NO. 20-_____

In the Supreme Court of the United States

MAMA JO'S, INC. D/B/A BERRIES,

Petitioner,

v.

SPARTA INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

LEONARDO H. DA SILVA, II
COUNSEL OF RECORD
BRIAN C. COSTA
MIGUEL R. LARA
CHRISTOPHER A. MARTINEZ
ALVAREZ FELTMAN DA SILVA & COSTA, P.L.
2525 S.W. 27TH AVENUE, SUITE 200
MIAMI, FL 33133
(786) 409-6000
LEO@AFDC.LEGAL

JANUARY 14, 2021 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

The central question in this matter is what constitutes physical damage to property for the purposes of triggering coverage under an all-risk insurance policy. Amongst the jurisdictions, it is generally agreed that an all-risk insurance policy covers all fortuitous, "direct" and "physical" losses which are not specifically excluded or limited therein. The Circuit Courts are split as to what constitutes "direct physical loss". Some Circuits employ a more expansive definition in favor of insurance coverage for policyholders. Other Circuits employ a more narrow and restrictive interpretation in favor of insurance carriers. Although this case involves physical construction dust and debris damage to a restaurant, certain issues presented overlap with the recent proliferation of COVID-19 insurance cases across the country.

Additionally, these proceedings present the question of what level of testing, if any, is required to satisfy the *Daubert* standard and whether the district court may circumvent the role of the jury by ruling on the veracity of the opinion of a causation expert. This Court has held that a court's gatekeeper role is not intended to supplant the role of the jury. Instead, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof to the jury are the traditional and appropriate means to attack expert testimony. The questions presented are:

1. Whether construction dust and debris damage to covered property constitutes "direct physical loss" under an all-risk insurance policy.

2. Whether it was appropriate for the lower court to impose a heightened testing standard and supplant

itself for the jury in excluding Petitioner's causation experts under *Daubert* and its progeny.

CORPORATE DISCLOSURE STATEMENT

Petitioner does not have a parent corporation. No publicly held company owns 10% or more of Petitioner's stock.

PROCEEDINGS BELOW

United States Court of Appeals for the Eleventh Circuit

No. 18-12887

Mama Jo's Inc., D/B/A Berries, *Plaintiff-Appellant,* v. Sparta Insurance Company, *Defendant-Appellee.*

Opinion Date: August 18, 2020

United States District Court for the
Southern District of Florida

No. 1:17-cv-23362-KMM

Mama Jo's, Inc. D/B/A Berries, *Plaintiff,* v. Sparta Insurance Company, *Defendant.*

Omnibus Order Date: June 11, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OTHER DOCUMENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES

JUDICIAL RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit (the "Opinion").

OPINIONS BELOW

The Opinion of the Eleventh Circuit is reprinted in the Appendix to the Petition ("App.") at 1a-22a. It is also available at 823 Fed. Appx. 868 (11th Cir. 2020). The opinion of the district court is reprinted at App. 23a-48a, and is available at Westlaw citation 2018 WL 3412974 (S.D. Fla. June 11, 2018). These opinions have not been designated for publication.

JURISDICTION

The Eleventh Circuit issued its Opinion on August 18, 2020. On March 19, 2020, this Court extended the deadline to file any petition for writ of certiorari due on or after that date to 150 days. Accordingly, this Petition is timely. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

There are no constitutional provisions, treaties, statutes, ordinances, or regulations involved in this case.

STATEMENT OF THE CASE

Across the country, home and business owners obtain all-risk insurance policies and rely on the security of knowing their properties and businesses are protected by the coverages afforded therein. The Opinion below construes the general provisions found in nearly all policies providing coverage for "direct" and "physical" losses to exclude coverage for items or structures that need to be cleaned instead of replaced. The implications of this overly narrow interpretation of coverage have a significant impact on the insurance industry. While this case pertains to cleaning construction dust and debris as well as actual physical loss to property and business income, the restrictive interpretation of "direct physical loss" extends to claims involving the cleaning and remediation of water, mold, smoke, soot, and viruses. Because there is a split amongst the Circuits as to the interpretation of "direct physical loss" in the face of damage that may be repaired through cleaning, there is cause for this Court to accept jurisdiction to resolve the conflict.

Additionally, in the proceedings below, Petitioner proffered the testimony of three causation experts,

Alex Posada (audio/lighting), Chris Thompson (awning damage), and Alfredo Brizuela, P.E. (engineering/ causation). The district court found that each of these experts were sufficiently qualified in their respective fields, but still excluded their opinions as "unreliable". In so doing, the district court exceeded its role as gatekeeper and substituted itself as the jury by prejudging select portions of their proffered testimony. As held by this Court and adopted by the Seventh Circuit, cross-examination, presentation of contrary evidence, and instructions on the burden of proof to the jury are the traditional and appropriate means of attacking otherwise admissible expert testimony. Further, in affirming the district court, the Eleventh Circuit implicitly adopted a heightened standard that requires a specific means of testing to satisfy the *Daubert* standard, contrary to the standard adopted by the Tenth Circuit that testing is not necessary in all instances to establish reliability.

