No. A _____-_____

IN THE
SUPREME COURT OF THE UNITED STATES

MARY L. DOHERTY, JAMES DOHERTY, JOHN DOHERTY,

Petitioners,

v.

ALLSTATE INDEMNITY COMPANY,

Respondent.

Application to Recall and Stay the Mandate
of TheThird Circuit Court of Appeals
pending Preparation, Filing and Dispensation of a Petition for Writ of Certiorari

DIRECTED TO
THE HONORABLE SAMUEL A. ALITO,
ASSOCIATE JUSTICE OF THE SUPREME COURT
AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT

Respectfully submitted,

JOSEPH Q. MIRARCHI, ESQUIRE
MIRARCHI LEGAL SERVICES, P.C.
3 Logan Square, 36th Floor,
1717 Arch Street, Suite 3640,
Philadelphia, PA 19103
Telephone: (267) 250-0611
Facsimile: (215) 569-3200
Email: JQMLegalServices@AOL.COM

Counsel for Petitioners
Member of
The United States Supreme Court Bar; The U.S. Court of Appeals, 3rd Cir. Bar;
The U.S. District Court, E.D., PA Bar; and The Pennsylvania Bar Association.

PARTIES TO THE PROCEEDING
AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioners are: Mary Lou Doherty, Esquire; James Doherty; and John Doherty. They are landlord-insurance consumers owning the insured real properties that are the subject of the dispute between the parties. As such, a corporate disclosure statement is not required pursuant to Supreme Court Rule 29.6. However, in light of full spirit of the Rule, Petitioners acknowledge they are natural persons and not nongovernmental corporate entities. They do not have any publicly issued shares existing that pertain to their ownership of the properties. Petitioners also acknowledge there is no parent or publicly held company that owns 10% or more of any stock in the properties.

Respondent is Allstate Indemnity Company and at all times material has been the insurer of the subject properties. Petitioners acknowledge that Respondent is a corporate non-governmental entity that issues shares of its ownership interests publicly. In doing so, Respondent may have a parent or publicly held company that owns 10% or more of any stock in Respondent.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Treatises and Other Authorities

APPLICATION TO RECALL AND STAY THE MANDATE OF THE THIRD CIRCUIT COURT OF APPEALS PENDING PREPARATION, FILING AND DISPENSATION OF A PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Dear Honorable Justice Alito,

On behalf of Petitioners, Mary Lou Doherty, Esquire; James Doherty; and John Doherty, my Office is filing this urgent Application to Recall the Third Circuit Court of Appeal's Mandate in their matter dated June 28, 2018, and to Stay the Judgment dated May 25, which the district court filed on July 2. The deadline for filing a Petition for Writ of Certiorari is August 23, 2018. A copy of the Order and Mandate, and the Opinion in *Doherty, et al. v. Allstate Indemnity Company,* ___ Fed. Appx. ___, 2018 WL 2382799 (3rd Cir. May 25, 2018), are attached for review (**Exhibit "A"**). Petitioners make these requests so they can complete and file their Petition for Writ of Certiorari with the Court.

As I will explain, Petitioners' case is a First Party Landlord Insurance dispute which was dismissed on summary judgment and affirmed on appeal. It is important because they are now deprived of their Seventh Amendment Right to a Jury Trial and their Fifth Amendment Right to Due Process by not being able to cross examine Respondent and its witnesses at jury trial. This case also concerns the proper functions of the federal courts in determining material, disputed facts when conducting summary judgment proceedings. Particularly, the judgment raises

important questions in applying the standards for summary judgment set by the Court in its great judgment *trilogy*[1] and its progeny under Federal Rule of Civil Procedure ("Rule") 56, and the preclusion and/or use of Hearsay Evidence as per Federal Rules of Evidence ("FRE") 403, 702, 801 and 802. The judgment also conflicts with the substantive rulings of the Court including but not limited to *Railway v. McCarthy,* 96 U.S. 258 (1878), as well as various Circuits and States courts. The Third Circuit erroneously relied upon inadmissible hearsay and precluded admissible, material evidence of Petitioners' Expert Witness Reports, by David Cole, Esquire. (**Exhibit "B"**), and James Wagner, L.P.A. (**Exhibit "C"**), which challenged Respondent's duties of good faith and fair dealing owed to them (as insureds) during the adjustment of their claims.

Amazingly, both Respondent and the district court conceded that the evidence which they relied upon was inadmissible Hearsay, and though Petitioners disputed these facts they should be deemed undisputed and admissible for summary judgment. They did so despite Petitioners' Motion in Limine to Preclude Trial Exhibits, Testimony and Argument based on Hearsay (**Exhibit "D"**), and detailed summary judgment objections (**Exhibit "E"**), without ever confirming that such evidence would be capable of being put into an admissible form at trial as per Rule 56(c)(1). In affirming, the Third Circuit dismissed Petitioners hearsay objections, and granted Respondent's submission of additional hearsay evidence into the

---

1 *Celotex Corp. v. Catrett,* 477 U.S. 317, 331 n.2 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-252 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 595 (1986).

Appellate Record, despite Petitioner's filing a Motion to Strike the same (**Exhibit "F"**). As a result, the judgment radically departed from traditional adjudication under Rule 56, and Federal Rule of Appellate Procedure 30.

There is a strong possibility that the Court—via its Supervisory Powers--will grant certiorari. If so, it is a near certainty that the judgment below will be reversed or vacated. A stay pending this Court's review is necessary to prevent Petitioners from suffering substantial, irreparable injuries in the form of inappropriate Rule 11 sanctions. It also serves public interest by preventing Respondent from repeating these threats against other members of the public. (**Exhibit "G"**). Such actions undoubtedly promote a litigation tactic to deter insured-consumers nationwide from invoking their constitutional rights when in the same or similar circumstances.

If the Court has any questions after reviewing this Application, Petitioners and I welcome the privilege to reply to any response raised by Respondent and to appear forthwith for Oral Argument.[2]

I. JURISDICTION

This Supreme Court's jurisdiction exists pursuant to 28 U.S.C. § 1254(1). It can also issue stays as per 28 U.S.C. §§ 1651(a) and 2101(f). *See* Sup. Ct. R. 10(a)(noting certiorari is likely if a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on

---

2 *See* Stephen M. Shapiro, et al., SUPREME COURT PRACTICE 911 (Second Printing Jan. 2017)(Bloomberg BNA ed., 10th Ed. 2013) (noting that oral argument has not been heard by any Justice of the Court since 1980).

the same important matter . . . or has so far 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"). When a lower court has issued a mandate, it can be recalled and a stay issued. *See, e.g., Florida v. Rigterink,* 129 S. Ct. 1667 (2009)(being granted by the Court upon Justice Thomas's referral); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,* 548 U.S. 936 (2005)(being granted upon referral of Justice Scalia).

II. PRIOR ATTEMPT TO OBTAIN A STAY

On June 14, 2018, Petitioners filed with the Third Circuit a Motion to Stay the Mandate pending Submission of their Petition for Writ of Certiorari to the Supreme Court. On June 28, the Third Circuit denied the Motion (**Exhibit "A"**) and as of July 2, 2018, the Mandate is of record with the Eastern District Court of Pennsylvania.

