No. 24-680

IN THE

Supreme Court of the United States

DENNIS G. COLLINS, *et al.*,

Petitioners,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

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

REPLY BRIEF

ROBERT R. DUNCAN
JAMES H. PODOLNY
DUNCAN LAW GROUP, LLC
161 North Clark Street,
Suite 2550
Chicago, IL 60601

THOMAS C. CRONIN
Counsel of Record
CRONIN & CO., LTD.
120 North LaSalle Street,
20th Floor
Chicago, IL 60602
(312) 500-2100
tcc@cronincoltd.com

336897

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

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Statutes

Rules

Cited Authorities

Page

ARGUMENT

In its "Brief in Opposition to Petition for a Writ of Certiorari," Respondent Metropolitan Life Insurance Company ("MetLife") ignores governing law and attempts to re-frame the key issue. Respondent's proposed rule—any decision that is purportedly "supported by the record" passes muster—misstates the issue. In the case at bar, neither the Petitioners nor MetLife presented, argued, submitted, contended or even mentioned: (1) that Petitioners' Complaint failed to satisfy Federal Rule of Civil Procedure 8's plausibility requirement or Rule 9(b)'s particularity requirement; or (2) that one or more statutory defenses defeated Petitioners' Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS § 505/1 *et seq.*, and Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. § 407.020, claims. To suggest that the Eighth Circuit's opinion was "supported by the record" is mere deflection. Well-settled law is clear that MetLife waived any Rule 8, Rule 9(b) and statutory objections it had to Petitioners' Complaint by failing to raise them at any point before the Eighth Circuit issued its opinion. This is not a case where the record purportedly supports the circuit court's opinion. Here, there was no "supporting record;" only MetLife's waiver.

The best support for Petitioners' position comes from the Eighth Circuit's own opinion. There, the Court wrote: "We may affirm on any basis supported by the record." [Pet. App. 3a]. For that oh-so-reasonable proposition, the Court cited *U.S. ex rel. Dunn v. N. Memorial Health Care*, 739 F.3d 417, 419 (8th Cir. 2014). [Pet. App. 3a]. But that's the give-away—while the *Dunn* case includes the quoted line, it does ***not*** support the Eighth Circuit's conclusion in this case.

In *Dunn*, the Eighth Circuit explicitly acknowledged in the opening paragraphs that:

> [Defendant] North Memorial moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b). The district court dismissed the complaint under Rule 12(b)(6). We affirm the dismissal on the alternative ground that Dunn's complaint does not meet the requirements of Rule 9(b).

Dunn, 739 F.3d at 418. The distinction between the Eighth Circuit's erroneous decision in this case and its decision in *Dunn* is obvious: in *Dunn*, the Eighth Circuit affirmed dismissal on alternative Rule 9(b) grounds ***that the defendant explicitly raised below***.[1]

Dunn permitted the Eighth Circuit to rule on alternative grounds when "supported by the evidence"—that is, when the dispositive issue was at least raised below and there was no waiver. Here, MetLife waived any Rule 8 (plausibility), Rule 9(b) and statutory defenses it may have had by failing to raise them in the district court. Thus, *Dunn* supports this petition for writ of certiorari and contradicts the Eighth Circuit's decision in this case.

Petitioners also have demonstrated that the Eighth Circuit's decision in this matter conflicts with Fifth, Seventh, Tenth, and Eleventh Circuit precedent prohibiting appellate courts from raising alternative grounds for affirmance that the parties have already waived. What's

1. Surprisingly, Judge Loken, who authored the Eighth Circuit opinion in the instant case, also served on the panel in *Dunn*.

more, as Petitioners demonstrated in their opening brief, the Eighth Circuit's decision in this case even conflicts with the Supreme Court's decisions in *United States v. Sineneng-Smith*, 590 U.S. 371 (2020), *Wood v. Milyard*, 566 U.S. 463 (2012), and *Day v. McDonough*, 547 U.S. 198 (2006), in which the Supreme Court held that United States Courts of Appeals should adjudicate "case[s] shaped by the parties." *Sineneng-Smith*, 590 U.S. at 375.

In its Response, MetLife principally attempts to distinguish the Fifth, Seventh, Tenth, and Eleventh Circuit cases that Petitioners cited in their petition for writ of certiorari. [Br. Opp'n Pet. Writ Cert. at 6-9]. Such attempts are unavailing.

