No. 19-558

IN THE

Supreme Court of the United States

MONTVILLE TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

ZURICH AMERICAN INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

LORRAINE M. ARMENTI, ESQ.
Counsel of Record
MICHAEL E. HRINEWSKI, ESQ.
COUGHLIN DUFFY LLP
350 Mount Kemble Avenue
P.O. Box 1917
Morristown, New Jersey 07962
(973) 267-0058
larmenti@coughlinduffy.com

Attorneys for Respondent

292772

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Should the Supreme Court grant Certiorari as to Montville's Petition regarding the interpretation of state law governing the use of extrinsic evidence in determining an insurance company's duty to defend its insured, which does not address a federal question, and for which there is no conflict between the Third Circuit, other Circuit Courts, and the New Jersey Supreme Court?

Did the United States Court of Appeals for the Third Circuit correctly apply established New Jersey law regarding the use of extrinsic evidence in determining an insurer's duty to defend?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent, Zurich American Insurance Company ("Zurich"), hereby states as follows:

Zurich American Insurance Company is a wholly owned subsidiary of Zurich Holding Company of America, Inc., a Delaware corporation. Zurich Holding Company of America, Inc. is wholly owned by Zurich Insurance Company Ltd, a Swiss corporation. Zurich Insurance Company Ltd is directly owned by Zurich Insurance Group Ltd, a Swiss corporation. Zurich Insurance Group Ltd is the only publicly traded parent company, with a listing on the Swiss stock exchange, and a further trading of American Depositary Receipts.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS..... iii

TABLE OF CITED AUTHORITIES iv

INTRODUCTION..... 1

STATEMENT OF THE CASE 2

REASONS TO DENY THE PETITION 9

I. Montville's Petition Seeks Certiorari on a State Law Issue, Not a Federal Question 9

II. The Third Circuit Correctly Applied Settled New Jersey Law, Which Is Not In Dispute Between The Circuit Courts, Or Between The Third Circuit And The New Jersey Supreme Court 12

CONCLUSION 16

TABLE OF CITED AUTHORITIES

Page

Cases

Abouzaid v. Mansard Gardens Assocs., LLC,
207 N.J. 67 (2011) 5, 7

Danek v. Hommer,
28 N.J. Super. 68 (App. Div. 1953) 13

DIRECTV, Inc. v. Imburgia,
136 S. Ct. 463 (2015). 11

Erie R.R. v. Tompkins,
304 U.S. 64 (1938). 11

Lucker Mfg. v. Home Ins. Co.,
818 F. Supp. 821 (E.D. Pa. 1993). 11

Reifer v. Westport Ins. Corp.,
751 F.3d 129 (3d Cir. 2014). 11

SL Industries v.
American Motorists Insurance Co.,
607 A.2d 1266 (1992) . . . . . *passim*

State Auto Ins. Cos. v. Summy,
234 F.3d 131 (3d Cir. 2000) 11

Volt Information Sciences, Inc. v. Board of
Trustees of Leland Stanford Junior Univ.,
489 U.S. 468, 109 S. Ct. 1248,
103 L. Ed. 2d 488 (1989) 11

Cited Authorities

Page

Statutes and Other Authorities

Sup. Ct. R. 10 . . . . . 1, 9, 10

INTRODUCTION

Petitioner, Montville Township Board of Education, ("Montville") provides no grounds upon which to support a grant of Certiorari by this Court. As such, the Petition should be denied. Montville concedes in its Petition that: "[t]he issue of insurance coverage is a state law question." *See*, Montville's Petition, Page 6. It is well established that both the interpretation of insurance contracts is a matter of state control. Montville's Petition does not in any way address a federal question.

