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

REPLY

Respectfully submitted,

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INTRODUCTION

Respondent misconstrues the purposes for a Brief in Opposition—raising the question as to why it filed a brief that merely adopts its version of the records of the lower courts. The resounding answer is:

The Petition is not frivolous and is meritorious.

As to the relevant legal arguments, Respondent incorrectly contends that: 1) Petitioners failed to present any conflict among the circuits; 2) There are no important federal questions; and 3) The decisions of the lower courts do not conflict with this Court's Law. The issue is not how Respondent mischaracterized it to be. Namely, a "factbound dispute" and "having no importance beyond the immediate parties." (Resp. Br. 1). The relevant, undisputed facts at issue are straightforward and not complex although Respondent buried them in its brief. They pertain to Petitioners' issuance of their claim notice, their followup attempts, and Respondent's intentional disregard for its fiduciary obligations and duties of good faith and fair dealing owed to an insured in refusing the notifications—in accordance with the law and the customs and practices of the Insurance Industry.

At issue is whether the lower courts misapprehended the standards for summary judgment, and if so, whether this Court should intervene to promote uniformity in the process under Rule 56. *Tolan v. Cotton*, 134 S. Ct. 1862, 1869 (2014). In Respondent's

Statement of the Case, it relies on disputed Hearsay Evidence and tries to distract this Court from the District Court's "bench trial on argument and papers" rather than to have assessed the summary judgment motion based on argument and admissible evidence only.

However, Respondent's arguments opposing the Petition fail because Respondent cannot cite to any law refuting the importance of Petitioners' claims in the Petition. Notably, Respondent declared that Petitioners' claims are meritless and "incorporates by reference the facts, exhibits, arguments and supporting case law presented in its motion for summary judgment and case law set forth" by the Third Circuit and the District Court (Resp. Br. 23) even though the lower records are not yet before this Court. Respondent goes on to misrepresent facts which Petitioners welcome the opportunity to correct if this Court is inclined to order.

Where the misrepresentations are blatant, Petitioners will respond to show how important these facts are to the claims raised in the Petition. Comparably in the circuit courts, "an attempt to incorporate by reference arguments made in the District Court" fail to satisfy Rule 28 of the Federal Rules of Appellate Procedure. *Norman v. Elkin*, 860 F.3d 111 (3d Cir. 2017) (holding incorporation arguments do not satisfy the rules); *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452 (6th Cir. 2003) (noting "the incorporation by reference of arguments made . . . in the district court [do] not comply with . . . Appellate Procedure").

Respondent relies on material and genuinely disputed facts and findings which should be challenged before a jury. Further, Respondent relies on a misapplication of pure rules of law that warrant Certiorari. There are no barriers preventing this Court from reaching the merits of the matter.

SUMMARY OF THE REPLY

Questions involving the Seventh Amendment right to a jury trial and the Fifth Amendment's Due Process Clause, and misapplication of this Court's "Mend-the-Hold" Doctrine as declared in *Railway v. McCarthy*, 96 U.S. 258 (1878) are important Federal Questions. As questions of first impression, Respondent incorrectly claims this Court's review of the lower courts' use of the "Sham Affidavit" Doctrine during summary judgment under Rule 56 is meritless when it conflicts with Rule 15(a). Further, the submission of valid Expert Witness Reports precludes summary judgment under Rule 56. If allowed, Petitioners will elaborate on why the lower courts' findings are incorrect, how the records support these claims, and how Respondent's AS-84 Landlord Package Policy is an "All-Risks" or "Hybrid" Policy providing coverage as determined by courts across the Country. Also, there are five (5) possible *Amicus Curiae Supports*.

ARGUMENT

1. THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL AND THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE ARE ALWAYS IMPORTANT FEDERAL QUESTIONS.

Respondent without reliance on any federal precedence, contends that its coverage determination during litigation circumvents and extinguishes Petitioners' Seventh Amendment right to a jury trial and their right to Due Process under the Fifth Amendment. While Respondent ignores *Sections B.1-B.2* of the Petition, these questions are always important and subject to this Court's consideration when it is important to the public and involves pure law.[1]

These circumstances prevent the establishment of misleading precedent and the desire to correct an erroneous interpretation of important legal principles in considering a new issue on review anytime it sees that such constitutional provisions impact on the public or on future litigants. The Court is capable of correctly deciding these issues when the factual record is complete. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (allowing for discretion on a case-by-case basis); *Harris Corp. v. Ericsson Inc.*, 417 F.3d 1241, 1251 (Fed. Cir. 2005) (acknowledging the same). In fact, the Court will address such issues when "the proper resolution is beyond any doubt" or "where 'injustice might otherwise result.'" *Singleton*, 428 U.S. at 121 (citing *Turner v.*

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[1] Rhett R. Demmerline, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 996-1003 (1989).