A. Relevant Factual Background

This case stems from a dispute relating to an "all-risk" insurance policy in effect between the Petitioner, Mama Jo's, Inc. d/b/a Berries ("Berries") and Respondent, Sparta Insurance Company ("Sparta"). The stipulated facts are: (1) that Berries operates as a restaurant in Miami, Florida; (2) that Berries was located at 2884 S.W. 27th Avenue, Miami, Florida 33133; (3) roadwork construction on S.W. 27th Avenue caused construction dust and debris to migrate onto Berries' premises; and (4) that Berries submitted a claim to Sparta on or about December 12, 2014. [D.E. 143 at 5]. Berries' original claim of $16,275.58 included increased cleaning costs, painting of the restaurant's damaged exterior walls, painting and

re-striping of the restaurant's parking lot area and business income losses of $292.550.84 related to same. The claim was timely supplemented to include $319,688.57 for Berries' sophisticated awning, lighting and audio systems. The entire construction dust claim relates to damages to the outdoor dining area, as differentiated from specifically excluded interior dust damage. *See* Relevant Excerpts of the Policy of Insurance at App.49a-212a. From December 2013 through June 2015, roadway construction immediately adjacent to Berries caused dust and debris to migrate onto and affect the restaurant. [D.E. 146 at 2]. Berries asserted that the contact of the construction dust and debris from the roadwork on the restaurant caused damage to its property. *Id.* at 3. Without ever conducting a physical inspection of the property, Sparta denied Berries' claim on January 30, 2017 stating that the claims presented were not covered by the policy. [D.E. 101 at 5].

The policy at issue is an "all-risk" policy as defined by Florida law, which covers for any fortuitous loss that is not expressly excluded by the terms of the policy. [D.E. 110 at 2]; *Mejia v. Citizens Prop. Ins. Corp.*, 161 So. 3d 576, 578 (Fla. 2d DCA 2014); *Hudson v. Prudential Prop. And Cas. Ins. Co.*, 450 So. 2d 565, 568 (Fla. 2d DCA 1984); *Wallach v. Rosenberg*, 527 So. 2d 1386, 1388-89 (Fla. 3d DCA 1988). The policy also provides coverage for "loss of business income" sustained due to "the necessary suspension of operations during the period of restoration" as well as "extra expense you incur during the period of restoration." App.108a-109a.[1] Notably, the loss of business income

[1] "Suspension" is defined in the policy in pertinent part as "(a) [t]he slowdown or cessation of your business activities". App.134a.

coverage is contingent upon a "direct physical loss" to property. *Id.* The term "direct physical loss" is not defined by the policy and is the subject of conflicting interpretations by the Circuits. Sparta's denial and defense are predicated on the position that the effect of dust and debris on the property did not constitute a "direct physical loss" because the construction dust damage could be cleaned or otherwise remediated.

During litigation, Berries retained an awning expert (Chris Thompson) and an audio/lighting expert (Alex Posada) to assess the damage at the Berries restaurant. Both performed testing and confirmed that the damage attributable to the adjacent street work significantly extended to Berries' sophisticated awning and audio/visual systems. Berries also retained the services of licensed professional engineer, Alfredo Brizuela, P.E., to determine how and to what extent the construction dust and debris damaged the restaurant. Berries timely supplemented its damage model to include the additional damages confirmed by its experts.

Berries' audio/lighting expert, Alex Posada, testified that he had several years of experience in the audio/lighting industry, including experience working with nightclub audio/lighting systems damaged by construction dust and debris. [D.E. 108-1 at 98:21-99:8]. Mr. Posada performed visual and auditory testing of Berries' audio and lighting systems. *Id.* at 24:5-47:5. Although the district court criticized Mr. Posada for not conducting "quality control diagnostic testing", Mr. Posada testified at length about how he developed the specialized ability to auditorily test for and determine whether a speaker was damaged by dust or debris based on the unique sound such speakers

make. *Id.* at 84:3-11; 94:4-21. Mr. Posada further testified that he visually observed and confirmed that dust and debris had affected the lights and speakers as he observed corroded speaker elements not attributable to normal wear and tear or exposure to the elements and observed lighting fixtures filled with dust and debris causing the lights not to work. *Id.* at 24:15-25; 38:15-17; 25:23-25; 32:17-20.

Berries' awning expert, Chris Thompson, testified that he had over 30 years of experience in the awning industry and had received numerous awards in the areas of awning design and manufacturing. [D.E. 105-4 and 108-3 at 47:23-48:16]. Mr. Thompson further testified that he performed visual testing during his walk-through of the restaurant and observed irreparable awning damage that was attributable to the construction dust and debris. [D.E. 108-3 at 40:5-9 and 13-18; 43:20-22; 44:14-20; 46:13-17; 62:20-25; 65:6-8; 71:17-23; 72:9-11; 79:3-18; 81:17-18). These damages included accumulation of sediment and debris in the tracks for the restaurant's electric roll-up curtains, damage to the drive-belt rendering the retractable awning roof inoperable, and damage to the awning fabric itself due to discoloration, shrinking, etc. *Id.* Notably, in excluding Mr. Thompson's proffered testimony, the district court ignored the stipulated fact that construction dust and debris in fact migrated onto the restaurant. Mr. Thompson's testimony explained how the roadwork construction dust and debris affected the awnings after damaging contact was made, not whether contact was made in the first instance.