III. BACKGROUND

A. Relevant Factual Background being the Dispute between the Parties.

This matter arises from Petitioners' Second Amended Complaint alleging Respondent's Breach of an "All- Risk/All-Perils" Insurance Contract (being the "All-Perils", "AS-84 Landlords Package Policy"), and violation of Pennsylvania's Bad Faith and Unfair Trades Claims Practices Act and Consumer Protection Law ("UTCPCPL"). The dispute is not just about the written terms expressed in the

contract. A separate, major issue is whether Respondent mis-handled the Petitioners' Claim by failing to properly open the claim upon notification, and thereafter failing to investigate the claim in a timely manner so as to adjust the loss and to provide a defense arising out of the loss occurrence. Petitioners' contentions are based on a comparison to Respondent's own internal claims handling procedures and the customs and practices of the U.S. Insurance Industry which are required in Pennsylvania per: Bad Faith, 42 Pa.C.S. §8370 (2015); Unfair Insurance Practices Act ("UIPA"), 40 P.S. §1171 (2015), *et seq.*; and the UTCPCPL, 73 P.S. § 201 (2015), *et seq.*

B. Relevant Procedural Background

1. Before the Third Circuit Court of Appeals.

On April 13, 2017, Petitioners filed a timely Notice of Appeal. On June 13, Petitioners participated in the Third Circuit's Mediation Program—to no avail. On September 29, they filed their Opening Brief and a Joint Appendix. Then, on January, 16, 2018, Respondent filed its Response Brief and a Motion to Supplement the Appendix hearsay evidence with a copy of the Supplement.

On January 17, 2018, the Third Circuit partially granted the Motion allowing in documents that were already part of the lower court record. To the extent Respondent sought to expand the record, it was referred to the Merits Panel. Responsively, on January 23 Petitioners objected and filed a Motion to Strike all portions of Respondent's Supplemental Index and Brief containing or referencing those documents. On January 26, Petitioners also filed a Motion seeking Expedited

Relief to Stay the Briefing Schedule because of ambiguities created by the outstanding Motions making it difficult for Petitioners to file Reply Brief conforming to the Circuit's word counts.

On January 29, 2018, the court referred the Motion to Stay to the Merits Panel, which denied it, but granted Petitioners thirty days to file their Reply and indicating that the Panel will address all pending motions when reviewing the Briefs. On January 30, Respondent responded to the Motion to Strike, which Petitioners replied. As a result, on February 27, the court scheduled Oral Argument for April 20, 2018.

Petitioners filed their Reply on February 28, accompanied by an unopposed Amended Motion seeking leave to submit the Brief exceeding of the word count. On March 30, Petitioners filed a second Amended Motion advising the court that they reduced their Reply to within the word count and also submitted the corrected Brief. On April 6, the court canceled Oral Argument.

On May 25, 2018, the court issued its non-precedential opinion--making no reference to ruling on the outstanding motions--and raising questions as to whether the court considered them in rendering its decision. However, the court did summarily dismiss Petitioners hearsay objections raising the same questions. Petitioners considered filing a Petition for Re-Hearing and Hearing En Banc, however, they elected to appeal directly to this Court. On June 14, Petitioners filed a Motion seeking an Order to Stay the Mandate.

On June 28, 2018, the Third Circuit denied the Motion and issued Orders

granting Respondent's Motion to Supplement the Appellate Record with Hearsay Documents not in the lower court record and accepted Petitioners' Reply Briefs—raising the same questions for Petitioners as on May 25. The court also issued the Mandate.

2. Before the District Court.

Respondent, on September 16, 2015, removed Petitioner's Complaint from Pennsylvania's courts to the Federal District Court of Eastern Pennsylvania. On September 24, Respondent filed an Answer with Affirmative Defenses. On April 28, 2016 and May 18, Respondent filed a Motion for Rule 11 Sanctions and a Motion for Summary Judgment respectively. Petitioners, pro se, filed a Response to the Rule 11 Motion on May 13, which Respondent filed a Reply.

On May 18, 2016, Petitioners newly retained Attorney (being the undersigned) entered his Appearance and proceeded with Petitioners' subsequent filings. On June 14, they filed a Motion Seeking Leave to File a First Amended Complaint. On June 20, Petitioners filed a Response to the Summary Judgment Motion. On or around June 29, Petitioners filed a Sur-Reply to the Rule 11 Motion. Thereafter, on July 20, the court dismissed Respondent's motions. The court also granted Petitioners' motion. They filed the Amended Complaint and engaged in discovery.

On August 10, 2016, Respondent filed a Rule 12(b)(6) Motion to dismiss Count III of the Complaint. On September 1, Petitioners filed a Rule 38(b) Demand for a Jury Trial. On September 9, the court granted the Demand and Petitioners

filed their 12(b)(6) Response on September 16. The court also issued an Amended Scheduling Order extending Discovery to November 18, 2016, and setting deadlines for dispositive motions. The court did not include a deadline for filing Amended Pleadings.

On September 27, the court granted Respondent's 12(b)(6) Motion and dismissed the Complaint with leave to amend. On October 11, Petitioners filed a Second Amended Complaint. On November 1, Respondent filed its second Rule 12(b)(6) Motion to Dismiss Count III of the Complaint. Respondent deposed Petitioner, Mary Lou Doherty on November 15, and on November 16 Petitioners sought leave to file a Third Amended Complaint based on the latest evidence obtained in discovery.

Almost concurrently, Petitioners also served and filed Discovery subpoenas to depose witnesses. On November 22, Respondent filed Motions to Quash the subpoenas, and never produced the witnesses for deposition. On December 6, Petitioners responded the latest Rule 12(b)(6) Motion which Respondent replied. On December 7, Petitioners filed their Responses to the Motions to Quash, and a Reply supporting their Motion for leave to Amend. On January 11, 2017, Petitioners filed a Motion to Compel/Sanctions against Respondent for refusing to produce its witnesses for deposition.

On January 13, Respondent filed its' second Motion for Summary Judgment which Petitioners responded, raising specific objections in their Memorandum of Law, which Respondent filed a Reply. Also on January 13, Petitioners filed a Motion

in Limine/Daubert Motion to Exclude or Limit the testimony of Respondent's Bad Faith Expert Witness, Richard McMonigle, Esq., which Respondent responded, and Petitioners replied.

On March 3, Respondent filed a Motion in Limine to Preclude the Doherty's Expert Witnesses from testifying. Petitioners also filed four (4) Motions in Limine which included 1. Motion in limine to Preclude Trial Exhibits and Testimony and Argument based on Hearsay; 2. Motion in Limine to Exclude Expert Witness, Gary Popolizio, P.E.; and 3. Motion in Limine to Preclude Respondent from Arguing that the Policy is not an "All-Risks" Policy (**Exhibit "H"**).

On March 8, after Hearing, the court dismissed Respondent's Rule 12(b)(6) Motion and granted its Motions to Quash. Petitioners' Motions in Limine were denied, and their Motions for leave to Amend the Complaint and Discovery Sanctions were denied as withdrawn because of noted rulings.

On March 10, Respondent filed a Response the Motion in Limine/Daubert Motion. On March 15, the court heard Oral Argument on the Summary Judgment Motion. On March 30, while the court was ruling on the Motion, Respondent filed an Answer to Petitioners' Complaint.

Thereafter, on April 6, 2017, the court issued its Order and opinion dismissing all three Counts of the Complaint. However, the court never ruled on Petitioners' Daubert Motion, and separate Motion in Limine, to preclude Respondent's Expert Witnesses or on Respondent's Motion in Limine to Preclude Petitioners Expert Witnesses.

