

NO. 26-87

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IN THE  
**Supreme Court of the United States**

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DIANA STEVENS-REYNOLDS,  
Petitioner,

v.

WILSHIRE INSURANCE COMPANY AND  
IAT INSURANCE GROUP,  
Respondents.

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit

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**BRIEF IN OPPOSITION**

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ROBERT I. SIEGEL  
TARA E. CLEMENT  
*Counsel of Record*  
LINDA E. GONZALES  
Laborde Siegel, LLC  
701 Poydras Street, 48<sup>th</sup> Floor  
New Orleans, LA 70139-4800  
Telephone: (504) 561-0400  
Email: rsiegel@labordesiegel.com  
tclement@labordesiege.com  
lgonzales@labordesiege.com  
Counsel for Respondents, Wilshire  
Insurance Company and IAT  
Insurance Group

**List of All Parties**

Petitioner/Appellant Diana Stevens-Reynolds

Respondents/Appellees Wilshire Insurance Company  
and IAT Insurance Group, Inc.

**Rule 29.6 Corporate Disclosure Statement**

Wilshire Insurance Company is wholly owned by Occidental Fire & Casualty Co. of North Carolina, which itself is wholly owned by IAT Insurance Group, Inc.

IAT Insurance Group, Inc., is wholly owned by IAT Reinsurance Company Ltd., which is wholly owned by Goose Creek Capital, Inc. 100% of the voting shares of Goose Creek, Capital, Inc. are privately held.

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**BRIEF IN OPPOSITION**

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**I. STATEMENT OF THE CASE**

This case involved first party property claims related to Hurricane Laura and Delta damage to (1) Petitioner’s four rental properties located in Lake Charles, Louisiana—2029 See Street, 2510 Mary Street, 2222 Woodring Street, and 213 Decker Street (collectively hereinafter referred to as the “Rental Properties”) and (2) Petitioner’s motel buildings located at 2208 Commercial Street, Lake Charles, Louisiana (hereinafter referred to as the “Motel”). Wilshire Insurance Company (“Wilshire”) issued Commercial Policy Number CF00027617 to Petitioner

for the Rental Properties for the policy period of May 10, 2020, to May 10, 2021 (the “Rental Policy”) and Commercial Policy Number CF00027589 to Petitioner for the Motel for the period April 1, 2020, to April 1, 2021 (the “Motel Policy”).

During the course of the case, the parties participated in motion practice. After all motions were decided by the District Court, the remaining claim at issue for trial was whether the second payment made by Wilshire was untimely, and if so, was Wilshire arbitrary, capricious, and without probable cause for the alleged untimely payment.<sup>1</sup>

At the beginning of the trial of this matter, Respondent IAT Insurance Group was dismissed because this entity is a holding company and had not issued either of the policies in question.<sup>2</sup> Following the trial, the District Court found that Petitioner failed to prove by a preponderance of the evidence that Wilshire was in bad faith for its handling of Petitioner’s claims and entered judgment in favor of Wilshire.<sup>3</sup>

Petitioner appealed the District Court’s summary judgments for Wilshire on loss valuation and the Motel policy’s roof exclusion, the District Court’s exclusion of expert testimony, and the District Court’s finding that Wilshire did not act in bad faith.<sup>4</sup> The United States Court of Appeals for the Fifth

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<sup>1</sup> ROA.2483.

<sup>2</sup> ROA.2542-2543.

<sup>3</sup> ROA.2494-2495.

<sup>4</sup> Appendix C at p.33.

Circuit Court affirmed the District Court’s judgments on all issues.<sup>5</sup>

### A. Relevant Procedural Background

Petitioner filed her Complaint in the U.S. District Court for the Western District of Louisiana on May 7, 2022.<sup>6</sup> The parties participated in the District Court’s Hurricane Laura and Delta Streamlined Settlement Process and the Special Master of that program certified their compliance on April 24, 2023, allowing the case to proceed to litigation.<sup>7</sup> The District Court then issued its Scheduling Order on May 5, 2023, setting the trial for January 29, 2024, the deadline for Petitioner to identify experts and provide her expert disclosures or reports as October 31, 2023, and the deadline for the filing of motions to compel discovery, *Daubert* motions, and motions *in limine* as January 2, 2024.<sup>8</sup>

On June 26, 2023, Respondents filed the motions for partial summary judgment that were at issue in Petitioner’s appeal to the Fifth Circuit: that both Policies paid losses on an actual cash value (“ACV”) basis only (the “Loss Valuation Motion”) and that the Motel Policy did not provide coverage for the losses claimed by Petitioner due to the Roof Exclusion Endorsement of that Policy (the “Roof Exclusion Motion”).<sup>9</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> ROA.26.

<sup>7</sup> ROA.120.

<sup>8</sup> ROA.121-122.

<sup>9</sup> ROA.128-230; ROA.352-542.

After the expiration of the original deadline for Petitioner to file any oppositions to Respondents' motions for partial summary judgment, and following the enrollment of Petitioner's third counsel of record, Petitioner filed a motion to extend the opposition deadline.<sup>10</sup> The District Court granted this request, setting a deadline for Petitioner's oppositions to the motions of August 7, 2023, and for Respondents' replies of August 14, 2023.<sup>11</sup> Petitioner timely filed an opposition to the Roof Exclusion Motion.<sup>12</sup> Filed with her opposition were five documents consisting of claim correspondences between Petitioner's paralegal Bruce Copeland ("Copeland") and Wilshire and between Petitioner's insurance agent and the underwriter, and a receipt for roofing shingles dated in 2006.<sup>13</sup> Petitioner filed no opposition to the Loss Valuation Motion. Respondents timely filed replies to both Motions on August 14, 2023.<sup>14</sup>

On August 23, 2023, the District Court issued its memorandum ruling and order on the Loss Valuation Motion, holding that the Petitioner did not elect to purchase the optional replacement cost coverage under the Policies, and, thus, Petitioner's losses are only to be paid on an ACV basis.<sup>15</sup> On August 25, 2023, the District Court issued its memorandum ruling and order on the Roof Exclusion Motion holding that Petitioner failed to produce any

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<sup>10</sup> ROA.559.