Berries' engineering/causation expert, Alfredo Brizuela, P.E., testified that he is a licensed professional engineer with over 33 years of experience in forensically

assessing commercial and residential property damage. [D.E. 113-10 and 113-11]. Mr. Brizuela testified in detail about how his visual and tactile testing led him to conclude that construction dust and debris from the nearby roadwork had aerosolized, migrated onto the restaurant, and then when combined with water, such as rain, had become a corrosive paste that bonded to the restaurant's exterior finishes and could not be removed without damaging the finishes it adhered to. [D.E. 113-10 and 108:5 at 98:11-112:21]. Mr. Brizuela's opinions about these chemical processes were based on his experience, reliable scientific principles and scientific literature.

Although the district court found that all three experts were qualified, it excluded their proffered opinions as "unreliable" by improperly prejudging the weight to be afforded to each expert's opinions. The Eleventh Circuit adopted the district court's findings.

B. Procedural History

Berries filed suit on May 19, 2017 in state court in Miami-Dade County, Florida. On September 6, 2017, Sparta removed the case to the United States District Court for the Southern District of Florida. On April 6, 2018, Sparta moved for summary judgment and to exclude the testimony of Berries' causation experts. Both motions were granted by the district court on June 11, 2018. Berries appealed to the United States Court of Appeals for the Eleventh Circuit. On August 18, 2020, the Eleventh Circuit filed its Opinion affirming the district court's grant of summary judgment in favor of Sparta and the exclusion of Berries' three causation experts. The Opinion includes a determination that "under Florida law, an

item or structure that merely needs to be cleaned has not suffered a loss which is both direct and physical." App.21a. This petition follows.

REASONS FOR GRANTING THE PETITION

The judgment below marked a matter of first impression for the Eleventh Circuit. In rendering its decision that damage that can be "cleaned" does not constitute "direct physical loss" to property, the Eleventh Circuit entered the fray in a split of jurisdictions on the issue. "Direct physical loss" is not defined in the policy and has been subject to differing interpretations among the Circuits. Certain Circuits have taken a more restrictive approach to the definition of physical loss, requiring tangible damage or destruction to property. Other Circuits have recognized that something other than total tangible destruction can be deemed a physical loss to property.

Determination of this contested issue of law is a matter of great public importance. At the time the Eleventh Circuit issued the Opinion, this question of law already affected hundreds of thousands of policy holders. Significantly, as of the date of this petition, the Eleventh Circuit's Opinion has been cited over 50 times in briefs directed towards COVID-19 claims. Insurance carriers are employing the rationale used by the Eleventh Circuit here and other jurisdictions to argue that viral contamination is not a direct physical loss because the virus can be cleaned or disinfected. This further reflects the disparity in the law and the conflict between the Circuits to the

extent that the basis for these rulings center on the definition of physical loss. This petition should be granted to resolve this important question of law and the conflict between the Circuits.

The Opinion below also erred in its affirmance of the exclusion of Petitioner's experts. A court's gatekeeping function has been well established since this Court's landmark decision in *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993). This Court and the Seventh Circuit have held a court's gatekeeper role is not intended to supplant the adversary system or the rule of the jury. Instead, where the rejection of expert testimony is the exception, rather than the rule, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking otherwise admissible expert testimony. In affirming the district court's exclusion of Berries' causation experts, the Eleventh Circuit improperly allowed the district court to prejudge the experts' proffered testimony. Further, contrary to the standard adopted by the Tenth Circuit, the Eleventh Circuit implicitly allowed the district court to adopt a *Daubert* standard that imposed a heightened yet undefined testing requirement as a condition precedent to admissibility.

I. WHAT IS "DIRECT PHYSICAL LOSS"? THE CONFLICT AMONGST THE CIRCUITS.

The term "direct physical loss" is often undefined in an "all-risk" policy and has been subject to conflicting interpretations amongst the Circuits. The First, Second, Eighth and Tenth Circuits have held in favor of coverage for policyholders giving the term a more

expansive definition. However, the Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits have held in favor of insurers giving the term a more narrow definition against coverage.

A. Circuits Ruling in Favor of Policyholders.

1. The First Circuit.

In *Essex Ins. Co. v. BloomSouth Flooring Corp.*, the First Circuit was asked to interpret the term "direct physical loss" in the context of a duty to defend action against BloomSouth for the alleged defective installation of flooring. 562 F.3d 399 (1st Cir. 2009). The only symptom of the alleged defect was a permeating odor emanating from the carpeting. The First Circuit performed its analysis based on two unpublished, lower court Massachusetts decisions and cases from other jurisdictions. *Id.* at 404-5. In summary, the decisions reviewed opined that odors were physical because they infiltrated the property and contaminated the building. *Id.* at 405. In accepting this reasoning, the First Circuit noted that those decisions rejected the concept that physical damage could only occur if some tangible injury to the physical structure occurred, reasoning that such a limiting definition must be included in the policy language to apply. *Id.*

The First Circuit rejected the insurer's arguments that odors were not tangible and were not physical damage, finding the allegation that unwanted odor permeated the building sufficiently alleged damage to property. *Id.* The First Circuit also found that the allegations that the odor was pervasive and permeating were sufficient to assert a physical injury to property. *Id.* at 406.

