No. 21-886

In The
Supreme Court of the United States

ISMET ISLAMI,

Petitioner,

v.

KEMPER INDEPENDENCE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITIONER'S REPLY BRIEF

JOSEPH F. OWENS
Counsel of Record
LAW OFFICES OF
JOSEPH F. OWENS, LLC
2665 S. Moorland Road, Suite 200
New Berlin, Wisconsin 53151
Phone: (262) 785-0320
aolaw@bizwi.rr.com

- and -

DEBRA K. RIEDEL
LAW OFFICES OF DEBRA K. RIEDEL
2665 S. Moorland Road, Suite 200
New Berlin, Wisconsin 53151

Counsel for Petitioner Ismet Islami

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTRODUCTION

The Wisconsin Supreme Court majority decision voided Kemper's contractual obligations to Ismet Islami by enforcing an exculpatory contract clause assigning her vicarious liability for the criminal acts of arson perpetrated against her by Ydbi Islami, despite her conceded innocence. The Wisconsin Supreme Court's majority decision was squarely based upon its determination of Ydbi as an "insured." [*See*: Wisconsin Supreme Court Decision, ¶18-¶20, App. pp. 10-13.]

In reaching this result, the Wisconsin Supreme Court stripped Ismet Islami of the legal efficacy of a Judgment of Legal Separation which terminated her status as married to Ydbi Islami for all property related purposes. The significance of this published decision reaches beyond Wisconsin because the Wisconsin Marital Property Act tracks the model Uniform Marital Property Act; which in turn is a template derived from community property laws of the states in the Union now operating under some form of community property system.[1] The population of those states in 1977 already comprised over 22% of the U.S. population.[2]

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[1] Cantwell, William P., "The Uniform Marital Property Act: Origin And Intent," 68 Marq. L.Rev. 383 (1985). *See also*: Uniform Marital Property Act, 9A U.L.A., §1(3) and (7); "Alaska Community Property Act" §34.77.900(9) and (10); Ariz. Rev. Stat. §25-313; Conn. Gen. Stat. §46b-67d (2019).

[2] Greene, Scott, "Comparison Of The Property Aspects Of The Common-Law Marital Property Systems And Their Relative Compatibility With The Current View Of The Marriage

Kemper's Brief In Response also contends that there is no U.S. Supreme Court case identifying a constitutional right to dissolve a marriage, whether by divorce or any other procedure. [Kemper Response Brief p. 15.] Kemper then posits " . . . Wisconsin could, if it so desired, eliminate any right to a divorce or legal separation altogether." [Kemper Response Brief p. 15.] Therefore, any uncertainty as to the existence of a constitutional liberty interest in the right to obtain dissolution of marital status, if unresolved, should be addressed in this case by this Court at this time.

After discussing pure insurance clause issues which are not before the Court, Kemper's Brief then moves to issues relating to Wis. Stat. §631.95(2)(f), a public policy statute which prohibits insurance companies from invoking property insurance exclusionary clauses in claims arising from an act of "domestic abuse." In a nutshell, Kemper opened the door to examine this highly significant and important social justice issue by characterizing Justice Karofsky's dissent as purely a state statutory issue. The Wisconsin Supreme Court ruled on summary judgment as a matter of law and without an evidentiary hearing, that the criminally malicious act of intentionally burning a woman's home by a person identified by that Court as her "spouse," does not raise any material issue of fact as to whether this arson constituted an act of "domestic abuse." Justice Karofsky's dissent brings to the forefront the due process violation of the rule of law by the

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Relationship And The Rights Of Women," 13 Creighton Law Review 71 (1980).

Wisconsin Supreme Court summarily adjudicating Ismet as "married" to the perpetrator but denying her a trial on "domestic abuse"; the result of which " . . . implicitly imputes the guilt of the arsonist to the innocent insured." [Wisconsin Supreme Court Decision, Karofsky, J., dissenting, ¶58 and ¶65, App. pp. 33, 34 and 37.]

ARGUMENT

I. THE CONSTITUTIONAL ISSUES CREATED BY THE WISCONSIN SUPREME COURT DECISION WERE PROPERLY PRESERVED.

Kemper begins its Response Brief by arguing that Ismet Islami, in her briefing to the Wisconsin Supreme Court, did not preserve the constitutional issues presented in her Petition for Certiorari.