IV. INTRODUCTION

As noted, this Application is Petitioners' request to recall and stay the Third Circuit's Mandate. It is also a prelude to their Petition for Writ of Certiorari. Indeed, Petitioners' case will bring the Supreme Court's attention to the most important case affecting the Court's standards in using Hearsay and Expert Witness evidence during summary judgment. It will also bring the Court's attention to the most important case effecting the U.S. Insurance Claims Industry---and the insured-consumer---since its ruling one hundred forty (140) years ago in *Railway v. McCarthy,* 96 U.S. 258 (1878). In fact, as of 1873, the Court acknowledged that insurance contracts are agreements to pay money.[3] *New Orleans Insurance Co. v. Piaggio,* 83 U.S. (16 Wall.) 378, 386-87 (1873).

This is an incredible area of public interest being monitored by Congress. In 2010, Congress created the Federal Insurance Office (FIO) within the Department of Treasury pursuant to The Dodd-Frank Act of 2010, 31 U.S.C.A. §313 (2018). This Office monitors and reviews "all aspects of the insurance industry, including identifying issues or gaps in the regulation of insurers that could contribute to a systemic crisis in the insurance industry[.]" 31 U.S.C.A. §313(c)(1)(A). FIO also serves as an Advisor on all major domestic insurance policy issues on all lines of insurance including property and casualty insurance which is at the heart of the

3 Willy E. Rice, *Judicial Bias, the Insurance Industry and Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad Faith, Breach of Contract, Breach-of-Good-Faith and Excess-Judgement Decisions, 1900-1991,* 41 CATH. U. L. REV. 325, 332 (1992).

dispute between Petitioners and Respondent. 31 U.S.C.A.§313(c)(1)(G),(c)(2),(d). Congress authorized federal oversight while respecting the regulatory authority of the states by assuring that "[FIO] or the Department of the Treasury" does not have any "general supervisory or regulatory authority over the business of insurance" thereby preventing any preemption issues under The McCarran-Ferguson Act of 1945, 15 U.S.C.A. §1012(b) (2018). 31 U.S.C.A. §313(k).

The Application also brings the Supreme Court's attention to the most important case within the Third Circuit's jurisdiction in fifteen (15) years--*Haugh v. Allstate Ins. Co.,* 322 F.3d 227, 233-34 (2003)--which adopted the Pennsylvania Supreme Court's decision in *Birth Center v. St. Paul Companies, Inc.,* 787 A.2d 376 (2001). In *Haugh,* the Third Circuit reaffirmed its predictions that bad faith under Pennsylvania's statute, 42 Pa. C.S.A. §8371, sounds separately in tort and not just in contract which it first found in *Polselli v. Nationwide Mut. Fire Ins. Co.,* 23 F.3d 747, 750 (3d Cir. 1986). In Petitioners' case, the court misapprehended both fact and law, and chose not to adopt Pennsylvania's latest decision setting the formal standard on Bad Faith in *Rancosky v. Washington Mutual Ins. Co.,* 130 A.3d 79 (2015), *aff'd, Rancosky,* 170 A.3d 364 (Pa. 2017). It also did so by misapplying this Court's decision in *Railway v. McCarthy, supra.*

The Supreme Court's review of Petitioners' case is significant because the final decision is binding on Petitioners as well as becoming persuasive on the nationwide class of persons identified as "insured-landlords" which is in excess of

twenty-three million (23,068,530) people.[4] Undoubtedly, Respondent as the second largest property/casualty insurer in the nation (having 5.13% of the market and writing direct premiums of $30.18 billion dollars in 2015) serves a percentage of this landlord class nationwide.[5] As of 2017, the U.S. Insurance Industry has over 2,655 Property and Casualty Insurers.[6] Indeed, Petitioners case raises critical questions and should be addressed by the Court.

FIO also raised concerns that insurers like Respondent have been deviating from standardized Homeowner (including Landlord) Insurance coverage "Form" policies, *e.g.,* the homeowners special policy form 3, or "HO-3" policies and are now using Non-Standardized Policies simultaneously with standardized policies, thereby limiting or extending coverage when compared to standardized forms. An empirical study of homeowner's policies found that 5 of 16 analyzed insurers used policies that were "substantially less generous than the HO-3 policy."[7] In other words, some insurers are using non-standardized forms to reduce consumer protection. The lack of transparency by insurers (such as Respondent) regarding policy changes becomes

---

4 *Rental Protection Agency, available at* https://www.rentalprotectionagency.com/rental-statistics.php (June 7, 2018).

5 Caitlyn Bronson, *These are the Top 25 Property/Casualty Insurance Companies in the US, available at* https://www.insurancebusinessmag.com/us/news/breaking-news/these-are-the-top-25-propertycasualty-insurance- companies-in-the-us-32630.aspx (May 21, 2016).

6 Federal Insurance Office, *Asset Management and Insurance Report* 73 (Oct. 2017), *available at* https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf?85 (Jul. 4, 2018) (citing SNL Financial; AM Best's Aggregates and Averages (2016), *available at*: http://www3.ambest.com/aggavg/toc/archive.aspx).

7 Federal Insurance Office, *Report on Protection of Insurance Consumers and Access to Insurance* 21 (Nov. 2016), *available at* https://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/2016_FIO_Consumer_Report.pdf (Jul. 4, 2018) (citing Daniel Schwarcz, *Reevaluating Standardized Insurance Policies,* 78 U. CHI. L. REV. 1263, 1272-73 (2011), *available at* http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?Article=5550&context=uclrev).

more problematic because it interferes with the consumers ability to understand their existing coverages.[8]

FIO also found that insurers such as Respondent, generally, are not making their policy forms available to consumers until after the purchase of the policy, thus preventing the consumer from discovering the actual terms of the policy. Without meaningful transparency, consumers cannot compare policies and coverage terms. Without understanding these differences among competing insurers, consumers cannot evaluate coverage options or pricing in an informed manner. This problem is aggravated further because State insurance regulators and State consumer protection agencies do not distribute examples of policy forms to consumers and cannot teach them about the existence of the coverage limitations in non-standardized policies because they are unique to each insurer.[9]

This change in policy format also raises serious concerns because "[s]tandardization of homeowners insurance policy forms traditionally has been a significant part of the homeowners insurance business because, among other reasons, it provides clarity of policy language by relying on established interpretations of coverage."[10] Additionally, the standardization allows consumers to compare policies based on price and reputation of the insurer, knowing that different policies provide consistent coverage.[11]

---

8 *Id.*, at 21.
9 *Id.*, at 22.
10 *Id.*, at 21.
11 *Id.*

These institutional concerns of Congress and FIO are exactly what are in dispute in Petitioners' case. Clearly, insurers should provide consumers with access to insurance policy forms before purchase, either providing a copy as part of an insurance quote, by posting prototype policies on a website, or by other means. Policies should be in a clear format that allows consumers to easily understand the limits, terms, conditions and exclusions. This will give an interested insured the chance to compare and shop for coverage.[12] FIO has made these institutional concerns and recommendations to the National Association of Insurance Commissioners ("NAIC"). As part of its 2016 Mandate, NAIC proposed to State Insurance Commissioners (and Insurers) that "Insurer Transparency" is the solution and they should "[s]ystematize and improve presale disclosures of coverage[.]"[13] These concerns and recommendations are exactly what the parties are disputing in Petitioners' case.

