

No. 19-319

In the
Supreme Court of the United States

BONNIE CRUICKSHANK-WALLACE
and WILLIAM WALLACE,
Petitioners,

v.

CNA FINANCIAL CORPORATION;
CONTINENTAL CORPORATION; CONTINENTAL
CASUALTY CO.; COLUMBIA CASUALTY CO.,
Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

REPLY BRIEF FOR PETITIONERS

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Pro se Petitioners, Bonnie Cruickshank-Wallace and husband William Wallace (“Wallace”) hereby Reply to the Opposition of Respondents CNA Financial Corporation (“CNAF”), The Continental Corporation (“TCC”), Continental Casualty Company (“Continental”) and Columbia Casualty Company (“Columbia”) (collectively “CNA”).

Never was an opposition so lame.

CNA Opposition p 2, 3 unseemly *ad hominine* Statement of the Case is factually false concerning past litigation for the only purpose to foster bias and, more importantly, irrelevant to the questions and issues before this Court.

The gravamen of the entire Opposition is at p 2, “this quotidian dispute over facts... does not present a compelling reason to grant certiorari. Sup. Ct. R. 10”.

But, “On motion to dismiss, the court must accept plaintiff’s allegations as true...” *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The lower courts as well as the state court did not decide any facts in this or the previous case.

1. Dismissing Continental and Columbia based upon “claim preclusion”

Opposition p 4 misrepresents that Petitioners “seek this Court’s review of those facts and permission to relitigate them in the District Court.” But, the facts have never been litigated and this Court need not determine facts.

The 3d Cir. (A-7) correctly observed, PETITION at 7:

“...the causes of action are not the same because their suit in state court alleged negligent malpractice on the part of Tupitza, whereas, here, they are alleging intentional torts on the part of Continental and Columbia...”

Opposition does not dispute (therefore S.C.R. 15.1 deems waived) PETITION at 5-6, 9 that the previous state summary judgment disposed of the negligence malpractice case against James Tupitza (not a claim nor a party in this case) and subsidiary claims against Continental and Columbia by simply disagreeing with the Wallaces’ Pa.R.C.P. 1042.3 Certificate that expert testimony regarding Tupitza’s negligence was not necessary (A-83) (3d Cir. agrees at A-3 *fn* 2, 3) and thereby concluded “we need not address whether issues of material fact exist concerning the individual elements of the claims” (A-52 *fn* 2) PETITION at 5-6, 9.

The question regarding *claim preclusion* is whether this Court should affirm the standard of *Blunt v. Lower Merion Sch. Dist.*, 77 F.3d 247 (3d Cir. 2014) that *claim preclusion* bars a new claim only when “the claim arises from the same set of facts as a claim adjudicated on the merits in the earlier litigation.” PETITION at 1, 7-8, 14-15.

Opposition does not dispute (S.C.R. 15.1 deems waived) PETITION at 6, 7 that regardless whether new claims might hypothetically have been previously brought, without a previous judgment finding of facts

regarding any claims, *claim preclusion* cannot bar new claims pursuant to *Blunt*.

Therefore, 3d Cir. affirming dismissal based on *claim preclusion/res judicata* conflicts with *Blunt*, and the claims against Continental and Columbia should be remanded for trial.

2. Dismissing TCC for lack of jurisdiction

Opposition p 4 misrepresents that “Petitioners claim the Third Circuit erred in affirming the dismissal of TCC because it gave insufficient weight to their factual assertions that all Respondents are part of a ‘corporate combine’...” Rather, 3d Cir. affirmed dismissing TCC only because “Appellants did not offer any facts to overcome TCC’s defense...that it is a holding company with no presence or operation in Pennsylvania” (A-5), PETITION at 10. But, Petitioners have never argued long arm statute 42 Pa.C.S. § 5322 jurisdiction.

The EDPa and 3d Cir. failed to address and Opposition does not dispute (S.C.R. 15.1 deems waived) PETITION at 10 that Complaint ¶ 9 alleges that TCC, like CNAF, is controlled and daily managed by wholly owned subsidiary Continental and PETITION at 11-13 case support specific to CNA holding company liability: *Continental Casualty Co., CNA Financial Corp. v. Diversified Industries*, 884 F.Supp. 937 (EDPa. 1995) and *Little v. MGIC Indemnity Corporation*, 836 F.2d 789 (3d Cir. 1987) that find CNA holding company liability for Continental conduct because of their “alter-ego relationship when one entity ‘controls the day-to-

day operations of another" *Savin Corp. v. Heritage Copy Prods., Inc.*, 661 F.Supp. 463, 469 (MDPa. 1987).

Therefore, 3d Cir. affirming dismissal of TCC for lack of jurisdiction directly conflicts with *Continental* and *Little* and *Savin*, and the claims against TCC should be remanded for trial.

3. Dismissing CNAF based upon "issue preclusion"

The question regarding *collateral estoppel/issue preclusion* is whether the Complaint makes new jurisdictional allegations regarding CNAF's liability for wholly owned Continental's conduct.

Opposition does not dispute (S.C.R. 15.1 deems waived) PETITION at 13 that the previous state court grant, before discovery, of CNAF's preliminary objection found only that CNAF did not control Continental (A-82), and moreover 3d Cir. acknowledged (A-10) "Citing paragraph 9 in their amended complaint, [Appellants] argue that Continental controls CNAF, whereas in the state court suit they alleged CNAF controlled Continental." PETITION at 13.

Therefore, 3d Cir. affirming dismissal CNAF based on *issue preclusion/ collateral estoppel* conflicts with *Montana v. United States*, 440 U.S. 147, 159 S. Ct. 970 L. Ed. 2d 210 (1979) *159:

"It is, of course, true that changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues. See, e.g. *United States v Certain Land at Irving Place*, 415 F.2d 265,

269 (CA2 1969); 1B J. Moore, *Federal Practice* ¶ 0.448, pp. 4232-4233, ¶ 0.422 [4], pp. 3412-3413. [add'l citations omitted]."

The conflict with *Montana* is similar to the conflict with *Blunt* that *claim preclusion* bars a new claim only when "the claim arises from the same set of facts as a claim adjudicated on the merits in the earlier litigation"; and therefore the issue of jurisdiction over CNAF should be remanded for trial.¹

CONCLUSION

Based upon the Petition and the foregoing, the Petition should be granted.

¹finding jurisdiction over TCC would directly apply to jurisdiction over CNAF.

Respectfully submitted.

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