitioner incorporates the succinct 12-page opinion authored by the United States Court of Appeals for the Third Circuit.

A. PETITIONERS' PURPORTED ISSUES DO NOT WARRANT REVIEW

The Court's Rule 10 "Consideration Governing Review on Certiorari" sets forth the basic standards used to assess whether an issue deserves its consideration. Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers.

(a) a United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided 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.

The Petitioners' Petition for a Writ of Certiorari fails to set forth any arguments worthy of this Court's consideration.

B. THE PLAIN, UNAMBIGUOUS LANGUAGE OF THE LANDLORDS PACKAGE INSURANCE POLICY RENDERS PETITIONERS' FIFTH AND SEVENTH AMENDMENT ARGUMENTS MERITLESS

The policy of insurance in effect on August 27, 2014 provides coverage for "sudden and accidental

direct physical loss to property." The policy contains the following provision:

> **Losses We Cover Under Coverages A and B:**
>
> We will cover sudden and accidental direct physical loss to property described in **Coverage A – Dwelling Protection and Coverage B – Other Structures Protection** except as limited or excluded in this policy.

(A1068.)

In addressing what constitutes a "sudden and accidental" loss, the Pennsylvania Superior Court found that "accidental" meant "unexpected or unintended" and "sudden" meant "abruptness or brevity." The Superior Court further found that a loss can be accidental without being sudden and that the unexpectedness of a loss is irrelevant to its suddenness. Therefore, in determining whether a loss is sudden and accidental, both the accidental element and the sudden element need to be established independently. *Lower Paxton Twp. v. United States Fid. & Guaranty Co.*, 557 A.2d 393 (Pa. Super. 1989).

In 2001, the Pennsylvania Supreme Court further elaborated on the sudden and accidental language. The Court found that the words sudden and accidental "reveal a clear intent to define the words differently" and stated that the phrase requires a temporal or immediate element to the loss, in addition to requiring it be accidental. Therefore, "sudden and accidental" does not mean merely "unexpected or unintended" but that the

requirement contains two elements: 1) an accidental element and 2) a temporal, sudden element. *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189 (Pa. 2001).

The violations memorialized by Radnor Code Enforcement Official Ray Daly in his 8/27/14 letters clearly do not constitute a "sudden and accidental direct physical loss" to the property. (A476 and A574.) Therefore, Plaintiffs cannot meet their initial burden for coverage. Specifically, Daly found the following violations when he inspected the Glenbrook properties on 8/22/14. He generated his notice of violation letter on 8/27/14.

a. Chapter 222, Section 108.1.3 (Structure unfit for human occupancy) – The dwelling is unfit for human occupancy due to it being unsafe, in disrepair, unsanitary, vermin infested, and covered in filth and contamination.

b. Chapter 222, Section 301.2 (Responsibility) – Defendants have failed to maintain the structure and the exterior property in compliance with the PMC.

c. Chapter 222, Section 302.3 (Sidewalks and driveways) – The front sidewalk and curb are in disrepair and constitute a tripping hazard.

d. Chapter 222, Section 302.4 (Weeds) – Defendants have failed to maintain the yard and fails to provide a clear path to the front door.

e. Chapter 222, Section 304.13.1 (Glazing) – A window pane is broken and storm windows are missing throughout the house.

f. Chapter 222, Section 304.13.2 (Openable windows) – Several windows are missing sash cords and the window in the upstairs bedroom is open and cannot be closed.

g. Chapter 222, Section 304.14 (Insect screens) – Screens are missing in most of the windows throughout the house.

h. Chapter 222, Section 304.15 (Doors) – The bedroom door hardware is not working.

i. Chapter 222, Section 305.3 (Interior surfaces) – All of the walls, ceilings, doors, windows throughout the house are pealing and must be repainted.

j. Chapter 222, Section 305.5 (Handrails and guards) – Handrails are missing or detached throughout the house.

k. Chapter 222, Section 306.1.1 (Unsafe conditions) – The interior basement walls are covered with black, wet, damp markings on the walls.

l. Chapter 222, Section 308.1 (Accumulation of rubbish or garbage) – The interior and exterior of the house is covered with trash.

m. Chapter 222, Section 309.1 (Infestation) – Mouse droppings were found throughout

the kitchen area, in cabinets and on the stove.