<sup>11</sup> ROA.562.

<sup>12</sup> ROA.581-585.

<sup>13</sup> ROA.586-591.

<sup>14</sup> ROA.597-599 (Reply Memorandum on Loss Valuation); ROA.604-611 (Reply Memorandum on Roof Exclusion).

<sup>15</sup> ROA.1096-1100.

summary judgment evidence that the Roof Exclusion did not apply and that, consequently, Petitioner's claimed damages to the Motel were excluded by the Motel Policy. The District Court dismissed Petitioner's claims as to the Motel with prejudice.<sup>16</sup>

In November 2023, Respondents propounded written discovery on Petitioner and requested the deposition dates for the depositions of Petitioner, Copeland, and three other witnesses.<sup>17</sup> After receiving no response to the written discovery, and after Petitioner and four other witnesses failed to appear for their confirmed depositions, Respondents filed a Motion to Compel on January 2, 2024, asking the District Court to require Petitioner to respond to discovery and for the witnesses appear for their depositions.<sup>18</sup>

That same day, Respondents also filed a motion *in limine* to exclude any undisclosed expert witnesses (the "Motion *in Limine*"), asking the District Court for an order prohibiting Petitioner from offering any expert opinions, since no experts had been disclosed and no expert reports were provided by the Scheduling Order's deadline of October 31, 2023, or thereafter.<sup>19</sup> On January 3, 2024, counsel for Respondents was contacted by Petitioner's counsel's office and advised that lead counsel was hospitalized and requested a continuance of the trial, which was

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<sup>16</sup> ROA 1109-1114.

<sup>17</sup> ROA 1170-1187; ROA.1192.

<sup>18</sup> ROA 1155-1156.

<sup>19</sup> ROA 1315-1316.

set for January 29, 2024.<sup>20</sup> Respondents advised that they would not oppose a motion to continue the trial on the condition that a new trial date would not reset those deadlines established in the May 5, 2023 Scheduling Order that had already passed as of January 3, 2024.<sup>21</sup> Petitioner agreed to this condition and filed a motion to continue trial on January 9, 2024.<sup>22</sup> The District Court granted Petitioner's motion for continuance, resetting the trial to September 16, 2024, and ordered that all deadlines that had lapsed would not be reinstated.<sup>23</sup> In addition, this Order reset the deadlines related to Respondents' pending motion to compel and motion *in limine*, with responses to both due by January 24, 2024, and replies by January 31, 2024.<sup>24</sup>

On January 10, 2024, Petitioner provided her responses to Respondents' written discovery.<sup>25</sup> In her opposition to the motion to compel, filed late on January 25, 2024, Petitioner claimed that providing these responses mooted the motion to compel.<sup>26</sup> The next day, also late, Petitioner filed an opposition to Respondents' motion *in limine*, claiming that because Respondents were aware of paralegal Copeland's involvement in the case, they were aware of all experts Petitioner may call to testify at trial, making the motion *in limine* moot.<sup>27</sup> Petitioner did not,

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<sup>20</sup> ROA 1335.

<sup>21</sup> ROA 1335.

<sup>22</sup> ROA 1335.

<sup>23</sup> ROA 1341.

<sup>24</sup> ROA 1341.

<sup>25</sup> ROA 1344.

<sup>26</sup> ROA 1342.

<sup>27</sup> ROA 1346-1347.

however, provide any expert reports or disclosures with her opposition or directly to Respondents. Respondents timely filed their replies to the motion to compel and the motion *in limine* on January 31, 2024.<sup>28</sup>

The District Court's memorandum ruling on Respondents' motion to compel noted that Petitioner's discovery responses were not before the Court to review.<sup>29</sup> Given that the trial had been continued and the District Court could not review the responses, the Court allowed Petitioner's counsel until March 15, 2024, to supplement the discovery responses.<sup>30</sup> The District Court also ordered Petitioner's counsel to work with Respondents' counsel to schedule and complete the depositions of Petitioner, Copeland, and the three other witnesses by April 12, 2024.<sup>31</sup>

The District Court granted Respondents' motion *in limine* on February 28, 2024, concluding that the presumptive sanction of Fed R. Civ. P. 37(c) was appropriate and ordering that Copeland and any other expert witness who had not provided a report to Respondents be excluded from testifying as an expert witness.<sup>32</sup> The District Court noted that Petitioner presented no explanation or evidence to suggest that the failure to provide expert disclosures or reports is substantially justified, and that Petitioner had never

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<sup>28</sup> ROA 1348-1651 (Reply to Motion *in Limine*); ROA.1325-1355 (Reply to Motion to Compel).

<sup>29</sup> ROA 1358.

<sup>30</sup> ROA 1358.

<sup>31</sup> ROA 1358.

<sup>32</sup> ROA 1362.

requested an extension of the deadline for expert reports.<sup>33</sup>

At the trial of this matter, the District Court dismissed Petitioner's separate Hurricane Delta claim for the Rental Properties. The Court noted that there had been an inspection of the properties after Hurricane Delta and Petitioner could not differentiate damage between the Laura and Delta claims.<sup>34</sup> Briefly, the claim investigation at the Rental Properties occurred as follows:

After the landfall of Hurricane Laura on August 27, 2020, Petitioner filed a claim for damages to the Rental Properties with Wilshire. Wilshire, through independent adjuster Transcynd, inspected the Rental Properties on September 13, 2020.<sup>35</sup> Following this inspection, on September 22, 2022, Wilshire issued payment for damages to each of the Rental Properties on an ACV basis, less the Rental Policy deductible.<sup>36</sup> Thereafter, two things happened, although the timing remains unclear: (1) Hurricane Delta made landfall in the Lake Charles area and (2) Petitioner hired public adjuster Jamicia Fisher ("Ms. Fisher") of Frontline Adjusting ("Frontline").