Insurer-insured relationships such as Respondent and Petitioners are built upon contractual consumer rights coupling the Court's and the Legislature's goals of protecting consumers. These goals can be affected by Petitioners' Petition for Writ of Certiorari. It will present notice of the substantial risks of the adverse effects on insured-consumers nationwide. Given the importance of the issues at stake, the decisions of the lower courts in Petitioners' case are worthy of review, requiring a recall of the mandate and a stay in the judgment.

---

12 *Id.*, at 21-23.

13 *Id.*, at 22-23 (citing NAIC, *Transparency and Reliability of Consumer Information (C) Working Group: 2016 Charges, available at* http://naic.org/cnte_c_trans_read_wg.htm).

More specific reasons follow.

V. REASONS FOR RECALLING THE MANDATE AND GRANTING THE STAY

A. Standard for the Mandate being Recalled and Stayed.

In *Hollingworth v. Perry,* 130 S.Ct. 705 (2010), the Court confirmed that at a stay can be obtained pending the filing and disposition of a petition for a writ of certiorari. *Id.* at 709-10. The applicant must show: 1. a likelihood that an Applicant will suffer irreparable harm from the denial; 2. a reasonable probability that four Justices will consider the issue meritorious; and 3. that a majority of the Court will vote to reverse the judgment below. *Id.* at 710.

In close cases the Court will balance the equities and weigh the relative harms between the applicant and respondent. *Id.* at 710; *Lucas v. Townsend,* 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Rostker v. Goldberg,* 448 U.S. 1306, 1308 (Brennan, J., in chambers). The applicant must also show that all other remedies have been exhausted. *Cheney v. United States Dist. Court for D.C.,* 542 U.S. 367, 380–381(2004). If established, this Court will issue the writ directly to a district court "where a question of public importance is involved, or where . . . it is peculiarly appropriate[.]" *Ex parte United States,* 287 U.S. 241, 248–249 (1932).

These standards are satisfied in Petitioners' case.

B. Argument.

1. Petitioners will suffer irreparable harm from the denial of a stay.

Petitioners will suffer irreparable injury without the judgment being stayed. Respondent repeatedly threatened them with Rule 11 Sanctions for invoking their rights to pursue their claims—namely, up to this Court. In *Philip Morris v. Scott,* 131 S. Ct. 1 (2010)(Scalia, J.), the Court granted the stay reasoning that: "Normally the mere payment of money is not considered irreparable . . . If expenditures cannot be recouped, the resulting loss may be irreparable. *See, e.g., Mori v. Boilermakers,* 454 U.S. 1301, 1303 (1981) [ ] (Rehnquist, J. in chambers)." Further, damages are no substitute for the loss of intangible value when deciding if the denial of a stay would result in irreparable injuries. *Reynolds v. International Amateur Athletic Fed'n,* 505 U.S. 1301, 1302 (1992) (Steven, J.).

Rule 11 Sanctions are a judicial reprimand and punishment. If imposed, the sanctions could be whatever the court decides is appropriate including monetary and non-monetary directives, including fines, attorney's fees and expenses. *See Martin v. Brown*, 63 F.3d 1282, 1264 (3d Cir. 1995); *see also* Rule 11(c)(4); s*ee gen.,* Fed. R. Civ. P. 11 Advisory Committee Notes (1983 Amendments). Furthermore, "Rule 11 is intended for only exceptional circumstances." *Gaiardo v. Ethyl Corp.,* 835 F.2d 479, 483-84 (3d Cir. 1987). It does not serve as a weapon to deter people from seeking appellate review when they have good faith beliefs that the claims are meritorious.

In Petitioners' case, Respondent repeatedly raised this threat to scare them from presenting their claims despite them having claims which are supported by

existing laws. If Respondents are allowed to proceed, it will deter Petitioners ability—as well as the public's ability--to present claims in court and to this Court. As a result, the Court will not be able to review claims before the next threat of possible punishment--"no matter how arbitrary or erroneous it may be[.]" *Reynolds,* 505 U.S. at 1302 (1992) (Stevens, J.).

Comparatively, Respondent would suffer no harm or injury.

2. It is likely Four Justices will consider the issue meritorious enough to grant certiorari.

There is a reasonable probability that four Justices of this Court will grant certiorari. *See Maryland v. King, Jr.,* 133 S. Ct. 1, 2 (2012) (J. Roberts, Jr.). There are at least six reasons making it ripe for review.

First, it is beyond cavil that questions concerning the Seventh Amendment right to a jury trial in civil matters is substantial and reviewable by this Court. *See Curtis v. Loether,* 415 U.S. 189, 194 (1974); *Simler v. Connor,* 372 U.S. 221, 222 (1963); *Chauffeurs, Teamsters, and Helpers Local No. 391 v. Terry*, 110 S. Ct. 1339 (1990).

It is also well established that summary judgment does not violate the Seventh Amendment---when summary judgment is properly applied. However, "[i]f summary judgment [is] granted erroneously in the face of a genuine dispute over material facts, . . . the jury's province [that] was established under common law would be invaded."[14] In essence, "[t]he key to constitutionality of the summary judgment procedure in practice is its limitation to cases in which 'there is no

14 Jeffrey W. Stempel, et al., 11 MOORE'S FEDERAL PRACTICE §56.06, Summary Judgment 56-39 (3d ed. 2018).

genuine dispute as to any material fact'" as per Rule 56(a). *Id. See Fidelity & Deposit Co. v. United States,* 187 U.S. 315, 319-20 (1902) (assessing affidavits in determining a genuine factual dispute in contract cases).

The Court declared the evidentiary standard for summary judgment in *Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242, 254-55 (1986):

> [I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of the determination. The question here is whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Id.[15]

Undoubtedly, these standards require conformity with the FRE. Particularly, the Rules on Hearsay Evidence, 801, *et seq.* Hence, "a party may not nakedly assert that a fact is or is not genuinely disputed" during summary judgment.[16] Comparably, summary judgment proceedings serve as screening function similar to grand-jury proceedings or preliminary hearings in criminal matters where hearsay

---

15 *Id.,* at § 56.22[2][b], Summary Judgment 56-67.
16 *Id.,* at §56.194, Summary Judgment 56-90.

is admissible.[17] However, they differ in their functions, timing and mode of presenting evidence, and in their finality.[18]

Although certain hearsay is "inadmissible" on a summary judgment motion, it still reaches the court when it is submitted by way of exhibits and incorporation into the briefed arguments of the submitting party. Hence, "there is no way to keep the hearsay from reaching the judge who is deciding the motion without bringing in another judge to rule on its admissibility[. It] is more accurate to say that the hearsay cannot be considered by the judge . . . or that it should be disregarded . . . or that it is entitled to no weight[.]"[19]

Ultimately, this allows the judge to anticipate what the evidence will look like if sent to trial. However, summary judgment proceedings are imperfect in this because it is impossible to determine during summary judgment whether hearsay will or will not be admissible at trial.[20]

To be considered, the content or substance of any evidence being submitted during summary judgment must be admissible at trial. Rule 56(c)(1). *See Fraternal Order of Police, Lodge I v. City of Camden,* 842 F.5d 251, 258 (3d Cir. 2016)(limiting the court's inquiry to determining if hearsay was capable of being put into admissible form at trial); *Lexington Ins. Co. v. Western Pa. Hosp.,* 425 F.3d 518, 320 n.6 (3d Cir. 2005)(allowing reliance on unauthenticated documents, so long as they

---

17 Wright & Graham, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE, Hearsay § 6334 (1997).
18 *Id.,* at § 6334 fn. 33.
19 *Id.*
20 *Id.*

are reducible to admissible evidence). In Petitioners' case, the lower courts never made this determination.