2. The Second Circuit

In *Bellsouth Telecomm., Inc. v. W.E. Grace & Co.*, the Second Circuit interpreted the term "direct physical loss" in the context of a defense of an asbestos claim. 77 F.3d 603 (2d Cir. 1996). In discussing the point of accrual for the claim, the Second Circuit noted that Bellsouth had completed asbestos abatement throughout the building and found this fact to be conclusive evidence that there was an asbestos contamination in the building and that Bellsouth had suffered "actual property damage—not just economic loss—as a result of this contamination." *Id.* at 613. Notably, that declaration of law was made in the face of Bellsouth's contention that a "building-wide" contamination did not occur until 1992. *Id.* at 611-12. This analysis necessarily includes the determination that asbestos contamination in the building constitutes property damage even without the building-wide contamination. This is in line with the Eighth Circuit opinion below.

3. The Eighth Circuit

In *Netherlands Ins. Co. v. Main Street Ingredients, LLC*, the Eighth Circuit interpreted the term "direct physical loss" in the context of a duty to defend claim stemming from a recall of dried milk distributed by Main Street to customers, including Malt-O-Meal Co., which used the dried milk in its instant oatmeal. 745 F.3d 909 (8th Cir. 2014). Relevant to our presented question, Netherlands argued that it had no duty to defend Main Street because the dried milk did not suffer "property damage". *Id.* at 913. The Eighth Circuit based its analysis on Minnesota law, particularly the holding in *General Mills, Inc. v. Gold*

Medal Insurance Co., where the Court of Appeals of Minnesota decided a similar coverage question involving a dispute by General Mills for loss of oat products that were treated with an unapproved pesticide. 622 N.W.2d 147 (Minn. Ct. App. 2001). The *General Mills* court held that "where the function of insured property is impaired, direct physical loss may exist without destruction of or structural damage to the property". *Id.* at 149 and 155.

The general principle that tangible structural damage is not a requirement of "direct physical loss" where functionality is impaired was adopted by the *Main Street* court. The Eighth Circuit similarly found that the findings of unsanitary conditions and recall of the dried milk product constituted physical property damage to the instant oatmeal regardless of whether any salmonella was actually discovered in the products. *Id.* at 916-17. In reliance on *General Mills*, the *Main Street* Court determined that impairment of functionality, namely the loss of the sale of those products because of the risk of salmonella, was sufficient to constitute a physical loss. *Id.*

Additionally, we look to the Eighth Circuit's opinion in *Source Food Technology, Inc. v. U.S. Fidelity and Guar. Co.*, 465 F.3d 834 (8th Cir. 2006). Though decided before *Main Street*, this case also analyzed *General Mills*. The Eighth Circuit found against coverage of Source Food's loss of purchased beef, which was not shipped in from Canada based on an embargo of Canadian beef during the "mad cow" epidemic. *Id.* at 835. The distinguishing feature in this analysis is that there was no evidence that any contamination touched Source Food's product and the evidence supporting the loss of the product was limited to

governmental action. This is distinguishable from *Main Street* where the "contamination", *i.e.*, the preparation of the product in unsanitary conditions, touched the actual product at issue. The Eighth Circuit's current position is that such a touching that impairs the use of the property is direct physical loss.

4. The Tenth Circuit

In *Adams-Arapahoe Sch. Dist. No. 28-J v. GAF Corp.*, the Tenth Circuit interpreted the term "direct physical loss" in the context of coverage of a partially collapsed roof structure, which was attributed to the introduction of gypsum-based concrete that caused the roofing structural components to corrode. 891 F.2d 772 (10th Cir. 1989). The Tenth Circuit analyzed whether the entirety of the roofing structure was deemed to be a physical loss or just the small portion that actually collapsed. The *Adams-Arapahoe* Court's discussion on this issue focused on *Western Fire Insurance Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P. 2d 52 (1968). There, a church was deemed uninhabitable due to the accumulation of gasoline around and under the building. *Id.* Importantly, there was no physical damage to the building. *Id.* at 55. The Colorado Supreme Court held that the loss of use of the church from the infiltration of gas was a physical loss. *Id.* The *First Presbyterian* court quoted and followed the rationale of the First District Court of Appeal of California in *Hughes v. Potomac Ins. Co. of District of Columbia*, which reasoned:

> To accept appellant's interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a

> steep cliff has not been 'damaged' so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, appellant would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.