City of Memphis, 369 U.S. 350, 357 (1962) and *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

Amazingly, Respondent opposes these claims and argues with the inadmissible hearsay evidence which Petitioners raised at issue on pages 8, 10, and 25-27 of their Petition. These allegations arise from other litigations which settled or are pending in Pennsylvania's courts. Each discovered and/or resulted in findings that contradict those of the District Court revealing why the court should not have relied on the hearsay during summary judgment. *Toebelam v. Missouri-Kansas Pipeline Co.*, 130 F.2d 1016, 1021 (3d Cir. 1942). If given the opportunity, Petitioners will elaborate in detail, and even though the facts of the lower records appear incomplete, these open questions of fact are material to the merits of the Petition—and as to why this matter should go to a jury.

2. MISAPPLICATION OF THIS COURT'S "MEND-THE-HOLD" DOCTRINE AS DECLARED IN *RAILWAY v. MCCARTHY*, 96 U.S. 258 (1878), IS ALSO AN IMPORTANT FEDERAL QUESTION.

As to this Court's Law declared in *Railway v. McCarthy*, *supra*, Respondent also ignores *Section B.3* of the Petition. In particular, Respondent claims that two (2) of this Court's Decisions, and the decisions of six (6) other circuits mean nothing to our Country. Again without relying on any precedence, Respondent shifts the blame to Petitioner, Mary Lou Doherty (who

is a licensed Attorney) creating credibility issues which are for a jury to decide. If allowed, Petitioners will also explain how Mrs. Doherty's testimony is consistent throughout the lower records to confirm when the loss occurred, that it was sudden and accidental, that Respondent's contention of denying the claim based on "insufficient notice" is untrue, and how Respondent made a pre-suit claim determination being the hold to mend.

This matter is important because Respondent disregards the Insurance Industry's customs and practices for giving and accepting notice, as well as the terms of the insurance contract at issue—which it drafted—and the precedence of the Third Circuit and Pennsylvania's Supreme Court as discussed on page 32 of the Petition. The Insurance Industry agrees.

James J. Markham, Vice-President of the Insurance Institute of America, edited the treatise: PROPERTY LOSS ADJUSTING, 2nd ed., Vols. 1-2 (1995). It guides adjusters on their education and training in the Insurance Claims Industry. As to receiving notice of a claim, Mr. Markham indicates that it must be prompt. *Id.*, Vol. 1, at 135, 139. He explains that:

> Following a loss, the insured must give **prompt notice** to the insurer or to the insured's agent. This clause does not require written notice, only that notice be given in some form. Some policies require written notice of loss. Also, the period of time for giving notice is not specified, only that it be prompt. The insured is held to a standard of what is

> reasonable notice under the circumstances. Notice to the agent is notice to the company, so if the claim is reported to the agent, proper notice has been given.

PROPERTY LOSS ADJUSTING, 2nd ed., Vol. 1, at 135.

Other jurisdictions agree. The insured does not have to prove the inapplicability of an all-risks policy's exceptions to recover, but rather, must show: 1) the loss occurred during the coverage period and 2) the contract encompasses the loss. *See Great Lakes Reinsurance (UK) PLC v. Soveral*, 2007 U.S. Dist. LEXIS 13261 (S.D. Fla. 2007); *see also Banco Nacional De Nicaragua v. Argonaut Ins. Co.*, 681 F.2d 1337, 1340 (11th Cir. 1982) (holding: "plaintiff[,] . . . must show a relevant loss in order to invoke the policy, and proof that the loss occurred within the policy period[.]"); *Morrison Grain Co., Inc. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430 (5th Cir. 1980) (citing: "the burden is upon the insured to prove that a loss occurred and that it was due to some fortuitous event or circumstance."); *B&S Assoc., Inc. v. Indemnity Cas. & Property, Ltd.*, 641 So.2d 436, 437 (Fla. 4th DCA 1994) (citing *Morrison:* "[i]t would seem to be inconsistent with the broad protective purposes of 'all-risks' insurance to impose on the insured . . . the burden of proving precise cause of loss or damage."); *see also Hudson v. Prudential Property & Cas. Ins. Co.*, 450 So.2d 565, 568 (Fla. 2d DCA 1984) (holding that an insured must prove a loss occurred to the property while the policy was active); *Egan v. Washington Gen. Ins. Corp.*, 240 So.2d 875, 876 (Fla. 4th DCA 1970) (finding that an insured's burden of proof under an

all-risks policy "is a light one: to make a prima facie case for recovery, he must show only that a loss has occurred.").