Furthermore, a court taking a case away from the jury at summary judgment always does so with less information than doing so at trial or after a verdict. At or after trial, a court ruling on a Rule 50 motion has not only seen the information during summary judgment, but has also had the opportunity to observe and hear the parties and witnesses (on direct and cross examinations), and has had documents presented again, and either authenticated or objected and challenged, and can have determined whether affiants and deponents maintained their stories at trial.[21] Consequently, at trial the court taking a case from the jury has more data to base its decision as compared to doing so at summary judgment. For these reasons, the courts in Petitioners' case were erroneous in relying upon the Hearsay evidence at issue—in any way--and even more so for disagreeing with their Expert Witness Reports at summary judgment. In this regard, Petitioners constitutional rights have been intruded upon.[22]

Second, based on all reasons raised herein, Petitioners will present a question of first impression querying whether the lower court proceedings below also violated the Due Process Clause[23] of the Fifth Amendment because they radically departed from established, traditional methods of adjudication. These issues are important because they are regularly recurring throughout the federal courts nationwide. The

---

21 11 MOORE'S FEDERAL PRACTICE, *supra* note 14, § 56.51[2], Summary Judgment 56-123.
22 *Id.*

23 *See* Shapiro, *supra* note 2, at 1283, 1286.

Due Process Clause protects civil litigants who seek recourse in the courts, to protect their property or redress grievances. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429-430 (1982).

One of the assurances of the Fifth Amendment is that: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. Const., amend V. In *Societe Internationale v. Rogers,* 357 U.S. 197 (1958), a plaintiff's claim was dismissed for failure to comply with a trial court's order. The Court held that the "property" component of the Fifth Amendment's Due Process Clause imposes "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.,* at 209. *See Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 349-351 (1909) (addressing default judgments); *Hovey v. Elliott,* 167 U.S. 409, 414-15 (1897)(same); *Windsor v. McVeigh,* 93 U.S. 274, 277-78 (1876)(same).

Comparatively, the Court has reviewed the Fourteenth Amendment's Due Process Clause for similar reasons. *See, e.g., Honda Motor Co. v. Oberg,* 512 U.S. 415, 430 (1994)(finding it presumptively violative of Due Process when a court departs from traditional adjudicatory methods). This inalienable right guarantees that a person shall be provided "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of rights." *Pennyoer v. Neff,* 95 U.S. 714, 732 (1877); *Murray's Lessee v. Hoboken Land & Imp. Co.,* 59 U.S. 272, 277 (1855);

Oberg, 512 U.S. At 430.[24]

Indeed, the circumstances of misapplying the rules of procedure and law explained herein raise both questions of substantive and procedural due process violations. It is axiomatic that due process requires that the right to a jury not be intruded upon when disputed facts exist between the parties. Such a right includes an opportunity to "confront and cross examin[e] witnesses to assure that hearsay evidence is properly objected to and challenged at trial." *See gen., e.g., Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991)(Scalia, J., concurring); *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970).[25]

Third, Petitioners will also present questions that were of first impression to the Third Circuit and create a circuit split in the use of the "Mend-the-Hold" Doctrine which has a Majority Rule and a Minority Rule. Quite frankly, the Circuit's ruling in Petitioners' case conflicts with all decisions of the Supreme Court and the circuits which have applied the Doctrine---the 2nd, 4th, 6th, 7th, 8th, and the 9th Circuits—thereby creating a divergent, Third Rule. *See, e.g., Hanna v. Plumer,* 380 U.S. 460, 468 (1965); *Railway v. McCarthy,* 96 U.S. 258, 267-68 (1878); *Davis v. Wakelee,* 156 U.S. 680, 690-91 (1875); *Corporacion De Mercadeo Agricola v. Mellon Bank Inter.,* 608 F.2d 43, 48-49 (2d Cir. 1979); *Domino Sugar Corp. v. Sugar Workers Local Union 392,* 10 F.3d 1064, 1068 (4th Cir. 1993); *Measday v. Kwik-Kopy Corp.,* 713 F.2d 118, 125-26 (5th Cir. 1983); *Life Care Centers of America, Inc. v. Charles Town Assoc., Ltd.,* 79 F.3d 496, 508-09 (6th Cir. 1995); *Harbor Ins. Co. v.*

---

24 *Id.*
25 *Id.*

Continental Bank Corp., 922 F.2d 357 362, 364 (7th Cir. 1990); *Horwitz v. Matthews, Inc., City of Chicago,* 78 F.3d1248, 1251-52 (7th Cir. 1996); *Continental Nat. Bank v. National City Bank of New York,* 69 F.2d 312, 318-19 (9th Cir. 1934). This split of authority is ripe for certiorari review.

In Petitioners' case, the Third Circuit incorrectly concluded:

> the [Petitioners] contend the District Court was compelled to apply the so-called "mend and hold" doctrine, because . . . 'the record shows that [Respondent] has impermissibly attempted to change the basis for its denial of [Petitioners] claims.' . . To the contrary, [Respondent] has consistently maintained throughout this litigation that the Policy is not an "all-risk" policy, and that the damage that occurred was not "sudden and accidental[.]"

Exhibit "A", Slip. op. p. 7, fn.1.

Indeed, a stay of the judgment should be granted because Petitioners will present the critical threshold issue of whether a court during summary judgment may allow an insurer (relying on inadmissible hearsay) to allege alternate defenses during litigation which were not the basis of its pre-litigation denial and which it never notified the insured of prior to the Complaint being filed.

As per *Railway v. McCarthy,* Respondent is limited to that single defense at trial. *Id.* at 267-68; *see also, e.g., Erickson v Carhart,* 1996 Neb App LEXIS 234, *10-11 (finding: "[A]n insurer that gives one reason for its conduct and decision as to a matter of controversy cannot, after litigation has begun, defend upon another and different ground."); *Hamlin v Mutual Life Insurance Co,* 145 Vt. 264, 267, 487 A2d 159, 161 (1984) (referring to the "insurance defense waiver rule"). As Summary Judgment is part of the overall litigation, per *Railway v. McCarthy,* Respondent

must be limited to that single defense at summary judgment.

The majority rule on the "Mend the Hold" doctrine limits a party's defenses for breaking a contract to the pre-litigation explanation for nonperformance given to the other party. *Hanna v. Plumer,* 380 U.S. 460, 468 (1965).[26] It renders the given explanation exclusive.[27] Although the doctrine only applies to breach of contract disputes, by way of Judicial Estoppel the Court extends the "mend the hold" doctrine to other claims for relief during the litigation to bar a party from asserting inconsistent positions that it prevailed with before the litigation. *Davis v. Wakelee,* 156 U.S. 680, 690-691 (1895)(quoting *Railway v. McCarthy,* 96 U.S. 258, 267-68 (1878)).[28] Judicial Estoppel protects the integrity of the courts by preventing perjury so no two courts rule in a party's favor on conflicting theories thereby making one court out to be wrong.[29]

Just as the Supreme Court found in *Railway v. McCarthy, supra,* Respondent's arguments confirmed by the lower courts:

> [were] an after-thought suggested by the pressure and exigencies of the case. Where a party gives reason for [its] conduct and decision touching anything involved in a controversy, [it] cannot, after the litigation has begun, change [its] ground, and put [its] conduct upon another and a different consideration. [It] is not permitted . . . thus to amend [its] hold. [It shall be] estopped from doing it by a settled principle of law.