n. Chapter 222, Section 502.1 (Dwelling units) – Bathroom sink, toilet and tub are not being maintained in a sanitary condition. In addition, kitchen sink and dishwasher not being maintained in a sanitary condition.

o. Chapter 222, Section 505.3 (Supply) – The water supply and meter are not properly installed or maintained.

p. Chapter 222, Section 603.1 (Mechanical equipment) – The furnace flue pipe needs to be replaced; the expansion tank needs to be properly supported; and the dryer vent pipe needs to be replaced and properly supported.

q. Chapter 222, Section 604.3 (Electrical system hazards) – Electrical service panel needs to be brought up to Code and recertified once such work is completed; light fixtures needed repair; basement lights do not work; several light fixtures had no globes and bulbs were exposed.

r. Chapter 222, Section 704.2 (Smoke alarms) – Functional smoke detectors are not installed in the basement, 1st floor, 2nd floor hallway, or in each bedroom; most smoke alarms were missing and none worked.

(A477-A478; A575-A576.)

Ray Daly testified that he personally observed these conditions when he inspected the Glenbrook properties on 8/22/14. (A2463.) Daly inspected both 949 and 951 Glenbrook Avenue. (A2467:12:19-25; A2469:18:13-17.) Daly inspected the properties on 8/22/14 and took the photographs himself. He posted the notices at the Glenbrook properties on 8/27/14. *Id.*: 20:6-22.

The Plaintiffs have failed to maintain their property, violated a court order requiring inspections, and were not in compliance with applicable housing codes. As a result, their rental license was revoked. This case is not about an insurable "sudden and accidental" loss but instead is claim related to a dispute between Radnor Township and the Dohertys about lack of maintenance and noncompliance with Radnor Code. Mary Lou Doherty authored a 10/15/15 letter explaining the "overview of the loss." This letter details a history of issues with Radnor Township. (A3328.) The burden was upon the Plaintiffs to adduce evidence of a sudden and accidental loss. They conspicuously failed to do so. As a result, Petitioners' arguments related to Fifth and Seventh Amendments are meritless.

C. PETITIONERS' ARGUMENT REGARDING THE MEND THE HOLD DOCTRINE IS MERITLESS

Petitioner Mary Lou Doherty failed to cooperate with the initial investigation of the claim and filed a lawsuit. As a result, the Respondent was unable to

properly investigate the claim and provide a pre-suit coverage decision. After review of subpoenaed records, admissions at the Rule 16 conference and receipt of various correspondence and discovery, Respondent formed an opinion that the Petitioners' alleged damages were not the result of "sudden and accidental direct physical loss" as required in the policy.

Petitioners contend that the claim was denied due to "insufficient notice." This is untrue. Respondent was not in a position to issue a claim decision pre-suit and did not do so. There never was a hold to mend.

D. PETITIONERS' ARGUMENT REGARDING THE SHAM AFFIDAVIT DOCTRINE IS MERITLESS

Petitioners contend that Judge Pappert erred by applying the "Sham Affidavit" Doctrine. They purport to explain the inconsistencies regarding Petitioner Mary Lou Doherty's testimony and prior statements. Petitioners argue that "she was unfamiliar with the applicable law and after retaining a knowledgeable attorney was able to amend her testimony to offer further elaboration." Aside from this offering (which could be construed as a euphemism for perjury), Petitioners fail to explain why the retention of counsel would alter basic facts and circumstances of the claim.

On January 19, 2017, after the close of discovery and after Allstate had filed its motion for summary judgment, Petitioner Mary Lou Doherty filed a "praecipe to attach certification/verification" to her

Second Amended Complaint. Presumably, Doherty sought to convert the Second Amended Complaint into a "verified complaint." Courts consider a verified complaint to be the equivalent of an affidavit for the purposes of summary judgment. *Wright v. City of Philadelphia*, No. 13-5589, 2016 WL 1241775 (E.D. Pa. Mar. 30, 2016).

The Court may disregard affidavits that contradict the record or materially alter the story told by discovery. *Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007). "The . . . affidavit need not directly contradict the earlier deposition testimony if there are other reasons to doubt its veracity, such as its inclusion of eleventh-hour revelations that could have easily been discovered earlier." *Cellucci v. RBS Citizens, N.A.*, 987 F. Supp. 2d 578, 582 (E.D. Pa. 2013).