Ms. Fisher advised Wilshire of her involvement in Petitioner's claims on October 23, 2020, and

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<sup>33</sup> ROA 1362.

<sup>34</sup> Appendix E at p. 39.

<sup>35</sup> ROA.2608. See also ROA.2060 (Transcynd Report dated 9/21/2020).

<sup>36</sup> ROA.2578. See also ROA.2061 (Wilshire letter dated September 22, 2020).

requested a reinspection of the Rental Properties.<sup>37</sup> Following a joint reinspection with Transcynd and Frontline on November 14, 2020, Frontline completed its estimate of damages on November 28, 2020.<sup>38</sup> The Frontline estimate included line items for house leveling relating to alleged shifting of all four Rental Properties. Wilshire advised that an engineer would be retained to investigate and inspect the Rental Properties in connection with these claimed damages.<sup>39</sup>

Stephens Engineering inspected all Rental Properties on January 29, 2021, and provided its report concerning the claimed damages to Wilshire on February 11, 2021.<sup>40</sup> That same day, Wilshire provided the Stephens Engineering report, which contained no calculation of the value of the observed damages, to independent adjuster Transcynd in order for Transcynd to make the necessary adjustments to its estimate in line with the Stephens Engineering report.<sup>41</sup> This estimate was completed on March 29, 2021.<sup>42</sup> Ready to issue an undisputed payment, Wilshire called Petitioner's counsel on March 31, 2021, to obtain payment instructions.<sup>43</sup> Wilshire followed up on this request via phone and email on April 7, 2021, and once Petitioner's counsel provided the payment information, Wilshire issued the

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<sup>37</sup> ROA.4223-4224.

<sup>38</sup> ROA.2063.

<sup>39</sup> ROA.4076.

<sup>40</sup> ROA.3242.

<sup>41</sup> ROA.4030.

<sup>42</sup> ROA.3159.

<sup>43</sup> ROA.4013.

payment the next day on April 8, 2021.<sup>44</sup>

Following the issuance of this undisputed payment, on April 12, 2021, six months after Hurricane Delta, Petitioner reported a claim for damage to the Rental Properties as a result of Hurricane Delta.<sup>45</sup> In response, Wilshire advised that the buildings were inspected after the reported date of loss of October 9, 2020, and that all undisputed damages had been paid.<sup>46</sup> The only response to Wilshire's inquiries regarding the newly filed Delta claim was from Copeland, who advised that:

The purpose of the additional claim is to ensure all damages claimed are addressed. Because we were retained after both storms, we are unable to separate the damages we see. However, if the total damages at the time of the inspection with the engineer are covered, then the new claim will be moot. In the event the damages exceed the limits, we will be seeking additional payments under the Delta claim number.<sup>47</sup>

As the District Court noted, because Petitioner could not differentiate between the Delta and Laura claims, there could not be any breach of contract claim

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<sup>44</sup> ROA.4012; ROA.4008; ROA.4006; ROA.2586.

<sup>45</sup> ROA.2622; ROA.4367.

<sup>46</sup> ROA.4366.

<sup>47</sup> ROA.4365.

as to Petitioner's Delta claim.<sup>48</sup> Under Louisiana law, statutory bad faith penalties do not stand alone and there is no cause of action for bad faith against the insurer absent a valid, underlying insurance claim.<sup>49</sup> Thus, the District Court dismissed any bad faith separate claims concerning Delta.<sup>50</sup>

On September 19, 2024, the District Court issued its trial opinion regarding the only remaining claim, whether Wilshire was in bad faith as to the second payment on the Rental Properties' claim.<sup>51</sup> The District Court found that this payment was timely and that, additionally, Petitioner had presented no evidence to establish that Wilshire's handling of her claim was arbitrary, capricious, and without probable cause, the requirements for bad faith under Louisiana R.S. 22:1892.<sup>52</sup>

### **B. Petitioner's Misstatements of Fact**

Respondents are aware of their obligation to the Court to point out Petitioner's misstatements of fact and law that bear on what issues would be properly before the Court if certiorari were granted. Accordingly, Respondents will address Petitioner's misstatement of facts here.

Petitioner refer to several record documents to establish her version of the procedural history of this

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<sup>48</sup> Appendix E at p. 39.

<sup>49</sup> Appendix C at p. 35

<sup>50</sup> Appendix E at p. 39.

<sup>51</sup> *Id.* R. Doc 163 at p. 2.

<sup>52</sup> *Id.* at p. 50. p. 13.

case. The first is titled, “Dkt. 45 (August 23, 2023): Limited recovery by applying Actual Cash Value (“ACV”) without assessing policy exceptions.”<sup>53</sup> As explained above, Petitioner filed no opposition to Respondents’ Loss Valuation Motion. As the District Court noted in its memorandum ruling, while the policy contains narrow exceptions to valuation on an ACV basis, the Petitioner did not argue that one of those exceptions applied.<sup>54</sup> On appeal, Petitioner asserted that the policies contain several exceptions when ACV is not used but she did not and could not show that any of the limited exceptions applied to her claims.<sup>55</sup>

Next Petitioner refers this Court, “Dkt. 55 (December 18, 2023): The Court granted summary judgment for Wilshire, misallocating the evidentiary burden and ignoring genuine issues of material fact”<sup>56</sup> The District Court record document no. 55 is the District Court’s Judgment on Respondent’s Motion for Summary Judgment on Loss of Business Income.<sup>57</sup> This ruling was not appealed to the Court of Appeal, and is inappropriate for review by this Honorable Court.<sup>58</sup> By way of further explanation, Respondents filed the Motion on Business Income on November 29, 2023. Petitioner showed that she elected not to purchase the optional Business Income coverage on either the Rental or Motel Policies. Furthermore, the

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<sup>53</sup> Petition at p. 11.