199 Cal.App.2d 239, 248-49, 18 Cal. Rptr. 650, 655 (Ct. App. 1962)

In reliance on *First Presbyterian*, the Tenth Circuit agreed that the presence of corrosion in the roofing structure caused by the introduction of the gypsum-based concrete, constituted a physical loss even for those parts of the roof that had not actually collapsed or broken. *Adams-Arapahoe*, 891 F.2d at 777-78.

B. Circuits Ruling in Favor of Insurers.

1. The Third Circuit.

In *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co. et al*, the Third Circuit reviewed the district court's holding that, in order to be deemed a physical loss or damage, the presence of asbestos must be of such a quantity or condition as to make the building unusable. 311 F.3d 226, 230 (3d Cir. 2002). In reaching this narrow interpretation, the Third Circuit distinguished cited cases from the Minnesota Court of Appeal because those cases dealt not only with the presence of asbestos, but also the release of asbestos fibers and resulting contamination. *Id.* at

234. After reviewing additional cases from other districts, the Third Circuit noted that no applicable state law existed to provide guidance and it fell to the Third Circuit to determine what the law should be. *Id.* at 235.

The Third Circuit agreed with the district court's ruling noting that if the quantity of asbestos was such that the building was unusable, then there may be coverage. In other words, the presence and potential threat of asbestos contamination was insufficient, only actual contamination or an imminent threat of contamination would constitute a physical loss and trigger coverage. *Id.* at 236. While this decision by the Third Circuit was against coverage, there was actually some overlap between the Third and Eighth Circuits' reasoning. Both required more than the potential for contamination. However, the Third Circuit's narrow standard is not satisfied by the touching of the contaminants with the property and threat of harm. Instead, the standard goes a step further and requires actual contamination or imminent danger of contamination. This requirement suggests that occupants of the property were or could have been harmed by asbestos fibers inside the property for there to have been a physical loss.

2. The Fifth Circuit

In *Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co.*, the Fifth Circuit noted that "the primary source of disagreement between the parties" was how the loss should be characterized. 181 Fed. Appx. 465, 469 (5th Cir. 2006). Mississippi Valley Gas Co. made a claim for the theft by means of a tap installed past the meter of the gas line, which

reintroduced gasoline back into the gas stream, causing it to be re-metered and resold to the insured. *Id.* at 467. The Fifth Circuit began that analysis with the question presented here, *i.e.* the "threshold concept" of physical loss or damage to covered property. *Id.* at 470. The Fifth Circuit similarly reached the narrow interpretation that "direct physical loss" required a physical manifestation of damages and not "mere monetary losses". *Id.*

3. The Sixth Circuit

In *Universal Image Productions, Inc. v. Federal Ins. Co.*, the Sixth Circuit affirmed the lower court's decision that mold and bacterial contamination alone did not constitute physical loss. 475 Fed.Appx. 569 (6th Cir. 2012). In its analysis, the Sixth Court cited to *de Laurentis v. United Services Auto. Ass'n.* for that case's definition of direct "physical loss", which required "tangible damage" to property. *Id.* at 573 (*citing de Laurentis*, 162 S.W.3d 714, 723 (Tex.Ct.App. 2005)). Just like the Third Circuit, the Sixth Circuit was without state law guidance and reached its narrow interpretation predicated on Michigan law. As such, along with accepting the *de Laurentis* definition of physical loss, the Sixth Circuit agreed with the Third Circuit's *Port Authority* case discussed above and imposed the heightened standard that, even without the strict "tangible damage" definition, the property must be rendered "uninhabitable" or substantially "unusable" for there to be a physical loss. *Universal Image*, 475 Fed.Appx 569 at 574.

4. The Seventh Circuit

In *Windridge of Naperville Condo. Ass'n v. Philadelphia Indem. Ins. Co.*, the Seventh Circuit ruled on similar issues as those analyzed by the Tenth Circuit in *Adams-Arapahoe Sch. Dist.* In *Windridge,* the dispute stemmed from whether the siding on all four sides of the buildings needed to be replaced rather than only the portion of the siding damaged by hail. 932 F.3d 1035 (7th Cir. 2019). While *Windridge* dealt with material matching issues, the result was the same in that both Circuits found that the undamaged portions of the property required replacement but was not deemed direct physical loss to property. *Id.* The decision in *Windridge* was based on a more restrictive interpretation of the policy terms. The Seventh Circuit held that physical loss "generally refers to tangible as opposed to intangible damage". *Id.* at 1040.

5. The Ninth Circuit

In *Great Northern Ins. Co. v. Benjamin Franklin Federal Savings & Loan Ass'n*, the Ninth Circuit analyzed an asbestos claim in the context of defining "direct physical loss". 953 F.2d 1387 (9th Cir. 1992). There, the Court held that the necessity for cleaning up of asbestos was not a direct physical loss. *Id.* Notably, the Ninth Circuit relied on the Oregon Supreme Court case of *Wyoming Sawmills, Inc. v. Transportation Insurance Co.*, 578 P.2d 1253 (Or. 1978). However, the Ninth Circuit pointed out that in *Wyoming Sawmills*, the policy defined property damage as "physical injury to . . . tangible property." *Great Northern*, 953 F.2d at *1. While the Ninth Circuit's opinion regarding physical loss matches those of the Third, Fifth Sixth, Seventh and Eleventh, the

basis for the ruling stems from specific policy definitional language that is absent from the case at bar. The Ninth Circuit's opinion favors the insurance carriers, but the reasoning supports Petitioner's argument. It proves that insurance carriers have the capability of writing specific exclusionary language into the policy. Their failure to do so cannot be construed to the detriment of the insured.