This argument fails for several reasons. First, it is uncontroverted that both the "free exercise" First Amendment issue and the broader Fourteenth Amendment "due process" issues were raised in Ismet Islami's Motion To Reconsider and her Memorandum of Law in Support of Motion To Reconsider timely submitted and denied by the Wisconsin Supreme Court. Relevant sections of those two documents were quoted at length in the Petition for Certiorari at pp. 15-17 in order to demonstrate conformity with S.Ct. Rule 14.1.(g)(i). Second, it was not until the Wisconsin Supreme Court decision itself was announced that any court during the progression of this case nullified the legal efficacy

of Ismet Islami's Judgment of Legal Separation. It was that decision by the Wisconsin Supreme Court majority opinion which created the multiple constitutional issues presented here.

II. THIS CASE PRESENTS FUNDAMENTAL CONSTITUTIONAL ISSUES AFFECTING PROPERTY RIGHTS.

Kemper begins Section II. of its Responsive Brief with the broad statement that this case presents *solely* issues of Wisconsin state law. Kemper never explains this assertion. As a Fourteenth Amendment case, it categorically involves examination of state law issues in light of applicable sections of the United States Constitution.

A. The Kemper Billing And Proof Of Claim Documents Were Improperly Relied Upon By The Wisconsin Supreme Court To Determine The Status Of Ydbi Islami As An "Insured".

In its Responsive Brief, Kemper skips over the two core constitutional issues presented by Ismet Islami's Petition (i.e. the First Amendment "free exercise" issue and the "due process" right to enforce her Judgment of Legal Separation). Instead, Kemper draws this Court's attention to two extraneous documents referenced by the Wisconsin Supreme Court ostensibly as contract documents, which documents are not encompassed within the stipulated material facts by the parties

for summary judgment. These extraneous documents were drafted exclusively by Kemper – not Ismet Islami.

The first document identified by Kemper is a policy billing statement which contains a reference to Ismet's status as "married." Significantly this reference appears only on the automobile liability policy renewal billing statement. It is set in miniscule typeface and significantly, does not appear anywhere on the homeowner policy coverage billing. [*See*: R-128; Supp. App. pp. 1-4].[3] The timing and materiality of Kemper generating this renewal billing statement, if correct when the policy was initially issued and not subsequently inquired about by Kemper upon renewal, was never addressed.

The second tangential document was a Proof of Loss form; again a pre-printed form created by Kemper for claimants to fill out and sign. [R-131, Supp. App. p. 5.] Ismet is correctly identified as the "insured" throughout the document and signed it where indicated. Ydbi also signed the document on the only signature line left – under which Kemper had inserted the pre-printed word "Insured." Notably, this Kemper form document does not address marital status anywhere. More importantly, however, the fine print at the bottom of Kemper's Proof of Loss form clarifies that a signatory may be either an "insured" *or* simply a

[3] Reproduction of the Kemper documents in the Supplemental Appendix in their original visual form is essential to the argument being made concerning their legal efficacy.

"subscriber" claiming property lost or damaged at the insured premises. This language in pertinent part reads as follows:

> *This loss did not originate by any act, design or procurement of the insured,* ***or this "subscriber,"*** *nothing has been done by or with the privity or consent of the insured* ***or this "subscriber"*** *to violate the conditions of the policy. . . .* (emphasis added)

[*See*: R-131; Supp. App. p. 5.]

These sidetrack arguments avoid the fact that this was a summary judgment case, in which the Wisconsin Supreme Court ruled *as a matter of law*, ostensibly based upon a formal stipulation executed by the parties' counsel of record. The stipulated facts include as an uncontroverted fact, agreed upon by all parties and binding on the reviewing courts, that Ismet did not make any false or misleading statement to Kemper " . . . at her Examination Under Oath, in her sworn Statement of Proof of Loss *and at any other time relevant* to the above-entitled action." [*See*: R-131; Supp. App. p. 7, ¶4.] That being the case, under the "rule of law," no tribunal can attribute any negative inference to Ismet Islami for alleged factual misrepresentations derived from these two documents prepared by Kemper.

B. The Wisconsin Supreme Court Decision Nullifies The Legal Effect Of The Dissolution Provisions Of The Wisconsin Marital Property Act.

The gist of this case is a contract action centering on indemnification for a casualty loss of property. The case was commenced by Kemper, a property loss casualty insurer, seeking a declaratory judgment under its contract relating to its contractual obligations following a casualty loss of insured "property." It is elemental that "property" is exactly the subject matter of Chapter 766 of the Wisconsin statute entitled "The Wisconsin Marital Property Act." This case is not a Chapter 767 "Action Affecting the Family," the scope of which Chapter is limited by its jurisdictional enabling provisions in §767.005 and §767.001 of the Wisconsin Statutes. [*See:* Wis. Stat. §767.001 "Scope" and §767.001(1) "Actions Affecting the Family" reproduced verbatim at Petition pp. 3 and 4.]