Montville's Petition also disregards the standard set forth in Rule 10 of the *Rules of the Supreme Court* for considerations governing review on Certiorari. Here, the Third Circuit panel correctly cited and applied established law on the duty to defend as held by the New Jersey Supreme Court in *SL Industries v. American Motorists Insurance Co.,* 607 A.2d 1266, (1992). Further, the Third Circuit decision in this matter is not in conflict with the decision of another Circuit Court on the issue of New Jersey's duty to defend law. Additionally, the Third Circuit decision is not in conflict with the decision of the New Jersey Supreme Court, in fact, the Third Circuit correctly relied upon the established New Jersey case law.

Here, the Third Circuit here properly applied settled New Jersey law. Through this Petition, Montville seeks to have the Supreme Court expand New Jersey law on insurance contract interpretation, to allow extrinsic evidence as to an insured's denial of liability to be relied on in determining an insurer's duty to defend. Montville is unhappy with the prior New Jersey Supreme Court's holdings, and seeks to challenge them in this forum.

Additionally, Montville's Petition goes 49 incorrect steps further, by seeking to have the Supreme Court set a "national standard which flatly rejects the "four corners" approach" that would apply to each state. *See*, Montville's Petition, Page 14. Montville, a New Jersey school district, does not have standing to seek this relief, and it is not a proper basis for Certiorari. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

In the underlying lawsuit for which Montville seeks coverage, Plaintiff, "Child M," alleges that she was sexually abused by Jason Fennes, an elementary school teacher, while she was a student at Cedar Hill Preparatory School in February, 2012. Montville previously employed Fennes as an elementary school teacher between September 1, 1998 and June 30, 2010. *App.110a.* Child M alleges that Montville knew Fennes had abused minor students at Montville, but failed to report that abuse to the proper authorities or other potential employers of Fennes, including Cedar Hill. *App.37a*, *App.111a*. In a termination agreement dated May 14, 2010, Montville agreed to limit the scope of information to be revealed and/or communicated about Fennes and thus would not inform any of Fennes' prospective employers of the abuse. *App.37a*, *App.111a*.

Child M claims that Montville's acts and omissions resulted in her severe personal injuries and emotional distress at the hands of Fennes. Specifically, the Child M Complaint alleges that Montville was "on notice" of Fennes' "abusive and/or sexual conduct with his infant students," and failed to report that conduct, causing Child M severe personal injuries. *App.123a, App.135a.*

American Guarantee and Liability Insurance Company, a wholly owned subsidiary of Zurich, issued policy CPO 3701598-07 to Montville for the period July 1, 2011 through July 1, 2012 (the "Zurich Policy"). The Zurich Policy contains multiple coverage parts. However, Montville's appeal to the Third Circuit was limited to the Abusive Act Liability Coverage Part ("AA Coverage Part"), which provides insurance for "'loss' because of 'injury' resulting from an 'abusive act'." In this coverage part, "abusive act" is defined as:

> [A]ny act or series of acts of actual or threatened abuse or molestation done to any person, resulting in "injury" to that person, including any act or series of acts of actual or threatened sexual abuse or molestation done to any person, resulting in "injury" to that person, by anyone who causes or attempts to cause the person to engage in a sexual act:
>
> a. Without the consent of or by threatening the person, placing the person in fear or asserting undue influence over the person;
>
> b. If that person is incapable of appraising the nature of the conduct or is physically incapable of declining participation in or communicating unwillingness to engage in the sexual act; or
>
> c. By engaging in or attempting to engage in lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of any person. *App.45a, App.161a.*

The AA Coverage Part includes a "Prior Known Acts" exclusion which states that "[t]his insurance does not apply to … [a]ny claim or 'suit' based upon, arising out of or attributable, in whole or in part, to any 'abusive act' of which any insured, other than the insured actually committing the 'abusive act', has knowledge prior to the effective date of this Coverage Part …." *App.179a.*

Zurich disclaimed any obligation to defend or indemnify Montville under the Zurich Policy for the Child M Action, based on the clear allegations of prior knowledge by Montville of "abusive acts" by Fennes.