6. The Eleventh Circuit

While the background and holding in this case have already been discussed in detail *supra*, the Eleventh Circuit's finding that the touching of the property by construction dust and debris, thereby damaging and impairing the use of the property, would have certainly met the definition of "direct physical loss" set forth by the First, Eighth and Tenth Circuits. The First Circuit's opinion in *BloomSouth*, the Eighth Circuit's opinion in *Main Street*, and the Tenth Circuit's opinion in *Adams-Arapahoe* all have a common thread: all of these circuits look beyond the tangible or intangible nature of the damage and look to the effect the loss had on the insured property. The invisible but permeating odor in *BloomSouth*, the impairment of the milk products in *Main Street* by potential contamination, and the presence of corrosion with no resulting damage in *Adams-Arapahoe*, all show that these Circuits are rightfully focused on the underlying purpose of insurance rather than a strict, draconian interpretation of the word "physical".

The Opinion adopted the Sixth Circuit's interpretation discussed above to reject harmful contact that "could be cleaned" as a damage, as well as the

Third Circuit's requirement that the property be uninhabitable or unusable. These standards are undeniably more restrictive to coverage than those endorsed by the circuits listed in section I.A. above. Although all the cases listed involve the analysis of state law, the question presented is universal to all cases. Each discusses the same phrase: "direct physical loss." And each gives an interpretation of the phrase and a standard to meet that interpretation. These conflicting interpretations are proof that there is a ripe and existing need for this Court to answer the important questions presented below and finally resolve the conflict between the Circuits.

II. WHY THE ELEVENTH CIRCUIT'S OPINION IS INCORRECT.

The Eleventh Circuit directly ignored a specifically contemplated type of loss contained in the insurance policy. This excising of the very protections bargained for in the subject all-risk policy has significant implications for the insurance industry, and the decision below reflects a troubling receding from insurance policy coverages.

Dust is a specifically contemplated and covered type of risk in this insurance policy. The insurance policy covers "Risks of Direct Physical Loss unless the loss is (1) Excluded in Section B., Exclusions; or (2) Limited in Section C., Limitations". App.137a. In other words, all causes of loss are covered unless expressly excluded or limited by the insurance policy. *See Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc.*, 639 F. App'x 599, 601 (11th Cir. 2016) (In broad terms, all-risk insurance policies cover all fortuitous losses, unless the policy contains a specific provision

expressly excluding the loss from coverage.); *Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430 (5th Cir. 1980) (same). As stipulated, (1) "[t]here was roadwork construction on S.W. 27th Avenue which is adjacent to Berries' restaurant" and (2) that "[d]ust and debris generated by roadway construction migrated onto Berries' premises". App.2a. Thus, the issue is whether the damaging touching of construction dust and debris constitutes "direct physical loss" to trigger coverage under the insurance policy.

The term "direct physical loss" is not defined in the insurance policy. However, the Eleventh Circuit erroneously concluded that "direct physical loss" does not include cleaning and/or requires the extraordinary step that the property be rendered "uninhabitable" or substantially "unusable". App.45a-46a. This finding is contradicted by the types of damages contemplated and provided for in the insurance policy along with cases from other jurisdictions that recognize "direct physical loss" can occur in the absence of structural damage.

A. Policy Language.

Pertinently, the insurance policy contemplates construction dust as direct physical loss when the policy limits dust coverage to interiors. App.152a. Given the existence of exclusionary language dealing only with the interiors, construction dust damage to the exteriors would fall under the purview of "Risks of Direct Physical Loss" and thus be covered. If dust and debris could simply be cleaned by wiping it up to remedy the damage to the property, then the following limitation would not need to exist in the insurance policy's Causes of Loss-Special Form:

> Causes of Loss—Special Form. C. Limitations. 1. We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that is a consequence of loss or damage as described and limited in this section . . . c. The interior of any building or structure . . . caused by or resulting from . . . dust, whether driven by wind or not . . .

App.152a (emphasis added).

In fact, Sparta acknowledged dust as a category of damage where it drafted a specific exclusion addressing same. Within the general liability coverage section of the insurance policy, there is a lengthy silica or silica-related dust exclusion. App.197a-198a. Conversely, the policy's building and business interruption coverage sections do not contain this detailed exclusion. This is another example of where dust and debris are contemplated as physical damage. It must necessarily follow that construction dust is an acknowledged and accounted for category of direct physical loss.