Kemper concedes that Wis. Stat. 766.01(7) of the Wisconsin Marital Property Act unequivocally provides that a judgment of legal separation "terminates" the marriage of the parties for property related purposes. [Kemper Responsive Brief p. 9.] Furthermore, Kemper cannot deny that this lawsuit is brought by Kemper as a "property" based civil action – not an "action affecting the family." Kemper then misrepresents Ismet Islami's position by attributing to her the statement that a decree of legal separation dissolves a

marriage "*for all purposes*."[4] The actual statement on page 20 of Ismet's Petition is that the Wisconsin Marital Property Act nullifies the parties' legal status as spouses at dissolution "*for property purposes*." Kemper then jumps to citing language from Chapter 767 as if this were an "action affecting the family." It is not. That action was brought and concluded by Ismet in 1997, thirteen years before the fire loss which is the gist of this action.

As a separate but closely related point of law, it is also an unalterable fact that since 1997, Ismet Islami has held a Judgment of Legal Separation, which in itself is an intangible property interest, duly obtained and entered pursuant to Wisconsin law, the legal effect of which adjudicates her marital status for all property related purposes in the State of Wisconsin according to Wis. Stat. §766.01(7). The legal efficacy of that Judgment was retroactively extinguished by four members of the Wisconsin Supreme Court who ostensibly appear to be philosophically opposed to the 1986 adoption

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[4] In the process of making its argument, Kemper confuses the provision in Wis. Stat. §§767.35(3) which delays the right to remarry until after expiration of six months following a divorce, with the provisions of Wis. Stat. §766.01(7) and (8). The bonds of matrimony are "terminated" at the time of "entry" of the judgment of legal separation; just as they are for persons at "granting" of a judgment of divorce. [*See*: Wis. Stat. §767.35(3) reproduced verbatim on p. 5 of the Petition and Wis. Stat. §766.01(8) and Wis. Stat. §766.01(7) reproduced verbatim on pp. 2-3 of the Petition.] Persons who obtain a legal separation judgment simply have to wait one year to convert their judgment of legal separation into one of divorce, and then wait six months – if they wish to remarry. [*See:* Wis. Stat. §767.35(5).]

of the community property system in the State of Wisconsin. This decision by the majority opinion was done without any explanation of a public policy rationale or some sort of constitutional defect in the clear and unambiguous language employed by the Wisconsin Legislature in enacting this law upon which this judgment was granted. In so doing, the Wisconsin Supreme Court engaged in an unconstitutional nullification of an existing intangible property right by judicial fiat without any rationale. This is a blatant violation of substantive "due process."

C. There Is A Constitutional Right To Dissolve The Bonds Of Marriage.

In its Responsive Brief, Kemper boldly asserts that Ismet Islami has no constitutional right to terminate her marriage whatsoever. Assuming that to be the case, Kemper then asserts that the Wisconsin Supreme Court's decision here has no federal constitutional implications. Kemper cites as authority for this proposition Justice Black's dissent in *Williams v. North Carolina*, 325 U.S. 226, 274, 65 S.Ct. 1092, 1116, 89 L.Ed. 1577, 1605-06 (1945). The premise underlying Kemper's position, however, was implicitly rejected in *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Nevertheless, Kemper raises a valid observation that there may be no case in which this Court explicitly confirms the fundamental liberty interest in obtaining dissolution of marriage in which Justice Black also dissented.

In *Boddie*, *supra*, 401 U.S. 371 at 380-81, this Court concluded that Connecticut's refusal to provide unfettered access to the sole means to obtain " . . . plaintiff's *claimed right to a dissolution of their marriage*," was " . . . *a denial of due process*." (emphasis added) Thus, the right to dissolution of marriage(s) is implicitly identified as a fundamental constitutional right protected by the Fourteenth Amendment.

The *Boddie* decision, however, goes further in providing:

> *Our cases further establish that a statute* ***or a rule*** *may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question.* ***Thus, in cases involving religious freedom****, free speech or assembly,* ***this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights.*** (emphasis added)

Boddie v. Connecticut, *supra*, 401 U.S. 379.