In three opinions, Judge Kevin McNulty of the District Court of the United States for the District of New Jersey affirmed Zurich's disclaimer under both the AA Coverage part and the Commercial General Liability ("CGL") Coverage Part. *See*, June 1, 2017 Order and Opinion, *App.57a;* January 19, 2018 Order and Opinion, *App.33a*; and August 21, 2018 Order and Opinion, *App.19a*.[1]

The District Court's January 19, 2018 Opinion on Montville's motion seeking "reconsideration" of the District Court's June 1, 2017 Order granting summary judgment for Zurich under the CGL part, contained

1. The June 1, 2017 Order and Opinion, *App.57a*, granted summary judgment to Zurich under the CGL Coverage Part of the Zurich Policy. The January 19, 2018 Order and Opinion, App.19a, was issued in response to Montville's purported "motion for reconsideration," which for the first time switched to an argument that Montville was entitled to coverage under the Zurich Policy's AA Coverage Part; and the August 21, 2018 Order and Opinion, *App.19a*, granted summary judgment to Zurich under the AA Coverage Part.

extensive analysis of the purported "extrinsic evidence" which Montville raises in this Petition. Specifically, Montville contended that investigations by the New Jersey Division of Youth and Family Services ("DYFS") of Fennes in 2008, 2009, and 2010 established the lack of abusive conduct by Fennes known to Montville, such that Zurich owed a duty to defend. Far from ignoring this evidence, Judge McNulty undertook a review of the DYFS investigations and held that they:

> [do] not change the nature of Child M's allegations or the scope of the duty to defend under the GCL Coverage Part. At best, it would seem to be a counterweight to the evidence of Montville's liability. The fact remains that Child M's claims arise from and relate to acts of abuse, as established in my prior Opinion, and that Montville has not established that these are covered risks under the GCL Coverage Part. *App.39a.*

In affirming the grant of summary judgment in favor of Zurich on the CGL Coverage Part, Judge McNulty also affirmed the applicable law in New Jersey as to the use of extrinsic evidence in the duty to defend analysis:

> The duty to defend may arise where facts extrinsic to the complaint in effect expand the claim, bringing the claim within the policy's coverage. *See Abouzaid v. Mansard Gardens Assocs., LLC*, 207 N.J. 67, 86 (2011) (where no covered claim appeared on face of complaint, but interrogatories revealed basis for covered claim, duty to defend was triggered); *SL Indus.*

> *v. Am. Motorists Ins. Co.*, 128 N.J. 188, 198 (1992) (even where complaint appears to allege no covered claim, plaintiff's later interrogatory responses may trigger duty to defend). That exception is to be distinguished, however, from the defendant insured's (sic) simply saying that it will prevail on the merits and thereby negate some exclusion or limitation on coverage. That does not change the nature of the claims being asserted. (Emphasis Added.) *App.44a.*

Subsequent to Judge McNulty's January 19, 2018 Opinion ruling in Zurich's favor on the CGL Coverage Part discussed above, Montville moved for summary judgment on the AA Coverage Part. Judge McNulty's August 21, 2018 Opinion as to the AA Coverage Part, also found in Zurich's favor that it had no duty to defend Montville. In that opinion, Judge McNulty, revisited and reiterated his prior analysis:

> [the Child M] complaint rests on the theory that Montville knew Fennes committed abusive acts while he was a teacher at Montville. Of course, Montville contests this, but if the insured's denial of liability controlled the issue, then there might rarely if ever [not] [sic] be a duty to defend. It is generally the nature of the allegation that controls the insurer's duty to defend, and here the allegation is that Montville knew about the prior acts of molestation upon which its liability is premised. *App.30a.*

Montville filed an appeal of the August 21, 2019 decision on the AA Coverage Part to the Third Circuit. *App.88a.*

By Opinion dated July 26, 2019, the Third Circuit affirmed the District Court's decision, holding that Zurich "does not have a duty to defend the school district because the allegations made in the other lawsuit plainly fall within the [Prior Known Acts] exclusion provision." *App.1a.* The Third Circuit Opinion included a concise and accurate statement of established New Jersey law on an insurer's duty to defend:

> As a practical matter, the determination of an insurer's duty to defend requires review of the complaint with liberality to ascertain whether the insurer will be obligated to indemnify the insured 'if the allegations are sustained.'" *Abouzaid v. Mansard Gardens Assocs., LLC*, 207 N.J. 67, 23 A.3d 338, 346 (N.J. 2011) (citation omitted). "[I]f 'the complaint comprehends an injury which may be within the policy,' a duty to defend will be found." Id. (citation omitted). Put another way, "[i]f the complaint is ambiguous, doubts should be resolved in favor of the insured and thus in favor of coverage." *Voorhees*, 607 A.2d at 1259. *App.9a.*

Although courts generally look to the complaint to ascertain the duty to defend, the analysis is not necessarily limited to the facts asserted in the complaint." *Abouzaid*, 23 A.3d at 347 (citations omitted). "Thus, for example, an insurer's duty to provide a defense may also be triggered by 'facts indicating potential coverage that arise during the resolution of the underlying dispute.'" *Id.* (*quoting SL Indus. v. Am. Motorists Ins. Co.*, 607 A.2d 1266, 1272 (N.J. 1992)). "That notion is said to align with the expectations of insureds, who 'expect their coverage and defense benefits to be determined by the nature of

the claim against them, not by the fortuity of how the plaintiff, a third party, chooses to phrase the complaint against the insured.'" *Id.* (quoting *SL Indus.*, 607 A.2d at 1272). That said, "the insurer has no duty to investigate possible ramifications of the underlying suit that could trigger coverage." *SL Indus.*, 607 A.2d at 1272. *See, App.9a.* The Court next referred to Montville's "emphatic agreement" at oral argument that "the nature of Child M's claims against [Montville] are generally that [it] knew about Fennes' . . . sexual molestation and abuse of students while he worked for [it]." (Emphasis Added.) *See, App.17a.* The Third Circuit concluded that based on Child M's allegations, which fall undoubtedly within the Prior Known Acts Exclusion, Zurich is not obligated to defend it in the Child M Action. Significantly, the Court held that extrinsic evidence presented by Montville would not change that outcome. *App.17a.*[2]

Accordingly, the fundamental premise of Montville's Petition, that the District Court and the Third Circuit's rulings are inconsistent with the New Jersey Supreme Court's holding in *SL Industries*, is patently incorrect. Montville selectively quotes from, and misrepresents the Courts' rulings. Both Courts reviewed the "extrinsic evidence" presented by Montville but rejected it as irrelevant to Zurich's duty to defend. Both Courts found

2. Further, the Third Circuit held that Montville waived its right to argue *SL Industries*, and extrinsic evidence on appeal, because it "entirely failed to raise this argument in its second partial summary judgment motion before the District Court." *App.10a.* The Third Circuit nonetheless went on to analyze Montville's argument on the merits, finding that a review of the extrinsic evidence presented would not change the outcome of the Court's ruling.

the "extrinsic evidence" to amount to nothing more than Montville's denial of liability to Child M. Both Courts found that the "extrinsic evidence" did not change the allegations made by Child M or Montville's prior knowledge. Accordingly, applying well established duty to defend law in New Jersey, including *SL Industries*, both Courts correctly determined that Zurich had no duty to defend Montville under the terms of the Zurich Policy.

REASONS TO DENY THE PETITION

I. Montville's Petition Seeks Certiorari on a State Law Issue, Not a Federal Question

While granting a Petition for Certiorari is subject to the discretion of the Supreme Court, Rule 10 of the *Rules of the Supreme Court* provides that a petition for a writ of certiorari will be granted only for compelling reasons. Rule 10 outlines the primary reasons the Court considers relevant to grant Certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of 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 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;
>
> (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.

Rule 10 further provides that "certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Here, Montville's Petition relates to a state law question, not a federal question, therefore paragraphs (b) and (c) of Rule 10 are inapplicable. Further, there is no dispute between the Third Circuit, another Circuit Court, or the New Jersey Supreme Court, on the state law question raised by Montville. Finally, the Third Circuit properly applied an established rule of law. Accordingly, Montville's Petition should be denied.