---

26 Robert H. Sitkoff, *"Mend the Hold" and Erie: Why an Obscure Contracts Doctrine Should Control in Federal Court Diversity Cases,* 65 U. Chi. L. Rev. at 1062 (1998)(citing *Hanna v. Plumer, supra.*), *http://nrs.harvard.edu/urn-3:HUL.Intrepos:15038461.*

27 *Id.,* at 1062-1063.

28 *Id.,* at 1063.

29 *Id.*

Id. at 267-268 (citations omitted).

In Pennsylvania, an insurer cannot avoid its obligations to the insured based on the notice provisions of a policy unless: 1. the provision was breached and 2. the insurer was prejudiced as a result. *Brakeman v. The Potomac Ins. Co.,* 472 Pa. 66, 76-77, 371 A.2d 193 (1977)(noting the function of the notice requirement protects the insurer's interests from being prejudiced). *Id.* at 75. If an insurer's interests are not harmed—even after extenuating circumstances—it will not be relieved of its obligations to the insured. *Id.* The burden of proving prejudice is on the insurer. *Id.* at 77. In Petitioners' case, Respondent failed the test.

The Circuit adopted the rule of law in *Brakeman* in *Brooks v. American Centennial Ins. Co.,* 327 F.3d 260, 265-67 (2003)(reversing a summary judgment decision based on an insurer's failure to meet its burdens to prove lack of notice). Hence, the Circuit's failure to apply *Brakeman*, via *Brooks*, and its application of *Railway v. McCarthy's* "Mend the Hold" argument conflicts because it resulted in a decision was erroneous and prejudicial to Petitioners, being the non-movants under Rule 56. Particularly, the district court's decision "to analyze Doherty's [*sic.*] breach of contract claim as if [Respondent] formally denied the insurance claim" was erroneous.[30]

This decision, at the summary judgment stage, negates the Expert Witness Opinions of Mrrs. Cole and Wagner which are clearly inapposite. The error continued as it allowed Respondent to raise alternative arguments, *e.g.,* all hearsay

30 *Doherty, et al. v. Allstate Indemnity Co.,* 2017 WL 1283942 *13 fn.28 (E.D. Pa. Apr. 6, 2017).

arguments raised during the litigation. Since Respondent (before litigation was commenced) raised only ineffective notice as its reason for nonperformance and breach of contract, it cannot after suit was filed "mend its hold" and rely on other defenses.[31] *Davis,* 156 U.S. at 690-691; *McCarthy,* 96 U.S. at 267-68; *Brooks,* 327 F.3d at 265-67; *Brakeman,* 472 Pa. at 76-77.

Fourth, Petitioners will also ask the Court to consider whether their submission of Expert Witness Reports during summary judgment resulted in decisions becoming a divergent opinion in the Third Circuit as well as conflicting with the Supreme Court's Decisions in *Daubert v. Merrell Dow Pharm. Inc.,* 509 U.S. 579, 592 (1993), and *Kumho Tire Co. v. Carmichael,* 526 U.S. 136, 147 (1997). *See In re Paoli R.R. Yard PCB Ltig.,* 35 F.3d 717, 742 (3d Cir. 1994); *In re Paoli R.R. Yard PCB Ltig.,* 916 F.2d 829, 846 (3d Cir. 1990); *Klinger v. State Farm,* 115 F.3d 230, 234 fn.2 (3d 1997); *Wolfe v. Allstate Prop. & Cas. Ins. Co.,* 790 F.3d 487, 496-97 (3d Cir. 2015); *Haugh v. Allstate Ins. Co.,* 322 F.3d 227, 233-34 (2003); *Polselli v. Nationwide Mut. Fire Ins. Co.,* 23 F.3d 747, 750 (3d Cir. 1986); *Rancosky v. Washington Mutual Ins. Co.,* 130 A.3d 79 (2015), *aff'd, Rancosky,* 170 A.3d 364 (Pa. 2017); *Birth Center v. St. Paul Companies, Inc.,* 787 A.2d 376 (2001).

As per FRE 403, the court may not preclude evidence where the probative value is not substantially outweighed by the danger of undue prejudice. *See Old Chief v. U.S.,* 519 U.S. 172, 180-92 (1997); *Coleman v. Home Depot, Inc.,* 306 F.3d 1333, 1343 (3d Cir. 2002). The standard for Expert Testimony is in FRE 702(a). A

---

31 Sitkoff, *supra* note 29, at 1059 fn5-6.

court must determine "whether the expert is proposing to testify to (1) [specialized] knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 592 (1993). These gatekeeping requirements apply to all expert testimony. *See Kumho Tire Co. v. Carmichael,* 526 U.S. 136, 147 (1997).

The decisions of the lower courts in Petitioners' case clearly conflict with rules and laws of this Court, and those within the Circuit. This conflict is most obvious in the declarations of the district court claiming that the opinions of their Experts, *i.e.,* Mr. Wagner and Mr. Cole needed "to alter the court's conclusion as to the insufficiency of the evidence presented[.]"[32] These Reports are unrefuted evidence submitted by Petitioner in support of all Counts in the Complaint and premised upon Pennsylvania's Insurance Regulations. All evidence relied upon by the Experts was admissible for trial and authenticated by Petitioners and by Respondent's witnesses. Hence, the lower courts cannot ignore uncontradicted expert witness evidence during summary judgment whether they agreed with it or not. *In re Paoli R. Yard PCB Litigation*, 916 F.2d 829,846 (3d Cir.1990).

In further support, the Circuit adopted Pennsylvania law allowing an insured to "point to 'bad faith' conduct as defined in [UIPA]" in support of a §8371 action. *Romano v. Nationwide Mut. Fire Ins. Co.*, 646 A.2d 1228,1232 (Pa. Super. 1994). For trial (and summary judgment) purposes, a court must decide if "the expert is proposing to testify [to specialized knowledge that] will assist the [fact-finder] to

---

32 *Doherty, et al. v. Allstate Indemnity Co.,* 2017 WL 1283942 at *43.

understand or determine a fact in issue." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579,592 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 136,147 (1997). In doing so, the courts must apply a reliability analysis. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717,742 (3d Cir. 1994)(citing *Daubert*, 509 U.S. at 590). The expert must have "good grounds." *Id.* at 741-42. If met, the court must not weigh the evidence relied upon by the expert or decide if it agrees with the conclusions. *Daubert,* 509 U.S. at 591-93.

As to bad faith claims, Expert Testimony is admissible but limited. *See Klinger v. State Farm Mut. Auto. Ins. Co.,* 115 F.3d 230,234 fn2 (3d Cir.1997)(testifying that insurer acted recklessly and unreasonably). In summary, Petitioners' Experts expressed concerns that: Respondent failed to properly investigate, adjust or deny Petitioners' claim; Respondent's actions were unreasonable and reckless enough to be considered for bad faith when compared to UIPA and UTCPCPL; and Respondent engaged in deceptive conduct to be considered in violation of UTCPCPL.