Petitioners cite *Coggin v. Longview Indep. Sch. Dist.*, 337 F.3d 459 (5th Cir. 2003), for the well-settled proposition that a "federal appellate court does not consider an issue not passed upon below." *Coggin*, 337 F.3d at 470. Specifically, "the grounds must at least have been proposed or asserted in that court by the movant." *Id.* MetLife attempts to dismiss this rule by arguing that it was annunciated in the *Coggin* dissent. [Br. Opp'n Pet. Writ Cert. at 7]. However, MetLife conveniently omits that the *Coggin* dissent cited a host of Fifth Circuit precedent to support the foregoing proposition—including *Johnson v. Sawyer,* 120 F.3d 1307, 1316 (5th Cir. 1997)), in which the Fifth Circuit stated, "'[a]lthough we can affirm a summary judgment on grounds not relied on by the district court, those grounds must at least have been proposed or asserted in that court by the movant.'" *Coggin*, at 470 n. 5 (quoting *Johnson,* 120 F.3d at 1316). Thus, the Coggin dissent merely restated an established Fifth Circuit rule. *See, e.g.*, *Johnson*, 120 F.3d at 1316 (internal citations omitted).

MetLife merely deflects the issue and refuses to address its waiver below and the resulting fact that Judge Loken and his colleagues wholly ignored the requirement annunciated in *Dunn* and other precedent across the circuits that "it would be reckless to affirm on a ground that the appellant had never had a chance to address because the appellee had failed to raise it." *Frederick v. Marquette Nat. Bank*, 911 F.2d 1, 2 (7th Cir. 1990).

Respondent claims that Petitioners have selectively quoted the Seventh Circuit opinion in *Frederick*. [Br. Opp'n Pet. Writ Cert. at 7-8]. Not true. Judge Posner, writing for the Court, does identify an exception to the rule of recklessness—but that exception is frivolousness:

> If the waived ground makes the suit frivolous, the dismissal can be affirmed on that ground. *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276-77 (7th Cir. 1988). A frivolous suit does not invoke the jurisdiction of the federal courts, meaning: a frivolous suit, because it is a complete waste of judicial effort, can be dismissed even if the parties do not recognize its frivolousness. When a statute expressly confines liability to X's and the defendant is a Y, the suit is frivolous. *Rush v. Macy's New York, Inc.*,775 F.2d 1554 (11th Cir. 1985).

Frederick, 911 F.2d at 2. *Frederick* upholds that almost universal rule in our adversary system—that is, the courts decide questions based on the facts and arguments presented by the parties, but if the matter is deemed entirely frivolous a court may so determine.

It is difficult, if not impossible, to see how a defense that an experienced litigant like MetLife[2] (which has been represented by competent counsel throughout the entirety of this litigation) fails to raise in a Rule 12(b)(6) motion to dismiss could be so obvious and irrefutable as to render a lawsuit "frivolous." MetLife wholly fails to explain how that could be the case. Thus, *Frederick* and the Seventh Circuit do not support the Eighth Circuit's decision here.

The Tenth Circuit too has determined that the proper role of the courts is to serve "as arbiter of the parties' arguments." *United States v. Woodard*, 5 F.4th 1148, 1154–55 (10th Cir. 2021). *Woodard* explicitly cited the critical "benefit of the parties' adversarial exchange" and that it would be "imprudent" to *sua sponte* affirm on grounds not addressed by the litigants. *Id.* MetLife's only response to this well-settled logic is that *Woodard* did not say that it "lacked the authority" to affirm *sua sponte* with no reliance on the record before the court. [Br. Opp'n Pet. Writ Cert. at 8]. Again, MetLife deflects, but acknowledges (as it must) that Tenth Circuit too contradicts the Eighth Circuit's "imprudent" ruling in this case.

MetLife's claim that the Tenth Circuit's opinions in *A.M. v. Holmes*, 830 F.3d 1123 (10th Cir. 2016), and *Velasquez v. Utah*, 857 F. App'x 971 (10th Cir. 2021) somehow allow United States Courts of Appeals to affirm district court judgments on alternative grounds the parties waived is wrong. In *Velasquez*, the Tenth Circuit affirmed the district court's claim preclusion-

2. A "Party Search" on PACER for "Metropolitan Life Insurance Company" yields more than 5,400 results.

based dismissal on alternative issue preclusion grounds because the plaintiff had the opportunity to address claim preclusion in the district court, the doctrines of claim preclusion and issue preclusion are "closely related," and "issue preclusion presents a legal question." 857 F. App'x at 975 (internal citations omitted). In *A.M.*, the Tenth Circuit merely interpreted two statutes' plain language on appeal. *A.M.*, 830 F.3d at 1146 n. 11.

Thus, neither *A.M.* nor *Velasquez* involved affirmance on alternative grounds that the parties waived. Therefore, *A.M.* and *Velasquez* are inapposite.