<sup>54</sup> ROA.1099

<sup>55</sup> Appendix C at p. 33

<sup>56</sup> Petition at p. 11

<sup>57</sup> ROA.1138

<sup>58</sup> *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

Motel Policy stated explicitly that the Motel buildings were vacant. As such, the Motel Policy also contained a Vacancy Permit Endorsement, which excluded additional causes of loss because the Motel buildings were vacant. Petitioner filed no opposition. The District Court determined that it was undisputed that the motel was vacant and the policies did not provide any coverage for loss of business income or related coverage.<sup>59</sup> Additionally, the District Court noted that Petitioner's Complaint also alleged that the "Policy for the 'properties' did not provide any coverage for loss of rents".<sup>60</sup> Therefore, it's a misstatement of fact and law that the District Court misallocated the evidentiary burden and ignored genuine issues of material fact in granting this motion.

The Petitioner asserts that, "Dkt. 70 (January 9, 2024): Set discovery deadlines that later became the basis for excluding expert testimony."<sup>61</sup> The District Court record document no. 70 is the District Court's memorandum order denying Petitioner's Motion for Reconsideration of the Summary Judgment on Loss of Business Income.<sup>62</sup> This ruling was not appealed to the Court of Appeals, and is inappropriate for review by this Honorable Court. By way of further explanation, Petitioner requested reconsideration of the motion on the merits, explaining that she mistakenly calendared the deadline for her opposition and requested permission

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<sup>59</sup> ROA.1137.

<sup>60</sup> ROA.1136.

<sup>61</sup> Petition at p. 11

<sup>62</sup> ROA.1339-1340.

to file an opposition, which Respondents opposed. The District Court denied the Motion for Reconsideration, noting that it granted the Business Income Motion based on the plain language of the policies and no genuine issues of material fact exist regarding business income coverage. This order sets no discovery or any other deadlines.

Furthermore, the deadline for expert disclosures and reports was set by the District Court's scheduling Order entered on May 5, 2023, which, as explained above, set Petitioner's deadline to furnish her expert disclosures on or before October 31, 2023.

Petitioner next refers to "Dkt. 92 (April 19, 2024)" as support for her claim that the District Court, "[g]ranted motions in limine excluding expert testimony and reports critical to distinguishing hurricane damage"<sup>63</sup> The District Court record document no. 92 is the District Court's memorandum order denying Petitioner's Motion for Reconsideration of the Roof Exclusion Motion.<sup>64</sup> Petitioner had attempted to create ambiguity in the Motel Policy roof exclusion endorsement by arguing that an empty, optional checkbox defeats the Roof Exclusion.<sup>65</sup> The District Court determined that this argument was "completely nonsensical" and the Fifth Circuit rejected it as "counterintuitive".<sup>66</sup> Moreover, this order did not concern expert testimony.

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<sup>63</sup> Petition at p. 11

<sup>64</sup> ROA.1393-1394

<sup>65</sup> *Id.*

<sup>66</sup> ROA.1394; Appendix C at p. 33.

Petitioner cites to “Dkt. 164 (September 19, 2024): Final judgment dismissing Petitioner’s motel claim and denying bad faith claims.”<sup>67</sup> The District Court record document no. 164 is the Judgment pursuant to the District Court’s Trial Opinion. Petitioner’s Motel claims were dismissed over a year before that on August 25, 2023, when the District Court granted the Roof Exclusion Motion and these claims were not at issue in the trial of this matter.

Petitioner then references two other documents relating to her newly claimed discovery compliance argument (“The record reveals a critical factual dispute about discovery compliance”<sup>68</sup>). To the contrary, the record reveals that there is no factual dispute about discovery compliance. Petitioner and four other witnesses failed to appear for confirmed depositions. Petitioner did not respond to written discovery until after Respondents filed their motion to compel on January 2, 2024. The District Court, in its ruling on the motion to compel, allowed Petitioner until March 15, 2024, to supplement her deficient discovery responses and until April 12, 2024, to complete the depositions requested by Respondents. The deadline for providing expert disclosures and reports, however, was never extended, nor did Petitioner request that it be extended.

The Petitioner claims that on, “January 10, 2024: Petitioner’s counsel provided comprehensive discovery responses via Dropbox Link, including the

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<sup>67</sup> Petition at p. 11

<sup>68</sup> Petition at p. 11

Copeland Estimate and all expert materials.” Petitioner further maintains that record document “75-1, page 3, contains email confirmation with the subject line ‘Reynolds v. Wilshire Discovery Responses via Dropbox.’ Opposing Counsel responded the same day: ‘Got it, thanks.’” The District Court record document no. 75-1 is only two pages and does not include the response “Got it, thanks” from Respondents’ counsel.<sup>69</sup> Furthermore, the document production provided by Petitioner’s counsel on January 10, 2024, did not include the Copeland estimate or any other “expert materials”. Petitioner has never provided any expert disclosures or reports in compliance with Fed. R. Civ. P. 26(a)(2)(B), which requires that expert reports be prepared and signed by the witness and include (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.

As to the second document, the Petition cites to, “January 29, 2024: Despite having acknowledged receipt, opposing counsel filed a Reply Memorandum (Doc. 77) claiming they had ‘never received’ the estimates and that ‘Plaintiff has never provided a

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<sup>69</sup> ROA.1344-1345.

report or other documents from Copeland.”<sup>70</sup> The District Court record document no. 77 is Respondents’ reply to the Motion *in Limine*, not Respondents’ reply to their motion to compel.<sup>71</sup> Petitioner is conflating the two motions. Regardless, as stated above, Petitioner never provided, as of January 29, 2024, and through the present day, expert disclosures or reports that comply with Fed. R. Civ. P. 26. Petitioner’s opposition to the Motion *in Limine* did not contend that she provided compliant disclosures, but simply insisted that, “Defendants are fully aware of all experts who may called [sic] to testify at trial of this matter.”<sup>72</sup>

Petitioner next asserts that, “The district court excluded expert testimony without resolving this factual dispute or making findings regarding willfulness, bad faith, prejudice, or availability of less drastic motions.”<sup>73</sup> As shown above, there was no factual dispute regarding whether Petitioner had made expert disclosures in compliance with Fed. R. Civ. P. 26(a)(2) by the Court’s deadline of October 31, 2023. In its ruling granting the Motion *in Limine*, the District Court specifically found that Petitioner had failed to explain why she had not provided expert disclosures or reports and that Respondents would be prejudiced by Petitioner’s failure to disclose expert witnesses. The Fifth Circuit found no abuse of discretion in this decision.