Not every contradictory affidavit is a sham, however. *See Baer v. Chase*, 392 F.3d 609, 624 (3d Cir. 2004). The Court may consider whether the record establishes that the affiant was "understandably mistaken, confused, or not in possession of all the facts during the previous deposition." *Jiminez*, 503 F.3d at 254. If a party fails to explain the contradiction between the affidavit and the prior deposition, the Court will disregard the affidavit. *Id.*

Petitioner Mary Lou Doherty sought to "verify" her allegations after the close of discovery and the motion for summary judgment. The policy was first issued in 2005. The events involving the Villanova students

occurred in August of 2014. Issues with Radnor Township Code Enforcement were ongoing for many years prior to 2014. Petitioners ignored Judge Zetusky's Order since 2009. Nothing about the facts of the case changed between the time the case was filed in 2015 and the date of the affidavit in early 2017. Judge Pappert was correct (and well within his discretion) in ruling that the Doherty affidavit was a sham.

E. THE SUBMISSION OF EXPERT REPORTS DOES NOT PRECLUDE SUMMARY JUDGMENT AND DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS

1. The District Court did not improperly weigh the credibility of James Wagner

Petitioners contend that Judge Pappert improperly weighed the credibility of public adjuster James Wagner. This is false.

James Wagner was retained to provide an estimate of the "damage" at 949-951 Glenbrook. (A3331.) Wagner prepared an estimate to repair the "damages" and then opined in a conclusory manner that "the damages sustained were consistent with damage covered under the insured's policy."

Judge Pappert did not make a determination of the credibility of Wagner, he made a determination of the evidentiary insufficiency of Wagner's report. The opinion states "nowhere in Wagner's report does he describe the damage in any meaningful way, discuss the sudden and accidental requirement, conclude that the

damage was sudden and accidental or explain his basis for concluding that the damage was of the kind that would be covered under the Landlords Policy. His report contains nothing about the cause of the losses and, notwithstanding the all-encompassing nature of the proposed repairs, nowhere does he explain in what manner virtually every single structure, floor, wall, ceiling, door, window, toilet, tub, sink, faucet, cabinet, light fixture and appliance was damaged as part of a 'sudden and accidental direct physical loss' in August 2014." (A49).[4]

Furthermore, Wagner's opinion is not the proper subject of expert testimony since coverage is a legal question reserved for the Court. *Cont'l Cas. Co. v. Cty. of Chester*, 244 F. Supp. 2d 403, 407 (E.D. Pa. 2003) ("In Pennsylvania, the interpretation of insurance contracts is a question of law for the courts to decide. Whether a particular loss is within the coverage of an insurance policy is such a question of law and may be decided on a motion for summary judgment." (internal citations and quotations omitted)); *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co.*, No. 05-281, 2011 WL 204618, at *3 (E.D. Pa. Jan. 20, 2011) ("It is well-settled that expert testimony regarding the interpretation of an insurance policy is impermissible.").

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[4] Wagner's initial report indicates that the type of loss was "vandalism", a cause that is specifically excluded. Wagner subsequently issued a conflicting and untimely report indicating that this designation was made in error. For the purposes of summary judgment, the Court did not consider his prior opinion that the type of loss was vandalism. (*See* fn. 35, A48).

2. The District Court did not Improperly Weigh the Credibility of David Cole

Petitioners retained David Cole to offer opinions about Allstate's handling of the claim. Petitioners argue that "without providing any basis for doing so, the district court simply ignored Mr. Cole's expert testimony." This is untrue.

Judge Pappert reviewed and considered Cole's report. On page 94 of Pappert's opinion, he wrote "moreover, the opinion of David Cole, Doherty's proposed expert, that Allstate's conduct rose to the level of statutory bad faith does not preclude summary judgment. (A96.) *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 595 (E.D. Pa. 1999) ("The mere presence of an opinion supporting the non-moving party's position does not necessarily defeat a summary judgment motion; rather, there must be sufficient facts in the record to validate that opinion." (citing *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1198-99 (3d Cir. 1995))). Because Cole's opinion "includes no analysis or interpretation that would alter the court's conclusion as to the insufficiency of the evidence presented by plaintiff," *id.*, summary judgment is warranted." (A97).