Comparatively, pursuant the parties' Policy "[i]n the event of a loss [Petitioner] must promptly give [Respondent] or [its] agent notice." An insured's failure to comply with this requirement can only result in a denial of coverage if it prejudices Respondent. There is no requirement within the Policy as to what details are to be provided, or the form or manner of the notice.

3. RESPONDENT TRIES TO AVOID THIS COURT'S REVIEW OF THE "SHAM AFFIDAVIT" DOCTRINE DURING SUMMARY JUDGMENT UNDER RULE 56 AS IT CONFLICTS WITH RULE 15(A).

As to this Court's first time review of the "Sham Affidavit" Doctrine, Respondent also misinterprets the precedence cited by Petitioners in *Section B.4* of the Petition to the point of violating all of it including this Court's decisions in *Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) and *Foman v. Davis*, 371 U.S. 178, 182 (1962). In fact, the testimony throughout the lower records is consistent which they disregarded. As a red herring, Respondent makes issue with Petitioners' use of Verification Forms which they attached to their Second Amended Complaint and their Proposed Third Amended Complaint. As this Court is aware, its Rules of Civil Procedure do not require pleadings to be

verified. However, the filing of any pleading is still subject to certification requirements within Rule 11(b) confirming the veracity of the contents when filed.

This Court needs to address the "Sham Affidavit" Doctrine because the lower courts' application of it violates Rule 15(a), when the evidence presented under Rule 56 is to be tested in a light most favorable to the nonmovant. It will also promote uniformity with other Rules such as Rule 11. Further, this Court's review will prevent the lower courts from engaging in a practice of dismissing complaints based on an imperfect statement of legal theory without affording Petitioners reasonable opportunities to add to their complaint. *Johnson*, 135 S. Ct. at 346.

As Petitioners explained at page 38 of their Petition, the Third Circuit applies the "*flexible approach.*" A majority of circuits applying this approach recognize that "not every prior inconsistency is devastating to the credibility of a witness; there is always the possibility that the apparent change was the product of an innocent misunderstanding of the question, nervousness at deposition, or maybe a suddenly refreshed recollection."[2]

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[2] Ryan A. Mitchell, *Comments: Is the Sham Affidavit Rule Itself a Sham, Designed to Give the Trial Court More Discretion at the Summary Judgment Level?*, 37 U. BALT. L. REV. 255, 261 (2008) (quoting James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, WASH. & LEE L. REV. 1523, 1598 (1995)); *see* Collin J. Cox, Note, *Reconsidering the Sham Affidavit Doctrine*, 50 DUKE L.J. 261, 289-90 (2000) (discussing a "reasonableness test" for assessing contradictory affidavits).

4. THE SUBMISSION OF EXPERT WITNESS REPORTS DOES PRECLUDE SUMMARY JUDGMENT UNDER RULE 56.

As to this Court's review of the lower courts' assessment of Petitioners' Expert Witness Reports (being Mr. Wagner and Mr. Cole), Respondent disregards the precedence cited by Petitioners in *Section B.5* of the Petition in conflict with this Court's decisions in *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 136 (1997). Further, a court is not authorized to ignore properly presented and authenticated expert witness testimony during summary judgment. *See In re Paoli R. Yard PCB Litigation*, 916 F.2d 829, 846 (3d Cir. 1990) (reversing summary judgment holding: "a court may not ignore an expert's uncontradicted testimony").

This issue is important because Respondent again disregards the Insurance Industry's customs and practices for preparing such Reports. If given the opportunity, Petitioners will present how their Expert Reports conform to the Industry's standards and requirements as well as the Law. These Experts are used to determine facts, verify the extent of the loss or damage, and to estimate the value of loss.[3] They know the property policies and insurance company claims procedures, and they assist insureds in organizing and presenting claims.[4] They prepare estimates on "scope sheets [simply listing] the areas damaged,

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[3] PROPERTY LOSS ADJUSTING, 2nd ed., Vol. 1, at 222.