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<sup>70</sup> Petition at p. 12

<sup>71</sup> ROA.1348-1351.

<sup>72</sup> ROA.1346

<sup>73</sup> Petition at p. 12

Petitioner also claims that, “The court then granted summary judgment on technical causation issued that required the excluded expert testimony.”<sup>74</sup> However, no summary judgments were granted after the District Court issued its order on the Motion *in Limine* on February 28, 2024. The summary judgments Petitioner challenged in her appeal on the Loss Valuation Motion and the Roof Exclusion Motion, were issued by the District Court over six months prior to the exclusion of Petitioner’s undisclosed experts, on August 23, 2023, and August 25, 2023. Even though Petitioner could have submitted expert evidence or affidavits in opposition to these motions, because these motions were before the District Court well before the October 31, 2023 expert deadline, none were submitted. In April of 2024, following the decision on the Motion *in Limine*, Petitioner did file a motion for reconsideration of the Roof Exclusion Motion, which the District Court denied. But again, Petitioner did not claim anywhere in her motion for reconsideration that this issue required expert testimony.

As to the appellate procedural history the Petition asserts, “The Fifth Circuit affirmed without addressing the due process implications of excluding expert testimony based on disputed facts or the propriety of granting summary judgment on issues requiring the excluded expert proof.”<sup>75</sup> As stated above, there were no disputed facts that led to the exclusion of expert testimony. Petitioner failed to comply with the District Court’s scheduling

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<sup>74</sup> Petition at p. 12.

<sup>75</sup> Petition at p. 12.

deadlines, failed to provide expert disclosures, and failed to explain her failure to provide expert disclosures. No summary judgments were granted after the exclusion of undisclosed expert testimony, let alone any which discussed expert proof.

Finally, Petitioner states, “When opposing counsel claimed materials were ‘never received’ despite having acknowledged receipt in writing, they violated these fundamental duties of candor”<sup>76</sup> Petitioner is conflating receipt of deficient discovery responses with an unsupportable claim that she provided an estimate and “expert materials” after the filing of Respondents’ Motion *in Limine*. Petitioner never provided compliant expert disclosures, as she was required to do. Furthermore, although defense counsel received Petitioner’s discovery responses after the filing of the motion to compel, the responses were deficient and did not address the outstanding depositions. The motion to compel was well-founded at the time it was filed and the time it was submitted to the district court for decision, as was the Motion *in Limine*.

## II. SUMMARY OF THE ARGUMENT

The Petitioner fails to identify any compelling reason that would warrant the exercise of this Honorable Court’s supervisory power of review. The Petition is based upon a procedural narrative that is not supported by the record and asks this Court to consider questions presented that were not previously raised by Petitioner nor ruled upon by the Fifth

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<sup>76</sup> Petition at p. 20.

Circuit. The courts below applied settled federal procedural rules and Louisiana substantive law to an ordinary first party property insurance dispute arising from alleged damage caused by Hurricanes Laura and Delta. Their rulings neither create a conflict among the Circuit Courts of Appeal nor depart from the accepted course of judicial proceedings.

The Petition's central argument—that the District Court first excluded expert evidence and then granted summary judgment on technical causation issues that required that evidence—is incorrect. The District Court ruled on the summary judgments on loss valuation provisions and the roof exclusion of the applicable policies in August 2023, over six months before its February 2024 order excluding any expert evidence that was not disclosed pursuant to Federal Rule of Civil Procedure 26(a)(2)(B) and the District Court's Scheduling Order. Indeed, the Petitioner neither opposed the loss valuation motion nor identified any summary judgment evidence creating a genuine dispute as to non-roof damage at the motel property. Additionally, the Petitioner did not seek an extension of the expert disclosure deadline or offer the District Court any reason for not complying. The Fifth Circuit reviewed each ruling under the appropriate standard and affirmed the rulings of the District Court.

The Petition also identifies no genuine conflict among the Circuit Courts of Appeal. The authorities cited by the Petitioner concern sanctions under provisions other than Rule 37(c)(1). The Courts of

Appeals cases that Petitioner relies upon do not require a court to make a finding of willfulness or bad faith for sanctions for failure to disclose experts..

More importantly, Petitioner's Questions Presented were not raised in the Fifth Circuit. Specifically, she did not argue to the Fifth Circuit that the District Court was required to make findings of willfulness, bad faith, or prejudice, and consider other sanctions. She also did not argue that the summary judgments depended on excluded expert testimony, or that the District Court had an independent duty to investigate her compliance with the expert disclosures. Finally, even if Petitioner's claims were properly preserved, she seeks error correction based on factual assertions that conflict with or mischaracterize the record.

Here, the District Court interpreted unambiguous policy language, enforced its Scheduling Order deadline applying a common consequence for failing to make the required expert disclosures, and, after a trial on the merits, found no bad faith in Wilshire's handling of the claim. The Fifth Circuit found no reversible error. Because the Petition presents no important question of federal law, no conflict among the Circuit Courts of Appeals, and no departure from usual judicial proceedings, the Petition for a Writ of Certiorari should be denied.

### III. ARGUMENT - REASONS FOR DENYING THE WRIT OF CERTIORARI

#### A. Issues Not Raised to Appellate Court

The Supreme Court has adopted a general rule that provides that it will not ordinarily consider issues that were neither previously raised by a party seeking review, nor considered by the United States Court of Appeals.<sup>77</sup> In the present Petition, Petitioner seeks this Court's review based upon three separate questions presented. However, none of the Petitioners' questions were raised before the Court of Appeals for the Fifth Circuit, nor were they considered by that court.