Furthermore, Petitioners cite two cases in support of their position. First, Petitioners point to *In re Paoli R. Yard PCB Litigation*, 916 F.2d 829, 846 (3d Cir. 1990). In that case, the Court reversed summary judgment granted to defendants and held that a "court may not ignore an expert's uncontradicted testimony."

David Cole's report was specifically contradicted by the report of Richard McMonigle.[5] Cole's report was further contradicted by the evidence of record, applicable case law and common sense.

Petitioners next cite *Provenz v. Miller*, 102 F.3d 1478, 1490 (9th Cir. 1996) for the proposition that "as a general rule, summary judgment is inappropriate where an expert's testimony supports the non-moving party's case."

As initial matter, this is a 9th Circuit decision and is not binding upon the other 12 circuits. More fundamentally, *Provenz* has no application to the present matter. In *Provenz*, shareholders brought an action against MIPS Computer Systems, Inc. alleging violations of various Securities Exchange Commission rules. The citation referenced by Petitioners is actually from a prior securities case, *In re Worlds of Wonder*, 35 F.3d 1407 (9th Cir. 1994). The *WOW* Court explained that "an expert's conclusory allegations that a defendant acted with scienter are insufficient to defeat summary judgment where the record clearly rebuts any inference of bad faith. *Id.* at 1426. The Petitioners have cherry picked a headnote which supports Respondent's position.

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[5] Richard McMonigle prepared a report on behalf of Allstate. McMonigle is the author of *Insurance Bad Faith Law in Pennsylvania*, now in its 17th edition. McMonigle thoroughly reviewed the record and concluded that the evidence did not support Petitioners' case. (A3393-A3428.)

In any event, the district court reviewed Cole's report and his opinions cannot cure the underlying insufficiencies of the evidence presented by the Petitioners.

F. THE AS84 LANDLORDS POLICY IS NOT AN "ALL-RISKS" POLICY

Despite the lengthy, detailed and well-reasoned 95-page opinion issued by Judge Pappert (A3-A97), as well as the clear and unambiguous language of the policy and controlling case law, Petitioners persist in maintaining that the policies at issue are "All-Risk" or "All-Perils" policies. Petitioners intrepidly claim that Respondent "labeled and advertised this form of policy as being an 'All-Risk' or 'All-Perils' insurance policy." Predictably, Petitioners offer no support for these ridiculous contentions.

An "All-Risk" or "All-Perils" policy is a particular type of policy that "covers every kind of insurance loss except what is specifically excluded." *Betz v. Erie Ins. Exch.*, 957 A.2d 1244, 1255 (Pa. Super. 2008) (quoting Black's Law Dictionary 815 (8th ed. 2004)); *see also* §148:50 nature and scope of coverage, 10 Couch on Ins. §148.50 (A property insurance policy which covers "physical loss or damage to property insurance from any external cause" is properly construed to be an "All-Risk" policy). In other words, an "All-Risk" or "All-Perils" policy covers any kind of loss unless specifically excluded.

However, the coverage grant of the AS84 Landlords Policy only provides coverage for "sudden and accidental direct physical loss to the property except as limited or excluded under the policy." Therefore, Petitioners must meet an initial threshold that the "damages" or "loss" were caused by a "sudden and accidental direct physical loss" to the property. Petitioners conspicuously and repeatedly ignore the plain language of the coverage grant (as well as controlling case law) and insist that they were issued an "All-Risks" policy.

The Third Circuit has consistently found that insureds issued policies governed by the "sudden and accidental" coverage grant must meet that initial evidentiary threshold or suffer summary judgment. *See Wehrenberg v. Metro Prop. & Cas. Ins. Co.*, No. 2:14-01477, 2017 WL 90380, at *4 (W.D. Pa. Jan. 10, 2017) (granting summary judgment where Plaintiff subject to identical policy language failed to show that the loss was sudden and accidental); *Hamm v. Allstate Prop. & Cas. Ins. Co.*, 908 F. Supp. 2d 656, 667 (W.D. Pa. 2012) (requiring plaintiffs subject to identical policy language to show that the loss was sudden and accidental in the first instance).

Clearly, the coverage grant of the policy at issue is clear and unambiguous. It should be noted that despite the fact that the Petitioners have consistently maintained that the form AS84 policy was an "All-Risks" policy, they dedicated less than two pages of the Petition to this argument.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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