Petitioners also cite the Eleventh Circuit's opinion in *United States v. Campbell*, 26 F.4th 860, 872–74 (11th Cir. 2022) (appellate courts cannot affirm a judgment on alternative grounds that the parties waived *sua sponte*), *cert. denied*, 143 S. Ct. 95 (2022). *Campbell* involved the district court's denial of a motion to suppress evidence arising from a traffic stop. *Campbell* drew a specific distinction between issues that are "forfeited" in which a party fails to make a timely assertion of a right, and issues that are "waived" in which a party abandons a known right. *Id.* at 872. Waiver, of course, "directly implicates the power of the parties to control the course of the litigation." *Id*. *Campbell* holds that if a party waives an issue, "then courts must respect that decision." *Id*.

In its Response, MetLife never even addresses its own waiver of any defenses based on Rule 8's plausibility requirement, Rule 9(b)'s heightened pleading standard, and other statutory grounds. MetLife attempts to avoid the import of *Campbell* by dismissing it as a "criminal case" and ignoring *Campbell*'s explicit distinction between

waiver and forfeiture. [Br. Opp'n Pet. Writ Cert. at 9]. Such efforts to distinguish are ineffective. *Campbell* stands for the same principle annunciated by other circuit courts and embodied in the Federal Rules of Appellate Procedure—a principle overlooked by the Eighth Circuit in the present case: that it is the responsibility of the parties to present the issues for review and that courts' decisions are based on the facts and arguments presented. *See*, *e.g.*, Fed. R. App. P. 28(a)(5)-(8), (b).

The Supreme Court upholds this principle. In *Sineneng-Smith*, *Wood*, and *Day*, the Supreme Court held that Courts of Appeals should adjudicate "case[s] shaped by the parties rather than [] case[s] designed by [] appeals panel[s]." *Sineneng-Smith*, 590 U.S. at 375. *See also Wood*, 566 U.S. at 470-71 n.4, n.5 (internal citations omitted); *Day*, 547 U.S. at 202, 211 n. 11. Indeed, circuit courts do not have discretion to consider *sua sponte* an issue that a party previously waived. *Day*, 547 U.S. at 202, 211 n. 11.

Indeed, the Supreme Court has endorsed the same distinction between waived and forfeited defenses, holding that federal courts have "authority to resurrect only forfeited defenses" (i.e., defenses "that a party has merely failed to preserve"). *Wood*, 566 U.S. at 470-71 n.4, n.5. Equally important, this Court has repeatedly recognized the fundamental principle that "a court must accord the parties fair notice and an opportunity to present their positions before acting on its own initiative." *Day*, 547 U.S. at 210. *See also Lankford v. Idaho*, 500 U.S. 110, 126-27 (1991) (internal citations omitted) ("Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure. . . . If notice is not given, [] the adversary process is not permitted to function

properly[; and] there is an increased chance of error, and with that, the possibility of an incorrect result.").

MetLife does not—and cannot—overcome this authority. Instead, MetLife contends that such clear authority is nothing more than "unusual and extreme criminal cases." [Br. Opp'n Pet. Writ Cert. at 14]. Such contentions are not the stuff of compelling jurisprudential analysis. MetLife waived any reliance on Rule 8, Rule 9(b), and other statutory defenses that it completely failed to assert. The Eighth Circuit ignored that waiver and acted "as an inquisitor does" by affirming *sua sponte* without any support in the record and without any presentation by the parties. *See McNeil v. Wisconsin,* 501 U.S. 171, 181 n. 2 (1991).

CONCLUSION

"Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003). *See also Sineneng-Smith*, 590 U.S.at 376 ("[Circuit courts] do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.").

By *sua sponte* affirming dismissal of Petitioners' fraud, fraudulent concealment, ICFA, and MMPA claims on alternative grounds that the parties failed to raise in both the District Court and on appeal, the Eighth Circuit abandoned the "principle of party presentation," assumed the role of an "inquisitor," and "compromise[d] the essential

character of the court" in the United States' adversarial justice system. The Eighth Circuit's affirmance with prejudice even denied Petitioners the opportunity to cure any defect. At a minimum, the Eighth Circuit should have remanded this case to provide an opportunity for amendment. Again, MetLife in its Response wholly ignores this argument and its own waiver, and never even mentions the fact that Petitioners were unfairly denied any opportunity to respond to the Eighth Circuit's concerns or amend their pleading.

Because the Eighth Circuit's decision in this case conflicts with Supreme Court and other precedent that upholds the essence of the adversarial system and, thus, "so far depart[s] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power," the Court should grant Petitioners' writ of certiorari. Sup. Ct. R. 10(a), (c). Alternatively, the Court should summarily reverse the decision below.

Respectfully submitted,

Robert R. Duncan
James H. Podolny
Duncan Law Group, LLC
161 North Clark Street,
Suite 2550
Chicago, IL 60601

Thomas C. Cronin
Counsel of Record
Cronin & Co., Ltd.
120 North LaSalle Street,
20th Floor
Chicago, IL 60602
(312) 500-2100
tcc@cronincoltd.com