Petitioner's first question presented is "[w]hether federal courts may exclude expert testimony...without making findings regarding willfulness, bad faith, or prejudice, and without considering less drastic sanctions."<sup>78</sup> However, in her appeal to the Fifth Circuit, Petitioner did not argue that the District Court was required to make findings regarding willfulness or bad faith. The four factors that Petitioner asked the Fifth Circuit to consider in reviewing the District Court's exclusion of expert testimony are the importance of the testimony, the explanation of the party for its failure to comply with the court's order, the potential prejudice that would arise from allowing the testimony, and the availability of a continuance to cure the prejudice,

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<sup>77</sup> *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

<sup>78</sup> Petition at p. 2.

which are the very factors that the Fifth Circuit considered.<sup>79</sup> Petitioner requests for the first time in her Petition to this Court for a different standard to be applied.

Petitioner's second question presented is "[w]hether federal district courts may grant summary judgment on technical causation issues requiring expert testimony after excluding such testimony on procedural grounds."<sup>80</sup> Not only is this question factually inconsistent with the procedural history of this case, but Petitioner also never raised the lack of expert testimony as an error in granting any summary judgment by the District Court. Rather, Petitioner argued to the Court of Appeals that, as to the Loss Valuation Motion, the policies contain exceptions for when ACV is not used. As to the Roof Exclusion Motion, the Petition argues that a check box in the schedule was not marked and that the Motel suffered damage unrelated to the roof, a contention for which Petitioner could point to no supporting summary judgment evidence of a factual dispute. Petitioner did not argue that summary judgment was inappropriate on either motion due to a lack of expert evidence in opposition. Indeed, at the time that these motions were before the District Court in August of 2023, the established expert deadline of October 31, 2023, had not yet passed and Petitioner was free to submit any expert discovery, reports, affidavits, or testimony in opposition to these motions; but no such expert evidence was submitted.

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<sup>79</sup> Appellant's brief at p.9; Appendix C at p. 34.

<sup>80</sup> Petition at p. 2.

Petitioner's third question is "[w]hether courts have a duty of investigate claims of discovery non-compliance ... before imposing case ending sanctions."<sup>81</sup> Again, not only is Petitioner presenting a question to this Court for consideration that patently misstates the procedural history of this case, but Petitioner has also never before argued, either to the District Court or the Court of Appeals, that she complied with her expert disclosure obligations.

While the Supreme Court has recognized deviations from the general rule to not consider issues not pressed or passed on below, it is only in exceptional cases that the Court reviews a question not raised in the lower court.<sup>82</sup> Petitioner has failed to make any showing that this case is somehow exceptional. Consequently, the general rule should apply, and Petitioner's questions should not be considered by this Court.

**B. Petitioner has Provided No Compelling Reasons for this Court to Exercise its Supervisory Review.**

Petitioner relies on misstatements of fact and law to try to establish reasons for granting her Petition in accordance with Rule 10. This matter does not meet the criteria for this Honorable Court to grant certiorari.

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<sup>81</sup> Petition at p. 2

<sup>82</sup> *Lawn v. United States*, 355 U.S. 339, 78 S.Ct. 311 (1958), *reh den*, 355 U.S. 967, 78 S.Ct. 529.

1. Petitioner manufactures a “circuit split” where none exists.

Petitioner argues that a split amongst the appellate circuits exists as to whether courts must find willfulness or bad faith prior to excluding expert testimony. However, the cases Petitioner uses to support her position do not concern exclusions under Fed. R. Civ. P. 37(c)(1), for failure to disclose or supplement. For example, Petitioner cites *Freeland v. Amigo*, 103 F.3d 1271 (6th Cir.1997), to show that the Court of Appeals for the Sixth Circuit requires a finding of willfulness or bad faith prior to expert exclusion. *Freeland v. Amigo*, however, concerned sanctions under Rule 37(b), which governs sanctions for failure to comply with a court order, not the general expert disclosures addressed by Rule 37(c)(1). In that case, the District Court precluded plaintiffs’ expert witnesses from testifying at trial as a sanction for discovery abuses: plaintiffs’ experts were timely disclosed, but plaintiffs’ counsel did not respond to repeated requests from defense counsel to depose plaintiffs’ expert witnesses prior to the discovery cutoff date.<sup>83</sup> In review of this decision, the Sixth Circuit employed that circuit’s “*Regional Refuse* test”: a consideration of 1) whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; 2) whether the adversary was prejudiced by the party's failure to cooperate in discovery; 3) whether the party was warned that failure to cooperate could lead to the sanction; and 4) whether less drastic sanctions were first imposed or

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<sup>83</sup> *Freeland v. Amigo*, 103 F.3d 1271, 1274 (6th Cir. 1997).

considered.<sup>84</sup> However, the “*Regional Refuse* test” was established in 1988 before Rule 37(c)(1) was passed by Congress.<sup>85</sup> The Sixth Circuit has noted that the test for a 37(c)(1) sanction is very simple: “the sanction is mandatory unless there is a reasonable explanation of why Rule 26 was not complied with or the mistake was harmless.”<sup>86</sup> The Sixth Circuit continues to apply the “*Regional Refuse* test” to sanctions under Rule 37(b) or Rule 41(b), but sanctions under those rules are not at issue in this matter.<sup>87</sup>

Petitioner claims that the Tenth Circuit requires “clear evidence of willfulness, bad faith or fault’ before expert exclusion,” relying on *Wilson v. Muckala*, 303 F. 3d 1207. However, not only does the *Wilson v. Muckala* case not concern sanctions under Rule 37(c)(1), the case does not contain any of the quotations Petitioner has attributed to it. The case referenced by Petitioner for the Second Circuit, *Bobal v. Rensselaer Polytechnic Inst.*, 916 F. 2d 759 (2d Cir. 1990), involves a dismissal under Rule 37(d), a party’s failure to appear for her own deposition. Contrary to Petitioner’s assertions, and similar to the Sixth Circuit, the Second Circuit has held that a showing of bad faith is not required to exclude evidence under Rule 37(c)(1).<sup>88</sup> In fact, the Second Circuit considers

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<sup>84</sup> *Id.* at 1277.