Elsewhere, "Pollutants" is defined in the insurance policy's Building and Personal Property Coverage Form as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste". App.107a. Coverage for clean-up of "pollutants" is limited, not excluded, by the policy as follows:

> 4. Additional Coverages d. Pollutant Clean-up and Removal. We will pay your expense to extract "pollutants" from land or water at the described premises if the discharge, dis-

> persal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the insurance policy period . . . The most we will pay under this Additional Coverage for each described premises is $10,000 for the sum of all covered expenses . . .

App.133a.

While dust is not a pollutant, this is a crystal-clear example that damage which requires cleaning is covered. The "Additional Coverages" section of the insurance policy also provides coverage for debris removal-another type of cleaning:

> 4. Additional Coverages. a. Debris Removal (1) Subject to Paragraphs (3) and (4), we will pay your expenses to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the insurance policy period.

App.71a. The Opinion renders entire areas of coverage nonexistent, contrary to the express terms of the policy. To require permanent tangible destruction of property as a condition precedent to insurance coverage strips Petitioner, and policyholders across the country, of protections specifically contemplated and bargained for.

Given that all losses are covered by an all-risk insurance policy unless specifically limited or excluded, and dust is a contemplated type of damage, it follows that exterior dust damage, the very damage claimed in this case, is covered. Sparta, as the insurance policy drafter, is aware that dust is a potential risk which had to be addressed through specific limitations

and exclusions. App.152a; App.197a-198a. As the drafter of the insurance policy, Sparta is held to the terms set forth therein. *See Aschenbrenner v. U.S. Fidelity & Guar. Co.*, 292 U.S. 80, 86 (1934) ("The insurer has chosen the terms, and it must be held to their full measure in this clause, as in any other, whether its promise be for more or less"). Sparta could have, but did not, include an exclusion or limitation for exterior dust damage in the policy's building and personal property section. At a minimum, where an ambiguity exists based on whether dust constitutes a covered risk in the insurance policy, a construction more favorable to the insured is adopted. *Id.* at 85; *see also Aetna Ins. Co. v. Boon*, 95 U.S. 117, 123 (1877). To the extent any ambiguity arises from whether dust damage is covered, the ambiguity must be construed in favor of the Petitioner as the non-drafting party.

Even though the lower court concluded that "direct physical loss" does not include cleaning, the policy repeatedly contemplates causes of loss that are remedied through cleaning, not repair or replacement. App.71a, 107a, 133a. The lower court relied on Florida state law for the proposition that the property must be rendered uninhabitable or unusable, effectively requiring a total loss before coverage. App. 20a-21a. This stands in contrast to provisions for coverage in the policy. The policy's Business Income (And Extra Expense) Coverage Form contemplates that losses may occur which result in a mere slowdown of business activities, not a complete cessation. App.134a. For example, soot or smoke damage resulting from a fire would require cleaning, just like water, mold, dust, or debris. Once again, the lower

court's holding results in a significant excision of coverage contemplated and bargained for in the insurance policy.

In sum, the lower court erred in holding that coverage cannot be extended for cleaning pertaining to construction dust and debris damage. Given that the insurance policy is replete with provisions extending and excluding coverage for dust, cleaning, and business slowdowns, Petitioner's underlying claim is covered.

III. THE IMPORTANCE OF RESOLVING THE CONFLICT BETWEEN CIRCUITS REGARDING WHAT CONSTITUTES "DIRECT PHYSICAL LOSS".

As noted above, the Eleventh Circuit's opinion in *Mama Jo's, Inc. v. Sparta Insurance Company* has been cited over 50 times throughout the country in cases involving COVID-19 claims. Clearly, there are other issues involved in the ongoing and relatively young debate regarding coverage of claims stemming from COVID-19 that distinguish it from the case at bar. However, relevant to the matter at hand, several district courts have relied on the Opinion as a basis for rejecting that a virus' touching of property constitutes a physical loss. For example, the District Court of Kansas has followed a more restrictive approach to physical loss in the face of COVID-19. *Promotional Headwear International v. The Cincinnati Ins. Co.,* No. 20-CV-2211-JAR-GEB, 2020 WL 7078735 (D. Kan. Dec. 3, 2020). The district court held as follows:

> The Court follows the majority of courts to consider identical policy language in the context of COVID-19 and holds that direct physical loss or damage to the property requires a tangible, actual change to or

> intrusion on the covered property. Like the restaurant in *Mama Jo's*, Plaintiff alleges no loss or damage to the property that required repair or replacement based on an actual or tangible problem with the premises.[64] And like the plaintiffs in *Pentair* and *Source Food*, Plaintiff suffers purely economic damages due to temporary loss of use, not a direct, physical change or intrusion onto the property.

Id. at *7.

This is one of many examples of district courts employing the instant case as a basis for their determination that the mere touching of the property by the virus is insufficient to constitute a physical loss in the absence of tangible destruction of property. Petitioner does not suggest that the issues involved in this dispute are directly akin to the issues involved in COVID-19 claims. Yet, this Court is in the position to resolve this ripe and intersecting question of law.