[4] *Id*. at 221.

which includes the type of damage, a description of the proposed types of repairs, and the measurement of those areas."[5] They use computer Estimating Systems as adjusting tools because they promote efficiency in the industry.[6]

Interestingly, Respondent does not acknowledge that it hired its own Property Damages Expert Witness (Gary Popolizio, P.E.) to refute Mr. Wagner's damages assessment—or that Petitioners filed a Motion in Limine to Preclude Mr. Popolizio's Report (expressing a damages assessment and causation) which the District Court never ruled upon. In footnote 4 of its brief, Respondent also argues that Petitioners' Expert, Mr. Wagner, determined the loss to be caused by vandalism. This is incorrect as Mr. Wagner's supplemental Reports explain otherwise.

Even more interesting is Respondent's reliance on the Report of its Bad Faith Expert Witness, Richard McMonigle, in footnote 5 of its brief. During Summary Judgment, Respondent did not rely on Mr. McMonigle's Report (or Mr. Popolizio's Report). In fact, Mr. McMonigle's Report was subject to a *Daubert* Motion which the District Court chose not to rule upon. Hence, it is important for this Court to assess the lower courts' use, acceptance and/or rejection of all Expert Witness Reports during summary judgment and whether the match-ups warrant them being presented to a jury as

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[5] *Id*. at 217.

[6] *Id*. at 220-222.

Petitioners discuss on pages 41 through 43 of the Petition.

5. RESPONDENT'S AS-84 LANDLORD PACKAGE POLICY IS AN "ALL-RISKS" OR "HYBRID" POLICY PROVIDING "ALL-RISKS" COVERAGE FOR REAL PROPERTY DAMAGE CLAIMS.

As to this Court's review of the Insurance Policy at issue, the question goes to the merits of the case rather than the Petition. As this was a question of first impression for the lower courts, it is clear that Respondent ignores what the courts from all around our Country have determined as explained in *Section B.6* of the Petition. If given the opportunity, Petitioners will elaborate on the cited precedence. *Union Savings Bank v. Allstate Indemnity Co*., 830 F.Supp.2d 623, 630 (S.D. Ind. 2011) (acknowledging: the "AS-84 Landlord Package Policy" is "All-Risks") (citing *Associated Aviation Underwriters v. George Koch and Sons, Inc.*, 712 N.E.2d 1071 (Ind.Ct.App. 1999) (noting insured's Declaratory Judgment action).

CONCLUSION

Indeed, the Petition is certworthy. As Alexander Hamilton cautioned in THE FEDERALIST, No. LXXXIII, the Constitution could not remain silent on "*civil causes*" because any silence would amount to "an

abolition of the trial by jury[.]"[7] Petitioners' matter effects the practical and inherent constitutional and contractual rights of every insured-consumer in our United States—and how our Federal Court System handles the process of any disputes between an insurer and the insured-consumer from inception, through discovery and Summary Judgment Practice under Rule 56, as well as before a jury.

In the undersigned Counsel's professional opinion, all conflicts identified in the Petition are direct, significant, and of great national importance for the administration of justice as noted above. Any of the noted jurisdictions hearing Petitioners' matter would rule in their favor. Petitioners explained why uniformity is needed under Rule 56 and why the lower judgments are incorrect. Respondent failed to establish how the Petition fails to satisfy any factor required for certworthiness. The courts below departed from the accepted and usual course of summary judgment proceedings—and sanctioned such departure—calling for this Court to exercise its supervisory power. If these conflicts in law and procedure continue, they will continue to interfere with the People's rights to a jury in civil matters under the 7th Amendment, and deny them both procedural and substantive Due Process under the 5th Amendment.

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[7] *Being reprinted in* THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND SELECTED WRITINGS OF THE FOUNDING FATHERS 628 (Barnes & Noble, Inc. 2012).

Lastly, Petitioners received five (5) commitments for possible *Amicus Curiae Support* if this Petition is granted.

For all the forgoing reasons, Petitioners pray this Honorable Supreme Court will grant their Petition and any other relief deemed just.

Beholden and Respectfully submitted,

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And

God Bless America.

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