<sup>85</sup> *Vance, by & Through Hammons v. United States*, 182 F.3d 920 (6th Cir. 1999).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* See also, *Bradley J. Delp Revocable Tr. v. MSJMR 2008 Irrevocable Tr.*, 665 F. App’x 514, 521 (6th Cir. 2016).

<sup>88</sup> *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 296 (2d Cir. 2006)(“Since Rule 37(c)(1) by its terms does not require a

the same four factors as the Fifth Circuit: the explanation for failure to comply, the importance of the testimony of the precluded witness, the prejudice to the opposing party as a result of having to prepare to meet the new testimony, and the possibility of a continuance.<sup>89</sup>

Petitioner has no support for her contention that some Circuit Courts of Appeals require a finding of willfulness or bad faith in order to apply the presumptive Rule 37(c)(1) sanction. The Fifth Circuit has not entered a decision in conflict with the decision of another United States Court of Appeal on the same important matter, as would warrant the grant of this Court's review in this case.

2. Petitioner contends that she was denied due process; however, the record shows she only failed to use the process available to her.

Petitioner argues that exclusion of her undisclosed experts violates her due process rights. Petitioner claims “[w]hen procedural sanctions make it impossible to prove substantive claims, they violate due process regardless of their procedural validity.”<sup>90</sup> In essence, Petitioner is arguing that no evidence that a litigant feels is essential to its claims can be excluded under rule 37(c)(1). However, it was entirely in Petitioner's power to comply with the District

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showing of bad faith, we now hold that such a requirement should not be read into the Rule”).

<sup>89</sup> *Id.*

<sup>90</sup> Petition at p.17.

Court's Scheduling Order and Rule 26(a)(2) by simply making timely and compliant expert disclosures. Furthermore, Petitioner never sought relief from the District Court to extend the deadline to disclose her experts at a later time. Additionally, in response to Respondents' Motion *in Limine*, Petitioner could have provided an explanation for her failure to identify her experts, shown the importance of their expected testimony, and offered an argument as to the prejudice in allowing the testimony and the availability of a continuance to cure the prejudice. She did none of these things. Petitioner's experts were not precluded from testifying because she was denied due process. Petitioner repeatedly failed to use the process that was available to her.

### 3. De Novo Review of Summary Judgments Affirmed the District Court

Petitioner incorrectly claims that summary judgment was improperly granted in this case due to the exclusion of Petitioner's experts. As discussed previously, Petitioner is incorrect in her procedural timeline, as the summary judgments she complains of were issued by the District Court over six months prior to the exclusion of her undisclosed experts.

Summary Judgment is reviewed *de novo* based on the evidence properly before the district court.<sup>91</sup> Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment

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<sup>91</sup> *Stewart v. Gruber*, No. 23-30129, 2023 WL 8643633, at \*3 (5th Cir. Dec. 14, 2023).

as a matter of law.”<sup>92</sup> The party moving for summary judgment must “demonstrate the absence of a genuine issue of material fact,” but need not negate the elements of the nonmovant’s case.<sup>93</sup> If the movant meets this burden, the nonmovant must “go beyond to pleadings and designate specific facts showing that there is a genuine issue for trial.”<sup>94</sup> Factual controversies are resolved in favor of the nonmoving party, “but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts.”<sup>95</sup> The Court of Appeals does not, “in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts.”<sup>96</sup> Nor is the District Court required to sift through the record in search of evidence to support a party’s opposition to summary judgment.<sup>97</sup> When the nonmovant fails to identify any evidence in his or her summary judgment responses, evidence is not properly before the district court and will not be considered on appeal.<sup>98</sup>

In reviewing the Loss Valuation Motion and Roof Exclusion Motion, the Fifth Circuit reached the same conclusions as the District Court: there were no issues of genuine fact that the policies provided

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<sup>92</sup> *Lincoln v. Scott*, 887 F.3d 190, 195 (5th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)).

<sup>93</sup> *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003)

<sup>98</sup> *Id.*

coverage on an actual cash value basis, the Motel policy contained a roof exclusion, and there was no summary judgment evidence establishing a fact dispute over whether the motel suffered non-roof related damage.<sup>99</sup> The Fifth Circuit and District Court both followed proper summary judgment procedure in reaching the same determinations. There was no departure from the accepted and usual course of judicial proceedings as to warrant review by this Court.

4. Courts are not required to independently investigate whether parties have complied with their disclosure requirements.

Petitioner also attempts to establish a duty on the District Court to independently investigate what she calls “contradictory claims” of compliance with disclosure requirements. As explained previously, there are no contradictory claims as to whether Petitioner ever produced expert disclosures or reports in compliance with Fed. R. Civ. P. 26(a)(2)(B): she did not. Furthermore, her statement that her counsel provided “the Copeland Estimate and all expert materials” is categorically untrue.<sup>100</sup> Most importantly, even if Petitioner had provided compliant expert disclosures, the District Court has no duty to independently investigate her compliance in order to rule on Respondents’ Motion *in Limine*. The onus was on Petitioner, in her opposition to the

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<sup>99</sup> Appendix C at pp. 33-34.

<sup>100</sup> The Copeland Estimate only referenced the Motel properties, which claims were dismissed by the District Court six months earlier.

Motion *in Limine*, to point out any errors or factual mistakes presented by Respondents.