As in *Boddie*, the courts of Wisconsin constitute a monopoly on the sole forum available to legally dissolve a marriage. The Wisconsin Legislature has enacted legislation which provides an alternative to a judgment of divorce for dissolution of the property-related ramifications of marriage to persons who cannot, within the exercise of their religion, or for other

legitimate reasons, do not wish to obtain a judgment of divorce. The Wisconsin Supreme Court in its sweeping and precedential ruling, denied the efficacy of a Judgment of Legal Separation obtained pursuant to this statute. In so doing, it prospectively and retrospectively extinguished the right of *all* persons seeking to obtain dissolution of the legal attributions of "marriage" for property and contractual liability purposes via a judgment of legal separation.

The only choice left by the Wisconsin Supreme Court to a married person who wishes to terminate the legal property and contractual obligations imposed on them by the Wisconsin Marital Property Act and whose religious beliefs do not allow them to divorce, is to stay married or violate the tenets of their religion. As stated in the quoted language in Kemper's Brief at p. 17 from *Bowen v. Ray*, 476 U.S. 693 at 706, 106 S.Ct. 2147 at 2155-56, 90 L.Ed.2d 735 at 749 (1986), the Wisconsin Supreme Court decision here " . . . inescapably compels conduct that some find objectionable for religious reasons."

D. The Wisconsin Supreme Court Decision Imputing The Guilt Of The Convicted Arsonist To The Innocent Insured Person On Summary Judgment Violates The Rule Of Law.

Kemper, on pp. 23-25 of its Responsive Brief, opens the door to the miscarriage of justice issues raised by the three dissenting Justices based upon the Wisconsin

Supreme Court violating the rule of law in its disposition by summary judgment of the "domestic abuse" issues presented by Wis. Stat. §631.195(2)(f).

In *Boddie v. Connecticut*, *supra*, 401 U.S. 371 at 374, this Court instructed the bench and bar of the several states:

> *At its core, the* ***right to due process*** *reflects a fundamental value in our American constitutional system.* (emphasis added)
>
> * * * * * * * * * * * *
>
> *Put more succinctly,* ***it is this injection of the rule of law*** *that allows society to reap the benefits of rejecting what political theorists call the 'state of nature.'* (emphasis added)

This Court in *Boddie*, *supra*, 401 U.S. at 375 continued to explain:

> *Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system.*

Kemper posits in its Responsive Brief at p. 25 that the dissent does not raise any issues of constitutional dimension. To the contrary, the dissenting opinion raises a myriad of violations of the rule of law by the majority opinion, which in turn implicate the procedural due process rights of Ismet Islami, whom all parties stipulated to be an "innocent insured."

The Karofsky dissent begins by identifying the failure of the Wisconsin Supreme Court majority opinion to follow "the rule of law" when proceeding on summary judgment to deny Ismet any meaningful evidentiary hearing based upon its finding that the record "lacks any evidence" that Ydbi's destruction of Ismet's house by arson constituted domestic abuse. [App. p. 23.]

The Karofsky dissent proceeds in ¶37, ¶38, ¶50, ¶51, ¶55, ¶58, ¶61 and ¶65 [App. pp. 23-37] to identify multiple instances of the majority opinion violating fundamental rules of summary judgment methodology, resulting in deprivation of Ismet Islami's right to a trial on material issues of fact relating to whether Ydbi's adjudicated criminal conduct constituted "domestic abuse." These material issues of fact include the historic behavioral manifestations of Ydbi's adjudicated episodic mental incompetency in his criminal case, and his criminal history of violent acts against women.

The Karofsky dissent closes its analysis with the following stunning indictment:

> *In erroneously and inexplicably concluding that the record lacks any evidence showing Ydbi's acts constituted domestic abuse and affirming the circuit court's grant of summary judgment to Kemper, the majority 'implicitly imputes the guilt of the arsonist to the innocent insured.'*

[*See:* App. p. 37, ¶65.]

CONCLUSION

Ismet Islami, for the reasons set forth in her Petition and this Reply, respectfully requests this Court to issue a Writ of Certiorari to review and reverse the precedential decision of the Supreme Court of the State of Wisconsin in this matter.

Respectfully submitted,

JOSEPH F. OWENS
Counsel of Record
LAW OFFICES OF
JOSEPH F. OWENS, LLC
2665 S. Moorland Road, Suite 200
New Berlin, WI 53151
Phone: (262) 785-0320
aolaw@bizwi.rr.com

- and -

DEBRA K. RIEDEL
LAW OFFICES OF DEBRA K. RIEDEL
2665 S. Moorland Road, Suite 200
New Berlin, WI 53151

Counsel for Petitioner, Ismet Islami