The Opinion affects the rights of millions of property and business owners who have insured their assets with all-risk policies. Potentially billions of dollars of proceeds are inextricably tied to the interpretation of the term "physical loss". The Circuits discussed above have been faced with the same question and have reached two different answers. What would ordinarily be a state law question has become a federal question of policy interpretation that can and should be answered by this Court.

IV. WHY THE ELEVENTH CIRCUIT MISAPPLIED IMPORTANT *DAUBERT* PRINCIPLES.

This Court's decision in *Daubert* established a court's gatekeeping function regarding expert testimony. However, this gatekeeper role was not intended to supplant the adversary system or the rule of the jury as "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence". *Daubert*, 506 U.S. at 596; *Cooper v. Carl A. Nelson & Co.*, 211 F. 3d 1008, 1021 (7th Cir. 2000) (same). As recognized by the Rules of Evidence, "the rejection of expert testimony is the exception, rather than the rule". Fed. R. Evid. 702 advisory committee notes (2000).

Here, the Eleventh Circuit erred when, contrary to the reasoning of this Court and the Seventh Circuit, it affirmed the district court prejudging the proffered testimony of Berries' causation experts with a heightened but undefined testing requirement. For example, although Berries' audio/lighting expert testified at length about how his experience with similarly damaged lighting and audio systems allowed him to auditorily assess damaged speakers based on the unique sound such speakers make, the district court excluded his opinions as "unreliable" because it felt that Mr. Posada should have conducted "quality control diagnostic testing". App.32a-33a. In affirming the district court's ruling, the Eleventh Circuit implicitly imposed a heightened testing standard as a precondition to admissibility of expert testimony under *Daubert*. However, both this Court and the Tenth Circuit have adopted a different, and far less restrictive, standard

that does not necessarily require heightened testing. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) ("relevant reliability concerns may focus upon personal knowledge or experience"); *Bitler v. A.O. Smith Corp.*, 400 F. 3d 1227, 1236 (10th Cir. 2005) (holding that "testing is not necessary in all instances to establish reliability under *Daubert*"); *Orth v. Emerson Elec. Co.*, 980 F. 2d 632, 637 (10th Cir. 1992) (lack of testing goes "to the weight the trier of fact should accord the evidence and do[es] not make the testimony incredible").

With respect to Berries' awning expert, Chris Thompson, the district court found that Mr. Thompson was qualified but excluded his opinions as "unreliable" based on the weight the district court afforded to his opinions. Although the parties stipulated that construction dust and debris migrated onto the Berries restaurant, the district court opined that Mr. Thompson's visual observations of the awning damage were not reliable. App.35a-38a. However, the district court ignored Mr. Thompson's well-reasoned opinions on how the construction dust and debris affected the restaurant's awning system, such as discoloration and shrinking of the awning fabric. [D.E. 108-3]. As before, the district court criticized Mr. Thompson for not taking samples of the observed construction dust and debris and conducting lab tests of construction materials. App.35a-38a. Such rigorous testing was not required, particularly given that the presence of such dust and debris was an undisputed fact. [D.E. 143].

With respect to Berries' engineering/causation expert, Alfredo Brizuela, P.E., his credentials were never in dispute. The district court again prejudged

Mr. Brizuela's proffered opinions. The district court opined that Mr. Brizuela did not have the particularized knowledge that roadway construction dust can cause the type of damage found at the restaurant. App. 38a-41a. Yet, this conclusion fails to account for Mr. Brizuela's testimony about (1) his prior experience with cases involving similar damage cause by aerosolized construction dust and (2) how construction dust and debris aerosolized, migrated and combined with water to turn into a corrosive paste that bonded to the metal, paint, glass and other materials at the property. [D.E. 108-5]. The district court also excluded Mr. Brizuela's opinions because he did not perform chemical testing. App.38a-41a. As recognized by this Court and the Tenth Circuit, such rigorous lab testing is not always required. *Kumho*, 526 U.S. at 150; *Bitler*, 400 F. 3d at 1236. Mr. Brizuela testified that he performed visual and tactile testing, as employed by Sparta's own expert, and how such testing and his experience in forensic engineering led him to the result that the construction dust and debris damaged the property. [D.E. 108-5 at 98:11-112:21].

Daubert and its progeny are at the very core of federal jurisprudence. Here, the Eleventh Circuit modified the *Daubert* standard by adopting a heightened testing requirement that conflicts with this Court, as well as the Seventh and Tenth Circuits. Therefore, this case presents a superior vehicle for resolving this conflict.

CONCLUSION

For the foregoing reasons, Petitioner, Mama Jo's Inc. d/b/a Berries respectfully requests that this Court grant its petition for writ of certiorari.

Respectfully submitted,

LEONARDO H. DA SILVA, II
COUNSEL OF RECORD
BRIAN C. COSTA
MIGUEL R. LARA
CHRISTOPHER A. MARTINEZ
ALVAREZ FELTMAN DA SILVA & COSTA, P.L.
2525 S.W. 27TH AVENUE, SUITE 200
MIAMI, FL 33133
(786) 409-6000
LEO@AFDC.LEGAL

COUNSEL FOR PETITIONER

JANUARY 14, 2021