Petitioner's opposition, after a recitation of the procedural timeline, consisted of only three sentences:

On information and belief there are no undisclosed expert witnesses as of this writing. This is evidenced by Defendants specifically seeking to exclude a witness, Bruce Copeland, who they have also requested to compel for deposition. As such, Defendants are fully aware of all experts who may be called to testify at trial of this matter.<sup>101</sup>

Needless to say, being aware of a potential expert witness and having received compliant expert disclosures for all expert witnesses are not the same. There was no departure from the accepted and usual course of judicial proceedings when the District Court issued its ruling on the Motion *in Limine*, as affirmed by the Fifth Circuit.<sup>102</sup>

5. The underlying rulings did not undermine Louisiana law.

Finally, Petitioner claims that the Federal procedures utilized in this case nullified state law, specifically the protections under Louisiana's bad faith statutes La. R.S. 22:1892 and La. R.S. 22:1973. However, both the District Court in its ruling and the Fifth Circuit in its review applied Louisiana law to

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<sup>101</sup> ROA.1346

<sup>102</sup> Appendix C at p. 34.

decide Petitioner's bad faith claims.

Petitioner appears to claim that the procedural requirements to timely disclose expert witnesses and provide their reports under Rule 26(a)(2) or the corresponding sanctions under Rule 37(c)(1) prevented her from proving her bad faith claims. However, it was Petitioner who availed herself of the federal procedural rules when she filed her Complaint in the District Court under diversity jurisdiction. She now complains of the clear application of those procedural rules in her chosen venue. The use of federal procedural rules in a diversity action is in compliance with, not departure from the accepted and usual course of judicial proceedings and is not a reason for review by this Court.

### **C. The Underlying Rulings were Correct.**

The District Court granted summary judgment on the Loss Valuation Motion based on the clear language of the policies. The District Court granted summary judgment on the Roof Exclusion Motion based on the clear language of the Motel policy and a lack of genuine issue of fact that Petitioner's claimed damages to the Motel were excluded by the policy. The Fifth Circuit's *de novo* review affirmed these rulings.

In her Petition, Petitioner does not point to any genuine issue of fact submitted for consideration in opposition to these motions. Instead, Petitioner argues that these motions were granted because she was precluded from using experts to support her position. As previously shown, Petitioner's undisclosed experts were excluded for lack of

disclosure six months after the District Court's rulings on these issues. Had Respondents' Motion *in Limine* not been granted, the outcome of the Loss Valuation Motion and the Roof Exclusion Motion would have been exactly the same.

The Court of Appeals reviewed the District Court's Motion *in Limine* decision for abuse of discretion.<sup>103</sup> The decision of the District Court will be reversed "only in unusual and exceptional cases."<sup>104</sup> The District Court concluded that the presumptive sanction, excluding expert testimony of Copeland<sup>105</sup> and all other undisclosed expert witnesses, was appropriate.<sup>106</sup> The Court of Appeals found no abuse of discretion.

Petitioner claims for the first time in her Petition that "the Copeland Estimate and all expert materials" were provided to Respondents on January 10, 2024. This is incorrect. Furthermore, Petitioner did not make this claim in her opposition to the Motion *in Limine*. While Petitioner now describes expert testimony as "essential" to her case, she failed to offer any explanation of the importance of their testimony when the Motion was before the District Court. In hindsight, Petitioner can speculate about potential expert testimony that may have supported her claim; speculation, however, is not sufficient to show that the District Court, in weighing the facts

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<sup>103</sup> Appendix C at p. 34.

<sup>104</sup> *Stewart v. Gruber*, No. 23-30129, 2023 WL 8643633, at \*3 (5th Cir. Dec. 14, 2023).

<sup>105</sup> It is noted that Copeland testified at trial as a fact witness.

<sup>106</sup> ROA.1362

and arguments presented to it for consideration, abused its discretion in excluding only the expert testimony of Petitioner's undisclosed experts.

The Court of Appeals reviewed the District Court's bad faith findings for clear error. A factual finding is clearly erroneous "if it is without substantial evidence to support it, the court misinterpreted the effect of the evidence, or this court is convinced that the findings are against the preponderance of credible testimony."<sup>107</sup> The Court of Appeals found no error in the District Court's finding that the second payment for the Rental Properties was timely and that Petitioner presented no evidence to establish that Wilshire's handling of her claim was in bad faith. Furthermore, there could be no bad faith in Wilshire's handling of the claim related to Hurricane Delta because Petitioner could not prove any damages related solely to Hurricane Delta.

As with the Roof Exclusion Motion, Petitioner speculates that expert testimony may have supported her bad faith claims. The Court of Appeals, however, does not consider hypothetical support of the appellant's position when examining the findings of fact of the District Court based on the evidence actually presented at trial. There was no error in either the District Court's findings or the Court of Appeals' review of those findings.

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<sup>107</sup> *French v. Allstate Indem. Co.*, 637 F.3d 571, 577 (5th Cir. 2011) (quoting *Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 (5th Cir. 2009)).

#### IV. CONCLUSION

The Petition for Writ of Certiorari should be denied because Petitioner never raised in her appeal the issues she now advances. Petitioner's position is based on the incorrect assertion that she provided an estimate and "expert materials" after the filing of the Motion *in Limine*. Petitioner argues that a split in the Courts of Appeal in evaluating a sanction exists by conflating tests used for other Rule 37 sanctions. Petitioner claims due process violations when she simply did not utilize the process that was available to her. Petitioner's contortions of the law and facts is not sufficient to show any error in the courts below, nor any compelling reason for this Court's consideration.

WHEREFORE, for the foregoing reasons, the petition for a writ of certiorari should be denied, and Respondent should be awarded its costs.

Respectfully submitted,

ROBERT I. SIEGEL  
TARA E. CLEMENT  
LINDA E. GONZALES  
Laborde Siegel, LLC  
701 Poydras Street, 48<sup>th</sup> Floor  
New Orleans, LA 70139-4800  
Telephone: (504) 561-0400  
Facsimile: (504) 561-1011  
Email: rsiegel@labordesiegel.com  
tclement@labordesiegel.com  
lgonzales@labordesiegel.com  
Counsel for Respondents,  
Wilshire Insurance Company  
and IAT Insurance Group

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