Montville's fatal concession is that: "[t]he issue of insurance coverage is a state law question." *See*, Montville's Petition, Page 6. Montville first concedes that the issue upon which it seeks action by the Court – the use of extrinsic evidence in determining an insurer's duty to defend – is a state law question. Yet it nonetheless seeks Certiorari by the Supreme Court to issue a nationwide, "uniform standard of coverage evaluation which rejects the "four corners" rule."

Even without Montville's concession, its Petition must be denied. Our jurisprudence leaves no doubt that diversity jurisdiction cases lack a federal question or interest. *Reifer v. Westport Ins. Corp.*, 751 F.3d 129, 136 (3d Cir. 2014). State law applies to duty to defend and policy interpretation questions. *Lucker Mfg. v. Home Ins. Co.*, 818 F. Supp. 821, 824 n.8 (E.D. Pa. 1993). *Also, see Erie R.R. v. Tompkins*, 304 U.S. 64, (1938). In diversity jurisdiction actions, such as the present matter, the Court's review of insurance coverage issues and insurance contract interpretation is subject to applicable state law. *State Auto Ins. Cos. v. Summy*, 234 F.3d 131, 131 (3d Cir. 2000) ("District courts should give serious consideration to the fact that they do not establish state law, but are limited to predicting it. This is especially important in insurance coverage cases." *Id.* at 135.). More broadly, as this Court recently stated, "the interpretation of a contract is ordinarily a matter of state law to which we defer." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) *citing*, *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).

Montville argues that "thirty-one states allow for exceptions to the four-corners rule in determining whether a duty to defend exists," and cites to State Supreme Court cases and State Appellate Court cases. The absence of any federal ruling by Montville is further support for Zurich's position that insurance law is uniquely the province of the states. Montville's Petition should be denied as it presents no federal question for this Court to decide.

Montville's request for a nationwide standard on insurance law should also be denied. Montville states that

the Question Presented to the Court in the Petition is in part, "should this Court now establish a uniform standard of coverage evaluation which rejects the "four corners" rule?" *See*, Montville's Petition, Page i. Montville's Petition concludes that it seeks Certiorari to "establish a uniform standard of coverage evaluation which rejects the "four corners" rule." *See*, Montville's Petition, Page 14. The interpretation of insurance policies in the respective states is a matter inherently within the purview of State Courts. Montville, a New Jersey public school district, seeks to have the Court overrule the decisions of various State Supreme and Appellate Courts, which have already determined how each state governs an insurer's duty to defend analysis. Accordingly, Montville's Petition should be denied.

II. The Third Circuit Correctly Applied Settled New Jersey Law, Which Is Not In Dispute Between The Circuit Courts, Or Between The Third Circuit And The New Jersey Supreme Court.

The relief sought by Montville is based on a fundamental misunderstanding of well-settled law in New Jersey and a misrepresentation of the analysis performed by the Third Circuit and the District Court. As set forth above, both the Third Circuit and the District Court correctly cited to, and relied on, established New Jersey law. The Third Circuit's ruling is not in conflict with the New Jersey Supreme Court; in fact it cites to and properly applies the New Jersey Supreme Court precedent. Further, the Third Circuit decision is not in conflict with any other Circuit Court on the state law issue of how New Jersey court's use extrinsic evidence in determining an insurer's duty to defend. Accordingly, Montville's Petition should be denied.

First, New Jersey law is clear that it abides by the four corners rule when determining an insurer's duty to defend its insured. *Danek v. Hommer*, 28 N.J. Super. 68, 77 (App. Div. 1953). New Jersey law is equally clear, however, that while it abides by the four corners rule, it also allows the use of extrinsic evidence when determining a duty to defend, so long as that evidence changes the nature of the claims made in the complaint. *SL Industries v. American Motorists Insurance Co.,* 607 A.2d 1266, 1272 (1992). Contrary to Montville's arguments, *SL Industries* did not reject the four corners rule. The New Jersey Supreme Court applied the four corners rule, but also allowed for the use of permitted extrinsic evidence that changes the nature of the allegations against the insured in the complaint. Montville is seeking not to enforce the law in New Jersey, but to fundamentally expand it.