Mr. Cole's Reports also raised concerns of first impression for the Circuit and this Supreme Court about "institutional bad faith" existing with the U.S. Insurance Industry and the coming decision in *Rancosky, supra.*[33] It exists when an insurer's corporate structure and policies promote systemically unfair claims handling, *i.e.*, based on a lack of transparency. These claims hinge on the insured's ability to

33 Pennsylvania's Supreme Court issued its decision in *Rancosky* on September 28, 2017, and adopted much of the lower appellate court's opinion.

discover information evidencing these unfair and general business practices.[34]

Other jurisdictions found that institutional bad faith can be inferred from the record when a series of discrete acts or omissions bare indicative traits of habit, custom, usage, or business policy regarding the handling of a claim that shows frequent disregard of the applicable statute. *Dudrill v. Nationwide Mut. Fire Ins. Co.,* 491 S.E.2d 1,12-13 (W.Va.1997). Petitioners' Experts considered the context of the case, and Petitioners efforts to communicate with Respondent as well as its responses. However, the courts in Petitioners' case still disagreed with their Experts for summary judgment purposes and dismissed the case. In doing so, they excluded the year's period of time and Respondent's good faith obligations (which are the basis of Petitioner's case) to incorrectly conclude that Respondent's pre-complaint failure to accept, investigate, and deny the claim was reasonable despite having competent, uncontradicted evidence in hand. *In re Paoli R. Yard PCB Litigation*, 916 F.2d at 846.

Fifth, the Third Circuit's first impression ruling that the parties' Insurance Contract is not an "All-Risks" Policy conflicts with decisions of other Circuits and States. For this reason, Petitioners will ask for this decision to be reviewed. As Respondent sells this unique, non-standardized form contract nationwide, it effects the rights of all potential landlord insurance-consumers who may purchase the policy from Respondent. FIO raised these same concerns (as discussed in **§IV**), and Petitioners' appeal arises from the same.

---

34 Christopher Martin, *"Master Class: Bad Faith"* 34(ACCEC 2017); Jason Mazer, *"Institutional Bad Faith"* 1, 4 (ABA 2011).

Petitioners' Policy is indeed unique. It has an "All-Risks" Section covering the Dwelling and a "Named Perils" Section covering Personal Property. On March 3, 2017, Petitioners advised the lower courts of this when they filed a Motion in Limine and pointed out that other jurisdictions found the Policy is an "All-Risks" policy (which Respondent was already of) (**Exhibit "H"**). *See Union Savings Bank v. Allstate Indemnity Co.,* 830 F.Supp.2d 623, 630 (S.D. Ind., 2011)(acknowledging that 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 the insured's Declaratory Judgment action). Respondent did not appeal the findings.

In Pennsylvania, the Insurance Department identifies the Named Perils Policy as a "Broad Form 2" policy and "All-Risks" policies as a "Special Form 3" policy "[covering] **risk of direct loss** to physical property except with certain specified exclusions." Offering more comprehensive protection than Form 3 is "Form 5" (called "Open Perils") which "[c]overs **damage** to physical property and contents, except with certain specified exclusions[.]"[35]

In Petitioners' case, the text of the Policy reveals it is a hybrid policy (affording coverage under both all-risk language and named-perils)--which Pennsylvania's Insurance Department advises it to be a more comprehensive and protective policy for the insured-consumer ("Form 5"). *See Fabozzi v. Lexington Ins.*

---

35 PA Ins. Dept., *Insurance Facts for PA Consumers, Your Guide to Homeowners Ins., available at* http://www.insurance.pa.gov/Coverage/Documents/ homeowners.pdf, at 2 (Feb. 21, 2018); PA Ins. Dept., *Homeowners Insurance Guide,* at 4, 14 (Feb. 21, 2018), *available at* http://www.insurance.pa.gov/Coverage/Documents/Homeowners%20Insurance%20Guide.pdf.

Co., 639 Fed.Appx. 758, 761 fn.1 (2d Cir. 2016); *North American Foreign Trading Corp. v. Mitsui Sumitomo,* 413 F.Supp.2d 295, 300-301 (S.D.N.Y. 2006)(indicating a policy may provide both all-risks and named-perils coverage, depending on the policy's terms); *Costabile v. Metro. Prop. & Cas. Ins. Co.,* 193 F.Supp.2d 465, 474 (D.Conn. 2002) ("provid[ing] both all-risk and named perils type coverage, depending on the . . . coverage at issue."); *see also Battishill v. Farmers Alliance Ins. Co.,*139 N.M. 24, 127 P.3d 1111, 1115 (2006), finding "separate sections of the policy do not conflict . . . because the all-risk dwelling coverage and the named-perils coverage are separate and distinct coverages, each providing separate coverage for different risks to different property under different terms").

Sixth, as a question of first impression, Petitioners shall ask the Court whether the Third Circuit's application of the "Sham Affidavit" Doctrine[36] violates Rule 15(a), when the sufficiency of evidence presented on summary judgment under Rule 56 is tested in a light most favorable to the non-movant. Legal commentators proffer the Doctrine is derived from the Court's Decision in *Anderson v. Liberty Lobby. Inc.,* 477 U.S. at 251 (quoting *Sartor v. Ark. Gas Corp.*, 321 U.S. 620, 624 (1944)).[37] In *Anderson*, the Supreme Court noted:

> [T]he genuine issue summary judgment standard is very close to the reasonable jury directed verdict standard: ["]The primary difference between the two motions is

---

36 *Jiminez v. All Am. Rathskeller, Inc.,* 503 F.3d 247, 251 (3d Cir. 2007) (identifying the "Flexible Approach" to the "Sham Affidavit" Doctrine as a principle of summary judgment) (citing *Perma Research & Dev. Co. v. Singer Co.*).

37 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).

> procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted."]

Id. at 251 (quoting *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 745 n.11 (1983)).[38]

In essence, the summary judgment test is: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

The circuits vary in applying the Doctrine because no Federal Rule addresses offsetting affidavits and as such, there is no prohibition for their use.[39] Since creation of the Doctrine almost 50 years ago by the Second Circuit, in *Perma Research & Development Co. v. Singer Co.,* 410 F.2d 572 (2d Cir. 1969), every Federal Circuit considering the issue used it in some form.[40] A court can disregard an affidavit that offsets the affiant's prior deposition testimony where the contradiction is unexplained and unqualified by the affiant. *Id.* at 578. It requires the court to "engage in two separate inquiries, first [to] determin[e] if a contradiction exists and then [to] determin[e] whether the contradiction is justified."[41]

However, affidavits cannot be disregarded by the courts merely because they

---

38 Mitchell, *supra,* at 261.
39 *Id.*, at 257; Collin J. Cox, Note, *Reconsidering the Sham Affidavit Doctrine,* 50 DUKE L.J. 261, 266-67 (2000).
40 Mitchell, *supra* note 37, at 259; Cox, *supra*, at 269.
41 Mitchell, *supra* note 37, at 259; Cox, *supra* note 39, at 269.

are inconsistent with prior testimony.[42] In federal courts, two exceptions exist.[43] First, the Fifth Circuit, in *Kennett-Murray Corp. v. Bone,* 622 F.2d 887, 894 (5th Cir. 1980), held that a party is allowed to submit an offsetting affidavit during summary judgment if he or she can demonstrate any confusion caused by the questions asked the deposition.[44] Second, the Seventh Circuit, in *Adelman-Tremblay v. Jewel Cos.,* 859 F.2d 517 (7th Cir. 1988), held that "[a] contradictory supplemental affidavit is also permissible if it is based on newly discovered evidence." *Id.* at 520. This "newly-discovered evidence" exception is now a generally accepted justification for contradictions between a deposition and a subsequent affidavit.[45]

In Petitioners' case, they filed their Second Amended Complaint on September 16, 2016. Respondent deposed Petitioner, Mary Lou Doherty, on November 15, and on November 16 Petitioners filed their proposed third Amended Complaint serving to clarify all three Counts and to raise new facts and claims against all responsible parties based on new discovery. On January 13, 2017, Respondent filed its second summary judgment motion. On January 19, Petitioners attached verifications to their pleadings. Respondent did not object. On April 6, the court issued its opinion and declared that the verifications converted the pleadings into sham affidavits.

This Supreme Court has never considered the use of the "Sham Affidavit"

---

42 *See, e.g., Adelman-Tremblay v. Jewel Cos.*, 859 F.2d 517, 520 (7th Cir. 1988); Mitchell, *supra* note 37, at 259.

43 Judge Randy Wilson, *The Sham Affidavit Doctrine in Texas*, 66 TEX. B. J. 962, 964 (Dec. 2003).

44 *Id.*, at 964, 968 n. 11; Mitchell, *supra* note 37, at 259-60.

45 Cox, *supra* note 39, at 288-89.

Doctrine during summary judgment. However, in *Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014), the Court held that its Rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted . . . [P]etitioners, . . . should be accorded an opportunity to add to their complaint[.]" *Id.* (reversing summary judgment based on liberal amendment policies of Rule 15(a)(2)); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962)(finding: "leave shall be freely given when justice so requires."). *Id.* "[T]his mandate is to be heeded." *Id.* at 230. Although a court has discretion to grant an amendment, "outright refusal to grant the leave without any justifying reason . . . is not an exercise of discretion." *Id.*

The Circuit also found the same. *Shane v. Fauver*, 213 F.3d 113, 115-17 (3d Cir. 2000); *Berkshire Fashions, Inc. v. The M.V. Hakusan II*, 954 F.2d 874, 887 (3d Cir. 1992). Among the grounds justifying a denial are "undue delay, bad faith, dilatory motive, prejudice, and futility." *In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997)(citations omitted); *see also Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413 (3d Cir. 1993). "[P]rejudice to the [non-movant] is the touchstone for denial[.]." *Lorenz*, 1 F.3d at 1414.

The Circuit applies a "flexible approach" to the "Sham Affidavit" Doctrine. *See Daubert v. NRA Group, LLC*, 861 F.3d 382, 391 (3d Cir. 2017)(noting: "we adhere to a 'flexible approach' [in applying the doctrine] giving due regard to the 'surrounding circumstances'")(*quoting Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 254 (3d Cir. 2007) and *Baer v. Chase*, 392 F.3d 609, 624 (3d Cir. 2004)). Hence, a court is not required to declare an affidavit a sham merely because there is a

discrepancy between it and prior testimony. *See Baer*, 392 F.3d at 624. It should permit a party to explain the discrepancy and consider its surrounding circumstances. *Id.* In Petitioners' case, although they expressed alternate theories, there were no actual discrepancies in their statements, their deposition testimony, or their pleadings.

Striking the verified Pleadings during summary judgment is tantamount to striking Petitioners' Second Amended Complaint in violation of Rule 15. A majority of the courts applying the "flexible approach" also 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 a question, nervousness at a deposition, or maybe a suddenly refreshed recollection."[46]

In short, Petitioners shall present substantial questions of grave importance to insurance-consumers, as well as all civil litigants, nationwide. Hence, their Application should be granted.

3. A majority of the Court will vote to reverse the judgment below.

As discussed, there is a strong, reasonable possibility and likelihood that the Court will reverse or vacate the judgment below. Particularly, the Court may hold that the judgment violates the standards for summary judgment in admitting inadmissible hearsay into the record and precluding Expert Witness Reports;

---

46 Mitchell, *supra* note 37, at 261 (quoting James Joseph Duane, *The Four Greatest Myths About Summary Judgment,* 52 WASH. & LEE L. REV. 1523, 1598 (1995)); *see* Cox, *supra* note 39, at 289-90 (discussing a "reasonableness test" for assessing contradictory affidavits).

thereby violating their constitutional rights and the law of *Railway v. McCarthy.*

4. The equities of relative harms weigh in favor of Petitioners and the Public.

Also, the equities favor granting this Application. Any refusal may cause irreversible harm to Petitioners and will cause Respondent no injury. *See, e.g., San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson,* 548 U.S. 1301 (2006)(Kennedy, J.)(noting that "the harm in a brief delay pending the Court of Appeals' expedited consideration of the case seems slight"); *Barnes v. E-Systems, Inc.,* 501 U.S. 1301, 1304-05 (1991)(Scalia, J.)(granting the stay after balancing the equities and potential risk of harm to the parties); *United States Postal Serv. v. National Ass'n of Letter Carriers,* 481 U.S. 1301, 1302-03 (1987)(Rehnquist, C.J.)(balancing to maintain the status quo); *Mikutaitis v. United States,* 478 U.S. 1306, 1309 (1986)(Stevens, J.)(granting the stay when Respondent would suffer no significant prejudice by the occurrence of a short delay).

5. Petitioners exhausted all other remedies below for a stay.

As indicated in **§II**, Petitioners sought to Stay the Mandate in the Third Circuit and were denied. Having no other recourse, Petitioners filed this Application.

VI. CONCLUSION

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

Beholden and Respectfully submitted,

MIRARCHI LEGAL SERVICES, P.C.,

By: _____

JOSEPH Q. MIRARCHI, ESQUIRE,
3 Logan Square, 36th Floor
1717 Arch Street, Suite 3640
Philadelphia, PA 19103
Telephone: (215) 545-5090
Facsimile: (215) 569-3200
Email: JQMLegalServices@AOL.COM

And
GOD BLESS AMERICA

Dated: **July 11, 2018**

CERTIFICATE OF SERVICE

I, Joseph Q. Mirarchi, Esquire, hereby certify that I issued for service on July 12th, 2018, I filed 3 personally signed copies of Petitioner's Application to Recall and Stay the Third Circuit's Mandate, dated June 28th, 2018, with the United States Supreme court. In doing so, pursuant to Supreme Court Rule 29.5, I also served a true a true and correct copy of the Application with Exhibits to all parties and or counsel listed below contemporaneously, by Email and U.S. Mail First Class.

John J. Donnelly, Esquire
Brian Madden, Esquire
Donnelly & Associates, P.C.
One West First Avenue, Suite 450
Conshohocken, PA 19428
F: 610-828-8340
Email: Bmadden@donnellyandassociates.com

Respectfully Submitted,
MIRARCHI LEGAL SERVICES, P.C.

JOSEPH Q. MIRARCHI, ESQUIRE
Attorney for Petitioners
3 Logan Square, 36th Floor
1717 Arch Street, Suite 3640
Philadelphia, PA 19103
O: 215-569-3000
C: 267-250-0611
F: 267-569-3200
Email: JQMLegalServices@AOL.COM

Dated: July 12th, 2018