Second, Montville misinterprets the underlying Courts' reliance on *SL Industries* in deciding that Zurich has no duty to defend Montville in the Child M Action. The record is clear that both Judge McNulty and the Third Circuit looked to *SL Industries* for guidance in determining the duty to defend issue. *App.44a, App.9a.* In following the mandates of *SL Industries*, the District Court and the Third Circuit found that the allegations in the Child M complaint left no room for doubt that the Prior Known Acts Exclusion precluded coverage to Montville. Montville pointed to the conclusions by the New Jersey Division of Youth and Family Services ("DYFS") in its investigations of Fennes in 2008, 2009, and 2010 to support its denial of knowledge. The District Court and the Third Circuit did not ignore the extrinsic evidence proffered by Montville. Both Courts reviewed the extrinsic evidence presented by Montville and ruled in Zurich's favor because it did nothing to change the nature of the allegations

against Montville. The District Court and the Third Circuit rightfully rejected the extrinsic evidence because it amounted to nothing more than a denial by Montville of the allegations made by Child M. This is precisely the point that Judge McNulty addressed when he held:

> The [Child M] complaint rests on the theory that Montville knew Fennes committed abusive acts while he was a teacher at Montville. Of course, Montville contests this, but if the insured's denial of liability controlled the issue, then there might rarely if ever [not] [sic] be a duty to defend. It is generally the nature of the allegation that controls the insurer's duty to defend, and here the allegation is that Montville knew about the prior acts of molestation upon which its liability is premised. *App.30a.*

The Third Circuit held that "[a]lthough courts generally look to the complaint to ascertain the duty to defend, the analysis is not necessarily limited to the facts asserted in the complaint." *See*, *App.9a.*

Contrary to Montville's argument, the Third Circuit, and the District Court, correctly cited, and applied, well established New Jersey law as held by the New Jersey Supreme Court in *SL Industries v. American Motorists Insurance Co.,* 607 A.2d 1266, (1992), and its progeny. While New Jersey law applies the four corners rule in determining a duty to defend, it also allows a court to review extrinsic evidence when determining an insurer's duty to defend. However, the extrinsic evidence must change the nature of the allegations against the insured so as to bring those allegations within the coverage of

the policy. Montville's purported denial of liability as to its knowledge of Fennes' abuse does nothing of the sort. Accordingly, the District Court, and the Third Circuit correctly dismissed Montville's argument.

In *SL Industries,* the case at the very foundation of Montville's argument, the extrinsic evidence at issue was additional information provided by the claimant by way of answers to interrogatories which changed the nature of the damages claim being made by the claimant to potentially bring it within the policies' definitions of personal injury and bodily injury. *SL Industries, Inc.*, 128 N.J. at 184–185. Montville's use of extrinsic evidence to support its denial of liability does not change the nature of Child M's allegations against it. Montville's statement that the "Third Circuit failed to apply *SL Industries* correctly" blatantly disregards the underlying Court's rulings and established New Jersey law. The law in New Jersey on the duty to defend is established by the New Jersey Supreme Court in *SL Industries*. The record is clear that the Third Circuit properly applied the principles of *SL Industries* in analyzing and deciding the coverage issues before it such that there is no dispute between the Third Circuit and the New Jersey Supreme Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Lorraine M. Armenti, Esq.
Counsel of Record
Michael E. Hrinewski, Esq.
Coughlin Duffy LLP
350 Mount Kemble Avenue
P.O. Box 1917
Morristown, New Jersey 07962
(973) 267-0058
larmenti@coughlinduffy.com

Attorneys for Respondent